

# MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

3019

2005 HOUSE NATURAL RESOURCES

HCR 3019

2005 HOUSE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3019

House Natural Resources Committee

☐ Conference Committee

Hearing Date **February 11, 2005**

Tape Number	Side A	Side B	Meter #
1		x	0-3700
2	x		2450-2919 -Action
Committee Clerk Signature <i>Loren Bonnet</i>			

Minutes:

**Chr. Jon O. Nelson:** We will open the hearing on HCR 3019. All members present at roll call. Bill was read aloud. How many people are here to testify on this resolution? Four. Any against?

**Wayne Stenehjem, Atty. Gen.:** (Written testimony attached, One-Missouri River Litigation Chronology, A Summary; and Two-NAWS Project, Litigation Summary) I appreciate the opportunity to appear and testify, if I could, on all three of the resolutions you have dealing with the operation of the Missouri River system. I want to take the opportunity to explain, not in great detail, but in summary fashion, all of the things that my office has been doing with respect to our disagreement with the U.S. Army Corps of Engineer over their operation of the Missouri River System. We are now in the second round of litigation that is resulting because of the droughts that periodically occur here in ND. I don't know that I need to reiterate for members of the committee, what ND suffered in order to establish a river system that is supposed to be for the benefit of everyone. ND gave up over 500,000 acres of prime Missouri River bottomland. South

Dakota gave up almost the same, in exchange for promises that were made to us that we would have water available for irrigation and for municipal water supplies, for game and fish, and for recreation. At the same time, downstream interests were promised benefits that they actually got, that is, municipal water supplies and more importantly for them, flood control. These are benefits that are for the most part for us of the upper reaches of the river system have never been realized. We haven't obtained the water for irrigation that we were promised. We put together a world class game and fish and recreation industry here in ND and we're constantly struggling to maintain those natural resources. The resolutions that you have before you ask for a variety of things, including that the governor and my office pursue all avenues of litigation that might be available. That is the purpose of providing the chronology for you. I won't go through all of the items that were mentioned up until 1991, but, 1991 was when the first round of litigation was pursued here in ND. As a result of the lawsuit, in the final analysis, the court agreed that they would give all of the interests in the Missouri River systems equal treatment. They promised they would do that and as a result the court, in 1991, dismissed all those lawsuits. The Corps of Engineers, however, did not follow through with the promises it would make to *not* give navigation primary consideration. In 1990, they were in the process of revising the 1979 Master Manual and after the drought broke and the reservoirs filled back up, they lost their interest in actually doing that which they promised to do. So, 2002 is really when the current round of litigation began. SD, to protect its smelt spawn, sued the Corps in the state of SD. On May 10, the district court in SD enjoined the Corps from further lowering Lake Oahe until May 23. What the court did as a result, was to respond by increasing the amount of water they were releasing from Lake Sakakawea and from Ft. Peck. That concerned us greatly and so we pursued our own

injunction here in ND and obtained an injunction that prevented the Corps from temporarily lowering Lake Sakakawea. That injunction saved the 2002 Lake Sakakawea smelt spawn. For those who don't know, the smelt are the feed fish upon which the walleye rely for just about all of their food. They also asked the court to issue an order requiring that the Corps properly apply the 1944 Flood Control Act and to release that long promised new Master Manual. Montana sued the court as a result in a domino effect, seeking their own injunction with respect to Ft. Peck. That same year, Nebraska sued the Corps in U.S. District Court in Nebraska and they got an injunction requiring the Corps to operate the system to maintain minimum navigation flow. We intervened in that lawsuit. That same year, the Corps appealed the three district court injunctions to the 8th Circuit Court of Appeals which is the circuit in which ND, SD and the other states now sit. Meanwhile, in the District of Columbia, a group known as American Rivers, and some other environmental organizations sued the Corps in the court there. They asserted that the Corps' river management violates the Endangered Species Act and the 1944 Flood Control Act. We offered an amicus brief that was joined by South Dakota and Montana opposing the Corps' motion to transfer that American Rivers lawsuit to get (where?) Nebraska. We didn't think that was such a good idea. The court denied that motion. Then we intervened in the American Rivers lawsuit, to protect ND's interests. We supported American Rivers, and requested in 2003 for an injunction against the Corps and that was the motion that was granted by the court. The court in 2002 appeals to the U.S. Circuit Court of Appeals, however, remained pending all through 2003 and then the 8th Circuit filed all arguments on them. In 2003, we served the Corps with notice in another lawsuit claiming that the Corps' drawing down of Lake Sakakawea would violate the state's water quality standards and destroy the cold water fishery on

which the walleye and salmon depend. We later sued the Corps in U.S. District Court for ND as well, and that differed in some respects from the 2002 lawsuit. This new lawsuit asserted that the Corps was violating the federal Clean Water Act, drawing down Lake Sakakawea and jeopardizing the cold water habitat. The suit also seeks and obtains an injunction to protect the spring smelt spawn. That injunction was good news because it saved the 2003 smelt spawn. Next, Blaske Marine, which is really a front for the barge industry and some other downstream interests, sued the federal government and us in the U.S. District Court in Nebraska. In other claims, they asserted that the states and the government violated the Endangered Species Act because we stocked walleye. They claim that walleye are not indigenous species to ND or to the upstream reservoirs. They asserted that the walleye compete with the endangered pallid sturgeon and we responded by defending that lawsuit. That same year, Nebraska filed a motion asking that all of these issues be consolidated before one judge - *in Nebraska*. We, of course, opposed that and the net result which we thought was at least a minor initial victory was that the suits were consolidated, but not in NE. They were consolidated before Judge Magnussen in the state of Minnesota. As we were in a hearing that very day, on our claim of violation of the Cold Water Act, the 8th Circuit Court of Appeals issued its decision on the three injunctions that were issued in 2002. The court overturned all of those injunctions that were issued by North Dakota and South Dakota and affirmed one that was issued in Nebraska. Its opinion contains comments that concerned us because they could be construed as ruling that the Flood Control Act gives navigation a priority. That, for us, was very bad news. ND then offered a petition appealing all of this to the United States Supreme Court. South Dakota joined us. Unfortunately, later that year, the U.S. Supreme Court indicated that it was not going to hear our appeal on that case. In

Feb. 2004, Judge Magnussen granted our motion and ordered the Corps at long last, to issue a new Missouri River Master Manual. That was very good news for us. Judge Magnussen later upheld a hearing on the many motions that were pending and in April, he dismissed ND's 2003 suit against the Corps where we asserted that there was a violation of the Clean Water Act. The judge ruled that the Corps was not subject to ND's Clean Water Quality standards which was bad news for ND. In June, 2004, Judge Magnussen issued his decision on all the remaining issues. He dismissed the Blaske Marine claim that our walleye stocking violates the Endangered Species Act. That was good news. He ruled that the Flood Control Act does not give navigation a priority over recreation and that is very good news. But he said the Corps has a duty to even-handedly balance all river uses. This said for the first time that the navigation doesn't preempt all of the other uses of the Missouri River System. That is very good news. He said, however, that in operating the Missouri River System, the Corps of Engineers has considerable discretion. I view that, at least temporarily, as bad news, based upon the decisions and the manner in which the Corps has decided to operate the Missouri River System. He dismisses the American Rivers lawsuit based on environmental claims. The good news is that the downstream states think that this is a very bad ruling for them. In the long run, that could actually be the case because once it is widely understood and recognized that the navigation industry is an industry that has never reached the potential that was envisioned back in 1944 when the Flood Control Act was passed. There was great optimism that the navigation industry would take off. It never has. Instead, what's happened is that the game and fish and recreation industries *upstream* have many fold, ten or more times more beneficial in dollar amounts to the state of ND than the barges. They have appealed that decision to the 8th Circuit of Appeals. We are in the process of

sorting through all of the briefs that have to be filed and we expect that there will be 20 or more briefs that are filed by various interests and that in mid-April the 8th Circuit Court of Appeals will hear all arguments on that case. This is our most recent filing which is just from a couple days ago that shows the amount of work. All of this information is available to anybody who wants to look at it, but I will tell you that there are many, many banker boxes full of all the legal pleadings, briefs, complaints, all of the other items that have been filed in this case. I have something here to give you a little background about what has been happening. We have five lawyers in my office who have been working diligently and vigorously in order to defend the interests of the state of ND. You may feel free to pass this resolution. If you need to think that you are urging me to do anything more than we already are, I am here to refer to you that any good and valid legal claim that can be pressed to protect the interests of the state of ND will be pressed by my office.

**Chr. Nelson:** Thank you, Mr. Attorney General. Are there questions for the Attorney General?

**Rep. Charging:** Have you ever discussed the possibility of each of the individual tribes joining in that lawsuit? Would that be a potential benefit?

**Stenehjem:** Some of the lawsuits have been joined at least by an amicus, friends of the court, by one or more of the tribes. We visit them on a regular basis. They have made appearances in one or more of our lawsuits indicating their support. We're in the same boat. I've seen the marina in your area and I know what's happening down at Standing Rock. There is insufficient water available. I mention that one of the groups that you know that suffered the most and sacrificed the most for this water system were both on our reservations, particularly yours.

**Chr. Nelson:** Further questions?



**Rep. Porter:** If we pass this, and the Secretary of State takes a copy of it to your office, and you're already doing all the work that can be done, what are you going to do with it?

**Stenehjem:** I'm more concerned with what the Corps will do with it because I think that they treat these resolutions like we treat all the credit card applications that we get unsolicited in the mail - just trash. What our lawsuits are unable to impress upon the Corps of Engineers I fear that a resolution from the ND Legislature is not going to augment.

**Rep. Hanson:** A while back, there was a press release that Sen. Dorgan suggested that someone buy out the barge industry. Do you know anything about that?

**Stenehjem:** I do, but others have suggested to me that we make some kind of arrangements to actually buy it out. I don't know that that's a realistic approach to it. I think we need this is for *everybody* to recognize a simple, plain, economic fact. That is that the navigation industry is dying and getting worse. It has not reached the potential that was anticipated for it. Some of the people who are actually involved in the barge industry see the handwriting on the wall. Some of them are going out of business. I think that is what the future holds for them. The sooner that everybody, including the Corps of Engineers, recognizes that fact, the better off everybody else is going to be.

**Rep. Norland:** Is true that the Corps owns more barges than private industry?

**Stenehjem:** You can go on a website and see how many barges are operating at any given time. There's never more than two or three on the river system at any given time. I'm told that most of the barges that are there are hauling gravel from one Corps of Engineers site to another. I don't know if that's true.

**Rep. Solberg:** This has been going on for many years, and they're deaf to our issues. In your opinion, what do you think it would take to get their attention?

**Stenehjem:** I think two things. We're either going to solve it in court, and we're on our way, and I don't think we are totally at a loss because I think when they finally issue the new Master Manual, after they've been requested to for many years, will be good news. They will respond to what the court says they have to do. Number two, they will respond to political pressure. The only place where political pressure can be imposed, is not here in the ND Legislature, but in the U.S. Congress where they have control over the Flood Control Act. They can always amend that. I know that is a politically difficult thing to accomplish, but they also control the appropriations for the Corps of Engineers.

**Chr. Nelson:** Seeing no further questions, thank you. Is there further support for HCR 3019?

**Andy Mork, rural Mandan:** In 1926, I believe I saw the last of the paddlewheel boats operating on the Missouri River. We know the river very well and I rise in full support of all these resolutions because they are very important to ND. I relish the opportunity to inform more people about the appeal of the Missouri River. The Attorney General has done a very complete job of that. To that effort, I've written a book about the Missouri River and some of your interests in it. You might contact me. I should add a bit more from what the current A.G. has told you about the Missouri River. Downstream, from Sioux City (IA) south to St. Louis (MO) was all equipped for navigation, and that meant rip rap on both sides of the river. For a navigation channel you have to force the river to a narrower channel so it stays deep enough for the boats. That was all done at an expense of almost \$1 million dollars a mile in 1950 dollars. On top of that, the dam didn't provide 100% flood control down there, so there were times when

the river was high enough to endanger some of the land, so a lot of levies were built along the river, too. Also, during the Missouri flood time, if water was filling in local drains, they had to have pumps to pump the local water up into the higher river at that time. That was all done and maintained at government expense. Here in ND, in this 80-mile river that we have, we have a problem of bank erosion. Five counties along the Missouri River have organized a joint board called the BOMM Board, which is an acronym for Burleigh, Oliver, Morton, McClean and Mercer Counties, to address this problem. We've been successful to some extent.

Environmentalists don't want us to change the river so we're having an impact with that. That all relates to some of the problems we have on the river. The dirt banks have eroded and traveled down to still water at the reservoirs and created a delta situation. The delta situation has happened in other places in upstream dams when the Missouri River overflows. Right now, Pierre, SD is in the process of buying out 200 homes in south Pierre, SD due to silt and the high water table. They're doing that at government expense, so they are all related. What happened at Ft. Yates was the fact that sediment coming down the river, instead of being deposited in south Bismarck like it had for many years, when the Oahe River was low enough, the sediment moved on down to Ft. Yates and deposited on top of their water intake. That's the reason they had problems. The problem that we have with the river all boils down to one fact. When we have too much water in the Missouri River drainage, they tell us to keep our darn water in ND and we darn near flood up here. When there's not enough water like we have now, they want the water down there to float the barges. At a city meeting a few years ago, I had the opportunity to visit at length with the owners of the barge industry. The only sympathy I have for them is the uncertainty in water levels at certain times of the year, so I can see as a business opportunity

where it's not too great. In fact, they are threatening to pull out of the Missouri River altogether because of that. We have to realize that to float a barge, they have to have water deep and flowing at 5 mph. It takes a tremendous amount of water to float one boat downstream, and it could have been used more practically upstream. That 550,000 acres that ND was forced to give up, was a lot of the land that the tribes owned. They've certainly suffered from that because that was some of the key things of their tribes at that time. I've always advocated that ND should be charging the federal government rent on that 550,000 acres instead of asking for appropriations for rural water systems.

**Chr. Nelson:** Any questions for Mr. Mork? Seeing none, thank you for your testimony. Further testimony in support of HCR 3019?

**Duaine Ash, ND Sportfishing Congress and Friends of Lake Sakakawea: (Written testimony attached)**

**Chr. Nelson:** Are there any questions of Mr. Ash? Seeing none, thank you. Is there further support for HCR 3019?

**Randal J. White, councilman, and public school board member, Standing Rock:** I come before to support HCR 3019. Last November, 10,000 members at Standing Rock were without water. The media made videos, and I wanted to remind you today how big an effect it was on our tribe. I know Chr. Murphy has been in Washington (D.C.) 4-5 times and has met here several times. I would encourage people from ND, from our homelands in ND, let's look out not only for Standing Rock, but for Bismarck/Mandan. It's not happening to Bismarck/Mandan even though they have three times as much people as us. I'm here to support the bill and I encourage you. Right now, the \$8 million dollars cost is a temporary fix. If it freezes again, our people are

going to be suffering. When our school shut down we had to explain to the kids that it was because of the water situation. When our hospital was closed down, we had to explain to our dialysis patients that we had to transport them to Bismarck. Those on dialysis suffer enough. If you travel an additional 66 miles, you suffer more. You talked about fish and animals, but let's talk about humans and get enough water for all of us here in ND. If it has to be, we ask ND to take it to court. I would encourage your support. I hope we can work it out.

**Chr. Nelson:** Are there questions for Mr. White? Thank you Mr. White.

**Archie Fool Bear, Standing Rock Sioux Tribe:** I attended the Governor's summit in Sioux Falls (SD). I had to listen to the Corps of Engineers presentation and the state of South Dakota's concerns. The title that's given is *Drought Conditions As Being Critical, Water Levels Being Critically Low*. I'm not speaking for the Corps, I'm *not* speaking *for* them, just from what I hear. Everybody is looking for blame. Now the court is looking at Mother Nature. With the Master Manual that took 15 years to develop, they're still trying to alleviate blame to them. Listening to that testimony given by the Missouri representative- (I think) they were self-centered. They were wanting more water to come down to keep the barge traffic going. They have a whole different outlook compared to what we have in ND. They don't live here. I'm in support of HCR 3019, however it can be done to urge the Corps, the U.S. Government to manage this water properly so we *can* have a relaxed way of life. Right now, we're sitting on standby, should this water level get so low again that our intakes freeze up again. Our intake is now about ¼ mile from the shoreline from where it use to be. We had to build a dike to get to the river. I wish that all of you could hear how much more Missouri (state of) advocates more water down there. They were outnumbered six to one and were still advocating more water down there. So were the governors

from North and South Dakota, Montana, and Nebraska . Gov. Schweitzer from Montana let the committee know that there are two rivers that feed this Missouri River system. One is the Milk River, which we get most of our water from. The second is the St. Mary's River that flows into Canada. He was making hints to the Corps of Engineers to keep that in mind. If we can have some of that water, we won't have this crisis. Maybe the Corps can explore that and channel some of that water our way. We're in support and strongly recommend your support of 3019.

**Chr. Nelson:** Any questions. Seeing none, I appreciate your testimony. Further support of HCR 3019.

**Austin Gillette, Three Affiliated Tribes, Mandan, Hidatsa, and Arikara:** We support the effort to maintain adequate water levels in Standing Rock. Thank you.

**Chr. Nelson:** We appreciate your testimony. We do understand the issues that surround this. Is there further testimony in support of HCR 3019?

**Dale Frink, ND State Engineer:** I certainly support this resolution. Lake Oahe took over 90,000 acres of land from the state of ND. Today, it has all retreated into South Dakota. The Missouri River right now is just running through a dry lake bed until it gets into SD. This has caused all kinds of problems for the state. I support this bill.

**Rep. Charging, Dist. 4:** The Missouri River passes through the majority of our district. I wanted to make mention that the Attorney General referenced the promises that the Corps of Engineers has made and the Missouri River Tribes know how demeaning those broken promises have been. It goes back even further. There were promises made *before* the drought, regarding water. Now the tribes and state of ND are working on a rural water system, which hasn't been funded. We are joined with the state of ND in trying to restore the funding through the federal

government. We just found that the good news is that they are looking at funding our hospital.

Recreation was a by-product to the tribes. Today, they are depending on it, the casinos, the riverside. The human cost that Councilman White has described is great. We're looking at all of our municipal water being in grave danger along the Missouri River system. We're looking at 51 one years after the building of the dam. The recreation, the fisheries and the endangered species are all covered. But there are new concerns coming up, the noxious weeds, salt cedar. I don't know the long term cost salt cedar is going to bring. The cattle industry along the river system has difficulty getting to water. There are so many by-products of the problem. I just want to say that by passing this resolution, as Rep. Porter has mentioned, what will it do? There is the possibility that they may just overlook it. But, I believe the ND Legislature has a strong voice.

The people are here supporting all three of these concurrent resolutions. I hope we pass all three resolutions. If nothing else, they know we're still here and not giving up hope without solutions.

**Chr. Nelson:** Thank you. Any further testimony in support of HCR 3019? Seeing none, any opposition? Seeing none, I will close the hearing on HCR 3019.

**Rep. Solberg:** I move a do pass.

**Chr. Nelson:** Rep. Solberg, Rep. Porter has some amendments that he's considering so we will take action on this later today. With that I will close the hearing on HCR 3019.

Afternoon, same day:

**Chr. Nelson:** Let's take up HCR 3019. Rep. Porter has some amendments to offer.

**Rep. Todd Porter:** The amendment before you only addresses Pg. 2, Line 8 but the amendment I have addresses Pg. 1, Line 3 also. **(Proposed amendments attached) I would move the amendment.**

**Rep. Duane DeKrey: Second.**

**Chr. Nelson:** The proposed amendment is moved by Rep. Porter and seconded by DeKrey.

Committee discussion:

**Rep. Porter:** In the attorney general's presentation, it went through an entire timetable of all the effort and work that has been going on in this area. I don't know that the A.G. needs to be urged to take continued action. They and the governor have taken all the action that they possibly can. I think they need to be complimented on their efforts for the Missouri River System in the state of ND.

**Rep. David Drovdal:** I don't disagree with the amendment, and I certainly agree with intent of resolution 3019. I think the attorney general's testimony indicated what happens, and we need to pass this, but when we amend it like this, whether it's a good amendment or not, it goes on the sixth order, then has to go on the 11th order, where we can't put it on the consent calendar. I think the prime sponsor would appreciate complimenting the governor and attorney general. I will resist the amendment but support the bill.

**Rep. Charging:** I see it the same way. As we're getting closer to cross over, we can compliment them all day. The reality is, this, along with the three others, are doing the same thing, the front line defense that we have. I would urge the committee to pass it as this.

**Rep. DeKrey:** I would urge the committee to pass these amendments. I think it's only right that the attorney general and governor get credit for what they've done, and urge them to continue their efforts. It's not going to get pulled off the sixth order unless somebody wants to make it an issue.

**Rep. Darrell Nottestad:** Call for question.



**Chr. Nelson:** Question has been called on the proposed amendment on HCR 3019. I will try a voice vote. All those in favor of the proposed amendment, signify by saying aye; opposed, same sign. Motion carried, unanimous.

**Rep. Nottestad: I move a do pass on HCR 3019 as amended.**

**Rep. DeKrey: Second.**

**Chr. Nelson:** Motion by Rep. Nottestad for do pass as amended, and seconded by DeKrey, and placed on the consent calendar. Further committee discussion? I'll try a voice vote. All those in favor of the amended resolution, signify by saying aye; opposed, same sign. Motion carried, unanimous.

**Do pass on HCR 3019 as amended, Voice vote:**

**14-Ayes; 0-Nays; 0-Absent; CARRIER: Nottestad**

By: Rep: Porter

PROPOSED AMENDMENTS TO HOUSE CONCURRENT RESOLUTION NO. 3019

Page 2, line 8, replace "and urges the Governor and the Attorney General to take appropriate action" with ", compliments the Governor and the Attorney General on their efforts, and urges them to continue their actions"

Renumber accordingly

February 11, 2005

YR  
2/11/05

PROPOSED AMENDMENTS TO HOUSE CONCURRENT RESOLUTION NO. 3019

Page 1, line 3, replace "and urging" with ", complimenting"

Page 1, line 4, replace "to take appropriate action" with "on their efforts, and urging them to continue their actions"

Page 2, line 8, replace "and urges" with ", compliments" and replace "to take appropriate action" with "on their efforts, and urges them to continue their actions"

Renumber accordingly

Date: 2/11/05  
Roll Call Vote #: 1

2005 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. HCR 3019

House NATURAL RESOURCES Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number :

Action Taken : No Pass as Amend & Placed on Consent Calendar

Motion Made By : Nottestad Seconded By : DeKrey

Representatives	Yes	No	Representatives	Yes	No
Chairman - Rep. Jon O. Nelson	✓		Rep. Lyle Hanson	✓	
Vice Chairman - Todd Porter	✓		Rep. Bob Hunsakor	✓	
Rep. Dawn Marie Charging	✓		Rep. Scot Kelsh	✓	
Rep. Donald L. Clark	✓		Rep. Dorvan Solberg	✓	
Rep. Duane DeKrey	✓				
Rep. David Drovdal	✓				
Rep. Dennis Johnson	✓				
Rep. George J. Keiser	✓				
Rep. Mike Norland	✓				
Rep. Darrell D. Nottestad	✓				

Total (Yes) 14 No 0

Absent 0

Floor Assignment Nottestad ✓

If the vote is on an amendment, briefly indicate intent:

**REPORT OF STANDING COMMITTEE**

**HCR 3019: Natural Resources Committee (Rep. Nelson, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE PLACED ON THE CONSENT CALENDAR** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HCR 3019 was placed on the Sixth order on the calendar.

Page 1, line 3, replace "and urging" with ", complimenting"

Page 1, line 4, replace "to take appropriate action" with "on their efforts, and urging them to continue their actions"

Page 2, line 8, replace "and urges" with ", compliments" and replace "to take appropriate action" with "on their efforts, and urges them to continue their actions"

Renumber accordingly

2005 SENATE NATURAL RESOURCES

HCR 3019

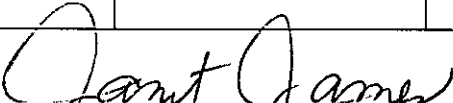
2005 SENATE STANDING COMMITTEE MINUTES

BILL/RESOLUTION NO. HCR 3019

Senate Natural Resources Committee

☐ Conference Committee

Hearing Date March 10, 2005

Tape Number	Side A	Side B	Meter #
2	X		35.1 - 48.5
Committee Clerk Signature 			

Minutes:

**Senator Stanley Lyson**, Chairman of the Senate Natural Resources Committee opened the hearing on HCR 3019 urging the United States Army Corps of Engineers to retain sufficient water on the upper portion of Lake Oahe to ensure a stable water supply for the residents of the Standing Rock Reservation and surrounding communities.

All members of the committee were present except Senator Joel Heitkamp.

**Representative Rod Froelich** of District 31, sponsor of HCR 3019 introduced the resolution to give support to the Attorney General and the Governor of North Dakota in telling the Corp. of Engineers that water needs be saved for the citizens of the state.

**Senator John Traynor** asked if it is true that some of the communities in his district were not able to draw water because of the low water levels.

**Representative Froelich** confirmed this to be true and stated it took over \$10 million invested just to get water.

**Duane Ash** (37.9) representing the North Dakota Sportsfishing Congress testified in support of HCR 3019 (See attached testimony).

**Senator Traynor** asked what impact there has been on the fish with the low water levels.

**Duane Ash** stated that there aren't many fish anymore in Lake Oahe and if the water level keeps falling it will do away with the fishing in Lake Sakakawea.

**Mike Donahue** representing the United Sportsmen of North Dakota and the North Dakota Wildlife Federation testified they are in support of HCR 3019.

**Carol Two Eagle** testified in support of HCR 3019 stating there are no walleye fish in Lake Oahe and that siltation is the major problem. She further told the committee her personal story of hauling water to Fort Yates when they ran out of water.

**Dale Frink** (44.1) State Engineer and also Secretary and Chief Engineer to the State Water Commission testified in support of HCR 3019 (See attached testimony).

**Senator Lyson** asked for opposing testimony and hearing non closed the hearing on HCR 3019.

**Senator Layton Freborg** made a motion for a Do Pass of HCR 3019.

**Senator Rich Wardner** second the motion.

Roll call vote for a Do Pass of HCR 3019 was taken indicating 6 YEAS, 0 NAYS AND 1 ABSENT.

**Senator Freborg** will carry HCR 3019.



Date:

**Roll Call Vote #:**

## 2005 SENATE STANDING COMMITTEE ROLL CALL VOTES

**BILL/RESOLUTION NO.** 3019

Senate Senate Natural Resources

## Committee



Legislative Council Amendment Number

### Action Taken

**Motion Made By**

Seconded By Wardman

[illegible]

**Total**

(Yes)

No

**Absent**

## Floor Assignment

**If the vote is on an amendment, briefly indicate intent:**

**REPORT OF STANDING COMMITTEE (410)**  
March 10, 2005 12:55 p.m.

**Module No: SR-44-4632**  
**Carrier: Freborg**  
**Insert LC: . Title: .**

**REPORT OF STANDING COMMITTEE**

**HCR 3019, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman)**  
recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING).  
Engrossed HCR 3019 was placed on the Fourteenth order on the calendar.

2005 TESTIMONY

HCR 3019

By: Wayne Stenehjem  
Re: HCR 3019  
H. Nat. Res. /2/11/05  
Pg 1 of 4



Wayne Stenehjem  
ATTORNEY GENERAL

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www.ag.state.nd.us

February 11, 2005

**NAWS PROJECT – LITIGATION SUMMARY**

**1944:** Congress passes the 1944 Flood Control Act. The Act authorizes irrigation projects, and North Dakota, in return for its support for the legislation, is promised huge irrigation projects.

**1965:** Congress passes the Garrison Diversion Unit Act authorizing multi-purpose water projects for North Dakota.

**1968:** Construction on the Garrison Diversion Project begins.

**1970:** The Government of Canada begins to express opposition to the project. It is concerned that the project will transfer "foreign biota," that is, Missouri River Basin organisms, to the Hudson Bay Basin that will, Canada asserts, damage the Canadian environment.

**1974:** The United States and Canada refer the project to the International Joint Commission, a body established by the 1909 Boundary Waters Treaty. The Commission studies the project and later in the year issues a report expressing concerns about the project.

**Late 1970s – early 1980s:** The U.S. and Canada, along with North Dakota and Manitoba, study the Garrison Diversion Project's transboundary affects. But the Canadian issues, coupled with waning Congressional support for large irrigation projects and objections from environmental groups, largely end the original vision of Garrison Diversion.

**1986 – late 1980s:** Congress passes The Garrison Diversion Reformulation Act, authorizing municipal, rural, and irrigation (MR&I) projects in North Dakota and a scaled-down irrigation project. North Dakota begins planning a water project for the northwest and north central parts of the state. The project eventually becomes known as the Northwest Area Water Supply Project, or the NAWS Project. Canadian concerns and objections, however, continue, and federal support for even the smaller irrigation project weakens.

**1990s:** Throughout much of the 1990's, the Department of the Interior's Bureau of Reclamation support for NAWS remains strong and it works to satisfy the obligations of the National Environmental Policy Act (NEPA), as

well as those of the 1909 Boundary Waters Treaty. It works in cooperation with North Dakota. The Governments of Canada and Manitoba participate in many joint technical meetings and studies throughout the 1990s. The primary objective of the work is to ensure that the NAWS Project does not transfer "foreign biota" to the Hudson Bay Basin.

**1999-2000:** NAWS reaches the highest levels of government. The project is discussed by Pres. Clinton and Prime Minister Chretien. Meetings are held with Canadian officials and U.S. State Department, as well as with the Administrator of the Environment Protection Agency (EPA).

**2000:** Congress enacts the Dakota Water Resources Act. The Act is another reformulation of the Garrison Diversion Project. With the Act, Garrison Diversion has evolved from primarily an irrigation project to one focused on the state's MR&I needs.

**2001:** The Secretary of the Interior, in consultation with the Administrator of the EPA, concludes that the NAWS Project satisfies the 1909 Boundary Waters Treaty. In the spring, the Bureau of Reclamation issues its Finding of No Significant Impact for the Project. This allows the Bureau to avoid preparing an environmental impact statement. The Bureau of Reclamation also issues its Final Environmental Assessment.

**2002:** Groundbreaking for NAWS occurs in April. In October the Province of Manitoba files suit against U.S. Department of the Interior and the U.S. Bureau of Reclamation. The suit is filed in U.S. District Court for the District of Columbia. Manitoba's suit asserts that the government's development of the Project violates the NEPA. In particular, Manitoba asks the court to order the Bureau to prepare an environmental impact statement for the Project. Manitoba also asks that construction on the Project stop.

**2003:** North Dakota files a motion asking to be allowed to intervene in the suit to protect North Dakota's interests. The motion is granted. North Dakota later files a motion asking the court to dismiss the case on jurisdictional grounds. North Dakota asserts that transboundary relations between the U.S. and Canada are governed by 1909 Boundary Waters Treaty and that the two countries established the International Joint Commission to address transboundary disputes. Consequently, North Dakota asserts, the judiciary lacks jurisdiction to consider what is essentially a matter of the Nation's foreign

affairs. The Bureau of Reclamation files a similar motion. The court holds a hearing on the motions. In November the court denies the motions.

**2003:** Despite the litigation, construction on the project proceeds.

**2004:** Manitoba files a motion for summary judgment. The Government of Canada files an amicus brief in support of Manitoba. Environmental groups, led by the National Wildlife Federation, also file an amicus brief supporting Manitoba. And the State of Missouri files an amicus brief. Missouri argues that North Dakota should not be allowed to withdraw water from the Missouri River. North Dakota and the federal government file their own motions for summary judgment. The court holds a hearing on the pending motions.

**2004:** Despite the litigation, construction on the project proceeds.

**2005:** The court grants, in part, Manitoba's summary judgment motion. It denies North Dakota's and the federal government's summary judgment motions. The court rules that the Bureau of Reclamation did not satisfy its duties under NEPA. It orders the Bureau to do more analysis on leakage from the NAWES pipeline and on the effects to Canada's environment should "foreign biota" reach and take hold in Canada. The court, however, does not stop work on the Project, but states that it will consider doing so at a hearing to be held in the near future.

**Options:** Because of the Bureau of Reclamation's significant role in the Project and litigation, North Dakota will have to work with the Bureau in deciding how best to respond to the court's order.

**Testimony of Duaine Ash, President, North Dakota Sportfishing  
Congress and Friends of Lake Sakakawea**

**LOBBYIST # 383**

Presented to the House of Representatives Natural Resources Committee

ON

**HCR 3019**

February 11, 2005

Thank you for the opportunity to speak in support of House Concurrent Resolution 3019. My name is Duaine Ash. I am president of the North Dakota Sportfishing Congress and the Friends of Lake Sakakawea.

Most people take their water for granted. As long as it flows from the tap on demand, the mechanisms that make it available really aren't a concern in our daily lives. However, when the tap goes dry as it did in Fort Yates last year. Providing water becomes everyone's top priority. The water shortage at Fort Yates was triggered by the falling water levels in Lake Oahe. Fixing the problem required enormous effort and the time required cause severe hardships especially on the Standing Rock Indian Reservation. We believe that maintaining higher water levels in Lake Oahe could have prevented this crisis.

Our primary interest in the Missouri River and its reservoirs has more to do with recreation and maintaining sufficiently high water levels in our reservoirs to maintain a healthy fishery and water based recreation opportunities. However, we know there is a need to keep water levels high enough to meet the water supply needs of people living near Lake Oahe and for the thousands of people who visit the area each year.

We support House Concurrent Resolution 3019 because we feel it is appropriate and necessary for the State of North Dakota to seek a change in the way the Corps of Engineers has been managing the Missouri River System and for the federal government to provide financial support to avert and future water supply crisis.

Thank you for giving us this opportunity to express our concerns.



Wayne Stenehjem  
ATTORNEY GENERAL

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By: Wayne Stenehjem  
Re: HCR 3019  
HN Res. - 2/11/05  
Pg: 1 of 4

February 11, 2005

**Missouri River Litigation Chronology – A Summary**

**1944:** The 1944 Flood Control Act authorizes Missouri River dams.

**1967:** The dams become fully operational.

**1979:** The Corps adopts a Master Manual to implement the Flood Control Act and to guide management of the System.

**1987 – 1993:** The Missouri River Basin experiences its first major drought since the dams became fully operational.

**1989:** The Corps recognizes that its operations are contrary to the basin's current needs and begins studying revisions to the 1979 Master Manual.

**1990:** North Dakota, South Dakota, and Montana jointly sue the Corps, seeking temporary reductions in releases from the dams to protect the smelt spawn. (The smelt is the primary food source for the walleye.) On May 11<sup>th</sup> the U.S. District Court for North Dakota issues an injunction stopping the Corps from releasing water until June 1<sup>st</sup>. The Corps appeals to the Eighth Circuit Court of Appeals, which promptly overturns the district court's order. That court later dismisses the states' lawsuit as moot because the spring smelt spawn is over. The merits of the states' claims are never reached.

**1991:** North Dakota, South Dakota, and Montana again jointly sue the Corps. The suit, which is filed in the U.S. District Court for Montana, asserts that the 1979 Master Manual and the Corps' operation of the dams is contrary to the 1944 Flood Control Act. The states allege that the Corps must treat fish, wildlife, and recreation equally with other System purposes. During the lawsuit, the Corps agrees that all uses are entitled to equal consideration. The court dismisses the lawsuit based on the Corps' assurances that it will give all water uses equal consideration while the Master Manual is being revised.

**1990s:** The drought breaks in 1994. Because there is sufficient water for all uses litigation abates. The full reservoirs, however, remove any urgency to revise the 1979 Master Manual. The Corps' revision process moves slowly.

**2000:** The present drought takes hold.



**2002:** South Dakota, to protect Lake Oahe's smelt spawn, sues the Corps in the U.S. District Court for South Dakota. On May 10<sup>th</sup> the court enjoins the Corps from lowering the lake until May 23<sup>rd</sup>. The Corps responds by increasing releases from Lake Sakakawea and Ft. Peck.

**2002:** North Dakota sues the Corps in U.S. District Court for North Dakota and obtains an injunction preventing the Corps from temporarily lowering Lake Sakakawea. The injunction saves Lake Sakakawea's 2002 smelt spawn. The suit also seeks an order requiring the Corps to properly apply the 1944 Flood Control Act and to promptly issue a new Master Manual.

**2002:** Montana sues the Corps in the U.S. District Court for Montana. After obtaining some temporary relief, Montana dismisses its suit and, for the most part, removes itself from further litigation.

**2002:** Nebraska sues the Corps in the U.S. District Court for Nebraska and obtains an injunction requiring the Corps to operate the System to maintain minimum navigation flows. North Dakota later intervenes in this suit to protect the state's interests before the Nebraska District Court

**2002:** The Corps appeals the three district court injunctions to the Eighth Circuit Court of Appeals.

**2003:** American Rivers and other environmental organizations sue the Corps in the U.S. District Court for the District of Columbia. They assert that the Corps' river management violates the Endangered Species Act and 1944 Flood Control Act.

**2003:** North Dakota authors an amicus brief joined by South Dakota and Montana opposing the Corps' motion to transfer the American Rivers lawsuit to Nebraska. The motion is denied. North Dakota later intervenes in the American Rivers lawsuit to protect its interests before the U.S. District Court for the District of Columbia.

**2003:** North Dakota supports American Rivers' request for an injunction against the Corps. The District of Columbia Court grants the injunction. The Corps and downstream states and interests appeal to the District of Columbia Court of Appeals, but the appellants later dismiss their appeals.

**2003:** The Corps' 2002 appeals to the Eighth Circuit Court of Appeals, however, remain pending and the Eighth Circuit holds oral argument on them.

**2003:** North Dakota serves the Corps with a Notice of Violation informing the Corps that drawing down Lake Sakakawea will violate the state's water quality standards and destroy the coldwater fishery, on which the walleye and salmon depend. North Dakota later sues the Corps in the U.S. District Court for North Dakota. This suit differs from the 2002 suit. The 2003 suit asserts that the Corps will violate the federal

Clean Water Act by drawing down Lake Sakakawea and jeopardizing its coldwater habitat. The suit also seeks and obtains an injunction to protect the spring smelt spawn. The injunction saves Lake Sakakawea's 2003 spawn.

**2003:** Blaske Marine and other downstream interests sue the federal government and upstream states in the U.S. District Court for Nebraska. Among other claims, they assert that the states and the government violate the Endangered Species Act by stocking walleye, which, Blaske Marine asserts, compete with the endangered pallid sturgeon. The state responds and defends the suit.

**2003:** Nebraska files a motion asking the Judicial Panel on Multidistrict Litigation to consolidate all pending Missouri River cases before the Nebraska District Court. The Corps and other downstream interests support the motion. North Dakota and other parties oppose it. North Dakota later appears before Judicial Panel on Multidistrict Litigation to argue that if the cases are to be consolidated, then the Minnesota District Court would be the most appropriate court. The Panel orders all Missouri River cases consolidated before Judge Paul Magnuson of the U.S. District Court for Minnesota.

**2003:** The Eighth Circuit Court of Appeals issues a decision on the three injunctions issued in 2002. It overturns injunctions issued by the North Dakota and South Dakota District Courts and affirms the one issued by the Nebraska District Court. Its opinion contains comments that could be construed as ruling that the Flood Control Act gives navigation priority over recreation.

**2003:** North Dakota authors a petition for certiorari that is joined by South Dakota. The petition asks the United States Supreme Court to review the Eighth Circuit Court of Appeals' decision.

**2003-2004:** Dozens of motions are filed in the underlying cases with Judge Magnuson.

**2004:** The Corps and downstream states and interests file oppositions to North Dakota's petition for certiorari. In April, the U.S. Supreme Court denies North Dakota's petition and declines to review the Eighth Circuit's decision.

**2004:** In February, Judge Magnuson grants North Dakota's motion and orders the Corps to issue a new Missouri River Manual, which the Corps does in March. Judge Magnuson later holds a hearing on the many motions pending in the consolidated cases.

**2004:** In April, Judge Magnuson dismisses North Dakota's 2003 suit against the Corps in which the state asserted that drawing down Lake Sakakawea violates the Clean Water Act. The judge rules that the Corps is not subject to North Dakota's

water quality standards. North Dakota later appeals the decision to the Eighth Circuit Court of Appeals.

**2004:** In June, Judge Magnuson issues his decision on all remaining issues. He dismisses Blaske Marine's claim that North Dakota's walleye stocking violates the Endangered Species Act. He rules that the Flood Control Act does not give navigation a priority over recreation, but that the Corps has a duty to even-handedly balance all river uses and that in doing so it has considerable discretion. He also dismisses American Rivers' environmental claims. Downstream interests view the decision as a loss and appeal to with the Eighth Circuit Court of Appeals. American Rivers also appeals.

**2004-2005:** Briefs are filed with the Eighth Circuit. Thus far, about 20 briefs have been filed. The final batch, which is due in a couple of weeks, will include another six briefs. The Court of Appeals will hold oral argument on the appeals in mid-April.

**TESTIMONY OF DUAINE ASH, LOBBYIST #383,  
PRESIDENT OF THE NORTH DAKOTA SPORTFISHING  
CONGRESS  
PRESENTED TO THE SENATE NATURAL RESOURCES COMMITTEE**

ON

**HCR 3019  
March 10, 2005**

Mr. Chairman and member of the committee:

We concur with this resolution urging the United States Army Corps of Engineers to retain sufficient water in the upper portion of Lake Oahe to ensure a stable water supply for the residents of the Standing Rock Indian Reservation and surrounding communities and urging the Governor and the Attorney General to take appropriate action to ensure federal officials retain sufficient water in the upper portion of Lake Oahe to protect the health and well-being of the citizens of the area.

The downstream states in the Missouri River Basin have received all the benefits promised in the Pick-Sloan Project; resulted in billions of dollars in flood protection to downstream interests and has allowed these downstream interests to develop the original flood plain of the Missouri River for industrial, municipal, and agricultural uses.

The residences and people of North Dakota have given more than their share for the benefit of the lower states: it about time that some consideration be given to those people that have given so much.

Thank you for allowing us to testify here today

**TESTIMONY ON ENGROSSED HOUSE CONCURRENT RESOLUTION 3019**  
**Senate Natural Resources Committee**

**Dale L. Frink, State Engineer**  
**State Water Commission**  
**March 10, 2005**

Mr. Chairman and Members of the Senate Natural Resources Committee, I am Dale Frink, State Engineer and also Secretary and Chief Engineer to the State Water Commission. I am appearing in support of Engrossed House Concurrent Resolution 3019.

The U.S. Army Corps of Engineers acquired approximately 90,000 acres of land in North Dakota for Lake Oahe. Because of the current low lake levels, Lake Oahe has retreated from North Dakota, leaving the Missouri River meandering through a dry lakebed. Engrossed House Concurrent Resolution 3019 urges the Governor and the Attorney General to take appropriate action to ensure federal officials retain sufficient water in Lake Oahe to protect the health and well being of the citizens of the area. I assure you that as the state agency responsible for water management in the state we have and will continue to do everything possible to persuade federal officials to conserve water in the Missouri River reservoirs.

I recommend a do pass on Engrossed House Concurrent Resolution 3019.  
Thank you.