2011 HOUSE ENERGY AND NATURAL RESOURCES

HCR 3019

2011 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

HCR 3019
02/11/2011
14372
☐ Conference Committee

Committee Clerk Signature Jeanette

Minutes:

Rep. Porter: We will open the hearing HCR 3019.

Rep. Schmidt: I represent district 31. I gave up 434 acres for the Oahe Dam. This resolution speaks for itself it urges the United States Army Corp. of Engineers to forgo any attempt to charge water users in North Dakota a fee to use water from Lake Sakakawea and Lake Oahe. We think this is not necessary.

Rep. Carlson: I am the representative from district 41. The key part of this resolution is all the things that happened through the Pick-Sloan Act. We all hope everyone will read the resolutions and do something about them. They are not a law, what they are is a very strong recommendation from us saying do not charge us for water, which are rights we believe we received when that land us inundated. It is important to know if you are going to get charged for water you thought would getting without charges.

Senator Stenehjem: The water resources we have in North Dakota belong to North Dakota. I don't know how anybody can think that we should have to pay to use any of that water. It is a very important resource to North Dakota and I think this sends a strong message about what we in North Dakota believe in the use of our needed water.

Governor Dalrymple: Governor of the state of North Dakota. This resolution urges the Corp. of Engineers to forgo any attempt to charge North Dakota water users a fee for water from Lake Sakakawea and Lake Oahe. As stated in the letters dated June 10 and October 28 2010 and January 30, 2011 the state of North Dakota has serious concerns about the Corps. recently introducing restrictions and policies regarding access to water in the Missouri River. It seems that Corp. policies are now blocking access to free flow the Missouri River which is rightful property of the state of North Dakota. The

Corps. new policies are unjust and unacceptable. The Corps. main reason for the sudden implication of this policy stems from problems that have arisen on east coast reservoirs due to their smaller size. Unlike the east coast reservoirs the storage capacity of the Missouri River main stem reservoirs vastly overshadows any proposed water storage needs within North Dakota by several orders of magnitude. The blanket policy proposed by the Corp. is inappropriate for the state of North Dakota. Prior to the enactment of the 2008 Corp. Real Estate Policy water users were able to gain access to water in the Missouri River main stem system through a land easement application process. The Lake Sakakawea drafts a plus water report and environmental assessment released in December 2010 states that the Corp. has issued 142 water intake easements around Lake Sakakawea, only one of which has a fee based surplus water supply agreement. These easements were issued over the last 60 years without the need for a reallocation study or a water storage contract.

The Corps. recent change in position is now to require the allocation of storage in reservoirs in the issuance of water storage contracts to existing water users under the 1944 Flood Control Act and the Water Supply Act of 1958 and is unjustifiable for a number of reasons. First the Missouri River is a vital water source to the state of North Dakota that existed prior to the construction of the main stem reservoirs. According to article 11 section 3 the North Dakota Constitution states "all flowing streams and natural water sources shall remain forever the property of the state for mining, irrigating and manufacturing purposes." The Missouri River continues to flow through Lake Sakakawea today and cannot be considered stored water due to the permanent rights held by the state. North Dakota water users must have access to the river without cost and without the requirements of surplus water supply agreements.

The Dakota Water Resources Act of 2000 which amended the 1944 Flood Control Act recognized the municipal, rural and industrial water supply projects in North Dakota. Section 7 of the act stated the water systems in North Dakota would not have to repay the Secretary of the Army for features of the Missouri River that were constructed prior to the act. Section 301 B of the 1958 water supply act provides that recovery of the capital cost may extend for a period for up to 50 years. The fifty year time period has expired. The Corps. Proposal to charge for construction costs is unacceptable.

Third the draft report only proposes a storage fee for water users in the upper basin states that withdraw water directly from the main stem reservoirs, but

does not charge downstream water users a similar fee. Restrictions in access would affect state water projects, the farmers, the ranchers that rely on access for irrigation purposes. It would hinder the development of domestic energy resources and eliminate the 3 tribes and the Standing Rock Nation from freely accessing the water supply. I ask the committee to move forward with this resolution. All consideration for the water users have been settled in the past and should not be opened to further discussion. The Corp. needs to continue to provide water access to existing and potential water users without cost and without delay. (see Attachment1)

Rep. Keiser: On page 2 where we identify people that will be receiving this resolution. Why not include the President of the United States in that list?

Governor Dalrymple: I am no objection to you improving the resolution by adding amendments.

Rep. Keiser: These don't always go up the chain, by adding him they should communicate.

Wayne Stenehjem: Attorney General of North Dakota. North Dakota has been blessed with many natural resources the Missouri River is one of the greatest of those natural resources. The law of the United States gives this river special legal status and recognizes the state special interest in it. Prior to statehood the states held the Missouri River in trust for the benefit of the future state of North Dakota. Federal Law prohibited the law from the government from holding on to the river or convening it to other interests or otherwise depriving North Dakota of this asset.

The U.S. Supreme Court has repeatedly recognized that navigable rivers like the Missouri are fundamental to the state. It is a principal adopted by the citizens of North Dakota in our State Constitution which declares that flowing streams and natural water courses shall forever remain the property of the state. River flows that continue through Lake Sakakawea are not and should not be considered stored water. While it is not just or legal to demand that we get permission to use water that naturally flows through our state, it is an insult to demand that we pay for it. I have instructed our attorneys in my Natural Resources Division of my office to complete the research and to commence the drafting of a draft summons complaint in the event the Corp. continues on this unwise unreasonable and unjustified course. The Corp. did built the dam it did not put the natural flow through the Missouri River. The Corp. has some authority but not the kind of authority that it appears to assert here.

Rep. Porter: It seems this is a reverse process. If anybody should be charging anybody for the storage of water we should charge the Corp. because it is still our water.

Wayne Stenehjem: We gave up a lot for the construction of this reservoir system. We gave up five hundred thousand acres of prime land in North Dakota in exchange for a promise that the Federal Government has not kept, that is why I think it is important that you know that all of us will do what we have to make sure our rights are protected.

Rep. Nathe: What is the reason for them to do this?

Wayne Stenehjem: Some attorneys are advising them that they are on legal footing. We differ with them and are prepared to do whatever we have to pursue the matter.

Rep. Hanson: Should we add tributaries to the Missouri like the James River?

Wayne Stenehjem: The James River as well was given to us, anything that you fell is necessary to strengthen this resolution is fine with me.

Michelle Klose: Manager of the Northwest Area Water Supply Project for the North Dakota state Water Commission. I am here in support of HCR 3019. The Corps. surplus water attempt to charge water users for a storage fee to use of natural flows of the Missouri River is an insult to the sacrifice North Dakota made over years ago. (see attachment 2). The last 3 pages of the amendments line out how it would change the resolution.

Rep. Porter: You are explaining the tributaries inside the amendments. So it is clearer on what we are saying is ours.

Michelle Klose: Currently the Corp. is only requiring payment on the lands that were inundated by the reservoirs. There is no charge for the water between Lake Sakakawea and Lake Oahe. There have been questions raised for flowage easements on tributaries to those reservoirs. The Corps. main issue is those lands that were taken with commendation. There policy says if you need an easement for stored water you have to get a storage contract. The pipe stem has not been mentioned as one of the reservoirs that they are looking at. Right now it is the main stem after the Missouri River. The first

report that they completed is on Lake Sakakawea. The next report will cover the other 5 main stem reservoirs.

Dave Koland: General Manager of Garrison Diversion Conservancy District. (see attachment 3) I can't think of any other facilities other than the Garrison Dam that was built by the Secretary of the Army.

Gene Schafer: Director of the North Dakota Water Coalition. I am passing out a couple of things, one from the North Dakota Irrigation Association (see attachment 4) we also sent a letter of opposition from the North Dakota Water Coalition (see attachment 5.)

Glenn McCrory: I am from Linton North Dakota. I sent a letter to the Corp. when they had their comment period which was until February1, 2011. (see attachment 6.) My family lost 750 acres of bottom land which is now used for restored water. We went into irrigation in the 1970s and had to have a permit from the Corp. to cross their land to get to the water and we had to have state permit for the use of the water. We got 2 acre feet to use for irrigating but then we had to pump it up over 180 feet to use it. Under this proposal they are talking $20.91 an acre foot to go with the permit, that would be like $42.00 a year for me to apply that would be if you use the water or not.

Rep. Porter: Is there further testimony in support of HCR 3019? Is there any opposition? We will close the hearing on HCR 3019.

Rep. Kasper: Is it possible to get the documentation the Corp. of Engineers has filed?

Rep. Porter: Do you have that? On page 2 line 6 after the word "copies" on these important resolutions we have always included the language by certified mail return receipt requested so that we are assured that the convenance of the Legislative Assembly reaches those that we are convening this too. One other thing that Rep. Keiser brought up was a very good point, and that is the letter needs to go the top. The state engineers purposed amendments that focus in on what the issue is, and uses the language that has been presented to them.

Rep. Kasper: Is it appropriate to add to copies to the leadership of the United States Senate and the United States House?

Rep. Porter: I don't have an issue with that.

Rep. Kasper: I move that the cc section beginning on line 6 page 2 we would add copies to the President of the United States, to the Majority and the Minority Leaders in the United States Senate and the Majority leader and the Minority Leader in the House, and the Speaker of the House in the United States House of Representatives to be sent certified mail with a return receipt.

Rep. Nathe: Second.

Rep. Porter: All in favor voice vote taken motion carried.

Rep. Hofstad: I move the Water Commissions Amendment.

Rep. Clark: Second.

Rep. Porter: Is there any further discussion? Voice vote taken motion carried.

Rep. Kasper: I move a Do Pass as amended on HCR 3019 to be placed on the consent calendar.

Rep. Nathe: Second.

Rep. Porter: Is there any discussion? Voice vote taken motion carried
Carrier: Rep. Kasper.

Date: 2-10-11
Roll Call Vote #: 1

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3019

House House Energy and Natural Resources Committee

Legislative Council Amendment Number 11.3063.01601

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep Kasper Seconded By Rep. Nathe

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Hanson		
Vice Chairman Damschen			Rep. Hunskor		
Rep. Brabandt			Rep. Kelsh		
Rep. Clark			Rep. Nelson		
Rep. DeKrey					
Rep. Hofstad					
Rep. Kasper					
Rep. Keiser					
Rep. Kreun					
Rep. Nathe					
Rep. Anderson					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

voice vote taken
motion carried

add copies to leadership

PROPOSED AMENDMENTS TO HOUSE CONCURRENT RESOLUTION NO. 3019

Page 1, line 1, replace "to forego any attempt" with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River."

Page 1, remove line 2

Page 1, line 16, replace "tourism, recreation, and the well-being of the citizens and communities in North" with "the United States Army Corps of Engineers, through the *Surplus Water Report*, is clearly challenging the State of North Dakota and the upper basin states' rights to access the states' natural flows;"

Page 1, line 17, remove "Dakota depend upon an adequate and dependable source of water;"

Page 1, remove lines 18 through 21

Page 1, after line 23, insert:

"**WHEREAS**, in contradiction to the Dakota Water Resources Act of 2000 and the 1958 Water Supply Act, the United States Army Corps of Engineers is forcing reimbursement of nonreimbursable costs by withholding review of future easement applications; and

WHEREAS, before the dams were constructed the Missouri River provided ample water; and

WHEREAS, the natural flows of the Missouri River – even during the lowest flow periods – were and continue to be more than plentiful for the needs of North Dakota; and

WHEREAS, the natural flows of the Missouri River through Lake Sakakawea and Lake Oahe, are not, and should not be, considered stored water; and"

Page 1, line 25, replace "or other restriction on" with "and deny water users in"

Page 1, line 25, replace "its lawful right to use and allocate water" with "access the natural flows of the Missouri River"

Page 2, line 4, replace "to forego any attempt to charge water users in North Dakota a fee to use water from" with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River;"

Page 2, line 5, remove "Lake Sakakawea or Lake Oahe;"

Renumber accordingly

Date: 2-10-11
Roll Call Vote #: 2

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3019

House House Energy and Natural Resources Committee

Legislative Council Amendment Number _____

Action Taken: ☐ Do Pass ☐ Do Not Pass ☐ Amended ☒ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep Hofstad Seconded By Rep Clark

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Hanson		
Vice Chairman Damschen			Rep. Hunskor		
Rep. Brabandt			Rep. Kelsh		
Rep. Clark			Rep. Nelson		
Rep. DeKrey					
Rep. Hofstad					
Rep. Kasper					
Rep. Keiser					
Rep. Kreun					
Rep. Nathe					
Rep. Anderson					

Total (Yes) 15 No —

Absent —

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent: Water commission Counsel.

voice vote taken
motion carried

11.3063.01001
Title.02000

Adopted by the Energy and Natural Resources Committee

February 10, 2011

VR
2/11/11

PROPOSED AMENDMENTS TO HOUSE CONCURRENT RESOLUTION NO. 3019

Page 1, line 1, remove "forego any attempt"

Page 1, replace line 2 with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River."

Page 1, line 16, remove "tourism, recreation, and the well-being of the citizens and communities in North"

Page 1, replace lines 17 through 21 with "the United States Army Corps of Engineers, through the Surplus Water Report, is clearly challenging the state of North Dakota and the upper basin states' rights to access the states' natural flows; and"

Page 1, after line 23, insert:

"**WHEREAS**, in contradiction to the Dakota Water Resources Act of 2000 and the 1958 Water Supply Act, the United States Army Corps of Engineers is forcing reimbursement of nonreimbursable costs by withholding review of future easement applications; and

WHEREAS, before the dams were constructed, the Missouri River provided ample water; and

WHEREAS, the natural flows of the Missouri River, even during the lowest flow periods, were and continue to be more than plentiful for the needs of North Dakota; and

WHEREAS, the natural flows of the Missouri River through Lake Sakakawea and Lake Oahe are not, and should not be, considered stored water; and"

Page 1, line 25, replace "or other restriction on" with "and deny water users in"

Page 1, line 25, replace "its lawful right to use and allocate water" with "access the natural flows of the Missouri River"

Page 2, line 4, remove "forego any attempt to charge water users in North Dakota a fee to use water from"

Page 2, line 5, replace "Lake Sakakawea or Lake Oahe" with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River"

Page 2, line 6, after "resolution" insert "by certified mail with return receipt"

Page 2, line 7, after "to" insert "the President of the United States; the Majority Leader of the United States Senate; the Minority Leader of the United States Senate; the Majority Leader of the United States House of Representatives; the Minority Leader of the United States House of Representatives; the Speaker of the United States House of Representatives;"

Renumber accordingly

Page 2, line 11, after "Delegation" insert "by certified mail with return receipt"

Renumber accordingly

Date: 2-10-11
Roll Call Vote #: 3

2011 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3019

House House Energy and Natural Resources Committee

Legislative Council Amendment Number 11.3663.01001 Title 02000

Action Taken: ☒ Do Pass ☐ Do Not Pass ☒ Amended ☐ Adopt Amendment
on consent calendar
☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Rep Kasper Seconded By Rep. Nathe

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Hanson	✓	
Vice Chairman Damschen	✓		Rep. Hunskor	✓	
Rep. Brabandt	✓		Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Nelson		
Rep. DeKrey	✓				
Rep. Hofstad	✓				
Rep. Kasper	✓				
Rep. Keiser	✓				
Rep. Kreun	✓				
Rep. Nathe	✓				
Rep. Anderson	✓				

Total (Yes) 15 No 0

Absent 0

Floor Assignment Rep Kasper

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

voice vote taken motion carried

REPORT OF STANDING COMMITTEE

HCR 3019: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (15 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HCR 3019 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "forego any attempt"

Page 1, replace line 2 with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River."

Page 1, line 16, remove "tourism, recreation, and the well-being of the citizens and communities in North"

Page 1, replace lines 17 through 21 with "the United States Army Corps of Engineers, through the Surplus Water Report, is clearly challenging the state of North Dakota and the upper basin states' rights to access the states' natural flows; and"

Page 1, after line 23, insert:

"**WHEREAS**, in contradiction to the Dakota Water Resources Act of 2000 and the 1958 Water Supply Act, the United States Army Corps of Engineers is forcing reimbursement of nonreimbursable costs by withholding review of future easement applications; and

WHEREAS, before the dams were constructed, the Missouri River provided ample water; and

WHEREAS, the natural flows of the Missouri River, even during the lowest flow periods, were and continue to be more than plentiful for the needs of North Dakota; and

WHEREAS, the natural flows of the Missouri River through Lake Sakakawea and Lake Oahe are not, and should not be, considered stored water; and"

Page 1, line 25, replace "or other restriction on" with "and deny water users in"

Page 1, line 25, replace "its lawful right to use and allocate water" with "access the natural flows of the Missouri River"

Page 2, line 4, remove "forego any attempt to charge water users in North Dakota a fee to use water from"

Page 2, line 5, replace "Lake Sakakawea or Lake Oahe" with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River"

Page 2, line 6, after "resolution" insert "by certified mail with return receipt"

Page 2, line 7, after "to" insert "the President of the United States; the Majority Leader of the United States Senate; the Minority Leader of the United States Senate; the Majority Leader of the United States House of Representatives; the Minority Leader of the United States House of Representatives; the Speaker of the United States House of Representatives;"

Renumber accordingly

2011 SENATE NATURAL RESOURCES

HCR 3019

2011 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee
Fort Lincoln Room, State Capitol

HCR 3019
March 11, 2011
Job #15310

☐ Conference Committee

Committee Clerk Signature Veronica Sparling

Explanation or reason for introduction of bill/resolution:

A concurrent resolution urging the United States Army Corps of Engineers to immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River.

Minutes: Testimony Attached

Chairman Lyson opened the hearing on HCR 3019.

Representative Jim Schmidt, District 31, introduced HCR 3019. The House Natural Resources Committee voted 15-0 for a Do Pass.

Andrea Travnicek, Senior Policy Advisor for the Governor of North Dakota, presented written testimony in favor of HCR 3019. See Attachment #1.

Jean Schafer, representing the ND Water Coalition, presented written testimony in favor of HCR 3019. See Attachment #2, a letter from the ND Water Coalition to the Army Corps of Engineers. She mentioned that every group listed on the left side of the letterhead is also in opposition to the actions taken by the Corps. Also see Attachment #3, a position presented by the ND Irrigation Association at the Corps of Engineers Public Comment Meeting on January 6, 2011.

Glenn McCrory, from Linton, presented an email that he sent out to the Corps of Engineers. See Attachment #4. He lost 750 acres to the Corps and the Corps doesn't always keep water on it. They took the land away from us, now they want to charge us for the water.

Bruce Engelhardt, Director of Water Development of the ND State Water Commission, presented written testimony. See Attachment # 5.

Senator Hogue: What is the fee structure the Corps offers?

Bruce Engelhardt: It is very confusing, it is per acre ft of water, it is based on what they call surplus water in the reservoir, then they divide it by the total amount of water. The $20

per acre foot is one of the numbers that has been put out there, but it is not settled on yet. Mr McCrory was right, you sign a contract to pay that fee every year whether you use it or not. Typically if you irrigate, your water usage varies year to year but the Corps would still want the entire fee. The other thing that is in the Corps report that is very troubling is they state that they cannot issue surplus water storage contracts for irrigation. So not only are they trying to charge it but they may be trying to completely eliminate irrigation water use out of the reservoirs.

Opposition: None

Chairman Lyson closed the hearing on HCR 3019.

Senator Hogue: motion for a Do Pass

Senator Schneider: Second

Roll Call Vote: 5-0-2

Carrier: Uglem

Date: 3-11-11
Roll Call Vote # 1

2011 SENATE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. 3019

Senate Natural Resources Committee

Legislative Council Amendment Number _____

Action Taken: ☒ Do Pass ☐ Do Not Pass ☐ Amended ☐ Adopt Amendment

☐ Rerefer to Appropriations ☐ Reconsider

Motion Made By Hogue Seconded By Schneider

Senators	Yes	No	Senators	Yes	No
Chairman Lyson	✓		Senator Schneider	✓	
Vice-Chair Hogue	✓		Senator Triplett		
Senator Burckhard					
Senator Freborg	✓				
Senator Uglem	✓				

Total (Yes) 5 No 0

Absent 2

Floor Assignment Uglem

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

REPORT OF STANDING COMMITTEE

HCR 3019, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman) recommends **DO PASS** (5 YEAS, 0 NAYS, 2 ABSENT AND NOT VOTING). Engrossed HCR 3019 was placed on the Fourteenth order on the calendar.

2011 TESTIMONY

HCR 3019

Attachment 1

Testimony for House Concurrent Resolution No. 3019
Energy and Natural Resources Committee
Pioneer Room
February 10, 2011

Good morning, I am Jack Dalrymple, the Governor of North Dakota. I appreciate the opportunity to comment on House Concurrent Resolution No. 3019 which urges the U.S. Army Corps of Engineers to forego any attempt to charge North Dakota water users a fee for water from Lake Sakakawea or Lake Oahe. As stated previously in letters dated June 10, 2010, October 28, 2010, and January 30, 2011, the State of North Dakota has serious concerns about the Corps' recently introduced restrictions and policies regarding access to water in the Missouri River. It seems that Corps policies are now blocking access to the free flow of the Missouri River which is rightful property of the State of North Dakota. The Corps' new policies are unjust and unacceptable.

In 1957, the Corps completed construction of the Garrison Dam, creating a reservoir that holds more than 24 million acre feet of water. Today, Lake Sakakawea is the third largest man-made lake in the United States and is unique to all other reservoirs in the United States. In addition, Lake Oahe, the fourth largest artificial reservoir in the United States, was completed in 1962. The Corps' reason for the sudden implementation of this policy stems from problems that have arisen on East Coast reservoirs due to their smaller size. Unlike the East Coast reservoirs, the storage capacity of the Missouri River main stem reservoirs vastly overshadows any proposed water storage needs within North Dakota by several orders of magnitude. The blanket policy proposed by the Corps is utterly inappropriate for the State of North Dakota.

Prior to the enactment of a 2008 Corps Real Estate Policy, water users were able to gain access to water in the Missouri River main stem system through a land easement application process and associated permits without being charged a fee. The Lake Sakakawea Draft Surplus Water Report and Environmental Assessment released in December 2010 states that the Corps has issued 142 water intake easements around Lake Sakakawea, only one of which has a fee-based "surplus water supply agreement." These easements were issued over the last 60 years without the need for a reallocation study or a water storage contract. Thus, the Corps' recent change in position to now require the allocation of storage in reservoirs and the issuance of water storage contracts to existing and potential water users under the 1944 Flood Control Act and the Water Supply Act of 1958 is unjustifiable for a number of reasons.

First, the Missouri River is a vital water source to the State of North Dakota that existed prior to the construction of the main stem reservoirs. According to Article XI, Section 3 of the North Dakota Constitution, "[a]ll flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes." The Missouri River continues to flow through Lake Sakakawea today and cannot be considered stored water

due to permanent rights held by the State. North Dakota water users must have access to the river without cost and without the requirement of surplus water supply agreements.

Second, the main stem reservoirs were constructed with planned benefits to the States where land and resources were impacted. Approximately 550,000 acres of prime farmland were taken in North Dakota for the construction of the main stem reservoirs. Congress has since recognized the majority of these benefits have been realized downstream and has provided amendments to the 1944 Flood Control Act to address some of these inequities. Specifically, The Dakota Water Resources Act of 2000, which amended the 1944 Flood Control Act, recognized municipal, rural, and industrial water supply projects in North Dakota. Section 7 of the Act stated that water systems in North Dakota would not have to repay the Secretary of the Army for features on the Missouri River that were constructed prior to the Act.

Additionally, section 301(b) of the 1958 Water Supply Act provides that recovery of capital costs may extend for a period of up to 50 years. That 50-year time period has expired! The Corps should not have the ability nor a federal responsibility to charge water storage costs to repay the construction costs of dams for surplus water when original repayment contracts were never required at the start of construction. The Corps' proposal to charge for construction costs is unacceptable. They then exacerbate this ill-conceived idea by basing their fees on what would be the costs to construct the dam today.

Third, the Draft Report only proposes a storage fee for water users in the upper basin states that withdraw water directly from the main stem reservoirs, but does not charge downstream users a similar fee. Reservoirs, like Lake Sakakawea, provide numerous benefits for all users not just those that withdraw water directly from the reservoirs. Hydropower, navigation, water supply, and flood control are just some of the benefits reaped by downstream users that are not charged a fee.

The Missouri River, including Lake Sakakawea and Lake Oahe, is valuable to the State of North Dakota and is a resource that should be readily available to access without cost. Access to Lake Sakakawea alleviates environmental and infrastructure concerns within the western part of the State and also benefits communities statewide through water projects such as the Red River Water Supply Project, the Northwest Area Water Supply Project, and the Southwest Pipeline Project. Restrictions in access would affect these very projects; the farmers, and ranchers that rely on access for irrigation purposes; hinder the development of domestic energy resources and eliminate the Three Affiliated Tribes and the Standing Rock Nation from freely accessing water supply.

As development in North Dakota continues, Missouri River water becomes an important component to the growth of the State and the nation. Just as important is the ability to access Missouri River water in a timely manner in order to meet the immediate water supply needs of the people of North Dakota. In summary, I ask the committee to move forward with this

Resolution. We need to urge the Corps to continue to expedite the work required to process easement requests that are currently before them. Further delay of processing these easements is unacceptable. Using U.S. Army Corps of Engineers' easements to block North Dakota's access to its own rightful water supplies is not only an improper use of the intended purpose of these easements, but is also an unconscionable and unjust attempt to achieve monetary gain where none is justified. Financial claims have not been sought in the past and contradict states' rights and congressional authorizations. All considerations for the use of Missouri River water have been settled in the past and should not be open to further discussion. The Corps needs to continue to provide water access to existing and potential water users without cost today!

Attachment 2

TESTIMONY ON HOUSE CONCURRENT RESOLUTION 3019

House Energy and Natural Resources Committee

Michelle Klose, NAWS Project Manager
North Dakota State Water Commission

February 10, 2011

Mr. Chairman and members of the House Energy and Natural Resources Committee, I am Michelle Klose, Manager of the Northwest Area Water Supply (NAWS) Project for the North Dakota State Water Commission. On behalf of the State Engineer, Todd Sando, I am here in support of the idea of House Concurrent Resolution 3019. The Corps' Surplus Water initiative and attempts to charge the water users a storage fee to use the natural flows of the Missouri River water is an insult to the sacrifice North Dakota made over 60 years ago, when hundreds of thousand of acres were permanently flooded for the benefit of those downstream. The State Engineer and Water Commission support a resolution on this matter, and offer additional language to strengthen the resolution. Lines 16 through 21 of the resolution imply that the State depends on Lake Sakakawea and Lake Oahe for water supply. This is not the case. We depend on the Missouri River, and the reservoirs only serve to impede access to water, that belongs to the citizens of North Dakota.

Therefore, I offer the attached amendments to HCR 3019 and urge you to take a strong stance on this issue.

Thank you for your time and attention to this matter.

PROPOSED AMENDMENTS TO HOUSE CONCURRENT RESOLUTION NO. 3019

Page 1, line 1, replace "to forego any attempt" with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River."

Page 1, remove line 2

Page 1, line 16, replace "tourism, recreation, and the well-being of the citizens and communities in North" with "the United States Army Corps of Engineers, through the *Surplus Water Report*, is clearly challenging the State of North Dakota and the upper basin states' rights to access the states' natural flows;"

Page 1, line 17, remove "Dakota depend upon an adequate and dependable source of water;"

Page 1, remove lines 18 through 21

Page 1, after line 23, insert:

"**WHEREAS**, in contradiction to the Dakota Water Resources Act of 2000 and the 1958 Water Supply Act, the United States Army Corps of Engineers is forcing reimbursement of nonreimbursable costs by withholding review of future easement applications; and

WHEREAS, before the dams were constructed the Missouri River provided ample water; and

WHEREAS, the natural flows of the Missouri River – even during the lowest flow periods – were and continue to be more than plentiful for the needs of North Dakota; and

WHEREAS, the natural flows of the Missouri River through Lake Sakakawea and Lake Oahe, are not, and should not be, considered stored water; and"

Page 1, line 25, replace "or other restriction on" with "and deny water users in"

Page 1, line 25, replace "its lawful right to use and allocate water" with "access the natural flows of the Missouri River"

Page 2, line 4, replace "to forego any attempt to charge water users in North Dakota a fee to use water from" with "immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River;"

Page 2, line 5, remove "Lake Sakakawea or Lake Oahe;"

Renumber accordingly

Attachment 3

Testimony by Dave Koland, General Manager

Garrison Diversion Conservancy District

To the

House Energy and Natural Resources Committee Hearing on HCR 3019

Bismarck, North Dakota
February 10, 2011

Mr. Chairman, members of the committee; for the record my name is Dave Koland. I serve as the General Manager of the Garrison Diversion Conservancy District (Garrison Diversion).

Garrison Diversion is the local political subdivision created in 1955 to be the local sponsor that would construct the Garrison Diversion Unit (GDU) of the Missouri River Basin Project as authorized by Congress on December 22, 1944. Amendments in 1986 and 2000 have changed the GDU from a million acre irrigation project into a multipurpose project with an emphasis on the development and delivery of municipal and rural water supplies. Garrison Diversion's mission remains: **To provide a reliable, high quality and affordable water supply to benefit the people of North Dakota.**

Providing municipal, rural and industrial water has been a primary purpose of the Garrison Diversion Unit legislation and amendments since 1965. Any suggestion by the Corps that irrigation remains the primary purpose of the GDU ignores the changes in the GDU over the past 30 years as GDU legislation has been amended.

Congress passed the GDU Reformulation Act of 1986, which implemented the recommendations of the GDU Commission and focused on meeting North Dakota's MR&I needs.

"The Congress declares that the purposes of this Act are to: (1) implement the recommendations of the Garrison Diversion Unit Commission Final Report (dated December 20, 1984) in the manner specified by this Act; (2) meet the water needs of the State of North Dakota, including municipal, rural and industrial water needs, as identified in the Garrison Diversion Unit Commission Final Report." Act of May 12, 1986, PL 99-294, § 1(a) (1) – (2), 100 Stat. 418. Importantly, one of those recommendations in the Final Report was to make water previously allocated to irrigation available for the expanded MR&I use. Congress approved a reallocation of the irrigation water supply uses of water behind Garrison Dam to make that water available for MR&I uses. As such, the Corps' recent position that it can unilaterally reallocate waters behind the dam as 'surplus water' fails to recognize the legal significance of Congressional action already approving the reallocation of irrigation and other waters behind the dam for North Dakota municipal, rural and industrial purposes.

Congress reaffirmed its long-standing commitment to make Missouri River water available to North Dakota for MR&I purposes when it passed the Dakota Water Resources Act of 2000, (DWRA). In his remarks on the United States Senate floor immediately following the vote approving the DWRA, Senator Byron Dorgan left no doubt as to the purpose of the subsequent amendments to PL 89-108, the Act of August 5, 1965 and its authorization of MR&I projects.

> Mr. President...This bill is essential to meeting the water needs of North Dakota. The bill, as amended, **will provide authorization for the development of municipal, rural, and industrial water projects across the State of North Dakota**. ...Mr. President, the Dakota Water Resources Act represents a responsible way for the federal government to fulfill their role in the state. It also represents a serious compromise on the part of North Dakota, while still meeting our highest priority water supply needs. ...

146 Cong. Rec. S10534 – 535 (2000). Congress has repeatedly recognized that the water held behind the Garrison Dam plays a critical role in meeting North Dakota's MR&I water needs and authorized the use of Missouri River water to meet those statewide needs. Since the water behind the dam has already been allocated for MR&I purposes throughout the state, there is no basis on which the Corps can claim the requested industrial uses to be 'surplus water' that can be reallocated. Water cannot be designated as surplus water if it already has an existing lawful use. The Corps cannot designate the Missouri River water in question as surplus water because it already has an existing lawful use – to supply North Dakota with MR&I water.

The requested industrial water does not meet the Corps' own definition of surplus water, which is: (1) water stored in a Corps' reservoir "that is not required because the authorized need for the water never developed or the need was reduced by changes that have occurred since authorization," and; (2) water "more beneficially used as municipal and industrial water than for the authorized purpose." Water Supply Handbook, Revised IWR Report 96-PS-4 at 2-7. Neither definition fits the present facts under consideration. In fact, the opposite is true. The water stored in Lake Sakakawea is required by North Dakota and its public and private water systems, as has been authorized for MR&I use by Congress through the Garrison Acts.

Further, while the Corps relies upon the Water Supply Act of 1958 as a source of its authority for contracting and supplying surplus water from its reservoirs, that Act merely grants the limited ability to permit water storage at existing projects that had not been planned or granted initial authorization for that purpose. It permits the Corps to charge users for any modifications required to accommodate their particular, newly contemplated storage and use. MR&I water supply uses were originally contemplated as an authorized use of waters held behind Garrison Dam, and the GDU legislation amendments over the years make that crystal clear, so this is not a newly contemplated use for water held behind the Garrison Dam.

Finally, the DWRA contains critical amendments to the WSA with regard to the ability to charge for storage costs. Section 7(c) of the DWRA states:

> With respect to the Southwest Pipeline Project, the Northwest Area Water Supply Project, the Red River Valley Water Supply Project, and **other municipal, industrial, and rural water systems** in North Dakota, the costs of the features constructed on the Missouri River by the Secretary of the Army before the date of enactment of the Dakota Water Resources Act of 2000 **shall be non-reimbursable** (emphasis added).

This language allows North Dakota MR&I interests to withdraw water from Corps facilities without the requirement to reimburse the Corps for either the construction costs or the operation and maintenance costs of those Corps facilities that was incurred prior to 2000. The reference to "features constructed on the Missouri River by the Secretary of the Army before the date of enactment of the [DWRA]" is a clear reference to the main-stem reservoirs on the Missouri River constructed under the Pick-Sloan Plan, including the Garrison Dam. The Corps' assessment of storage costs on the basis of the cost to construct the dam would nullify the DWRA.

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Attachment 4

North Dakota Irrigation Association

P.O. Box 2254
Bismarck, ND 58502
701-223-4615, 701-223-4645 (fax)
e-mail: ndirrigation@btinet.net

Dedicated to strenghtening and expanding irrigation to build and diversify our economy.

Comments on the Corps of Engineers on Lake Sakakawea Draft Surplus Water Report, Environmental Assessment

Presented at the Corps of Engineers Public Comment Meeting
January 6, 2011, Doublewood Inn
Bismarck, North Dakota

The release of the "Lake Sakakawea Draft Surplus Water Report, Environmental Assessment" is the first step by the U.S. Army Corps of Engineers (COE) to formulate a basis for establishing storage fees and begin charging North Dakota water users, with some exceptions specified by statute, for water withdrawn from Lake Sakakawea and ultimately from Lake Oahe. Singling out Lake Sakakawea for imposing surplus water fees is unacceptable, unfair, and unlawful under North Dakota Law.

The Missouri and Yellowstone Rivers discharge more than 15 million acre-feet of water annually through Lake Sakakawea and later through Lake Oahe. This flow was occurring long before the construction of the dams on the Missouri River. Article XI, Section 3 of the North Dakota Constitution states "all flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes." North Dakota water law is based on this section. Records show that the natural flow of the Missouri River is ample to meet North Dakota's water needs.

North Dakota has consistently asserted that it has a right to capture water from the natural flow to meet its needs irrespective of the storage in Lake Sakakawea or Lake Oahe. In fact, the reservoirs represent an impediment to gaining reliable access to the water because of the wide fluctuations that occur in the level of the reservoirs during periods of below normal precipitation. Significant expenditures are usually required for the modification of pump intakes in order to follow the water as it recedes and eventually the cost becomes prohibitive. During the last drought period, it appeared that the COE was more of a hinderance to implementing ways to pump water than it was in providing help in processing the permits needed to modify pump intakes.

The report indicates that irrigators may not have continued access to Lake Sakakawea unless a surplus water agreement is executed as a part of the real estate easement required for access. On page 1-2 of the report, ER 1105-2-100 states that surplus water agreements are not authorized for crop irrigation. In reading the language of the section, it can be concluded that requiring a surplus water agreement for irrigation is prohibited.

North Dakota sacrificed 550,000 acres of prime farmland and many families were disrupted as the result of the construction of the main stem reservoirs. After already paying such an enormous price, it is outrageous for the COE to consider charging for the natural flows of the Missouri River because they pass through Lake Sakakawea. Irrigation benefits from the construction of the main stem reservoirs were promised in the 1944 Flood Control Act and remain unrealized. In addition, electric power generated by the main stem dams has not been allocated for irrigation as provided in the Act and instead the power has gone to others. It is unjust to consider charging North Dakota water users when downstream and other beneficiaries have not been asked to pay project costs for flood control, navigation, industrial and municipal water supplies. The current proposed action would place unacceptable and unjust burdens on the ability of the state of North Dakota to rightfully develop its water resources.

Therefore, the COE must abandon the proposal to require surplus water agreements when renewing real estate easements for the purpose of imposing charges for the water allocated by the North Dakota State Engineer and which represents the natural flow of the river. The proposed action by the Corps is illegal and violates the long standing right of the state to manage its water resources. To implement such a requirement is coercion

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COALITION

PO Box 2254
Bismarck, ND 58502
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MEMBERS

Cass County Joint Board
City of Bismarck
City of Devils Lake
City of Dickinson
City of Fargo
City of Grand Forks
City of Minot
City of Williston
Devils Lake Basin Joint Board
Garrison Diversion Conservancy District
Lake Agassiz Water Authority
Missouri River Joint Water Resource Board
Mercer County Water Resource District
North Central Rural Water Consortium
North Dakota County Commissioners Association
North Dakota Association of Rural Electric Cooperatives
North Dakota Atmospheric Resource Board
North Dakota Farmers Union
North Dakota Irrigation Association
North Dakota League of Cities
North Dakota Public Finance Authority
North Dakota Rural Water Systems Association
North Dakota State Water Commission
North Dakota Water Resource Districts Association
North Dakota Water Users Association
North Dakota Weather Modification Association
Red River Joint Water Board
Souris River Joint Water Resource Board
South Central Regional Water District
Southwest Water Authority
Sportsman Rural Water District
Three Affiliated Tribes
West River Joint Water Board
Western Area Water Supply

attachment 5

January 18, 2011

Colonel Robert J. Ruch
Commander of the Omaha District
U.S. Army Corps of Engineers
1616 Capitol Avenue, Suite 9000
Omaha, NE 68102

Dear Colonel Ruch:

The North Dakota Water Coalition is comprised of more than 30 statewide, regional and tribal organizations which are united in our efforts to complete North Dakota's water infrastructure for economic growth and quality of life. This letter is to express our vigorous opposition to the Corps of Engineers System Storage proposal for the waters of Lake Sakakawea.

Make no mistake on this issue; we stand united in complete **opposition** to this action. We oppose the Lake Sakakawea Draft Surplus Water Report and EA document. We oppose any recommendations which may result from such a report which either limits the users of our state from accessing and using water from Lake Sakakawea, or which may seek to impose any type of fee or charge for use of such water.

Our position was clearly stated in the testimonies presented at the January 6, 2011 public meeting held in Bismarck by Governor Jack Dalrymple, Attorney General Wayne Stenehjem, State Engineer Todd Sando, Senator John Hoeven's office, and more than 30 other representatives of state, tribal and local leadership as well as the general public who attended and provided testimony at that meeting.

Please include this letter as written testimony in opposition from the North Dakota Water Coalition for this proposed action derived from the Lake Sakakawea Draft Surplus Water Report and EA document.

Sincerely,

Dennis Hill
Chairman

Cc: Governor Jack Dalrymple
Attorney General Wayne Stenehjem
Senator Kent Conrad
Senator John Hoeven
Congressman Rick Berg
State Engineer Todd Sando

Attachment 6

Glenn McCrory

From: "Glenn McCrory" <gmccrory@bektel.com>
Date: Monday, January 31, 2011 10:21 AM
To: <garrisonsurplusstudy@usace.army.mil>
Cc: "Robert J COL NWO Ruch" <Robert.J.Ruch@usace.army.mil>; "Eileen Wehri" <eileen_wehri@hoeven.senate>; "Jack Dalrymple" <gov@nd.gov>; "Ken Royse" <ken.royse@bartwest.com>; "Mike Dwyer" <mdwyer@btinet.net>
Subject: Surplus Water Study

I wish to comment on the proposed policy of charging for water taken from the Missouri River system. I am opposed to charging for water removed from the system. The 1944 Flood Control Act did not provide for such policy and later legislation does not either.

My family had to give up nearly 750 acres of productive agriculture land under threat of condemnation . Some of that land was Homesteaded by my Great-Great Grandfather. Land that would be worth probably 70 to 80 times what the Corps of Engineers paid for it to store water. Now The COE proposes to charge for water that would have been available to the landowner from the Missouri River. That water is still available and the COE does not have aright to charge for it.

Steamrolling the people of North Dakota, South Dakota and Montana with this proposal is not right and forcing legal action to stop it is not is not in the best interest of USA. Is there any wonder why the people question the sensibility of the Federal Government.

It is my hope that thoughtful heads in the Corps of Engineers will do the right thing and scrap this proposal!

Sincerely

Glenn McCrory
7475 Hwy 1804
Linton, ND 58552

#1

Testimony for House Concurrent Resolution No. 3019
Natural Resources Committee - Fort Lincoln Room
Andrea Travnicek, Ph.D., Senior Policy Advisor
Governor's Office

March 11, 2011

Good morning Mr. Chairman, members of the Committee, I am Andrea Travnicek, Senior Policy Advisor for the Governor of North Dakota. I appreciate the opportunity to comment on House Concurrent Resolution No. 3019 which urges the U.S. Army Corps of Engineers to immediately cease wrongful denial of access and wrongful requirement of payment for the natural flows of the Missouri River. As stated previously in letters and in several meetings, the Governor has serious concerns about the Corps' recently introduced restrictions and policies regarding access to the Missouri River. It seems that Corps policies are now blocking access to the free flow of the Missouri River which is the rightful property of the State of North Dakota. The Corps' new policies are unjust and unacceptable.

Prior to the enactment of a 2008 Corps Real Estate Policy, water users were able to gain access to water in the Missouri River main stem system through a land easement application process and associated permits without being charged a fee. These easements were issued over the last 60 years without reallocation studies or water storage contracts. Thus, the Corps' recent change in position to now require the allocation of storage in reservoirs and the issuance of water storage contracts to existing and potential water users under the 1944 Flood Control Act and the Water Supply Act of 1958 is unjustifiable for a number of reasons.

First, the Missouri River is a vital water source to the State of North Dakota that existed prior to the construction of the main stem reservoirs. Second, the main stem reservoirs were constructed with planned benefits to the States where land and resources were impacted. Approximately 550,000 acres of prime farmland were taken in North Dakota for the construction of the main stem reservoirs. Third, the Draft Surplus Water Report only proposes a storage fee for water users in the upper basin states that withdraw water directly from the main stem reservoirs, but does not charge downstream users a similar fee.

The Missouri River, including Lake Sakakawea and Lake Oahe, is a valuable resource to the state of North Dakota that should be readily available to access

without cost. Access to Lake Sakakawea alleviates environmental and infrastructure concerns within the western part of the State and also benefits communities statewide through water projects such as the Red River Water Supply Project, the Northwest Area Water Supply Project, and the Southwest Pipeline Project. Restrictions in access would adversely affect these very projects; the farmers, and ranchers that rely on access for irrigation; it would hinder the development of domestic energy resources and eliminate the Three Affiliated Tribes and the Standing Rock Nation from freely accessing their water supply.

As development in North Dakota continues, Missouri River water becomes an important component to the growth of the State and the Nation. Just as important is the ability to access Missouri River water in a timely manner without cost in order to meet the immediate water supply needs of the people of North Dakota. In summary, we ask the committee to move forward with this Resolution.

#2

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#3

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To: <garrisonsurplusstudy@usace.army.mil>
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Sincerely

Glenn McCrory
7475 Hwy 1804
Linton, ND 58552

#5

TESTIMONY ON ENGROSSED HOUSE CONCURRENT RESOLUTION 3019

Senate Natural Resources Committee

Bruce Engelhardt, Director of Water Development
North Dakota State Water Commission

March 11, 2011

Mr. Chairman and members of the Senate Natural Resources Committee, I am Bruce Engelhardt, Director of the Water Development Division of the North Dakota State Water Commission. On behalf of the State Engineer, Todd Sando, I am here in support of Engrossed House Concurrent Resolution 3019. The actions the United States Army Corps of Engineers (Corps) have taken in the last several months to deny access and charge for Missouri River water flowing through Lake Sakakawea are wrong. The upper Missouri River Basin states and tribes have sacrificed greatly in loss of land and resources and suffered personal hardship for the Missouri River Basin. Most of the promised benefits for the upper basin states and tribes have never been realized Now, to add to the injustice, the Corps presumes to require payment for access to natural flows simply because those flows lie within the boundaries of the reservoirs. The natural flows of the Missouri River belong to the states for the beneficial use of their citizens, and as long as natural flows are sufficient, the reservoirs provide no service to water users and in fact, impede their access to the states' waters.

The Corps' Surplus water Report maintains that the intent is to charge for "surplus storage" in the reservoirs by requiring water storage contracts as a condition for an easement to construct intake works on Corps property. In so doing, the Corps is obstructing access to and use of Missouri River natural flows, which are water owned by the people of North Dakota. The Office of the State Engineer is the state agency

responsible for the appropriation of North Dakota's water, and we do not believe the Corps has the legal or Constitutional ability to encumber our appropriations for beneficial uses in this manner. The Corps is clearly challenging the State of North Dakota's rights to access the natural flows. The choice being presented is either, no access to Missouri river water within the boundaries of the Corps reservoirs, or incurring additional cost for water access even when the original benefits of water supply of the State have never been fully realized.

The Corps' Surplus Water initiative and attempts to charge the water users a storage fee to use the natural flows of the Missouri River water is an insult to the sacrifice North Dakota made. The State Engineer and Water Commission support this resolution and urge passage.

Thank you for the opportunity to speak on this matter.