

2013 HOUSE ENERGY AND NATURAL RESOURCES

HB 1063

2013 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources Committee
Pioneer Room, State Capitol

HB 1063

17379

1 testimony

Conference Committee



Relating to the term unnavigable and water conservation.

Minutes

Rep. Porter: We will call HB 1063 to order.

John Pazkowski: Regulatory Section of North Dakota State Water Commission; I am here on behalf of State Engineer, Todd Sando, I am here in support of HB 1063. The amendment to N.D.C.C. 61-02-01 replaces the term "unnavigable" with the term "nonnavigable" is the language used by courts. (See testimony1)

Rep. Porter: Why not change the Century Code since that is the Century Code?

John Pazkowski: In reference to that what we are dealing with has to do with the metes and bounds descriptions the meandered water body really has nothing to do with defining navigability. Navigability is covered in Century Code 6133 which deals with sovereign lands so what we are trying to do is capulate those items there under sovereign lands where this issue comes into play rather than elsewhere in code.

Rep. Porter: Why not amend the 611501 to what you that have in administrative code so that it appears in the Century Code?

John Pazkowski: That could be done as well.

Rep. Hofstad: Could you give us some examples of the navigable waters in the State of North Dakota and do we have them defined the administrative code.

John Pazkowski: There are some waters that are defined encode under the definition of navigable waters in administrative code number 8910 they are not all inclusive the list as it stands right now. Examples are the Yellowstone River, James River, Red River, The Sioux River, as far as lakes those that have met the test of some legal action Sweet Water Lake, Painted Woods Lake, Devils Lake, Metigoshe Lake, Long Lake in the Turtle Mountains, Souris River, those are some of them that list is not all inclusive.

Rep. Hofstad: Using the administrative code that you have now and applying that rule you could expend that list?

John Pazkowski: That is correct.

Rep. Porter: I would like to see you guys come back with an amendment that shows us what it would look like if we amend your version of the administrative code into the Century Code prior to taking action on this bill.

John Pazkowski: That would only be for the 611501 that portion that lists the 2 definitions.

Rep. Porter: The 611502 talks about the control of water and wildlife conservation projects invested in the state.

John Pazkowski: 611502 refers to navigable lakes as have been meandered during the public survey the courts have not shown that law to be valid because meandering has no bearing on navigability.

Rep. Porter: Thank You we will close the hearing on HB 1063.

2013 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources

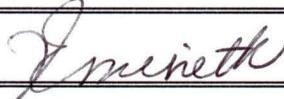
Pioneer Room, State Capital

HB 1063

18153

February 1, 2013

Conference Committee



Relating to the term unnavigable and water conservation

Minutes:



Rep. Porter: We will open HB 1063. This bill is changing definitions from what we have in statute to match what the courts have said is the law of the land. The water commission came back with a definition that you will see in the section 2-3 of the bill that this keeps those definitions in the century code.

John Paczkowski: From the Water Commission to explain the amendments to HB 1063. The amendments that we proposed based on conversations that we have had regarding this issue as was originally presented. There were some concerns expressed with repealing the language as we had recommended in the original proposal. (Proposed amendments enclosed)

Rep. Keiser: Notice on the original bill we were going to repeal this section 611501. That was the recommendation I assume with the state engineer and now you are coming back and saying don't repeal it lets modify it.

John Paczkowski: Based on the discussion we had the initial proposal there was some concern expressed with repealing any of this code. The state engineer office felt that at the time that this code was addressed elsewhere. Discussion we had outside the meeting suggestion that we leave this in place and include it in both locations.

Rep. Hofstad: when we talk about a navigable lake now with the federal definition we are on the same page?

John Paczkowski: The state engineer's office has the ability to determine navigability based on N.D. law and so forth. There some rivers and so forth that have gone through the federal test. I am not aware of any lakes that have gone through the federal test.

Rep. Hofstad: It seems ambiguous because a nonviable which was defined as navigable at the time of statehood certainly could change as we go through wet and dry cycles. Does a lake that does go down does it still keep definition?

John Paczkowski: That is correct. That water body does remain a navigable lake even is there are changes the water.

Rep. Hofstad: In the course of Commerce at statehood if it was easier to go across the lake rather than go around it, is that was determined the lake to navigable at that time?

John Paczkowski: That is one method logically that has been used by the attorneys general's office.

Rep. Hofstad: Should we have a discussion on the consequences of a navigable body of water. What does it mean to the state if that water is considered a meandered lake?

John Paczkowski: A meandered water body is a water body when the government land office came and did surveys. As the survey team went across the state they were setting up boundaries and townships etc. If the water body was large enough require them to go around they would meander that water body and develop out lots around the edge of that.

Rep. Keiser: Does the state have any authority in a body that was determined navigable at statehood may not have any water in it for some time and no anticipated water being in that because just drainage. Does the state have the authority to retain the mineral rights? But sell the surface rights?

John Paczkowski: Right now there is a law in the books the state cannot relinquish sovereign lands.

Rep. Porter: There is a process that the land dept. can go through to sell the surface it is in the constitution that once it has been owned by the state the mineral and everything under it stay with the state of N.D. We have a motion Rep. Keiser to move the proposed amendment to HB 1063 and a second from Rep. Hofstad. Voice vote carried.

We have an amended bill in front of us. We have a motion from Rep. Hofstad and a second from Rep. Damschen for a do pass as amended. Motion carried.

Yes 13 No0 Absent 0 Carrier Rep. Hofstad

February 1, 2013

2/1/13
TO

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1063

Page 1, line 1, replace "section" with "sections"

Page 1, line 1, after "61-02-01" insert ", 61-15-01, and 61-15-02"

Page 1, line 2, after "nonnavigable" insert "and water conservation"

Page 1, line 2, replace "sections 61-15-01, 61-15-02, and" with "section"

Page 1, after line 19, insert:

"SECTION 2. AMENDMENT. Section 61-15-01 of the North Dakota Century Code is amended and reenacted as follows:

61-15-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "A navigable lake" ~~shall include~~includes any lake ~~which shall have been meandered and its metes and bounds established by the government of the United States in the survey of public lands that was at time of statehood used or susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.~~
2. "Ordinary high watermark" ~~shall mean~~means that line ~~reached by water when the lake or stream is ordinarily full and the water ordinarily high below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. An island in navigable waters is considered to be below the ordinary high watermark in its entirety.~~

SECTION 3. AMENDMENT. Section 61-15-02 of the North Dakota Century Code is amended and reenacted as follows:

61-15-02. Control of water and wildlife conservation projects vested in state.

By virtue of its police power the state shall be vested with the control of navigable lakes ~~which have been meandered and their metes and bounds established by the government of the United States in the survey of public lands,~~ within the ordinary high watermark for the purpose of constructing, maintaining, and operating dams, dikes, ditches, fills, spillways, or other structures to promote the conservation, development, storage, distribution, and utilization of such water and the propagation and preservation of wildlife."

Page 1, line 20, replace "Sections 61-15-01, 61-15-02, and" with "Section"

Page 1, line 21, replace "are" with "is"

Renumber accordingly

Date: 2-1-2013
Roll Call Vote #: 1

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1063

House Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken _____

Motion Made By Rep Keiser Seconded By Rep Hofstad

Representatives	Yes	No	Representatives	Yes	No
Chairman Todd Porter			Rep. Bob Hunskor		
Vice Chairman Chuck Damschen			Rep. Scot Kelsh		
Rep. Jim Schmidt			Rep. Corey Mock		
Rep. Glen Froseth					
Rep. Curt Hofstad					
Rep. Dick Anderson					
Rep. Peter Silbernagel					
Rep. Mike Nathe					
Rep. Roger Brabandt					
Rep. George Keiser					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*VOICE - motion carried
to move the proposed amendment to HB 1063*

Date: 2-1-2013
Roll Call Vote #: 2

2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1063

House Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken Rep Hofstad

Motion Made By Rep Hofstad Seconded By Rep Damschen

Representatives	Yes	No	Representatives	Yes	No
Chairman Todd Porter	✓		Rep. Bob Hunsakor	✓	
Vice Chairman Chuck Damschen	✓		Rep. Scot Keish	✓	
Rep. Jim Schmidt	✓		Rep. Corey Mock	✓	
Rep. Glen Froseth	✓				
Rep. Curt Hofstad	✓				
Rep. Dick Anderson	✓				
Rep. Peter Silbernagel	✓				
Rep. Mike Nathe	✓				
Rep. Roger Brabandt	✓				
Rep. George Keiser	✓				

Total (Yes) 13 No 0

Absent 0

Floor Assignment _____

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

Do pass as Amendment

REPORT OF STANDING COMMITTEE

HB 1063: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). HB 1063 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "section" with "sections"

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SECTION 3. AMENDMENT. Section 61-15-02 of the North Dakota Century Code is amended and reenacted as follows:

61-15-02. Control of water and wildlife conservation projects vested in state.

By virtue of its police power the state shall be vested with the control of navigable lakes ~~which have been meandered and their metes and bounds established by the government of the United States in the survey of public lands,~~ within the ordinary high watermark for the purpose of constructing, maintaining, and operating dams, dikes, ditches, fills, spillways, or other structures to promote the conservation, development, storage, distribution, and utilization of such water and the propagation and preservation of wildlife."

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Re-number accordingly

2013 SENATE NATURAL RESOURCES

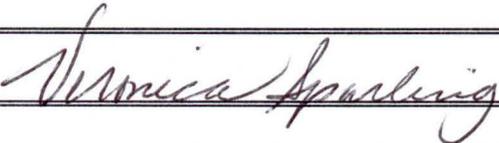
HB 1063

2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1063
March 22, 2013
Job Number 20368

Conference Committee



Explanation or reason for introduction of bill/resolution:

Relating to the term nonnavigable and water conservation

Minutes:

attachment

Roll call was taken and all committee members were present. Senator Triplett arrived a few minutes after roll call was taken.

Chairman Lyson opened the hearing for HB 1063.

John Paczkowski, Chief of the Regulatory Section for the State Water Commission, presented written testimony in favor of HB 1063. See attachment #1. (Ends at 04:19)

Senator Lyson asked if this bill had been brought forward because of the court case now pending in our Supreme Court that concerns mineral rights and high water mark.

Mr. Paczkowski was not sure if it is because of the court cases now pending. He said the high water mark is generally the boundary between private and public property. This high water mark language in this bill should not affect those cases.

Senator Laffen asked Mr. Paczkowski to define meandering, the act of meandering, and meandering a lake.

Mr. Paczkowski defined those terms. (05:45 to 07:25)

Senator Murphy and Senator Laffen asked questions about how the land was surveyed for homesteading. (07:48 to 09:25)

Senator Lyson asked if this bill is a little premature because we have several cases headed for the Supreme Court.

Mr. Paczkowski was not sure.

Jennifer Verleger, ND Attorney General's office, said those cases have to do with the minerals and whether the ordinary high water mark or the ordinary low water mark is the

Senate Natural Resources Committee

HB 1063

March 22, 2013

Page 2

boundary, but this bill wouldn't change the definitions. They won't have any impact on the cases that are pending, or at least any cases that she knows of.

Opposition: None

Neutral: None

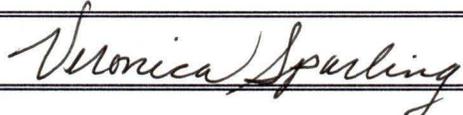
Chairman Lyson closed the hearing for HB 1063.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1063
April 4, 2013
Job Number 20886

Conference Committee



Explanation or reason for introduction of bill/resolution:

Relating to the term nonnavigable and water conservation

Minutes:

No attachments

Chairman Lyson opened the discussion for HB 1063.

Senator Triplett: Do Pass
Senator Unruh: Second

Senator Triplett reminded the committee that Mr. Paczkowski from the State Water Commission was the only testifier and there were no objections and he said it is basically to clean up the language. There was no substantive change intended.

Senator Murphy reminded the committee that Senator Lyson had reservations about this because some court cases pending in the Supreme Court may affect this. Then he mentioned that someone testified this would not affect those cases.

Senator Lyson explained what was behind his reservations. (02:03 to 06:10) The court cases mentioned are because the State tries to claim land that had a high water mark that was established in 1959 and even if the river is now a mile away they still try to lay claim to those lands.

There was some discussion about this decision affecting the cases before the Supreme Court. What Chairman Lyson was concerned about was how the Supreme Court decisions could affect this bill.

Senator Hogue feels this is a big deal because as soon as you say something is navigable, that means the state or the federal government owns the minerals underneath that stream, lake, river, or any water bed. (06:30 to 07:00)

There was discussion about the language of the bill on page 2, line 1-5 and which bodies of water would be included in that definition. (07:00 to 08:02)

There was further discussion about the language in the bill and whether the committee would like someone from the Attorney General's office to come back to the committee and answer some questions. Maybe the changes are just to clarify and are not substantive. (08:05 to 10:45)

Roll Call Vote: 3, 4, 0
Do Pass Motion Failed

There was a discussion about whether someone from the Attorney General's office could be allowed to come down and answer some questions. Chairman Lyson feels "they are all in one basket and they are seeing what is happening up there in that Missouri River from the Montana line all the way to Lake Sakakawea and the people there I think are getting..." He is not sure anyone from that department could answer his questions. The concern was more with the definition of high water mark than with navigability. (12:00 to 14:35)

Senator Hogue: Do Not Pass
Senator Burckhard: Second

There was more discussion about the definition of navigable. Would this bill expand the area of navigable lakes or would it decrease the area? If it would expand the area of navigable lakes that would involve changing the mineral rights from private individuals to the State of ND.

Senator Triplett is not concerned with the language in the bill. She has more concern about the definition of ordinary high water mark.

Senator Unruh asked if the committee could have someone come in to speak to the committee.

Chairman Lyson said they would consider this bill tomorrow.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee
Fort Lincoln Room, State Capitol

HB 1063
April 5, 2013
Job Number 20919

Conference Committee

Veronica Spurling

Explanation or reason for introduction of bill/resolution:

Relating to the term nonnavigable and water conservation

Minutes:

attachment

Chairman Lyson opened the discussion for HB 1063.

Senator Triplett reminded the committee that yesterday she made a Do Pass motion; it failed on a 3, 4 vote. Then there was a Do Not Pass motion on the floor and she asked if the vote on the Do Not Pass motion could be held until the committee could hear from someone to clear up the concerns. She reminded Senator Lyson that he did not like the fact that the Missouri River moves around.

Senator Lyson mentioned there are Supreme Court cases pending on this issue.

John Paczkowski, State Water Commission, gave a history of the evolution of HB 1063. (01:28 to 04:08)

Senator Murphy asked if the point of HB 1063 was to clear up redundancy.

Mr. Paczkowski said that was the original goal. They then were told that wasn't sufficient. Then they tried to make things consistent between the two pieces of code and to eliminate the references to meandering as to how it ties to navigable waters. In the code as it exists now, it appears that it does; yet, the courts have repeatedly said that is not the case.

Senator Hogue asked if the State Engineer or the Attorney General have an inventory of all of the lakes in ND and which ones have been declared navigable and which ones have been declared nonnavigable.

Mr. Paczkowski said there is a partial list in the administrative code 89.10 where there is a definition of navigable waters. There is not a fully inclusive listing at this time. He also mentioned that the courts have said that part of the list that exists, they are Section 10 waters. Under the Commerce Clause of the US Constitution they have determined through the Section 10 efforts that these waters are in fact navigable. There have also been some

court cases for those listed. The Supreme Court has said in a document, The Sovereign Lands Management Plan, that the State Engineer has the right to claim jurisdiction on additional waters as information comes available. He cited a place where that had taken place recently in the northwestern part of the state with the oil activity. Because of the confusion with the code that they are trying to change it talks about meandered lakes being navigable and yet the courts say that that is not true. Historically all these meandered lakes have been claimed as state land. Yet based on this and additional findings, that is not necessarily true. Meandering does not determine navigability. So we are claiming or disclaiming jurisdiction as you will on additional lakes or water bodies at this time. (05:12 to 07:11)

Senator Hogue asked Mr. Paczkowski if he could identify the lakes in northwestern ND where the State Engineer has asserted that they are navigable.

Mr. Paczkowski said there have been very few: Lake Metigoshe, there have been two or maybe three, versus the historically the Land Department has claimed all of them at some point in time when leases have come up. Now when they come up there is a process that both the State Engineer and the Land Department go through to essentially disclaim that they are no longer taking jurisdiction on these water bodies because of a lack of evidence or susceptibility to navigation. They have gone through a list of about 30 lakes up in that area.

Senator Lyson asked how far they go away from a lake to say it is a lake. Lake Sakakawea doesn't start at Williston. It starts a little farther east than that. He asked if there are still cases in the Supreme Court.

Mr. Paczkowski said there are several cases dealing with ownership and where the line is at. He doesn't think it has been defined yet where lake effect takes place versus where the river is at. That is different than the water bodies he was referring to.

Chairman Lyson spoke of the river in Williston being navigable when it ran near the depot. Now the river is a mile south of there.

(9:30 to 11:10) There was discussion about the fact that rivers change course and their high water marks move. Boundaries of counties can even move when the river changes course.

Senator Lyson asked if Mr. Paczkowski felt this bill was necessary.

Mr. Paczkowski said it is necessary.

Senator Triplett asked what happens to mineral rights when a river ambulates over time. Does the state at some point cede its mineral interests in the area where the river has moved from and then claim mineral rights in the area where it is now? For example if it moves over a period of twenty years. How does that work?

Mr. Paczkowski said that is what takes place. As the river changes course, so does that boundary line. As a point of clarification, this bill does not affect Lake Sakakawea or those

activities taking place there. Our original intent was to eliminate these pieces of code. Again, sovereign land management is governed in 61-33 so this simply takes out the meandering language. Lake Sakakawea was not meandered. Meandering took place when the original government survey work was done. He explained that there are two different meanings for the word "meandering". (12:44 to 13:30)

Senator Triplett asked if the bill would make more sense if they went back to the original version of it.

Mr. Paczkowski said he thought it would.

Senator Hogue asked whether the State Water Commission is called upon to determine whether a body of water is navigable or not.

Mr. Paczkowski said they do work with the Land Department and the State Engineer's office to make that determination. The code says the State Engineer's office has management of the surface rights and the Land Department has the mineral rights underneath these water bodies. What has been done historically is: a request will come in and the Land Department will do their research to see if they can find anything that determines navigability of that water body. They then turn over that request for that individual water body and our sovereign lands manager will research that as well. Then they sign a document disclaiming ownership of the bed of that water body with the caveat that if additional information becomes available at a later date that can be revised. Historically, if it was meandered everything was claimed so the land owners adjacent to that property would not be eligible for any of those acres. (14:30 to 16:32)

Jennifer Verleger, Attorney General's office, said the cases before the Supreme Court are about who owns the minerals between the low water mark and the high water mark. Before you would even get to looking at the low and the high water mark, the first question would be whether the water body is navigable. That is what this bill would be addressing. In the cases before the Supreme Court, that is not a legal question. It is the Missouri River and everyone has conceded that it is navigable.

Chairman Lyson said this does not affect those cases, but would the outcome of those cases affect this?

Senator Triplett explained that the confusion dealt with the two definitions of "meander". (18:12 to 18:54)

Chairman Lyson asked, "When the river moves a mile away, what happens then?"

Ms. Vergeler said when the river moves, then the ownership that the state claims also moves with the river. The state's ownership stays with the river.

Senator Hogue asked why we don't just have a list of the lakes that we recognize as navigable.

Ms. Verleger said there are a lot of water bodies out there so they haven't looked at every one of them. They have only looked at the ones they have received questions on. To determine if it is navigable, they have to look at navigability at statehood so it takes a lot of historical research to find the evidence. It is very time intensive so they look at the ones that have been brought to their attention.

Senator Triplett reminded the committee that they still had a motion on the floor for a Do Not Pass made yesterday by Senator Hogue and seconded by Senator Burckhard. Senator Triplett further reminded the committee that she had requested that they hold the discussion and the vote until they had more conversation.

Senator Murphy expressed that he would like to do something to help the Water Commission in this regard, whether it is going back to the original bill or passing this bill to make the language clearer.

Bruce Engelhardt, the Director of Water Development for the State Water Commission, explained why this bill was originally requested. There is presently a conflict between what the state law says and how the courts have been ruling. This bill would fix that. (22:25 to 25:40)

Senator Triplett asked if the main idea of this bill would be time savings of staff resources of our state in the Water Commission and the Attorney Generals' office, not having to answer questions from attorneys who are reading the statute and getting confused. They never took the class in water law in law school and they don't understand the notion that this area of law really does depend on federal court interpretation of the US Constitution. Just by getting the confusing words out of the law we are saving them the time and hassle of having to have this conversation over and over again with people who read this and are trying to rely on it when it really isn't the law of the land.

Mr. Engelhardt said that is part of it. The other part is to try to address the confusion with the attorneys and the public that read the law. There is a law in the books that if they go to court on, they are going to lose.

Senator Triplett said she will resist the Do Not Pass motion in hopes of amending the bill to its original state.

Roll Call Vote on Do Not Pass motion: 1, 6, 0
Motion Failed

Senator Triplett presented the original HB 1063. See attachment #1.

There was discussion about the merits of reverting back to the original version of HB 1063.

Senator Triplett: Motion to amend the bill back to the original form (13.8039.01000).

Senator Murphy: Second

Motion to amend the bill back to the original form (13.8039.01000) carried by voice vote.

Senator Triplett: Do Pass as Amended

Senate Natural Resources Committee
HB 1063
April 5, 2013
Page 5

Senator Burckhard: Second
Roll Call Vote: 7, 0, 0
Carrier: Senator Triplett

April 5, 2013

4/5/13
TD

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1063

Page 1, line 1, replace "sections" with "section"

Page 1, line 1, remove ", 61-15-01, and 61-15-02"

Page 1, line 2, remove "and water conservation"

Page 1, line 3, replace "section" with "sections 61-15-01, 61-15-02, and"

Page 1, remove lines 20 through 23

Page 2, remove lines 1 through 19

Page 2, line 20, replace "Section" with "Sections 61-15-01, 61-15-02, and"

Page 2, line 20, replace "is" with "are"

Renumber accordingly

Date: 4-4-13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1023

Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Triplett Seconded By Unruh

Senators	Yes	No	Senators	Yes	No
Senator Lyson		✓	Senator Triplett	✓	
Senator Burckhard		✓	Senator Murphy	✓	
Senator Hogue		✓			
Senator Laffen		✓			
Senator Unruh	✓				

Total (Yes) 3 No 4

Absent 0

Floor Assignment _____

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

motion failed

Date: 4-4-13
Roll Call Vote #: 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1063

Senate Natural Resources Committee

Check here for Conference 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 Burckhard

Senators	Yes	No	Senators	Yes	No
Senator Lyson			Senator Triplett		
Senator Burckhard			Senator Murphy		
Senator Hogue					
Senator Laffen					
Senator Unruh					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

vote held

Date: 4-5-13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1063

Senate Natural Resources Committee

Check here for Conference 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 Burckhard

Senators	Yes	No	Senators	Yes	No
Senator Lyson	✓		Senator Triplett		✓
Senator Burckhard		✓	Senator Murphy		✓
Senator Hogue		✓			
Senator Laffen		✓			
Senator Unruh		✓			

Total (Yes) 1 No 6

Absent 0

Floor Assignment _____

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

*Motion made on April 4th
Vote taken on April 5th*

Date: 4-5-13
Roll Call Vote #: 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1063

Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment

Rerefer to Appropriations Reconsider to original version

13.839.0100

Motion Made By Triplett Seconded By Murphy

Senators	Yes	No	Senators	Yes	No
Senator Lyson			Senator Triplett		
Senator Burckhard			Senator Murphy		
Senator Hogue					
Senator Laffen					
Senator Unruh					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*carried by
voice vote*

Date: 4-5-13
 Roll Call Vote #: 3

**2013 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 1063**

Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
back to original form
 Rerefer to Appropriations Reconsider 13,8039.01000

Motion Made By Triplett Seconded By Burckhard

Senators	Yes	No	Senators	Yes	No
Senator Lyson	✓		Senator Triplett	✓	
Senator Burckhard	✓		Senator Murphy	✓	
Senator Hogue	✓				
Senator Laffen	✓				
Senator Unruh	✓				

Total (Yes) 7 No 0

Absent 0

Floor Assignment Triplett

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

REPORT OF STANDING COMMITTEE

HB 1063, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1063 was placed on the Sixth order on the calendar.

Page 1, line 1, replace "sections" with "section"

Page 1, line 1, remove ", 61-15-01, and 61-15-02"

Page 1, line 2, remove "and water conservation"

Page 1, line 3, replace "section" with "sections 61-15-01, 61-15-02, and"

Page 1, remove lines 20 through 23

Page 2, remove lines 1 through 19

Page 2, line 20, replace "Section" with "Sections 61-15-01, 61-15-02, and"

Page 2, line 20, replace "is" with "are"

Renumber accordingly

2013 CONFERENCE COMMITTEE

HB 1063

2013 HOUSE STANDING COMMITTEE MINUTES

House Energy and Natural Resources

Pioneer Room, State Capital

HB 1063
April 16, 2013
21156

Conference Committee



Minutes:

"attached testimony."

Present were: Rep. Schmidt, Rep. Brabandt, Rep. Mock, Senator Burckhard, Senator Unruh, Senator Triplett,

Others present: John Paczkowski

Rep. Schmidt: We will call the conference meeting to HB 1063 to order. Senator I did listen to your video on the floor and ask you to explain the senate position on how this impacts this bill.

Senator: Triplet: I think John Paczkowski is aware of the position. As states were admitted to the Union the new states received title from the federal government to lands under navigable rivers. The main principal is functional one which is whether it was capable of sustaining commercial traffic at the time of statehood. 1:14-6:01

Senator Burckhard: One of the goals is to eliminate redundancy is that correct?

John Paczkowski: The definition that you see before you on 611501 those definitions have to do with sovereign lands. Chapter 61-33 in the N.D. Century Code deals with sovereign lands issues. Those definitions spell out the definition order and water mark and navigable waters as well. The redundancy issue that if we are going to look for issues relative to sovereign lands we would go to 6133 and its associated administrative code.

Senator Burckhard: Is this bill necessary?

John Paczkowski: Yes it causes a lot of confusion. Meander has nothing to do with navigability.

Rep. Schmidt: Do we have the definitions HB 1063 in 61-15-01 we could eliminate those 2 definitions out of this?

John Paczkowski: Yes those are found elsewhere.

Rep. Schmidt: We would be in agreement in those definitions. In section 3 the amendment we need to decide whether or not we agree that should be included or not?

Senator Burkhard: That is correct.

John Paczkowski: Section 3 talks about the issue of meandering as it relates to navigability lakes. Following along the same logic as before: navigability is not determined by the meets and bounds description, 611502 deals with control and water conservation issues.

Rep. Schmidt: Senator Triplett talked about state rights with respect to mineral rights under these waters. Does this amendment address Senator Triplett's discussion?

John Paczkowski: If you go back to section 6133 of the N.D. Century Code it talks about sovereign lands authority there it does address mineral rights as it relates to the land department. The Board of Trust Lands will have the authority for the mineral rights associated with sovereign lands. Section 3 does not change anything there.

Senator Triplet: It wasn't necessary because of Mr. Paczkowski's testimony in our committee which he just repeated that it is covered.

Rep. Schmidt: Are you offering to strike that section?

Senator Triplet: Yes. It is a matter of cleaning up the code. I encourage people to read this document called N.D. Sovereign Land Management Plan it has a lot of information.

John Paczkowski: This would clean up the language these items are covered elsewhere in the code.

Rep. Brabandt: The definition of unnavigable and non-navigable; does unnavigable mean that the lake was never navigable and never will be navigable as opposed to non-navigable which means currently it is not navigable?

Rep. Mock: We have come to the agreement that section 2 is not necessary. Section 3 is we comfortable with eliminating that or do we need the assurance that there is some language that we need to amend and adopt? I have a motion; John can you provide us with the sections of law where they are addressed?

John Paczkowski: Yes I can do that.

Rep. Mock: I move the house accede to the senate amendment.

Rep. Schmidt: We have a second from Senator Triplett for the house to accede to the senate amendments on HB 1063. Motion carried. We will adjourn the meeting.

2013 HOUSE CONFERENCE COMMITTEE ROLL CALL VOTES

Committee: Energy + Natural Resources

Bill/Resolution No. HB 1063 as (re) engrossed

Date: 4-16-13

Roll Call Vote #: 1

- Action Taken**
- HOUSE accede to Senate amendments
 - HOUSE accede to Senate amendments and further amend
 - SENATE recede from Senate amendments
 - SENATE recede from Senate amendments and amend as follows

House/Senate Amendments on HJ/SJ page(s) 1204 - 1205

- Unable to agree, recommends that the committee be discharged and a new committee be appointed

((Re) Engrossed) _____ was placed on the Seventh order of business on the calendar

Motion Made by: Rep. Mock Seconded by: Rep. Triplett

Representatives				Yes	No	Senators				Yes	No
<u>Rep. Schmidt</u>				✓		<u>Senator Burkhard</u>				✓	
<u>Rep. Bralverdt</u>				✓		<u>Senator Unruh</u>				✓	
<u>Rep. Mock</u>				✓		<u>Senator Conrad Triplett</u>				✓	

Vote Count Yes: 6 No: 0 Absent: Conrad

House Carrier Rep. Schmidt Senate Carrier Senator ~~Conrad~~ Burkhard

LC Number _____ of amendment

LC Number 13-8039-02001 . 03000 of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

REPORT OF CONFERENCE COMMITTEE

HB 1063, as engrossed: Your conference committee (Sens. Burckhard, Unruh, Triplett and Reps. Schmidt, Brabandt, Mock) recommends that the **HOUSE ACCEDE** to the Senate amendments as printed on HJ pages 1204-1205 and place HB 1063 on the Seventh order.

Engrossed HB 1063 was placed on the Seventh order of business on the calendar.

2013 TESTIMONY

HB 1063

TESTIMONY ON HOUSE BILL NO. 1063

House Natural Resources Committee

**John Paczkowski, Chief - Regulatory Section
North Dakota State Water Commission**

January 17, 2013

Mr. Chairman and members of the Natural Resources Committee, my name is John Paczkowski and I am the Chief of the Regulatory Section for the State Water Commission. On behalf of State Engineer, Todd Sando, I am here in support of House Bill No. 1063 which would amend N.D.C.C. § 61-02-01 and seeks to repeal N.D.C.C. §§ 61-15-01, 61-15-02, and 61-15-08.

The amendment to N.D.C.C. § 61-02-01 replaces the term "unnavigable" with the term "nonnavigable" because "nonnavigable" is the language used by courts.

The substance of this bill is to repeal N.D.C.C. §§ 61-15-01, 61-15-02, and 61-15-08 because they are redundant of other Century Code and Administrative Code sections, and because the definitions found in N.D.C.C. § 61-15-01 are contrary to what courts will use during litigation.

N.D.C.C. § 61-15-01 contains two definitions. The first is a definition for "navigable lake," which defines the term to include any lake that has been meandered and had its metes and bounds surveyed by the U.S. government. The reason this causes confusion is because the courts have consistently held that the test for navigability (for purposes of determining title) is determined under the following federal standard:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

PPL Montana, LLC v. Montana, 132 S. Ct. 1215, 1228, 182 L. Ed. 2d 77 (2012)

In other words, even though N.D.C.C. § 61-15-01 redefines the term "navigable," the courts will still use the definition shown above. In essence, this makes the definition in N.D.C.C. § 61-15-01 meaningless. "Meandered lakes are not necessarily navigable lakes. Meandering a lake does not determine the question of its navigability." State v. Adams, 89 N.W2d 661, 687 (Minn. 1958).

Further, "navigable waters" is defined in N.D. Admin. Code § 89-10-01-03(5), where the definition mimics the language used by the courts. Similarly, "ordinary high

watermark” is also defined in N.D. Admin. Cod § 89-10-01-03(6); therefore, the definition in N.D.C.C. § 61-15-01 is unnecessary.

The repeal of N.D.C.C. § 61-15-02 follows from the elimination of the term “navigable lakes” in N.D.C.C. § 61-15-01 and the removal of the language regarding metes and bounds. Further, the statute is redundant in that the state already has control of navigable waters through the Constitution and sovereign lands statutes found in N.D.C.C. chapter 61-33 and the corresponding N.D. Admin. Code article 89-10.

Lastly, the repeal of N.D.C.C. § 61-15-08 also follows from the elimination of language regarding meandering. This statute is also redundant because N.D.C.C. § 61-32-03 requires a drainage permit from the state engineer in order to drain a watershed area of 80 acres or more. It is unlikely that a lake would be meandered that wouldn't also have a watershed of at least 80 acres, and the Office of the State Engineer has not been able to identify any situations to the contrary.

To summarize, the definitions found in N.D.C.C. §§ 61-02-01 and 61-15-01 are not the same as those that a court would use in litigation; therefore they are unenforceable. Further, both terms used in N.D.C.C. § 61-15-01 are already properly defined in the Administrative Code. Repealing N.D.C.C. §§ 61-15-02 and 61-15-08 is necessary because these statutes are predicated on the incorrect definitions found in N.D.C.C. § 61-02-01. Additionally, other statutes already cover the purpose they are trying to accomplish.

Thank you for the opportunity to comment on this matter. I will be happy to answer any questions you might have.

#1

TESTIMONY ON ENGROSSED HOUSE BILL NO. 1063

Senate Natural Resources Committee

**John Paczkowski, Chief - Regulatory Section
North Dakota State Water Commission**

March 22, 2013

Mr. Chairman and members of the Natural Resources Committee, my name is John Paczkowski and I am the Chief of the Regulatory Section for the State Water Commission. On behalf of State Engineer, Todd Sando, I am here in support of Engrossed House Bill No. 1063 which would amend N.D.C.C. §§ 61-02-01 61-15-01, and 61-15-02, and repeal N.D.C.C. § 61-15-08.

Specifically, House Bill No. 1063 seeks to eliminate the misconception that if a water body has been meandered it is then considered to be navigable. In addition, this bill seeks to establish a consistency of definition throughout state code as is pertains to certain terms.

The amendment to N.D.C.C. § 61-02-01 replaces the term "unnavigable" with the term "nonnavigable" because "nonnavigable" is the language used by courts.

N.D.C.C. § 61-15-01 contains two definitions. The first is a definition for "navigable lake" which defines the term to include any lake that has been meandered and had its metes and bounds surveyed by the U.S. government. The reason this causes confusion is because the courts have consistently held that the test for navigability (for purposes of determining title) is determined under the following federal standard:

Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

PPL Montana, LLC v. Montana, 132 S.Ct. 1215, 1228, 182 L.Ed.2d 77 (2012)

In other words, even though N.D.C.C. § 61-15-01 redefines the term "navigable," the courts will still use the definition shown above. In essence, this makes the definition in N.D.C.C. § 61-15-01 meaningless. "Meandered lakes are not necessarily navigable lakes. Meandering a lake does not determine the question of its navigability." *State v. Adams*, 89 N.W.2d 661, 687 (Minn. 1958).

Therefore, the State Engineer is proposing to use the definition of "navigable waters" as defined in N.D. Admin. Code § 89-10-01-03(5), where the definition mimics

the language used by the courts. Similarly, it is proposed to amend the definition of "ordinary high watermark" as defined in N.D. Admin. Code § 89-10-01-03(6) for consistency.

The amendment of N.D.C.C. § 61-15-02 removes the language regarding meandering. The courts have routinely held that the simple act of meandering a water body has no bearing whether it is navigable.

Lastly, the repeal of N.D.C.C. § 61-15-08 also follows from the elimination of language regarding meandering. This statute is also redundant because N.D.C.C. § 61-32-03 requires a drainage permit from the state engineer in order to drain a watershed area of 80 acres or more. It is unlikely that a lake would be meandered that wouldn't also have a watershed of at least 80 acres, and the Office of the State Engineer has not been able to identify any situations to the contrary.

To summarize, as proposed this bill will not only standardize the terminology used in the various sections of code, but also eliminate the confusion created when dealing with meandered water bodies.

Thank you for the opportunity to comment on this matter. I will be happy to answer any questions you might have.

#1

13.8039.01000

Sixty-third
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1063

Introduced by

Energy and Natural Resources Committee

(At the request of the State Engineer)

1 A BILL for an Act to amend and reenact section 61-02-01 of the North Dakota Century Code,
2 relating to the term nonnavigable; and to repeal sections 61-15-01, 61-15-02, and 61-15-08 of
3 the North Dakota Century Code, relating to water conservation.

4 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

5 **SECTION 1. AMENDMENT.** Section 61-02-01 of the North Dakota Century Code is
6 amended and reenacted as follows:

7 **61-02-01. Water conservation, flood control, management, and development declared**
8 **a public purpose.**

9 It is hereby declared that the general welfare and the protection of the lives, health,
10 property, and the rights of all the people of this state require that the conservation,
11 management, development, and control of waters in this state, public or private, navigable or
12 ~~unnavigable~~nonnavigable, surface or subsurface, the control of floods, and the management of
13 the atmospheric resources, involve and necessitate the exercise of the sovereign powers of this
14 state and are affected with and concern a public purpose. It is declared further that any and all
15 exercise of sovereign powers of this state in investigating, constructing, maintaining, regulating,
16 supervising, and controlling any system of works involving such subject matter embraces and
17 concerns a single object, and that the state water commission in the exercise of its powers, and
18 in the performance of all its official duties, shall be considered and construed to be performing a
19 governmental function for the benefit, welfare, and prosperity of all the people of this state.

20 **SECTION 2. REPEAL.** Sections 61-15-01, 61-15-02, and 61-15-08 of the North Dakota
21 Century Code are repealed.