

2009 HOUSE AGRICULTURE

HB 1459

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1459

House Agriculture Committee

Check here for Conference Committee

Hearing Date: January 30, 2009

Recorder Job Number: 8262

Committee Clerk Signature

*R. Mae Kuehn*

Minutes:

**Senator Erbele, Sponsor:** The issue really relates to the Corp land and receding water and the land that is now exposed and being leased by the owners along there for various purposes.

Most of your reactions would be as you look at the bill that this can't be done. Maybe it can't.

But it is a discussion that needs to be had. Since the water has gone down, the west side is used more for haying and on the east side the issue is grazing. The Corp has changed the grazing dates from May 15 to entering in mid July. That has created a tremendous weed problem. The Corp says they don't have any money to manage it. The weeds were not an issue when you grazed it early enough. By the time they get in now in July 15, the weeds are so tall that the cattle can't use the land. I think it is an issue of fairness that needs to be discussed.

**Representative Kerzman, Sponsor, Dist. 31:** We've had landowner issues on our side of the river. They've also changed the way they can farm it. They don't want them to make silage out of the corn. They want them to leave so much standing for wildlife. It has really upset a number of farmers. When I did see the final draft, I thought it was a bit radical but maybe you can work things out.

**Representative Uglem:** I've heard there are other states that are attempting to do something similar.

**Representative Kerzman:** I'm not aware of that. Some of the land has been in families for generations back. The Corp took it over with agreements that they could still operate the land and set in irrigation systems.

**Herb Grenz, Emmons Co. Commissioner: (Written testimony attached #1)**

Noxious weeds can and do bring about restrictions and contamination to agriculture production grown in Emmons County. **(Photo attached and map—note wildlife management circled)**

**Al Tschosik, Emmons Co. Commissioner: (attached #2)**

Thank you for allowing us to participate in this bill. We feel something needs to be done.

There are many, many farmers that could testify. The Russian Thistle, for example, the seeds on top go like a helicopter. It flies all over the countryside. It's very costly to the neighbors.

**Glen McCrory, West of Linton:** I'm fifth generation there. My great-great-grandfather homesteaded in 1880 part of the land we still have. My son operates there and he has two sons. Forty years ago, when my father was still alive, they took 750 acres from us. That really hurt because it was a big hay bottom that supplied the feed for cattle. We learned to work around it and changed some things. We've always been able to get along with the Corp until just recently. Recently they decided, we think on behalf of wildlife organizations, that grazing and wildlife don't go together. All our grassland on the home place runs to the river. In our pastures they have 10% ownership of the grass and we have 90%. When they come with these rules and regulations, they're controlling our whole place. This just came about in the last two years. In 2007 they grumbled about it but didn't do anything about it. The next year I received a letter, if I was not going to follow the July 15 thing, the lease was going to be taken away. It's very rough to fence. Just recently I received a letter, if I present a grazing plan that

we could accept, and if you go to NRCS and get it approved, we'll consider letting you in earlier than July 15. The problem is where we really need to be before July 15 is on this land by the lake bottom when the water is down. That's where this Canadian thistle is really a problem. Cattle will hold it down if going in early May.

**Representative Mueller:** How does your lease work with the Corp? What is your responsibility in regard to weeds on the Corp land?

**Glen McCrory:** On the Corp land that we pay lease on, my part is 100 acres and my son has about 25 acres. On that part we have to control the weeds. This other land to the river is wherever the water level is. Where I am, that amounts to about 400 or 500 acres. It's rough down there. That's the part I could control with my cattle.

**Chairman Johnson:** Have you worked with the Congressional delegation?

**Glen McCrory:** We did have a meeting down at Beaver Bay. Senator Dorgan's office was there along with the Governor's office and State Ag office. I didn't hear a word from them until now they want me to go to NRCS and develop a plan that they can approve.

**Durant Schiermeister, Emmons Co. farmer and seed producer:**

**(Written testimony attached #3)**

If the state can get possession of the land, we could lease and the money could go back to the schools, fire dept., etc. 35,000 acres in Emmons Co. alone was taken off the taxes. Put the land back in control to the people that love the land.

**Merlin Leithold, ND Weed Control Assn. South-Central Area Director:** Emmons Co. is in my district. **(Written testimony attached #4 )**

**Opposition:**

**Gary Preszler, Land Dept.:** I'm the secretary for the Board of University and School Lands and Commissioner for the State Land Dept. We have been waiting for the request of a fiscal note and didn't receive one. We support Section 1, the intent provision. The Land Department manages over 700,000 acres of trust lands and that does include controlling weeds. If we receive additional land, we will manage it. What I want to draw to your attention is Section 2. Can the Governor even seize land from the Federal Government? I suspect there may be more expenses than revenue with this land. The other trusts would be burdened by the cost of managing these lands.

**Chairman Johnson:** Do you have policies with grazing dates with your lands?

**Gary Preszler:** Over 99% of the lands we manage are leased. They're leased by public auction for a five-year term. No we don't have a date. But we have some with management plans with heavy grazing where we specify the amount of livestock that can be placed on the land and the dates they can be turned in or taken out.

**Representative Mueller:** Does the Governor have any authority to take land in this circumstance?

**Gary Preszler:** That's something the Governor's office can provide.

**Neutral Information:**

**Glen McCrory:** On my property there isn't a fence. It would take a lot of brace posts.

**Representative Rust:** Have you ever been fined or threatened?

**Glen McCrory:** I've been threatened to have the lease pulled.

**Representative Belter:** Have you had the actual Congressional delegation down there to look at the situation?

**Glen McCrory:** Not to my knowledge:

**Ken Junkert, Dept. of Ag.:** The Ag Commissioner has the authority to hold a hearing in this matter. However, we don't have the authority to compel the Corp of Engineers to come.

**Representative Belter:** Have you requested the Congressional delegation to be here? This problem needs to be handled by a Congressional delegation.

**Kent Junkert:** The Commissioner has communicated several times with our Congressional delegation. We've asked for additional funding to be included with the agency budget. The response we get back is it's a matter of financial resources. Their agency budgets are flat. We've even asked for perimeter control.

**Chairman Johnson:** We're trying to be good stewards of our land. As legislators we can see the problem but it's not being addressed.

**Lance Gaebe, Senior Staff for Governor Hoeven:** I don't think the Governor would have the authority to seize the land. I organized a meeting in June and asked the Corp of Engineers from the Pierre office to come. Both Senators had representatives at this meeting.

The Corp is trying with a management plan.

**Representative Vig:** Why did they switch dates?

**Lance Gaebe:** A lot of the contracts on the west side are managed by Game & Fish. The Corp received some complaints of overgrazing of some areas. One bad apple caused them to be more restrictive.

**Representative Uglem:** Have any other state met with success?

**Lance Gaebe:** In South Dakota, Congress did authorize the transfer of most of the Corp land above the high water mark to the State and tribes. Of course they also put in place an \$80 million trust fund to help the state and tribes in South Dakota manage it.

**Representative Mueller:** Do you know about the agreements when the land was transferred to the Corp. Whose obligation might be in that document?

**Lance Gaebe:** We've never studied those documents.

**Herb Grenz:** I've been discussing this situation with South Dakota. On the east side of the river, the Government has turned it over to the State of South Dakota who has then given it to the State Game & Fish Dept. The west side is reservation. They are worried about overgrazing but they'll never recognize that they have a noxious weed problem.

My plan is for the County Commissioners to set up a committee to study this excess land and that includes wildlife, recreation, everybody. In our county we have approximately 12,000 excess acres. At the time of the need of the reservoir, never once was it indicated that there would be wildlife involved. I've also been working with Terry Fleck from Lake Sakakawea to come up with a plan. The reservoir has been a zero for economic development in our county.

**Chairman Johnson:** Closed the hearing.

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1459

House Agriculture Committee

Check here for Conference Committee

Hearing Date: February 5, 2009 (**Committee Work**)

Recorder Job Number: 8815 (35'00")

Committee Clerk Signature

*LeMae Kueh*

Minutes:

**Chairman Johnson:** Representative Brandenburg has a substitute study resolution.

**Vice Chairman Brandenburg:** (**Attachment #1**) We know that to seize the land is probably not going to happen. But yet this issue is very important on both sides of the river. Roger Johnson is calling a field hearing. We're trying to keep it alive and get it over to the Senate.

**Representative Uglem:** This would not affect the land that is below the high water level where a lot of the weeds are coming from.

**Vice Chairman Brandenburg:** We're learning that the Water Commission has some authority. Also in South Dakota the State Land Dept. has taken over the Corp land. Weeds have always been there. But the farmers have always been able to graze it starting May 15. Nobody is addressing it. The landowners have not been involved at all in these rules to keep the cattle off until July 15. I'm sure they're receiving pressure from the wildlife groups to implement the rules.

**Representative Wall:** Will this get the attention at the upcoming meeting?

**Vice Chairman Brandenburg:** Yes, it's already getting attention because Ag Week is writing a story on it. When this resolution gets to Washington and to the right people, they don't want this type of publicity. I think we're going in the right direction with it. The Corp says they want

a plan. But they haven't given us what they want. Fencing doesn't work when the water level comes up.

**Representative Schatz:** Have you sent a resolution like this before?

**Vice Chairman Brandenburg:** On other issues we have, but not pertaining to this.

**Representative Schatz:** I think this is going in the right direction.

**Chairman Johnson:** Adjourn until 15 min. after session.

## 2009 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1459

House Agriculture Committee

Check here for Conference Committee

Hearing Date: February 5, 2009 (**Committee Work**)

Recorder Job Number: 8832

Committee Clerk Signature

*R. Mae Kuehn*

Minutes:

**Vice Chairman Brandenburg:** The way this bill was before, the Governor would seize the land and the State Land Dept. would be in charge. Now, we “urge that the land be taken.”

**Vice Chairman Brandenburg:** I move this Hog House Amendment.

**Representative Froelich:** Seconded

**Voice Vote taken. Passed.**

**Representative Froelich:** We have a problem with the Corp. They just don't live up to the expectations. I hope the committee can support this.

**Representative Mueller:** Are we talking all the Corp land around Lake Oahe?

**Vice Chairman Brandenburg:** Yes, what that consists of, there is a takings line from when they took the land. Some area along the river may only be 100 or 200 yards wide because you have steeper banks. Some areas could be 2 miles wide. There are farmers out there with 1,000 acre farms that were taken away. It was very productive land. But when the water rises in the dam 2-3 feet, it goes under water. This is the land that's being grazed. The Corp is doing a terrible job. South Dakota has actually taken the land away from the Corp and put it in the State Land Dept. I know the Governor is not going to seize the land. I wish he would.

Let's keep this alive and keep working on it. Send it to Washington. Somebody is going to realize we've got a problem.

**Representative Mueller:** When we are going to have the land transferred to the State of ND, where is the water at? Low water point or high water point?

**Representative Froelich:** When the Corp put in Lake Oahe, it devastated Standing Rock. They stole the land from the natives. What the Sioux Tribe and its members have done, is say "The heck with them." They are a sovereign nation. They're going in and farming some of it and grazing it and that's why we don't have as big of problem as they do across the river. In answer to Representative Mueller, the Corp would own the land at whatever the watermark is at the time. If that changes from day to day, that's where it's going to be. The Corp would own the water but not the land.

**Representative Boe:** Do we want this to be just the land around Lake Oahe?

**Representative Froelich:** Yes. Lake Sakakawea has their own set of problems.

**Vice Chairman Brandenburg:** If we take on too big of a chunk, we'll have more problems. Those people haven't come in here to be a part of it.

**Vice Chairman Brandenburg:** The takings line is at 1617 elevation. Right now the water is down at 1590 so you have 27 feet that you're dealing with. When the water is up, the weeds don't grow. When the water is down, you need the cattle to control the weeds.

**Representative Schatz moved Do Pass as amended.**

**Representative Froelich seconded.**

A Roll Call vote was taken. **Yes: 12, No: 0, Absent: 1**, (Representative Belter).

**Representative Brandenburg will carry the bill.**

**FISCAL NOTE**  
**Requested by Legislative Council**  
03/18/2009

Amendment to:       Engrossed  
                              HB 1459

1A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2007-2009 Biennium		2009-2011 Biennium		2011-2013 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
<b>Revenues</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Expenditures</b>	\$0	\$0	\$0	\$0	\$0	\$0
<b>Appropriations</b>	\$0	\$0	\$0	\$0	\$0	\$0

1B. **County, city, and school district fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

2007-2009 Biennium			2009-2011 Biennium			2011-2013 Biennium		
Counties	Cities	School Districts	Counties	Cities	School Districts	Counties	Cities	School Districts
\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0	\$0

2A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

This bill has no fiscal impact.

B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

This bill has no fiscal impact.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation is also included in the executive budget or relates to a continuing appropriation.*

<b>Name:</b>	Jeff Weispfenning	<b>Agency:</b>	Agriculture
<b>Phone Number:</b>	328-4758	<b>Date Prepared:</b>	03/18/2009

VR  
2/5/09

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1459

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide legislative findings and a declaration concerning lands around Lake Oahe managed by the army corps of engineers.

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

**SECTION 1. LEGISLATIVE FINDINGS AND DECLARATION OF INTENT.**

The legislative assembly finds and declares that:

1. The economy and well-being of the residents of North Dakota are dependent upon agriculture.
2. The United States, through the army corps of engineers, has acquired certain lands around Lake Oahe.
3. The army corps of engineers has failed to control weeds and manage this land properly.
4. The failure to control weeds on land managed by the army corps of engineers is a public nuisance and jeopardizes the public health, safety, and general welfare of the citizens of North Dakota.

**SECTION 2. CONGRESS URGED TO TRANSFER CERTAIN LANDS - DUTIES OF SECRETARY OF STATE.** The legislative assembly urges the Congress of the United States to enact legislation to transfer lands around Lake Oahe, excluding lands adjoining the Standing Rock Reservation, owned by the United States, through the army corps of engineers, to the state of North Dakota. The secretary of state shall forward copies of this Act to each member of the North Dakota congressional delegation."

Renumber accordingly

Date: 2/5/09

Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1459

House Agriculture Committee

Check here for Conference Committee

Legislative Council Amendment Number 90775.0101

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Rep. Brandenburg Seconded By Rep. Froelich

Representatives	Yes	No	Representatives	Yes	No
Dennis Johnson, Chair			Tracy Boe		
Mike Brandenburg, Vice Chair			Rod Froelich		
Wesley R. Belter			Richard Holman		
Joyce M. Kingsbury			Phillip Mueller		
David S. Rust			Benjamin A. Vig		
Mike Schatz					
Gerry Uglem					
John D. Wall					

*Vote  
Vote  
amendment  
passed*

Total (Yes) \_\_\_\_\_ No \_\_\_\_\_

Absent \_\_\_\_\_

Bill Carrier \_\_\_\_\_

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

*Hog House*

Date: 2/5/09

Roll Call Vote #: 1

2009 HOUSE STANDING COMMITTEE ROLL CALL VOTES  
BILL/RESOLUTION NO. 1459

House Agriculture Committee

Check here for Conference Committee

Legislative Council Amendment Number 90775.0101

Action Taken  Do Pass  Do Not Pass  Amended

Motion Made By Rep. Schatz Seconded By Rep. Froelich

Representatives	Yes	No	Representatives	Yes	No
Dennis Johnson, Chair	✓		Tracy Boe	✓	
Mike Brandenburg, Vice Chair	✓		Rod Froelich	✓	
Wesley R. Belter	AB		Richard Holman	✓	
Joyce M. Kingsbury	✓		Phillip Mueller	✓	
David S. Rust	✓		Benjamin A. Vig	✓	
Mike Schatz	✓				
Gerry Uglem	✓				
John D. Wall	✓				

Total (Yes) 12 No 0

Absent 1

Bill Carrier Rep. Brandenburg

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

**REPORT OF STANDING COMMITTEE**

**HB 1459: Agriculture Committee (Rep. D. Johnson, Chairman)** recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (12 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1459 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide legislative findings and a declaration concerning lands around Lake Oahe managed by the army corps of engineers.

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

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The legislative assembly finds and declares that:

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Renumber accordingly

2009 SENATE AGRICULTURE

HB 1459

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1459

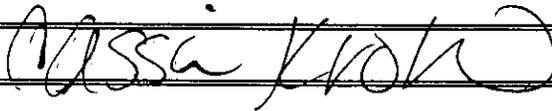
Senate Agriculture Committee

Check here for Conference Committee

Hearing Date: March 13, 2009

Recorder Job Number: 10883

Committee Clerk Signature



Minutes:

**Sen. Flakoll** opened the hearing on HB 1459, a bill to provide legislative findings and a declaration concerning lands around Lake Oahe managed by the army corps of engineers.

**Rep. Brandenburg**, district 28, testified in favor of the bill.

**Rep. Brandenburg-** Just to give a little history, this last summer we had a meeting with the corp of engineers in Beaver Bay talking about some of the weed problems out there. Some years ago there was problems dealing with corp land, the land owners were not a part of that meeting, and through that meeting there were rules put in place. One of the rules that passed is that the owners can no longer have their cattle graze on these weeds which really took care of a lot of the weed issues. I think that this is something that should be able to be worked out with the corp.

**Sen. Erbele**, district 28, testified in favor of the bill.

**Sen. Erbele-** I was part of the meeting that did take place and I agree that something needs to be done. I think that this would bring things to life where we could move forward in a way that doesn't carve out and alienate one section and that it all could work together with proper grazing plans weeds could be maintained but it has to be done early enough. But they need to

be open to discussing those opportunities and I hope that this bill at least creates that dialog and will bring some resolution to this problem.

**Rep. Froelich**, district 31, testified in favor of the bill.

**Rep. Froelich**- We do have some of these problems in our district as well, the corp as far as I am concerned is not managing this land properly, why not give it back to the state and the state could lease it out and we could set the guidelines. I am in support of this bill.

**Merlin Leithold**, ND weed Control Associations South Central Area director, testified in favor of the bill. See attached testimony, attachment #1.

**Sen. Klein**- I believe that as long as we have this environmentalist mentality in Washington we are not going to get the funding, I believe that is why this is not in the budget. Do you think that we are ever going to be able to leverage the kind of money we need?

**Merlin**- I think that you are right it is just going to depend who is in charge, a lot do not understand that these chemicals are environmentally safe.

**Alvin Tschesik**, Emmons county commission, testified in favor of the bill. See attached testimony, attachment #2.

**Durant Schiermeister**, farmer, testified in favor of the bill. See attached testimony, attachment #3.

**Sen. Taylor**- so that at time you can have a grazing permit to go down to the waters edge?

**Durant**- it says that only if they feel it is necessary otherwise it is not.

**Glen McCroy**, Linton resident, testified in favor of the bill.

**Glen McCroy**- I am the 5<sup>th</sup> generation on our place, the animals do a great job of grazing the thistle but these grazing leases come up every 5 years and then we have to rebid on this lease. On the last bid there was nothing in there about the July 15<sup>th</sup> date, what that does to my place is control all my grass cause there is no fence. If we go out too soon they threaten to

take our lease away. If we wait until that date it gets to high and the cattle will not touch it.

They have taken control of my own land and I do not think that is right. Anything that can be done to reduce the foot print of the corp of engineers is a good thing.

**Sen. Taylor-** when you mention the lease how much is it?

**Glen-** they claim that they go to NDSU and use that and then reduce it. I pay around \$9 a acre for the lease which is not a bad price but then I have to control all noxious weeds on that 100 acres of land, so that can drive the cost way up.

**Sen. Taylor-** have you ever discussed that if they are short of money and they want to leverage it could they stretch that money by cost share with the producer?

**Glen-** no there is not much communication with them.

**Herb Grenz,** representing himself, testified in favor of the bill. See attached testimony, attachment #4.

**Julie Ellingson,** ND Stockmen's association, testified in favor of the bill.

**Julie Ellingson-** I wanted to make just a couple of points in regard to this bill. We received many calls from members frustrated with the corp land and the lack of noxious weed control. We ask for your support in anything that you can do to help elevate this issue and bring some resolution to these producers whose lively hood and legacy really depends on the good steward of the land and ask for your help in that.

No opposition to the bill.

**Sen. Flakoll** closed the hearing.

## 2009 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. 1459

Senate Agriculture Committee

Check here for Conference Committee

Hearing Date: March 13, 2009

Recorder Job Number: 10885

Committee Clerk Signature

*Cassie Kroh*

Minutes:

**Sen. Flakoll** opened discussion on HB 1459.

**Sen. Miller** proposed amendments to the committee on the bill.

**Sen. Miller** motioned to adopt amendments and was seconded by Sen. Klein, roll call vote 6

yea 0 nay 1 absent.

**Sen. Klein** motioned for a do pass as amended and seconded by **Sen. Heckaman**, roll call

vote 6 yea 0 nay 1 absent.

**Sen. Miller** was designated to carry the bill to the floor.

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1459

Page 1, line 2, after "engineers" insert "; to create and enact a new section to chapter 4-33 of the North Dakota Century Code, relating to noxious weed control or eradication on publicly owned lands; and to provide for a legislative council study"

Page 1, after line 20, insert:

"SECTION 3. A new section to chapter 4-33 of the North Dakota Century Code is created and enacted as follows:

**Publicly owned land – Noxious weed control or eradication.**

1. The commissioner shall attempt to arrange a noxious weed control or eradication program with all state and federal agencies owning, controlling, or having jurisdiction over land within the state.
2. Weed control officers shall attempt to arrange a noxious weed control or eradication program with political subdivisions owning or controlling public land within each weed control officer's jurisdiction.
3. Each federal agency shall develop a management plan for controlling or eradicating noxious weeds on land under the agency's jurisdiction. If a federal agency does not control or eradicate the noxious weeds and does not develop a management plan for controlling or eradicating the noxious weeds, the weed control office shall notify the agency as provided in this chapter. The federal agency shall provide a report to the control authorities detailing the methods used by the federal agency and showing cause why the federal agency is not controlling or eradicating the noxious weeds. The commissioner may specify the forms on which the federal agency report must be submitted.
4. Upon being notified by a weed board of the federal agency's failure to control or eradicate noxious weeds, the commissioner may hold a public hearing to determine the reason for the failure.

**SECTION 4. LEGISLATIVE COUNCIL STUDY – WEED CONTROL PROGRAMS.** During the 2009-10 interim, the legislative council shall consider studying the issue of weed control programs of the U.S. Army Corps of Engineers on federal land under its control, including whether the Corps is in compliance with federal and any applicable state weed control laws, whether the Corps sufficiently budgets funds to address weed control on Corps land, and whether Congress provides proper funding for weed control on Corps land. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-second legislative assembly."

Renumber accordingly





**REPORT OF STANDING COMMITTEE**

HB 1459, as engrossed: Agriculture Committee (Sen. Flakoll, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed HB 1459 was placed on the Sixth order on the calendar.

Page 1, line 2, after "engineers" insert "; to provide for the control or eradication of noxious weeds on publicly owned lands; and to provide for a legislative council study"

Page 1, after line 20, insert:

**"SECTION 3. Publicly owned land - Noxious weed control or eradication.**

1. The commissioner shall attempt to arrange a noxious weed control or eradication program with all state and federal agencies owning, controlling, or having jurisdiction over land within the state.
2. Each weed control officer shall attempt to arrange a noxious weed control or eradication program with political subdivisions owning or controlling public land within the weed control officer's jurisdiction.
3. If a federal agency does not control or eradicate noxious weeds on land under the jurisdiction of the agency and does not develop a management plan for controlling or eradicating the noxious weeds, the appropriate weed control office shall notify the agency of the failure to control or eradicate the noxious weeds. The federal agency shall provide a report to the weed control authorities detailing the methods used by the federal agency and showing cause why the federal agency is not controlling or eradicating the noxious weeds. The commissioner may specify the forms on which the federal agency report must be submitted.
4. Upon being notified by a weed board of the federal agency's failure to control or eradicate noxious weeds, the commissioner may hold a public hearing to determine the reason for the failure.

**SECTION 4. LEGISLATIVE COUNCIL STUDY - WEED CONTROL PROGRAMS.** During the 2009-10 interim, the legislative council shall consider studying the weed control programs of the army corps of engineers on federal land under its control, including whether the army corps of engineers is in compliance with federal and any applicable state weed control laws, whether the army corps of engineers sufficiently budgets funds to address weed control on army corps of engineers' land, and whether Congress provides proper funding for weed control on army corps of engineers' land. The legislative council shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-second legislative assembly."

Renumber accordingly

2009 TESTIMONY

HB 1459

House Bill 1459

#1  
1459  
1/30/09  
Herb Grenz

Hon: Chairman Dennis Johnson, Hon: Vice Chairman Brandenburge, Hon: Members of the Committee.

Good morning: My name is Herbert Grenz. I live 45 miles south of Bismarck bordering Lake Oahe Reservoir in Emmons County. Our family lost over 2,000 acres to the reservoir. I was involved with negotiations with the Corps Real-estate Division for over 8 years in court and out of court. I was Secretary for the Oahe Landowners Association which was organized in 1960 including Sioux, Emmons, Morton and Burleigh County land owners losing land to Lake Oahe. The purpose-- to gather information and educate landowners rights' for negotiation procedures with the Army Corps Real-estate Division.

When Lake Oahe pool levels are reduced from elevation 1618 down to 1590 all counties in ND on Lake Oahe are reduced back to the Missouri River waterway, and land in this river is now state sovereign land. The tail end of this reservoir becomes one gigantic slough.

Emmons County has 60 miles (more or less) of take line bordering the lake reservoir. Years 2005-2008 had approximately 30,000 acres that became a noxious weed nursery on the lake bed. This has become a normal occurrence over the last 40 years of lake operation, and this lake bed will continue to become more notorious with noxious weeds every time land becomes exposed to low water level.

When lake levels drop the first thing that happens are terrible silt sand storms, until vegetation takes control. The first phase of vegetation was composed of red willow, cottonwood trees sweet clover and various other plant species. In the early 1980's we had the Russian thistle plague. These giant tumbleweeds were blown off the bottoms over the take line into fields, taking down fences, damaging standing crops and covering near by creeks and completely inundating pasture ravines. The positive side the goose hunters loved them.

Every major lake elevation trend, the vegetation is turning to more noxious weeds and less natural vegetation. Salt cedar, Canada thistle, worm wood, and foxtail barley now dominate the lake bottoms and are spreading onto adjacent lands. The noxious weed trend has been uncompromised by Corps Policies by making wild life habitat their priority.

Leases for grazing dates have been changed from starting May 1 - Oct. 31 to July 15 - Oct. 31, deleting 75 days of grazing, increasing the grazing fee and adding noxious weed control in excess land elevation above 1617.

Livestock which is one of the better natural controllers of noxious weeds in its early stages of growth are not allowed grazing until July 15, and if not complied--\$250.00 fine will be assessed for each trespass incident. Meaning, now we are responsible for fencing out the Corps take line.

Because of these changing policies, we have observed the rapid takeover of noxious weeds, and the lack of resources to control the problem.

Property owners are having grave concerns of the influx of noxious seeds being spread over vast areas in Emmons County, be it wood draws, shelter belts, wet lands, grazing land, dry land farming, hay land, irrigation lands, high value crops; **noxious weeds can and does bring about restrictions and contamination to agriculture production grown in Emmons County.** There is over 8,000 acres of irrigated land bordering Lake Oahe in Emmons County when there is water.

Yes, the corps ushers in money for the county weed board, but most of money resource has spent controlling salt cedar and not enough funds to control other noxious weeds especially Canada thistle and worm wood.

Grazing dates have been changed to enhance wildlife, livestock is bad for wildlife, but why do they get along in the feedlots or hay lots. The debate is ongoing in these Halls about baiting wildlife. I have baited wildlife, not to hunt but to keep them

away from the hay lots and feedlots. Adjacent land owners are concerned stewards of wildlife, and many donate resources of assistance for wildlife when needed. Yes, there is vegetation on the bottoms -- we have tall cottonwood trees, tall weeds, wild sweet clover and in some areas on the bottoms vegetation is a struggle to walk through, and all these seeds from this vegetation becomes a major problem for decades. When the reservoir pool returns to normal levels, many noxious weed seeds will lift off the bottom land, flow to the shore lines: now all abundant weeds and wildlife become adjacent landowners habitat.

The 40 plus years that I have been involved with this foreign government's policies, adjacent landowners have taken the brunt of transgressions from all parties involved. Be it noxious weeds, wildlife, recreation, environment, egress- ingress, adjacent land owners are indirectly responsible for taking care of excess lands.

When landowners are being taken advantage by government restrictions and neglect, effecting the individuals and local economy by gradually making it untenable we need to stand up for our principles.



DEED LAND

LEASE LAND

CORP. LAND

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3

MAY 15 1862

MAY 15 1861

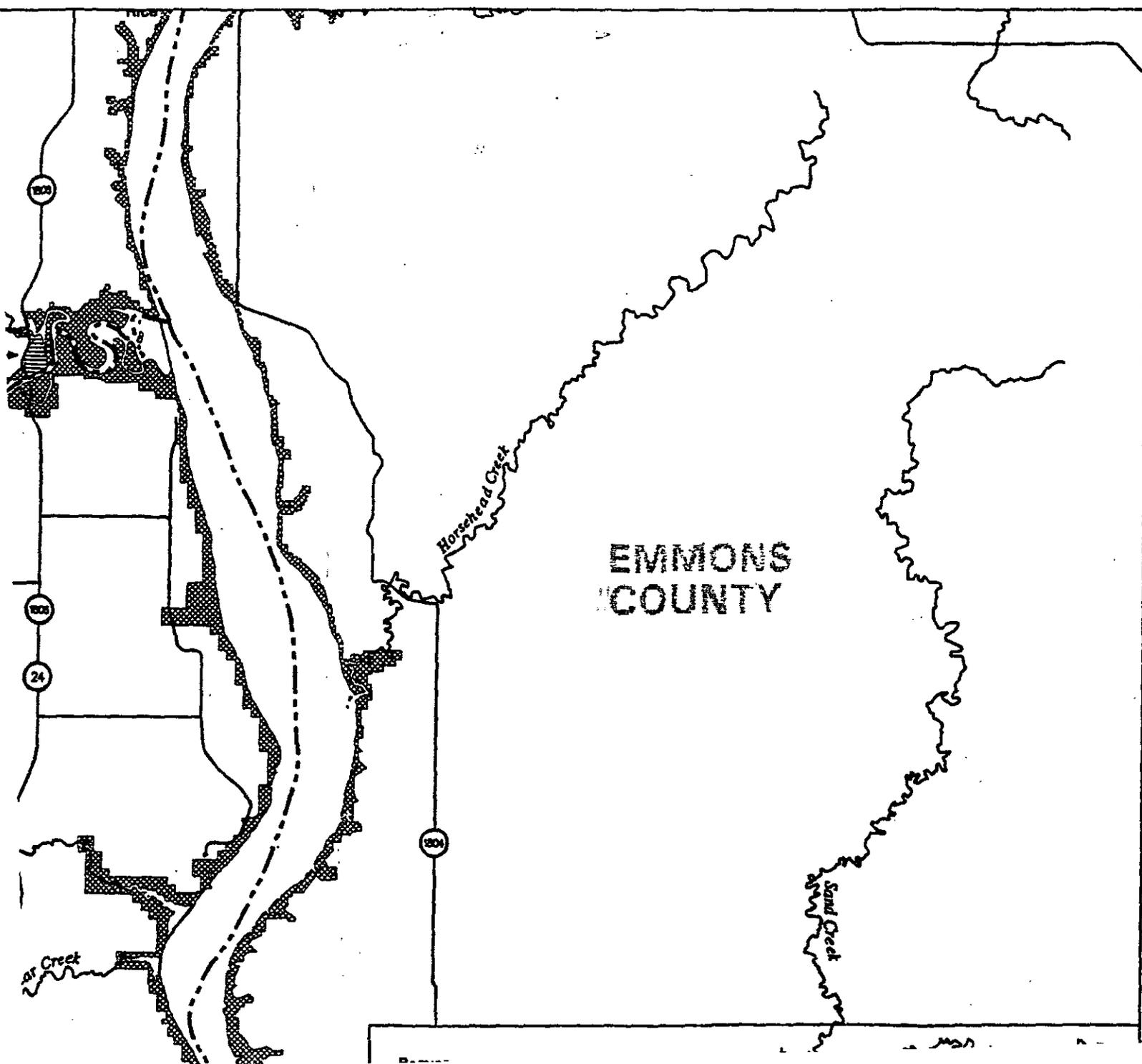
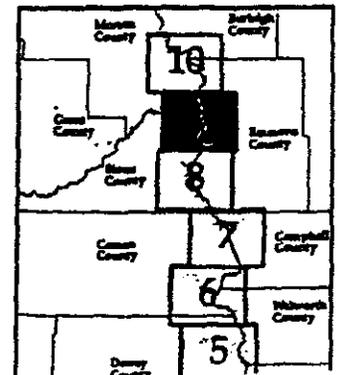
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# Lake Oahe Master Plan

## Land Classification

-  Project Operations
-  Recreation Intensive Use
-  Recreation Low Density
-  Mitigation
-  Wildlife Management
-  Environmentally Sensitive
-  Lake Oahe Normal Pool
-  Corps Boundary
-  County Boundary
-  Major Roads

## Plate Location



UNAPPROVED PROCEEDINGS OF THE BOARD OF COUNTY COMMISSIONERS  
OF EMMONS COUNTY, NORTH DAKOTA  
AT IT'S SPECIAL MEETING  
JANUARY 28, 2009

#2  
1459  
1/30/09  
Al Tschosik

Chairman Francis W. Lawler called the meeting to order at 5:00 P.M. with Commissioners Gary Keller, Dennis J. Hummel, Jeffrey J. Magrum and Alvin M. Tschosik being present. Also present was States Attorney, Donald Becker and Emmons County Publisher, Alan Burke.

The board reviewed House Bill No. 1459 introduced by Representatives Brandenburg, Froelich, Kerzman, Kretschmar and Senators Erberle and Krauter pertaining to a management plan for controlling the noxious weeds on U.S. Corps of Engineer land along Lake Sakakawea and Lake Oahe.

House Bill Number 1459 would authorize the Governor to direct the State's Attorney of each county in the state in which lands adjacent to Lake Sakakawea or Lake Oahe is located to seize that land and effect a transfer from the United States to the board of university and school lands if the U.S. Army Corp of Engineers fail to control weeds and manage this land properly.

Commissioner Magrum motioned that the Emmons County Commission support House Bill Number 1459. Seconded by Commissioner Keller. Roll Call "YES": Keller, Hummel, Magrum, Tschosik and Lawler. Motion carried. Commissioner Tschosik will represent the Emmons County Commission at the Legislative hearing held on January 30, 2009 at 10:00 A.M.

There being no further business before the board, Commissioner Magrum motioned to adjourn. Seconded by Commissioner Hummel. The meeting adjourned at 5:45 P.M.

Adjournment

TESTIMONY FOR HOUSE BILL 1459

#3  
1459  
1/30/09

Durant Schiermeister

Good Morning Mr. Chairman, members of the Committee, my name is Durant Schiermeister. I am from Emmons County and farm along the Missouri River, also known as Lake Oahe. I am on the Hazelton Fire Board, the Emmons County Crop Improvement Board, secretary for the Horsehead Irrigation District, and in 2007 was elected by the county to receive the Outstanding Agriculturist Award. I am here today to testify in favor of House Bill 1459.

I own and operate a large irrigated farm along Lake Oahe, which borders land owned by the Corps of Engineers. I grow high value crops, such as potatoes for French Fries and new releases of cereal grain and edible beans from NDSU. The new releases are foundation class and registered class seed grown under contract with the NDSU Seed Increase Program. To be a seed producer, your land has to be free of noxious weeds. This has almost become an impossible feat with the Corps land belching out miles of its noxious Canadian Thistle seed along with leafy spurge, knapweed and the list goes on. You need to witness the sight when the Canadian Thistle is in a mature state and the wind blows. It is a snow storm of seed for weeks. It plugs my irrigation pump radiators. The sky line is nothing but a white drift of weed seeds blowing for miles across private land, creating a constant battle for landowners to manage the weeds in their crops.

It is quite obvious that the Corps is not a good tenant of the land and can not manage their weeds. It has caused my business as a seed grower to be in real jeopardy along with running up a huge chemical bill in a hopeless situation.

Mr. Chairman, members of the Committee, I am asking for your support on this bill. Please, let the people who love the land take care of it.

Durant Schiermeister, 6120 Highway 1804, Hazelton, ND 58544  
701-673-3111



**NORTH DAKOTA WEED CONTROL ASSOCIATION**  
**3196 119<sup>th</sup> Ave SE, Valley City, ND 58072**  
www.ndweeds.homestead.com

#4  
1459  
1/30/09

*Merlin Leithold*

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schroeder.becky@yahoo.com

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**TESTIMONY OF MERLIN LEITHOLD**  
**LOBBYIST # 177**  
**HB 1459**  
**HOUSE AGRICULTURE COMMITTEE**

**JANUARY 30<sup>TH</sup>, 2009**

Good morning Chairman Johnson and members of the House Agriculture Committee.

My name is Merlin Leithold. I am the ND Weed Control Association's South-Central Area director, the association's lobbyist, and I am also the weed officer in Grant County.

When the lack of weed control takes place, no matter where, it tends to spread to other properties. This can cause stressful relationships among neighbors. That is the case that we hear about today. We not only understand the problem, but I have seen some of the problem first hand.

As an Association, we have heard both sides of this issue. There is no simple solution, even though it may seem so. We understand what the bill sponsors are trying to accomplish. Hopefully, this bill, even though we don't necessarily agree with the actual intent of the bill, but we do feel that this bill can be a vehicle to make more people aware of the problem that does exist.

Thank you

Sixty-first  
Legislative Assembly  
of North Dakota

**HOUSE CONCURRENT RESOLUTION NO.**

#1  
1459  
2/5/09

*Rep. Grandenbery*

Introduced by

Representative Froelich

(Approved by the Delayed Bills Committee)

1 A concurrent resolution urging Congress to enact legislation to transfer lands around Lake  
2 Oahe, excluding lands adjoining the Standing Rock Reservation, owned by the United States,  
3 through the Army Corps of Engineers, to the state of North Dakota.

4 **WHEREAS**, the economy and well-being of the residents of North Dakota is dependent  
5 upon agriculture; and

6 **WHEREAS**, the United States, through the Army Corps of Engineers, has acquired  
7 certain lands around Lake Oahe; and

8 **WHEREAS**, the Army Corps of Engineers has failed to control weeds and manage this  
9 land properly; and

10 **WHEREAS**, this failure to control weeds on land managed by the Army Corps of  
11 Engineers is a public nuisance and jeopardizes the public health, safety, and general welfare of  
12 the citizens of North Dakota; and

13 **WHEREAS**, this land would be better managed if it were under the control of the state  
14 of North Dakota, through the Board of University and School Lands;

15 **NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES**  
16 **OF NORTH DAKOTA, THE SENATE CONCURRING THEREIN:**

17 That the Sixty-first Legislative Assembly urges the Congress of the United States to  
18 enact legislation to transfer lands around Lake Oahe, excluding lands adjoining the Standing  
19 Rock Reservation, owned by the United States, through the Army Corps of Engineers, to the  
20 state of North Dakota; and

21 **BE IT FURTHER RESOLVED**, that the Secretary of State forward copies of this  
22 resolution to each member of the North Dakota Congressional Delegation.

**NORTH DAKOTA WEED CONTROL ASSOCIATION**  
**3196 119<sup>th</sup> Ave SE, Valley City, ND 58072**  
[www.ndweeds.homestead.com](http://www.ndweeds.homestead.com)



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[schroeder.becky@yahoo.com](mailto:schroeder.becky@yahoo.com)

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**TESTIMONY OF MERLIN LEITHOLD**  
**LOBBYIST # 324**  
**HB 1459**  
**SENATE AGRICULTURE COMMITTEE**

**March 13<sup>th</sup>, 2009**

Good morning Chairman Flakoll and members of the Senate Agriculture Committee.

My name is Merlin Leithold. I am the ND Weed Control Association's South-Central Area director, the association's lobbyist, and I am also the weed officer in Grant County.

When the lack of weed control takes place, no matter where, it tends to spread to other properties. This can cause stressful relationships among neighbors. That is the case that we hear about today. We not only understand the problem, but I have personally seen some of this problem first hand.

As an Association, we have heard both sides of this issue. There is no simple solution, even though it may seem so. We understand what the bill sponsors are trying to accomplish with the actual intent, we feel that this bill will, if nothing else, be a vehicle to make more people aware of the weed problem that does exist, and hopefully a solution can take place.

Thank you

# EMMONS COUNTY

STATE OF NORTH DAKOTA



**OFFICIALS:**

Marlys A. Ohlhauser, Auditor  
Florence Plienis, Treasurer  
Gary R. Sanders, Sheriff  
Donald R. Becker, State's Attorney  
Anita Ibach, County Recorder  
Shawna Paul, Supt. of Schools  
Ardella Deis, Tax Director  
Jeffrey Ohlhauser, VA Officer  
Alex Jahner, Road & Shop Foreman



LINTON, NORTH DAKOTA 58552

**COMMISSIONERS:**

Jeffrey J. Magrum, 1st District  
Francis W. Lawler, 2nd District  
Alvin M. Tschosik, 3rd District  
Gary Keller, 4th District  
Dennis J. Hummel, 5th District

March 11, 2009

Dear Committee Members:

At the January 28, 2009 Emmons County Board of Commissioners Special Meeting, the Commission approved a motion to support House Bill Number 1459.

Sincerely,

Marlys Ohlhauser  
Emmons County Auditor



TESTIMONY IN FAVOR OF HB 1459

Good Morning Mr. Chairman and members of the Committee, my name is Durant Schiermeister. I am from Emmons County and farm along the Missouri River, also known as Lake Oahe. I am on the Hazelton Fire Board, the Emmons County Crop Improvement Board, secretary for the Horsehead Irrigation District, and in 2007 was elected by the county to receive the Outstanding Agriculturist Award. I am here today to testify in favor of House Bill 1459.

I own and operate a large irrigated farm along Lake Oahe, which borders land owned by the Corps of Engineers. I grow high value crops, such as potatoes for French Fries and new releases of cereal grain and edible beans from NDSU. The new releases are foundation class and registered class seed under contract with the NDSU Seed Increase Program. To be a seed producer, your land has to be free of noxious weeds. This has almost become an impossible feat with the Corps land belching out miles of its noxious Canadian Thistle seed along with leafy spurge, knapweed and the list goes on. You need to witness the sight when the Canadian Thistle is in a mature state and the wind blows. It is a snow storm of seed for weeks. It plugs my irrigation pump radiators. The sky line is nothing but a white drift of weed seeds blowing for miles across private land, creating a constant battle for landowners to manage the weeds in their crops.

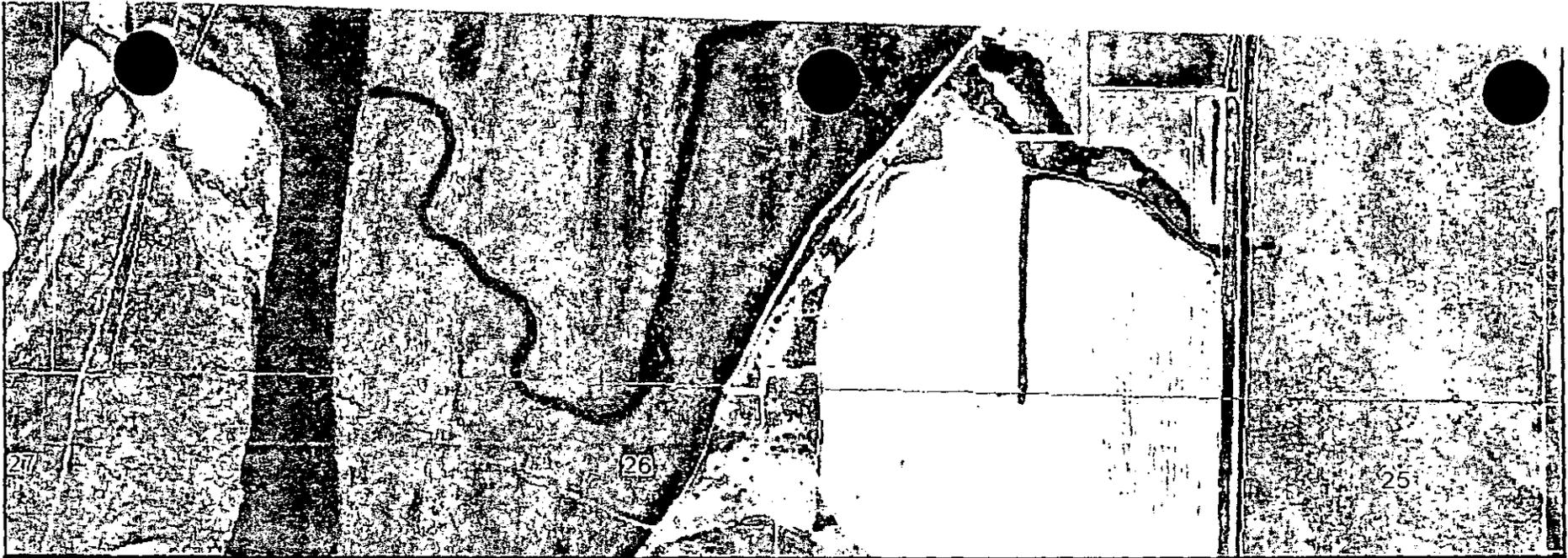
It is quite obvious that the Corps is not a good tenant of the land and can not manage their weeds. It has caused my business as a seed grower to be in real jeopardy along with a huge chemical bill in a hopeless situation.

Along with my testimony is an aerial map showing one of my irrigated fields that is along side land owned by the Corps of Engineers. The yellow highlighted border shows the high water mark and the Corps excess land. As you can see, their cesspools of weeds run right up to my field.

Mr. Chairman, members of the Committee, I am asking for your support on this bill. It would be good to see this land put back into production again. Please, let the people who love the land take care of it.

**Aerial Map**





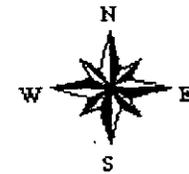
map center: 46° 29' 42.46, 100° 34' 34.57

scale: 12009

**23-135N-79W**

**Emmons County**

**North Dakota**



3/12/2009

Maps provided by:



©AgriData, Inc. 2009

[www.AgriDataInc.com](http://www.AgriDataInc.com)

Field borders provided by Farm Service Agency as of 5/23/2008. Aerial photography provided by Aerial Photography Field Office.

House Bill 1459

Hon: Chairman Tim Flakoll, Hon: Members of the Senate.

Good morning: My name is Herb Grenz, I live 45 miles south of Bismarck bordering Lake Oahe Reservoir in Emmons County. Our family sacrificed over 2,000 acres for the reservoir needs. I was secretary for the Oahe Landowners Association which was organized in 1960 including Souix, Emmons, Morton and Burleigh county landowners losing land to Lake Oahe. The purpose of the organization was to gather information and educate landowners rights for negotiation procedures with Army Corp Real-estate Division.

H.B. 1459 is a real challenge, involving a powerful Government Agency. There comes a time when we have to challenge the challenged. If we never do anything we will never know what we've done. But no matter what we do, when you are in a Government Agency there are no consequences. Nobody is held accountable, who is to make up for their mistakes. We the citizens make up for their mistakes. However, that certainly doesn't mean citizens can't and should point out the mistakes and hold fast to the facts.

H.B. 1026 is the seed to H.B. 1459 where 6301. 1-25 "publicly owned land." The Federal Agency responsibilities were deleted because the state has no control over these agencies. We hope this section in some forum will be amend and reappear in the ND century code, or else where, addressing these problems.

The meeting called March 3-09 relating to publicly owned land paragraph six was a meeting along time coming for Federal Agencies to come forth and answer questions about lack of noxious weed control. Money- money seemed to be the issues. To me it sounded like job security -- the bigger the budget the more secured job. We should demand from the Federal Government's money policies what they demand from us. Is it economically feasible, or a "feasibility study" to manage this Corps property, or should it be turned back to the local entities for their consideration.

H.B. 1459 addresses many concerns that are presently occurring in Emmons County, which is a concerned county with its surrounding environment. This county had a beautiful natural river front that was destroyed and not by choice. One would hope that after 50 years some of the natural beauty would return, it hasn't.

If government owns the land or has the right to regulate it as deems fit, and people are at the mercy of bureaucrats regulations, land will not prosper. Land use regulations encumber property rights, there by reducing, or eliminating equity so there is little to no capital with which to create wealth. Without wealth, land becomes more difficult to protect the environment and land assets values decline.

Received the Corps letter 1-26-09 "unless you have a rotational grazing plan which is approved by the Corps of Engineers and NRCS or other specific dates as stated in the lease, grazing is allowed after 14 July lease year." Now we have 2 sets of rules to follow 1. NRCS, 2. Corps of Engineers. The grazing dates have been changed from 1 May to 15 July - Oct. 31.

"Due to the increased interest in alternate and early grazing dates, (who are these increased interest?). Grazing lessee are encouraged to Work with their local NRCS to set up rotational grazing program on the Corps managed lands they lease."

"Upon completion of a rotational grazing program, lessee are encouraged to personally meet in Bismarck NR staff to discuss and finalize the program and work it into their lease." (Question, which program do I entail my sovereign rights.) Paragraphs 2-3 = we are talking in many case about 90 acres of grass that has a 4.5 mile shore line which would support 7 ANU if not incorporated within the 2 pastures consisting of 2,300 acres; where as, July 15 would control all pasture grazing from May 1 to July 15 if not fenced out. The 90 acres of grass are a concern because this policy is allowing thousands of noxious weed acres that lies on the bottom land below elevation 1617 and noxious weeds spreading into lease land and private property to flourish. Weeds are not grass, therefore, not rotational which was explained by Ken Sedizec "Range Land Managment NDSU" during the March 3<sup>rd</sup> meeting, he explained the July 15 date for wildlife

protection is for haying, it was also indicated that wildlife numbers are very compatible when incorporated with livestock grazing before July 15. If forced to fence out the 4.5 mile take area consisting of 90 acres, land from the Corps would not be leased - - its not worth the bother. I have enclosed a copy what we believe brought about the 1 May to 15 July grazing date. "Digest of Federal Resource Laws of Interest to US Fish Wildlife Service". 2<sup>nd</sup> page The 1958 Amendments Wildlife Resources to the Nation. This is the amendment the Corps refers to.

The fence is another issue one major problem regardless who erects or maintains the take line fence; because of very steep and hilly terrain there is a great concern with the ecosystem that different grazing habits may cause uncontrollable erosion problems.

Does the Corps of Engineers have the right to jeopardize and create harm to citizens of this state by failing policies and neglect. H.B. 1459 is a shot across the bow, and is a warning for changes. If 1459 fails then the courts will be asked for assistance.

# Digest of Federal Resource Laws of Interest to the U.S. Fish and Wildlife Service

## Fish and Wildlife Coordination Act

Fish and Wildlife Coordination Act (16 U.S.C. 661-667e; the Act of March 10, 1934; Ch. 55; 48 Stat. 401), as amended by the Act of June 24, 1936, Ch. 764, 49 Stat. 913; the Act of August 14, 1946, Ch. 965, 60 Stat. 1080; the Act of August 5, 1947, Ch. 489, 61 Stat. 770; the Act of May 19, 1948, Ch. 310, 62 Stat. 240; P.L. 325, October 6, 1949, 63 Stat. 708; P.L. 85-624, August 12, 1958, 72 Stat. 563; and P.L. 89-72, 79 Stat. 216, July 9, 1965.

The Act of March 10, 1934, authorizes the Secretaries of Agriculture and Commerce to provide assistance to and cooperate with Federal and State agencies to protect, rear, stock, and increase the supply of game and fur-bearing animals, as well as to study the effects of domestic sewage, trade wastes, and other polluting substances on wildlife.

The Act also directs the Bureau of Fisheries to use impounded waters for fish-culture stations and migratory-bird resting and nesting areas and requires consultation with the Bureau of Fisheries prior to the construction of any new dams to provide for fish migration. In addition, this Act authorizes the preparation of plans to protect wildlife resources, the completion of wildlife surveys on public lands, and the acceptance by the Federal agencies of funds or lands for related purposes provided that land donations received the consent of the State in which they are located.

The amendments enacted in 1946 require consultation with the Fish and Wildlife Service and the fish and wildlife agencies of States where the "waters of any stream or other body of water are proposed or authorized, permitted or licensed to be impounded, diverted . . . or otherwise controlled or modified" by any agency under a Federal permit or license. Consultation is to be undertaken for the purpose of "preventing loss of and damage to wildlife resources."

The amendments authorize the transfer of funds to the Fish and Wildlife Service to conduct related investigations. Land made available to the Secretary of Interior for wildlife protection purposes is to be managed directly by or under cooperative agreements with the Secretary of Interior. General plans may also include the transfer of project lands to a State for management. The amendments authorized

appropriations for related purposes and specifically exempted the Tennessee Valley Authority from its provisions.

Miscellaneous amendments in 1936, 1947, 1948, and 1949 authorized the following provisions respectively: 1) purchase of lands in Idaho for use as a game management supply depot and laboratory, 2) transfer of lands in connection with the Crab Orchard Creek Project to the Secretary of Interior, 3) use of surplus Federal property for wildlife conservation purposes, and 4) exchange of lands within the Skagit National Wildlife Refuge.

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indicate

The 1958 amendments added provisions to recognize the vital contribution of wildlife resources to the Nation and to require equal consideration and coordination of wildlife conservation with other water resources development programs, and authorized the Secretary of Interior to provide public fishing areas and accept donations of lands and funds.

The amendments also titled the law as the Fish and Wildlife Coordination Act and expanded the instances in which diversions or modifications to water bodies would require consultation with the Fish and Wildlife Service. These amendments permitted lands valuable to the Migratory Bird Management Program to be made available to the State agency exercising control over wildlife resources.

"Oct 1984 Garrison Division Unit Commission in Fargo, N.D. Governor Guy reminded the Commission that the state's water subsidy to down stream barge transportation had been expressly forbidden by the O'Mahoney-Milliken Amendment to the Flood Control Act of 1944. Yet, this lawless practice had been going on unchecked for thirty years. The Corps, said Guy, was the biggest group of thieves that Washington had ever turned loose on honest people, hard working citizens."

them to the elements. SDGFP Wildlife Conservation Officers assist with patrolling nesting areas to keep the public out of nesting areas.

**Contaminants**

*Description:* Adverse affects from environmental contamination should be monitored for potential impacts to least tern and piping plover populations. A study on least terns and piping plovers on the Missouri River did not find any reduction in reproductive success attributable to contamination (Welsh and Mayer 1993). Researchers should be aware of potential impacts by contaminants in the future, but management actions do not appear to be necessary at this time.

**Disease**

*Description:* A dead piping plover tested positive for West Nile virus in 2003 (Pers. Comm. Greg Pavelka, Corps). The Corps' crews are currently collecting dead least tern or piping plover specimens found during monitoring and shipping them to the USFWS health lab for analysis. A disease epidemic among least terns and piping plovers could have devastating effects on the populations.

*SDGFP Management Options:* SDGFP summer employees on the river with Corps least tern and piping plover crews will assist with specimen collection and documentation as they find carcasses.

Table 1: Causes of least tern and piping plover nest failures during the Corps monitoring period in South Dakota. Monitoring Periods: Lake Oahe 1995-2003, Fort Randall River 1986-2003, Lewis and Clark Reservoir 1986-2003, Gavins Point River 1986-2003. Source: Greg Pavelka.

<b>Least tern Nests: Causes of Failure</b>						
<b>Total Nests Monitored 4,271</b>						
<b>Cause</b>	<b>Flooding</b>	<b>Human Disturbance</b>	<b>Livestock</b>	<b>Predation</b>	<b>Erosion</b>	<b>Weather</b>
<b>Number Destroyed</b>	235	22	10	420	21	128
<b>Percent of all tern nests</b>	5.5%	0.5%	0.2%	9.8%	0.5%	3.0%

<b>Piping plover Nests: Causes of Failure</b>						
<b>Total Nests Monitored 2,564</b>						
<b>Cause</b>	<b>Flooding</b>	<b>Human Disturbance</b>	<b>Livestock</b>	<b>Predation</b>	<b>Erosion</b>	<b>Weather</b>
<b>Number Destroyed</b>	129	36	3	256	9	63
<b>Percent of all plover nests</b>	5.0%	1.4%	0.1%	10.0%	0.4%	2.5%

**House Amendments to HB 1459 (90775.0101) - Agriculture Committee 02/05/2009**

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide legislative findings and a declaration concerning lands around Lake Oahe manage the army corps of engineers.

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

**SECTION 1. LEGISLATIVE FINDINGS AND DECLARATION OF INTENT**

The legislative assembly finds and declares that:

1. The economy and well-being of the residents of North Dakota are dependent upon agriculture.
2. The United States, through the army corps of engineers, has acquired certain lands around Lake Oahe.
3. The army corps of engineers has failed to control weeds and manage land property.
4. The failure to control weeds on land managed by the army corps of engineers is a public nuisance and jeopardizes the public health, safe and general welfare of the citizens of North Dakota.

**SECTION 2. CONGRESS URGED TO TRANSFER CERTAIN LANDS - DUTIES OF SECRETARY OF STATE.** The legislative assembly urges the Congress the United States to enact legislation to transfer lands around Lake Oahe, excluding lands adjoining the Standing Rock Reservation, owned by the United States, through the army corps of engineers, to the state of North Dakota. The secretary of state shall forward copies of this Act to each member of the North Dakota congressional delegation."

Renumber accordingly

**House Amendments to HB 1459 (70700.0101) - Appropriations Committee 02/13/07**

Page 1, line 2, after the semicolon insert "to provide for budget section tour group review

**House Amendments to HB 1459 (70700.0101) - Appropriations Committee 02/13/07**

Page 2, after line 19, insert:

**"SECTION 2. BUDGET SECTION TOUR GROUP REVIEW.** Institution: report to any budget section tour group that visits the institution during the 2007-interim on the status of the extraordinary repairs funded in section 1 of this Act and tour groups shall review the repairs as part of the tour of the institution."

Renumber accordingly

**STATEMENT OF PURPOSE OF AMENDMENT:**

House Bill No. 1459 - House Action

December 2007

## BANKS AND BEDS OF STREAMS - BOUNDARY OF OWNERSHIP - OPERATION AND EFFECT OF NORTH DAKOTA CENTURY CODE SECTION 47-01-15

This memorandum discusses the rights and obligations of riparian landowners along navigable bodies of water and the rights that members of the public may have in the shore zone of navigable bodies of water. The shore zone is that area between the low watermark and the high watermark.

Sovereign lands are governed by North Dakota Century Code (NDCC) Chapter 61-33. This chapter provides that sovereign lands must be administered by the State Engineer and the Board of University and School Lands. As used in this chapter, sovereign lands means those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to Section 47-06-05 are considered to be above the ordinary high watermark and are not sovereign lands.

Other provisions are also relevant to this discussion. For purposes of NDCC Chapter 61-15 relating to water conservation, "ordinary high watermark" is defined to mean that line reached by water when a lake or stream is ordinarily full and the water ordinarily high. Section 47-01-15 purports to vest the shore zone, that area bordering a navigable lake or stream between the low watermark and the high watermark, in the riparian landowner. This section provides that "[e]xcept when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low watermark. All navigable rivers shall remain and be deemed public highways. In all cases when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both." As will be discussed in this memorandum, the attempt of Section 47-01-15 to vest ownership of the shore zone in the riparian or upland property owner is most likely unconstitutional.

If a water body is navigable in fact on the date of a state's admission to the Union, ownership of the bed below such waters vests in the state as an incident of state sovereignty. This sovereign state ownership of the bed extends to the ordinary high watermark. In *Shively v. Bowlby*, 152 U.S. 1 (1894), the United States Supreme Court stated that new states admitted into the Union since the adoption of the Constitution have the same rights as the original states in the "tidewaters, and in the lands below the high watermark, within their respective jurisdictions. Title to the beds of nonnavigable waters, however, remained in the federal government at statehood and followed subsequent governmental transfers of riparian lands. There is no doubt the Missouri River is

navigable and was stipulated as such in *Hogue v. Bourgois*, 71 N.W.2d 47 (N.D. 1955) and *State v. Loy*, 20 N.W.2d 668 (N.D. 1945).

As noted earlier in this memorandum, NDCC Section 47-01-15 purports to grant that portion of the bed of a navigable stream or lake between the high and low watermarks to riparians who border the water who would then own that portion of the shore zone in fee to the low watermark. No North Dakota case has directly addressed this ownership issue. However, Section 47-01-15 has been analyzed extensively by at least three commentators, all of whom conclude that the statute is most likely unconstitutional.

### EQUAL FOOTING DOCTRINE

As noted earlier in this memorandum, the United States Supreme Court has stated that "[u]pon the admission of a state to the Union, the title of the United States to lands underlying navigable waters within the state passes to it, as incident to the transfer to the state of local sovereignty." *United States v. Oregon*, 295 U.S. 1, 14 (1934). This sovereign state ownership of the bed extends to the ordinary high watermark. By virtue of common law, the equal footing doctrine, the public trust doctrine, the Submerged Lands Act, and the Enabling Act for the State of North Dakota, these lands constitute sovereign public trust lands of the state of North Dakota. The state continues to own the beds of navigable waters to the high watermark in fee subject to a public trust, unless the state has legally conveyed its interests in the bed.

### PUBLIC TRUST DOCTRINE

The Supreme Court of North Dakota has adopted the public trust doctrine. In *United Plainsmen Association v. North Dakota Water Conservation Commission*, 247 N.W.2d 457 (N.D. 1976), the court held that the state holds navigable waters and the lands beneath them in trust for the public. Courts do not favor the conveyance of sovereign land by states and will usually interpret such conveyances restrictively and apply a more rigorous standard than is used to analyze conveyances by private persons.

### NORTH DAKOTA CENTURY CODE SECTION 47-01-15

North Dakota Century Code Section 47-01-15 purports to convey to riparian landowners an interest in that part of the bed of navigable waters between the high and low watermarks. The Supreme Court of North Dakota has never interpreted directly Section 47-01-15 or determined whether this section is

constitutional. The section that is now codified as Section 47-01-15 was enacted by the Territorial Legislative Assembly in 1877. When North Dakota came a state in 1889, the state acceded to the laws of the Dakota Territory that were not repugnant to the Constitution of North Dakota. In Note, *North Dakota Century Code Section 47-01-15; determining North Dakota's interest in the beds of navigable waters*, 59 North Dakota Law Review 211, (1983), the author concludes that:

The Territorial Legislative Assembly had no authority to confer on or vest in riparian landowners any title, interest, or estate in the beds of navigable waters . . . Because the beds were held in trust for the future state by the federal government, an interpretation to the contrary would violate the equal footing doctrine. If either title to or jurisdiction over the beds of navigable waters could be conveyed by territorial legislative assemblies to riparians, new states would enter the Union on less than an equal footing with the original states.

The Dakota government had no authority to confer upon riparians title to the beds of navigable water to the low watermark.

However, NDCC Section 47-01-15 was reenacted when the state revised its civil code in 1895 and Section 47-01-15 was retained in its original form. Thus, an argument could be made that even if the Territorial Legislative Assembly had no authority to enact Section 47-01-15 before the territory entered the Union, the section was reenacted and became law after the state entered the Union.

#### **ARTICLE X, SECTION 18, OF THE CONSTITUTION OF NORTH DAKOTA**

Even if NDCC Section 47-01-15 is interpreted as being reenacted after the territory entered the Union, thus allowing the state to enter the Union on an equal footing with previously admitted states, the section still runs afoul of the public trust doctrine discussed earlier in this memorandum and Article X, Section 18, of the Constitution of North Dakota. This section provides that the "state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its

credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation." Also, Article IX, Section 9, of the Constitution of North Dakota prohibits private individuals from claiming state public lands based on adverse possession. This section provides that "[n]o law shall ever be passed by the legislative assembly granting to any person, corporation or association any privileges by reason of the occupation, cultivation or improvement of any public lands by said person, corporation or association subsequent to the survey thereof by the general government. No claim for the occupation, cultivation or improvement of any public lands shall ever be recognized, nor shall such occupation, cultivation or improvement of any public lands ever be used to diminish either directly or indirectly, the purchase price of said lands."

#### **CONCLUSION**

Although enactments of the Legislative Assembly are presumed to be constitutional, from the foregoing discussion it appears that NDCC Section 47-01-15 would likely be found unconstitutional by the North Dakota Supreme Court. However, until such time as the court addresses this issue, presumably landowners can rely on Section 47-01-15 to occupy the shore zone under color of title. This occupation may encompass such activities as cattle grazing but the riparian landowner cannot exclude members of the public as they have a right to enjoy use of the shore zone under the public trust doctrine. The author of the note cited in this memorandum concludes that Section 47-01-15 may be construed as a conveyance of a mere license to riparians to use the navigable bed to the low watermark in a manner consistent with the state's sovereign ownership and corresponding public trust responsibilities. The author states that "[S]uch a license might allow a riparian to pasture his cattle thereon and to gather firewood therefrom; but he would acquire no private rights over such lands as against the public. The rights provided riparians by this license are subject to revocation by the state of North Dakota by repeal of Section 47-01-15 or by legislation to the contrary. Most importantly, however, this interpretation would not operate to confer on or vest in the riparian any title, interest, or estate in the sovereign lands subject to the license."



REPLY TO  
ATTENTION OF

DEPARTMENT OF THE ARMY  
CORPS OF ENGINEERS, OMAHA DISTRICT  
REAL ESTATE DIVISION  
PO BOX 527  
RIVERDALE, NORTH DAKOTA 58578  
January 16, 2009

Herb Grenz  
7145 5<sup>th</sup> Avenue SW  
Linton, North Dakota 58552

Dear Mr. Grenz:

In accordance with your 14 January 2009 written request for information on the South Dakota Agricultural Leasing Program, the following information/documentation is furnished:

**1. Pursuant to Title VI of the Water Resources Development Act of 1999, most Corps managed lands on Lake Oahe, South Dakota, were transferred to the State of South Dakota with the exception of dam operational areas and lands within the exterior boundaries of the Standing Rock Sioux Indian Reservation. Thus, the Corps has very few leases on Lake Oahe, South Dakota.**

**2. Attached for your information is a copy of current Lease No. DACW45-1-06-7005 to Standing Rock Farms for agriculture and grazing on Corps managed lands.**

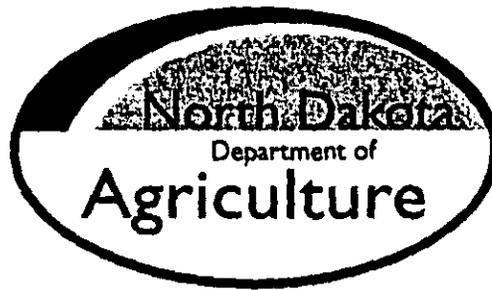
**3. With respect to grazing on Corps managed lands within the exterior boundaries of the Standing Rock Sioux Indian Reservation, I have enclosed a copy of Public Law 85-915 which covers the grazing portion of the lease noted in sub-Paragraph 2 above. The lease basically covers the cropping portion of the lease.**

I hope that this information will be useful to you. If you have any questions, please feel free to contact Mr. Bud Kuhn of my staff at (701) 654-7414, ext. 233.

Sincerely,

Timothy D. Kolke  
Senior Realty Specialist  
Civil Branch, Real Estate Division

Enclosures



## Public Hearing

**Emmons County Weed Board and US Army Corps of Engineers**

**March 3, 2009**

9:30 A.M. to 12:00 P.M.

North Dakota Heritage Center, Lecture Rooms A & B, Bismarck, ND

- 9:30 am **Welcome**  
*Roger Johnson, Agriculture Commissioner*
- Introduction and ground rules
- 9:40 am **Emmons County Weed Board**  
*Herman Mosset, Chairman Emmons County Weed Board*  
Other county representatives
- 10:35 am **US Army Corps of Engineers**  
*Representatives*
- 11:30 am **Response from public**
- 11:55 am **Recap**  
*Commissioner Johnson*
- Identify issues, pro-active steps, list of suggested or recommended actions
- Noon **Adjourn**

North Dakota coin to their...  
the USS North Dakota battleship display. The coin is the first in a series of four, and depicts  
Virginia class submarine 754 with the North Dakota flag in the background. The obverse  
shows the original USS North Dakota battleship that was in commission from 1910 to 1923. The  
coins are available in bronze or silver from the Bismarck-Mandan Chamber of Commerce.

# The monster of weed control

## Meeting tackles growing problem of weeds along the Missouri

By BRIAN GEHRING  
Bismarck Tribune

When the rain comes, crops and pastures do well.

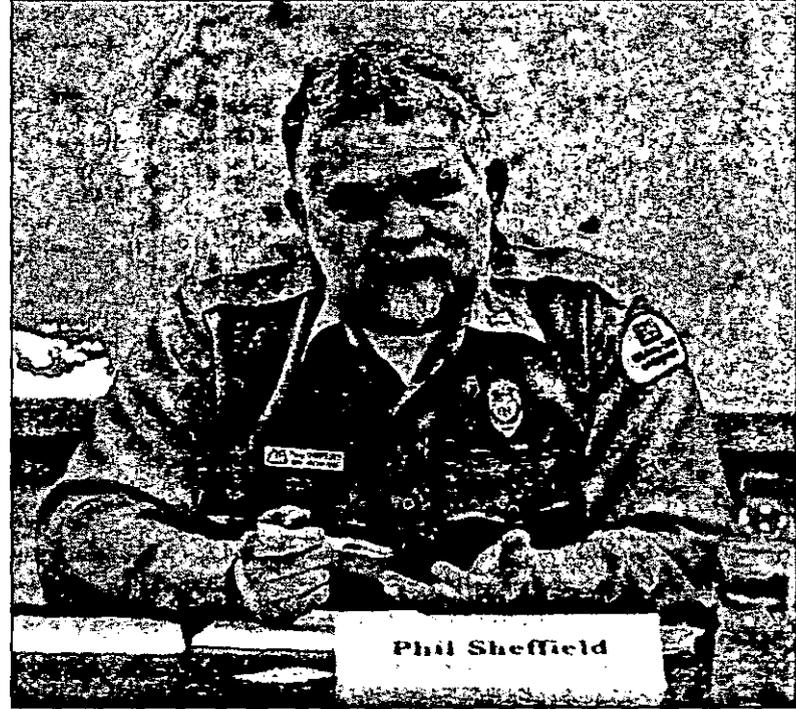
The same can be said for weeds when the rain doesn't come.

The rain hasn't been too timely over the past decade, and the result has been an explosion of invasive weeds on U.S. Army Corps of Engineers land along the Missouri River in Emmons County.

It's become such a problem, especially since the drought has exposed more river bottom land, that a bill in the Legislature, if passed, would urge Congress to transfer that land to the state of North Dakota.

While that's not likely to happen, the sentiment does reflect the level of frustration landowners along the river are feeling.

On Tuesday, the State Department of Agriculture hosted a hearing and a multi-agency meeting at the North Dakota Heritage Center



TOM STROMME/Tribune

Phil Sheffield of the U.S. Army Corps of Engineers said the noxious weed money received from the corps is distributed to local governments.

to see if it could get a handle on what do do about controlling noxious weeds.

The morning hearing came at

the request of the Emmons County Weed Board.

David Kalberer, vice chairman  
*Continued on 6B*

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