

## WEED CONTROL PROGRAMS OF THE ARMY CORPS OF ENGINEERS ON FEDERAL LANDS - BACKGROUND MEMORANDUM

Section 4 of House Bill No. 1459 (attached as an [appendix](#)) directs the study of weed control programs of the Army Corps of Engineers (corps) on federal land under its control. The study must include:

1. Whether the corps is in compliance with federal and any applicable state weed control laws.
2. Whether the corps sufficiently budgets funds to address weed control on corps land.
3. Whether Congress provides proper funding for weed control on corps land.

Section 1 of House Bill No. 1459 contains legislative findings. These findings state:

1. The economy and well-being of the residents of this state are dependent on agriculture.
2. The corps has acquired land around Lake Oahe.
3. The corps has failed to control weeds and properly manage this land.
4. The failure to control weeds by the corps on its land creates a public nuisance and jeopardizes the public health, safety, and general welfare of the citizens of this state.

Section 2 of House Bill No. 1459 urges Congress to transfer lands of the corps around Lake Oahe to North Dakota, excluding lands adjoining the Standing Rock Reservation.

Section 3 of House Bill No. 1459 requires the Agriculture Commissioner to attempt to arrange a noxious weed control program with all state and federal agencies with jurisdiction over land in this state. Similarly, each weed control officer must do the same with political subdivisions with jurisdiction over land in the weed control officer's jurisdiction. In addition, a weed control officer is required to notify a federal agency of any failure to control noxious weeds. The federal agency, on forms specified by the Agriculture Commissioner, is to provide a report to weed control authorities detailing methods used to control and reasons for not controlling noxious weeds. In addition, the Agriculture Commissioner is required to hold a public hearing to determine the reasons for the federal agency not controlling noxious weeds.

As introduced, House Bill No. 1459 required the Governor to direct the state's attorney of each county with lands adjacent to Lake Sakakawea or Lake Oahe to seize that land and transfer it to the Board of University and School Lands. As the bill passed the House, the bill contained solely Sections 1 and 2 of the final version--the findings and urging of congressional action. The Senate added Sections 3 and 4.

The legislative history reveals that the problem of weeds on corps land results from receding water. When the water recedes, weeds grow. One way to control the weeds is by the introduction of cattle early

in the growing cycle of the weeds. However, the corps recently moved the date that cattle can be introduced from May 15 to July 15. The testimony included that the reason for the change was overgrazing by certain ranchers. There was testimony that the July 15 date may be modified to an earlier date with an approved rotational grazing plan from the Natural Resources Conservation Service. If cattle are introduced too late, however, the weeds are too developed and the cattle will not eat the weeds.

Variables that make weed control more difficult is that the amount of weeds is dependent on the water level. When the water level is up, there are not many weeds. In addition, the grazing of corps land below the takings line is in conjunction with privately owned land. If cattle are placed on the adjacent land before the takings land is open to grazing, the rancher is forced to fence out the corps land. Because Lake Oahe rises and falls, fencing is not an economical method of separating private land from corps land.

### STATE AND FEDERAL LAW

The present weed law in this state was rewritten in 2009. House Bill No. 1026 (2009) moved the provisions of weed law from Title 63 on weeds to a new Chapter 4.1-47 in the agriculture title. The bill was the result of an interim study by the Agriculture Committee to eliminate provisions that are irrelevant or duplicative, clarify provisions that are inconsistent or unclear, and rearrange provisions in logical order.

House Bill No. 1026 clarified that it is the duty of each person to control the spread of noxious weeds. The bill provided authority for the Agriculture Commissioner to enter land to assess situations and take samples. In addition, law enforcement agencies were required to enforce noxious weed laws. The bill clarified quarantine authority and provided for the imposition of an emergency quarantine. The bill clearly separated the targeted assistance program for cost-share with county and city weed boards and the landowner assistance program for cost-share assistance with landowners through weed boards that historically have provided assistance for herbicide purchases.

In general, state weed law provides for oversight by the Agriculture Commissioner to designate and control noxious weeds and invasive species. Each county must have a county weed board and must employ a weed control officer. The cost of weed control may be paid from the county general fund or the noxious weed fund. In addition, state funding is provided through the Agriculture Commissioner's office. Cities may have a weed board and weed control officer as well. The law allows for entry onto land for weed control, providing notice to landowners,

and controlling the weeds with the expense made part of the taxes to be levied against the land. In addition, the commissioner may quarantine land to prevent the spread of noxious weeds. It is a Class B misdemeanor to willfully disseminate weeds by transporting weeds. In addition, there is a civil penalty for the violation of the weed chapter or any rule made under the chapter of an amount not to exceed \$80 per day of violation, not to exceed \$4,000.

In Letter Opinion 2003-L-62, the Attorney General addressed the duty of federal agencies, specifically the corps, to control noxious weeds. The first question addressed was whether federal agencies that own or manage land must comply with state weed laws. Although the plain language of the state laws applies to federal agencies, the federal agency may be insulated from state laws through the supremacy clause of the United States Constitution. The letter opined:

[F]ederal agencies owning or managing public land in North Dakota are only required to comply with state noxious weed law where state law is not preempted under the Constitution's Supremacy Clause. "Federal preemption of state law may occur if: (1) Congress explicitly preempts state law; (2) Congress impliedly preempts state law by indicating an intent to occupy an entire field of regulation; or (3) state law actually conflicts with federal law."

The plenary power Congress has over public lands necessarily includes the power to eradicate or control the spread of noxious weeds on those lands, if it so chooses. The extent to which Congress has exercised this power must be examined to fully address your inquiry.

Congress, in various laws, has addressed a federal agency's duty to eradicate or control noxious weeds on federal lands. The Carlson-Foley Act (43 U.S.C. § 1241 *et seq.*) authorizes and directs federal agencies to permit a state agriculture commissioner, or other proper agency head, to enter federal land to destroy noxious plants growing on such land if the state has in effect its own noxious plants control program for privately owned land. 43 U.S.C. § 1241. See Northwest Coalition for Alternatives to Pesticides (NCAP) v. Lyng, 844 F.2d 588, 590 (9th Cir. 1988) ("The BLM is required to control and eradicate noxious weeds on public lands by the Carlson-Foley Act."). The Carlson-Foley Act also allows states to be reimbursed for control costs, but only to the extent Congress appropriated funds specifically to carry out the purposes of state control of noxious weeds on federal land during the fiscal year in which the expenses are incurred. 43 U.S.C. § 1242.

A statutory duty is also found in the Federal Noxious Weed Act of 1974 (7 U.S.C. § 2814). Under it, each federal agency has a duty to develop and coordinate an undesirable plants management program, establish and adequately fund such program through its budgetary process, enter into cooperative agreements with state agencies, and establish integrated management systems for controlling noxious weeds under such cooperative agreements. 7 U.S.C. § 2814. Similar to the Carlson-Foley Act, the Federal Noxious Weed Act does not require federal agencies to carry out noxious weed control programs on federal lands unless similar programs are being implemented on state or private lands in the same area. 7 U.S.C. § 2814(d).

In addition to these federal laws, the President has issued an Executive Order to "prevent the introduction of invasive species and provide for their control and to minimize the economic, ecological, and human health impacts that invasive species cause." Executive Order No. 13112, 64 Fed. Reg. 6183 (Feb. 3, 1999), as amended by Executive Order No. 13286, 68 Fed. Reg. 10619 (Feb. 28, 2003). The President's Order directs federal agencies to use relevant programs and authorities to "detect and respond rapidly to and control populations of [invasive] species." 64 Fed. Reg. 6183 at 6184. An agency may "not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species" unless the agency determines and makes public its determination that the benefits outweigh the harm, and the agency takes "all feasible and prudent measures to minimize the risk of harm." *Id.* As with the Carlson-Foley Act, compliance with the Executive Order is "subject to the availability of appropriations." *Id.*

Congress, in enacting the Carlson-Foley Act and the Federal Noxious Weed Act, directed federal agencies to control or eradicate noxious weeds on public lands. However, those Acts do not provide mechanisms allowing states to enforce state noxious weed laws against federal agencies. Rather, the Acts express a congressional intent to "occupy the field," and thereby prevent application of state law under the Supremacy Clause. See Billey v. North Dakota Stockmen's Ass'n, 579 N.W.2d 171, 178 (N.D. 1998).

Another question addressed in the letter opinion was whether a political subdivision had any remedies against a federal agency that refuses to comply with noxious weed laws. Under the previous Section 63-01.1-13, local weed officials were required to arrange control of weeds on public land and the Agriculture Commissioner had authority to arrange weed control with federal agencies. In addition, the

Agriculture Commissioner was authorized to hold a public hearing to determine the reason for the federal agency's failure or refusal to control noxious weeds. The Attorney General's letter opined that if the Agriculture Commissioner finds that a federal agency is not complying with relevant federal noxious weed control laws, the Agriculture Commissioner or county could explore litigation, including bringing a declaratory judgment seeking a court order forcing compliance.

In short, the opinion states that federal law imposes requirements on federal agencies to control noxious weeds, but these laws do not provide a mechanism for states to enforce noxious weed laws against federal agencies.

## **TRANSFER OF LAND TO STATE OF SOUTH DAKOTA**

Under Title VI of the Water Resources Development Act of 1999, most corps-managed lands on Lake Oahe in South Dakota were transferred to the state of South Dakota except for lands within the Standing Rock Reservation and dam operational areas.

The law transferring federal land to South Dakota states:

The Secretary shall transfer to the Department of Game, Fish and Parks of the State of South Dakota (referred to in this section as the "Department") the land and recreation areas described in subsections (b) and (c) for fish and wildlife purposes, or public recreation uses, in perpetuity.

Under the uses of the land section, South Dakota is to maintain and develop the land outside the recreation areas for fish and wildlife purposes in accordance with fish and wildlife purposes in effect on the date of enactment of the Act or plan developed to restore terrestrial wildlife habitat. In addition, the corps retained the right to inundate with water the land transferred to South Dakota or draw down a project reservoir, as necessary to carry out an authorized purpose of a project.

The following are excerpts from a memorandum drafted by the South Dakota Legislative Research Council on the Missouri River Wildlife Habitat Mitigation Bill. This bill also is referred to as the Missouri River Land Transfer Act. The memorandum encompassed the land transferred to the tribe as well as the state. The following focuses on the transfer to South Dakota. The memorandum states:

In 1944, Congress passed the 1944 Flood Control Act, establishing the Pick-Sloan Program, one of the most significant events in South Dakota's economic history, resulting in the construction of four large dams and reservoirs on the Missouri River and an end to much of the area's flooding problems, not only in South Dakota and the upper Missouri Basin states, but in the downstream states as well.

However, construction of the dams and reservoirs resulted in the permanent flooding of more than half a million acres of Indian and non-Indian Missouri River bottomland and the relocation of several Indian and Non-Indian communities. In addition, many of the Pick-Sloan benefits promised for South Dakota, particularly irrigation benefits, did not materialize, and most of the proposed irrigation projects are no longer being actively pursued.

Loss of the inundated land also meant devastating losses of wildlife habitat, and part of the federal legislation governing the Pick-Sloan Program called for mitigation of wildlife habitat losses incurred after 1958 as a result of the Pick-Sloan Program.

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In the course of constructing the dams and planning for the creation of the Missouri River reservoirs, the Corps of Engineers acquired lands to create a zone or "take line" outside the expected new shoreline of the reservoirs. This land, which was acquired from adjacent tribes and from private owners, both Indian and non-Indian, has been in federal ownership ever since.

Since the late 1970s, when the Oahe Project, the largest of the proposed Pick-Sloan irrigation projects in South Dakota, was halted, the state has pressed the federal government for an appropriate substitute for the loss of inundated lands and the failure of the proposed federal irrigation projects.

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The Missouri River Wildlife Habitat Mitigation bill was drafted primarily as an attempt to seek additional compensation for South Dakotans for the loss of lands under the Pick-Sloan Program and the failure of many Pick-Sloan projects to materialize, as discussed above. The basic concept is that Corps of Engineers "take land" along the Missouri River that is adjacent to Indian reservations would be returned to the respective tribes, and Corps take land adjacent to non-Indian land would be ceded to the state for public use.

Of particular interest was the opportunity for additional public hunting areas, given the controversies that have intensified in recent years over the increasing commercialization of hunting and declining opportunities for South Dakota residents to hunt.

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In general terms, the legislation turns over Corps of Engineers land along the Missouri River that is located within reservation boundaries to the affected tribes that agree to the transfer. Corps of Engineers land that lies outside reservation boundaries would be transferred to the state of South Dakota to be

used for public recreational and wildlife habitat purposes.

The bill also generated some non-Indian opposition from persons whose land was taken for Pick-Sloan project features, such as canals or irrigation reservoirs that were never built or were only partially completed. Some of these landowners believe that such areas should be returned to private ownership rather than transferred to the state for hunting and recreation purposes.

Proponents of the bill hope to address several long-standing problems and issues in addition to compensation for Pick-Sloan losses. These include the provision of additional public hunting, fishing and recreational areas, clarification and simplification of jurisdiction over hunting and fishing regulation and enforcement, improvement of wildlife habitat, protection of Native American cultural sites, and providing funding for those purposes. In addition, proponents view the legislation as a good opportunity to make better use of land currently not needed by the Corps of Engineers by transferring the land to the respective tribes or to the state.

According to a representative with South Dakota Game, Fish and Parks, the following points are important to consider in determining whether North Dakota would desire similar treatment as South Dakota as to corps land:

1. The transfer in South Dakota was a property between the high water mark and the takings line. Most of the weed problem in South Dakota is below the high water mark, i.e., the lake bed, and a similar transfer in North Dakota would not address the weed problem.
2. South Dakota Game, Fish and Parks' first obligation under federal law is to manage the property for wildlife mitigation. The mitigation is for the wildlife habitat taken when Lake Oahe was created.
3. South Dakota Game, Fish and Parks manages the property for the same purposes as the corps did in the past. Although in the opinion of the representative, the state may be more responsive to citizens of South Dakota than the corps, the addition of the state creates an additional layer of government for a neighboring landowner to work with for grazing.
4. The land transfer was moved through Congress under the supervision of the Senate majority leader who was from South Dakota.
5. The transfer was accompanied by funding to the state for 10 years followed by funding from a trust fund that was funded with \$150 million.

## AGRICULTURE COMMISSIONER

The Agriculture Commissioner held a hearing on weed control on corps land on March 3, 2009. The hearing was between the Emmons County Weed Board and the corps. A representative from the corps said that under the master plan (1961), grazing is an "interim use" and not an "authorized project purpose" in support of changing the grazing date to July 15. The grazing restriction was implemented in 1998 in response to the drought conditions. In fiscal year 2007, the corps spent almost \$400,000 on weed control. Seventy-nine percent was spent through contracts with Emmons County. At the time of the hearing, the corps was requesting a similar amount of money for fiscal year 2009. The main solution offered by the corps was for landowners to develop acceptable grazing plans with the corps.

The Agriculture Commissioner has been in contact with the corps. The commissioner, as part of the comment on the corps' efforts to update its master plan, has suggested that the corps:

- Seek additional funding or reprioritize funding (especially when water levels are low), or both, for the control of noxious weeds.
- Regularly map treated and untreated infestations of noxious weeds and prioritize accordingly. This may also aide in a stronger argument for additional funding for weed control in addition to the fact that the corps is mandated to comply with the Federal Noxious Weed Act.
- Place noxious weed control higher on its priority list and categorize noxious weed control as an authorized project to not only protect critical habitat but to stop the spread of invasive species to other lands.
- Implement early season grazing--at least in or near weed-infested areas--as a management tool to further control noxious weeds. Grazing restrictions on weed-infested lands will only add to weed-related problems given that noxious weeds deplete resources, potentially harm habitat, encroach on recreation areas, and decrease the value of land.
- Recognize studies that have shown that livestock grazing does not significantly impact least tern and piping plover nests (see pages 25 and 28 of Aron C. 2005. South Dakota Interior Least Tern (*Sterna antillarum athalassos*) and Piping Plover (*Charadrius melanodus*) Management Plan. South Dakota Department of Game, Fish and Parks, Pierre, Wildlife Division Report No. 2005-02, 76 pp.). A July 15 grazing restriction on noxious weed-infested lands will only allow weed infestations to increase, thereby causing least tern and piping plover nesting habitat to be potentially harmed or lost. Work cooperatively with local county weed boards and the Natural Resources Conservation Service to control

- noxious weeds on corps leased and managed property to prevent weed problems from spreading and causing further harm.
- Work with local lessees to develop an acceptable grazing plan.
  - Enforce lease requirements with regard to weed control and provide guidance and incentives to lessees to manage noxious weeds on project lands.
  - Implement an integrated pest management program for the control of noxious weeds and utilize such methods as biological control and aerial spraying in areas considered inaccessible. However, please note that biocontrol will be ineffective in those areas that are flooded regularly for long periods of time.
  - Distribute a greater portion of resources for noxious weed control to northern Lake Oahe project lands and maintain weed control along property borders to further prevent the spread of noxious weeds to neighboring property and areas downstream.

### **SUGGESTED STUDY APPROACH**

The committee may desire to receive testimony from the involved entities. These entities include landowners, county weed boards, the Agriculture Commissioner, and the corps. Because Lake Oahe straddles the border between North Dakota and South Dakota, the committee may desire to receive testimony from South Dakota Game, Fish and Parks. This department has control over the property surrounding Lake Oahe in South Dakota. If the South Dakota experience is applicable to North Dakota, the committee may desire to receive testimony from the North Dakota Game and Fish Department.

ATTACH:1