

MICROFILM DIVIDER

OMB/RECORDS MANAGEMENT DIVISION

SFN 2053 (2/85) 5M



ROLL NUMBER

DESCRIPTION

2096

2007 SENATE NATURAL RESOURCES

SB 2096

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

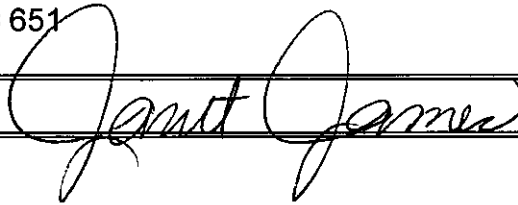
Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: January 5, 2007

Recorder Job Number: # 651

Committee Clerk Signature



Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee brought the committee to order.

Attendance was taken indicating all member of the committee were present.

Senator Lyson opened the hearing on SB 2096, relating to sovereign land management regulations violations and danger in navigable waters.

Dale Frink, North Dakota State Engineer of the North Dakota State Water Commission introduced SB 2096 (see attached testimony #1). He also presented additional background information explaining sovereign lands as land being along navigable rivers, streams and lakes in North Dakota that were acquired at statehood. Sovereign lands are defined as the ordinary water mark from one side of the river, stream or lake to the ordinary water mark on the other side.

This land is public land including the beds, sandbars and the areas of vegetation or wetland. In the last few years there have been issues associated with sovereign lands and the Attorney General's office issued an opinion that required the State Engineer to prepare a long over due sovereign lands management plan. There have been cases of false posting of sovereign lands as the public demand and competition for these lands has increased. As a result a lot of effort

was put into developing this comprehensive plan. Most of the changes will be the rules but there are changes in statute that expand the section stating "lakes" into "waters" and the ability to impose a small penalty. He also commented that adding the suggested phrase "environment" is a concern of the State Health Department but feels comfortable in the removal of it.

Senator Lyson commented that SB 2096 sounds like a simple bill, but is concerned about the rules that would be set down without much input or control of the legislature.

Dale Frink stated the rules are presently in a draft form and would be glad to share them. The bill and rules reflect the General Attorney's opinion and the requirement of the North Dakota State Water Commission be more proactive in managing the sovereign lands. The department is hoping the North Dakota Game and Fish Department will help manage the lands.

Senator Constance Triplett questioned the removal of "by a court" in the third line of the bill.

Dale Frink stated that the various courts should not be the only ones who determine what is navigable because it is an ongoing process. Criteria for determining "navigable" will be part of the rules instead of just what the courts have determined.

Senator Herbert Urlacher asked if and what kinds of violations are presently occurring.

Dale Frink answered that most issues involve all terrain vehicles and hunting on public lands, but for the most part it is an issue of private land owners that claim land as sovereign when it should remain open for use.

Senator Urlacher asked if landowners have access to the water for their livestock.

Dale Frink assured the committee that adjacent landowners always have access to the water. He also commented if it is not sovereign lands, the public cannot walk along the edge of the waters.

Mike McEnroe representing the North Dakota Chapter of the Wildlife Society testified in support of SB 2096 (See attached testimony #2).

Senator Lyson commented he receives correspondence from the societies membership agreeing with SB 2096 and questioned if the membership would also accept the rules that would result with the bill.

Mike McEnroe said the society agreed with what they reviewed in the Water Commission's sovereign lands management plan and that when the rules are available there will be a comment period and will then respond to those rules.

Dennis Fewless, Director of the Water Quality Division of the North Dakota Department of Health testified on SB 2096, clarifying the addition of the word "environment" in the bill was of concern for the department. They are discussing the issue of determining the impact on the environment with the Water Department as the Health Department has the mandate and authority to regulate the rules in determining the rules.

Senator Joel Heitkamp asked for clarification if Dale Frink of the Water Commission wants to take the word "environment" out of the bill.

Dale Frink answered the discussion is not to that point yet although the concern is important and should be considered.

Senator Triplett asked about what rules already exist from their agency.

Dennis Fewless answered the water pollution control rule under Chapter 61-28 already gives the State Water Department the authority to control water pollution as well as waste management and air pollution rules, therefore the discussion between the two agencies is warranted.

Senator Lyson asked for testimony in opposition to SB 2096.

Sandy Tabor, general counsel for the Lignite Energy Council testified on SB 2096 stating they do not have a present position regarding SB 2096, but is happy the two departments are discussing regulations and how "environment" is defined and hopes the committee is cautious in their actions deciding this bill.

Senator Lyson asked if there was any other testimony regarding SB 2096 and hearing none, closed the hearing on SB 2096.

Senator Lyson asked for discussion and stated he has concerns about proceeding with SB 2096 until further information is available.

Senator Triplett agreed and would like to review the draft of the management plan and inquired the time schedule for the draft.

Dennis Fewless responded as much time as the committee would allow, but stated they would need a few days.

Senator Ben Tollefson stated the committee definitely would require more specific information before it could take action on SB 2096.

Senator Lyson announced SB 2096 was to be tabled until a later date.

Senator Heitkamp further commented the issue is real and just because someone owns the land does not mean the public should not have access to the shoreline.

Senator Lyson adjourned the committee.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

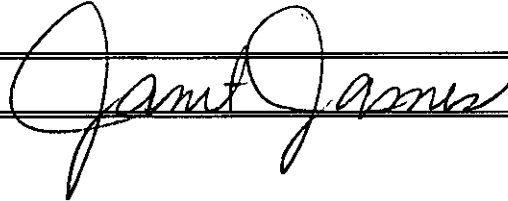
Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: January 11, 2007

Recorder Job Number: # 922

Committee Clerk Signature



Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee opened committee work on SB 2096.

All members of the committee were present.

Senator Lyson stating the Office of the State Engineer of the North Dakota State Water Commission had presented to the committee members the final draft of the North Dakota Sovereign Land Management Plan and had asked the interested agencies to be available for comments and questions.

Todd Sando, Assistant Engineer and the Director of Water Development for the North Dakota State Water Commission, stated Dale Frink, the State Engineer was unavailable and therefore was present before the committee representing the agency. He stated the agency has been working with the North Dakota Game and Fish Department and the State Health Department and the Directors of each were also present. He presented a proposed amendment (See attached) that addresses the issue of giving the North Dakota Game and Fish Department the legal authority to enforce the penalties proposed in the bill. They are also trying to develop MOA and MOU with the Game and Fish Department and the county sheriff departments to help enforce the rules they are trying to adopt. He further explains the amendments (See

attached) including the concerns with the Health Department and the Lignite Energy Council, enforcing the rules and the ability to enter agreements with the Game and Fish Department and other agencies and finally the concern with severity of the penalty.

Senator Constance Triplett stated she would not understand what the words "unless otherwise indicated" inferred if she were not sitting in the committee. She further stated that a court could actually interpret those words to include a higher penalty because it is stated so vaguely.

Todd Sando answered they relied on the recommendation of the Game and Fish Department and referred the question to Director of the North Dakota Game and Fish Department.

Terry Steinwand, Director of the North Dakota Game and Fish Department answered the question as these words are standard when referring to the department's administrative rules. Unless other penalties are specified, often an offense will be classified as Class B non-criminal offense that will not go on a person's record. He agreed that as the law is stated, it would need an explanation.

Senator Triplett asked if a violation could be higher than a Class B misdemeanor.

Terry Steinwand assured the committee that would be the highest penalty by law and that most offenses would be much lower than a Class B.

Senator Lyson asked if the amendment could be defined for a better understanding.

Terry Steinwand confirmed that this language is used on all the department bills unless otherwise indicated which gives the flexibility within the administrative rules process.

Senator Triplett suggested that "unless a lesser penalty is indicated" would be a lot clearer.

Terry Steinwand agreed that would be clearer and was willing to make the change.

Senator Joel Heitkamp commented that would make sense but would the phrase require changes on a lot of other things.

Terry Steinwand answered he did not think it would be a problem, but if Senator Triplett has a excellent point that if she is interpreting it differently, others might do the same, but does not feel that a wholesale set of changes would be required for every bill that already has this language.

Senator Ben Tollefson requested the definition of sovereign lands and if it has any relationship to sovereign lands of the Indian reservations.

Todd Sando answered that sovereign land refers to land to land high water mark and this could be on reservation land but sovereign land refers to the state of North Dakota as described in Chapter 61-33 of the Century Code.

Senator Triplett requested information regarding the removal of the word "environment" within the bill and how the departments involved arrived to the conclusion of eliminating it from the bill.

Dale Sando stated that he was present at the hearing and it was decided the environment will be considered in the rules, but it should be defined in the law and that removing "environment" will not effect the managing of the sovereign lands and are therefore is willing to remove it because of the Health Departments concerns.

Senator Layton Freborg asked if not all Game and Fish lands are not sovereign lands as they are government lands, owned by the state.

Terry Steinwand confirmed that under the laws they are state lands of North Dakota and are not considered sovereign lands under this definition, although there are some areas of purchased lands that do include sovereign lands.

Senator Triplett clarified that there is a difference between the sovereign lands under navigable waters definition as opposed to the land the state purchases for other reasons, like

school lands or for other propriety reasons. These lands can be bought and sold whereas the other sovereign lands are held in trust and are not allowed to be sold.

Senator Lyson stated the amendments will be given to the Legislative Council to be drawn up to be studied.

Dennis Fewless, Director of the Water Quality Division of the North Dakota State Health Department responded to Senator Triplett question regarding the department's involvement in the decision to remove "environment" from the SB 2096 stating that removing the "environment" is acceptable. The department has always had a good working relationship with the Water Commission and North Dakota Game and Fish Department regarding any environmental issues, and has implemented any pertinent rules. He further stated that after reading the amendments, his department is considered to be one of the agencies referred to in Section 3 on Page 3, after line 20 and if the need arises they could also enter into a MOU with the Water Commission. His department would not have to be specifically listed in the bill because they are already included as "another law enforcement entity."

Senator Triplett had a concern that more dependence might be given to the North Dakota Game and Fish Department or not enough acknowledgment to all other entities if all are listed.

Dale Frink explained that a lot of the department's rules regard issues that are related to the Game & Fish Department for law enforcement and just did not want to name all the departments they work with.

Senator Triplett again asked why name any of the departments.

Senator Lyson stated that there is only a small portion of the Game & Fish Department that is law enforcement and the other sections of the Department to not have the authority, so therefore list them separately.

Senator Heitkamp added that North Dakota Game and Fish Department is needed to be specifically listed within the bill because the public needs to know who has the authority.

Todd Sando further stated the Water Commission needs different departments for additional support in enforcing their rules because they do not have an enforcing division.

Senator Herbert Urlacher asked if the federal regulations are the responsibility of the State Water Commission to regulate and if this bill writes an agreement with the Game & Fish to enforce the responsibility although it still lies with the Water Commission.

Todd Sando confirmed this to be true and that there are different acts regulated by the Federal government that defines sovereign lands.

Lee Klappardt, Director the Planning and Education Division of the North Dakota State Water Commission, repeated how the management plan developed due to the direction of the Attorney General's office. He referred to the management plan and he further described sovereign lands on navigable waters that are determined by prescribed criteria and preceded to list some of small number within the state. He further explained the management plan to included criteria of navigation of waters at statehood and the waters need to be considered a highway of commerce to be considered navigable so that small lakes or pot holes cannot be included. He also explained the ordinary high water mark and how it is defined in the administrative code and by the Supreme Court.

Senator Lyson stated that instead of Mr. Klappardt reviewing the entire management plan the committee members could ask questions if they required explanation of any sections.

Senator Lyson asked if there will be time for public comment on the management plan.

Lee Klappardt confirmed there were public hearings across the state as required although they were not very well attended. He further added the real guts of the plan were in the nineteen recommendations and many issues already raised are answered in the plan.

Senator Triplett asked how well the public hearings were attended.

Lee Klappradt answered there were meetings in Williston, Minot, Fargo, Valley City and Bismarck which had the largest attendance (20-30 people) due to the issues of development in the Bismarck/Mandan area.

Senator Triplett asked if the Water Commission anticipated further public hearing processes as interest is developed when other areas of the state are affected.

Lee Klappradt envisions this to happen in the future.

Senator Triplett asked for confirmation that the sovereign land management plan was not intended to become part of the administrative code but is an internal working set of codes.

Lee Klappradt assured the committee the plan is not cast in stone and is a working document that will be modified as needed. The State Engineer of the Water Commission only inherited the Sovereign Lands Management Plan recently and will aid the Commission in consistent management of the sovereign lands along with the laws and regulations.

Senator Freborg asked for an explanation of the navigable test.

Patrick Fridgen, a member of the planning staff of the Water Commission, explained two criteria is used for determination of "navigable" including the historical documentation of a body of water being used as highway of commerce and the accessibility for navigational purposes.

Senator Heitkamp asked if and how the Corp of Engineers was involved with this process.

Lee Klappradt answered the Corp of Engineers involvement is based on Section 10 law that makes the Corp part of the determination of navigability to whether it is federal water having an impact on the said navigable water in question or not or if it is sovereign land or not.

Patrick Fridgen clarified the North Dakota only has title to the original bed of the Sakakawea Reservoir and Lake Oahe and the land flooded is considered to be a separate tracks of land.

Senator Heitkamp asked for confirmation that this is a North Dakota issue and the Federal Corp of Engineers has no involvement.

Lee Klappradt sited the issue of the Corp of Engineers wanting to establish bird habitat on the sand bars on the Missouri River. The Corp did not have control because the sandbars belong to the state of North Dakota and were required a permit from the State Engineer because it is ruled as sovereign land.

Senator Lyson commented the amendments will be drawn up and a later time will be set for later review.

Senator Lyson closed the committee work on SB 2096.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

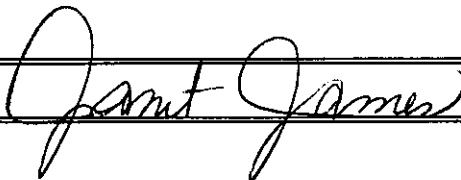
Senate Natural Resources Committee

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Hearing Date: January 18, 2007

Recorder Job Number: #1334

Committee Clerk Signature



Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee opened committee work on SB 2096 relating to sovereign land management regulations, violations and dangers in navigable waters.

All members of the committee were present except **Senator Joel Heitkamp** who was testifying in another committee.

Copies of the proposed amendments were distributed to the committee members.

Senator Lyson suggested that after reviewing the amendments further discussion would be held the next day.

Todd Sando, Assistant State Engineer of the North Dakota State Water Commission, told the committee the department had some concerns with the penalty section of the amendment on page 4. The portion of the bill has been removed; "subject to a civil penalty not to exceed \$1000.00 for each violation."

Senator Lyson commented that was the penalty for Class B misdemeanor and further clarification within the bill was necessary.

Senator Constance Triplett informed the committee that after discussion, this phrasing is the cleanest language.

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Senate Natural Resources Committee

Bill/Resolution No. SB 2096

Hearing Date: 1-18-07

Senator Lyson again informed the committee that after Senator Heitkamp has an opportunity to review the amendment, the committee will work further on the bill.

Senator Lyson adjourned the committee.

2007 SENATE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

Senate Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: January 19, 2007

Recorder Job Number: 1459

Committee Clerk Signature



Minutes:

Senator Stanley Lyson, Chairman of the Senate Natural Resources Committee brought the committee to order.

Attendance was taken indicating all members of the committee were present.

Senator Lyson asked the committee to take a look at a mock-up of the bill with the proposed amendment including the use of the better language as suggested by **Senator Constance Triplett** (see attachment).

In questioning if the North Dakota State Water Commission agrees with the amendment, **Senator Triplett** reminded the committee that **Todd Sando**, Assistant Director of the State Water Commission had told them the day before the department had no further questions regarding the amendment indicating their approval.

Senator Ben Tollefson made a motion to adopt the amendment as written in the mock-up bill.

Senator Pomeroy second the motion.

Roll call vote #1 of a voice vote was taken indicating 7 Yeas, 0 Nays and 0 absent or not voting.

Senator Tollefson made a motion for a Do Pass as Amended of SB 2096.

Senator Pomeroy second the motion.

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Senate Natural Resources Committee

Bill/Resolution No. SB 2096

Hearing Date: 1-19-07

Roll call vote # 2 for a Do Pass as Amended for SB 2096 was taken indicating 7 Yeas, 0 nays and 0 absent or not voting.

Senator Joel Heitkamp will carry SB 2096.

Senator Lyson closed the committee work on SB 2096.

PROPOSED AMENDMENTS TO SENATE BILL NO. 2096

Page 1, line 2, after the semicolon insert "to amend and reenact subsection 1 of section 20.1-02-15.1 of the North Dakota Century Code, relating to additional powers of the game and fish department;"

Page 1, line 4, after the semicolon insert "to amend and reenact section 61-33-05 of the North Dakota Century Code, relating to duties and powers of the state engineer;"

Page 1, after line 5, insert:

"SECTION 1. AMENDMENT. Subsection 1 of section 20.1-02-15.1 of the North Dakota Century Code is amended and reenacted as follows:

1. To enforce state laws and rules on any game refuge, game management area or other land or water owned, leased, or managed by the department, and on sovereign lands."

Page 1, line 9, overstrike "a"

Page 1, line 14, remove "or the environment."

Page 1, line 19, remove "or the environment."

Page 3, line 8, remove "or the environment."

Page 3, after 20, insert:

"SECTION 3. AMENDMENT. Section 61-33-05 of the North Dakota Century Code is amended and reenacted as follows:

61-33-05. Duties and powers of the state engineer. The state engineer shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all rights of the owner in its own name; may issue and enforce administrative orders and recover the cost of the enforcement from the party against which enforcement is sought; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter. The state engineer has the authority to enter into agreements with the game and fish department or other law enforcement entities to enforce this chapter and its related administrative rules."

Page 3, line 24, after "misdemeanor" insert "unless otherwise indicated"

ReNUMBER accordingly

REPORT OF STANDING COMMITTEE

SB 2096: Natural Resources Committee (Sen. Lyson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (7 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2096 was placed on the Sixth order on the calendar.

Page 1, line 3, replace "section" with "subsection 1 of section 20.1-02-15.1 and sections", after "61-03-21.3" insert "and 61-33-05", and after "to" insert "powers of the game and fish department,"

Page 1, line 4, after "waters" insert ", and powers of the state engineer"

Page 1, after line 5, insert:

"SECTION 1. AMENDMENT. Subsection 1 of section 20.1-02-15.1 of the North Dakota Century Code is amended and reenacted as follows:

1. To enforce state laws and rules on any game refuge, game management area, or other land or water owned, leased, or managed by the department and on sovereign lands."

Page 1, line 9, overstrike "a"

Page 1, line 13, remove the overstrike over the first "or", remove the first underscored comma, remove the overstrike over the second "or", and remove the second underscored comma

Page 1, line 14, remove "or the environment."

Page 1, line 18, remove the overstrike over "or" and remove the underscored comma

Page 1, line 19, remove the overstrike over "or", remove the first underscored comma, and remove "or the environment."

Page 3, line 7, remove the overstrike over the first "or", remove the first underscored comma, remove the overstrike over the second "or", and remove the second underscored comma

Page 3, line 8, remove "or the environment."

Page 3, after line 20, insert:

"SECTION 3. AMENDMENT. Section 61-33-05 of the North Dakota Century Code is amended and reenacted as follows:

61-33-05. Duties and powers of the state engineer. The state engineer shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all rights of the owner in its own name; may issue and enforce administrative orders and recover the cost of the enforcement from the party against which enforcement is sought; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter. The state engineer may enter agreements with the game and fish department or other law enforcement entities to enforce this chapter and rules adopted under this chapter."

Page 3, line 24, replace "and is subject to a civil penalty not to exceed one thousand" with "unless a lesser penalty is indicated. A"

Page 3, line 25, remove "dollars for each violation. The"

Renumber accordingly

2007 HOUSE NATURAL RESOURCES

HB 2096

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

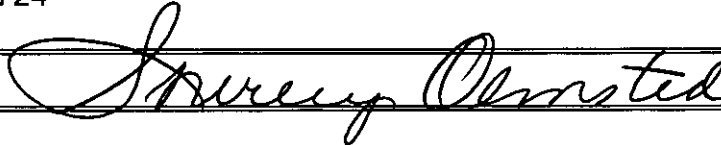
House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: February 23, 2007

Recorder Job Number: 3724

Committee Clerk Signature



Minutes:

Chairman Porter opened the hearing on SB 2096 and asked the clerk to read the title.

Mr. Todd Sando, Assistant State Engineer, came forward as a sponsor of SB 2096. Two years ago, the Burleigh County Water Resource Board had asked the Attorney General's office for an opinion on some developments that were going on the Missouri River. We had been drafting permits for them to mitigate on public land for some of these marina projects and developments. The Attorney General said we needed a comprehensive sovereign lands management plan in order to be issuing these permits. The last two years we have put together a sovereign lands management plan and have worked a working group of some other state agencies from Game and Fish, Health Department, the Historical Society and several other agencies to draft a plan to come up with twenty recommendations as sovereign lands are becoming more and more utilized all the time. We are having more and more controversy with people along the rivers and lakes and they are encroaching on the public lands. We have had issues with developers and landowners that are trying to claim sovereign lands so we feel it is important that we need to get out and take a more active role in managing sovereign lands and have a better way of handling the boundaries. We needed some changes in legislation to

help move the sovereign lands management plan forward. There are four parts to the bill.

See written testimony marked as Item #1.

Chairman Porter asked if he could explain the new language on the top of page 2, line 3 beginning with "if a building". In regard to the expansion of navigable water; are you talking about spring runoff?

Mr. Sando said that would be in reference to Devils Lake when the lake continues to grow and keeps getting larger and larger. Actually the ordinary high water mark over time is moving upwards so it is expanding. The sovereign land is actually growing in the area up at Devils Lake.

Chairman Porter asked if that was an automatic taking by the state as that body of water grows or is there a process?

Mr. Sando in a way it is like an automatic taking but the soils and the vegetations all has to change and this takes time so the ordinary high water mark is ambulatory and moves up and down based on weather conditions. Right now we are in a wet cycle so the sovereign land area is growing in some of these lakes like Devils Lake. The Missouri River is just the opposite and it has been flowing much lower for a long time so in this case the ordinary high water mark may be moving down.

Chairman Porter asked about the penalty section on the last page of the bill. Regarding the civil proceeding of 28-32, is that the normal administrative law chapter in the century code?

Mr. Sando said to his knowledge it was.

Representative DeKrey asked that if this bill passes you would actually have to write rules on how this would be implemented. You must mostly have that in place. Is that correct?

Mr. Sando said no we don't. We just have a draft plan and we will have to go into the rule making process and have public hearings and develop those rules through the rule making process.

Representative DeKrey asked if they were a long ways away from implementing this.

Mr. Sando said they were several months away from getting it implemented.

Representative Solberg asked him to explain navigable waters for him.

Mr. Sando said this is land that is below the ordinary high water mark so along the rivers and lakes anything that would fall below the ordinary high water mark is considered sovereign lands.

Representative Solberg said there has been some concern about the sovereign land. Does that mean the reservations?

Mr. Sando said that was a different definition. When you hear about sovereign nations that is tribal land. Sovereign land in this context is when it is controlled by the State of North Dakota.

Representative Solberg said there was some concern from of the folks that water their livestock from the Cannonball River which is very low in the midsummer. Will this have any affect on those folks and will it restrict them in any way to continue to water their livestock out of this river?

Mr. Sando said regarding the Cannonball River, right now the river is not determined as navigable so the adjacent landowners along the Cannonball River own to the centerline of the river so they have access to the centerline of the river to water their livestock. The Cannonball River is not considered navigable at this point.

Representative Damschen asked as the ordinary high water mark rises how does this affect the taxation for landowners who have been farming this land.

Mr. Sando said there is that area between the ordinary low water mark and ordinary high water mark when it is ambulatory that there is joint ownership with the landowner and the State of North Dakota. What is happening is the landowners continue to pay taxes on that land because the ordinary high water mark may move down and this is still their private property.

Representative Damschen said on page 1 regarding navigable it looks like so far that determination has been made on individual cases but what is the definition of navigable if this bill passes.

Mr. Sando said on navigability, not all the rivers have gone through the court system to determine if they are navigable so there are a lot of others we will just have to deal with that we feel are navigable or not and will have to look at and make the determination. For example, the James River, right now only part is determined navigable. In fact, it is only the lower James River that is considered navigable and the upper James River is not. We have the ability to assert jurisdiction based on putting together navigability criteria.

Representative Damschen will that just be up to the discretion of State Water Commission or the State Engineer or how will that be determined.

Mr. Sando said they have actually started the process by hiring a consulting firm to help with laying out guidelines regarding navigability and issues of ordinary high water marks and determining what the ordinary high water mark is. We will rely on that criteria and our goal would be to go out and try to start to delineate some of these real controversial areas like the confluence of the Yellowstone River up by Williston through to the Bismarck stretch. Right now no one knows where the line in the sand is and what is sovereign land.

Representative Nottestad said that Devils Lake is navigable, correct?

Mr. Sando said that was correct.

Representative Nottestad asked as Devils Lake and Stump Lake merge to one, will that make Stump Lake considered to be navigable?

Mr. Sando said that would be his understanding.

Representative Nottestad said going back to the second page where it speaks about buildings, structures, etc, so our farmsteads that are going to be completely inundated it seems weird that whoever owned it last is responsible. How are you going to deal with these people when their entire farmsteads are going to be submerged? Give me a scenario on this.

Mr. Sando said actually they have already been doing that this past couple of biennium's when we got legislation passed with the area around Devils Lake. The local health officer and Health Unit up in Devils Lake would issue an order for the debris to be removed so they have been going down that path when the State Engineer gets involved with that process to get the debris and to get the houses and structures and outbuildings removed

Representative Nottestad said let's get to money. Who picks up the tab on this?

Mr. Sando said it is the responsibility of the landowner.

Representative Nottestad said so he loses his land and he loses his home and he has to pay for the damages.

Mr. Sando said yes but there is flood insurance and other programs that have been compensating a lot of the landowners for lots of their structures.

Representative Nottestad said most of these farmers that are taking out flood insurance on these outlying buildings knowing they have little value and that they will be responsible for the removal.

Mr. Sando said it was his understanding that there was not much being insured for the out buildings and in fact I am not sure if they are insurable.

Representative Nottestad said previously you said that flood insurance would be available but obviously that is not an answer.

Mr. Sando said it does not deal at all with the actual land. It is just the residence.

Representative Nottestad said he realized that.

Chairman Porter asked if in those situations where it does come up and takes their land, how long does it take before the taxation changes if the land becomes sovereign and the high water moves. Is there a process that the state is required to go through in order to do that taking?

Mr. Sando said the taxation is on a local government so they are the ones that are reducing the taxes and dealing with all of that. The local taxing authority deals with that. The state does not get involved in that.

Chairman Porter said so we do not address that even though we could say that once the land becomes sovereign a local political subdivision can't tax the individual any longer. We could say that right?

Mr. Sando said yes I guess so.

Representative Drovdal said that somewhere he was missing the boat. When the water comes up, like at Devils Lake, that land is considered sovereign because of the new high water mark and in a way we are actually give the title to the state to manage it. What is the compensation since we are taking that land away from the individuals? When Devils Lake goes down which will eventually happen according to history, is that land then given back to that landowner or does it remain in the control of the state?

Mr. Sando said no it reverts back to the landowner with the ordinary high water mark being ambulatory that line changes.

Chairman Porter asked how often does that line change. Do you look at it every year, every two years, every fifty years or every hundred years? I know how it changes on the way up but my questions is how does it change on the way down.

Mr. Sando said basically on the way back down if there is no water on it the adjacent landowners have rights to use it to the waters edge, even if it is below the ordinary high water mark so really the adjacent landowners can follow the water right back.

Chairman Porter said but he was talking about putting a building back where one once was and it was flood. Now the water is going back down. How soon would that high water mark change to the point so that they can put that building back?

Mr. Sando said that is complicated because the vegetation type has to change back and there is always criteria relating to vegetation type and soil classification. Now it is going back to non-hydric soils so it is a combination of issues that is going on with the soil and vegetation.

Chairman Porter said so on the way up it changes a lot faster than it does on the way back down.

Mr. Sando said it all depends on the rate of rise and the rate of decline. Rate of rise can usually go up a lot faster and evaporation will only remove a couple of feet of water a year on any given lake. It doesn't move down as fast as it can possibly go up.

Representative Drovdal said his definition of the high water mark is the average highest that would get to so you can protect yourself from flooding. Your definition of high water marks sounds like wherever the shoreline is at. According to the way the testimony is going here that is the impression I am getting. Am I correct?

Mr. Sando said it is not actually the exact shoreline where the waters edge is. It is vegetation type and if the soils are hydric then it could be three or four feet up the bank where the

ordinary high water mark is. Devils Lake can bounce up a couple of feet or the Missouri River at some periods can be four or five feet higher in the wintertime.

Representative Drovdal said you are saying that high water mark can change every year.

Mr. Sando said on lakes more often than rivers. Rivers are more constant.

Representative Damschen asked him to explain the difference between meander line and high water line.

Mr. Sando said he would try. The meander line is when they came in and did the original survey. They meandered out a lot of the water bodies. Anything below the leaps and bounds of the meandered water body was considered meandered land and anything above is considered private land.

Representative Damschen said what are the implications of the meandered lands compared to the ordinary high water mark. What is the significance of the meander line?

Mr. Sando said the meander line is more a taxation line and the landowners pay down to the meander line and that is what they actually own title to. Anything below the meander line they don't have title to that land.

Representative Hofstad said he was not clear on the meander line. When the sovereign land was determined and these meander lines were set, the definition of a navigable body of water was determined and they determined those meander lines. Can you address that? I am still not clear as to what kind of body of water you consider navigable. Are they slues or are they lakes or are they navigable or are they not navigable. Can you try to sort that through?

Mr. Sando said he would like to have the State Engineer address that.

Mr. Dale Frink of the State Water Commission, State Engineer, said that when they set the meander lines back in the 1800's they were not thinking navigability and they were not thinking of sovereign lands. It is a line that they put in place where they wanted to meander out in the

lakes and they were looking at homestead lands where everyone was entitled to 160 acres of land so if there was a piece of it that was in a lake, they would meander that out so maybe you would get 120 acres on this quarter and you would get 40 acres somewhere else. It has become a tax line and the sovereign lands and the definitions of the navigability has actually been in the court system later than that. Let's just take Stump Lake as an example. That was meandered in the 1420 range and so then the landowners had access all the way down to the water but they didn't take any taxes below that meander line. Now it is 20 feet above that and they still make them pay taxes. That is determined by the county. In Devils Lake the counties after a couple of years typically will reclassify those lands as waste land so they paid pennies. The State Water Commission and the State Engineer do not get involved when this happens. That does not relate specifically to this bill. The county will reclassify those lands from time to time. In Devils Lake as the lake comes up, the sovereign lands grow and as Devils Lake drops the sovereign lands decrease. The county could possibly go back and reclassify that land. Sovereign lands at Devils Lake is the water level where it is right now plus or minus.

Chairman Porter asked if there was any reason why we don't have the taxation issue tied to this moving line because a landowner paying taxes on flood land for two years doesn't seem very fair to me. Is there any reason why when it comes up that it just isn't triggered within a mechanism like this?

Mr. Frink said that this is a local issue and when they make that change, we do not get involved in that process at all.

Representative Drovdal said going back to sovereign land and the water line, can't there be a potential for an access problem for ranchers where they could actually restrict them from allowing the livestock to drink that water.

Mr. Frink said the preparing landowner always has access to the water so this gets to be a gray area. There is also a difference if it is a stream or a river and like Devils Lake as a spring or a river the ordinary high water mark is more fixed but it still can change but it doesn't go up and down with the water elevation. During a flood it can come up for ten days and go down and does not change during that period. Devils Lake is different because it comes up slow and stays there for awhile but on a river situation the ordinary high water mark is determined differently.

Representative Meyer said there are a lot of ranchers in Sioux County, Grant and Morton County that are concerned and had attended several federal meetings last year in concerns with the language in this as to what becomes sovereign land. When you remove the lake and put in waters it means virtually every stream everywhere. With that, when you take away the navigability of these streams and allow it to be determined by the Court it seemed to be a much better idea. Take the Little Missouri for example, the high water mark is unbelievable in May and April when have the ice backing up as to when it slow down to a trickle and you can walk across it and it doesn't come up to your ankles. It has always been a big argument as to whether it is navigable or not. I know that ranchers do have a great deal of concern with this bill as it would virtually make everything above the high water mark sovereign lands.

Mr. Frink said that this bill does not directly deal with what is sovereign and what is not sovereign lands. It deals with management of whatever the sovereign lands are. The determination of what is sovereign can be controversial and most of them do end up in court where they must determine that a stream or river is sovereign or not. This bill deals with the land that is sovereign. If is determined to be sovereign than it would be affected by this bill. Those issues have to be determined separately.

Representative Meyer said to follow up on this that was my point. I don't believe that if you are not going to define sovereign in this bill, and then you are taking out the navigability being determined by the court, and there again I am just speaking for the farmers and ranchers and the streams on the Little Missouri. They are feeling that this is a dangerous precedent to go with. You are taking out lakes and putting in all waters. You haven't defined sovereign lands and when you take out the court determining if they are navigable or not, it has always been an argument.

Mr. Frink said that first of all the Little Missouri has been determined to be not navigable. It would be very difficult to overturn that in the courts and not to say that it is impossible but there are advantages and disadvantages to having sovereign. For example if it is not a sovereign land, then that landowner will own all the way across the river. If they want to fence it and stop the canoeist and recreationalist, I don't know how we could stop them. If is sovereign then it is available to the public. If Lake Isabelle was sovereign then you could walk all around that lake because you are walking on public land. If it was not sovereign, and a neighbor didn't like you he could say you were trespassing once he got to your lot line. We get comments that are plus or minus on this. There are advantages to having it public.

Chairman Porter asked where the definition of sovereign land is inside the century code. Is there one?

Mr. Frink said there was a definition in Chapter 6, 133 and there have been supreme court ruling that have provided further definitions of this.

Chairman Porter said one of the areas of confusion is on page 1 line 18 why the "by a court" portion of the existing law needs to be removed. There is an overstrike of "by a court".

Mr. Frink said the reason for that is that it is going to be a substantial time before some of these bodies of water will be determined or a lot of these won't be determined by a court. I

don't know if Lake Isabelle will be a court case or not or others. In some cases, we are going to have to make a ruling and then it would be challenged in court. We get requests all the time to make rulings on everything from boat docks and so forth. It gives us some flexibility.

Representative Damschen said his concern that the definition of sovereign lands is really dependent on the determination of whether it is navigable waters or not for this bill. If there is a discrepancy or disagreement or question, I would hate to see in any case it referred to the Corps of Engineers definition of navigable waters. I guess if it affected the landowner, his only recourse would be to challenge that determination in the court.

Mr. Frink said going to court it is going to be expensive. Some of the major rivers like the Knife River and the Little Missouri River over time they will be but I am not sure about the small lakes.

Representative Hofstad asked about the liability issue with the State Engineer or the Health Department is responsible for the removal of all the obstructions that are in the lakes and rivers and we don't meet that obligation which has certainly been the case. Is the state ultimately responsible or is there a liability issue addressed?

Mr. Frink said that has always been an issue with Devils Lake and that was the issue when the legislature put that bill in place regarding Devils Lake several years ago. The debris in Devils Lake gets to be a public hazard and the legislature felt at that time that it was necessary and more of an issue than the liability that might be incurred by putting this in law. What it does in Devils Lake is encourages the removal of the debris and the buildings rather than just leaving them.

Representative Keiser asked about the new language on page 2, and it carries over from page 1. Why are we exempting a fence or corral?

Mr. Frink because that is what the legislature did in the original bill. They felt that some of the fences and corrals if they required them to remove them the water may come down and therefore the fence and corral would be needed.

Representative Keiser said part of that is "partially" submerged. From your department, what does that mean? I am talking about a building or structure.

Mr. Frink said to him that would be any portion or corner of the building.

Representative Keiser said on the last page regarding the penalty, we are going to give you the authority to adjudicate the proceedings rather than requiring you to go to court. What if you just go to court rather than use the adjudicative proceedings?

Mr. Frink said he does not know that but he can get back to them on this. On the senate side, we did reduce the penalty that we added in that first paragraph unless it was a penalty as indicated. If Game and Fish wanted to issue you a ten dollar fine they could do it. This gives us some flexibility. I suspect we would probably not go to court unless there was some really good reasons to do so.

Representative Keiser said the on the language of partially submerged, should there be some requirement to define it as "substantially partially submerged" and not some technical point like the corner of a building with water touching it.

Mr. Frink said most of his experience has been in the Devils Lake basin. On a home that is the point of which it becomes eligible for flood insurance. I know that there have been structures that have not been removed at that point. Some of them have gotten to the depth where they cannot be removed. It is a complicated thing with flood insurance and they have provided waivers in some portions of the lake.

Representative Nottestad said that it speaks about building structures and debris. What about farm equipment, cars, tractors and the like that has been under water. How would this bill deal with that? It is happening and you know it and it has happened.

Mr. Frink said the State Engineer has the authority to order it removed and in all cases that has not been done. That has been in the Devils Lake area for some time and we have expanded that to the Missouri River. If a car is abandon on the river we have the ability to at least to get this removed at the tenant's expense. We had that happen on an estate and we went ahead and moved it because there was barely enough money in the estate to get the guy buried. A couple of years ago, a guy was having his car repossessed so he drove it over a cliff and it ended up on sovereign lands and those type of things would allow us to take care of this.

Representative Nottestad asked if this bill passes would they look at some of this stuff earlier or do you think life would go on as it has in the past.

Mr. Frink said they would look at it as staff allows.

Representative Damschen asked if FEMA had an effect on sovereign lands.

Mr. Frink said it really doesn't have an affect on sovereign lands per se but yes it does have an affect on when structures can be moved. You don't want to move these structures until they have received the flood insurance.

Mr. Mike McEnroe of the ND Chapter of the Wildlife Society came forward in support of SB 2096. See written testimony marked as Item #2. They feel that this does give the State Engineer the ability to manage these sovereign lands. One suggested amendment to the bill would be to reinsert the words "or the environment" that were taken out. There was some concern that the State Engineer had the responsibility for environmental factors or does that lie with the State Health Department.

Chairman Porter asked for further testimony in support of SB 2096. Hearing none, he asked for opposition to SB 2096.

Mr. Ron His Horse is Thunder, Chairman of the Standing Rock Sioux Tribe came forward in opposition to this bill. Please see written testimony marked as Item #3.

Chairman Porter asked if there was any further opposition to this bill. Hearing none, the hearing was closed on SB 2096.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

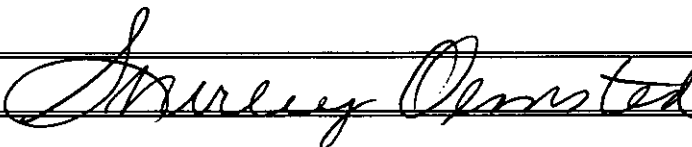
House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: February 23, 2007

Recorder Job Number: 3725

Committee Clerk Signature



Minutes:

Chairman Porter opened the discussion on SB 2096. He thinks that a sub committee should be created to address this bill.

Representative Damschen, Representative Hofstad and Representative Meyer will make up this subcommittee.

The session was closed.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

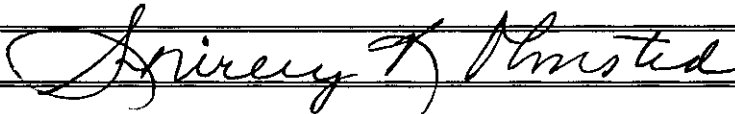
House Natural Resources Committee - Subcommittee

☐ Check here for Conference Committee

Hearing Date: March 1, 2007

Recorder Job Number: 4224

Committee Clerk Signature



Minutes:

Chairman Hofstad opened the subcommittee hearing on SB 2096.

For the record all three sub committee members are present including Chairman Hofstad, Representative Meyer and Representative Damschen. Todd Sando, Assistant State Engineer, Matt Sagsveen, Assistant Attorney General, Pat Fridgen, State Water Commission, and Paul Schadewald from the Game and Fish were also present. This subcommittee has been charged with reworking SB 2096. He asked for Mr. Sagsveen to start by giving them a short cursor on exactly what sovereign lands are and how they are defined.

Mr. Sagsveen said there have been many court cases on what sovereign lands are and the extent of sovereign lands. Sovereign lands are lands that are acquired by the state based on a number of federal laws and federal court decisions. The state holds these lands in trust for the public. For instance, take Devils Lake. The federal court has determined that Devils Lake is navigable and the bed of the Missouri River. I have some attorney general's opinions that I can give you to. The citations on them go into great detail as to what sovereign lands are. It is literally pages upon pages of case citations.

Chairman Hofstad said generally would that determination have been made when the surveyors came across the state when they surveyed it and made the determination of the body of water as navigable or did that enter into it.

Mr. Sagsveen said the short answer is no. The United States Supreme Court has developed a test and I can state the test for you. It is a short paragraph. It is from a case call the Daniel Ball which is an 1871 case. The test is they are navigable in fact when they are used for or susceptible of being used in their ordinary condition as highways for commerce for which trade and travel are or may be conducted in the customary modes of trade and travel on water. It is not exactly A plus B equals C. There are some complicated factual things that you must go through and there are a number of bodies of water in the state of North Dakota that the courts have determined are navigable. The Federal Government has also determined that the Little Missouri is not navigable despite there was a long history of movement of transportation of logs on the rivers and some commerce, but the court said it is not navigable. As it stands the land under the Little Missouri is not sovereign lands.

Representative Damschen asked if they were defining sovereign lands or navigable waters.

Mr. Sagsveen said they are both intertwined.

Representative Damschen said in this bill is the definition of sovereign that broad or is it limited to how it is outlined in section 61-33-01.

Mr. Sagsveen said as far as he knows but he said he did not think this bill was changing the definition of what is and what is not sovereign lands. That would be in the State Engineer's Administrative Rules definition of navigable streams and waters. Actually 61-33-01 defines sovereign lands.

Representative Damschen said that hinges on navigable.

Mr. Sagsveen said that is correct. The applicability of that statute depends upon the navigability of that water.

Representative Damschen said that is why he has some concerns with this bill.

Chairman Hofstad asked Mr. Sando if he could tell them about the incident in Burleigh County that led to an Attorney General's opinion and the State Engineer developing a sovereign lands management plan.

Mr. Sando said the State Engineer has been issuing sovereign land permits. There has been a lot of development going on in the Missouri corridor. Developers have been building marinas and we are granting sovereign land permits allowing these developers to mitigate on sovereign lands like sandbar habitat and doing some things with channel work. The Burleigh County Resource Board asked for the Attorney General's opinion relating to Southport. I have the opinion right here and I could certainly get you a copy if you would want one. The question was whether the state would allow the land developers to construct wildlife habitat on river sandbars to satisfy a federal mitigation request. The Attorney General issued a thirteen to fourteen page opinion on the issue of the public trust doctrine and directed the State Engineer to develop a sovereign management plan to manage not only on the Missouri River but in the state.

Representative Meyer asked about the sovereign land management plan. She asked if there was written testimony on these hearings. You did have hearings didn't you?

Mr. Fridgen said they held a series of hearings. There was no real formal process for us to follow. It was an effort for us to get a draft out to the public and an opportunity for them to tell us what they thought. As we went to the different places, we did take notes and attempted to incorporate those comments into the plan where appropriate.

Mr. Sando said once the plan becomes final then we will go through the rules making process and have an actual hearing.

Mr. Sagsveen said both comments were correct. There was no set process so we formalized a process and went out and held hearings. I don't think we have transcripts. I guess maybe hearing is not the correct the word as it was more of an educational meeting. We had a power point presentation and went through what the plan was about. People asked questions and we tried to answer them. There are written comments. Is that what you are looking for?

Representative Meyer said she was thinking of the written comments. That is when it was first brought to my attention as there were a lot of farmers and ranchers very concerned with that plan and what it was going to entail. It falls under the definition of what you would deem as sovereign land. That is when I was first asked what I was going to do about it although I didn't do anything about it.

Mr. Sagsveen said maybe Pat could address this better than he could but in the plan we are not necessarily setting the rules where it is a recommendation as to what rules we may want to adopt. When we decide to do those rules we will go through the whole formalized administrative rule making process. We would meet in front of the Legislative Committee to do that so it is really a guidance document on how we would take care of our sovereign land. The legislature told the State Engineer that they wanted them to do this and the Attorney General said in order to do that you need a plan and something more formalized and some discipline. I think we can get you the written comments if that is what you are interested in.

Representative Meyer said that was what she was interested in. **(See attached comments provided by Patrick Fridgen of the State Water Commission.)**

Chairman Hofstad asked the State Engineer to explain the changes. The issues that he sees could be a problem are that we are either expanding the definition of sovereign lands and

maybe that is a misperception and the second issue is taking "by the court" out of this and putting the burden of proof on the landowner. Can you address those two issues?

Mr. Sagsveen said he would try to address this from more of a legal perspective as what the language would signify. As far as the purpose of why the State Engineer wanted to do this. Would you like to walk through the sections?

Chairman Hofstad said let's walk through them and explain why the State Engineer wants verbiage.

Mr. Sagsveen said in Section 1 allows the Game and Fish Department to assist the State Engineer in the enforcement of the sovereign rules and laws on sovereign lands. The State Water Commission and the State Engineer do not have any wardens or are not like the Corp of Engineers so we don't have people out there enforcing the rules. We have staff but only in the office. The problem is how can the State Engineer's Office have any idea if the laws are being followed. The Game and Fish is out on the river and they are in many of these areas. I think the thought was maybe they could assist us with enforcement of the laws.

Chairman Hofstad asked the committee if they had a problem with that.

Representative Meyer said she had a problem with it because it is not defined. Until or unless it is defined I don't think that we can just have that language without a definition.

Mr. Sagsveen asked if that was the definition of sovereign lands.

Representative Meyer said yes you must have a definition.

Mr. Sagsveen asked if it would be better to say "on sovereign lands as defined by 61-33-01, subsection 3. It is right here in the code.

Representative Meyer said it would be better.

Mr. Sagsveen asked if the committee would like for them to work up an amendment.

Chairman Hofstad said yes as it was their bill.

Mr. Sagsveen said they would add after on sovereign lands as defined by Section 61-33-01, subsection 3.

Chairman Hofstad said it still seems like it broadens the definition at least that is his perception.

Mr. Sagsveen said that he would be straight forward with them. It does broaden the application of this statute. In the law it now applies to navigable lakes. The question to me is that there are more than just navigable lakes in North Dakota. There are navigable streams as well. As this statute is, can we change it to apply to navigable waters?

Representative Meyer asked how many navigable streams are there.

Mr. Sagsveen said there are a number of navigable streams identified in the Administrative Rules. They include the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake.

Representative Damschen said the definition of sovereign land refers to the ordinary high water mark of navigable lakes and streams already, correct?

Mr. Sagsveen said correct.

Representative Damschen said so navigable waters really is somewhat of an expansion or at least in this context.

Mr. Sagsveen said it is only expanding the context of the statute.

Representative Meyer asked if the Missouri River in its entirety include the Little Missouri River.

Mr. Sagsveen said it has not been treated that way by the federal court and I have those decisions too if you want to see them.

Mr. Sando said some of the issues that are out there right now would be for example would be on the Missouri River at Double Ditch we have had car bodies run off the bank into the river and we didn't have any way to deal with this.

Chairman Hofstad said he thought it was important to note that this was written for Devils Lake. Now we are expanding this list to include the rivers and streams, correct?

Mr. Sando said that was correct.

Representative Damschen said then we need to broaden the scope of that next change where "by the court" is stricken. I think that leaves it wide open because the water has now been determined as navigable and it doesn't say who determines it and I don't know what it implies but with the original language where it says "by the court" at least we would have an authority named and that would still apply but at the expense of the landowner based on the past challenges.

Mr. Sagsveen said you raise a good point. I think my recommendation as the council to the State Engineer would be that you better have all your ducks in a row before you go out to these streams and tell people to do something pursuant to the statute. You better be able to follow the test that I read to you from the Daniel Ball case. You have to have the history of the stream and you have to have a factual finding and go through all the steps before you can determine if it is navigable before you can do this. If you don't know that then you may not be in compliance with the statute. I understand what you are saying. The statute as it is right now says "by the court" and this change would say that the State Engineer could make these findings and go down that path without going to court.

Representative Damschen said he was not concerned with it right now, but you don't know who will be in that position after him.

Chairman Hofstad said the issue is that the test would have to be proven by the landowner who would have to challenge and that is expensive.

Representative Meyer said that everyone is aware of the fights they had over the Little Missouri and there are still a lot of people who would like to see the definition changed to navigable. That is my biggest concern with that and I feel like passing this that if tomorrow they decide it is navigable there is not a whole lot the ranchers and landowners along that could do to change that determination.

Representative Damschen said he would really like to see the overstrike removed.

Mr. Sagsveen said he would have to take to Dale Frink and Todd about that.

Mr. Sando said for example the Sheyenne River is not on the list and it hasn't been determined by the court but basically we are considering that navigable. That would take away our jurisdiction to manage that and some of the other rivers.

Mr. Sagsveen said he would sit town with Dale and Todd and hash it out and get back to you and work out an amendment.

Chairman Hofstad asked if the court gave it the test or is it the State Engineer that determines if it is navigable. Help me out here.

Mr. Sagsveen asked if he meant right now.

Chairman Hofstad said yes right now.

Mr. Sagsveen said right now it has to be determined by the courts.

Chairman Hofstad said Todd said we are not doing that.

Mr. Sando said well I guess we are as we are having them apply for permits if there is a pipeline crossing or a bridge that is being put in with abutments at the ordinary high water mark, we are requiring them to apply for permits. We are assuming that.

Mr. Sagsveen asked if they were talking about waters that are already been determined to be navigable or waters that have not.

Chairman Hofstad said he was talking about waters that had not been determined to be navigable and the State Engineer determines them to be so. Based on that determination, is the test have to be made by the courts,

Mr. Sagsveen said he believes that the engineer has made decisions about navigability in the past that have been challenged in administrative proceedings specifically like Lake Isabelle. That did not go to district court.

Chairman Hofstad said lets assume for a moment that we expend public funds for some of these projects for navigable or sovereign lands so do we get that determination from the court?

Mr. Sagsveen asked if he meant on lands that have not been determined previously by the court.

Chairman Hofstad said that he thinks the concern here is that when we expand the sovereign lands that we put the burden on the landowner and if he has to go to court it is very expensive. It would be cost prohibitive for most. I think this is a concern of the committee and we need to deal with this issue.

Representative Damschen said when they were referring to the Sheyenne River are you enforcing some regulations there or are you dealing with debris removal.

Mr. Sando said no because their debris removal enforcement was only for Devils Lake.

Representative Damschen said so your reference to that was that you want it to be declared navigable so that the department could manage it there or what. He wasn't clear on that.

Mr. Sando said they were analyzing some of the streams to see if they would have deep enough water to have commercial navigation so we haven't come up with any fast rules as to

how far up a river it might be determined by the State Engineer as navigable. It could go all the way to Harvey or that kind of thing.

Mr. Fridgen said the State Engineer would have to look at the same standard the court would look at. They would have to look at the history and see if there was a stream of commerce on that water body and could it be a stream of commerce. It would be basically be the same standard.

Representative Meyer said to take this one step farther, this was her complaint with the first section how the administrative code determines the navigable streams is completely different than 61-33-01. Those really aren't very similar and I guess that is one of the problems that I have and it is all tied together. I guess I am looking at the meandering streams and the difference that you have in the spring of the year in April and May and it looks a lot different in August.

Mr. Sagsveen said from a legal perspective in my work with the State Engineer, that is one of the things that we struggle with is to not just put a blanket determination on all streams like the Cannon Ball. The sub-western streams are not going to be the same as the northeastern streams so how do we develop a way to look at these things that deal with each stream individually.

Representative Meyer said that is why we have a court.

Mr. Sagsveen said that is up to you as a legislature if you want to do that. I am not saying you can't do that but that was one of the suggestions from the State Engineer so that is why we decided to insert the overstrike on that line. I will talk to Todd and Dale and hopefully we can work out a solution.

Chairman Hofstad said there was some discussion about the partially submerged statement.

Representative Meyer said that was Representative Keiser's concern and we should mention that to you. He said that language has to be more clearly defined. He gave the example in the beginning that if you have one corner of a building submerged, that was his concern about the bill.

Chairman Hofstad said personally he didn't have a problem with that but I don't know how you would define partially. I don't have a problem with the language as it is.

Representative Damschen asked when does the sovereign land come until the control of the State Water Commission. Is it as soon as there is the expansion of the navigable waters or is it all the time?

Mr. Fridgen said on a river that ordinary high water line is established over a long period of time so if you have a flood that line is not going to change. It has to be established by the presence of water over a long period of time where it is changing the soils and vegetation. Usually it is very static but is ambulatory to a certain degree from one year to the next.

Representative Damschen said if there is not water up to the ordinary high water mark and someone is using the land between the water and the mark, do they have control of that land? They may have equipment there and buildings.

Mr. Sando said there is joint ownership between the ordinary low water mark and ordinary high water mark so the riparian owner has rights down to the low water mark and the state has rights up to the ordinary high water mark. For example, on the bank of the Missouri River on the bank the ordinary high water mark most times is higher than what the actual water surface is. Someone could pull up on that shoreline with boat and have a campfire and the landowner could also drive his four-wheeler down to the sandbar or whatever or put an intake in or hay it or whatever. It is king of joint ownership.

Representative Damschen said the reason he was asking is because in the language on page 2 starting on line 5 it says the person responsible is the person who owns or has control of the property on which the object is located or the person who owned or had control of the property immediately before it became submerged by water. I am wondering if inundated is rendering it unusable. Once that land is inundated is it controlled by the State Water Commission or the state and does that mean they are responsible if the property becomes submerged?

Mr. Sagsveen asked Mr. Sando if he knew the background on this. Would they have changed this?

Mr. Sando said he did not recall them changing this.

Representative Damschen said he was just wondering if this section would put the burden on the state or the landowner.

Mr. Sando said he thought the burden was still on the landowner who has the deed to the property but as the land becomes inundated and he has structures out there that are in the water partially or fully in the water, it is going to be the responsibility of the landowner to get that structure, whether it be a grain bin or a house or whatever out of the way.

Mr. Sagsveen said that the principals that would have been applied by the court are that the sovereign land generally follows the bed underneath the water as the water moves from time to time. The court has not said that it is ambulatory. As you know in respect to Devils Lake that is pretty significant because Devils Lake has expanded to 130,000 acres from 50,000 acres. My understanding was that what the legislature was saying with this bill is that they were going to allow the State Engineer to go to a landowner who has a house that is now inundated by water and use this statute to have this person remove the house. You can call it inundated or submerged as I think it is one in the same.

Mr. Sando said that is the way he would look at it too.

Mr. Sagsveen said the reason I say that is because when water inundates or submerged the structure of the building it is argued that now that structure is on sovereign lands.

Chairman Hofstad asked where does the ambulatory nature of the stream fit? Devils Lake can arguably come down in a month or so. How do we deal with that when someone says it is inundated but it is going to go down next year? There is the example of a stream and that level will go up and down as the lake could.

Mr. Sagsveen said he didn't think the State Engineer was going out and flying around the lake and looking for each building they can possibly find and go through the rigmarole of this statute to have it removed. For the most part, I think most of those buildings within that area of the close proximity of the lake are probably already removed, aren't they?

Mr. Sando said the ones related to the flood insurance program. There are still a lot of structures in the water and we really haven't been that active in enforcing this.

Mr. Sagsveen said he thought it was the issue of hazards on the lake.

Chairman Hofstad the only thing that can really make this an issue is if there was some oil rights involved on what is now sovereign lands.

Mr. Sando said that was the main issue on the Little Missouri.

Mr. Sagsveen said he wanted to add something to this. It would have to be a menace to life of property or public health. That is the bottom line for this statute to come into play. If not, then this statute does not come into play.

Representative Meyer said with that and not that we should write law for everything that happens. I know a man who was very personally affected by this in Devils Lake. He not only lost his entire farm but he was required to remove a barn and the removal of that barn cost him

forty thousand dollars. He was still paying taxes and if this passes then we are going to hit with a civil penalty also.

Mr. Sando said that is already in place for Devils Lake.

Representative Meyer said that is correct but we are expanding this. With that he was still paying taxes at that time and he could not generate a dollar of income off this. He was told he had to remove this barn and the cost was forty thousand dollars. Devils Lake was not his fault but he was certainly a victim of that. I feel like this is an expansion.

Mr. Sando said you have to worry about the citizens that are using the lake too. You could have several people killed by hitting some debris in the water. You can flip your boat and they could all drown. It is a very dangerous situation if you leave this debris out there. It could cost a life.

Representative Meyer said that is absolutely true but when he tried to fence it off and not allow the boaters to go around there he had trouble with that also. He tried to put bayous up so that they couldn't hit the structures but they wanted to fish there because of the manure piles. When you listen to his story play out, it gives you a little different perspective on this. Should he have been the one to have to pay for the cost of the removal of the danger on the navigable waters? That was nothing that he had planned and I guess that is my question. Why should the landowner be responsible for that cost?

Mr. Sando said that is a valid question.

Representative Meyer said she feels like this will expand and you could expand this to every navigable stream and lake.

Mr. Sando said I guess you could have all the other taxpayers in the state pay for it.

Representative Damschen said again I think we have to determine what the authority is. I think that striking 'by the court' really broadens that authority and I would hate to see that the State Engineer for lack of a better vehicle revert to the Corps definition of navigable waters. He said that he didn't know how many definitions that there were but he had not heard on that he liked.

Mr. Sando said like Matt said we will have a discussion with the State Engineer and point out our concerns that you feel like we are broadening our authority by striking out by the court.

Mr. Schadewald said that he wanted to mention that the Game and Fish was not planning to do any work with landowners or get into those issues. They would have to set up a MOU with the sovereign lands folks. We do not have peace officers that have jurisdiction off the Game and Fish lands. My understanding is that if someone were having a fire on sovereign lands where they were not supposed to, we could write them a ticket for this. Otherwise we would have to call in the Sheriff's Department. That is the kind of thing that our Game Wardens would be doing. We would not be getting involved in the complicated issues but normal routine law enforcement issues.

Chairman Hofstad said so the game warden cannot write me a speeding ticket?

Mr. Schadewald said not on the highways but they have jurisdiction to do that in a boat.

This would give them the authority on sovereign lands and not just the Game and Fish lands.

Representative Damschen said we would probably not know much about this if it wasn't for Devils Lake.

Mr. Sando said there are issues of people putting up tree stands when they think this is on sovereign land versus on private deeded property. There are a lot of issues up in the Williston area with issues like that cropping up. We do want to make some actual findings and

determinations where the ordinary high water mark is. At this point in time, this is where it is but it can move. We would like to do this in the Bismarck corridor plus or minus a few miles.

Representative Meyer asked what was the average years or how many years do you determine this high water mark on the average to be because you said you did not factor in the drought or the floods. Is there an average high water mark for a number of years?

Mr. Sando said in a way there really is. On the Missouri River it is going to have to take a wet cycle for quite a while or a change in the operation of the Garrison Dam with their release patterns to change the ordinary high water mark. It is not going to change much. The Yellowstone River could change a lot more because there it is an uncontrolled river. It is not dammed up and the water flows can change dramatically. You really can't say it is good for five years or ten years or it is good for twenty years. We cannot predict the weather next week so we have no idea how long the ordinary high water marks will stay at this point.

Mr. Sagsveen said some of the situations, if I might add, would be some people buying property along the river. They paid for 90 acres but now they are selling 400 acres as they are selling arguably sovereign land areas. That is causing some problems. The question now is should North Dakota get involved in this process.

Mr. Sando said there are many issues such as structures out on sandbars, putting up gazebos, to wanting to put docks out or leaving things out there or planting trees or going out there and start mowing and claiming that it is there land. There are a lot of issues especially on the Missouri corridor with adjacent land owners. The public is asking why are there posted lands on these islands saying that we cannot trespass on it. They are trying to prevent four wheelers from four wheeling out there on the sandbars.

Mr. Sagsveen said there is the flip side to that also. There are other things that are happening on sovereign lands that are not fair to the riparian owner either. They are saying that they are out in front of my house and four wheeling all hours of the night.

Mr. Sando said we also have to look at noise issues.

Mr. Sagsveen said the sheriff's department won't go and tell them to stop running because they do not have the jurisdiction in that area. That is a pretty big problem that we are trying to resolve.

Mr. Sando said a lot of the testimony of people who showed up at the hearings was at the Bismarck meeting. The biggest were Bismarck, Williston, Minot and Fargo and the other locations and one of the biggest issues was ATV's on sovereign lands with people there for and against this. The adjacent land owners who have their dream home on the shores of the Missouri River who are having huge problems with all the public use by ATV's right out in from of their place at all hours. Those are some of the issues out there. We just wanted to point that out to you.

Representative Damschen said that most of the people, let's take Devils lake for example are the landowners who are paying the taxes on that.

Mr. Sando said definitely because there are a lot of deeded acres under water so they are continuing to pay taxes to the local entities as they control that. There have been tax abatements and lower taxes but Curt probably understands that better as to what the county is doing for those people who have flooded land.

Chairman Hofstad said he thought that after two years they can go in for abatement on those taxes. I told Mr. Sando that Chairman Porter had mentioned that it probably should be in state statute that as the sovereign land expands that it is a state law that the taxes are abated but I think that is a local issue.

Representative Damschen asked if the state paid taxes on this and I am not saying that it shouldn't but I am just saying I can see the landowners point. The other problem is when you start taking the taxes off the county loses a lot of tax base with the expansion of the lake. I suppose we could put something in that says the state would reimburse the counties.

Chairman Hofstad asked the committee if they had anything else.

Representative Damschen said Chairman Porter was wondering if there was a relaxing in some areas where the water commission does not want the responsibility of enforcing some of these rules.

Mr. Sando said he thought Lake Isabelle was a good example. Harley Swenson is on the state water commission and he thinks the state should maintain jurisdiction and issue permits and regulate the uses of the bed of Lake Isabelle.

Representative Meyer said aren't you going to be giving the enforcing to Game and Fish on this?

Mr. Sagsveen said they had asked the Game and Fish to work with us to enforce this.

Mr. Schadewald said we would be secondary on this. We are not primary but could help in some situations.

Mr. Sando said if there was a gazebo built out there we are not going to the Game and Fish. We are going to have to address those issues ourselves with our staff and our attorneys. We are going to rely on the Game and Fish for the things that they see going on out there. We are not going to go out there and look for problems.

Representative Meyer said so you are going to retain your enforcement.

Representative Damschen asked for them to give an example of a situation where you would ask Game and Fish to become involved.

Mr. Sando said Mr. Fridgen spent a lot of time on this issue and done a lot of work looking into how other states manage sovereign lands.

Mr. Fridgen said one example might be if some one has a four wheeler on sovereign lands and are in areas where they shouldn't be. We don't have regular enforcement on the river and another thing we are having trouble with is people with houseboats who are parking their houseboats and leaving them there like it is a private spot for the rest of the summer. We are interesting in being able to change some things like that. You just can't basically squat for the entire summer and we don't have staff that is out there to see these things happen. We do have game wardens on the river continually and they could do something about it or let us know.

Representative Damschen asked if that would be a violation.

Mr. Fridgen said one of the recommendations relating to this came out of the plan was for abandoning or leaving watercrafts unattended. We have had other instances where people have pulled their boats up on shore by the boat ramps on Sunday evening and leave them for a week or two. If the river comes up and takes that boat downstream we have to have rules to take care of those kinds of things.

Representative Damschen said what about the ATV's that is playing in front of someone's front yard.

Mr. Fridgen said that this can be a pretty complicated issue because there are a lot of opinions on both sides of the fence. The State Engineer's office would have to work out some kind of recommendation where there are basically designated areas so that people cannot just go wherever they want whenever they want and is somewhere between the high and the low water marks.

Representative Damschen asked if there was such a thing as reckless driving on an ATV?

Mr. Fridgen said they don't like to get into that.

Chairman Hofstad brought up hunting and that is another issue.

Representative Damschen asked if those rules were established or are you working on that.

Mr. Sando said that is part of it and we are reaffirming that they are public lands and that people can go out and hunt and fish and trap and that we are allowing livestock to graze or water. As we sit down to talk with all the other agencies in developing a plan and recommendation there are so many different issues.

Representative Damschen said he was curious as to how that process works. You have the authority to establish what is a violation and what isn't a violation.

Mr. Sagsveen said 61-33-05 states that the State Engineer shall manage, operate and supervise all properties transferred to it by this chapter.

Representative Damschen said that simplifies that.

Mr. Sando said if there is one amendment here but if there was something they could do to amend other concerns or how do you want us to handle some of these amendments. Under Section 1 I understand what we should do there by defining section 61-33-01 but some of these other concerns. We can talk about the other issue with Dale about the court but have we agreed on anything else that we should amend.

Chairman Hofstad said they should talk to Dale and see if you can take this bill in another direction otherwise we will probably just amend it out and take it to the committee. I think we are going to have a tough time getting this out of committee.

Representative Damschen said other than that he really didn't have a lot of concerns about this.

Chairman Hofstad said he certainly understands where the State Engineer's office is coming from and I certainly realize that something has to be done. We will try to make sure that it gets done.

Representative Meyer said she wanted to see the definition in code.

Mr. Sando asked if they would like to reconvene with them.

Chairman Hofstad said he thought they were done if they would bring the amendments back to us. The subcommittee meeting was closed.

Attachments: Definitions and copies of hearings and letters from the ND Sovereign Land Management Planning meetings held throughout the state as requested by Representative Meyer.

2007 HOUSE STANDING COMMITTEE MINUTES

Bill/Resolution No. SB 2096

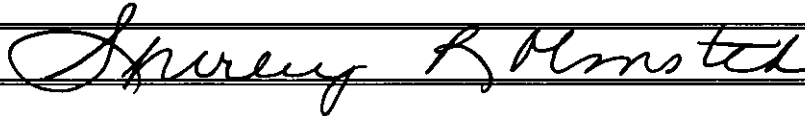
House Natural Resources Committee

☐ Check here for Conference Committee

Hearing Date: March 8, 2007

Recorder Job Number: 4631

Committee Clerk Signature



Minutes:

Chairman Porter asked the committee to consider SB 2096.

Representative Hofstad said that the sub-committee met with the State Water Commission regarding SB 2096 and their concern was that we were redefining sovereign lands. We referenced the statute for sovereign lands so that we are sure that we are not touching that definition. Line 11 we are going to insert "as defined by section 61-33-01". The second concern was the issue that they had struck out "by the court" when determining what sovereign lands are, and that would be determining what is navigable and what is not navigable. That often ends up in a court of law. We were concerned that we would have an individual landowner would be responsible for defending themselves in court. Taking that jurisdiction away from the court and putting that in the hands of the State Engineer was a problem for us. We wanted to make sure that it had to be done by a court of law. We removed the overstrike on "by the courts". This area of the code was developed in 1997 to deal with the water situation at Devils Lake. As the waters rose and as buildings became inundated, we had to have some kind of mechanism for those buildings to be removed. This was that mechanism that offered the authority to the State Engineer. We are now having that same problem on the

Missouri as it is changing. We also need a mechanism for the State Engineer to go down and manage that system.

Chairman Porter asked if anyone on the subcommittee had anything else to add.

Representative Damschen said they needed the definition of navigable waters and who determines that. He said he thought Representative Hofstad covered it.

Representative Meyer said it is just a decision to let the State Engineer the ability to bring a civil action to recover damages resulting from violations. The people of Devils Lake have been though enough.

Representative Hofstad made a motion to accept the amendments.

Representative Meyer seconded the motion.

Representative DeKrey said he had a problem with a state agency writing the rule and having the ability to give you a class b misdemeanor which is a maximum of 30 days in prison and a \$1000 fine or both. Here we have a state agency and not a law enforcement agency, writing the rule and are going to be able to give you a class b misdemeanor. I don't know anywhere else where we have given any state agency the administrative rules to be able to give you a criminal violation. I would like to see in the penalty section that you can get the civil penalty and I am fine with that. We would also want to level a fine to a maximum dollar amount like up to \$1000 or a civil penalty. I don't think it is right for them to be able to charge you with a class b misdemeanor.

Porter Chairman asked for them to stick to this amendment and then move on to the penalty area. He asked for further discussion. Hearing none, he called a voice vote. The motion prevailed.

Representative Hofstad said regarding the penalty area, the state engineer is going to develop a memorandum of understanding with the Fish & Wildlife Service. Because they are going to use the Department of Game and Fish on this, I am thinking that is why they did this.

Chairman Porter said that one of things that brought the penalty section forward was the Attorney General's opinion stating that there was really nothing in the law. It really came out in Burleigh County on the sandbars and the people are using four wheelers down there and the Burleigh County Water Resources District wanted to say that certain sandbars are off limits and do some things like that and there wasn't anything for the Burleigh County Sheriff's Department or the ND Game and Fish to charge anybody with it.

Representative DeKrey said as long as it is going to be law enforcement officials doing this I am alright with it.

Chairman Porter said he thought this section of the bill is strictly dealing with the Sheriff's Department of the Game and Fish enforcing the sovereign lands part of it.

Representative DeKrey said we have it in record now.

Representative Charging said he would agree with the point by Representative DeKrey when you think about the human approach on the river down here when people are putting their docks in and leaving their boats. If you raise the river overnight and their docks or boats could be inundated and then would every one of these be in line for a criminal charge. I think that is wrong.

Representative Hofstad said what we are really talking about is the shore zone. When you are talking about sovereign lands you are talking about lands up to the ordinary high water mark. Wherever the water is, as that water recedes and it goes down to the low water mark, we are talking about is the difference between the low water mark and the high water mark. That is considered sovereign lands but we have joint use of that land. The courts have ruled

often that there is joint use of that land. If the water all of a sudden rose, it would not necessarily put anyone in violation.

Representative DeKrey made a motion for a do pass as amended on SB 2096 as long as it is in the record the law enforcement officials will be in charge of the class b misdemeanors.

Representative Hofstad seconded the motion.

Representative Solberg said that it is the landowner's responsibility to pay for the removal of any of these mentioned items. Is that correct?

Chairman Porter said that was correct. It has always been their responsibility and it is now clarified.

Representative Solberg said he has to go with a no on this bill. A prime example of this is what occurred in the Devils Lake area where a rancher was unfortunate enough to have his farm buildings flooded and he had a huge bar with a cement foundation and he paid a huge amount of money to get this foundation removed.

Chairman Porter said that this law will not change the responsibility for that person. That is already in place in existing law. All this does is clarify and include rivers instead of just lakes.

Representative Drovdal asked if someone came on his land and made a mess, would they be charged with a class b misdemeanor.

Chairman Porter asked what is trespassing these days. He said he was not sure if it was a class b or class c so technically yes they could. It may not be up at the b level, but trespassing is what you would be looking at.

Representative Nottestad said yes the law remains the same but we have subjected more people to this regulation.

Representative Meyer said on the subcommittee they never really talked about the penalty portion of this bill at all. In relation to a few calls I got yesterday, with Representative DeKrey's

statement, it is my understanding that the State Engineer can give the Game and Fish the power to issue the class b misdemeanor.

Chairman Porter said in Mr. Sando's testimony says the first part of the bill amends subsection 1 of the NDCC to clarify that the ND Game and Fish can enforce state laws and rules on sovereign lands. This is the void that exists now. The penalty portion relates to subsection 1.

Chairman Porter asked for further discussion. Hearing none, he asked the clerk to call the roll on a **do pass as amended on SB 2096**. Let the record show there were 9 yes, 5 no with all present.

Representative Hofstad will carry the bill to the floor.

Date: 3-8-07
Roll Call Vote #: 1

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB2096

House Natural Resources Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken mv Amended

Motion Made By Hofstad Seconded By Keiser

Representatives	Yes	No	Representatives	Yes	No
Chairman – Rep. Porter			Rep. Hanson		
Vice-Chairman – Rep Damschen			Rep. Hunskor		
Rep. Charging			Rep. Kelsh		
Rep. Clark			Rep. Meyer		
Rep. DeKrey			Rep. Solberg		
Rep. Drovdal					
Rep. Hofstad					
Rep. Keiser					
Rep. Nottestad					

Total Yes _____ No _____

Absent _____

Floor Assignment _____

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

None

Date: 3-8-07
Roll Call Vote #: 207

2007 HOUSE STANDING COMMITTEE ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2076

House Natural Resources

Committee

☐ Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken

SP as Amended

Motion Made By

DeKrey

Seconded By

Hofstad

Representatives	Yes	No	Representatives	Yes	No
Chairman - Rep. Porter	✓		Rep. Hanson	✓	
Vice-Chairman - Rep Damschen	✓		Rep. Hunsakor	✓	
Rep. Charging		✓	Rep. Kelsh	✓	
Rep. Clark	✓		Rep. Meyer		✓
Rep. DeKrey	✓		Rep. Solberg		✓
Rep. Drovdal		✓			
Rep. Hofstad	✓				
Rep. Keiser	✓				
Rep. Nottestad		✓			

Total Yes 9 No 5

Absent 0

Floor Assignment

Hofstad

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

REPORT OF STANDING COMMITTEE

SB 2096, as engrossed: Natural Resources Committee (Rep. Porter, Chairman)
recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends
DO PASS (9 YEAS, 5 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2096
was placed on the Sixth order on the calendar.

Page 1, line 11, after "lands" insert "as defined by section 61-33-01"

Page 1, line 18, remove the overstrike over "~~by a court~~"

Renumber accordingly

2007 TESTIMONY

HB 2096

TESTIMONY ON SENATE BILL 2096

Senate Natural Resources Committee

**Dale L. Frink
North Dakota State Engineer, and
Chief Engineer-Secretary to the
North Dakota State Water Commission**

January 5, 2007

Mr. Chairman and members of the Senate Natural Resources Committee, I am Dale Frink, North Dakota State Engineer, and Chief Engineer-Secretary to the North Dakota State Water Commission.

It is my pleasure to appear before you today regarding Senate Bill 2096.

Senate Bill 2096 has two parts. The first part of the bill amends Section 61-03-21.3 of the North Dakota Century Code to cover dangers on all navigable "waters" rather than just navigable lakes. The second part of the bill creates a new section to Chapter 61-33 that provides the ability to impose a penalty on any person who violates this chapter or any rule pertaining to this chapter of the North Dakota Century Code.

Section 61-03-21.3 of the North Dakota Century Code is currently entitled "Removal, modification, or destruction of dangers in, on the bed of, or adjacent to a navigable lake." I am proposing to remove the word "lake" and replace it with the word "waters" so that the law would apply to both navigable lakes as well as navigable rivers or streams. In addition, Section 61-03-21.3 prohibits actions that are "... a menace to life or property or public health or safety" I am suggesting that the phrase "or the environment" also be added.

Relative to the second part of this bill, current state law does not allow for a penalty to be imposed for actions on sovereign lands that are in violation of North Dakota Century Code Chapter 61-33 and its associated rules. Senate Bill 2096 would make any violation of North Dakota Century Code Chapter 61-33 and its associated rules a Class B misdemeanor subject to a civil penalty of up to \$1,000 for each violation.

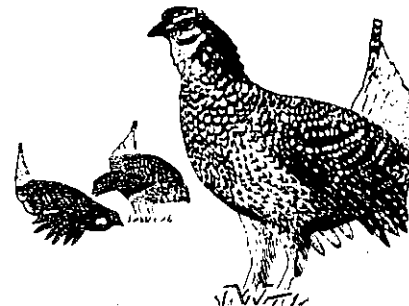
I ask for your favorable consideration of Senate Bill 2096.



North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



**TESTIMONY OF MICHAEL McENROE
NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY**

**PRESENTED TO SENATE NATURAL RESOURCES COMMITTEE
ON SB 2096, JANUARY 5, 2007**

CHAIRMAN LYSON AND MEMBERS OF THE COMMITTEE:

I am Mike McEnroe speaking on behalf of the North Dakota Chapter of The Wildlife Society.

The Chapter supports SB 2096 relating to the management regulations of sovereign lands by the State Engineer. The Chapter supported the State Water Commission's Sovereign Land Management Plan in October of this past year. We believe this legislation provides enforcement strategies for protecting the State's sovereign lands.

I have attached a copy of the Chapter's letter supporting the Sovereign Land Management Plan to my testimony.

2006-19



North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



October 28, 2006

Dale Frink
State Engineer
Office of the North Dakota State Engineer
900 East Boulevard
Bismarck, North Dakota 58505-0850

Dear Mr. Frink,

The North Dakota Chapter of The Wildlife Society (Chapter) appreciates the opportunity to provide comments on the draft, North Dakota Sovereign Land Management Plan, dated September 2006. Our Chapter is encouraged that the State Water Commission is pursuing the development of criteria and rules for this plan to clarify management of important State resources held in the public trust.

Sovereign lands in North Dakota include many important and valuable natural resources that will benefit from management and protection. Some of these lands have unique resources, such as special wildlife values that may require specific protection measures. This plan should be compatible with and relate to the variety of State agency resource objectives. The long-term management and protection of these areas will have many benefits for now and in the future.

We agree with your statement that this draft should be considered a "first step". There are a number of important criteria to be worked-out and in some cases codified before this plan can become fully operational. Our Chapter requests that the process to accomplish these tasks be identified and that the public, including our Chapter be alerted to these actions and be afforded the opportunity to provide specific comments.

Among issues that will be critical to plan development are criteria for establishing the ordinary high water marks, identification of specific sovereign lands, enforcement strategies for established criteria, assuring access for compatible uses, and securing resources to implement the plan. The implementation of rules to properly manage use of vehicles is a positive step. Also, it will be necessary to develop site-specific criteria to manage and protect high impact areas such as the Missouri River and it's islands.

Please keep us informed on the development of this plan.

Sincerely,


Will Meeks
President

North Dakota Chapter of the Wildlife Society

ARTICLE 89-10

ISLANDS AND BEDS OF NAVIGABLE STREAMS AND WATERS

Chapter

89-10-01 Islands and Beds of Navigable Streams and Waters

CHAPTER 89-10-01

ISLANDS AND BEDS OF NAVIGABLE STREAMS AND WATERS

Section

89-10-01-01	Authority
89-10-01-02	Prohibition on Permanent Relinquishment
89-10-01-03	Definitions
89-10-01-04	Authorizations
89-10-01-05	Application for Permit, Easement, Lease, or Management Agreement
89-10-01-06	Application Review
89-10-01-07	Public Meeting
89-10-01-08	General Permit Standards
89-10-01-09	Specific Project Requirements
89-10-01-10	Projects Not Requiring a Permit
89-10-01-11	Structures Below Ordinary High Watermark
89-10-01-12	Public Recreational Use
89-10-01-13	Vehicular Access
89-10-01-14	Cancellation by the State Engineer
89-10-01-15	Termination by Applicant
89-10-01-16	Assignments
89-10-01-17	Inspections
89-10-01-18	Reclamation
89-10-01-19	Maintenance and Repair
89-10-01-20	Areas of Special Interest
89-10-01-21	<u>Organized Group Activities</u>
89-10-01-22	<u>Pets</u>
89-10-01-23	<u>Camping</u>
89-10-01-24	<u>Hunting, Fishing, and Trapping</u>
89-10-01-25	<u>Unattended Watercraft</u>
89-10-01-26	<u>Removal of Public Property</u>
89-10-01-27	<u>Cultural or Historic Resources</u>
89-10-01-28	<u>Disposal of Waste</u>

Section 89-10-01-01 is amended as follows:

89-10-01-01. Authority. These rules are adopted and promulgated by the state engineer pursuant to North Dakota Century Code chapter 61-33 to provide consistency in the administration and management of the islands and beds of navigable streams and waters. These rules do not apply to the interests of the state of North Dakota in oil, gas, and related hydrocarbons.

History: Effective November 1, 1989; amended effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-03 is amended as follows:

89-10-01-03. Definitions. The following definitions apply to this article:

1. "Authorization" means a permit, easement, lease, or management agreement approved and granted by the state engineer after application; and the authority granted in sections 89-10-01-10 and 89-10-01-19.
2. "Grantee" means the person, including that person's assigns, successors, and agents who are authorized pursuant to an authorization.
3. "Navigable streams or waters" means any waters which were in fact navigable at time of statehood, ~~including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake~~ that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.
4. "Ordinary high watermark" means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety.
5. "Project" means any activity which occurs below the ordinary high watermark of navigable streams or waters.
6. "Riparian owner" means a person who owns land adjacent to

navigable ~~streams or~~ waters or the person's authorized agent.

7. "State engineer" means the state officer provided for in North Dakota Century Code section 61-03-01 or any of the state engineer's employees or authorized agents.

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-04 is amended as follows:

89-10-01-04. Authorization. Each project which lies either partially or wholly below the ordinary high watermark of navigable ~~streams or~~ waters requires an authorization from the state engineer prior to construction or operation, except as specified in sections 89-10-01-10 and 89-10-01-19.

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Subdivision b of subsection 1 of section 89-10-01-06 is amended as follows:

- b. The state department of health and ~~consolidated laboratories;~~

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-08 is amended as follows:

89-10-01-08. General permit standards. The state engineer may approve, modify, or deny any permit application. In deciding what action to take on a permit application, the state engineer shall consider the potential effects of the proposed project on the following:

1. Riparian owner's rights;
2. Recreation;

3. Navigation;
4. Aesthetics;
5. Environment;
6. Erosion;
7. Maintenance of existing water flows;
8. Fish and wildlife;
9. Water quality; and
10. Cultural and historical resources; and
11. Alternative uses.

History: Effective November 1, 1989; amended effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-12 is amended as follows:

89-10-01-12. Public recreational use. The public's right to use the islands and beds of navigable ~~streams and~~ waters for nondestructive, recreational purposes is not prohibited except as otherwise provided by these rules.

History: Effective November 1, 1989; amended effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-13 is amended as follows:

89-10-01-13. Vehicular access. The use of motorized vehicles ~~other than boats on land~~ below the ordinary high watermark ~~is authorized in conjunction with the use of navigable waters for transportation or recreation, or as reasonably necessary for activities allowed pursuant to these rules~~ water bodies is prohibited, except:

1. When on government-established trails;

2. When on sovereign land areas adjacent to the Kimball Bottoms off-road riding area;
3. When on state-designated off-road use areas, provided the area is managed and supervised by a government entity, the government entity has developed a management plan for the off-road area that must be submitted to the state engineer, and the managing government entity has obtained a sovereign land permit for off-road use in the designated area;
4. To cross a stream by use of a ford, bridge, culvert, or similar structure provided the crossing is in the most direct manner possible;
5. To launch or load a boat, canoe, or other watercraft in the most direct manner possible;
6. To access and operate on the frozen surfaces of any navigable water, provided the crossing of sovereign land is in the most direct manner possible;
7. To access private land that has no other reasonable access point, provided that access across sovereign land is in the most direct manner possible;
8. By disabled persons who possess a totally or permanently disabled person's fishing license or shoot from vehicle permit;
9. When operation is necessary as part of a permitted activity or project; and
10. By the riparian owner or the riparian owner's lessee in the shore zone adjacent to the riparian owner's property.

This section does not authorize use of property above the ordinary high watermark ~~but does authorize the use of trails established by a government agency, such as those established for snowmobiles, which are located below the ordinary high watermark~~ A person who violates this section is guilty of a class B misdemeanor.

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-14 is amended as follows:

89-10-01-14. Cancellation by the state engineer. The state engineer may cancel any authorization granted pursuant to these rules, including projects authorized by sections 89-10-01-10 and 89-10-01-19, ~~if the grantee fails to comply with any term or condition of the authorization or this article.~~ Cancellation does not release grantee from any liability.

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-21 is created as follows:

89-10-01-21. Organized group activities. Organized group activities that are publicly advertised or are attended by more than twenty-five persons are prohibited without a permit issued by the state engineer. A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-22 is created as follows:

89-10-01-22. Pets. Pets may not be permitted to run unattended on sovereign land in and around the Missouri River between the railroad bridge near the south border of Fort Lincoln state park (river mile marker 1,310) and the Interstate 94 bridge (river mile marker 1,316). Pets in this corridor of the Missouri River must be leashed by a restraint of no more than ten feet. A pet's solid waste must be disposed of properly. A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-23 is created as follows:

89-10-01-23. Camping. Camping for longer than ten consecutive days in the same vicinity or leaving a tent or camper unattended for more than twenty-

four hours is prohibited on any state sovereign land area. A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-24 is created as follows:

89-10-01-24. Hunting, fishing, and trapping. All sovereign land areas are open for public hunting, fishing, and trapping, except as provided in other rules and regulations or laws, or as posted at public entry points. Posting sovereign land with signage by anyone other than the state engineer is prohibited without a sovereign land permit. A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-25 is created as follows:

89-10-01-25. Unattended watercraft. Watercraft may not be left unattended on or moored to sovereign land for more than twenty-four hours except:

1. When moored to privately owned docks;
2. When moored to private property above the ordinary high water mark with a rope, chain, or other type of restraint that does not cause unreasonable interference with navigation or the public's use of the shore zone; or
3. By riparian landowners in the shore zone.

A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-26 is created as follows:

89-10-01-26. Removal of public property. Trees, shrubs, vines, plants, soil, gravel, fill, rocks, fossils, sod, water, firewood, posts, poles, or other public property may not be removed from sovereign land without a permit issued by the state engineer, except that firewood may be removed under certain stated conditions from designated firewood cutting plots, and the riparian landowner or their lessee may hay or graze land in the shore zone. Commercial cutting of firewood is prohibited on all sovereign land. Gathering of downed wood for campfires is permitted. Removal of property from sovereign land by permit shall only be in a manner, limit, and condition specified by the permit. Berries and fruit may be picked for non-commercial use, unless prohibited by posted notice. Property may not be destroyed or defaced. A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-27 is created as follows:

89-10-01-27. Cultural or historic resources. Artifacts, or any other cultural or historic resources occurring on sovereign land may not be destroyed or removed without formal written approval from the state historical society. A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

Section 89-10-01-28 is created as follows:

89-10-01-28. Disposal of waste. The disposal of refuse, rubbish, bottles, cans, or other waste materials is prohibited except in garbage containers where provided. Abandonment of vehicles or other personal property is prohibited. Holding tanks of campers or boats may not be dumped on sovereign land. Glass containers are prohibited on sovereign land. A person who violates this section is guilty of a class B misdemeanor.

History: Effective July 1, 2007.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

FINAL DRAFT

**North Dakota
Sovereign Land Management Plan**



**Office of the State Engineer
900 East Boulevard Avenue, Dept 770
Bismarck, ND 58505-0850
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January 2007

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FINAL DRAFT
NORTH DAKOTA SOVEREIGN LAND MANAGEMENT PLAN

INTRODUCTION

North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams.¹ The State of North Dakota plays an important role in the management of sovereign land through the State Engineer, who is responsible for administering the state's non-mineral interests in North Dakota's sovereign land.²

The goal of the State Engineer in managing this vital resource is: to manage, operate, and supervise North Dakota's sovereign land, for multiple uses, that are consistent with the Public Trust Doctrine, and are in the best interest of present and future generations.

Background and Purpose of the Sovereign Land Management Plan

On January 3, 2005, the North Dakota Attorney General issued an opinion, North Dakota Attorney General (N.D.A.G.) 2005-L-01, regarding the ability of land developers to construct wildlife habitat on sovereign land to satisfy federal mitigation requirements.³ In that opinion, the Office of the State Engineer was advised to, among other things, issue sovereign land permits only when they are consistent with a comprehensive sovereign land management plan.

The State Engineer's authority to manage sovereign land is derived from North Dakota Century Code (N.D.C.C.) § 61-33-05, which states that the State Engineer shall "manage, operate, and supervise" sovereign land. The State Engineer has adopted administrative

¹ N.D.C.C. § 61-33-01(3).

² The state's mineral interests in sovereign lands are managed by the State Land Department under the authority of the Board of University and School Lands. N.D.C.C. § 61-33-03.

³ Appendix – N.D.A.G. 2005-L-01.

rules to create a framework to follow legislative directives.⁴ But, the Attorney General has indicated management of sovereign land requires that the State Engineer incorporate the Public Trust Doctrine into any management scheme. Specifically, that the State Engineer create a plan pursuant to the doctrine to manage sovereign land.

In response, the Office of the State Engineer has developed a North Dakota Sovereign Land Management Plan to:

1. Continue to fulfill the State Engineer's duty to manage sovereign land pursuant to the Public Trust Doctrine;
2. Satisfy requirements outlined in N.D.A.G. 2005-L-01;
3. Provide improved consistency in the management of sovereign land and administration of regulations;
4. Serve as a complement to North Dakota's Administrative Code (N.D.A.C.) ch. 89-10-01 concerning sovereign land management; and
5. Generally improve management of the state's sovereign land for present and future generations.

The Planning Process

In developing North Dakota's Sovereign Land Management Plan, the Office of the State Engineer recognized the need for diverse technical expertise, and therefore sought assistance from the North Dakota Sovereign Land Advisory Board provided for in the North Dakota Century Code.⁵ In response, a technical working group, including, but not limited to, representatives from all of the advisory board member agencies, was formed to bring a broad spectrum of interests and expertise into the planning process. Member

⁴ N.D.A.C. ch. 89-10-01.

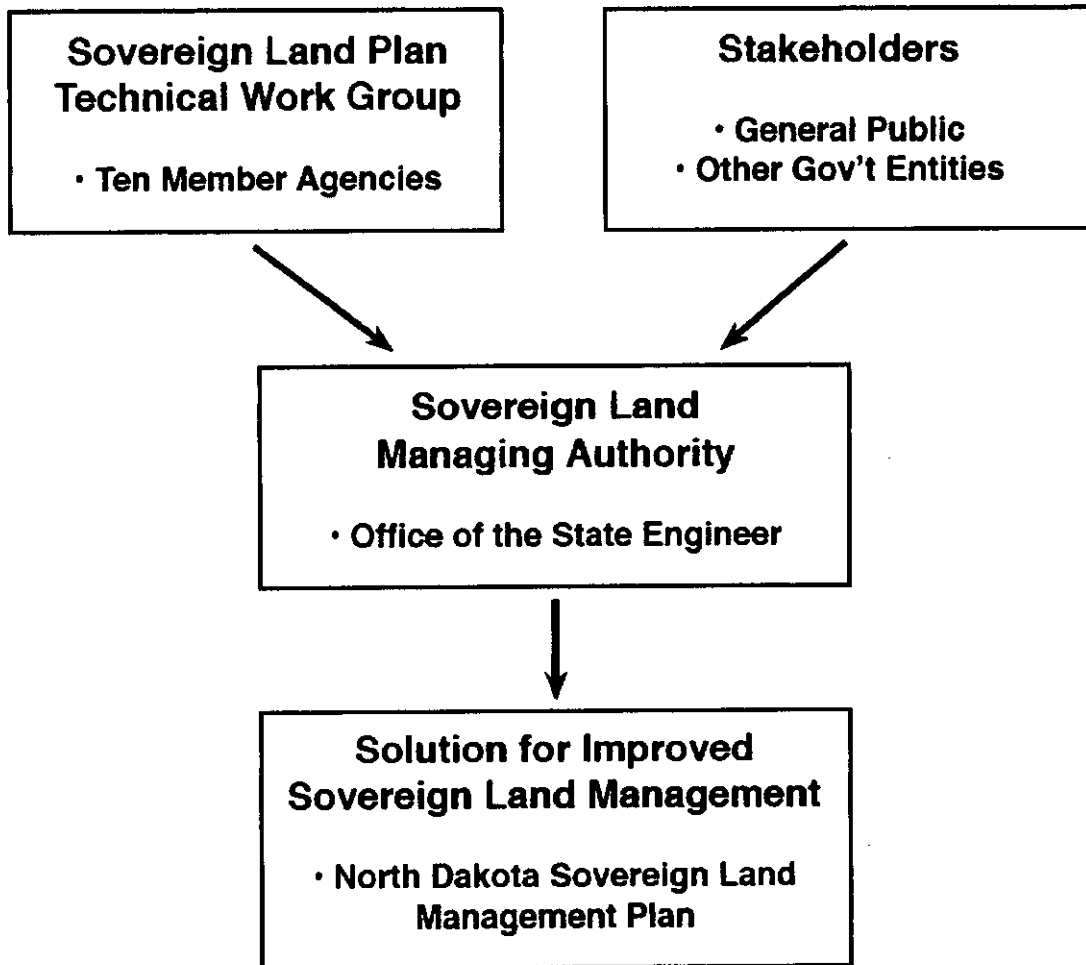
⁵ N.D.C.C. §§ 61-33-08 and 61-33-09.

agencies on the sovereign land technical working group included (in alphabetical order) the:

- Attorney General's Office
- Department of Agriculture
- Game and Fish Department
- Garrison Diversion Conservancy District
- Health Department
- Historical Society
- Land Department
- Parks and Recreation Department
- Office of the State Engineer
- State Water Commission

This plan is the product of a cooperative planning effort between the above agencies, coordinated by the Office of the State Engineer and State Water Commission staff. In addition, comments from other government entities and the general public were sought and considered in the final version of the plan.

The interactive and cooperative North Dakota Sovereign Land Management Plan development process (Figure 1).



APPLICABLE LAWS AND RULES

The source of the state's authority to manage sovereign land emanates most centrally from the Equal Footing Doctrine. N.D.A.G. 2005-L-01 provides a comprehensive discussion of the doctrine and the basis of the state's authority to manage sovereign land. But the Public Trust Doctrine provides the framework for the state to manage sovereign land.

Black's Law Dictionary defines the Public Trust Doctrine as "the principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the

public's right to the use."⁶ Thus, in the simplest of terms, the Public Trust Doctrine provides for the legal right of the public to use certain lands and waters. Further, the North Dakota Supreme Court, in United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d, 457, 463, stated that the Doctrine permits alienation and allocation of such precious state resources, only after an analysis of present supply and future demand.

The Public Trust Doctrine, as interpreted by the North Dakota Supreme Court, imposes on the state the duty to manage sovereign land to foster not only the "public's right of navigation" but also "other important aspects of the state's public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies."⁷ The Doctrine further requires the protection and preservation of other interests including "natural, scenic, historic, and aesthetic values."⁸

The North Dakota Supreme Court has also stated that the Public Trust Doctrine includes an element of planning, and that the Doctrine requires, at a minimum, evidence of planning in the allocation of public water resources.⁹ This in fact became the original source of the planning requirement that prompted the development of a sovereign land management plan for the state.

APPLICATION OF THE PUBLIC TRUST DOCTRINE

The Public Trust Doctrine provides the general framework for North Dakota's Sovereign Land Management Plan by placing significant limitations and affirmative duties on the state. As such, the best interests of the public require the conservation and preservation of the state's sovereign land. The Doctrine, however, has exceptions for activities with equal benefit to the public including, but not limited to bridges, boat ramps, and water

⁶ Black's Law Dictionary 1246 (7th ed. 1999).

⁷ J.P. Furlong Enterprises, Inc. v. Sun Explor. & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988).

⁸ United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 462 (N.D. 1976) (citing Payne v. Kassab, 312 A.2d 86, 93 (Penn. 1973)).

⁹ United Plainsmen, at 463.

supply intakes. Private use of sovereign land may also be permissible under the Doctrine so long as the public's interests are not materially compromised.¹⁰

SOVEREIGN LANDS – WHERE ARE THEY?

One of the more challenging aspects of applying the Public Trust Doctrine is to clearly identify what land is sovereign and subject to state control. Again, North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams. In North Dakota, two interrelated federal standards may be considered for determining whether a given water body is navigable. The first is the federal standard for establishing state title to sovereign land under the Equal Footing Doctrine. The second is also a federal standard, where water bodies are defined as navigable waters of the United States under the Commerce Clause of the United States Constitution.

The Federal Standard Under the Equal Footing Doctrine

When applying the federal standard under the Equal Footing Doctrine, waterways are navigable if they were navigable in fact at statehood:

And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.¹¹

¹⁰ E.g., Caminiti v. Boyle, 732 P.2d 989, 995-96 (Wash. 1987) (private docks not necessarily inconsistent with the trust); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094 (Idaho 1983) (private marina permitted); State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983) (ski jump acceptable if it does not "materially obstruct navigation" and "is not detrimental to the public interest"); Morse v. Oregon Div. of State Lands, 590 P.2d 709, 712 (Or. 1979) (private grants acceptable if they do not substantially impair the public's interests); State v. Pub. Serv. Comm'n., 81 N.W.2d 71, 74-75 (Wis. 1957) (small part of a lake could be filled to expand a park); Boone v. Kingsbury, 273 P. 797, 817 (Cal. 1923) (drilling derricks would not significantly impede the public trust, particularly since the state retained authority to have the derricks moved if they did interfere with the trust).

¹¹ The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871).

Thus, if historical investigations determine that a water body was used as a highway for commerce, then it would likely be considered navigable. However, in a sparsely populated state like North Dakota, where historical records around the time of statehood are limited or are non-existent, the standard of being susceptible to use for commerce becomes very important.

The susceptibility test requires that a water body need only be capable of supporting commerce in its natural state, and that it need not ever have supported navigation for commerce, as long as its characteristics and location could lend itself to those types of activities. Additional discussions of susceptibility, as it pertains to North Dakota, will be presented in greater detail later in the plan.

The Federal Standard Under the United States Constitution Commerce Clause

The Commerce Clause of the United States Constitution states: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ." ¹² As such, federal jurisdiction over navigable waterways has been asserted through various statutes, such as Section 10 of the Rivers and Harbors Act of 1899 ¹³ and the Federal Power Act. ¹⁴

The most influential case that defined standards for navigability determinations under the Commerce Clause test was United States v. Appalachian Elec. Power Co. in 1940. ¹⁵ In that case, the Supreme Court determined that navigability may be established by: (1) present use or suitability for use; (2) suitability for future use with reasonable improvements; or (3) past use or suitability for past use. ¹⁶

There are several similarities between the Commerce Clause test of navigability and the standard under the Equal Footing Doctrine, but there are also important differences. One

¹² U.S. Const. art. I sec. 8, cl. 3.

¹³ 33 U.S.C. 401-406.

¹⁴ 16 U.S.C. 791 *et seq.*

¹⁵ 311 U.S. 377 (1940).

¹⁶ Gollatte v. Harrell, 731 F.Supp. 453, 458 (S.D. Ala. 1989); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-08 (1940).

difference is that reasonable improvements to the waterway to facilitate travel may be considered.¹⁷ Closely related is the issue that navigability for Commerce Clause purposes can develop after statehood with waterway improvements.¹⁸ And lastly, the Commerce Clause test requires that a waterway must serve as a link in interstate or foreign commerce, whereas the Equal Footing Doctrine test does not.¹⁹

North Dakota's Navigable Waters

In the past, North Dakota has affirmatively asserted jurisdiction over a relatively small number of the state's waters based on both federal tests of navigability. Meaning that some of North Dakota's waters were identified as navigable because of the federal standard under the Equal Footing Doctrine. Others were determined to be navigable because they were listed as Section 10 (of the Rivers and Harbors Act of 1899) "waters of the United States" under the Constitution's Commerce Clause test.²⁰

Before development of this plan, the courts had determined the Missouri and James Rivers, and Devils, Painted Woods, and Sweetwater Lakes to be navigable because of the federal standard under the Equal Footing Doctrine. In addition, the Missouri River, the James River from the North Dakota/South Dakota border to the railroad bridge in Jamestown, the Yellowstone River, the Red River from the confluence of the Bois De Sioux and Ottertail Rivers in Wahpeton to the Canadian border, the Bois De Sioux River, from the North Dakota/South Dakota border to its confluence with the Ottertail River in Wahpeton, and the Upper Des Lacs Lake were determined to be Section 10 waterways, and thus navigable.

However, failure to be identified as a navigable waterway by the courts or the U.S. Army Corps of Engineers does not prevent the State Engineer from asserting jurisdiction over additional lands. In fact, the State Engineer has a responsibility under the Public Trust

¹⁷ *The Montello*, 87 U.S. (20 Wall) 430 (1874).

¹⁸ *Appalachian Elec. Power*, at 408.

¹⁹ *Oregon v. Riverfront Protection Ass'n*, 672 F.2d 792, 794 n.1 (9th Cir.1982); *Utah v. United States*, 403 U.S. 9, 10 (1971).

²⁰ The listing of waters as Section 10 navigable waterways is a function of the U.S. Army Corps of Engineers.

Doctrine to use prudent judgment in identifying all of the rivers and lakes throughout the state that should be included on the state's list of navigable waters, based on their location, physical characteristics, and/or historic and present use.

In order to address North Dakota's waters that have no prior federal navigability determinations, it will be necessary for the state to identify other water bodies that are likely navigable, and therefore involve sovereign land under the jurisdiction of the State Engineer. To make those determinations, the state will rely on the federal standard for navigability under the Equal Footing Doctrine – in particular, whether a water body was “susceptible” to navigation at statehood, or if historical documentation warrants a navigability determination.

Since the navigability test requires only that a water body be susceptible or capable of being used as a highway for commerce, susceptibility as a commercial highway may be shown several ways, including through an examination of a river's physical characteristics.²¹ If a water body is “capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a navigable river or highway.”²²

In consideration of modes of transportation, the types of watercraft used around the time of statehood can be used to measure navigability. Thus, canoes; small, flat-bottomed boats; and any other shallow-draft boats can suffice. Further, if a river's present characteristics make it useful for commerce, and if hydrological evidence or other technical proof indicate that present characteristics are similar to those at statehood, then that may be considered proof of navigability.²³

²¹ Appalachian Elec. Power, at 410-13; United States v. Utah, 283 U.S. 64, 83 (1931); The Montello, at 441-42; Alaska v. United States, 662 F. Supp. 455, 463 (D. Alaska 1987).

²² The Montello, at 441-42.

²³ Charles M. Carvell, *ND Waterways: The Public's Right of Recreation and Questions of Title*, 65 N.D.L. Rev 7, at 17 (1988), citing United States v. Utah, at 83; Loving v. Alexander, 548 F. Supp. 1079, 1089 (W.D. Va. 1982).

With regard to lakes and other water basins, technical standards and physical characteristics alone may be inadequate to determine susceptibility of use. This issue, as it relates to North Dakota, was addressed comprehensively in a recent Attorney General memorandum on the ownership of White Lake in Mountrail County.²⁴ Generally speaking, it has been determined with respect to lakes that geography, not hydrological characteristics, is a more important overriding factor, in the absence of historic evidence of use for commerce. Even if any type of boat could traverse a given lake, it is more important that the lake is "so situated that it becomes or is likely to become a valuable factor in commerce."²⁵ Thus, isolated bodies of water, or dead-end lakes, that are not situated to be used as a means of transportation or a highway of commerce may not be navigable.²⁶

Since river, stream, and lake navigability determinations are dependant on several circumstances, and since there are thousands of miles of rivers and streams and hundreds of lakes throughout the state that have not been subjected to navigability determinations, an inventory of existing navigable water bodies is all but impossible to develop during the course of this planning process. Therefore, the state will proceed with the development of navigability determination standards, followed by the implementation of those standards for jurisdictional determinations on a case-by-case basis in the future.

In the interim, anyone pursuing a project occurring in or around any river or stream, or meandered water body, shall be required to submit an application to the Office of the State Engineer for a sovereign land permit. The State Engineer's authority to regulate activities on those water bodies will be reviewed, based on the best available evidence at that time.

²⁴ Appendix - White Lake Memorandum

²⁵ Id. (citing State V. Aucoin, 20 So.2d 136, 154 (La. 1944).

²⁶ Lefevre v. Washington Monument & Cut Stone Co., 81 P.2d 819, 822 (Wash. 1938); United States v. Utah, at 83, 86.

THE ORDINARY HIGH WATER MARK

The delineation of the ordinary high water mark is a critical component of sovereign land management, because it identifies the specific areas in and around the state's navigable waters that are under the jurisdiction of the State Engineer. Another way of looking at it is that the ordinary high water mark delineates the boundary between uplands owned by riparian landowners and state-owned sovereign land.

As defined in North Dakota's Administrative Code, ordinary high water mark means:

[T]hat line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety.²⁷

The North Dakota Supreme Court has further defined high water mark as:

[W]hat its language imports - a water mark. It is co-ordinate with the limit of the bed of water; and that only is to be considered the bed that the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . .

In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks. In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian owner and the public. It is the point up to which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of

²⁷ N.D.A.C. § 89-10-01-03.

vegetation, constituting what may be termed an ordinary agricultural crop.²⁸

General Guidelines for Ordinary High Water Mark Delineations

The above definitions do provide some guidance for ordinary high water mark delineations in North Dakota, wherein the courts determined that hydrology and impacts upon the soil are the primary indicators, followed by vegetative impacts. But, beyond those definitions, the State of North Dakota does not have a specific set of standards or guidelines established for ordinary high water mark delineations.

The Office of the State Engineer recognizes the need for such standards, and as a result, members of the sovereign land workgroup have initiated the process of developing specific guidelines. However, that level of effort exceeds the original scope of this sovereign land management planning process, but it will proceed independently and become an appendix to this plan in the future.

To develop a specific set of standards or guidelines, other states were consulted (particularly Minnesota, Wisconsin, and Washington). All have or are in the process of developing technical guidelines for ordinary high water mark delineations. Though all of the above states have descriptions of what to look for in ordinary high water mark delineations, they do not all agree on the importance of specific indicators.

In Minnesota, the primary physical features looked for in order of significance are trees, water-formed evidence, and vegetative evidence.²⁹ In Washington, the hierarchical order of significance is hydrology, soils, and then vegetation.³⁰ In Wisconsin, the state

²⁸ *State ex rel. Sprynczynatyk v. Mills*, 1999 ND 75, ¶ 13, 592 N.W.2d 591 (citing *In re Ownership of the Bed of Devils Lake*, 423 N.W.2d at 144-5 (quoting *Rutten v. State*, 93 N.W.2d 796, 799 N.D. 1958)).

²⁹ John Scherek and Glen Yakel, *Guidelines for Ordinary High Water Level (OHWL) Determinations*, Minnesota Department of Natural Resources Technical Paper 11, 1993.

³⁰ Erik Stockdale and Alan Wald, *Methods for Delineating an Ordinary High Water Line or Ordinary High Water Mark on Streams and Rivers in Washington State (Draft Version 1.1)*, Washington Department of Fish and Wildlife, Washington Department of Ecology, 2005.

provides an inventory of what to look for, though no order of significance is provided for each of the indicators.³¹

A commonality for all ordinary high water mark delineation techniques, no matter where they are being conducted, is that they must be multidisciplinary in nature. Ordinary high water mark delineations should consider hydrology, soils, vegetation, and other physical indicators (i.e. ice scars, erosion, mud/sediment/water stains, wrack, sediment deposition, etc) . Thus, it is probably less important to focus on the order of importance of all the potential water mark indicators than it is to recognize that several indicators are important.

Historically and in the immediate future, until more specific guidelines for ordinary high water mark delineations are developed, the Office of the State Engineer has and will continue to use prudent judgment in making delineations in compliance with the court's determinations and in consideration of all the aforementioned indicators.

Correlative Rights Between the State and Riparian Landowners

The Office of the State Engineer is required to manage sovereign lands, which include those areas from high water mark to high water mark on navigable waters. However, there is also the issue of correlative rights between the state and riparian landowners between the ordinary high water mark and the ordinary low water mark, where that area is often referred to as the shore-zone. The ordinary low water mark is defined as a mark that is "the low level reached by waters of a lake under ordinary conditions, unaffected by periods of extreme and continuous drought."³² It has also been defined as "the line or level at which the waters of a lake usually stand when free from disturbing causes."³³

This issue of correlative rights was addressed in N.D.A.G. 2004-L-33, where it was explained that between the ordinary high water mark and the low water mark there is a

³¹ *Wisconsin Department of Natural Resources, Waterway and Wetland Handbook (Chapter 40, Ordinary High Water Mark)*, 2004

³² *South Dakota Wildlife Fed'n v. Water Mgmt. Bd.*, 382 N.W.2d 26, 27 (S.D. 1986).

³³ *Slauson v. Goodrich Transp. Co.*, 69 N.W. 990, 992 (Wis. 1897).

zone along the shoreline wherein the state and the landowner have correlative rights.³⁴ In State ex rel. Sprynczynatyk v. Mills, the North Dakota Supreme Court declined to specify the rights of riparian landowners and the state:

The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise. Any precise delineation of parties' rights in this situation would be advisory.³⁵

The Court did, however, cite a Minnesota Supreme Court decision wherein that court explained:

While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the right of the public to use the same for the purpose of navigation or other public purpose. The state may use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation. Restricted only by that paramount public right the riparian owner enjoys proprietary privileges, among which is the right to use the land for private purposes.³⁶

Thus, neither the state nor the riparian landowner has absolute title to the shore-zone, although the riparian landowner can use this land for private purposes as long as the use does not interfere with or adversely affect the public's use or interest in the zone.

³⁴ Appendix – N.D.A.G. 2004-L-33.

³⁵ State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 544 (1994).

³⁶ Id. at 543-44 (quoting State v. Korrer, 148 N.W. 617 (Minn. 1914)).

PLAN STRATEGIES AND RECOMMENDATIONS

In managing, operating, and supervising North Dakota's sovereign land, the Office of the State Engineer is guided primarily by N.D.A.C. ch. 89-10-01. However, in order to achieve the state's sovereign land management goal contained in this plan and to address more contemporary issues that have evolved in recent years, several recommendations and action strategies were developed.

The Sovereign Land Management Plan recommendations and corresponding action strategies listed below were developed in consideration of comments from all of the state agencies involved in the sovereign land technical workgroup. Considerations were also made after receiving input from other local and regional entities, as well as the general public.

Any additions or modifications to state statutes and rules will be conducted through established legal protocol.

Sovereign Land Management Plan Recommendations and Action Strategies

Recommendation 1: The definition of "navigable streams or waters" in N.D.A.C. § 89-10-01-03 contains inconsistencies and should be updated to consider federal standards.

- Action Strategy 1.1: It is proposed that the definition of "navigable streams or waters" in N.D.A.C. § 89-10-01-03 be amended to consider federal standards and to read as follows:

"Navigable streams or waters" means any waters which were in fact navigable at time of statehood, including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Laes Lake, and Devils Lake that is, were used or were susceptible of being used in their ordinary condition as highways for

commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.

Recommendation 2: Any authorization by the Office of the State Engineer for activities impacting sovereign land should be conditional and revocable if the action is in the best interest of the public trust.

- Action Strategy 2.1: N.D.A.C. § 89-10-01-14 should be amended to include language specifying that all authorizations are conditional and revocable if new information or circumstances deem that the action is in the best interest of the public trust. The actions should not be restricted to incidence of grantee non-compliance with the original conditions of the authorization.

Recommendation 3: The Office of the State Engineer should consider the impacts of actions on sovereign land to cultural and historic resources before granting or modifying permits.

- Action Strategy 3.1: Though the State Historical Society is included in the list of agencies consulted for sovereign land permit application reviews under N.D.A.C. § 89-10-01-06, cultural and historical resources are not included in the list of "general permit standards" in N.D.A.C. § 89-10-01-08. Therefore, N.D.A.C. § 89-10-01-08 should be amended to include cultural and historic resources.

Recommendation 4: The state's annually updated Section 303(d) list of water quality-limited waters should be an important consideration in the review of any sovereign land permit application. Section 303(d) of the federal Clean Water Act and its accompanying regulations (CFR Part 130 Section 7) require each state to list water bodies (i.e., lakes, reservoirs, rivers, streams, and wetlands) that are considered water quality-limited and require load allocations, waste load allocations, and Total Maximum Daily Loads (TMDLs). This list has become known as the "TMDL list" or "Section 303(d) list."

- Action Strategy 4.1: Since the State Department of Health is included in the list of agencies consulted for sovereign land permit application reviews under N.D.A.C § 89-10-01-06, it is expected that the Office of the State Engineer would be made aware of the significance of any action on the state's Section 303(d) listed waters. However, the Office of the State Engineer should keep a copy of the most recent Section 303(d) list for reference.

Recommendation 5: It is recommended that a subcommittee of the sovereign land workgroup continue to work on the development of more specific standards or guidelines for water mark delineations in North Dakota.

- Action Strategy 5.1: The Office of the State Engineer will retain an environmental services consulting firm, with expertise in hydrology, soils, and wetland vegetation to assist with the development of ordinary high water mark delineation guidelines for North Dakota. Technical input from the sovereign land planning workgroup agencies will also be sought to improve the effectiveness of the guidelines.

Recommendation 6: The Office of the State Engineer should play a more active role in regulating and supervising the use of motor vehicles on the state's sovereign land. Under N.D.A.C. § 89-10-01-12, the public has the right to recreate on sovereign land so long as those activities are "nondestructive." In addition, general permit standards under N.D.A.C. § 89-10-01-08 require the Office of the State Engineer to consider impacts of actions on riparian landowner's rights, recreation, aesthetics, environment, erosion, fish and wildlife, water quality, and alternative uses.

- Action Strategy 6.1: N.D.A.C. § 89-10-01-13 should be amended as follows:

The use of motorized vehicles ~~other than boats on land~~ below the ordinary high watermark ~~is authorized in conjunction with the use of navigable waters for transportation or recreation, or as reasonably necessary for activities allowed pursuant to these rules~~ water bodies is prohibited, except:

1. When on government-established trails;
2. When on sovereign land areas adjacent to the Kimball Bottoms off-road riding area;
3. When on state-designated off-road use areas, provided the area is managed and supervised by a government entity, the government entity has developed a management plan for the off-road area that must be submitted to the state engineer, and the managing government entity has obtained a sovereign land permit for off-road use in the designated area;
4. To cross a stream by use of a ford, bridge, culvert, or similar structure provided the crossing is in the most direct manner possible;
5. To launch or load a boat, canoe, or other watercraft in the most direct manner possible;
6. To access and operate on the frozen surfaces of any navigable water, provided the crossing of sovereign land is in the most direct manner possible;
7. To access private land that has no other reasonable access point, provided that access across sovereign land is in the most direct manner possible;
8. By disabled persons who possess a totally or permanently disabled person's fishing license or shoot from vehicle permit;
9. When operation is necessary as part of a permitted activity or project; and
10. By the riparian owner or the riparian owner's lessee in the shore zone adjacent to the riparian owner's property.

~~This section does not authorize use of property above the ordinary high watermark but does authorize the use of trails established by a government agency, such as those established for snowmobiles, which are located below the ordinary high watermark. A person who violates this section is guilty of a class B misdemeanor.~~

Recommendation 7: For the Office of the State Engineer to fulfill its duty to manage, operate, and supervise activities on the state's sovereign land, a more visible presence –

particularly regarding enforcement and general compliance checks will be required in the future.

- Action Strategy 7.1: The Office of the State Engineer will work to develop interim cooperative agreements with the Game and Fish Department and other local law enforcement to address sovereign land-related disputes, violations, and enforcement.
- Action Strategy 7.2: The Office of the State Engineer will request from the Governor and Legislative Assembly additional funding and FTEs to deal with the increasing workload associated with sovereign land delineations, navigability determinations, management, and enforcement.

Recommendation 8: The Office of the State Engineer should begin to make sovereign land delineations in areas that are under high development or use pressure, and that are currently in question as to their ownership.

- Action Strategy 8.1: The Office of the State Engineer, in cooperation with other state agencies and professional consultants, will begin to make ordinary high water mark and sovereign land delineations on an as needed basis (particularly in the Bismarck-Mandan area along the Missouri River and near the confluence of the Yellowstone and Missouri Rivers) to prevent private encroachment on sovereign land.
- Action Strategy 8.2: If large-scale delineations are made, the Office of the State Engineer may produce general maps of those areas to be used as educational tools for landowners, local governments, and developers.
- Action Strategy 8.3: Where practical, and particularly in high-use or conflict areas, the Office of the State Engineer may mark and maintain sovereign land boundaries.

Recommendation 9: An educational program should be developed and administered to inform the general public, government agencies and entities, and developers about new and existing sovereign land regulations, the consequences associated with violations, and the location of areas containing sovereign land.

- Action Strategy 9.1: The Office of the State Engineer will develop public announcements, magazine articles, informational brochures, maps, and other publications as sovereign land management-related educational tools. Regional seminars may also be conducted to improve awareness.

Recommendation 10: No established penalties currently exist to discourage illegal projects or use, or the placing of unpermitted objects on sovereign land. N.D.C.C. § 61-03-21.3 deals with the removal, modification, or destruction of dangers in, on the bed of, or adjacent to navigable lakes. Since the current language only applies to lakes, the State Engineer should pursue an amendment that would make N.D.C.C. § 61-03-21.3 applicable to all navigable waters.

- A bill will be developed for the 60th Legislative Assembly to amend N.D.C.C. § 61-03-21.3 so it applies to all navigable waters, and any illegal projects or objects that occur on the state's sovereign land.

Recommendation 11: The Office of the State Engineer should play a more active role in the prevention and control of noxious weeds on sovereign land.

- Action Strategy 11.1: The Office of the State Engineer will work with the State Department of Agriculture, county weed boards, and other federal, state, and local entities to monitor, inventory, and control the spread of noxious weeds and invasive species on the state's sovereign land.

- Action Strategy 11.2: The Office of the State Engineer will work to secure additional funding to monitor and control noxious weeds and invasive species infestations on sovereign land.

Recommendation 12: The number of people using sovereign land for summer recreation has increased dramatically in recent years. Along with increased use has come increased incidence of littering. In particular, broken glass containers that get mixed into the soil are becoming a serious health risk for recreators. Thus, in the interest of public health and safety, it is necessary for the Office of the State Engineer to put controls in place that specifically prohibit littering, the abandonment of property, and the possession of glass containers on sovereign land.

- Action Strategy 12.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits littering, the abandonment of property, and the possession of glass containers on sovereign land. Possession of glass containers inside of boats will not be subject to this rule. Proposed language might read:

The disposal of refuse, rubbish, bottles, cans, or other waste materials is prohibited except in garbage containers where provided. Abandonment of vehicles or other personal property is prohibited. Holding tanks of campers or boats may not be dumped on sovereign land. Glass containers are prohibited on sovereign land. A person who violates this section is guilty of a class B misdemeanor.

Recommendation 13: Hunting, boating, fishing and trapping are all activities that have minimal long-term impacts and commonly occur on sovereign land throughout the state. However, language is required in the North Dakota Administrative Code to allow for the management and supervision of these activities on sovereign land, since none currently exists.

- Action Strategy 13.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses public access and use. Proposed language might read:

All sovereign land areas are open for public hunting, fishing, and trapping, except as provided in other rules and regulations or laws, or as posted at public entry points. Posting sovereign land with signage by anyone other than the State Engineer is prohibited without a sovereign land permit. A person who violates this section is guilty of a class B misdemeanor.

(Also see Action Strategy 7.1)

- Action Strategy 13.2: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses watercraft. Proposed language might read:

Watercraft may not be left unattended on or moored to sovereign land for more than twenty-four hours except:

1. When moored to privately owned docks;
2. When moored to private property above the ordinary high water mark with a rope, chain, or other type of restraint that does not cause unreasonable interference with navigation or the public's use of the shore zone; or
3. By riparian landowners in the shore zone.

A person who violates this section is guilty of a class B misdemeanor.

Recommendation 14: Specific rules and regulations regarding the removal and destruction of natural resources occurring on the state's sovereign land are required to protect the integrity of these public areas for generations to come.

- Action Strategy 14.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits unpermitted activities that remove or destroy natural resources occurring on the state's sovereign land. Specific language might read:

Trees, shrubs, vines, plants, soil, gravel, fill, rocks, fossils, sod, water, firewood, posts, poles, or other public property may not be removed from sovereign land without a permit issued by the state engineer, except that firewood may be removed under certain stated conditions from designated firewood cutting plots, and the riparian landowner or their lessee may hay or graze land in the shore zone. Commercial cutting of firewood is prohibited on all sovereign land. Gathering of downed wood for campfires is permitted. Removal of property from sovereign land by permit shall only be in a manner, limit, and condition specified by the permit. Berries and fruit may be picked for non-commercial use, unless prohibited by posted notice. Property may not be destroyed or defaced. A person who violates this section is guilty of a class B misdemeanor.

(Also see Action Strategy 7.1)

Recommendation 15: Specific rules and regulations regarding the removal and destruction of cultural resources occurring on the state's sovereign land are required to protect the integrity of these resources for generations to come.

- Action Strategy 15.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits the unpermitted removal or destruction of cultural resources occurring on the state's sovereign land. Specific language might read:

Artifacts, or any other cultural or historic resources occurring on sovereign land may not be destroyed or removed without formal

written approval from the state historical society. A person who violates this section is guilty of a class B misdemeanor.

Recommendation 16: Language is required in the North Dakota Administrative Code to allow for the management and supervision of camping on sovereign land, since none currently exists.

- Action Strategy 16.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses camping on the state's sovereign land. Specific language might read:

Camping for longer than ten consecutive days in the same vicinity or leaving a tent or camper unattended for more than twenty-four hours is prohibited on any state sovereign land area. A person who violates this section is guilty of a class B misdemeanor.

(Also see Action Strategy 7.1)

Recommendation 17: In the interest of public health and safety, the management and supervision of organized group activities on the state's sovereign land should be more closely managed in the future.

- Action Strategy 17.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses organized group activities. Specific language might read:

Organized group activities that are publicly advertised or are attended by more than twenty-five persons are prohibited without a permit issued by the Office of the State Engineer. A person who violates this section is guilty of a class B misdemeanor.

(Also see Action Strategy 7.1)

Recommendation 18: Since there are thousands of river and stream miles and hundreds of lakes throughout the state that have no prior navigability determinations, the Office of the State Engineer should consider means of determining navigability where appropriate in the interest of the public trust.

- Action Strategy 18.1: The Office of the State Engineer will develop standards for making navigability determinations, using the federal standard under the Equal Footing Doctrine as a foundation.

(Also see Action Strategy 7.2)

Recommendation 19: The State Engineer will take a more active role in managing the presence of pets at large on higher-use sovereign land areas, particularly in the Bismarck-Mandan corridor of the Missouri River. In the future, additional sovereign land areas may be considered for restrictions on an as needed basis.

- Action Strategy 19.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits pets at large in a six-mile corridor of the Missouri River near the Bismarck-Mandan area. Specific language might read:

Pets may not be permitted to run unattended on sovereign land in and around the Missouri River between the railroad bridge near the south border of Fort Lincoln state park (approximately river mile marker 1,310) and the Interstate 94 bridge (approximately river mile marker 1,315.4). Pets in this corridor of the Missouri River must be leashed by a restraint of no more than ten feet. A pet's solid waste must be disposed of properly. A person who violates this section is guilty of a class B misdemeanor.

(Also see Action Strategy 7.1)

LETTER OPINION
2005-L-01

January 3, 2005

Mr. Ken Royse
Chairman
Burleigh County Water Resource District
221 North 5th Street
Bismarck, ND 58501

Dear Mr. Royse:

Thank you for your letter asking whether the state may allow land developers to construct wildlife habitat on Missouri River sandbars to satisfy federal mitigation requirements. It is my opinion that the state may allow land developers to construct wildlife habitat on Missouri River sandbars to satisfy federal mitigation requirements provided the state permit is issued under a comprehensive river management plan, the habitat serves a public purpose, the habitat's presence does not unreasonably interfere with public use of the river, and the constitution's "gift clause" is satisfied.

ANALYSIS

Background – Missouri River land development and regulation.

Recently, considerable development has occurred on land adjoining the Missouri River, particularly in the Bismarck-Mandan area. Nearly all of the development has been for housing. Development projects often include work to prevent bank erosion, which is usually achieved by riprap.

The United States Army Corps of Engineers asserts jurisdiction over bank stabilization projects under the Clean Water Act and the Rivers and Harbors Act. U.S. Army Corps of Engineers, Department of the Army Decision Document: WW Ranch Bank Stabilization Proposal 1-2 (Mar. 21, 2001) (hereafter "Corps' WW Ranch Decision"). The Corps believes that bank stabilization adversely affects sandbar development. E.g., id. at 49, 84. Sandbars are of interest to the Corps because sandbar habitat is relied on by the piping plover and interior least tern. E.g., id. at 50; In re Operation of the Missouri River System Litigation, 03-MD-1555, 2004 WL 1402563 at *8 (D. Minn. June 21, 2004) ("sandbar habitat essential to plover and tern survival"). The tern is listed as "endangered" under the federal Endangered Species Act ("ESA") and the plover is considered "threatened."¹ Furthermore, the United States Fish & Wildlife

¹ Endangered and Threatened Wildlife and Plants; Interior Population of the Least Tern Determined to be Endangered, 50 Fed. Reg. 21784 (May 28, 1985) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Determination of

Service states that if bank stabilization continues on the river in the stretch from Bismarck to Garrison Dam, the cumulative effect could require listing additional species under the ESA and slow recovery of listed species. U.S. Army Corps of Engineers, Supplement: March 21, 2002 WW Ranch Decision Document at 3 (Jan. 31, 2002) (hereafter "Corps' Supp. WW Ranch Decision").

The Corps applied the ESA when the WW Ranch, a partnership, sought permission to protect the river bank at its housing development, the River Place Subdivision, located six miles north of Mandan. Because of its concerns for the listed tern and plover, the Corps imposed a mitigation requirement on the bank stabilization permit it issued WW Ranch. The permit was conditioned on constructing sandbar habitat. Corps' WW Ranch Decision at 83, 86. The Corps is considering whether to require habitat construction as mitigation for a bank stabilization permit sought by the Misty Waters Development, a housing subdivision under construction a few miles north of Bismarck. Letter from Michael Gunsch, Houston Engineering, Inc., to Dale Frink, State Engineer (Aug. 30, 2004) (hereafter "Gunsch Letter").

The federal government, however, is not the only government with regulatory authority over activities on the river. The state plays a significant role because it owns the bed of navigable waters, and the Missouri River is navigable. State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 539 (N.D. 1994). The state's title extends from ordinary high watermark to ordinary high watermark. Id. See also Shively v. Bowlby, 152 U.S. 1, 26 (1894); Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906); 43 U.S.C. § 1301(a)(1).² Consequently, a state permit is required for bank stabilization projects and for any mitigation work a developer desires to carry out within the river. Permits are issued by the State Engineer, the state official responsible for administering the state's non-mineral interests in navigable waters. N.D.C.C. ch. 61-33. The State Land Board manages the mineral interests. N.D.C.C. § 61-33-03. The State Engineer has adopted rules regulating river activities. N.D.A.C. ch. 89-10-01.

Endangered and Threatened Status for the Piping Plover, 50 Fed. Reg. 50726 (Dec. 11, 1985) (to be codified at 50 C.F.R. pt. 17).

² In the area between the ordinary high watermark and the ordinary low watermark, the shorezone, the riparian landowner holds an interest. State v. Mills, 523 N.W.2d at 544. Although the state and riparian landowner have "correlative interests" in the shorezone, id., the state's interest, to ensure compliance with its duties under the public trust doctrine, is predominant. Id. at 543-44. See also id. at 545 (Levine, J., concurring) (whatever rights the riparian landowner may hold, they must be assessed "in the context of the State's sovereign duty to hold the shore zone in trust for the public"). See also, e.g., Ashwaubenon v. Pub. Serv. Comm'n, 125 N.W.2d 647, 653 (Wis. 1963) ("It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount").

In 2002, the State Engineer issued WW Ranch a permit allowing it "to establish a 10-acre nesting, brood-rearing and foraging habitat" on a sandbar at a location a few miles north of Mandan. Sovereign Land Permit No. S-1326 (July 31, 2002). Earlier, the State Engineer had issued a bank stabilization permit for WW Ranch's River Place Subdivision. Sovereign Land Permit No. S-1204 (Apr. 14, 1997). In August of 2004, a permit application was filed for the Misty Waters Development. Sovereign Land Permit Application No. S-1365. The developer seeks permission to create piping plover habitat a few miles north of the Misty Waters Development. Id. The application was filed because the developer contemplates that the Corps of Engineers will condition its riprap permit on constructing wildlife habitat. Gunsch Letter. The State Engineer has not acted on the Misty Waters mitigation application, but he did issue the development a bank stabilization permit. Sovereign Land Permit No. S-1348 (Oct. 31, 2003).

These recent events raise the question whether the state may permit navigable waterways, also known as sovereign lands, to be used by private persons to satisfy federal mitigation requirements. This question raises a closely related one, that is, the propriety of permitting bank stabilization. These issues implicate the nature of the state's title to sovereign lands, a title impressed with unique public trust responsibilities. Also implicated is the state constitution's "gift clause."

State title to navigable waters.

Upon achieving independence from Great Britain, each American colony became sovereign. As such, they held "the absolute right to all their navigable waters and the soils under them." Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283 (1997) (quoting Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)). New states admitted to the Union were entitled to the same rights as those held by the original states. Id.; State v. Mills, 523 N.W.2d at 539. Thus, upon North Dakota's admission to the Union it took title to sovereign lands in the state. Id.; see also 101 Ranch v. United States, 714 F.Supp. 1005, 1013 (D.N.D. 1988), aff'd 905 F.2d 180 (8th Cir. 1990).

This title is "absolute." Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372, 374 (1977). It is also unique. "The State holds the navigable waters, as well as the lands beneath them, in trust for the public." United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976). See also State v. Mills, 523 N.W.2d at 540; State v. Sorenson, 436 N.W.2d 358, 361 (Iowa 1989) (the state's interest "in public trust lands is, in a sense, only that of a steward").³ Because they are an attribute of the state's sovereignty, sovereign lands "are

³ The public trust doctrine, to protect navigable waters, might extend to non-navigable waters. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 714 (Cal. 1983). See also Mineral County v. State, 20 P.3d 800, 807-08 (Nev. 2001) (Rose, J., and Shearing, J., concurring).

distinguished from lands the State holds in a proprietary capacity." State ex rel. Bd. of Univ. & School Lands v. Andrus, 671 F.2d 271, 274 (8th Cir. 1982), rev'd on other grounds sub nom., Block v. North Dakota, 461 U.S. 273 (1983). The state holds sovereign lands under the public trust doctrine, which North Dakota formally recognized in the 1976 United Plainsmen decision. 247 N.W.2d at 460 ("the discretionary authority of state officials to allocate vital state resources is not without limit but is circumscribed by what has been called the Public Trust Doctrine").

The public trust doctrine.

In adopting the public trust doctrine, the North Dakota Supreme Court relied on Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892), the primary case on the doctrine. E.g., Joseph Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 489 (1970); 4 Waters & Water Rights 30-29 n.140 (R. Beck ed. 1991). Illinois Central held that the Illinois Legislature could not convey the state's title to a portion of Lake Michigan. The attempted transfer was unlawful because it abdicated the Legislature's duty to regulate, improve, and secure submerged lands for the benefit of every citizen. Id. at 455-60. It could not convey sovereign lands because the state's title is "different in character" from other state land. Id. at 452. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." United Plainsmen, 247 N.W.2d at 461 (quoting Illinois Central, 146 U.S. at 453).

The essence of the doctrine prohibits the state from conveying sovereign lands or otherwise relinquishing its authority to protect and preserve these lands for the public. The traditional interests protected are navigation, commerce, and fishing. E.g., Illinois Central, 146 U.S. at 452. But the public trust doctrine is flexible. It can account for modern and changing community needs. E.g., Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). It is "not limited to the ancient prerogatives." Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972). "[L]ike all common law principles, [the doctrine] should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." Id.

Thus, over time, the public interests in sovereign lands have been recognized as considerably broader than just the traditional triad of navigation, commerce, and fishing. The doctrine is commonly held to protect the public's interests in hunting, swimming, boating, and general recreation. E.g., Friends of Hatteras Is. v. Coastal Resources Comm'n, 452 S.E.2d 337, 348 (N.C. Ct. App. 1995); Orion Corp. v. Washington, 747 P.2d 1062, 1073 (Wash. 1987); Shokal v. Dunn, 707 P.2d 441, 451 (Idaho 1985); Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984); State v. Sorenson, 436 N.W.2d 358, 363 (Iowa 1989); Wisconsin's Envtl. Decade, Inc. v.

Dep't of Natural Resources, 271 N.W.2d 69, 72 (Wis. 1978); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Nelson v. DeLong, 7 N.W.2d 342, 346 (Minn. 1942).

In addition, the doctrine is often applied to protect more general public interests in streams and lakes. Hawaii has concluded that the public has an interest in maintaining sovereign lands "in their natural state." In re Water Use Permit Applications, 9 P.3d 409, 448-449 (Hawaii 2000). California recognizes that the public trust doctrine protects "the people's common heritage" in sovereign lands. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983). In some states the doctrine protects aesthetics and scenic beauty. United States v. State Water Res. Control Bd., 227 Cal.Rptr. 161, 201 n.41 (Cal. Ct. App. 1986); Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improv. Dist., 733 P.2d 733, 737 (Idaho 1987); United States v. 1.58 Acres, 523 F.Supp. 120, 122 (D. Mass. 1981); Wisconsin's Envtl. Decade, 271 N.W.2d at 72.

The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that that natural beauty should be protected as against specific structures that may be found to mar that beauty.

Claflin v. State, 206 N.W.2d 392, 398 (Wis. 1973).

North Dakota's public trust doctrine.

North Dakota has also expanded the doctrine. The North Dakota public trust doctrine imposes on the state the duty to manage sovereign lands to foster not only the "public's right of navigation" but also "other important aspects of the state's public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies." J.P. Furlong Enterprises, Inc. v. Sun Explor. & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988). This list of protected interests, because it is preceded by the phrase "such as," is illustrative, not exhaustive. See Nish v. Cohen, 95 F.Supp.2d 497, 504 (E.D. Virg. 2000); Bouchard v. Johnson, 555 N.W.2d 81, 83 (N.D. 1996); Peterson v. McKenzie County Pub. School Dist. No. 1, 467 N.W.2d 456, 459-60 (N.D. 1991). Consequently, other interests are likely protected by North Dakota's public trust doctrine. Indeed, United Plainsmen cites with approval authority holding that the doctrine requires the state to preserve "natural, scenic, historic and esthetic values." United Plainsmen, 247 N.W.2d at 462 (citing Payne v. Kassab, 312 A.2d 86, 93 (Penn. 1973)).

Relying on United Plainsmen, a North Dakota administrative law judge held that North Dakotans "have a right . . . to the preservation of the natural, scenic, and esthetic values of the environment." In re Application for Authorization to Construct a Project Within . . . Lake Isabel, Recommended Findings of Fact, Conclusions of Law and Order 8 (Office of State Engineer, Sept. 8, 1999).

The public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the state must conserve and maintain them for the benefit of all the people.

Id. The State Engineer adopted the administrative judge's recommendations. In re Application for Authorization to Construct a Project Within . . . Lake Isabel, Order of the State Engineer, Order No. 99-7 (Sept. 22, 1999). Further, rules governing review of sovereign land permit applications require that the State Engineer consider, among other interests, aesthetics, the environment, recreation, and fish and wildlife. N.D.A.C. § 89-10-01-08. In sum, the North Dakota public trust doctrine, like that in many other states, protects a broad range of interests.

North Dakota has also interpreted the doctrine in a novel way. In United Plainsmen, the plaintiffs asserted that the doctrine required the State Engineer to prepare a comprehensive plan for developing the state's natural resources, in particular, Missouri River water, before water permits could be issued for power plants. 247 N.W.2d at 459. The court agreed.

The development and implementation of some short- and long-term planning capability is essential to effective allocation of resources 'without detriment to the public interest in the lands and waters remaining.'

Id. at 462 (quoting Illinois Central, 146 U.S. at 455-456). Water permits for energy development could be issued by the State Engineer consistent with the public trust only if, "at a minimum," the State Engineer examined the potential effect of the water appropriation on the present water supply and the state's future needs. Id. The public trust doctrine "permits alienation and allocation of . . . precious state resources only after an analysis of present supply and future need." Id. at 463. Thus, the North Dakota public trust doctrine includes a planning component. See also Matter of the Application for Permits to Drain Related to Stone Creek Channel and White Spur Drain, 424 N.W.2d 894, 903 (N.D. 1988) (State Engineer satisfied his duties by fully analyzing the challenged drainage permits and their consequences).

Planning before acting is particularly appropriate for the Missouri River. From Bismarck to Garrison Dam the river is a significant historic, cultural, and natural resource. N.D. Parks & Recreation Dep't, Missouri River Study and Action Plan 1, 5 (Jan. 1989). Indeed, it "is one of North Dakota's most spectacular natural resources." Missouri River Centennial Comm'n, A Comprehensive Plan for Recreational Use of the Riparian Public Lands in Burleigh and Morton Counties 7 (Aug. 1986) (hereafter "Centennial Comm'n 1986 Report"). It is a "tremendous public recreational resource." Id. at 1. The river may be the "last of [its] kind." Corps' WW Ranch Decision at 57.

The need for comprehensive planning has been expressed by state and local agencies. A 1986 study concluded that the lack of a comprehensive plan for managing the river has resulted in its "under-utilization" for recreation, while at the same time the river experiences "over-crowding and conflicts between incompatible uses." Centennial Comm'n 1986 Report at 1. To meet public needs, "an objective assessment of management possibilities and formulation of and adherence to a well thought-out plan is an absolute necessity." N.D. Game & Fish Dep't, The Missouri River in North Dakota: Garrison Reach at 2 (Aug. 1998) (hereafter "Game & Fish Dep't 1998 Report"). A "vision group" has been formed by the Burleigh, Oliver, Morton, Mercer, and McLean Counties Joint Water Resource Board, along with representatives of state agencies, federal agencies, and private organizations with interests in the river. N.D. Legis. Council Memorandum, Missouri River Issues Study - Background Memorandum at 17 (June 2000). The "vision group's" objective is to develop a river management plan. Id.

Applying the public trust doctrine.

While the public trust doctrine places significant limitations and affirmative duties on the state, the state has flexibility in satisfying its trust obligations. The contours of the state's duties, however, are difficult to assess because the doctrine is not fully defined in North Dakota. Guidance must be found in the case law of other states.

"[W]hat one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use." Sax, 68 Mich. L. Rev. at 488. For example, encroachments on sovereign lands that serve the public interest are acceptable. E.g., Nat'l Audubon, 658 P.2d at 724. Thus, public boat ramps are acceptable. They can significantly enhance public access to and recreation on a river, while only marginally disturbing the river's natural characteristics and aesthetics. Even the private use of sovereign land may be permissible under the public trust doctrine so long as the public's interests are not materially disrupted. E.g., Caminiti v. Boyle, 732 P.2d 989, 995-96 (Wash. 1987) (private docks not necessarily inconsistent with the trust); Kootenai Env'tl. Alliance v. Panhandle Yacht Club, Inc., 671 P.2d 1085, 1094 (Idaho 1983) (private marina permitted); State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983) (ski jump acceptable if it does not "materially obstruct navigation" and "is not detrimental to the public interest"); Morse v. Oregon Div. of State Lands, 590 P.2d 709, 712 (Or. 1979) (private grants acceptable if they do not substantially impair the public's interests); State v. Pub. Serv. Comm'n, 81 N.W.2d 71, 74-75 (Wis. 1957) (small part of a lake could be filled to expand a park); Boone v. Kingsbury, 273 P. 797, 817 (Cal. 1923) (drilling derricks would not significantly impede the public trust, particularly since the state retained authority to have the derricks moved if they did interfere with the trust). As United Plainsmen

states, the public trust doctrine does not prohibit all development, but it does require controlled development. 247 N.W.2d at 463.⁴

Constructing wildlife habitat on sovereign lands is not necessarily inconsistent with the trust. Work authorized by the State Engineer under the WW Ranch permit allows construction of habitat needed by the endangered least tern and threatened piping plover, birds that have always been a part of the Missouri River ecosystem. Because the public trust doctrine includes a duty to preserve, to some degree, the river's natural characteristics, habitat construction is not inconsistent with the state's role as guardian of the river. The doctrine does not necessarily prohibit the State Engineer from allowing sovereign lands to be used for constructing wildlife habitat. The State Engineer, however, should ensure that the mitigation is actually effective; otherwise there is unlikely to be a public benefit for the private use of sovereign land. Indeed, the Game and Fish Department concludes that the Corps would help the terns and plovers more by adjusting its water flow regime, and that creating "sandbar habitat is a poor second choice." Letter from Michael McKenna, N.D. Game and Fish Dept., to Timothy Fleeger, U.S. Army Corps of Engineers (Sept. 26, 2003).⁵

Establishing tern and plover habitat may adversely affect habitat relied on by other species, such as whitetail deer, pheasants, Canada geese, beavers, etc. *Id.* It will also limit public use of that area. The Endangered Species Act provides significant protection to the habitat of listed species. It is unlawful to "take" a listed species, 16 U.S.C. § 1538(a)(1)(B), and "take" has a broad meaning. It includes not only "kill" but also "harm or harass." 16 U.S.C. § 1532(19). "Harm" and "harass" are broadly defined to cover activities that "disrupt" a species' behavioral patterns, including "breeding, feeding and sheltering." 50 C.F.R. § 17.3. See also *Strahan v. Coxe*, 939 F.Supp. 963, 983 (D. Mass. 1996), *aff'd in part and vacated in part*, 127 F.3d 155 (1st Cir. 1997) ("take" to be liberally construed). A person can be guilty of a criminal violation under the Act without intending to violate it. *United States v. Ivey*, 949 F.2d 759, 766 (5th Cir. 1991).

⁴ In what may be North Dakota's only contested administrative sovereign lands case, the State Engineer denied, on public trust grounds, a request from the owner of a lot on Lake Isabel to place fill in the lake to expand his lot. The lake covers about 773 acres; the fill would have covered .20 acres. Findings, Conclusions, and Recommendations Concerning Authorization to Construct a Project on Sovereign Lands Application No. S-1251 at 8 (Nov. 27, 1998).

⁵ The Corps is yet uncertain whether artificial habitat actually provides any substantial assistance to listed species. E.g., U.S. Fish & Wildlife Serv., 2003 Amendments to the 2000 Biological Opinion on the Operation of the Missouri River Main Stem Reservoir System 287 (Dec. 16, 2003).

Thus, allowing habitat construction on sovereign lands indirectly transfers to the federal government some control over the land and inhibits public use of it. Neither of these consequences necessarily violate the trust, but they are factors for the State Engineer to weigh in considering applications to use sovereign lands for habitat construction, particularly if more land developers seek permission to use Missouri River sandbars to mitigate the environmental consequences of their developments. More mitigation projects means more federal control of the river. The State Engineer should also consider indirect consequences of issuing habitat mitigation permits, one of which will be the continued development of land adjoining the river, which in turn can have adverse effects on the river's aesthetics.

Habitat construction, as explained, is a consequence of the Corps' decision to place conditions on its bank stabilization permits. A common sovereign land application submitted to the state seeks permission for bank stabilization. About 41 miles of the bank from Bismarck-Mandan to Garrison Dam have been stabilized. Corps' WW Ranch Decision at 43, 60. As much as 40% of the river in the Bismarck-Mandan area has been stabilized. Game & Fish Dep't 1998 Report at 10. The State Water Commission believes that erosion control provides significant benefits. N.D. State Water Comm'n, Missouri River Bank Erosion: Garrison Dam to Lake Oahe at 1-2, 13 (Dec. 1997) (erosion can cause losses of personal and business income, property tax revenue, irrigation pump sites, riparian woodlands, and it contributes to the creation of a delta in the Bismarck area).

Riprap, on the other hand, is not entirely benign. It inhibits, by both foot and by boat, public access to the shore. It can adversely affect the environment. Installing riprap often requires that the riverbank be reshaped to ensure that the riprap stays in place. See Corps' WW Ranch Decision at 5, 22. The North Dakota Game and Fish Department believes that bank stabilization reduces the river's spawning and rearing habitat and that if more riprap is installed, it could have significant adverse effects on the Missouri River fishery. Id. at 27. See also id. 36, 46, 54-55, 70; Game & Fish Dep't 1998 Report at 6-8.⁶ Riprap presents aesthetic considerations. Id. at 10; Corps' WW Ranch Decision at 31, 55. Further, while the effect of one riprap project on the ecosystem and river aesthetics may be minimal, the cumulative effect of these projects may cause problems. E.g., id. at 25, 40-42; Game & Fish Dep't 1998 Report at 10-11. It is the cumulative effects of individual projects that the State Engineer would be best able to consider if management decisions were made under a comprehensive plan.

Allowing sovereign land to be used to mitigate the environmental consequences of riprap projects, and allowing riprap itself, provide significant benefits to landowners. In one assessment, waterfront housing is considered the most valuable, sought after, and

⁶ The walleye fishery in the Bismarck to Garrison Dam reach "is one of the best in the nation." Game & Fish Dep't 1998 Report at 5.

expensive type of residential real estate in the region. Corps' WW Ranch Decision at 6, 7. (Riverfront lots can sell for more than \$100,000. Id. at 7.) But the attractiveness of land along the river for housing, and consequently its value, largely depends on assurances that the bank will not erode. Prospective buyers will pay substantially more for lots with a protected bank. Id. at 8, 32, 56. The financial gain a land developer or landowner may derive from being allowed to use sovereign land for a habitat mitigation project, or to install riprap, is not directly relevant for the public trust analysis. Because it is the river that the state must protect, its focus must be on preserving public interests in the trust resource. The propriety of allowing sovereign land, the public's land, to be directly or indirectly used to significantly enhance the value of private land may be a policy consideration for the State Engineer in managing the river, but it is not a factor that the public trust doctrine requires the State Engineer to weigh.

As noted earlier, the State Engineer has adopted rules governing sovereign lands and the permitting process. Those rules prohibit sovereign lands from being permanently relinquished and require them to be held in perpetual trust for the citizens of North Dakota. N.D.A.C. § 89-10-01-02. Thus, any permit to use sovereign lands must be conditional or revocable. This is necessary because in the future, it may be determined that the permitted use harms the public interest or is no longer consistent with the public trust doctrine.

Public trust doctrine - conclusions.

The public trust doctrine requires that the state preserve and protect the public's interests in the Missouri River. And the public's interests are broad. This duty, however, does not necessarily prohibit the state from allowing the river to be used for private purposes. Whether an individual project is in fact appropriate depends on the particular facts. The State Engineer, as the guardian of the trust, must carefully review all relevant considerations before acting on permit applications. He must conduct the review under a comprehensive plan. United Plainsmen, 247 N.W.2d at 462-63. The review should not be narrow. See Arizona Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 170-71 (Ariz. 1992); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, 671 P.2d 1085, 1092-93 (Idaho 1983). It should examine all interests and consequences, including the cumulative effects of the proposed activity and existing and other proposed projects. Sovereign lands are entitled to the "highest degree of protection." Morse, 581 P.2d at 524. After all, "a river is more than an amenity; it is a treasure." New Jersey v. New York, 283 U.S. 336, 342 (1931) (Holmes, J.).

The constitution's gift clause.

In considering whether the Legislature could convey to riparian landowners a portion of the state's navigable waterways, the North Dakota Supreme Court recognized the potential applicability of the constitution's gift clause. It restrictively construed a statute "to avoid" violating the clause. State v. Mills, 523 N.W.2d at 542. Other state constitutions have similar "anti-gift" clauses and they have been applied in disputes involving state sovereign land management. E.g., Arizona Ctr. v. Hassell, 837 P.2d at 169-71. Thus, the State Engineer needs to consider the gift clause -- as well as the public trust doctrine -- when reviewing requests to use the Missouri River for a private purpose.

The gift clause states:

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business . . . but neither the state nor any political subdivision . . . 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.

N.D. Const., art. X, § 18. The provision, in general, prohibits the state from transferring public assets into private hands. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964); Petters & Co v. Nelson County, 281 N.W. 61, 64-65 (N.D. 1938).⁷ It applies not only to money, but also to transfers of property and other tangible assets. Solberg v. State Treasurer, 53 N.W.2d 49, 53-54 (N.D. 1952) (state-owned minerals); Herr v. Rudolf, 25 N.W.2d 916, 922 (N.D. 1947) (state-owned land); N.D.A.G. 2000-F-13 (books); N.D.A.G. 2000-L-13 (school district land). The gift clause applies to sovereign lands. State v. Mills, 523 N.W.2d at 542.

The limitations imposed by the gift clause do not apply in three situations: in making "internal improvements," in assisting the poor, and in furthering an "industry, enterprise or business" that the governmental entity is authorized to pursue. N.D.A.G. 2003-L-51 at 1. Permitting activities on sovereign land is unlikely to involve assisting the poor or involve a state industry or business. But some projects could constitute an "internal improvement" or further an "enterprise" the State Engineer has authority to pursue and, if so, would not violate the gift clause.

"Internal improvements" includes an array of activities that generally can be described as relating to "development" or "public improvement" projects, such as constructing and maintaining roads, building bridges, and improving waterways for commerce. N.W. Bell

⁷ A history and phrase-by-phrase review of the gift clause is at N.W. Bell Tele. Co. v. Wentz, 103 N.W.2d 245, 252-54 (N.D. 1960).

Tele. Co. v. Wentz, 103 N.W.2d 245, 254 (N.D. 1960); N.D.A.G. 98-F-30 at 2; Rippe v. Becker, 57 N.W. 331, 334 (Minn. 1894); Welch v. Coglan, 94 A. 384, 387 (Md. 1915). Constructing wildlife habitat is a conservation effort and probably not an "internal improvement," but other sovereign land projects could be "internal improvements," such as constructing boat ramps and shoreline facilities that further public use and enjoyment of the river.

"Enterprise" is any activity, especially one of some scope, complication, or risk. N.D.A.G. 93-F-11 at 2. While this definition is broad, the activity undertaken or permitted by a state agency must be one that the law authorizes the agency to itself undertake or to permit another to undertake. See, e.g., N.D.A.G. 2003-L-51 at 1. This requires examining the agency's scope of authority. If the State Engineer is to allow an activity on sovereign land, some authority must permit the activity and the State Engineer's approval of it. The duties imposed by the public trust doctrine have been delegated to the State Engineer. N.D.C.C. ch. 61-33. The duties imposed mandate, to some degree, that the state preserve the Missouri River's ecosystem, scenic beauty, and natural characteristics. These objectives can be furthered by constructing habitat that effectively supports species making their home on the river and, therefore, a sound habitat construction project could be considered an "enterprise" allowed by the gift clause.

Additional considerations affect the gift clause's application. The provision, at its core, requires that the activity or transaction in question promote a public benefit. If a public benefit justifies or serves as a basis for the grant, an unconstitutional gift can be avoided. Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944).

This does not mean that if a private benefit is obtained, the gift clause is violated. The clause is not necessarily violated if a private person receives a "special" or "incidental" benefit. N.D.A.G. 87-L-02 at 2; Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944). In State v. Mills, 523 N.W.2d 537, the court interpreted N.D.C.C. § 47-01-15, which states the riparian landowner "takes" to the ordinary low watermark. The court rejected the view that the statute nullifies the state's interest in the shorezone, that is, the area between the low and high watermarks. Having done so would have been inconsistent with the public trust doctrine and the gift clause. 523 N.W.2d at 542-43. The court nonetheless recognized that there can be private interests in sovereign land. Id. at 544. The case thus confirms that the gift clause, in some contexts, does not impose an absolute prohibition. At the same time, however, the court cited with approval authority that in the shorezone, state interests predominate. Id. at 543-44. See also id. at 545 (Levine, J., concurring) (whatever rights the riparian landowner may hold, they must be assessed "in the context of the State's sovereign duty to hold the shore zone in trust for the public").

In Stutsman v. Arthur, the court made a somewhat similar ruling. It found that where an appropriation of public funds is primarily for a public purpose, the gift clause is not necessarily violated if, as an incidental result, a private benefit is extended. 16 N.W.2d at 454. But, if the result is chiefly a private benefit, then an incidental or ostensible public purpose will not save its constitutionality. Id. Thus, while Stutsman v. Arthur and State v. Mills each allow a private benefit, each requires a prominent public benefit.

The public benefit does not need to be money. A public benefit can be a result that promotes "the public health, safety, morals, general welfare, security, prosperity, contentment, and equality . . . of all the citizens." Green v. Frazier, 176 N.W. 11, 17 (N.D. 1920). Even "equitable" and "moral" consideration may suffice. Solberg v. State Treasurer, 53 N.W.2d at 53; Petters & Co v. Nelson County, 281 N.W. at 65. But the connection between the activity in question and its public benefit cannot be tenuous. E.g., N.D.A.G. 2003-L-51 at 2 (paying wages owed by a defunct business is insufficiently related to economic development); N.D.A.G. 2002-F-09 (county's cash contribution to nonprofit's July Fourth celebration, which involved fireworks, is not justified on a concern for fire safety).

Whether or not a sovereign land permit issued to a private person satisfies the gift clause is a question of fact. E.g., N.D.A.G. 2003-L-09 at 3; N.D.A.G. 98-F-19 at 2; N.D.A.G. 96-L-93 at 3; N.D.A.G. 87-02 at 2. Compliance with the clause must be determined on a case-by-case basis with regard to the unique circumstances presented by each request to use sovereign land.

Sincerely,

Wayne Stenehjem
Attorney General

cmc

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

MEMORANDUM

TO: Rick Larson, Deputy Land Commissioner
FROM: Charles M. Carvell, Asst. Attorney General
DATE: June 17, 2005
RE: Ownership of White Lake

Issue

To ensure that North Dakota, upon achieving statehood in 1889, joined the Union on an equal footing with other states, North Dakota took title to the bed of all navigable bodies of water. Did North Dakota acquire title to the bed of White Lake under the equal footing doctrine? Stated otherwise, was White Lake navigable in 1889?

The question arises because there is oil and gas leasing activity in the White Lake area. If White Lake is navigable, North Dakota owns the bed and minerals under the bed.

Answer

Without evidence of actual commercial use on White Lake, it is unlikely a court would rule White Lake navigable at statehood.

Discussion

White Lake: White Lake is located in Mountrail County, a few miles northwest of the town of Stanley. This somewhat narrow lake is about five miles long. It covers 2,380 acres. When the federal government surveyed the area in 1898 it meandered White Lake. The lake, as depicted on the original survey maps, appears to have the same characteristics it has today. A recent aerial photo and one from 1983 do not show summer homes or boat ramps on the lake; they show no development of the littoral land. Neither the state parks and recreation department nor game and fish department have ever carried out any function or activity on the lake. White Lake can be considered isolated. It is not part of a chain of lakes and does not appear to have an outlet, at least not one of any consequence. Several small creeks drain into the lake. The Land Department has not undertaken a historical investigation to determine if White Lake has ever been used for boating or commerce.

The significance of meanders. The fact that White Lake is meandered does not settle the navigability question. "Meandered lakes are not necessarily navigable lakes. Meandering a lake does not determine the question of its navigability." *State v. Adams*, 89 N.W.2d 661, 689 (Minn. 1958). See also *Lefevre v. Washington Monument & Cut*

Stone Co., 81 P.2d 819, 822 (Wash. 1938).¹ "Meander lines are not per se boundary lines. Their purpose is to fix limits for the determination of the quantity of land to be paid for." *State v. Brace*, 36 N.W.2d 330, 333 (N.D. 1949). See also *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488, 492 (N.D. 1949). Meander lines are just one circumstance to consider in the navigability analysis. See, e.g., *Lykes Bros., Inc. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 636 n.5 (11th Cir. 1995); *McGahhey v. McCollum*, 179 S.W.2d 661, 663 (Ark. 1944).

The navigability test. Before North Dakota entered the Union, the United States held title to the beds of navigable waterways in the Dakota Territory. *Sprynczynatyk v. Mills*, 523 N.W.2d 537, 539 (N.D. 1994). Upon statehood, North Dakota acquired title to them under the equal footing doctrine and Submerged Lands Act. The equal footing doctrine entitled North Dakota to enter the Union on an equal footing with other states. *Id.* The doctrine accords "newly admitted State[s] the same property interests in submerged lands as was enjoyed by the Thirteen Original States as successors to the British Crown." *Utah v. United States*, 403 U.S. 9, 10 (1971). Under the Submerged Lands Act, 67 Stat. 29, 43 U.S.C. § 1301 *et seq.*, "the presumption of state title to 'lands beneath navigable waters within the boundaries of the respective States' is 'confirmed' and 'established.'" *Alaska v. United States*, 125 S.Ct. 2137, 2143-44 (2005) (quoting 43 U.S.C. § 1311(a)).

Waterways are navigable for title if they are "navigable in fact." *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871).

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

Id. See also *Utah v. United States*, 403 U.S. 9, 10 (1971).² "The true test of . . . navigability . . . does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation." *The Montello*, 87 U.S. 430, 441 (1874). It is the "capability of use by the public for purposes of transportation and

¹ On the other hand, the fact that a waterway was not meandered "does not establish that the waterway was not in fact navigable at the time of the survey, since surveying officers have no power to settle questions of navigability." *Bingenheimer v. Diamond Iron Mining Co.*, 54 N.W.2d 912, 918 (Minn. 1952) (citing *Oklahoma v. Texas*, 258 U.S. 574 (1922); *Harrison v. Fite*, 148 F. 781, 784 (8th Cir. 1906)).

² "Navigability" can have different definitions depending on the context in which the term is used. Thus, the navigability test to employ "must be determined by the purpose for which navigability is being assessed, whether for admiralty jurisdiction, land claims, or for some other reason." *North Dakota v. Andrus*, 671 F.2d 271, 278 (8th Cir. 1982), *rev'd on other grounds sub nom.*, *Block v. North Dakota*, 461 U.S. 273 (1983).

commerce" that affords the true navigability criterion rather than the extent and manner of actual use. *Id.* Because the test doesn't require actual use, a river or lake can be navigable without ever having had a boat on it. *United States v. Utah*, 283 U.S. 64, 83 (1931). The test requires only that the waterway be susceptible or capable of being used as a highway for commerce. If the waterway is "capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a navigable river or highway." *The Montello*, 87 U.S. at 441-42. Further, the kinds of watercraft that can prove navigability needn't be large. Typical craft in use around statehood can be used to measure navigability. Thus, canoes; small, flat bottom boats; and other shallow draft boats can suffice.

The navigability of White Lake - "Dead-end" lakes. There is little question that White Lake's characteristics allow the use of an array of watercraft. It could probably even support steamboats, which were often designed to draw only a few feet of water. But the navigability test requires more than just the capacity to float a boat. The waterway must be useful as a highway for commerce. It requires that the waterway be used, or susceptible of being used, for trade or travel. Given White Lake's size and location, it seems unlikely that it would have been used or even considered as a transportation route.

Dozens if not hundreds of court decisions apply the navigability test to particular bodies of water. Each case depends on its own facts. There is in this jurisprudence, however, a string of decisions analyzing the navigability of smaller, isolated lakes; lakes that begin "nowhere and lead[] nowhere." *Lefevre v. Washington Monument & Cut Stone Co.*, 81 P.2d 819, 822 (Wash. 1938).

Lefevre dealt with Silver Lake, a lake not unlike White Lake. Silver Lake is 3.5 miles long, 80' deep at its deepest, and from one-quarter to one-third of a mile wide. *Id.* at 820. The court found it non-navigable because it is "not so situated" where it is ever likely to be used as a means of transportation. *Id.* at 822. "It is simply an isolated pond of water." *Id.* at 820. The navigability test requires that the water must be a highway of commerce, but Silver Lake "can't be a highway for it starts from nowhere and leads nowhere." *Id.* at 822 (quoting trial court).

Scipio Lake in Utah is meandered and about 1.5 miles long and five-eighths of a mile wide. *Monroe v. State*, 175 P.2d 759, 760 (Utah 1946). Its average depth is four to five feet and it covers about 580 acres. *Id.* It has been used for boating and fishing, but not for commerce.

Scipio Lake is comparatively small and so located that . . . it is easier to go around it than to cross it. The public left to itself, is not going to select the hard way of travel, and if it is a short cut to go around it, that short cut will be used.

Id. at 761. Finding it navigable would be inconsistent with the idea that navigable bodies must "meet the needs of commerce" and must "afford[] a channel for useful commerce." *Id.* (quoting *United States v. Utah*, 283 U.S. 64, 83, 86 (1981)). Navigability depends not only on depth and width, but also on location. *Id.* (citing *State v. Aucoin*, 20 So.2d 136, 154 (La. 1944)). The lake must be "so situated that it becomes or is likely to become a valuable factor in commerce." *Id.* at 762. See also *North Dakota v. Hoge*, No. A1-83-42, slip op. at 5 (S.W.D. N.D., Feb. 28, 1984) (geography important "in establishing that a waterway is capable of being used as a highway").

Under such an analysis, even a tiny lake could be navigable, depending on its location. Thus, Syracuse Lake, a 33-acre Minnesota lake, was found navigable because it was part of a chain of lakes and rivers connecting Lake Superior to Rainy Lake and Lake of the Woods. *State v. Longyear Holding Co.*, 29 N.W.2d 657, 661 (Minn. 1947). Also, the waterway was used by Indians, fur traders, and lumber interests. *Id.* at 664. Liberty Lake, another small lake (.5 miles long and .75 miles wide) was found navigable in *Kalez v. Spokane Vally Land & Water Co.*, 84 P. 395, 396 (Wash. 1906). Small pleasure boats operated on the lake and a steamboat once did, carrying visitors and pleasure parties about the lake. *Id.* Evidence of the steamboat's presence on the lake may have been the deciding evidence of navigability.

Lakes larger than Liberty and Syracuse Lakes have been found non-navigable. The court that found Syracuse Lake navigable, found Five Lake, a lake six times larger than Syracuse Lake, non-navigable because of its location. *State v. Bollenbach*, 63 N.W.2d 278 (Minn. 1954). While Five Lake may have physical characteristics that permit water travel, it is not "situated in a location useful to commercial trade and travel." *Id.* at 289. Geographic location is important. Any body of water might be capable of floating a boat, but to determine navigability, "it is only those lakes and streams with a reasonable and practical possibility of future utility which are susceptible to use as a highway for commerce." *Id.* The shores of Five Lake are wooded, and so it is possible that logging could occur in the area and the lake used to float logs, but "it is doubtful whether any practical commercial purpose would be served by floating logs across the lake." *Id.* at 290.

Another Minnesota case considered the navigability of a chain of small lakes and connecting streams and channels. *State v. Adams*, 89 N.W.2d 661 (Minn. 1958). The upper part was found non-navigable; it "was only a watery cul-de-sac and led nowhere." *Id.* at 762. This is despite the fact that a 1,160-acre lake in this chain has been used for recreational boating, swimming, and fishing, and that resorts on it rent cabins and boats. While the lake's physical characteristics meet part of the navigability test, its location prevented a navigability finding. "The deadend watercourse had no commercial potentialities." *Id.* at 676.

A landlocked lake, if sufficiently large to furnish a route of useful commerce within itself between places which have a need, actual or

potential, for such route of commerce, of course comes within the Federal [navigability] test. Also, a small lake may be navigable if so located as to provide a commercial route. The physical capabilities of a lake, together with its location and all surrounding circumstances, determine its navigability.

Id. at 676-77. Consequently, the court found the upper part of the chain non-navigable because its lakes and streams are "not situated in locations useful for commerce. They have not been used for commerce and do not provide practical routes for commerce, and no lake connects points between which they would be useful as a practical route for navigation." *Id.* at 677.

Other state courts have applied the "dead-end lake" rule, although they may not have used that term. For example, the Texas Supreme Court stated:

Every inland lake or pond that has the capacity to float a boat is not necessarily navigable. It must be of such size *and so situated* as to be generally and commonly useful as a highway for transportation of goods or passengers between the points connected thereby. It must either alone or in connection with other bodies of water connect points between which it is practical to transport commerce by water. . . . While Stanmire Lake is large enough to float a boat, it is not wide enough or long enough to provide a practical route for the transportation of commodities in any direction and does not connect any points between which it would be useful as a practical route for navigation.

Taylor Fishing Club v. Hammett, 88 S.W.2d 127, 129-30 (Tex. 1935) (emphasis added). See also *Snively v. State*, 9 P.2d 773, 774 (Wash. 1932) (119-acre lake has no inlet or outlet and "is not so located that it . . . could possibly be used as a portion of a public highway. . . . The fact that there is sufficient water to float a commercial boat is not enough"); *State v. Sweet Lake Land & Oil Co.*, 113 So. 833, 835 (La. 1927), *overruled on other grounds*, *Gulf Oil Corp. v. State Mineral Bd.*, 317 So.2d 576 (La. 1974) (a lake that is "isolated . . . without a natural inlet or outlet large enough for a pirogue to navigate" is not navigable); *Proctor v. Sim*, 236 P. 114, 116 (Wash. 1925) (a lake's navigability depends in part on location)

The Eighth Circuit Court of Appeals adopted the "dead-end lake" test in *Harrison v. Fite*, 148 F. 781 (8th Cir. 1906), in which the navigability of Arkansas' Big Lake was considered. Earthquakes in the early 1800s lowered land adjoining Little River, as a result, overflows from the river created Big Lake, which "embraces many thousand acres." *Id.* at 782. Though Big Lake is meandered, the lake possessed "none of the characteristics of real commercial usefulness as a navigable thoroughfare." *Id.* at 785. The lake contains inlets of deeper water, but these can in no sense "be termed useful highways of commerce. They are for the most part tortuous, lacking continuity, and, so to speak, end nowhere." *Id.* at 786. See also *Gratz v. McKee*, 270 F. 713, 716 (8th Cir.

1921) (quoting *Griffith v. Holman*, 63 P. 239, 242 (Wash. 1900)) (among other characteristics necessary for a lake's navigability, the lake "must be so situated . . . as will enable it to accommodate the public generally as a means of transportation").

The "dead-end lake" cases express the "highway of commerce" element of the navigability test. A navigable river or lake must "afford[] a channel for useful commerce." *United States v. Utah*, 283 U.S. 64, 86 (1931). See also *The Montello*, 87 U.S. at 439 (navigable waters are "highways for commerce"). The "gist" of navigability is that the waterway serves as a "highway." *Utah v. United States*, 403 U.S. 9, 11 (1971). See also *Chisolm v. Caines*, 67 F. 28, 292 (Cir. Ct. S.C. 1894) ("The essential characteristic of a navigable stream is that it is . . . a public highway").

The typical small, isolated lake is unlikely a "highway." Without evidence of actual historical use, such lakes will likely be found non-navigable. Thus, unless there is evidence of White Lake actually having been used for commercial purposes, it is unlikely that a court would find the lake navigable.

Judicial decisions on the navigability of North Dakota lakes. The North Dakota Supreme Court has considered the navigability of three lakes not unlike White Lake. In 1921 it considered title to the bed of Sweetwater Lake, a meandered lake in Ramsey County, which is about six miles long and in some places two miles wide. *Roberts v. Taylor*, 181 N.W. 622, 623-24 (N.D. 1921). In *State v. Brace*, 36 N.W.2d 330, 331 (N.D. 1949), the court addressed Fuller's Lake, a meandered lake in Steele County covering 179 acres, and in *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488, 489-90 (N.D. 1949), it considered Grenora Lake No. 2, a meandered lake in Divide County covering a little more than a square mile.

The court found Sweetwater Lake navigable and Fuller's Lake non-navigable. *Roberts v. Taylor*, 181 N.W. at 626; *State v. Brace*, 36 N.W.2d at 334. The decisions, however, aren't instructive because the court failed to apply the federal navigability test. It stated that navigability for title may be determined by state law and applied what may be described as a "pleasure boat" test. *Roberts v. Taylor*, 181 N.W. at 625-26; *State v. Brace*, 36 N.W.2d at 319-22. This was error. Navigability "is necessarily a question of federal law." *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926). See also *Ozark-Mahoning*, 37 N.W.2d at 490 (title navigability "is a federal question").

When the court considered the navigability of Grenora Lake No. 2 in *Ozark-Mahoning*, it did recognize the applicability of the federal test. 37 N.W.2d at 490. The court stated that the lake has neither an inlet nor outlet; its waters are "malodorous and . . . unfit for use by man, beast, fish or fowl;" and that there "is no evidence that any use ever has been or could be made of the waters . . . either for pleasure or for profit, for travel, or for trade." *Id.* at 489-91. The court did not elaborate on these statements so the value of the decision and how it might apply to other small North Dakota lakes is uncertain. Nonetheless, it is clear that the North Dakota Supreme Court does not understand the federal navigability test satisfied merely by a lake's ability to float a boat. Thus, it would

be unsurprising were the court to use *Ozark-Mahoning* as a springboard to adopt the "dead-end" lake rule, or something like it.³

A federal court found Painted Woods Lake navigable. *North Dakota v. Hoge*, No. A1-83-42, slip op. at 6 (S.W.D. N.D., Feb. 28, 1984). This McLean County lake is about two miles long, very narrow, and covers about 165 acres. *Id.* at 2. It is located a few miles south of the town of Washburn. At one time the lake was part of the bed of the Missouri River but at statehood it was no longer connected to it. *Id.* 2-4. There was historical evidence that the lake was used for commercial purposes. "Twice entrepreneurs ran excursion boats on the Lake, one of which was 24 feet long and motor powered." *Id.* at 4. There was also "recreational boating, hunting and fishing [on the lake] since at least the early 1990's." *Id.*

Conclusion. White Lake is, by North Dakota standards, a fairly large body of water. Its present characteristics are similar to those at statehood. Any number and manner of boats could traverse the lake. But the lake is isolated, and isn't so large that it would be more convenient to cross the lake by boat than to travel around by land.

The "true criterion" for navigability is "usefulness . . . to the population . . . as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise," and if the water in question "may be prudently relied upon and used for that purpose at some seasons of the year recurring with tolerable regularity, then, in the American sense, it is navigable." *McGahhey v. McCollum*, 179 S.W.2d 661, 664 (Ark. 1944) (citing *Little Rock, M.R. & T.R. Co. v. Brooks*, 39 Ark. 403, 43 Am Rep. 277).

It seems far more prudent and practical that at statehood trade and travel in what is now northern Mountrail County would have been by horse and wagon on trails and roads, and not by boat on White Lake. It seems unlikely that White Lake would have been a part of the travel network. Because of this, coupled with the fact that I am unaware of any actual historical use of the lake, I conclude that White Lake was not navigable at statehood. If evidence of historical boat traffic on the lake comes to light, my conclusion might change.

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³ Devils Lake has also had its navigability assessed, and been found navigable. *E.g.*, *101 Ranch v. United States*, 714 F.Supp. 1005, 1007 (D.N.D. 1988), *aff'd*, 905 F.2d 180 (8th Cir. 1990); *Matter of the Ownership of Bed of Devils Lake*, 423 N.W.2d 141, 142 (N.D. 1988). But this finding is unhelpful in evaluating the navigability of lakes like White Lake. Devils Lake is an exceptionally large lake and there is abundant evidence of commercial boat traffic on it in the late 1800s and early 1900s.

**LETTER OPINION
2004-L-33**

May 11, 2004

Mr. Michael Connor
Manager
Devils Lake Basin Joint Water Resource Board
524 4th Avenue #27
Devils Lake, ND 58301

Dear Mr. Connor:

Thank you for your letter asking questions related to Devils Lake.¹ For the reasons discussed below, it is my opinion that as Devils Lake rises or recedes, the adjacent landowner will take title down to the ordinary high water mark, the State will take title to lands up to the ordinary low water mark, and the adjacent landowner and the State will have correlative rights to the area in between the two marks known as the shorezone; any financial assistance received by landowners related to land inundated by Devils Lake will likely not adversely affect the State's property interest in the bed of Devils Lake; debris removal on land exposed by the receding lake will be governed by N.D.C.C. §61-03-23.1 if applicable, and, if not applicable, will be the responsibility of the landowner for land above the ordinary high water mark; the courts have historically, without much explanation, applied laws determining the boundaries of navigable bodies of water to both rivers and lakes; and if Devils Lake continues to rise, State ownership may follow rising waters to inundated lands.

ANALYSIS

As you know, Devils Lake is a large freshwater lake in northeast North Dakota whose elevation has fluctuated widely. During Devils Lake's most recent rise beginning in the 1940's, the lake has risen and inundated many acres of developed land surrounding Devils Lake.

¹ You also ask questions relating to the operation of the Devils Lake outlet. This office will not issue an opinion on matters in which it is currently engaged in litigation. The State has, in fact, been sued over the outlet. Two groups have appealed the North Dakota Pollutant Discharge Elimination System Permit issued for the outlet by the North Dakota Department of Health to the State Water Commission. Consequently, this office respectfully declines to answer questions relating to the outlet.

Today, Devils Lake's elevation is over 1,447 feet mean sea level (msl). You ask if Devils Lake rises to 1,450' msl, whether the additional acreage inundated becomes State property. The essence of your question is whether the State's title to the bed of Devils Lake can expand. Conversely, you ask how ownership will be determined if the lake recedes. The answers to your questions require an analysis of why the State has absolute title to beds of navigable waters and principles of water and property law.

Upon achieving independence from Great Britain, each American colony became sovereign. As such, they held "the absolute right to all their navigable waters and the soils under them . . . subject only to the rights since surrendered by the constitution to the general government." Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842). Since the beds of navigable waters were not surrendered by the U.S. Constitution to the federal government, they were retained by the states. Mumford v. Wardwell, 73 U.S. 423, 436 (1867). New states admitted to the Union were entitled to the same rights as those held by the original states. Id.; Pollard v. Hagan, 44 U.S. 212, 224, 228-29 (1845). This concept is the equal footing doctrine. See Utah Division of State Lands v. United States, 482 U.S. 193, 195-196 (1987). Indeed, North Dakota's Enabling Act states that North Dakota shall be "admitted . . . into the union . . . on an equal footing with the original States" 25 Stat. 676, 679 (1889) reprinted in 13 N.D.C.C. p. 63 (1981).

Under the equal footing doctrine, upon North Dakota's admission to the Union it took title to the sovereign lands within the state. State v. Brace, 36 N.W.2d 330, 332 (N.D. 1949). "The starting legal principle is that a state acquires, as an incident of statehood, title to the beds of all navigable bodies of water within its boundaries" 101 Ranch v. United States, 714 F. Supp. 1005, 1013 (D.N.D. 1988), aff'd, 905 F.2d 180 (8th Cir. 1990). See also J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co., 423 N.W.2d 130, 132 (N.D. 1988) (same). This title is "absolute," Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 372, 374 (1977), and has been confirmed by the Submerged Lands Act. 43 U.S.C. § 1311(a). Thus, the State has absolute title to the beds of navigable waterways.²

Devils Lake is navigable. See In re Matter of the Ownership of the Bed of Devils Lake, 423 N.W.2d 141 (N.D. 1988); Rutten v. State, 93 N.W.2d 796 (N.D. 1958); Devils Lake Sioux Tribe v. State of North Dakota, 917 F.2d 1049 (8th Cir. 1990); 101 Ranch, 714 F.

² Although North Dakota took title to the bed of Devils Lake at statehood, in 1971, as part of the Garrison Diversion water project, the State conveyed to the United States by quitclaim deed all land "lying below the meander line in the Devils Lake-Stump Lake chain of lakes." 101 Ranch v. United States, 905 F.2d 180, 184 (8th Cir. 1990). "The 1971 deed expressly conveyed the lakebed by reference to pools in the lake." Id. at 184 n.9. The fact that the State conveyed certain lands to the United States should not affect the principles of law governing boundary determinations.

Supp. 1005; 101 Ranch, 905 F.2d 180; National Wildlife Federation v. Alexander, 613 F.2d 1054 (D.C. Cir. 1979). The next logical question is to what extent does the State's and adjacent landowners' ownership of a navigable body of water change as the lake rises and falls?

The boundary of a tract of land abutting a navigable body of water is ordinarily formed by a water line. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143.³ The boundary is generally discussed by reference to the ordinary low water mark, the ordinary high water mark, and the area between those two marks which is referred to as the "shorezone." The State owns absolute title to the bed of navigable bodies of water up to the low watermark. State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 540 (N.D. 1994) (citing Hogue v. Bourgois, 71 N.W.2d 47, 52 (1955)). The adjacent or upland owner owns title to the ordinary high water mark. Both the State and the upland owner have correlative rights between the ordinary high water mark and the ordinary low water mark known as the shorezone. State ex rel. Sprynczynatyk, 523 N.W.2d at 544-45.

Section 61-15-01, N.D.C.C., defines the ordinary high water mark as "that line reached by water when lake or stream is ordinarily full and the water ordinarily high." In a case involving the ordinary high water mark of Devils Lake, the Court explained:

"'High Water Mark' means what its language imports – a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . . In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks.

In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian⁴ owner and the public. It is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."

In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 144-5 (quoting Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958)). The doctrines of reliction and submergence

³ Because the water level of the lake may rise or fall before the ordinary high water mark is established, at any given time, the water level could be below or above the ordinary high water mark.

⁴ Riparian means 'belonging or relating to the bank of a river or stream; of or on the bank.' North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 298 at n.1 (N.D. 1995).

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define the boundary between public and private interests. 101 Ranch, 905 F.2d at 183. Relicted land is that which was covered with water, but which was uncovered by the imperceptible recession of the water. 101 Ranch, 714 F. Supp. at 1014 (citing Bear v. United States, 611 F. Supp. 589, 593 n.2 (D. Neb. 1985), aff'd, 810 F.2d 153 (8th Cir. 1987)). When relict lands are created, the upland owner takes title to those lands; the doctrine of reliction causes the title to riparian land to be ambulatory. 101 Ranch, 714 F. Supp. at 1014 (citing Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. at 386, and California ex rel. State Lands Com'n v. United States, 805 F.2d 857, 864 (9th Cir. 1986)).

"Submergence is the converse of reliction and involves the imperceptible rise in water level so that land formerly free of water becomes submerged." 101 Ranch, 714 F. Supp. at 1014 (citing Municipal Liquidators, Inc. v. Tench, 153 So.2d 728 (Fla. 1963)). When this happens, title to submerged lands reverts to the State and the loss is uncompensated. 101 Ranch, 714 F. Supp. at 1014. Thus, the ordinary high water mark is not a fixed line, but is instead ambulatory. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 144-5 (quoting Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958)). The extent of the State's and the adjacent landowner's title fluctuates with the water line as it exists from time to time. State ex rel. Sprynczynatyk v. Mills, 592 N.W.2d at 592 (citing In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143-144).

Typically, ordinary high water mark determinations only arise due to court actions. There have been at least two North Dakota Supreme Court cases and one federal district court case discussing ordinary high water mark determinations for Devils Lake. In Rutten v. State, the plaintiff argued and the district court agreed that the ordinary high water mark was 1,419 feet msl. Rutten, 93 N.W.2d at 798. The North Dakota Supreme Court, however, analyzed the historical rises and falls of the lake and concluded that the evidence was insufficient to sustain the plaintiff's contention that the waters of Devils Lake had permanently receded and that the ordinary high water line of the lake was 1,419 feet msl. Id. at 798-99. The Court explained that "the evidence before the court fails to warrant the conclusion that there has been a permanent reliction to the present level of the lake, or that the waters in the lake will never again reach some higher level." Id. at 799. In 1988, the North Dakota Supreme Court determined that the ordinary high water mark was 1,426 feet msl. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143. The same year, however, the North Dakota federal district court determined the ordinary high water mark to be 1,427 feet msl. 101 Ranch, 714 F. Supp. at 1008 (D.N.D. 1988). I am unaware of any additional court determinations relative to Devils Lake's ordinary high water mark. These cases illustrate the ambulatory nature of title to land adjacent to Devils Lake.

In some cases, land that was not riparian to the lake may now be inundated by Devils Lake. In a conversation you had with a member of my staff, you asked whether the nonriparian owner would become the owner of the riparian land if Devils Lake recedes below that riparian land. The North Dakota Supreme Court in Perry v. Erling, 132

N.W.2d 889 (N.D. 1965), has indirectly examined a variation of the issue you present. In Perry, land which was originally surveyed as riparian was submerged by the encroaching Missouri River; the encroachment caused land, originally surveyed as nonriparian, to become riparian. Id. at 897. The Perry Court concluded that when the river shifted back, causing the land originally surveyed as riparian to reemerge, title to the reemerging land rested with the owner of the original riparian land and not with the owner of the original nonriparian land. Id.

Although the North Dakota Supreme Court has not directly addressed this issue relative to Devils Lake, it is possible that the Court would expand upon the precedent set in Perry and 101 Ranch, and allow title to formerly inundated riparian land to revert to the person who owned it prior to inundation.

You ask if the State's ownership will be affected if landowners receive financial assistance for inundated land without State involvement. Generally, the State's title to land is unaffected by an exchange of money between landowners and a third party. See 101 Ranch, 714 F. Supp. 1005. It is difficult to imagine a situation in which an arrangement or transaction between a landowner and another person will adversely affect the State's property interest.

You ask who is responsible for debris removal from land currently inundated as the water recedes. For instance, debris such as dead tree groves (fallen and standing), abandoned machinery, and other objects that might be considered garbage may be left behind by receding waters on the newly exposed land.

In 1997, the North Dakota Legislature passed N.D.C.C. § 61-03-21.3, giving the State Engineer the authority to order the removal, modification, or destruction of dangers in, on the bed of, or adjacent to a navigable lake. The law provides in part:

If the state engineer finds that buildings, structures, boat docks, debris, or other manmade objects, except a fence or corral, situated in, on the bed of, or adjacent to a lake that has been determined to be navigable by a court are, or are imminently likely to be, a menace to life or property or public health or safety, the state engineer shall issue an order to the person responsible for the object. The order must specify the nature and extent of the conditions, the action necessary to alleviate, avert, or minimize the danger, and a date by which that action must be taken The person responsible is the person who owns or has control of the property on which the object is located, or if the property is inundated with water, the person who owned or had control of the property immediately before it became inundated by water.

Id.

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In cases where N.D.C.C. § 61-03-21.3 does not apply, for instance, if the debris did not constitute a menace to life, property, or public health or safety, other principles would govern. As noted earlier, the water line, no matter how it shifts, remains the property boundary around Devils Lake. 101 Ranch, 802 F.2d at 184-185 (citing Oberly v. Carpenter, 274 N.W. 509, 513 (1937); Jefferis v. East Omaha Land Co., 134 U.S. 178, 196 (1890)). Thus, if the water level drops, the owner of previously inundated land would regain absolute ownership to land above the ordinary high water mark and be responsible for debris removal assuming, of course, that either state or local law required the removal. Between the ordinary high water mark and the low water mark there is a zone along the shoreline wherein the State and the landowner have correlative rights. In State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d at 544, the North Dakota Supreme Court declined to specify the rights of riparian landowners and the State: "The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise. Any precise delineation of parties' rights in this situation would be advisory." The Court did, however, cite to a Minnesota Supreme Court decision wherein that court explained:

"While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose. The state may use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation. Restricted only by that paramount public right the riparian owner enjoys proprietary privileges, among which is the right to use the land for private purposes."

Id. at 543-44 (quoting State v. Korrer, 148 N.W. 617 (Minn. 1914)). Thus, neither the State nor the riparian landowner have absolute title to the shorezone, although the riparian landowner can use his or her land as long as the landowner does not interfere with the public's use of the zone. Based upon the lack of direction from the North Dakota Supreme Court relative to the extent of correlative interests and the potential for numerous factual scenarios, I am unable to issue an opinion whether it is the State or private landowner who would be responsible for debris removal in the shorezone when N.D.C.C. § 61-03-21.3 is not applicable.

You ask how laws designed to resolve "river" disputes can be applied to lakes. Historically, when analyzing the boundaries of navigable bodies of water, North Dakota courts have not distinguished between rivers and lakes. In Roberts v. Taylor, 181 N.W. 622, 625 (N.D. 1921), the North Dakota Supreme Court explained that "in this state a lake is differentiated from a water course only in that it is simply an enlarged water course wherein the water may flow or a basin wherein the waters are quiescent." In In re Matter of Ownership of Bed of Devils Lake, 423 N.W.2d at 144, the Court explained

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that the doctrines of accretion and reliction have often been applied by this court to lakes and rivers in this state. Id. (citing Hogue v. Bourgois, 71 N.W.2d at 52; Roberts v. Taylor, 181 N.W. at 622; Brignall v. Hannah, 157 N.W. 1042, 1045 (N.D. 1916)). In sum, the Court, without much explanation, has readily applied the principles of reliction, submergence, etc., to lakes just as those principles have been applied to rivers.

Finally, you ask whether lakes and coulees connected to Devils Lake that become inundated by the rising waters of Devils Lake become part of Devils Lake and subject to State ownership. As explained above, the extent of the State's ownership in the bed of Devils Lake fluctuates with the rise and fall of the lake. If geographic features connected to Devils Lake become covered by the rising lake, I see no reason why the principles discussed above would not apply and, therefore, the bed of the "connected" lakes and coulees could become owned by the State.

You also ask whether coulees and land under lakes "not previously connected to Devils Lake" that become inundated by the expansion of Devils Lake become part of Devils Lake and subject to State ownership. Your question implies that the lakes were not navigable at statehood and, therefore, their beds are not owned by the State. Again, the principles discussed above and the ambulatory nature of the State's ownership would seem equally applicable to this situation. But the situation is unique and we have not found a court decision that directly addresses this issue. Further, there is uncertainty in the meaning of "not previously connected to Devils Lake." Does it mean not connected in the past 10, 100, or 1,000 years? Consequently, although State title may follow rising Devils Lake waters to lands "not previously connected to Devils Lake," we are unprepared at this time to issue an opinion on the subject.

Sincerely,

Wayne Stenehjem
Attorney General

mas

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

Item #1

TESTIMONY ON ENGROSSED SENATE BILL 2096

House Natural Resources Committee

**Todd Sando
Assistant State Engineer and
Director, Water Development Division of the
North Dakota State Water Commission**

February 23, 2007

Mr. Chairman and members of the House Natural Resources Committee, I am Todd Sando, Assistant State Engineer, and Director of the Water Development Division of the North Dakota State Water Commission. It is my pleasure to appear before you today regarding Engrossed Senate Bill 2096.

Engrossed Senate Bill 2096 has four parts. The first part of the bill amends Subsection 1 of Section 20.1-02-15.1 of the North Dakota Century Code to clarify that the North Dakota Game and Fish Department can enforce state laws and rules on sovereign lands. The second part amends N.D.C.C. § 61-03-21.3 to include dangers on all navigable "waters" rather than just navigable lakes. Section 3 of the bill amends N.D.C.C. § 61-33-05 to allow the State Engineer to enter into agreements with law enforcement entities to enforce the laws and rules associated with N.D.C.C. ch. 61-33. This would allow the Office of the State Engineer to utilize existing law enforcement entities already patrolling sovereign lands to assist with enforcement of N.D.C.C. ch. 61-33 statutes and rules rather than creating a separate enforcement department under the direction of the State Engineer. The fourth and final part of the bill creates a new section to N.D.C.C. ch. 61-33 providing that a person who violates this chapter or any rule implementing this chapter is guilty of a class B misdemeanor unless a lesser penalty is indicated.

I ask for your favorable consideration of Engrossed Senate Bill 2096.



North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



TESTIMONY OF MICHAEL McENROE NORTH DAKOTA CHAPTER OF THE WILDLIFE SOCIETY

**PRESENTED TO HOUSE NATURAL RESOURCES COMMITTEE
ON SB 2096, FEBRUARY 23, 2007**

CHAIRMAN PORTER AND MEMBERS OF THE COMMITTEE:

I am Mike McEnroe speaking on behalf of the North Dakota Chapter of The Wildlife Society.

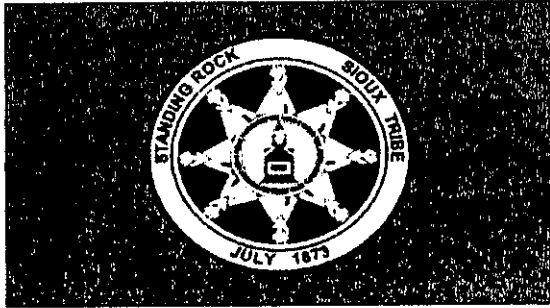
The Chapter supports SB 2096 relating to the management regulations of sovereign lands by the State Engineer. The Chapter supported the State Water Commission's Sovereign Land Management Plan in October of this past year. We believe this legislation provides enforcement strategies for protecting the State's sovereign lands. One suggested amendment to the engrossed bill is to add the words "or the environment" at the beginning of line 20. This was the way the introduced bill was written.

The Chapter also looks forward to commenting on the draft rules prepared by the State Engineer's Office for the management of the sovereign lands.

I have attached a copy of the Chapter's letter supporting the Sovereign Land Management Plan to my testimony.

Thank you. I would stand for any questions from the Committee.

Item #3



Standing Rock Sioux Tribe
Office of the Tribal Chairman
P.O. Box D
Fort Yates, ND 58538
(701) 854-8500
Fax (701) 854-7299

February 22, 2007

North Dakota State Legislature
State Capitol
600 East Boulevard
Bismarck, ND 58505-0360

To the Sixtieth Legislative Assembly of North Dakota:

On behalf of the Standing Rock Sioux Tribe, this letter is written in opposition to the enactment of Engrossed Senate Bill No. 2096 (hereafter "SB 2096"). As the bill now stands it includes the phrase "sovereign lands." The phrase "sovereign lands" is defined in the North Dakota Century Code § 61-33-01 (30) as meaning:

those areas, including lake 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 high watermark and are not sovereign lands.

Unfortunately, SB 2096 does not cite include that definition of "sovereign lands." This leads the Standing Rock Sioux Tribe to conclude that the North Dakota Legislature may be creating a gap, ambiguity or conflict by enacting SB 2096 with the undefined phrase "sovereign lands." Such a change in state law might also result in the state engineer creating rules for or attempting to manage or supervise lands held in trust by the United States for the sovereign Indian Tribes of North Dakota.

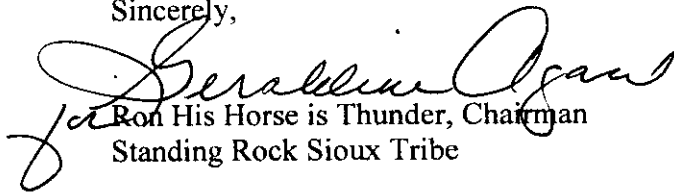
In addition, the Tribe is concerned that the state may also attempt, under the new section proposed to be created under chapter 61-33, to impose penalties on Tribal members who, though acting in accordance with Tribal law, may inadvertently violate the SB 2096 amendments and reenactment of the North Dakota Century Code §§ 20.1-02-15.1(1) relating to powers of the game and fish department, 61-03-21.3, dangers in navigable waters and 61-33-05, powers of the state engineer.

The potential penalties for violations of chapter 61-33 are harsh. Imposition of a Class B misdemeanor on a Tribal member for violating this chapter or any rule implementing this chapter, unless a lesser penalty is indicated, the additional imposition on that Tribal

member of a civil penalty by a court in a civil proceeding or by the state engineer through an adjudicative proceeding under chapter 28-32 and the possible imposition of other sanctions authorized by law, chapter 61-33, or rules adopted under chapter 61-33. The state engineer might also bring a civil action against the Tribal member to recover damages and costs. The Tribe opposes this unfortunate legislation because its language does not provide sufficient clarity of purpose to those against whom it may be enforced.

For the foregoing reasons, I respectfully ask that you join the Standing Rock Sioux Tribe in opposing the enactment of SB 2096. Your consideration in this important matter is appreciated.

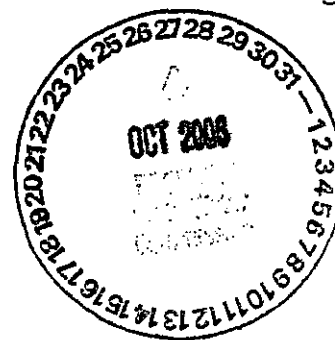
Sincerely,


Ron His Horse is Thunder, Chairman
Standing Rock Sioux Tribe

HHIT/ac
cc: file

John 1

October 26, 2006



Dale Frink, State Engineer
ATTN: Sovereign Land Planning
900 East Boulevard
Bismarck, ND 58501

Dear Dale:

The *Draft North Dakota Sovereign Land Management Plan* while acknowledging that riparian landowners have rights between the ordinary high water mark and ordinary low water mark attempts to usurp those rights. The section on vehicular access would prohibit an landowner from driving on portions of their property. To correct this I suggest a ninth exception be included as follows:

9. By the riparian owner between the ordinary low water mark and ordinary high water mark.

Item 2 under Action Strategy 14.2 should be clarified to insure that the landowner's permission is required to moor watercraft to private property.

Action strategy 15.1 would prevent the riparian owner from haying or grazing the shore zone, and could be interpreted by overzealous environmental groups and their attorneys as preventing the watering of livestock from any navigable body of water since the livestock in accessing the water would undoubtedly eat some vegetation thus removing some plants. This section, as well as other parts of the plan, also fails to take into account that the water marks are ambulatory, and private property may be in place on private land that becomes sovereign land due to rising water. The riparian owner should be allowed to retrieve his property. To correct this I urge you to change the proposed language to:

"Trees, shrubs, vines, plants, soil, gravel, fill, rocks, fossils, sod, water, firewood, posts, poles, or other **public** property may not be removed without a permit issued by the Office of the State Engineer, **except that the riparian owner may hay or graze land between the ordinary low water mark and ordinary high water mark and that firewood...**"

This section has a couple of contradictions. It states firewood may be removed from designated firewood cutting plots, but then states cutting of firewood is prohibited on all sovereign land. If the purpose of this exception is to gather dead wood from certain plots but to prevent cutting of standing trees the words "firewood cutting" should be removed after the word "designated." It also allows picking of berries and fruit, when the presence of berries or fruit would be a strong indicator that the property is above the ordinary high water mark.

Action Strategy 14.1 proposes that commercially guided hunts be prohibited on sovereign land. This item appears to be an example of developing the plan to deal with existing problems on the Missouri River without considering the impacts on other areas, in particular in this case Devils Lake. Allowing fishing guides to operate on the lake while prohibiting hunting guides from doing the same makes no sense.

Sincerely

A handwritten signature in cursive script, appearing to read "Bruce Engelhardt", followed by a horizontal line.

Bruce Engelhardt
Manager 101 Ranch

Subject: Draft North Dakota Sovereign Land Management Plan

Date: Wednesday, October 18, 2006 9:47 PM

From: Jeff Underhill <junderhi@nd.gov>

To: <NDSLMP@nd.gov>

Conversation: Draft North Dakota Sovereign Land Management Plan

10/18/2006

To whom it may concern,

I would like to start by thanking you for the informative meeting, and for allowing us the opportunity to voice our opinion of your draft.

My wife and I live at 4610 Crestwood Dr; Bismarck, ND 58503. That is next to Christmas Tree Island. I would like to comment on recommendation 6, I think it is long over due to get some form of supervision out there, as now the only people that can enjoy the island are the people on atvs and motorcycles. I have personally witnessed close encounters between the hikers, boaters and atvs. It seems the only way you can ride an atv is full throttle, with trees and bushes growing up there are all kinds of blind spots, and at high rates of speed it is only a matter of time before some one gets hit. If people are trying to enjoy the shoreline they race up and down right next to people on the sand also, you really have to keep an eye on your kids, because the atv riders don't seem to care.

There are also issues with wildlife, as this is an endangered species habitat. Without trail laws there is no sanctuary for the deer, fox and coyotes. We used to see Bald Eagles all year round down here, but now we only see them in the winter when there is no pressure on them. The vegetation that is also being destroyed every year as the atv traffic is just increasing and they are making there own trails everywhere. This small area will be quickly destroyed by only a few atvs, which is clear by how the Desert in the south river bottoms, a much larger area has already been destroyed.

This area needs to be preserved for its historical and natural value.

Respectfully yours,

Jeffrey and Cheryl Underhill

Subject: FW: Draft North Dakota Sovereign Land Management Plan Comments

Date: Monday, October 30, 2006 3:30 PM

From: Paczkowski, John A. <jpaczkowski@nd.gov>

To: "Fridgen, Patrick M." <pfridgen@nd.gov>

Conversation: Draft North Dakota Sovereign Land Management Plan Comments

Add this one to your list.

John

-----Original Message-----

From: Jonathan Bry [mailto:jonbry@copper.net]

Sent: Monday, October 30, 2006 3:26 PM

To: Paczkowski, John A.

Cc: Jonathan Bry Bry; 'Wayde Schafer'

Subject: Draft North Dakota Sovereign Land Management Plan Comments

ND State Water Commission

Office of the State Engineer

00 East Boulevard Ave, Dept 770

Bismarck, ND 58505-0850

October 27, 2006

RE: Draft North Dakota Sovereign Land Management Plan
Comments

Dear Mr. John Paczkowski

We are very pleased that the Draft North Dakota Sovereign Land Management Plan (DNDSLMP) is being considered and we would like to thanks the North Dakota State Water Commission (NDSWC) and the State Engineer for

their hard work in putting this plan together. This is long past due but better late than never. Our comments will be mostly focused on the Missouri River, which most people view as a national treasure. It is considered to be the most endangered river in the United States of America. We also understand and appreciate the fact that the NDSWC may face opposition from some individuals and groups that view the Missouri River as nothing more than a place to earn high profits at the expense of the public.

It is important to recognize the fact that there is very little public land along the 80 miles of the Garrison Reach of the Missouri River. Sovereign lands comprise the majority of land that is available for public use. It is also important to recognize that before the six mainstem dams were built, there were almost 400 miles of Missouri River flowing through North Dakota.

For the purpose of these comments, we will only reference the recommendations that we feel are the most important and the most relevant regarding public use rights and environmental considerations. The lack of commenting on certain recommendations does not necessarily mean that we do not support those recommendations or actions strategies.

Recommendation 6 is one of the most important segments of the DNDSLMP. The jurisdiction of the land between the ordinary high water marks (OHWM) of the Missouri River is unclear to most people. We are particularly concerned about the sovereign land that is adjacent to public land which includes United States Army Corps of Engineers land (USACE) , National Park land, State Park land North Dakota Game and Fish Department land (NDGFD) and land managed by the North Dakota State

Historical Society (NDSHS) All too often, people consider sovereign land in the Missouri River corridor as "no man's land" and believe that they can do anything that they wish in these areas.

Off road vehicles (ORV) can cause serious problems. ORV users tend to have little respect for wildlife habitat. They also seem oblivious to the fact that their actions diminish the quality of the experience for those who frequently visit the river to relax, recreate, fish, and hunt on sovereign land. These are some of the few public places that one can get away from the noise and development associated with living in the city. The river can rejuvenate one's soul as a place to unwind from the stresses of daily living and working in crowded and developed areas. Sandbars provide serenity and natural beauty, which are scenic and timeless. They are located within a very reasonable distance from populated areas and are accessible with boats, canoes, and by foot in some areas. Unfortunately, they are also accessible by ORV users when the river is low. The destructive impacts are documented in photos with captions to explain each situation which will be sent as a hard copy of this letter under a separate cover.

Under N.D.A.C. § 89-10-01-12, the public has the right to recreate on sovereign land so long as those activities are nondestructive. It is quite obvious that ORV use on sovereign land is very destructive. For example, I have often visited sandbars that were inaccessible by wheeled vehicles. The sandbars remained pristine, teeming with wildlife including great blue herons, canada geese, beavers and a variety of native vegetation and insects. In recent years of drought, these sandbars became accessible to vehicular traffic. They quickly became barren of life with a large quantity of trash left behind by ORV users. In some cases, these changes became evident in just a couple of weeks.

ORV use in these areas are extremely high impact as described in the following examples. They often tear the landscape by spinning their tires and driving in circles at high speeds. I have witnessed motorcycles and ATVs doing "cookies" in the sand or in the willow thickets. At times these people are teenagers who may not know any better, but more often than not, they are surprisingly adults. Many states have already banned ATVs on sovereign lands.

Accessing sovereign land by ORVs allows irresponsible people to haul unusual objects to either dump or burn. These objects include but are not limited to appliances, furniture and tires leaving behind sharp and unsightly fragments of metal and composite remains. This is almost always accompanied by multiple piles of broken glass and aluminum cans. I have even found places where a person had changed their oil on a sandbar, draining the old oil into the sand and leaving the oil filter and empty oil cans behind. One has to wonder what are they thinking at this time.

Hikers, boaters, canoeists and other outdoor enthusiasts are less likely to leave trash behind. In fact, they often bring garbage bags in order to clean the area that they frequently visit. The main two reasons for this behavior, I believe, is that those who enjoy being outdoors for the sake of being there are more conscientious and they do not have the capability to haul large objects on to sovereign land when they travel by boat or on foot. I am not an anti ATV person. They have do their place when used properly, particularly for utilitarian uses such as farm and ranch work, pulling an ice house onto a frozen lake, and to allow disabled people to be mobile on rough terrain.

The "desert" in the Kimball Bottoms has been designated as an ORV area. However, many ORV users do not stay within the boundaries. It seems that neither the USACE nor the Burleigh County Sheriffs Department (BCSD) enforce the rules of proper ORV use. I actually called the BCSD to report motorcycles and ATVs in an area that was prohibited to motorized vehicles. The officer's response was that he could do nothing about it because he could

not drive his car into the area to apprehend them, even though it was only a half mile walk to where the ORVs were parked.

We support Action Strategy 6.1 : N.D.A.C. § 89-10-01-13 and feel that it should be amended as stated in lines one through eight. This will create the most positive changes in the North Dakota Sovereign Land Management Plan while being in compliance with the Public Trust Doctrine, the principal that navigable waters are preserved for public use.

Recommendation 13, which discusses the increase in the number of people using sovereign land for recreation and therefore the increase of litter is directly correlated with recommendation 6 since ORV users have the ability to bring in more refuse. This is not to say that boaters never leave litter behind, but the problem is much more serious when ORVs are in use. Therefore, we strongly support actions strategy 13.1 to add language to N.D.A.C. ch. 89-10-01 to prohibit littering and the possession of glass on sovereign land. We also support action strategy 13.2 which will give more authority to law enforcement in the field. Public education would be another way to address these problems as stated under Action Strategy 9.1.

We support Recommendation 3, to consider the impacts of actions on sovereign land and Action Strategy 3.1 to amend N.D.A.C. § 89-10-01-08 to include the protection of cultural and historic resources. We feel that it is imperative that cultural and historic resources are protected. The Garrison Reach in North Dakota contains more American Indian historic/cultural sites than any other segment of the Missouri River.

We support Recommendation 4 which refers to section 303(d) of the federal Clean Water Act. We recommend monitoring to insure water quality by either the State Department of Health or the Environmental Protection Agency or

both.

We support Recommendation 9 which will inform the general public, government agencies and developers about new and existing sovereign land regulations and the penalties for violations as well as Recommendation 10 that establishes penalties to discourage illegal projects on sovereign land .

We support Recommendation 12, which would require the office of the state engineer to control noxious weeds on sovereign land (with the least environmental impact within reason).

Recommendation 14, We strongly support Action Strategy 14.1 which states that all sovereign lands are open to hunting and fishing (with some exceptions) and that commercially guided hunts are prohibited. As we stated in paragraph one of this letter, we oppose profiteering at the expense of the health and scenic quality of Missouri River.

We support Recommendation 17 , Action Strategy 17.2 that will only allow tents to be used on sovereign lands and prohibit the use of wheeled campers.

Recommendation 20: We support standards for making navigability determinations based on the federal Equal Footing Doctrine. We also feel that some tributaries of the Missouri River should be considered navigable from the mouth to a reasonable distance inland. Fences that cross a tributary for example, are obstructive and potentially dangerous to those in any type of water craft.

We feel that the state of North Dakota is best suited to manage sovereign land as per the Equal Footing Doctrine, N.D.A.G. 2005-L-01. We strongly oppose management at the county

level. For example, the Burleigh County Park Board may lease and therefore have jurisdiction of Missouri River sandbars on a three mile stretch north of Bismarck.

Authorized uses would include ATV use and dirt biking. We would like to note that the designated ORV area on the USACE land at the desert contains more than enough land to accommodate this use.

In references to the sandbars on a three mile stretch north of Bismarck, Burleigh County Commissioner Clause Lembke stated in an article in the Bismarck Tribune that " There has to be an area where the four-wheelers and dirt bikes can go freewheeling..." He also suggested that there should be a cohabitation with ATVs and hikers. We feel that is like attempting to mix oil with water. It is quite annoying to go bird-watching for example, while loud ATVs are speeding by. This also brings up a very serious safety issue since one may be run down by a very heavy ATV traveling at 40 or 50 MPH. We must also acknowledge the fact that sovereign land is usually inaccessible to an ambulance. Burleigh County has already demonstrated that they are neither capable or willing to protect the natural qualities which make the Missouri River an attractive place to visit. We are risking the chance for future generations to experience the wonders of the Missouri River due to poor management at the county level.

We would like to bring up some omissions that should be included in the NDSLMP: Member agencies on the sovereign land technical working group should also include American Indian representatives and non-governmental organizations (NGO).

The treatment of accretion land that is adjacent to privately owned riparian land should be addressed. If the accretion land is below the high water mark, it is sovereign land. Many landowners feel that they own accretion land even if it is below the OHWM. I have actually seen riparian land owners post sovereign land.

Livestock should not be allowed to enter sovereign land. For example, there is an area just north of Washburn where cattle are allowed to enter the Missouri River on a sandbar which is adjacent to private land. There is so much feces that the sand is barely visible and one can smell the animal waste from a mile away. We are not allowed to dump raw sewage into the river so why should we be allowed to dump raw animal waste? Privately owned land should be fenced between the OHWM and the river. Water could be pumped from the river to a stock tank to avoid contamination. Most of the Garrison Reach is upstream from Bismarck, thus contaminating the river where we fish, swim and acquire water for municipal use.

The shore zone is always be accessible to water craft. However, if the water level happens to be above the OHWM during times of high flows, water craft would not have access to the nearest shore in the case of emergencies. Persons in water craft must be able to exit the river at any location in the case of emergencies.

The detrimental practice of bank stabilization should not be encouraged by the NDSWC since rip rap extends into sovereign land. Section 404 of the Federal Clean Water Act should be monitored more closely. In particular, the NDSWC should identify illegal dredging and filling activities by private landowners who are altering the river below the OHWM on ND state sovereign lands. We realize that is this responsibility of the USACE and the

EPA but they rarely seem to get into the field.

Again, thank you for creating the Draft North Dakota Sovereign Land Management Plan. We feel that it is a great first step to protect rare public land in our waterways. Please feel free to contact me if you have any questions.

Sincerely,

Jonathan Bry

Chapter Chair

Copacotah Chapter of the Sierra Club

Day 221-9845, Res. 223-6179

jonbry@copper.net

Betty Morgan

1005 West Sweet Avenue
Bismarck, N.D. 58504
701-223-8384

October 26, 2006

Office of the State Engineer
900 East Boulevard Avenue, Dept 770
Bismarck, North Dakota 58505-0850

Attn: Sovereign Land Planning

Dear Gentlemen:

I attended the public meeting October 3 for public review and comment on the Draft North Dakota Sovereign Land Management Plan. Such a plan seems long overdue.

I believe the planning committee should also include representatives of certain non-governmental agencies having an interest in these very special areas.

For specific comments, I submit the following:

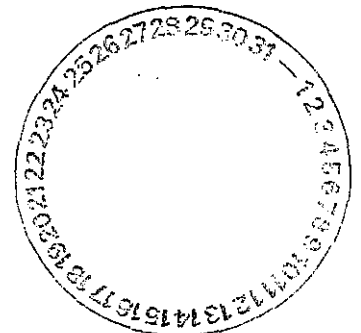
Page 19, Vehicular access. Z. correct spelling: "posses". Possess

Same paragraph: I suggest that the meaning of "a totally or permanently disabled fishing license" be clarified. To me, the words "disabled fishing license" indicate a worn, faded, wrinkled, dirty, tattered document.

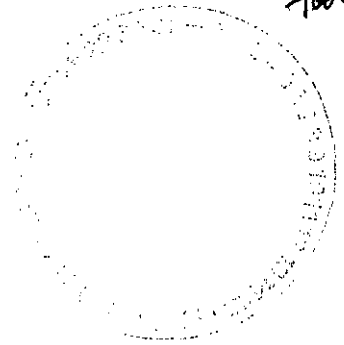
Thank you for providing this opportunity to submit my comments.

Sincerely,


Betty Morgan
meadowlark@syracuse.net



Peterson Coulee Outlet Association
3321 54th Ave. N.E.
Maddock, North Dakota 58348



October 27, 2006

Office of the State Engineer
Attn: Sovereign Land Planning
900 East Boulevard Avenue, Dept. 770
Bismarck, N.D. 58505-0850

Dear Sir;

We have reviewed the Draft North Dakota Sovereign Land Management Plan, dated September 2006.

We are extremely concerned about the issue of how the State Engineer can submit any Sovereign Land Management Plan to the citizens of North Dakota for approval before specific, technical guidelines for the ordinary high water mark delineations have been developed. The use of "prudent judgment" by the State Engineer in making determinations of the ordinary high water mark delineations compliance disputes is still, only the very broad, personal opinion of the State Engineer. This is an open invitation to arbitrary delineations on a case-by-case basis. Settling high water mark delineation compliance conflicts on a case-by-case basis will only lead to more confusion in the minds of the People of North Dakota when trying to develop their real property and allow even more lawsuits directed at the North Dakota State Water Commission. This leaves the state of North Dakota in the same peculiar predicament that it is in at the present time, and that is not in the best interest of the People of North Dakota.

Action Strategy 5.1, states in part "The Office of the State Engineer will retain an environmental services firm, with expertise in hydrology, soils, and wetland vegetation to assist with the development of ordinary high water mark delineation guidelines for North

Dakota". This is the very foundation for all Action Strategies of any sound Sovereign Land Management Plan that may be adapted. The specific criteria upon which the delineations will be based should be spelled out in detail so the delineations can be made on an objective basis--and challenged on an objective basis. This step must be completed before the People of North Dakota can be expected to give any reasonably informed comments using the best available existing information to any Draft North Dakota Sovereign Land Management Plan. Anything less is a disservice to the citizens of North Dakota and may make the State Engineer's office appear to be doing nothing more than "Empire Building" in the eyes of the public.

In developing the Draft North Dakota Sovereign Land Management Plan the technical working group included the Garrison Diversion Conservancy District. The Garrison Diversion Conservancy District's involvement does not seem appropriate since they are primarily involved with irrigation research. The Garrison Diversion Conservancy District's mandate from the North Dakota State Legislative Assembly does not include any involvement with the State Engineer's Office to develop a Sovereign Land Management Plan. The Garrison Diversion Conservancy District should be excluded from the technical working group developing the Draft North Dakota Sovereign Land Management Plan.

In many of the Action Strategies there are recommendations that state "... and shall pay a fine of up to ###". Fines should not be automatically charged for the first offense. The language in the proposed recommendations should be worded so a person is issued a warning only by licensed law enforcement personnel for the first offense, and any subsequent offenses may or may not have scaled, increasing monetary fines. At the very least, the provisions for appealing the State Engineer's decision and the fine should be spelled out in detail. An Attorney General's Opinion should be obtained, before comments can be made.

Sincerely;

Thelma Paulsen Pres.

Peterson Coulee Outlet Association

*John P.
Pat Lee
Hill*

October 26, 2006

State Engineer
900 East Boulevard Ave.
Bismarck, ND 58505-0850
Attn: Patrick Fridgen
Re: Sovereign Land

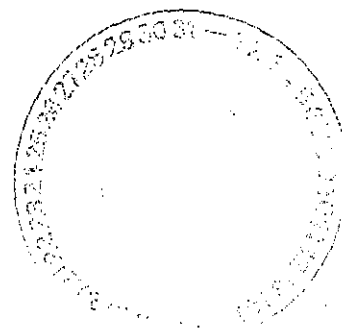
Sirs:

I appreciate your finally addressing the sovereign land issue for North Dakota. This is long overdue and will hopefully solve many of the controversies concerning sovereign land. We hope your Management Plan will include the following:

1. An exact definition of the boundaries of sovereign land. Consider that ND law (47-06-05 and 61-33-01) states that accretion land is not sovereign land.
2. An exact definition of "Ordinary high water mark". Consider that the river levels of the reaches downstream of Fort Peck and Garrison dams are not natural but controlled entirely by the dam discharges.
3. Define what "Public" includes in stating who can use the shore zone.
4. Define which entity (Corps of Engineers, ND Water Commission or the County Water Resource Boards) controls each part of sovereign lands. Consider the county WRB having full jurisdiction over the upstream reaches of our smaller streams or of the entire reach of small streams.

Andy Mork
3362 22nd Ave.
Mandan, ND 58554
701-663-3840

Andy Mork



September 23, 2006

Comment on the Sovereign Land Management Plan

By

Larry Spears

15160 Sundown Drive, Bismarck, North Dakota 58503-9206

Tel: 701-258-1899

Fax: 701-258-9177

Cell: 701-426-1023

Email: spears@btinet.net or spears1@aol.com (home)

Thank you for considering my comments and suggestions:

Recommendation 3: Recommendation 3 extends to protecting historical and cultural resources, but does not extend to cover environmental, viewscape and natural resources.

The sovereign lands uniquely hold value as natural resources and their surroundings as important public viewsapes. These should be factors for explicit consideration.

My concern is that failure to include natural resources as a protectable value in Recommendation 3 will conflict with the interests of the Federal Government in protecting endangered species and preventing the spread of noxious weeds in the River? Perhaps USACE should weigh in on this. In any case, the state should be proactive and occupy this field and consider the natural resource values in the permitting process so that intervention by, and conflict with, the federal government agencies will not be needed.

The Recommendation 3 should be revised to read: "The Office of the State Engineer should consider the impacts of actions on sovereign land to cultural, natural, environmental and historic resources before granting or modifying permits."

Recommendation 8: I support Recommendation 8 for land delineation as a significant contribution to the protection of the river areas and implementation of sound land management by government in high development pressure areas.

Comments Regarding the Draft Sovereign Land Management Plan

--- as the draft plan notes, it is important to 1) develop navigability determination standards to identify all navigable waters within the state of North Dakota, and 2) develop ordinary high water mark determination guidelines. In fact, these should have been developed decades ago. It is critically important to expedite development of these standards and guidelines, and to then expedite identification and proper management of sovereign lands.

--- it is important to assert within the plan that the State of North Dakota owns sovereign lands, and thus title to them. Any references or inferences to adjoining landowners taking title to the low water mark are simply not accurate or correct. Specifically, an AG letter opinion on this issue states that NDCC 47-01-15 is not likely valid now, nor was it likely valid when passed by the territorial legislature over a hundred years ago. As such, the plan should recommend that this section of the Century Code be repealed.

--- the draft plan references several legal decisions which have determined that the ordinary high water mark is "ambulatory", or at least can be in some instances. But additional wording should be added to note that the ordinary high water mark, if ambulatory, is not ambulatory over short periods of time (from year to year for example), but rather over much longer periods of time (decades or centuries of time). The various ordinary high water mark determinations at Devils Lake, for instance, would have been far more realistic and defensible had the opinions been rendered based upon a much longer time frame.

--- the draft plan refers to correlative rights which exist on sovereign lands. These rights are those which an adjoining landowner has (and only the adjoining landowner has) in terms of rights to use sovereign lands. Again, the plan should stress that correlative rights are those which allow an adjoining landowner to use state owned sovereign land; the landowner does not own or take title to the low water mark. It is important to also stress within the plan that the adjoining landowner's correlative rights do not allow him to materially degrade present or prospective public use of sovereign lands. Adjoining landowners can not, and should not be allowed to, degrade or abuse sovereign lands (i.e. allow their livestock to overgraze).

--- including all waters listed by the NDG&F Department as public fishing waters within the plan is not warranted or appropriate. A considerable number of these waters are constructed reservoirs; there is no sovereign land along or adjoining most of these reservoirs. To include all for regulatory purposes simply distracts from the far more pressing need to expedite the delineation and management of sovereign lands along known navigable waters.

--- a minor note is that the draft plan refers to "ordinary low water mark". This wording is not legally correct; any such wording in the plan should be changed to "low water mark".

In conclusion, the State Engineer is charged and entrusted with management of sovereign lands. His Public Trust responsibilities simply require that he manage these lands for the benefit of the public. The State Engineer in recent years, and other agencies of state government in the past, have simply been negligent in fulfilling these responsibilities. It is imperative that the State Engineer take these responsibilities seriously, and thus expedite delineation and management of these truly important tracts of publicly owned land. Thanks for your consideration of these comments.

Fred Ryckman, Williston

Subject: SL planning

Date: Saturday, October 7, 2006 8:36 PM

From: Harley Swenson <hms@extendwireless.net>

Reply-To: "Harley Swenson" <hms@extendwireless.net>

To: <NDSLMP@nd.gov>

Conversation: SL planning

You've asked for comments on your sovereign lands management plan. The following are my comments:

1. I totally agree with the person who questioned why the "general public", one of only two stakeholders that you identified, was not included in any working sessions in preparation of the draft plan. Handling the preparation of the draft plan as you have has made the "general public" feel that you are interested in management by government decree rather than listening to any input outside government agencies!!

2. The fact that you strongly discouraged and limited any verbal public comment at your "public" meetings compounds the image that you are not very interested in public discussion of your proposals!

I realize that public meetings where verbal comments are encouraged can sometimes get "messy" but it serves to bring out the concerns that the public has and accomplishes several things. It lets people "get things off their chests" and lets them know that their government employees are aware of their concerns and results in better decisions by government agencies AND better acceptance by the public of the new policies.

3. In general terms, I agree with much of the discussion regarding your interpretation of sovereign lands and the determination of the "ordinary high water mark".

I have concerns about your proposed re-definition of navigable waters which would limit sovereign lands to those lakes and rivers that have supported navigation for "commercial purposes" (trade and travel) only. Does this mean that the state has no intention of preserving or protecting the public's interest in other waters?

4. Under recommendation 5 you propose to hire a consultant to help locate and delineate the "ordinary high water mark"(ohwm). Since this is an ambulatory line and could change each year or two, wouldn't it be better to address each case on an individual basis as the need for it arises? Most likely, reasonable people will be able to agree. In those cases where people aren't "reasonable", the delineation will end up in court anyway. This would be the time to hire experts to establish the ohwm.

5. Under recommendation 6, you propose to prohibit or severely restrict the use of motorized vehicles on sovereign land. This would prohibit the use of ORV's on sandbars (which now is a favorite pastime along the Missouri River) and the use of snowmobiles on creeks, rivers and lakes. Do we really want to go that far? It certainly lends substance to the saying "There is nothing with more restrictions and less public access than 'public lands'!"

6. Recommendation 7 calls for more law enforcement and compliance with the rules checks. As you

state, this requires more state funding and more enforcement personnel. Obviously I do not get calls about those individuals who need to have more respect for property and other members of the public. Likewise, I have no information about how big this problem presently is. Could you please provide me with information so that I can make a judgement regarding how pervasive these problems are? Are the problems caused by a handful of individuals or are abuses widespread across the state?

7. Recommendation 10 refers to "removal, modification, or destruction of dangers in, on the bed, or adjacent to navigable waters" Please explain what this means. The biggest danger on the Missouri is the snags in the river. Do you intend to address this "biggest" danger, or just smaller ones that may be put in place by someone? The problem is not defined.

8. Recommendation 12 addresses the obvious--the state should address noxious weeds on THEIR lands just as state law REQUIRES that farmers and others take care of noxious weeds on their private property! I live near and observe how the state, on lands along the Missouri being managed by the Game and Fish Dep't and on sandbars being managed by the State Engineer, does not control noxious weeds. Why do we need to create rules that are now or should be in state law?

9. Recommendation 14 implies that the Game and Fish Dep't has no enforcement authority on sovereign lands. Is this true?

It also restricts unattended watercraft on a beach or shoreline (sovereign lands) to a maximum of 24 hours. Violators would be fined. I've been on few lakes where canoes, sailboats, paddleboats and other small watercraft have NOT been left unattended from weekend to weekend or more. You will have to hire a lot of FTE's, hopefully some will have experience in this area! (Can you tell I'm getting frustrated?)

10. Recommendation 17 prohibits camping on sovereign lands, except for tents. Do we really have to be this restrictive? Again, I want to know how widespread this problem is and how many people are now abusing this privilege. Please provide me with some context!

11. Recommendation 19 places restrictions on dock lengths--25 feet on a river and 50 feet on a lake. I don't agree that we should put actual length restrictions on docks. We should try to address the problem, if there is one, by making a rule that you can't unreasonably interfere with navigation or access to adjacent property. Let the courts and the lawyers argue over what that means. This will keep them employed-a good thing!

As you can probably infer, I've run out of patience--I don't have much to start with, so I'll close with this---If the "public" meetings had been structured to gather public input prior to the "draft", these comments would have been a lot shorter and I may not have run so low on patience.

Harley Swenson, State Water Commissioner

Subject: Sovereign Land

Date: Sunday, October 29, 2006 5:29 PM

From: Mick Cremers <cremers@btinet.net>

To: Commison Water <ndslmp@nd.gov>

Conversation: Sovereign Land

Office of Engineering

Attn: Sovereign Land Plan

Gentlemen:

As guardians of the sovereign lands in the State of North Dakota, it is your responsibility to protect and preserve the integrity of said land. One of the Water Commissions responsibilities is the protection of the land from the degradation of outside influences such as littering, vehicle and ATV traffic and other forms of disturbances that have historically ruined public properties, often beyond recognition. From my experiences, vehicles such as ATV's have directly destroyed the land and disturbed wildlife while offering no benefits to the land or its wildlife. Therefore, I would like to see all your recommendations concerning the restrictions on the vehicular usage on sovereign land become reality. If this takes legislative approval, I would recommend the Department seek it.

I realize this is a huge project for your Department. I wish you great luck in your efforts and admire your Department for the involvement in the proceedings. I appreciate your concerns and efforts and want to thank you for working hard to protect public lands for future generations.

Thank you,
Dick Scott
4305 Sandy River Drive
Bismarck ND 58503
(701)223-0817

Subject: Sovereign lands draft comments

Date: Sunday, October 29, 2006 11:22 PM

From: North Dakota Dirt Riders <information@nddirttriders.org>

To: <NDSLMP@nd.gov>

Conversation: Sovereign lands draft comments

The North Dakota Dirt Riders represents 165 enrolled members from across North Dakota and 16,500 registered off-highway vehicle users in the state.

After talking with Todd Sando at the Bismarck Sovereign Land Management meeting, I expressed the concerns the OHV community has with the proposed regulations.

Based on that conversation, I am sending a single e-mail to represent all NDDR members and OHV users, rather than having each member send an e-mail and overwhelm the committee. I trust that the group will keep this in mind and give this e-mail the weight of so many voices.

The OHV community's concern primarily resides with section six of the draft plan. A few small changes would manage those concerns. They are:

1. Grandfather in current riding areas such as Kimball Bottoms (The Desert) and Burnt Boat riding area. The lands have been, and are currently, used for off-road vehicles. There is no need to add a permit process and insist that an agency take over management.
2. Revise the plan so that clubs, such as NDDR or local chapters, can manage riding areas, not just government agencies. The NDDR believes that in some cases our group, as peers, could manage trails and encourage riders to adhere to regulations better than a government agency.
3. Ensure that the permitting process is open and easy, to encourage use of these lands.

The NDDR members and other non-OHV user groups are concerned that our group has had no representation at the past draft meetings and won't have any in future meetings. While the general public is listed as one of the two main stakeholders, there is nothing, outside of this commenting process, that allows public involvement. The meetings were purely informational, not a true forum. E-mail and mailed comments are the only methods to make our opinions known, and this after the draft already has been written. Once comments have been submitted, it will be very difficult to gauge if they have even been acknowledged before the plan is finalized.

Considering this plan affects most people who enjoy outdoor recreation in North Dakota, from OHV users to anglers, we should have been allowed a voice.

Thank you,

Jason Lueder
President, North Dakota Dirt Riders/North Dakota Off Road Vehicle
Association
701-667-2988

89-10-01-02. Prohibition on permanent relinquishment. Sovereign lands may not be permanently relinquished but must be held in perpetual trust for the benefit of the citizens of the state of North Dakota.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-03. Definitions. The following definitions apply to this article:

1. "Authorization" means a permit, easement, lease, or management agreement approved and granted by the state engineer after application; and the authority granted in sections 89-10-01-10 and 89-10-01-19.
2. "Grantee" means the person, including that person's assigns, successors, and agents who are authorized pursuant to an authorization.
3. "Navigable streams or waters" means any waters which were in fact navigable at time of statehood, including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake.
4. "Ordinary high watermark" means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety.
5. "Project" means any activity which occurs below the ordinary high watermark of navigable streams or waters.
6. "Riparian owner" means a person who owns land adjacent to navigable streams or waters or the person's authorized agent.
7. "State engineer" means the state officer provided for in North Dakota Century Code section 61-03-01 or any of the state engineer's employees or authorized agents.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-04. Authorization. Each project which lies either partially or wholly below the ordinary high watermark of navigable streams or waters requires