

2013 HOUSE AGRICULTURE

HB 1399

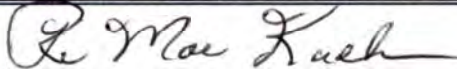
2013 HOUSE STANDING COMMITTEE MINUTES

House Agriculture Committee
Peace Garden Room, State Capitol

HB 1399
February 8, 2013
Job # 18641

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

(Fiscal note)

Require legal action by the attorney general against the United States fish and wildlife service

Minutes:

Attachments #1-11

Representative Headland, Co-Sponsor: We are asking the State Attorney General to take the U.S. Fish & Wildlife to court over wetland delineations.

Farmers, property owners, and political subdivisions across this state are prohibited to do what they need to do to improve their land when there is a wetland easement to Fish & Wildlife.

As a farmer I did what I needed to do to make my land farmable after years of this wet cycle. I burned some cattails that U.S. Fish & Wildlife has deemed they have easement over. I didn't know that because there is no delineation available. Fish & Wildlife sent a letter telling me that I am breaking the law by doing what I needed to do to get my land back into production. How can we determine what they have easement on? They sent a map that had a whole bunch of circles. Some of those circles were rock piles.

I don't think anybody wants to go to court. They don't want to come to the table. They don't want to deal with it. There is one case where the property owner has won.

Representative Fehr: When you say "to delineate", do they come out and survey it?

Representative Headland: At time of an easement, it gets recorded on an abstract. It is specific to acreage that they purchased. Now they are extending that from what was actually purchased at a drier time. They are trying to spread that easement across a whole tract of property. Without delineation we don't have the ability to contradict what they are saying.

Representative Rust: When someone sells that easement to the Fish and Wildlife, isn't it for a specified number of acres?

Representative Headland: It is, but on a tract of property that has 320 acres and they have a 20 acre easement, where is the easement? So you are not allowed to improve your land.

Representative Damschen, Co-Sponsor: The federal government has not acquired state land unless they have gubernatorial or legislative consent. Back in the 50s and 60s Fish and Wildlife started taking easements on private land. In the early 60s the governor put a limit on the amount of acres under easement.

Now instead of controlling the 10 acres of easement, they tried controlling the full quarter. So a Towner County farmer went to court and argued the Fish and Wildlife Service had reached their limit that the Governor had set. The Fish and Wildlife said they only control the acres under easement.

The landowners got so upset the way they were treated and went to the legislature. The legislature lowered the limit from what the Governor has set. The Fish & Wildlife won the case and that said they could buy more easements because they said they only controlled the acres under easement.

In the 90s we started to get really wet. The wetlands that had easements on them grew. It doesn't take a lot of expansion to increase the acres. Some farmers in the Oakes-Finley area had 30 acres of easement out of 160 acres. Those 30 acres grew to about 70 Or 80 acres. They requested Fish & Wildlife to come out and delineate the 30 acres. It never happened. They drained out some of the sheet water down to 50 acres. Then they got a response and were threatened with criminal charges and fines. They ended up in court. Fish and Wildlife wanted to control 80 acres not just the 30. They went to 8th District Court of Appeals. The court ruled the Fish and Wildlife only controlled 30 acres and were ordered to issue upon request delineations of wetlands. The two brothers that won the case were put out of business by the court proceedings. You can get a map but it won't be current with the signing of the easement.

Representative Brandenburg, Co-Sponsor: We have a wildlife easement that my grandfather signed in 1962 because he needed the money. In 1986 we cleaned out the ditches because when the easement was signed it said you could clean out the ditches. One guy showed up with a gun from Fish and Wildlife. He said that we can't drain. A week later three guys with guns came back. My grandfather only wrote in the main ditch and not the finger ditches. We were arguing about the finger ditches.

They have an easement of 30 acres and when it gets larger we can't drain. It has gotten to over 200 acres.

I even got in trouble from a neighbor burning cattails that spread into our land.

Representative Fehr: Are easements perpetual or time limited?

Representative Brandenburg: They are perpetual--a lifetime after a lifetime.

Eric Aasmundstad, North Dakota Farm Bureau: On our farm, in the Devils Lake area, we got rid of the property with a Fish and Wildlife Service easement. In our township we have two roads that span the distance of the township. Our township was prohibited from building a road up because of a Fish and Wildlife easement. So they made a road through a field.

Not being able to delineate these easements and having to find other acres to build highways is costing the state millions of tax dollars. If the Attorney General can do this it would have a positive impact on the economy of ND.

Dennis Miller: (See attached #1)

In answer to the question if these are perpetual easements, there was legislation in 1977 that is called the Duration of Easements. The easements signed prior to 1977 are perpetual. North Dakota Century Code stated in 1977 all others are 99 years.

Dan Wogsland, North Dakota Grain Growers: (32:00) (See attached #2a)
(Also refers to map #2b with easements as of 2009)

Larry Kinev, Independent Beef Association of North Dakota: Coming from the Coteau Region, our county is completely gray. We have a lot of delineation to do.

Cole Weckerly, Hurdsfield: In February of 2011, I put in our first wetland determination through the NRCS. If we were going to install tile, I thought this was the first step. NRCS and I came to an agreement. (Handed out #3--referred to as Exhibit A) Through this process initial predetermined wetlands from aerial photography were changed. There is a lot that went into this wetland determination process. I contacted Chase Lake Refuge and spoke with the manager to see if our field had easements on it. I found out that it did. I sent a plan of where we were going to tile. He came out with the Regional Easement Coordinator. They were there to make sure that we had not installed tile. They were not there to help with the tile plan. The problem was that there was no consistency between what NRCS identified as a wetland and what Fish and Wildlife identified. Fish and Wildlife gave their map. (See attached #4-referred to as exhibit B)

These areas cannot be tiled because easements were sold in the 50s and the Swamp Buster Act did not pass until 1984. If you compare the two maps, you will see Fish and Wildlife has drawn in additional areas. One agency says I can and the other says I cannot. The original intention of the wetland easements was for producers to work for wildlife officials to create sustainable wildlife habitat through cohesiveness with farmers. It has been proven to me that Fish and Wildlife has no intention of working with the producer.

Unless wetlands get identified through a science-based approach, Fish and Wildlife will continue to use their power to scare agriculture producers to their own agenda.

Representative M. Nelson: In looking at the Fish & Wildlife map, I read from the bottom "The Service reserves the right to revise this map, provided the mapped acreage remains consistent with the Easement's Summary Acres." I don't see the summary acres.

Cole Weckerly: I have Exhibit C. (See attached #5)

You can see it represents two different sections. The acreage attached to the easement for that section refers to 167 total acres of wetland easements. The problem is that the original easement has no acreage specified to legal section or tract. How am I to know how many acres are on my tract of land off of that easement? If you compare Exhibit C to Exhibit B there is nothing that ties that drawing to those acres.

Representative M. Nelson: When it says it reserves the right to revise the map, even if you did work on that land and they revise the map, you could still be in violation.

Cole Weckerly: That is the problem.

Greg Daws, Michigan: (43:50) (See attached #6a) (Also #6b)

Representative Headland: Farmers were struggling and a federal agency dangled a little money in front of them. I don't think they understood the impact of perpetual.

Greg Daws: They seemed to follow the hard times around the state and offer proposals.

Representative M. Nelson: In lake drainage, when they claim lateral effects, do they provide documentation.

Greg Daws: Going back to some of the old maps there is a county road. The Fish and Wildlife has an easement on one side of the road. The proposed ditch will go to the noneasement side of the county road. The easement wetland was probably hundreds of feet away but they are claiming lateral effects right up to the road.

Representative M. Nelson: In the past a landowner sold an easement on his property and now that is used to affect a whole number of producers--even though none of them sold an easement?

Greg Daws: Correct. 39,000 acres of water. Approximately \$17 million of lost revenue to the county since 1993. They spent \$2 million twice raising a road.

Dwight Grosz, Farmer/Rancher: (54:08) (See attached #7a & 7b)

Senator Luick: Over the past 20 years I have been putting out fires regarding wetland identifications. The process is flawed enough and the flaw is hindering what we should be doing. The high water mark should be identified which would identify the boundary of the wetland. We are spending millions of dollars to repair roads and fix property. If it were owned by a private individual, there would be lawsuits for the damage that it causes. The NRCS is working on some of this.

Terry Weckerly, Hurdsfield: We are watching land go backwards. The areas they are claiming wetlands is a travesty. Passed out colored map. (See attached #8a) Also Fish & Wildlife definition of map. (See attached # 8b) There are areas that are gray. No crop is growing there. When my son had them out to look at fields, they turned it backwards and asked when he drained them.

Last spring when it was wet, I got a phone call. We had trees removed because of a salinity problem. They held the snow. The guy with the dozer pushed the trees up to the edge of the wetland. A few branches hung over.

They are using satellite imagery that only they can get. Then they drive up to look at it. A week later I got a certified letter that said I didn't inundate the wetland but make sure I don't in the future.

How can the state set the acres and they come over the top and double or triple that acreage? (See attached #8c)

Representative Rust: With today's technology, they could delineate wetland with GPS coordinates and that could be given to the farmer/rancher. Would that be a way to do this?

Terry Weckerly: Not by itself. Once it is determined--but the problem is getting it determined.

Tom Lilja, Executive Director for North Dakota Corn Growers: In favor of this bill. This is a first step.

Representative Belter: There is a representative here from Farmers Union. I would like to hear their position.

Pam Musland, North Dakota Farmers Union: We are in support of water management issues. I can't speak to the suit. We have policy about having the U.S. Fish and Wildlife delineate these wetland acres for producers.

Opposing:

Lloyd Jones, U.S. Fish and Wildlife Service: (1:11:38) (See attached #9)

We have a priority process that if a landowner calls for a pre-1976 easement, it goes to the top of the pile and they have a map within a week. If there is another project such as a pipeline, we have a dedicated staff that can deal with it immediately and generate that map.

A lot of what is in the bill has been dealt with.

Representative Headland: Thank you for pointing out what may be a flaw in the language of the bill. We maybe need to change it to "a delineation to the easement at the time that it was acquired by Fish and Wildlife." The U.S. Fish and Wildlife is claiming easement on wetlands that were not wetlands in 1965 when the easement was established. We do need to strengthen the language.

Representative M. Nelson: The only maps we have seen look like this. (Holding up #8b) I can't tell anything on that map.

Lloyd Jones: This is the form of the map that they use. (Holding up #8b) This is what we present at the court house.

Representative M. Nelson: That is the map that says you get to change those any time you want in the disclaimer?

Lloyd Jones: We want the maps to be accurate. If there are changes needed, it should be changed. It should not be a rock pile.

Representative M. Nelson: How does a rock pile end up on a map in the first place?

Lloyd Jones: If preliminary maps are done and the landowner wants it quickly, we try to give one as accurate as we can at the time. The tools are not as good in generating the map.

Representative Rust: How do I know when I've crossed that line?

Lloyd Jones: The wetland easement is a limited interest easement. If it is dry through natural causes, it is the landowner's. The circle is an indication of where the wetland is. If a landowner is going to drain, they need to call Fish & Wildlife Service.

Representative Rust: So I have to call somebody to come out and tell me.

Lloyd Jones: Yes give a call.

Representative Rust: Would GPS work?

Lloyd Jones: The technology is improving over time. It may be used in the future.

Representative Headland: We had the State Conservationist testifying. She was asked if Fish and Wildlife was at the table when NRCS is developing their policy--the policy that is supposed to benefit the producer and help them improve their land. She was uncomfortable in answering that question. Is U.S. Fish and Wildlife there to help move forward or are they trying to prohibit what NRCS and the farmers are working for to move forward in developing their land?

Lloyd Jones: At one time the Food Security Act did direct that the Fish and Wildlife Service be part of a review or consultation with NRCS on wetland issues. Later farm bills removed that requirement to part of that process. NRCS is not required to come to Fish & Wildlife. Mary, the State Conservationist, responds to us as constituents. We are working with NRCS trying to help us understand where tiling can be done.

Representative Headland: Is this bill needed? US Fish and Wildlife is agreeable to delineation of the original easement established at the time they acquired it?

Lloyd Jones: Our mapping process takes into account all of the different wetland signators. The easement summary acreage is also part of the review process. We need to

be out doing this mapping. We are doing the mapping now. If there needs to be a lawsuit to tell us to do more of the same, that's fine with us.

Representative Belter: From testimony given today, farmers indicated that an easement was signed for 20 acres. With high precipitation that water area is now 40+ acres. These farmers are having a problem because you say they can't do improvements because it is under easement. How do you have the authority to go beyond the original 20 acres of the easement?

Lloyd Jones: The maps do include a clause that says any natural changes are included in the provisions of the easement agreement. A 5 acre wetland has the potential to go to 6 or 7 acres. One of the aspects of going from 5 acres to 7 acres--what happens when it goes dry? When it is dry, does the farmer pay back the easement money? When they increase in size to where they are creating problems, we can go in and address that problem

Representative Belter: Another issue is roads. If you drive from Fargo to Tower City there are cattails from one end to the other. The Highway Dept. tells me they can't do anything because it is designated wetlands. It hurts the roads because it saturates the base.

Lloyd Jones: There is other federal legislation that deals with wetlands in terms of federal funding. It could be the Corps or EPA. I don't think we have easements in the area that you describe.

Chairman Dennis Johnson: I know the frustration of a 44,000 acre lake in the Devils Lake basin grew to 200,000 acres and the inability to build roads because it is considered fill in the water.

Lloyd Jones: We work with township boards daily. We have agreements with North Dakota Dept. of Transportation since 1975. When DOT calls us about a road that needs to be built up, we have a wetland bank in place. It is a 5-minute situation to go through.

Chairman Dennis Johnson: And the road went around the slough into the field at the end of the day.

Representative Headland: If the wetland grows so does the easement. When it is dry can we pay money back and be done?

Lloyd Jones: The authorization that we operate under doesn't allow for that.

Representative Headland: Was that explained to the one signing the easement?

Lloyd Jones: (1:34:03) The easement program is active today. We have a waiting list of landowners that are interested in selling easements to the Fish & Wildlife Service. We have more interest than money to pay for. The program has been in place since 1958.

Representative Headland: I would help contribute to your cause and pay to get rid of mine.

Chairman Dennis Johnson: (1:35:07) In 1972 I came home from the service and took a scraper and started filling these nuisance spots. Around March two men came wearing side irons and showed us maps that we illegally drained. The easement we signed was the large slough in the pasture. We are still farming around the nuisance spots which are getting bigger. That is what is creating the frustration.

Representative Belter: Is the list of those who want easements public information?

Lloyd Jones: We don't have that in a document or a file. What I am referring to is when a landowner calls. If they don't have a problem with them releasing their name, we would.

Representative Belter: I would like a list to this committee.

Lloyd Jones: I would have to make sure it is appropriate to release a name.

Representative Belter: You did say you had a list, not telephone calls.

Lloyd Jones: A list made from telephone calls. We don't have a letter or a formal request from a landowner.

Representative M. Nelson: When I deal with NRCS they have a definition for wetlands. Outside the wetland area is nonhydric soil. How are you defining a wetland and is it consistent with the NRCS?

Lloyd Jones: There is a different purpose for NRCS does. The program we are authorized to apply is to preserve wetlands. The process is not identical to both agencies. We use many different processes to find out what a wetland does over time. (1:40:18) I would offer the Fish and Wildlife Service people who are responsible for wetland mapping to come and set up a computer and go through a process so you could see how we are mapping these wetlands and where we draw circles.

Representative Kiefert: A lot of the problem is you are creating maps for an agreement that was made 50 or 60 years ago.

Lloyd Jones: We are trying to do the best we can. We try to find earlier photos to help us understand what was out there.

Representative Fehr: We are talking about different federal agencies. Is there a way we can have a single definition of a wetland?

Lloyd Jones: That would be useful for landowners and agencies themselves. Most of this issue has been dealt with in Congress through the Food Security Act. The Corps of Engineers has jurisdiction over wetlands and may have a definition, EPA has a different view. Efforts in the past have not resulted in one definition

Representative Fehr: If Congress enacted one definition, would that happen?

Lloyd Jones: Yes, that would be correct. Our authorization comes from Congress as does NRCS through the Food Security Act.

Neutral:

Murray Sagsveen: (1:45:17) I was Assistant Attorney General through the wetland was beginning in 1973 and ending for me in the mid 1990s. (See attachments #10a, 10b, 10c)

I stopped in the 1990s because I was exhausted. The reason I came today is to see if anything has changed. I realize that nothing has changed.

Opposition:

Mike McEnroe, The Wildlife Society: Mr. Jones has explained the mapping procedures. The dispute is some people don't like the maps. (See attached #11)

Chairman Dennis Johnson: Closed the hearing

2013 HOUSE STANDING COMMITTEE MINUTES

House Agriculture Committee
Peace Garden Room, State Capitol

HB 1399
February 11, 2013
Job #18644

Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:
(Committee Action)

Require legal action by the attorney general against the United States fish and wildlife service

Minutes:

Attachments 1 & 2

Tom Trenbeath, Chief Deputy Attorney General: This is private property issue. You have the arrogance of the federal government picking on the farmers. This one has some challenges that may not make it possible for us to obey a mandate. It presumes the existence of a legal theory. There is a primary theory of bringing lawsuits that is called "standing." You have to have a case in controversy. North Dakota as a state has no controversy right now. This bill is challenged by its fiscal note.

I am suggesting an amendment. It changes the word "bring" to "shall consider bringing." If you adopt this amendment, then you can go forward with the bill and have the Attorney General take a serious look at this and go forward with an action should we find one to be warranted. Should we require funding, we could cover the expense of it until the next legislative session. If not we would have the emergency commission.

Representative Belter: Moved the amendment

Representative Headland: Seconded the motion

Voice Vote taken. Amendment passed.

Representative M. Nelson: The state has a limit on the number of wetland acres they can have under easement. What is the state's interpretation of our limit?

Tom Trenbeath: not ready to state it at this time

Representative M. Nelson: Do you know the total acres the Fish & Wildlife Service has under easement?

Tom Trenbeath: I have seen the number but can't remember it.

Representative Headland: I distributed what Murray Sagsveen had written. I think it said 1.2 million. (See attachments 1 & 2)

Representative Fehr: Moved Do Pass as amended and rerefer to Appropriations

Representative Larson: Seconded the motion

Representative Larson: Do you think that having it in writing to consider bringing action, will it give any message to Fish & Wildlife?

Tom Trenbeath: What they perceive to be the likelihood of a lawsuit, I couldn't speculate.

The one chink in the armor of the gentlemen from Fish & Wildlife that kind of had me looking at the rest of his testimony with a jaundiced eye also was when he was referring to the map. He was asked what the language meant at the bottom that said it could be changed at any time. He said that was for the benefit of the farmer. Then it should say that it is for the benefit of the farmer.

A Roll Call vote was taken: Yes 10, No 0, Absent 3. (Reps. Wall, Heilman, Haak)

Do Pass as amended carries.

Representative Fehr will carry the bill.

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: HB 1399

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

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$316,940	\$0	\$348,630	\$0
Appropriations	\$0	\$0	\$316,940	\$0	\$348,630	\$0

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

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

This bill would require the Attorney General to bring legal action against the US Fish and Wildlife Service regarding wetlands.

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

The bill would require the Attorney General to bring legal action against the US Fish and Wildlife Service to delineate and describe every wetland easement in North Dakota.

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

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

Not applicable

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

Estimated 2013-15 and 2015-17 biennium expenditures are for one assistant attorney general, operating expenses and expert witness fees.

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

The Office of Attorney General's general fund budget would need to be increased by approximately \$316,940.



Name: Kathy Roll

Agency: Office of Attorney General

Telephone: 701-328-3622

Date Prepared: 01/30/2013



February 11, 2013

- 11/11
CONE

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1399

Page 1, line 1, remove "legal action by"

Page 1, line 1, after "general" insert "to consider bringing legal action"

Page 1, line 6, replace "bring" with "consider bringing"

Renumber accordingly

Date: 2/11/13

Roll Call Vote #: 1

**2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1399**

House **Agriculture** Committee

Legislative Council Amendment Number 13.0707.01001

Action Taken: Do Pass Do Not Pass Amended Consent Calendar
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Belter Seconded By Rep. Headland

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson			Rep. Joshua Boschee		
Vice Chairman John Wall			Rep. Jessica Haak		
Rep. Wesley Belter			Rep. Marvin Nelson		
Rep. Alan Fehr					
Rep. Craig Headland					
Rep. Joe Heilman					
Rep. Dwight Kiefert					
Rep. Diane Larson					
Rep. David Rust					
Rep. Wayne Trottier					

Vote Passed

Total Yes _____ No _____

Absent _____

Floor Assignment _____

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

Replace "bring" with "consider bringing"

Date: 2/11/13

Roll Call Vote #: 2

**2013 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1399**

House **Agriculture** Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Consent Calendar
 Rerefer to Appropriations Reconsider

Motion Made By Rep. Fehr Seconded By Rep. Larson

Representatives	Yes	No	Representatives	Yes	No
Chairman Dennis Johnson	X		Rep. Joshua Boschee	X	
Vice Chairman John Wall	AB		Rep. Jessica Haak	AB	
Rep. Wesley Belter	X		Rep. Marvin Nelson	X	
Rep. Alan Fehr	X				
Rep. Craig Headland	X				
Rep. Joe Heilman	AB				
Rep. Dwight Kiefert	X				
Rep. Diane Larson	X				
Rep. David Rust	X				
Rep. Wayne Trottier	X				

Total Yes 10 No 0

Absent 3

Floor Assignment Rep. Fehr

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

REPORT OF STANDING COMMITTEE

HB 1399: Agriculture Committee (Rep. D. Johnson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (10 YEAS, 0 NAYS, 3 ABSENT AND NOT VOTING). HB 1399 was placed on the Sixth order on the calendar.

Page 1, line 1, remove "legal action by"

Page 1, line 1, after "general" insert "to consider bringing legal action"

Page 1, line 6, replace "bring" with "consider bringing"

Renumber accordingly

2013 SENATE NATURAL RESOURCES

HB 1399

2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1399
03/07/2013 am
Job Number 19573

Conference Committee

Veronica Spaulding

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to require the attorney general to consider bringing legal action against the United States fish and wildlife service.

Minutes:

Written Testimony 1-6 Attached

Chairman Lyson: Opened the hearing on HB 1399.

Representative Craig Headland, District 29: Testified as sponsor of the bill and explained the purpose of the bill. The bill is asking for the Attorney General to sue the Department of US Fish and Wildlife over wetland delineations. It is a problem that is recognized by property owners and it is also recognized by the US Fish and Wildlife department. The government is supposed to protect and serve taxpayers but they don't seem to believe that they need to address this problem in any way.

(2:39) Brad Thykeson, President of the North Dakota Grain Growers Association: See Attachments #1 and #2 for testimony in support of the bill.

(4:55) Chairman Lyson: Asked if the Attorney General had been spoken to about this.

Brad Thykeson: Responded that he had not personally done that, but the Attorney General's opinion had been given that there is some credibility to it.

(5:30) Chad Weckerly, North Dakota Farm Bureau and Member of North Dakota Grain Growers Association: See Attachments #3 and #4 for information given in support of the bill. Chad stated that the US Fish and Wildlife claims to own a fluctuating easement in the case presented in attachment #3. The case was won, but the US Fish and Wildlife did not change internal policy.

(10:35) Chairman Lyson: Asked Chad Weckerly if he had gone to the Attorney General regarding this case and he stated that he had not personally.

(10:58) Returned to testimony on attachment #4 and personal experience on wetland.

(13:45) Dan Wogsland, Executive Director of North Dakota Grain Growers Association: Testified in support of the bill. To answer the question in regard to discussion of this bill, yes we have. I can say that the prime sponsor and I have met with the Attorney General and I also know the House adopted amendments that were proposed by the Attorney General's office that made this a little more in line and did away with the fiscal note that was contained in the original bill.

(14:47) Representative Brandenburg, District 28: Testified in support of the bill. There is a solid basis for this lawsuit. He had personal experience with this issue.

(16:00) Scott Rising, Soybean Growers Association: Testified in support of the bill. There have been hundreds of stories from soybean growers about this particular issue. He compared it to the card game of canasta and the fact that there are a clear set of rules and it seems one person always wins.

(16:48) Greg Daws, Nelson County Farmer: See attachments #5 and #6 for testimony in support of the bill.

Chairman Lyson: Recessed the hearing on HB 1399.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1399
03/07/2013 pm
Job Number 19601

Conference Committee

Veronica Spaulding

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to require the attorney general to consider bringing legal action against the United States fish and wildlife service.

Minutes:

Written Testimony 1-2 Attached

Chairman Lyson: Reopened the hearing on HB 1399.

Julie Ellingson, North Dakota Stockmen's Association: See Attachment #1 for testimony in support of the bill.

No Opposition

Neutral

(2:00) Lloyd Jones, US Fish and Wildlife Services: See Attachment #2 for testimony in a neutral position on the bill.

(5:51) Senator Murphy: To what do you attribute this turnout (of citizens)?

Lloyd Jones: There is a lot of concern about where the exact boundaries of the wetlands are. For the fish and wildlife service, in recognizing the dynamic nature of what is in North Dakota as everyone would, there are years of higher precipitation and years of lower precipitation. The boundary of the wetland fluctuates tremendously. It is difficult to come to an exact boundary. The map in process that we do is primarily to define the location of where that wetland is rather than an exact acreage. We try to be as definitive as we can so the landowner knows what that is. There was testimony in the House committee that it is not so much concern with getting a map but with what the map says. If there is an easement there, it is a limited interest easement that simply says no draining, burning, or filling of the wetland. Our interest is to protect that location of the wetland.

(8:10) Senator Hogue: Could you talk about the department's policy with respect to the duration of these easements?

Lloyd Jones: The program that we are talking about here in the wetland easements, we consider those perpetual easements. The easement contract references, perpetuity, it's the copy that is provided to the courthouse and is filed in the courthouse. There was a case that actually went all the way to the US Supreme Court where it questioned whether or not the approval the fish and wildlife had received from previous Governors, and there was reference to that this morning in the testimony. The Governors have approved 1.5 million acres in wetland acquisition and that approval was for perpetual easements. The question before the Supreme Court was whether it should still be the same now. The court said no. We continue to acquire easements and we are at about 885,000 acres.

Senator Hogue: You may have to reference the case because if I have land and I sign the easement, how does the Governor wave statutory law?

Lloyd Jones: The act that congress passed in 1961 said that, through the fish and wildlife service, willing sellers of easements could be found for wetlands and grasslands with state agency approval to do so.

(11:20)Senator Hogue: It does not quite answer my question. Our statute says that you cannot have a (inaudible) easement, so how would the Governor be able to agree with the US fish and wildlife that we are going to wave that provisional by law. That does not make sense to me.

Lloyd Jones: The approval that I am referencing was back in the 1960's and I believe the law that you are referring to was passed in 1985. So the approval had already been given by prior governors, and that is the question that the state ultimately asked the courts to clarify and the Supreme Court said that the prior governor approval stands.

Senator Triplett: Could you talk about the word delineated and tell us what you mean by that?

Lloyd Jones: Gave an example of an acquired easement and what it meant by delineated.

Senator Triplett: Then the concept of delineation has changed?

Lloyd Jones: That is exactly right. At the time the program started in 1958, with the farming practices as they were, apparently it was felt at that time that it was sufficient just to (Inaudible). That it include all of the wetlands that are out in a particular section. As time went on that we needed to be more definitive. That there was more land being converted to other uses and farmers were asking more questions. We do a legal description and the exhibit A map that does define the location of the land grants.

Senator Triplett: Even though you delineate them within the larger track by the circles on the map, you still consider that the original terms on the easement are in effect when the standard language says that there will be no draining, tiling, or burning within the whole larger defined track, is that correct or would you allow tiling or draining outside the circle?

Lloyd Jones: Our only interest through the easement for discussion purposes is that circle. If a landowner wanted to do anything outside of that area, we have no jurisdiction.

(16:27) Discussion continued on the difference of opinion between the landowners and US Fish and Wildlife. They talked about whether or not landowners would have a map and what they are able to do or not do outside the boundaries. A map can be produced for a landowner generally within a week to clarify where the wetland is. The US Fish and Wildlife stated that they are willing to do whatever is necessary to assist the landowners through the office or in person, and they feel that they have tried to understand what the concerns are and can do to address them. The fluctuation of the wetland areas depending on the years is determined to be part of the problem. The easement agreement states that if there are any enlargements in the wetlands due to normal or abnormal increased water - therefore it could be considered a fluctuating easement. There are limits on how far the fish and wildlife service can go. The size is limited to the easement summary (basically when it was acquired). What is being done is what has been done since 1976.

(31:30) Tom Trenbeth, Chief Deputy Attorney General: Testified in a neutral position on the bill. I listened to a lot of testimony on the House side. I recognize the problem and I know the Attorney General has great sympathy for the people that are aggrieved by this policy. The fact of the matter is that I heard this morning that the chair of this committee had several people testify and the issue of whether or not they spoke to the Attorney General about this problem was discussed. The answer is yes that several heads of several of the agricultural groups have. The AG did not offer any encouragement for the state of North Dakota to become a party to what appears to be a contractual problem. Most of you know that when there is a situation that warrants our intervention, we intervene. The fact is that we have already done what this bill is commanding us to do. We have considered it and on several occasions.

(34:29) Senator Hogue: I share your assessment of the bill. What if we amended the bill to avoid all perpetual easements in the state?

Tom Trenbeth: Then we would be talking about money. It would be considerable expense to defend the challenges. We simply do not go against the federal government because they are paramount. (Senator Triplett asked a couple of questions that were inaudible and the answers were unclear as well.)

Chairman Lyson: Closed the hearing on HB 1399.

2013 SENATE STANDING COMMITTEE MINUTES

Senate Natural Resources Committee Fort Lincoln Room, State Capitol

HB 1399
March 21, 2013
Job Number 20322

Conference Committee

Monica Spaulding

Explanation or reason for introduction of bill/resolution:

A BILL for an Act to require the attorney general to consider bringing legal action against the United States fish and wildlife service.

Minutes:

attachment

Chairman Lyson opened the discussion for HB 1399.

Senator Hogue: Motion to adopt amendment 13.0707.02001. See attachment #1.

Senator Murphy: Second

Senator Hogue explained that this amendment will make this bill "do more". He feels this gives the Attorney General some additional legal authority in case it ever did turn into a lawsuit. It also provides for a delayed effective date of June 30, 2017. That date was chosen because it is approximately 6 months after the current administration's term expires. He mentioned that the pattern of migratory birds is changing which makes it bad policy to have perpetual waterfowl easements. He feels this can be the start of pushing back against the federal government.

Senator Triplett felt this is not the way to push back. A resolution would be more appropriate. We would be putting something into law which has already been litigated all the way to the US Supreme Court and lost. If someone tries to rely on this, they will lose in court. If we ask our Attorney General to defend this law, it will cost us money to defend and the result will be the same. It would be more appropriate to lobby the change rather than put it into state law. State law is not going to change federal law.

Senator Hogue stated that Oregon and Colorado passed laws that went against federal law and they were successful. He feels this is the way that states have to push back. They have to keep passing laws that declare their sovereignty on issues where the federal government impinges on their sovereignty. It may be that the next administration in 2017 will be sympathetic to the states' control of their own land within their borders.

The motion to adopt the amendment passed by voice vote.

Senator Hogue made a Do Pass as Amended motion.

Senator Burckhard: **Second**

Senator Triplett stated that she feels this is an inappropriate way to legislate. Resolutions are the correct way. She feels we are making our law more difficult to understand. It is in essence placing a political protest within our law. People may enter into lawsuits that end up getting thrown out of court, in essence wasting their money. It is bad policy to put laws into code that have no ability to be enforced.

Senator Hogue feels this does do something. After 50 years they are expected to renegotiate the easements.

Roll Call Vote: 6, 1, 0

Carrier: Senator Hogue

FISCAL NOTE
Requested by Legislative Council
02/12/2013

Amendment to: HB 1399

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

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$0	\$0	\$0	\$0
Appropriations	\$0	\$0	\$0	\$0	\$0	\$0

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

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

This bill has been amended to provide the Attorney General with the ability to consider bringing legal action against the US Fish and Wildlife Service regarding wetlands.

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

As this bill has been amended, with the Attorney General being able to consider bringing legal action, rather than requiring legal action, there is no estimated fiscal impact.

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

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

Not applicable

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

Not applicable

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

Not applicable

Name: Kathy Roll
Agency: Office of Attorney General
Telephone: 701-328-3622
Date Prepared: 02/12/2013

FISCAL NOTE
Requested by Legislative Council
01/22/2013

Bill/Resolution No.: HB 1399

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

	2011-2013 Biennium		2013-2015 Biennium		2015-2017 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues	\$0	\$0	\$0	\$0	\$0	\$0
Expenditures	\$0	\$0	\$316,940	\$0	\$348,630	\$0
Appropriations	\$0	\$0	\$316,940	\$0	\$348,630	\$0

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

	2011-2013 Biennium	2013-2015 Biennium	2015-2017 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

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

This bill would require the Attorney General to bring legal action against the US Fish and Wildlife Service regarding wetlands.

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

The bill would require the Attorney General to bring legal action against the US Fish and Wildlife Service to delineate and describe every wetland easement in North Dakota.

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

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

Not applicable

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

Estimated 2013-15 and 2015-17 biennium expenditures are for one assistant attorney general, operating expenses and expert witness fees.

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

The Office of Attorney General's general fund budget would need to be increased by approximately \$316,940.

Name: Kathy Roll
Agency: Office of Attorney General
Telephone: 701-328-3622
Date Prepared: 01/30/2013

March 18, 2013

B
3/21/13

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1399

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact subsection 2 of section 47-05-02.1 of the North Dakota Century Code, relating to duration of waterfowl production area easements; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 2 of section 47-05-02.1 of the North Dakota Century Code is amended and reenacted as follows:

2. The duration of the easement, servitude, or nonappurtenant restriction on the use of real property must be specifically set out, and in no case may the duration of any interest in real property regulated by this section exceed ninety-nine years. The duration of an easement for a waterfowl production area acquired by the federal government, and consented to by the governor or the appropriate state agency after July 1, 1985, may not exceed fifty years. A waterfowl production area easement that exceeds fifty years or which purports to be perpetual may be extended by negotiation between the owner of the easement and the owner of the servient tenement. A waterfowl production area easement that exceeds fifty years or which purports to be permanent and is not extended by negotiation is void. The duration of a wetlands reserve program easement acquired by the federal government pursuant to the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, may not exceed thirty years.

SECTION 2. EFFECTIVE DATE. This Act becomes effective on June 30, 2017."

Re-number accordingly

Date: 3-21-13
Roll Call Vote #: 1

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1399 Eng.

Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended Adopt Amendment
13.0707,02001
 Rerefer to Appropriations Reconsider

Motion Made By Hogue Seconded By Murphy

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

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

passed by voice vote

Date: 3-21-13
Roll Call Vote #: 2

2013 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1399eng.

Senate Natural Resources Committee

Check here for Conference Committee

Legislative Council Amendment Number _____

Action Taken: Do Pass Do Not Pass Amended ^{AS} Adopt Amendment
 Rerefer to Appropriations Reconsider

Motion Made By Hogue Seconded By Burckhard

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

Total (Yes) 6 No 1

Absent 0

Floor Assignment Hogue

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

REPORT OF STANDING COMMITTEE

HB 1399, as engrossed: Natural Resources Committee (Sen. Lyson, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). Engrossed HB 1399 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact subsection 2 of section 47-05-02.1 of the North Dakota Century Code, relating to duration of waterfowl production area easements; and to provide an effective date.

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SECTION 2. EFFECTIVE DATE. This Act becomes effective on June 30, 2017."

Renumber accordingly

2013 TESTIMONY

HB 1399

February 8, 10 am
House Energy and Natural Resource Committee

#1
HB 1399
2/8/13

Chairman Porter and Members
Energy and Natural Resources Committee

Thank you for hearing this bill and for allowing me to testify in support of HB 1399.

For the record, my name is Dennis Miller. I am testifying on my own behalf, although I am a member of the LAND board and LAND also supports this bill.

I have included in my handout the front page of a letter from then US Attorney John Schneider to the ND Attorney General at the time. This letter outlines the Federal interpretation of the Johansen decision pertaining to the enforcement of USFWS perpetual easements.. It clearly states that enforcement of the easement is limited to the acreage limitations set forth in the Easement Summary.

The next page of my handout consists of a letter I received from the USFWS informing me that I was infringing on their easement because I buried debris "on the edge of two protected wetlands", and they provided a map of the wetlands they claim to protect. The locations of my supposed infractions are not identified on this map.

The problem with this letter and map from the USFWS is that the map they provided (and I have included) is vague and claims the protection of wetland acreage more than 200% greater than what the Easement Summary shows. This Easement Summary of my land is highlighted on the page after the map. The Easement Summary shows the USFWS has control of 48 acres of wetlands but the map claims they control at least a hundred acres. My supposed infractions were on the edge of their claimed wetland acreage. I would not have been charged with violating their easement if the USFWS would have used the acreage listed in the Easement Summary.

This over expansion of acreage is exactly why we need this bill.

If you may allow me to comment on the fiscal note of \$348,000 attached to this bill. That amount of money amounts to about \$30 for every easement in the state, which is a very good investment in my opinion.

Are there any questions?



*United States Attorney
District of North Dakota*

*U. S. Post Office & Federal Building
657 Second Avenue North - Room 255
P. O. Box 2505
Fargo, ND 58108-2505*

*701-239-5671
FAX: 701-239-5232
ADMIN FAX: 701-239-5408*

January 7, 2000

The Honorable Heidi Heitkamp
North Dakota Attorney General
600 East Boulevard Avenue
Bismarck, ND 58505-0040

Re: Wetlands

Dear Attorney General Heitkamp:

On December 13, 1999, Assistant Attorney General Charles M. Carvell wrote me, enclosing a copy of his October 27, 1999, letter to Mr. Ralph Morgenwerk, Regional Director of the U. S. Fish and Wildlife Service, basically asking for hypothetical guidelines in light of the Eighth Circuit Court of Appeals decision in United States vs. Johansen, 93 F.3d 459 (8th Cir. 1996). Following receipt of those letters, First Assistant United States Attorney Lynn Crooks and I met with several officials of the U. S. Fish and Wildlife Service. To the extent that Mr. Carvell asked us our interpretation of the Johansen decision, we would reply as follows: the wetlands easements are legal, binding, and enforceable agreements, but are limited to the "Summary Acreage."

The acreage limit is that listed as "total wetland acres" contained in the internal summary sheets which were prepared with regard to each easement at the time of its acquisition. This is the only figure that identifies or defines the "Summary Acreage," which is mentioned repeatedly in the opinion. The Johansen decision also tells us that in drainage cases the government must prove at trial that the wetlands drained were among those included in that "Summary Acreage." Thus, the location of the covered wetlands must be objectively ascertainable and identifiable.



United States Department of the Interior



FISH AND WILDLIFE SERVICE
Devils Lake Wetland Management District
P.O. Box 908
Devils Lake, North Dakota 58301

January 9, 2004

Certified Mail No. 7001 1940 0005 6597 3997

Dennis Miller
9467 63rd St. NE
Lawton, ND 58345

Ramsey County
Easement 60X

Dear Mr. Miller:

I am writing you regarding land that you own and operate which is covered by a U.S. Fish and Wildlife Service (Service) Waterfowl Management Easement located in T. 156 N., R. 62 W., section 22, E1/2, Ramsey County, North Dakota. As you know, the easement contract prohibits the draining, filling, burning or leveling of wetlands covered by the provisions of the easement.

In the fall of 2003, Service staff observed several areas on the edge of two protected wetlands where vegetation was disturbed apparently in the process of burying debris.

I want to take this opportunity to inform you that placing any fill material in a protected wetland is indeed a violation of the easement contract.

For your reference, I have enclosed a copy of a map depicting the protected wetlands on this property as well as a copy of the contract for this easement.

Please contact this office if you have any questions. Our office address is 221 2nd St. W in Devils Lake and my phone number is 701-662-8611 ext. 326.

Sincerely,

Jim Hjelmgren
Refuge Officer

Enclosures

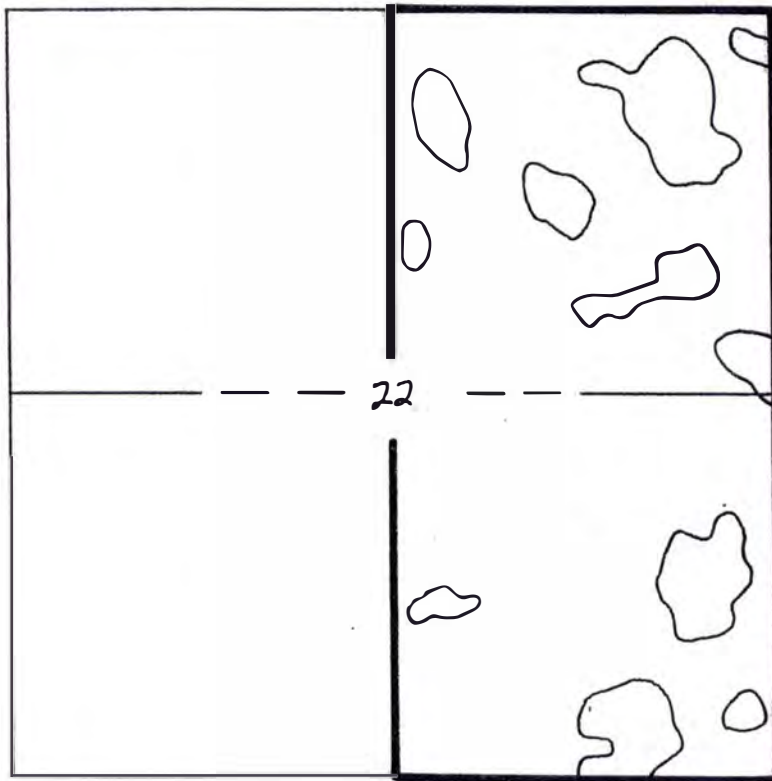
UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

TRACT 60X

MAP 1 of 1

WATERFOWL PRODUCTION AREA Ramsey COUNTY, STATE OF North Dakota
EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED.
T. 156 N., R. 62 W., 5th PRINCIPAL MERIDIAN

Section 22, E $\frac{1}{2}$




Scale: 4 Inches = 1 Mile

The U.S. Fish and Wildlife Service (Service) has purchased and owns perpetual rights which restrict or prohibit the right to drain, burn, level, and fill any wetland basin on the ownership represented by this map. This map represents the Service's effort to depict the approximate location of all protected wetland basins based on information and maps available at the time this map was prepared. However, because climatological and other natural conditions may cause the shape and location of wetland basins to change over time and from time to time, this map may or may not show wetlands as they appear in any given year.

LEGEND

 Boundary of Easement Description

 Wetlands covered by provisions of the easement

 Wetland deleted from easement by Drainage Facility Map prepared when the easement was purchased.

APPROVED:

Prepared by: Bradley Johnson Scott B. Kahan Date: 02/21/02

WATERFOWL PRODUCTION AREA - SUMMARY RECORD

DATE	TRACT	NAME	ACRES		COST	CUMULATIVE ACRES		COST	REMARKS
			WETLANDS	TOTAL		WETLANDS	TOTAL		
-20-64	61X,1	Lehnen, Hubert J.	36.00	150.63	600.00				✓
-20-64	83X	Nelson, John M.	129.00	960.00	2,200.00				✓
-20-64	63X,1	Anderson, Alevander T.	45.00	307.88	750.00				✓
-20-64	58X	Koch, A. W.	87.00	320.00	1,470.00				✓
-20-64	106X,1,2	* Myrvik, Alfred	35.00	320.00	600.00				✓
-20-64	77X	Myrvik, Andy O.	21.00	160.00	300.00				✓
-20-64	57X,1	Rader, H. W.	59.00	319.67	1,000.00				✓
-20-64	53X	McMillen, J. B.	100.00	480.00	1,700.00				✓
-20-64	60X	Bremseth, Odin	48.00	320.00	800.00				✓
-20-64	62X	Hessling, Bernhard	54.00	239.16	800.00				✓
-20-64	66X,1	Anderson, Charles F.	98.00	389.10	1,050.00				✓
-20-64	68X,1-3	Larson, Lars A.	126.00	800.00	2,100.00				✓
-20-64	76X,1	Kenner, Walter A.	88.00	474.69	1,500.00				✓
-20-64	78X,1	Settingsgard, Grant	32.00	240.87	550.00				✓
-20-64	79X	Aronson, Harold K.	78.00	400.00	1,175.00				✓
-20-64	80X	Walford, Alfred J.	50.00	240.00	850.00				✓
-20-64	82X	Thompson, Clyde W.	50.00	320.00	850.00				✓
-20-64	110X	Conroy Glenna K. Anderson	20.00	154.00	300.00				✓
-20-64	85X	Erickson, Hollis	31.00	160.00	500.00				✓
-20-64	65X	Ebensteiner, Andrew	56.00	313.50	950.00				✓
-13-64	87X	Johnson, Anton	19.00	160.00	300.00				✓
-13-64	74X	Tronson, David	22.00	160.00	375.00				
-24-64	99X,1	Anderson, Bernice	57.00	320.00	900.00				
-20-64	91X	Hayward, Delbert	40.00	160.00	600.00				
-20-64	38X,1	Stautz, Loren C.	64.00	240.00	770.00	5130.00	28091.18	61275.00	

DATE North Dakota (38)

COUNTY Ramsey (071)

TYPE Easement (580) #2

#2a



Your voice for wheat and barley. www.ndgga.com

North Dakota Grain Growers Association Testimony on HB 1399 House Agriculture Committee February 8, 2013

Chairman Johnson, Members of the House Agriculture Committee, for the record my name is Dan Wogsland, Executive Director of the North Dakota Grain Growers Association. The North Dakota Grain Growers Association appears before you today in support of HB 1399.

HB 1399 is a short bill with huge ramifications for the landowners in the state of North Dakota. The bill directs the North Dakota Attorney General to sue the United States Fish and Wildlife Service (USFWS) on behalf of North Dakota landowners to force USFWS to delineate and properly describe ALL of the wetland easement acres under their control in the state. Why is this important? Chairman Johnson, Members of the House Agriculture Committee, you have heard the North Dakota Grain Growers Association many times expound on the need for orderly water management in the state. This is a critical component for the continued success in our state's economy. Policies and procedures adopted by the United States Fish and Wildlife Service in regards to wetland easements and the definite delineation of easement acreage in the state stand in the way of that success. HB 1399 is an effort to bring common sense to these policies and procedures by forcing an agency to define its purported holdings in the state. In any other land transaction that would be good business; it's time for North Dakota to force the United States Fish and Wildlife Service to follow this common sense approach.

Chairman Johnson, Members of the House Agriculture Committee, I would like to refer you to the United States Fish and Wildlife Service easement maps which I have handed out. Each dot on the map represents a conservation easement in the state of North Dakota. Do you know the size of each of these tracts? That's alright because neither does the United States Fish and Wildlife Service, nor do they intend on defining that acreage unless forced to do so. Thus the need for HB 1399.

NDGGA provides a voice for wheat and barley producers on domestic policy issues – such as crop insurance, disaster assistance and the Farm Bill – while serving as a source for agronomic and crop marketing education for its members.

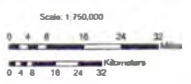
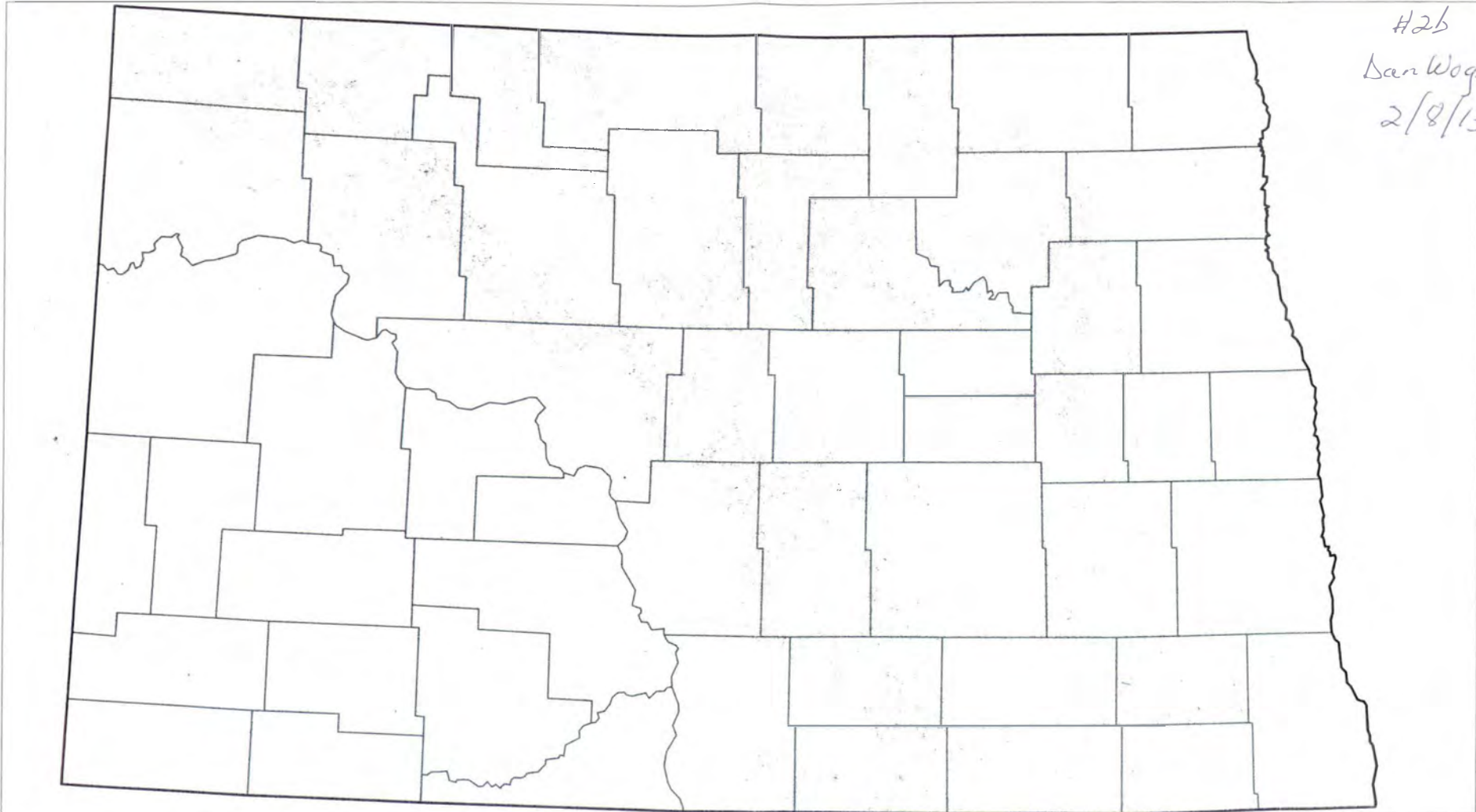
How have United States Fish and Wildlife Service easements negatively affected the state and its citizens you ask? There are a number of people in the room today that will give you their personal experiences on the negative impacts resulting from the United States Fish and Wildlife Service refusal to define the agency's holding in the state. Members of this House Agriculture Committee have their own personal negative experiences. In short wetland easements and their handling by the United States Fish and Wildlife Service has arguably been the biggest impediment to orderly water management in the state of North Dakota.

I would like to address some mechanics to the bill; first the fiscal note of \$665,570.00. This is a substantial amount of money but I would maintain that clear definition of these conservation easements will have a return on investment of 100 fold in better and more orderly water management. Second, as subsequent testimony will attest to the need to, and in consultation with the bill's prime sponsor, the Committee may want to look at tightening the way in which United States Fish and Wildlife Service would carry out wetland easement delineations.

Chairman Johnson, Members of the House Agriculture Committee, the 8th Circuit Court of Appeals opined "The wetland acquisition program was conceived of as a partnership between the federal government, the states, and individual property owners. As with any partnership, success requires good faith and reasonability." It is a sad day when a state has to step in to reign in a federal agency run amuck. It is time for North Dakota to take the reins in water management. Therefore the North Dakota Grain Growers Association would respectfully request that the House Agriculture Committee consider amendments tightening the scope of definite delineations of United States Fish and Wildlife Service easements and upon adoption of the amendments give HB 1399 a Do Pass recommendation.



#26
Dan Wogstland
2/8/13



Legend

-  State Boundary
-  County Boundary

Conservation Easement (1,194,444 acres)



Map Location

DISCLAIMER

The USFWS makes no claim as to the accuracy or completeness of the displayed information.

See the "Annual Report of Lands Under Control of the U.S. Fish and Wildlife Service", USFWS Division or Realty for detailed acquisition information.

For more detailed information on USFWS conservation easements, please contact the USFWS Realty Office, Bismarck, North Dakota or Huron, South Dakota.

Cole Wackerly #3

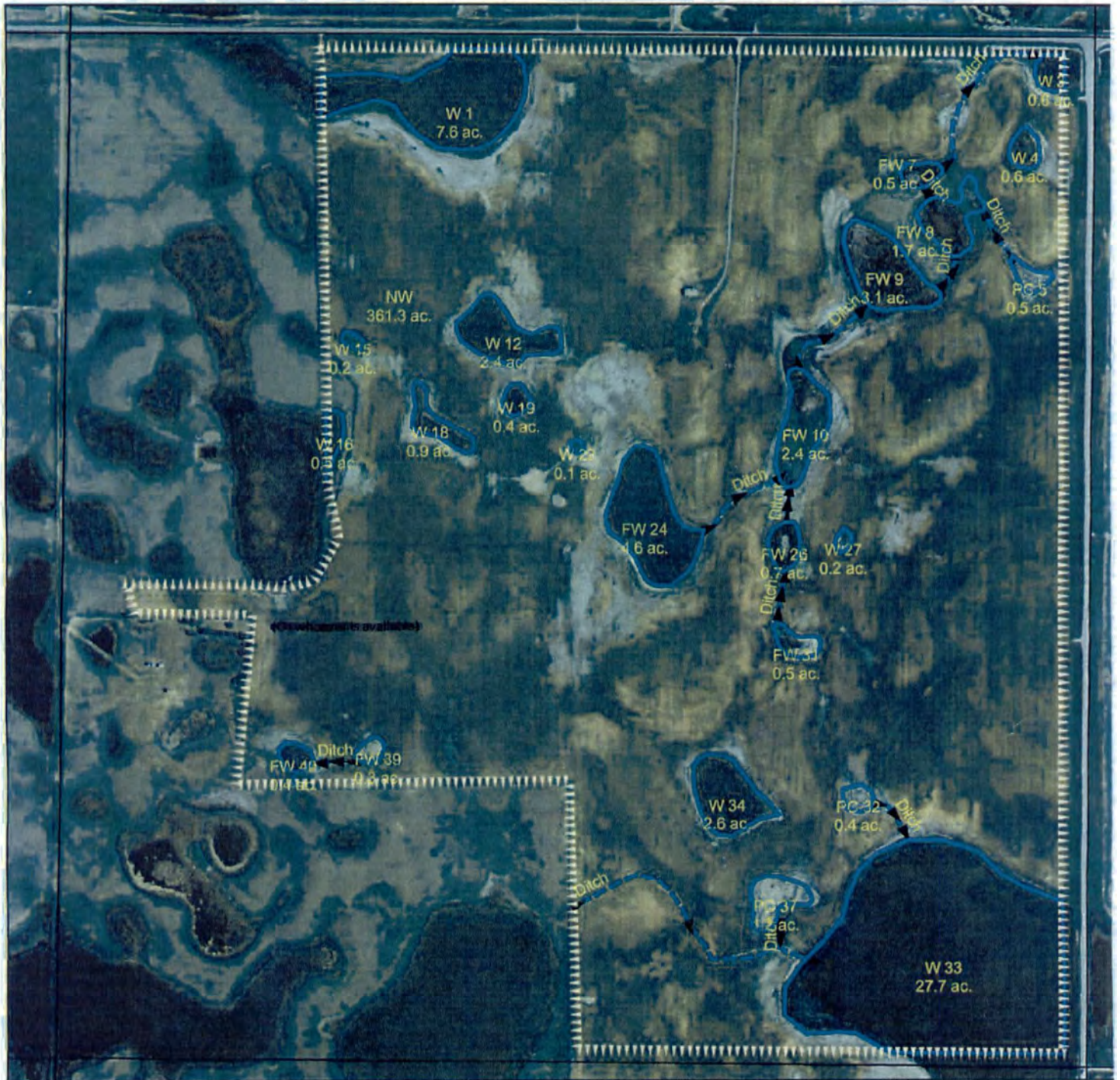
Certified Wetland Determination

A

Field Office: Fessenden FO
Legal Desc: 28-146-73

Easements

Agency: USDA-NRCS
Tract: 12255



Legend

- Certified Wetland Determination Boundary
- Wetlands
- Ditch

0 225 450 900 1,350 1,800 2,250 2,700 Feet

- W Wetland
- FW Farmed Wetland Drained or modified & cropped prior to 12-23-1985, but still meets wetland criteria
- PC Prior Converted
- NW Non Wetland
- NI Not Inventoried Potential Waters of the US

See NRCS CPA-O26E for definitions and additional info.



- easements -

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

B #4

Tract: 11X

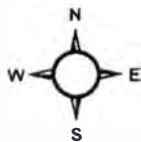
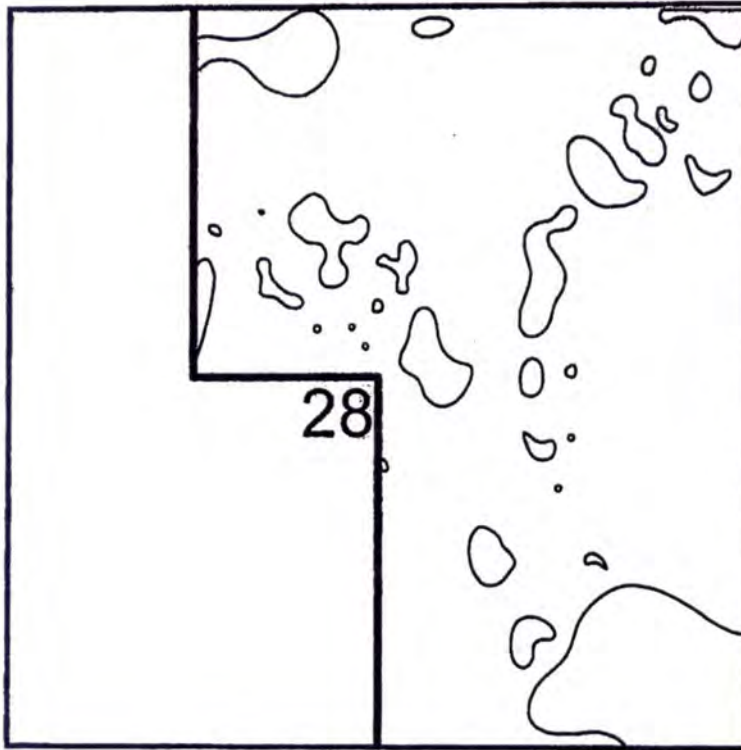
Map 1 of 2

WATERFOWL PRODUCTION AREA WELLS COUNTY, STATE OF NORTH DAKOTA EASEMENT
AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED.
T. 146N., R. 73W., 5th PRINCIPAL MERIDIAN

SECTION 28, E1/2, E1/2NW1/4

9 C
8-12
~~12-20~~

12,500



1 inch = 0.25 miles

The U.S. Fish and Wildlife Service (Service) has purchased and owns perpetual rights which restrict or prohibit the right to drain, burn, level, and fill any wetland basins depicted on this map. This map represents the Service's effort to depict the approximate location, size and shape of all protected wetlands based on information and maps available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetland in any given year. The Service reserves the right to revise this map, provided the mapped acreage remains consistent with the Easement's Summary Acres.

Prepared by: Kristina Hanson
Kristina Hanson

Approved by: Neil R. Shook
Neil Shook

Date: 10/19/2011

LEGEND

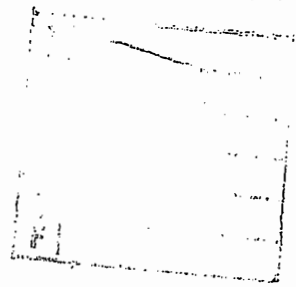
- Section Boundary
- Boundary of Easement Description
- Wetlands Covered by Provisions of the Easement
- Wetlands Deleted from the Easement
- Approved Drainage Facility

C #5

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

Easement Summary

REC'D
JAN 13 1966
NORTH DAKOTA



State : North Dakota
County : Wells
Location: T. 146 N., R. 73 W., 5th P.M.
sec. 29, E $\frac{1}{2}$
E $\frac{1}{2}$ NW $\frac{1}{4}$
sec. 33, SW $\frac{1}{4}$, E $\frac{1}{2}$

Tract Name : Radtke, Wallace E.
Tract Number: 11X
Easement Dated : 7-8-65 Easement Option Expires: 1-7-66
Easement Accepted: SEP 27 1965 Term of Easement: Perpetual
Easement Consideration: \$1500.00
Tract Acreage : 280.00 Cost per acre: \$1.70
Wetland Acreage: 167.00 Wetland cost per acre: \$8.98
Estimate of Value: \$1500.00
Accounting Number 14-16-0003-11554

Authorization to acquire easements in Wells County,
North Dakota, given by Governor William Guy
in letter dated 12-18-61.

Is your RETURN ADDRESS completed on the reverse side?

#6a
2/8/13

Mr. Chairman and fellow committee members.

I am Greg Daws, I farm in Nelson County, ND near Michigan. I am here today to show support for ~~HB~~ 1399.

I must give many thanks to my Grandfather and Father for not signing any of the wetland easements but saving all of the documentation for a day like today. As you can see I have brought a mini-filing cabinet containing brochures, Q and A's from the U.S. Fish and Wildlife Service trying to coax farmers to sign them during hard times for very little money but that is not what we are talking about today.

I do have documentation that my Father and I received through a Freedom of information request (page 3) that I made but it is all such poor copies that you cannot read it. A little story on the request. In June of 1996 I traveled to Bismarck to request documentation of an easement on some property we had purchased. In Bismarck at the Wetland habitat office they told me the info was in the Minot office. I then drove to the Minot office and they told me it was in Bismarck. I motored back to Bismarck and told them Minot said the documentation was in Bismarck. Bismarck then told me they had it but it would take a while to get it. I then drove back to Michigan empty handed and on October 17, 1996 we received the copies I am showing you.

Extremely frustrated would be an understatement; really pissed off was how I viewed my father when he opened the letter. As you can see on the Easement summary (page 2) of one of the parcels of land I have purchased it lists Wetland acreage as 118 acres. I have seen this parcel contain more than 225 acres of water which means there was 107 acres of excess water.

In Nelson County we are currently trying to lower Lake Loretta by 7 feet but the Fish and Wildlife Service is now claiming lateral effects to wetlands, many of which did not even exist when the easements were taken. It has become another roadblock in our 17 year process. To see the documentation is like pulling horse teeth, nearly impossible. Lake Loretta has grown from about 250 acres to 39,000 and made many miles of road impassable. Passage of this bill would lead to better info for the landowners. The Johannes court case directed the U.S. Fish and Wildlife to provide the info but when my family asked you can see what we got. I urged you to pass the bill so we can have greater clarity in dealing with the excess water.

Page 3 is a document I found in my NRCS file at the local office. You will notice someone took liberty to do some extra artistic expression.

If anyone would like a history lesson on Fish and Wildlife easements, my mini-file can give it. Are there any questions or documents you would like copies of?

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

Easement Summary

State : North Dakota

County : Nelson

Location: T. 153 N., R. 58 W., 5th P.M.

sec. 4, Frac. W₁ except parcel deeded to United States of America
B. 194, P. 175

sec. 5, Frac. E_{1/2}, SW_{1/4}

sec. 8, W_{1/2}, E_{1/2} except parcel deeded to Michigan Township Book
80, page 254

Tract Name : Olson, Oscar J.

Tract Number: 211X, 1

Easement Dated : 10-26-64 Easement Option Expires: 4-25-65

Easement Accepted: FEB - 1 1965 Term of Easement: Perpetual

Easement Consideration: \$2,000.00

Tract Acreage : 656.86 Cost per acre: \$3.04

Wetland Acreage: 118.00 Wetland cost per acre: \$16.95

Estimate of Value: \$2,000.00

Accounting Number 14-16-0003-9849

Authorization to acquire easements in Nelson County,
North Dakota, given by Governor William Guy
in letter dated 12-18-61

Date _____

Mr. Michael R. McEnroe
US Department of the Interior
Fish & Wildlife Service
1500 East Capitol Avenue
Bismarck, ND 58501-2096

RE: Freedom of Information Act Request

Dear Mr. McEnroe:

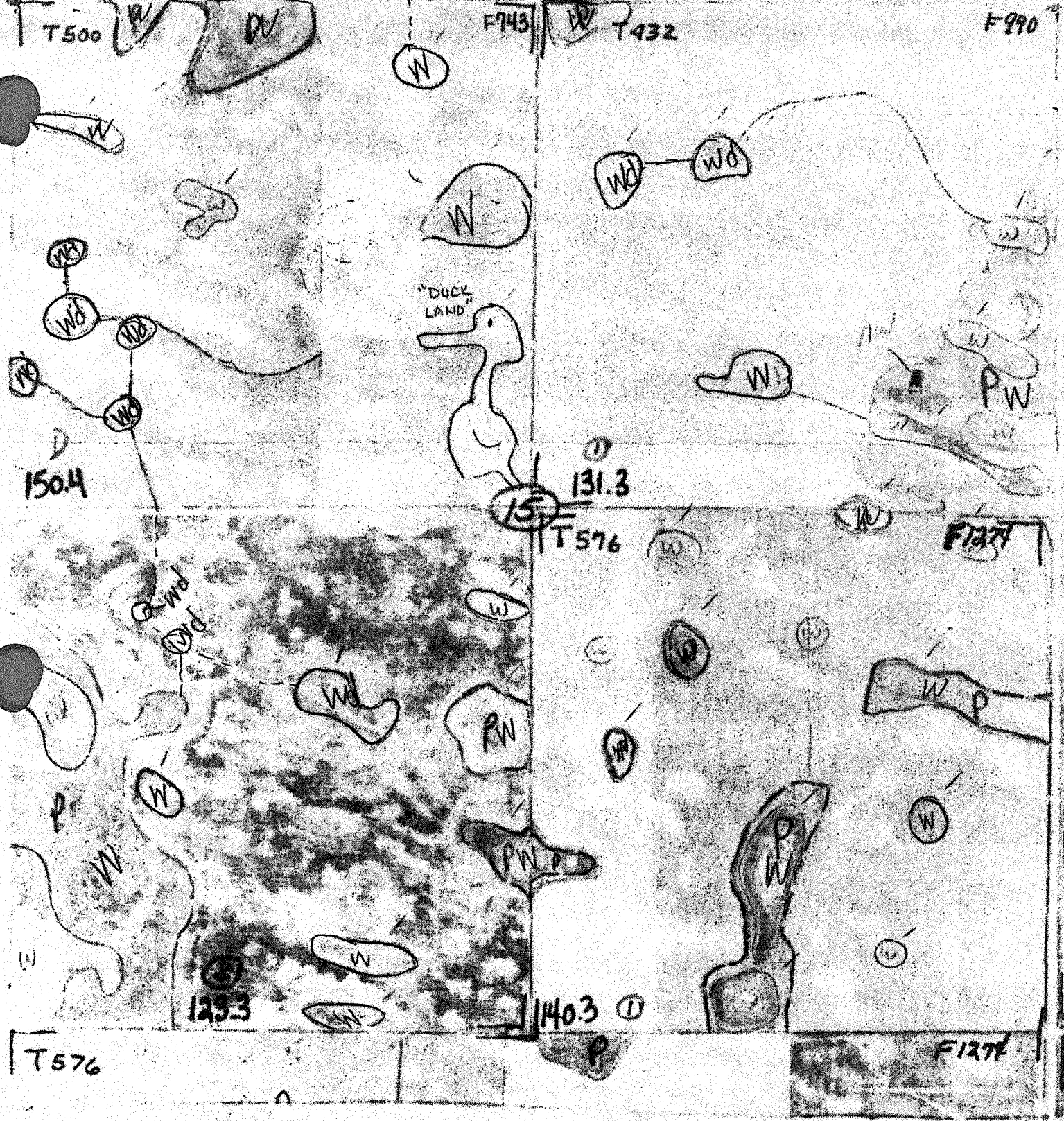
We hereby request disclosure of materials available from your agency under the Freedom of Information Act, 5 U.S.C. S 552, et, seq., described as follows:

1. A copy of the easement contract relating to the following described tract:

2. A copy of the Wetland Easement Summary report on the above described tract:
3. All maps and photographs used in determining wetland easement summary acres and location of these acres at the time the subject easement was taken.

Thank you.

Sincerely,





United States Department of the Interior

#66
2/8/13

FISH AND WILDLIFE SERVICE
Wetland Habitat Office
1500 East Capitol Avenue
Bismarck, North Dakota 58501

October 17, 1996

Richard E. Daws
Box 107
Michigan, North Dakota 58259

Dear Mr. Daws:

Enclosed are copies of materials you requested in a recent Freedom of Information Act Request. The following documents are provided:

- 1) Copies of the easement contract(s) covering lands referenced in your letter.
- 2) Copy of the easement summary sheet(s) for the respective easement.
- 3) A copy of aerial photographs that may have been used at the time this easement was purchased.

Please be aware that the easement summary and the photograph are not a part of the easement document that is filed with the Registrar of Deed's office at the county courthouse.

If you have questions, please contact this office (701/250-4418) or your local Fish and Wildlife Service office.

Sincerely,

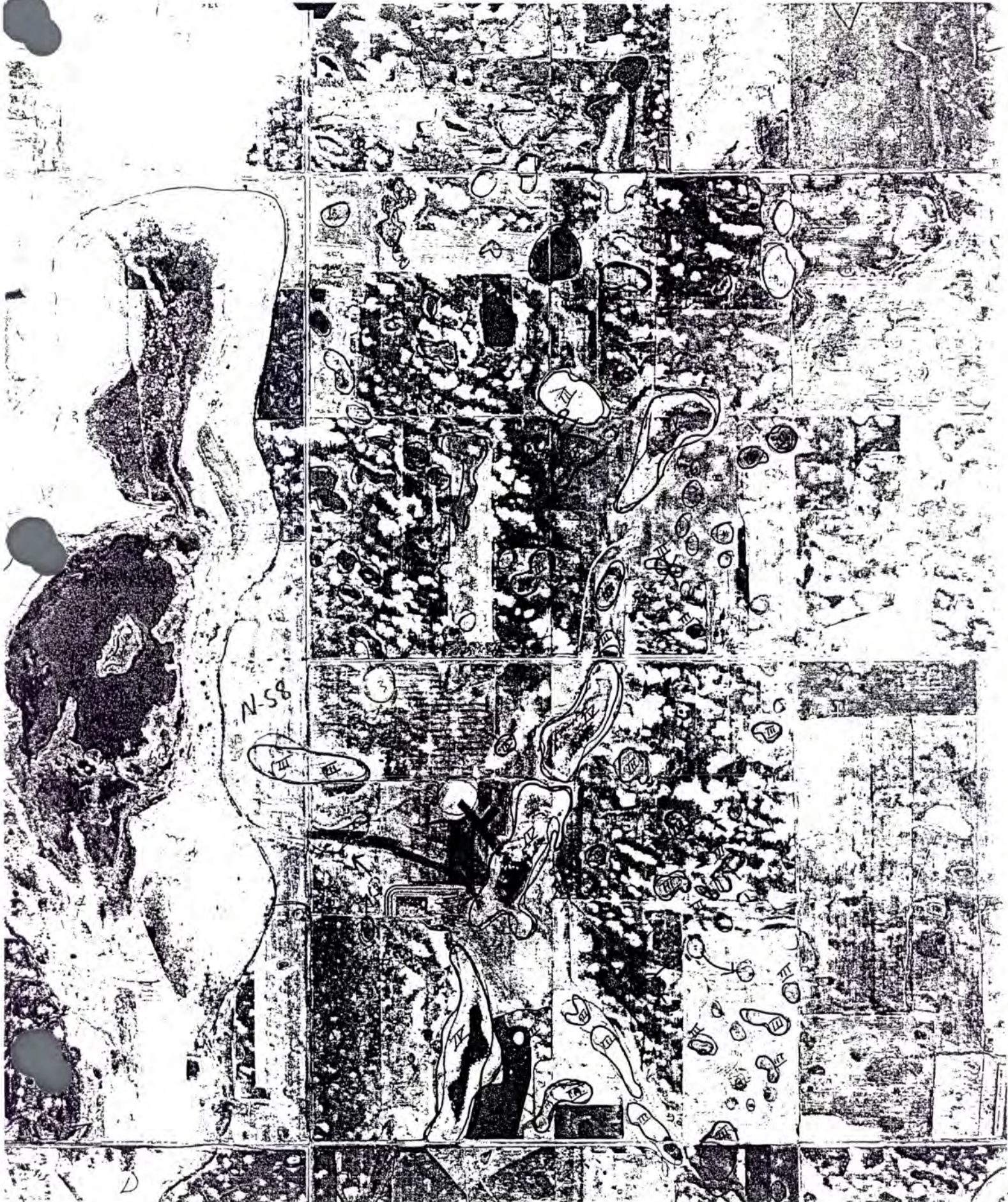
Michael R. McEnroe
Supervisor, ND Wetland Habitat Office

Enclosures

cc: Realty, Minot
WHO, Bismarck
Devils Lake WMD

Nelson Co. 153 58 sec. 18

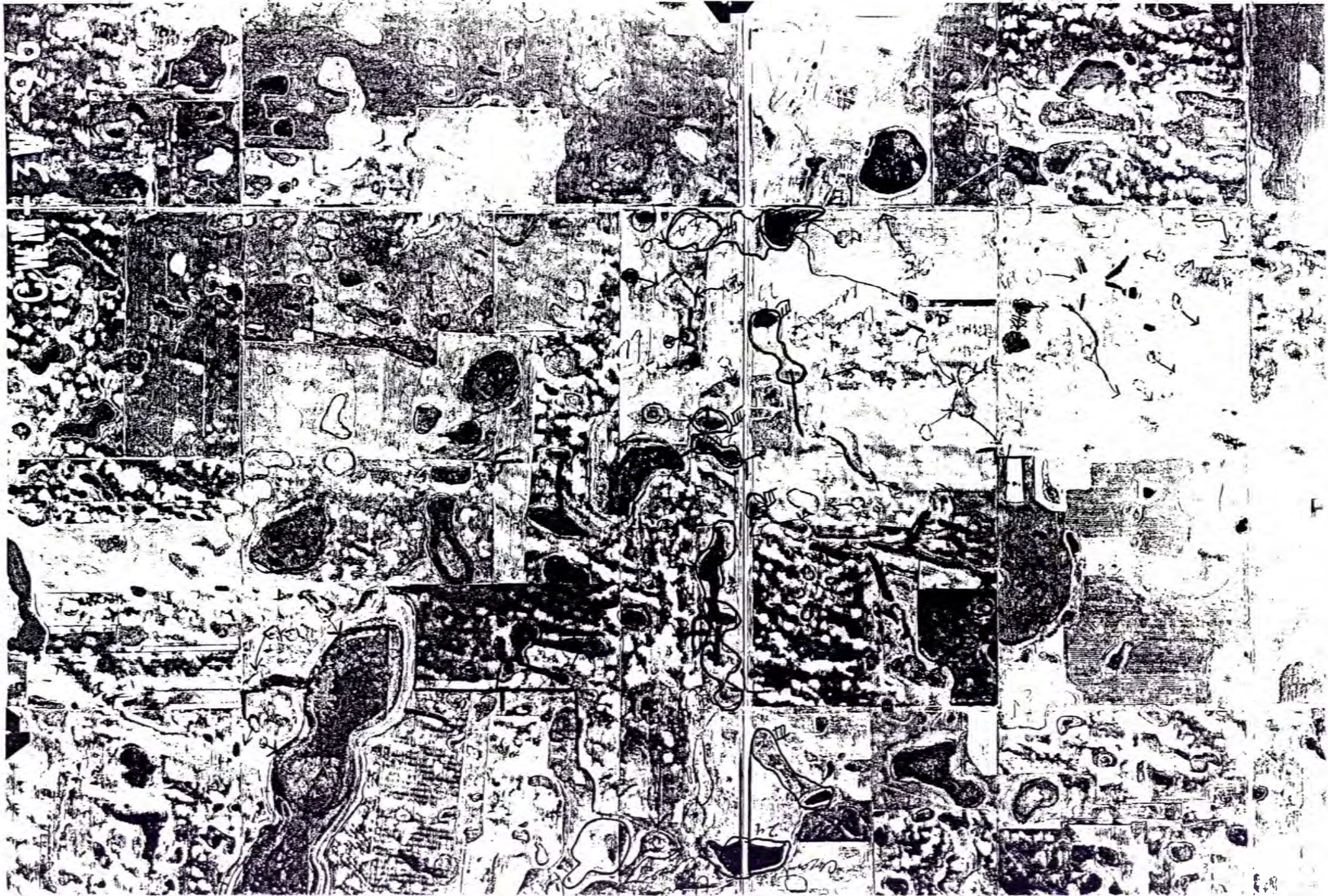
240X





1
127X

7



Nelson LO. 155 30 coll. 8 73X, 12 IX

6-1-59



7a
 Dwight Grosz
 Mountain-Prairie Region
 2/8/13
 AB 1399



U.S. Fish and Wildlife Service
Division of Refuge Planning

Completed Plan Contacts

The Service completed this plan in 2011

Landowners interested in easements may contact these offices

NORTH DAKOTA

Bismarck
Wetlands Acquisition Office
 3425 Miriam Avenue
 Bismarck, North Dakota 58501
 701 / 250 4415

Minot
Wetlands Acquisition Office
 2001 6th Street Southeast, Suite 5
 Minot, North Dakota 58701
 701 / 852 0318

SOUTH DAKOTA

Huron
Wetlands Acquisition Office
 200 4th Street Southwest, Room 307
 Huron, South Dakota 57350
 605 / 352 7014

Sand Lake
Wetlands Acquisition Office
 39650 Sand Lake Drive
 Columbia, South Dakota 57443
 605 / 885 6357

BRANCH OF LAND PROTECTION PLANNING

134 Union Boulevard, Suite 300
 Lakewood, Colorado 80228
 303 / 236 4366

Land Protection Plan

Dakota Grassland Conservation Area
 North Dakota, South Dakota

Description

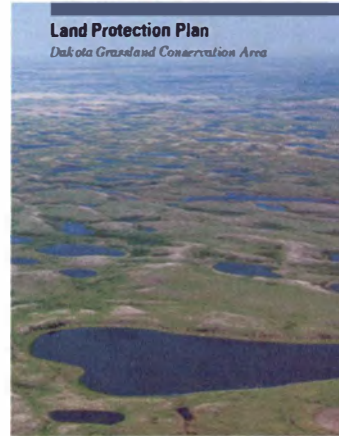
The Service has established the Dakota Grassland Conservation Area and will work with private landowners to accelerate the conservation of native prairie — both wetland and grassland habitats — within the Prairie Pothole Region in the eastern parts of North Dakota and South Dakota.

The conservation area is an easement program that will be part of a landscape-scale, strategic habitat conservation effort. The focus is to conserve populations of migratory birds by protecting the unique, highly diverse, and endangered ecosystem known as the Prairie Pothole Region.

- Land protection with conservation easements bought from willing sellers — 240,000 acres of wetland habitat — 1.7 million acres of critical grassland habitat
- [Project area map](#) (5 MB PDF)

The overall purpose of the proposed Dakota Grassland Conservation Area is to preserve, at a landscape scale, the ecological integrity of the area's mixed-grass prairie, tallgrass prairie, prairie pothole wetlands, and riparian woodlands with the support of the associated ranching culture. More specifically, the project is designed to do the following:

- Maintain and enhance the historical native plant, migratory bird, and other wildlife species.
- Preserve working landscapes based on ranching and livestock operations that support a viable livestock industry.
- Support the recovery and protection of threatened and endangered species and reduce the likelihood of additional listings under the Endangered Species Act.
- Prevent further habitat fragmentation.
- Protect an intact north-south migration corridor for grassland-dependent wildlife.



- Provide a buffer against climate change by providing resiliency for the mixed-grass and tallgrass prairie ecosystems and associated prairie pothole wetlands.
- Use this ecosystem resiliency to climate variability to ensure the continuation of wildlife habitat in the face of the uncertain effect of climate change.

Conservation easement contracts will specify perpetual protection of habitat for trust species and limits on residential, industrial, or commercial development. Contracts will prohibit alteration of the natural topography, conversion of native grassland to cropland, drainage of wetland, and establishment of game farms.

Easement land will remain in private ownership. Therefore, property tax and invasive plant control will remain the responsibility of the landowner, who also would retain control of public access to the land. Contracts would not restrict grazing on easement land.

Documents

Land protection plan (LPP) 2011

[LPP](#) (26 MB PDF)
 Includes the environmental assessment (EA) in appendix C.

By section, for faster download:
[Contents, Summary](#) (2 MB PDF)

- [Chapter 1, Introduction and Project Description](#) (7 MB PDF)
- [Chapter 2, Area Description and Resources](#) (8 MB PDF)
- [Chapter 3, Threats to and Status of Resources](#) (3 MB PDF)
- [Chapter 4, Project Implementation](#) (4 MB PDF)
- [Appendixes](#) (28 MB PDF)

Draft EA and draft LPP 2011

[Draft EA and draft LPP](#) (8 MB PDF)

Planning process documents

- [News release June 20, 2011](#)
- [News release December 29, 2010](#)
- [News release December 1, 2010](#)

76

Untitled

At the Federal level in 1965 Congress passed the Land Water Conservation Fund providing funds for federal aquisition and development of certain lands and other areas. The money was to be appropriated annually for worthy projects. It has only been fully funded twice since 1965.

In late December 2010 a Senator sought for the whole \$900 million dollar amount. The USFWS was to receive \$588 million for a project of theirs in the Dakotas.

The Dakota Grasslands Conservation Area would take \$588 million from the Land and Water Conservation Fund to buy easements on more than 240,000 acres of wetlands and 1.7 million acres of privately-owned grasslands in North Dakota, South Dakota, and eastern Montana.

In Febuary 2011 Congress came up against the debt ceiling debate and the \$900 million was axed in the very first round of cuts.

In 2012, we in ND had a petition for a Constitutional Amendment for Conservation and again they wanted to use taxpayer money, \$100 million, to aquire land and easements on land. It didn't make the ballot.

And now we have HB 1278 for \$30 million and we know there is some unhappiness with the language because they cannot use taxpayers money to buy land and only a twenty year easement on land.

The snap shot from here: Two years ago there was federal legislation for \$588 million. Last year there was a petition for \$100 million. Right now there is legislation for thirty million. This Bill HB 1399 has an appropriation of about \$350,000. Someday it may prove to have been money well spent.

Easement Information
Easment Documentation
Exhibit B



□ Boundary

Terry Weckerly
#82

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

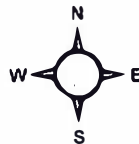
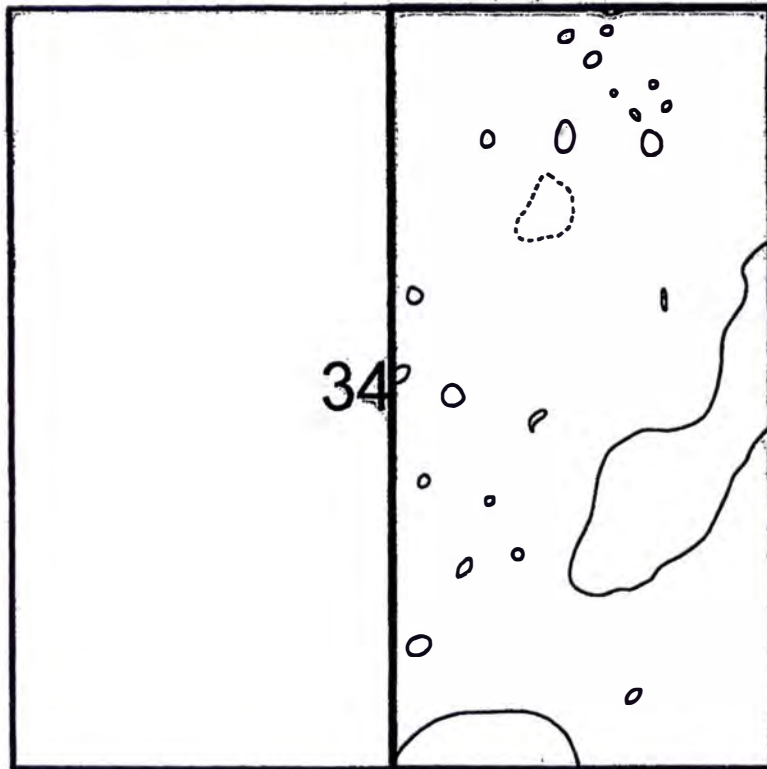
#86

Tract: 59X

Map 1 of 1

WATERFOWL PRODUCTION AREA WELLS COUNTY, STATE OF NORTH DAKOTA EASEMENT
AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED.
T. 146N., R. 73W., 5th PRINCIPAL MERIDIAN

SECTION 34, E1/2



1 inch = 0.25 miles






The U.S. Fish and Wildlife Service (Service) has purchased and owns perpetual rights which restrict or prohibit the right to drain, burn, level, and fill any wetland basins depicted on this map. This map represents the Service's effort to depict the approximate location, size and shape of all protected wetlands based on information and maps available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetland in any given year. The Service reserves the right to revise this map, provided the mapped acreage remains consistent with the Easement's Summary Acres.

Prepared by: Kristina Hanson
Kristina Hanson

Approved by: Neil Shook
Neil Shook

Date: 1/16/2013

LEGEND

-  Section Boundary
-  Boundary of Easement Description
-  Wetlands Covered by Provisions of the Easement
-  Wetlands Deleted from the Easement
-  Approved Drainage Facility

57X

United States Department of the Interior
Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realty

DRAINAGE FACILITY MAP

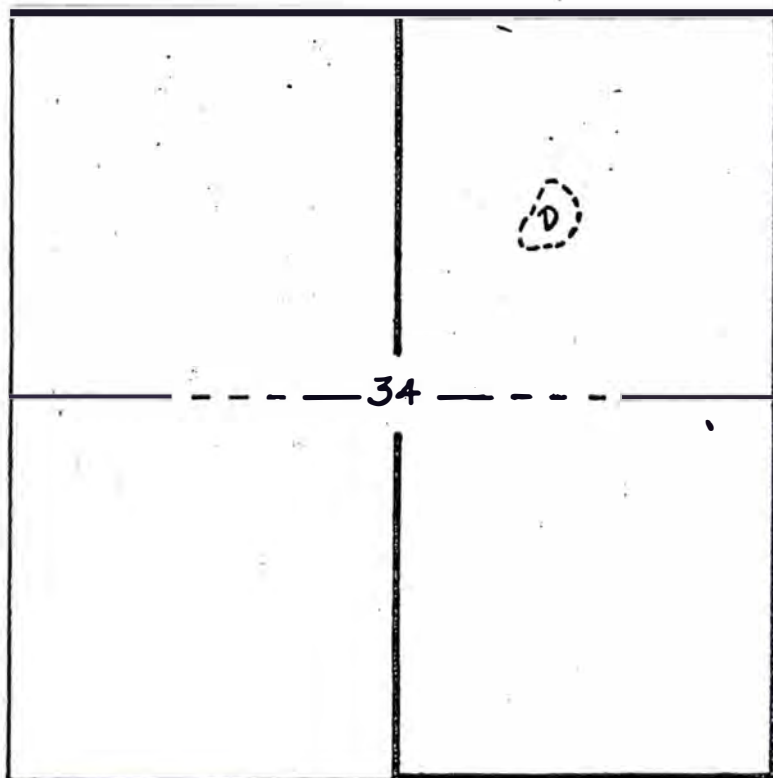
RADTKE ET AL, WALLACE F.
WATERFOWL PRODUCTION AREA
EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED
DESCRIPTION:

TRACT (59X)
WELLS COUNTY

320.00 ACRES
NORTH DAKOTA

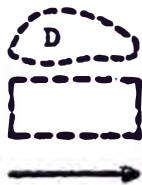
FIFTH PRINCIPAL MERIDIAN

T. 146 N., R. 73 W. , section 34, E $\frac{1}{2}$



I hereby certify that this map represents the excepted drainage ditches and/or deleted wetlands referred to in the easement agreement executed July 8, 1965 and accepted on SEP 21 1965.

/s/ W. P. Schaefer
Acting Regional Director



Wetlands Deleted from the Provisions of the Easement

Wetlands Drained

Open Ditch

Scale - 4" = 1 mile

Map drawn by: R.L.B. Date: 7-9-65

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

Easement Summary

State : North Dakota
County : Wells
Location: T. 146 N., R. 73 W., 5th P.M.
sec. 34, E₂



Tract Name : Radtko et al, Wallace F.
Tract Number: 59X
Easement Dated : 7-8-65 Easement Option Expires: 1-7-66
Easement Accepted: SEP 21 1965 Term of Easement: Perpetual
Easement Consideration: \$400.00
Tract Acreage : 320.00 Cost per acre: \$1.25
Wetland Acreage: 40.00 Wetland cost per acre: \$10.00
Estimate of Value: \$400.00
Accounting Number 14-16-0003-11541

Authorization to acquire easements in Wells County,
North Dakota, given by Governor William Guy
in letter dated 12/18/61

#80



2 of 8 DOCUMENTS



Positive
As of: Jan 03, 2013

United States of America, Appellee, v. Kerry Johansen, Michael Johansen, Appellants.

No. 95-3996

**UNITED STATES COURT OF APPEALS FOR THE EIGHTH
CIRCUIT**

93 F.3d 459; 1996 U.S. App. LEXIS 20640; 26 ELR 21644

**June 11, 1996, Submitted
August 19, 1996, Filed**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of North Dakota. CR C3-95-62-01. Honorable Rodney G. Webb, District Judge.

DISPOSITION: Reversed.

COUNSEL: Counsel who presented argument on behalf of the appellant was Michael D. Nelson, Fargo, ND. Additional attorney appearing on the brief was Donald R. Becker. Counsel who presented argument on behalf of the Amicus (State of ND) was Charles M. Carvell, AG, Bismark, ND.

Counsel who presented argument on behalf of the appellee was Lynn E. Crooks, USA, Fargo, ND.

JUDGES: Before BEAM and HEANEY, Circuit Judges, and BOGUE, District Judge.

* The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

OPINION BY: HEANEY

OPINION

[*460] HEANEY, Circuit Judge.

In the early 1960s, the federal government purchased easements on the farmland tracts of Kerry Johansen and Michael Johansen (the Johansens) for the maintenance of waterfowl production areas. After two unusually wet years in North Dakota, the Johansens requested the United States Fish and Wildlife Service (FWS) to delineate the extent of its wetland easements. The FWS refused, arguing that any wetlands that develop during wet years are subject to the easements' restrictions. Nevertheless, the Johansens proceeded to drain portions of their farmland tracts to contain the surface and subsurface [*461] water. The United States then charged the Johansens with unauthorized draining of wetlands in a Waterfowl Production Area, a violation of 16 U.S.C. § 668dd (1994). In response to a motion in limine by the United States Attorney, the United States District Court [**2] for North Dakota prohibited the Johansens from arguing that the federal wetland easements covered only 105 acres on the three tracts and that more than that number of wetland acres remained intact after the draining. After entering a conditional guilty plea, the Johansens now appeal that order. We reverse.

I.

A. History of the Federal Conservation Program.

In 1929, Congress enacted the Migratory Bird Conservation Act, 45 Stat. 1222, ch. 257 (1929) (codified as 16 U.S.C. § 715 et. seq. (1994)). Recognizing the importance of preserving potholes for migratory waterfowl, ¹ the Act authorized the Secretary of the Interior to acquire lands to be used for migratory bird sanctuaries. 16 U.S.C. § 715d. Acquisition was made subject to the consent of the state in which the land was located. 16 U.S.C. § 715f. ² The Migratory Bird Hunting and Conservation Stamp Act was passed in 1934 to fund the acquisition of bird sanctuaries. 48 Stat. 451 (1934) (codified as 16 U.S.C. § 718 et seq. (1994)). Subsequently, the conservation effort's strategy shifted away from the creation of large bird sanctuaries toward the preservation of wetlands on private property. Accordingly, federal law was amended [**3] in 1958 to permit the acquisition of wetland easements on individual parcels which were designated "Waterfowl Production Areas." Pub. L. 85-585, § 3, 72 Stat. 487 (1958) (codified as 16 U.S.C. § 718d(c) (1994)). The source of funding was later increased, but the acquisition of the wetland easements was conditioned on the consent of the governor of the state (as opposed to the state legislature as under the Migratory Bird Conservation Act). The Wetlands Act of 1961, Pub. L. 87-383, § 3, 75 Stat. 813 (codified as 16 U.S.C. § 715k-5 (1994)). From 1961 to 1977, the governors of North Dakota consented to the acquisition of easements covering 1.5 million acres of wetland. *See North Dakota v. United States*, 460 U.S. 300, 311, 75 L. Ed. 2d 77, 103 S. Ct. 1095 (1983). These consents further specified the maximum acreage that could be acquired in each county of North Dakota.

1 Much of the State of North Dakota, as well as parts of the Canadian Provinces of Manitoba, Saskatchewan, and Alberta, constitutes what marine biologists call the northeastern drift plain. As a prairie pothole region, each square mile of the drift plain is dotted by as many as seventy to eighty potholes, three to four feet deep, that retain water through July or August because of the soil's poor drainage capacity. These geographical attributes are of particular importance to certain migratory waterfowl that prefer these potholes as a habitat to raise their young because they provide isolated protection and a source of aquatic food.

[**4]

2 North Dakota, the state in question here, gave its consent to the acquisition by the United States of areas in the State of North Dakota "as the United States may deem necessary for the establishment of migratory bird reservations." 1931 ND Laws, ch 207, p. 360.

B. The Steele County Tracts.

In the mid-1960s, as part of the Waterfowl Production Area Program, the FWS purchased easements on three tracts of land from the Johansens' predecessors. These tracts, described as Steele County tracts 21X, 24X, and 30X, consist of two half sections (319.58 acres and 317.70 acres) and a half section plus eighty acres (395.98 acres), respectively. As with most wetland easement purchases, the FWS used a standardized wetland conveyance developed for the program. The conveyance instrument granted the United States "an easement or right of use for the maintenance of the land described below as a waterfowl production area in perpetuity" As was standard practice prior to 1976, the conveyance then legally described the whole parcel. In exchange for the easement, the property owner was given \$ 600 for each [**5] of the half-section parcels and \$ 700 for tract 30X. The conditions imposed by the easement on the servient tenement are as follows:

The parties of the first part . . . agree to cooperate in the maintenance of the aforesaid [*462] lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or reoccurring due to natural causes on the above-described tract, by ditching or any other means

Along with the recorded easement conveyance, the FWS prepared an Easement Summary which provided information including the tract description, the tract acreage, the wetland acreage, and the cost of the wetland per acre. According to each of the summaries, the wetland acres purportedly purchased were thirty-three acres in both tract 21X and tract 24X and thirty-five acres in tract 30X (Summary Acreage). The FWS has subsequently published annual reports in which it continues to represent that it controls thirty-three, thirty-three, and thirty-five acres of wetland on the tracts in question. *See, e.g.*, Annual [**6] Report of Lands Under Control of the U.S. Fish and Wildlife Service (Sept. 30, 1980) (Ex. D-154); U.S. Fish and Wildlife Service, Acreage Summary Record for Steele County Waterfowl Production Area (Ex. D-157).

C. The Johansens.

The spring of 1995 was a wet one in North Dakota. The Johansens, farmers in Steele County, North Dakota, were faced with the second consecutive wet year and farmland that could not support farm machinery due to the surface and subsurface water. ³ Aware that their farmland tracts were burdened by wetland easements, Kerry Johansen wrote the FWS to explain his problem and to ask "what water [he could] contain to get back to [his] normal farming practices." Letter from Kerry Johansen to Hoistad (Jan. 1, 1995) (Ex. D-120). In response, the FWS concurred that "your area has been hard hit in the last two years. . . . This particular tract of land has a high number of basins on it. This, I'm sure, combined with the high rain amounts has caused you some difficulty farming in the past year." Letter from Hoistad to Kerry Johansen (Mar. 17, 1995) (Ex. D-121). Despite its sympathy for the Johansens' difficulty, however, the FWS concluded: "The only provisions of the [**7]

easement that allow for drainage are when [there] are safety or health concerns involved. Another way of saying this is unless your roads or farmstead is in danger of being flooded, no drainage can take place." *Id.* In spite of this admonition, the Johansens dug ditches on the tracts to contain the water. ⁴

3 The Johansens allege that in 1995 there were 83.8, 64.9, and 67.1 wetland acres on tracts 21X, 24X, and 30X, respectively.

4 The extent and impact of the ditching have not been determined by a trier of fact. It is undisputed that some wetlands were drained as a result of the ditches.

As a result of their ditching, the Johansens were charged with draining wetlands covered by FWS easements in violation of 16 U.S.C. § 668dd (1994). In their defense, the Johansens planned to introduce the Easement Summaries and proof that each parcel, after the draining, contained wetland acreage in excess of the acreage provided for in the Easement Summaries. The United States, in a motion *in limine*, sought [**8] to exclude the evidence as irrelevant, arguing that the Easement Summaries were not part of the recorded easement and that defense theories claiming any limitation of the wetland easements had been rejected by this court. Relying on this court's decision in *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987) (Heaney, J.), the district court held the defense was improper and excluded the proffered evidence. The Johansens then entered conditional guilty pleas, subject to the outcome of this appeal, from that pretrial order.

II.

The government's prosecution of this case has been described by the Johansens as a shell game. We cannot disagree. The United States Attorney argues that prior decisions by this court have specifically interpreted the wetland easements to encompass all wetlands on the encumbered parcel. The government's argument, however, fails to acknowledge the ramifications of both the intervening Supreme Court decision in *North Dakota*, in which the Court adopted a more [*463] restricted interpretation of the wetland easements, and the representations made by the Solicitor General during that litigation. ⁵ The broad interpretation now advanced by the United States [**9] Attorney is not only inconsistent with the representations made by other federal officials, it would also raise serious questions with respect to limitations imposed by the easement program's enabling statute. Moreover, the stringent posture assumed in this enforcement prosecution does not comport with the efforts toward a "cooperative and helpful relationship between North Dakota, its farmers and political subdivisions, and the U.S. Fish and Wildlife Service" which is fundamental to the success of conservation programs. *See North Dakota and U.S. Fish and Wildlife Service Agreements 1* (July, 1993) (Ex. D-159). ⁶

5 Implicit within the figures quoted in the Solicitor General's brief is the representation that the United States had acquired title to thirty-three, thirty-three, and thirty-five acres on tracts 21X, 24X, and 30X, respectively. *See infra* at 9-10. The United States Attorney argues that "even if this Court would accept an argument that the federal government must pick only 33 or 35 acres (as the case may be) in each tract to protect, what makes the defendant think we would not pick the acreage they have drained? Indeed, we have already done so by charging them with illegal draining." Appellee's Br. at 11. Given the Johansens' attempts to involve the federal government in the delineation of its rights to the land, this declaration is repugnant to the notions of fair notice.

[**10]

6 This court notes that North Dakota has filed an amicus brief on behalf of the Johansens.

A. Interpretation of the Wetland Easements.

In essence, this case revolves around the interpretation of the wetland easements purchased by the federal government. State law will generally govern the interpretation of a real property conveyance instrument, either through direct application or through the "borrowing" principles of federal law, so long as it is neither aberrant nor hostile to federal property rights. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-96, 37 L. Ed. 2d 187, 93 S. Ct. 2389 (1973); *cf. United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974). Under North Dakota law, while the principles of contract law guide the inquiry, *see* N.D. Cent. Code § 47-09-11 (1978); *Royse v. Eastern Seal Society for Crippled Children & Adults, Inc.*, 256 N.W.2d 542, 544 (N.D. 1977), the "primary purpose in construing a deed is to ascertain and effectuate the intent of the grantor." *Malloy v. Boettcher*, 334 N.W.2d 8, 9 (N.D. 1983).

This suit, as well as numerous other suits involving wetland [**11] easements, arises in large part because prior to 1976, the FWS described wetland easements by referring to the entire tract of land rather than to the particular area of the covered wetlands. Since 1976, the FWS has recorded a map locating the covered wetland acres as part of every easement document. However, as a consequence of the former practice and the fact that prairie potholes, by nature, are ill-defined and subject to fluctuation, there has been a considerable amount of confusion regarding what the earlier wetland easements actually covered. *See, e.g., Albrecht*, 496 F.2d 906; *United States v. Seest*, 631 F.2d 107 (8th Cir. 1980); *United States v. Welte*, 635 F. Supp. 388 (D.N.D. 1982), *aff'd*, 696 F.2d 999 (8th Cir. 1982).

The United States Attorney for North Dakota takes the position that all wetlands found on an encumbered tract at any given time are covered by the easement and cannot be drained in any fashion. In other words, there are no "uncovered wetlands" on the parcel described by the easement. The Johansens, however, claim that the easements cover only a portion of their property and not every wetland that might develop during any given year. In support [**12] of their interpretation that only the potholes existing at the time of the easement conveyance are covered by the easement's restrictions, the Johansens point to the easement document language limiting drainage of potholes "now existing or reoccurring due to natural causes on the above-entitled land." Primarily, however, the Johansens rely on the Easement Summaries which indicate that thirty-three wetland acres were purchased on tracts 21X and 24X and thirty-five wetland acres were purchased on tract 30X.

[*464] The United States Attorney rejects the Johansens' reliance on the Easement Summaries for two reasons. First, the United States Attorney points out that the summary figures were not recorded as part of the easement document. This fact, however, is not necessarily preclusive. *See Schulz v. Hauck*, 312 N.W.2d 360, 363 (N.D. 1981) (holding that use of unrecorded, extrinsic evidence is permissible to interpret ambiguous grant language). Second, the United States Attorney contends that these summaries do not evidence the parties' intent, but were merely "used by government negotiators as a yardstick of the purchase price." Appellee's Br. at 10.

The government's interpretation is not [**13] unreasonable, given that the legal description of the easement includes the whole tract. More importantly, this interpretation has been given to the easements by this court in past decisions. *See, e.g., Albrecht*, 496 F.2d at 912 (holding that ditching encumbered parcel violated terms of easement); *Seest*, 631 F.2d at 108 (holding that ditching parcel,

although not diminishing the surface water, altered the natural flow of surface and subsurface water, violating the terms of the easement); *Welte*, 635 F. Supp. at 389 ("Had the government obtained an easement on only 22 acres [the acreage identified in the Easement Summary], appellants would have a valid point. The government obtained its easement on all 160 acres [the entire parcel], however."). Thus, at least as of the early 1980s, there was considerable case law to support the government's position that the easements prevented drainage on any portion of the described parcel.

B. The Impact of *United States v. North Dakota*.

The interpretation given the easements by this court in the early 1980s was rejected by the Supreme Court. Starting in the 1970s, the cooperation that had marked the joint effort between the [**14] federal and state governments to provide waterfowl habitats began to break down. After North Dakota enacted a series of laws intended to restrain further federal purchase of wetlands, the United States brought suit seeking to have the laws declared invalid. One of the objections raised by North Dakota during the litigation was that the total area described by the wetland easements, 4,788,300 acres, exceeded the gubernatorial consents which had limited the FWS to 1.5 million wetland acres. This court held that the gubernatorial consents were not required for the acquisition of waterfowl production areas. *United States v. North Dakota*, 650 F.2d 911, 916 (8th Cir. 1981), *aff'd on other grounds*, 460 U.S. 300, 75 L. Ed. 2d 77, 103 S. Ct. 1095 (1983). The Supreme Court rejected that view, acknowledging that "Congress has conditioned any such acquisition upon the United States' obtaining the consent of the Governor of the State in which the land is located." 460 U.S. at 310 & n.13.

While conceding that the limitations imposed by the gubernatorial consent were applicable, the United States represented that it had not exceeded the maximum wetland acreage. In its brief to the Supreme Court, the United States contended: [**15]

While the total gross area described in the easement documents is 4,788,300 acres, because the easement restrictions apply only to the wetlands acres North Dakota's contention that the United States already has acquired more acreage than the gubernatorial approvals encompass is without merit. By contrast, since the United States obtained gubernatorial consent to acquire easements over 1,517,437 acres of wetlands and has only acquired easements over 764,522 wetland acres, it is entitled to acquire [] additional [] acres

Brief for the United States at 19, *North Dakota v. United States*, 460 U.S. 300, 75 L. Ed. 2d 77, 103 S. Ct. 1095 (1983) (No. 81-773) (citations omitted) (*North Dakota* Brief). The latter figure, 764,522, was based on the acreage figures provided in the Easement Summaries.⁷ In other words, for the purposes [**465] of that litigation, the United States contended that the wetland easement restrictions applied only to the thirty-three, thirty-three, and thirty-five acres on the Johansens' tracts. The Supreme Court accepted the federal government's interpretation of the easement restrictions:

North Dakota next argues that the gubernatorial consents, if valid, have already [**16] been exhausted by acquisitions prior to 1977. This argument stems from the practice of including within each easement agreement the legal description of the entire parcel on which the wetlands are located, rather than merely the wetland areas to which the easement restrictions apply. If the entire parcels are counted toward the acreage

permitted by the gubernatorial consents, the United States already has acquired nearly 4.8 million acres, far more than the 1.5 million acres authorized. The United States has conceded as much in its answers to North Dakota's interrogatories. App. 49 ("The total acreage described in the permanent easements . . . is 4,788,300 acres . . ."). As the easement agreements make clear, however, the restrictions apply only to wetland areas and not to the entire parcels. . . . The fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired.

North Dakota, 460 U.S. at 311 n.14.

7 In response to an interrogatory asking, "How was the '764,522 wetland acres' figure computed," the FWS stated, "the 764,522 wetland acres is a summation of the wetland acres reported on the Easement Summary Sheets for all waterfowl production area easements acquired in North Dakota. The figure is used for record keeping and reporting purposes." Defendants' Response to Plaintiffs' Request for Admissions, Interrogatories, and Demand for Production to Defendants, filed on April 5, 1982, Answer to Interrogatory No. 40(a), in *Board of Managers et al. v. Key, et al.* (later changed to *North Dakota v. Butterbaugh*), Civ. No. A2-81-178, on file in the trial court. Exhibit D-115, at 23.

[**17] Although this interpretation of the easements, that the restrictions "apply only to wetland areas and not to the entire parcel," seems clearly at odds with this court's prior decisions holding the contrary, the United States Attorney contends there is no inconsistency:

There is simply nothing inconsistent between the U.S. Fish and Wildlife Service conceding that *only* the wetlands within the larger tract [are] covered by the drainage limitations and therefore that only that acreage counted against the "county consents" and . . . at the same time contending that *all* wetlands within a particular easement tract are subject to its limitations.

Appellee's Reply Br. at 3. What the United States Attorney fails to acknowledge, however, is that the Solicitor General's brief did not claim that the United States had acquired an interest in all wetlands on the parcel, but rather explicitly stated that the United States "had only acquired easements over 764,522 wetland acres," *i.e.*, the Summary Acreage. *North Dakota* Brief at 19. The implication of the United States' brief in *North Dakota* is clear: the United States acquired easements over thirty-three acres [**18] on tracts 21X and 24X and thirty-five acres on tract 30X.

It is important to note, however, that although the Supreme Court generally accepted the federal government's argument limiting the easement restrictions to the encumbered parcels' wetlands, it did not explicitly limit the wetland easement to the Summary Acreage. The Court merely stated that "the fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired." *North Dakota*, 460 U.S. at 311 n. 14. * Statements made by the Solicitor General in his *North Dakota* brief and the FWS response to interrogatories are not a binding statement of the rights of the United States. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84, 92 L. Ed. 10, 68 S. Ct. 1 (1947).

8 The Court's treatment of this argument implicitly suggests, however, that the "acreage" is a set figure and not subject to fluctuation.

C. Problems with a Fluctuating Easement.

Although the Court's language [**19] in *North Dakota* permits an interpretation of the easement to cover all wetlands on the encumbered [*466] tract rather than limiting the easements' scope to the Summary Acreage, doing so would create a host of problems. Under this interpretation, the number of wetland acres subject to the easement restrictions would fluctuate with the amount of rainfall. Not only is this inconsistent with the FWS Annual Summaries of the number of wetland acres under its control and traditional norms of real property conveyance, *see* Restatement of Property § 451, cmt. m (1944) (requiring definiteness), it would prohibit ditching on the entire, legally-described parcel. According to the government's theory, any action that would inhibit the collection of water in a particular depression would violate its interest in existing and future wetlands. Given that these properties are pocketed by depressions of various depths, however, any ditching will impact the formation of wetland. *See Albrecht*, 496 F.2d at 909 ("An expert in water biology testified that the ditching had the same effect as a drought . . . and that the usefulness of the [] land as a waterfowl production area had been 'significantly [**20] reduced.'"). Thus, the wetland easements' restrictions, as interpreted by the United States Attorney, would apply to the entire parcel. This was clearly and explicitly rejected by the Supreme Court in *North Dakota*.

This interpretation also presents problems with respect to the gubernatorial-consent component of the program's authorizing statute. If the easement restrictions expanded with the amount of wetland present on a parcel at any particular time, the acreage of federal wetlands counted against the gubernatorial limitation would fluctuate as well. This figure would also need to be kept current to ensure compliance with the gubernatorial consents, something that the federal government has been reluctant to do in the past. *See Vesterso*, 828 F.2d at 1242. The United States Attorney's suggestion that the Easement Summary figures may be used to compile a total of wetland acreage to be applied against the gubernatorial consents, but need not relate to the potholes actually covered by the restrictions, Appellee's Reply Br. at 2, can be rejected out of hand. Clearly, in order for the gubernatorial consent provision of the enabling statute to be meaningful, there must be a [**21] direct correlation between the figure of federal wetland acres applied against the consents and the actual acreage restricted by the wetland easements. Even were the federal government to assume the task of maintaining an accurate and current tally of the existing wetlands, that fluctuating figure could conceivably exceed the gubernatorial limitation during a wet year, thereby violating the terms of the easement program's enabling statute. ° In its reply brief, the United States Attorney's Office responds to this possibility as follows:

In the unlikely event the State could prove that the total wetland acres under easement in a particular county, when at maximum fill, exceeded the gubernatorial consents previously given, such an assumption might give rise to a right to bring a declaratory judgment or contract action against the federal government. *What such a suit might yield is unclear*, but what is clear is that it would not void all easements taken in that county or confer upon either the State or the landowners the right to choose which wetlands within each easement the federal government gets to keep.

Appellee's Reply Br. at 4 (emphasis added). We decline to [**22] follow the "cross-that-bridge-when-you-get-to-it" approach espoused by the United States Attorney's Office. Given the choice, we believe it more prudent to avoid this possibility by interpreting the easements' scope in a manner that fixes the federal acreage counted against the gubernatorial consent limitation.

9 This court has not received any assurances that there is enough room under the cap to make this possibility unlikely. Given that a wet year is likely to impact the water levels of an entire county similarly and that the gubernatorial limitations are imposed on a county-by-county basis, the possibility of exceeding the gubernatorial consents' acreage limitation could not be discounted.

* * * Therefore, we hold that the federal wetland easements are limited to the acreage provided in the Easement Summaries. This approach has the additional advantage of consistency with prior representations by the federal government of its interest in the [*467] properties, including the FWS Annual Survey and the Solicitor General's [**23] position in the *North Dakota* litigation.

D. Post-*North Dakota* Case Law.

In its motion *in limine* to the district court, the United States Attorney argued that this court's decision in *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987), rejected limiting the federal wetland easements to the Summary Acreage. In *Vesterso*, this court considered a case in which a North Dakota county water board had undertaken two drainage projects on properties subject to federal wetland easements. *Id.* at 1237. Despite being advised of the federal easements by the state water commission, the county water board completed the projects without conferring with or notifying the FWS. *Id.* at 1238.

In affirming the convictions, we wrote, "it is sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements." *Id.* at 1242. The United States Attorney interprets this language to mean that the drainage of any wetlands on a burdened parcel violates section 668dd. This language, however, must be understood within its context in the opinion: rejecting the defendants' [**24] assertion that the federal government had not ensured compliance with the gubernatorial limitation by identifying all wetlands covered by the federal easements. *Id.* at 1241. In the same section, we wrote:

Before the United States can prove a person damaged federal property as prohibited by section 668dd(c), it does not have to describe legally each wetland to which the restrictions apply and further determine whether the total wetland acreage exceeds the limits imposed by the gubernatorial consent for the county.

Id. at 1242. In this context, our discussion is simply understood to mean that the government did not need to legally describe the confines of each covered wetland under the pre-1976 easements to ensure compliance with the gubernatorial consent limitation, a question already answered by the Supreme Court in *North Dakota*.

The language in *Vesterso* regarding what the United States must prove is better understood to mean that the United States must prove beyond a reasonable doubt that identifiable, *covered* wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged and that the defendant [**25] knew that *the parcel* was subject to a federal easement. *See Vesterso*, 828 F.2d at 1244 (holding that defendants, who knew that the parcel was encumbered by a wetland easement, cannot claim that they did not know a particular wetland was covered by the easement because such a lack of knowledge would be caused by "willful blindness."). This meaning is made clearer later in *Vesterso* when we concluded:

We realize that the federal wetland easements in North Dakota have generated controversy and, in some instances, frustration for landowners. We point out, however, that the State of North Dakota and landowners are not without recourse if the easements cause flooding, for example, which results from nonnatural obstructions to water flow. *The prudent course in any event requires consultation with the Fish and Wildlife Service before undertaking drainage on parcels covered by easements.* . . . There is no evidence in the record indicating that [] cooperation would not have been forthcoming in this case. Instead of seeking cooperation, the appellants acted on their own by digging a ditch approximately three feet deep and fifteen feet wide across the easement in clear [**26] violation of the Wildlife Refuge Act.

Id. at 1245 (emphasis added). Having been so advised by this court, the Johansens sought cooperation from the FWS to contain the flooding that emersed their farmland. Unfortunately, the cooperation to which we alluded was not forthcoming.

Our decision in *United States v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1987), reiterates this court's revised interpretation of the wetland easements. In that case, we reviewed the district court's finding that a Minnesota farmer had violated a wetland easement. Specifically, Schoenborn's violations consisted of draining four basins (as potholes are [*468] known in Minnesota) and filling nine ditches. On review of each individual alleged violation, this court examined evidence that the specific potholes existed at the time of the easement conveyance, a clear departure from our prior practice focusing on any ditching of the burdened parcel, *cf. Albrecht*, 496 F.2d at 911, as well as the state of the basin at trial. Thus, *Schoenborn* implicitly acknowledged the limited scope of the wetland easements.

E. The District Court's Pretrial Order.

In this case, the district court's decision was predicated [**27] on a fundamental (albeit understandable) misinterpretation of this circuit's case law with respect to the scope of federal wetland easements. Therefore, we review the district court's pretrial order excluding evidence *de novo*. *See United States v. Singer Mfg. Co.*, 374 U.S. 174, 192-93, 10 L. Ed. 2d 823, 83 S. Ct. 1773 (1963). We hold that the United States' wetland easements acquired title on the acreage specified in the Easement Summaries. Although the *mens rea* element of this crime is fulfilled by proof that the defendant knew the parcel was subject to a wetland easement, *see Vesterso*, 828 F.2d at 1244, the government must still prove that the defendant drained the Summary Acreage covered by the federal wetland easement. The converse is also true: a defendant must be permitted to introduce evidence proving that they did not drain the Summary Acreage.

III. CONCLUSION

The wetland acquisition program was conceived of as a partnership between the federal government, the states, and individual property owners. As with any partnership, success requires good faith and reasonability. Although the United States Attorney pays lip service to the program's goal of co-existence between Waterfowl Production Areas and [**28] "normal farming practices," the government ignores the obvious potential consequence of its interpretation: the reduction of cultivable land on tract 21X by over sixteen percent would be a significant economic impediment to the continued viability of normal farming practices. It strikes this court as contrary to the program's goal of reasonable cooperation to refuse a request to identify the scope of the federal government's interest in a property and then prosecute the property owner for making his best efforts to contain surplus water to the protected federal wetlands. Therefore, we remand this case to the district court for action consistent with this opinion.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Audubon National Wildlife Refuge
3275 11th St. NW
Coleharbor, ND 58531-9419



January 31, 2013

#9
2/8/13

Dennis Johnson, Chairman
House Agriculture Committee

Re: Testimony on H.B. 1399

Dear Chairman Johnson,

My name is Lloyd Jones and I represent the U.S. Fish and Wildlife Service (FWS). I would like to provide testimony on HB 1399.

The bill requires the Attorney General to bring legal action against the FWS to delineate and properly describe every wetland easement acquired by the FWS. First, the U.S. Congress authorized the easement program in 1958. Every wetland easement acquired by the FWS since that time, is delineated and properly described by legal description and recorded in the courthouse. Every wetland easement ever acquired in North Dakota, already meets the criteria in this bill.

If the intent of the bill was to have the FWS identify the location of individual wetlands within the easement delineation, that is also being addressed. Every wetland easement acquired after 1976 has an accompanying map that identifies the location of wetlands that are included in the easement. The easement and the map are provided to the landowner and also recorded in the courthouse. For those easements acquired before 1976, the FWS is in the process of producing wetland location maps. We have a dedicated staff that is completing this mapping and have a priority process in place that addresses any individual landowner request.

Hopefully this information clarifies issues that were raised in HB 1399.

Lloyd Jones, Project Leader
U.S. Fish and Wildlife Service

10a

Testimony on House Bill 1399
to the
House Agriculture Committee
February 8, 2013

I am Murray Sagsveen, personally appearing before this committee with neutral testimony on House Bill 1399.

North Dakota has previously litigated waterfowl production area easement issues, which resulted in a U.S. Supreme Court decision, *North Dakota v. United States*, 460 U.S. 300 (1983). I represented the State of North Dakota in that lawsuit.

I subsequently authored a law review article about the events that led up to the Supreme Court decision, "Waterfowl Production Areas: a State Perspective," 60 N.D.L.Rev. 659 (1984).

Later, my son, Matthew Sagsveen, and I co-authored a follow-up law review article on the same subject, "Waterfowl Production Areas: an Updated State Perspective," 76 N.D.L.Rev. 861 (2000).

The Supreme Court decision and the two law review articles would provide excellent historical information for the committee members.

I was involved in wetland easement issues for about twenty years, beginning 1973. During that period, I held the following positions:

- 1973-1975, Legislative Assistant to Governor Arthur A. Link
- 1975-1978, Director of Legal Services, North Dakota State Water Commission
- 1978-1980, Solicitor, Office of Attorney General Allen Olson
- 1980-1997, General Counsel, Garrison Diversion Conservancy District

Accordingly, if I can be of any assistance to the committee, please contact me at 701-426-1905 or mgsagsveen@gmail.com.

#106

WATERFOWL PRODUCTION AREAS: A STATE PERSPECTIVE

MURRAY G. SAGSVEEN*

I. INTRODUCTION

In 1958 Congress authorized the Secretary of the Interior (Secretary) to acquire waterfowl production areas. The State of North Dakota initially supported the acquisition of waterfowl production areas by the Secretary. The State has, however, resisted the acquisition program in the last decade.

This Article will explain the historical development of the waterfowl production area program, analyze the federal-state dispute, and offer suggestions for resolution of the dispute. In addition, this Article will provide the practicing attorney with information for handling landowner problems involving waterfowl production areas.

II. HISTORICAL CONTEXT OF THE FEDERAL-STATE DISPUTE

A. THE AUTHORIZATION OF WATERFOWL PRODUCTION AREAS

The 1929 Migratory Bird Conservation Act authorized the acquisition of land for inviolate migratory bird sanctuaries.¹

*B.A. Concordia College, 1968; J.D., University of North Dakota, 1973; member of the North Dakota Bar; currently associated with the law firm of Zuger & Bucklin, Bismarck, North Dakota.

1. Pub. L. No. 70-770, 45 Stat. 1222 (1929) (codified as amended at 16 U.S.C. §§ 715-715s (1982)).

Section 7 of the Act contained an unusual accommodation to the federal-state relationship: the federal government could not acquire land unless a state consented "by law."² The State of North Dakota gave its consent in 1931.³

The 1934 Migratory Bird Hunting Stamp Act⁴ soon provided a funding mechanism for the refuge acquisition program. The 1934 Act authorized the sale of migratory bird hunting and conservation stamps (duck stamps) to generate revenue for the newly created Migratory Bird Conservation Fund.⁵

A 1958 amendment to the Migratory Bird Hunting Stamp Act gave the Secretary flexibility to acquire lands or interests in lands for "waterfowl production areas."⁶ Unlike lands acquired under the Migratory Bird Conservation Act, waterfowl production areas were not to be "inviolable sanctuaries." In addition, the amendment provided that the Secretary could acquire waterfowl production areas without the state legislative consent required in the 1929 Act.⁷

Congress was soon informed that a "crash program"⁸ for the acquisition of waterfowl production areas was desirable but that normal revenues to the Migratory Bird Conservation Fund (Fund) could not finance a massive land acquisition program. Accordingly, Congress determined in 1961 that a \$105 million interest-free loan to the Fund was necessary. Congress also recognized, however, that the tradition of state involvement should be extended to all acquisitions involving moneys from the Fund, whether for inviolable sanctuaries or waterfowl production areas.⁹ The legislation, as finally enacted, states: "No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency."¹⁰

Whereas the state consent required by the 1929 Migratory Bird Conservation Act was legislative, the 1961 Act contemplated approval by the state governor or the appropriate state agency. The

2. Migratory Bird Conservation Act, Pub. L. No. 70-770, § 7, 45 Stat. 1222, 1223 (1929) (codified as amended at 16 U.S.C. §§ 715-715s, 715f (1982)).

3. Act of Mar. 2, 1931, ch. 207, § 1, 1931 N.D. Sess. Laws 360.

4. Pub. L. No. 73-124, 48 Stat. 451 (1934) (codified as amended at 16 U.S.C. §§ 718-718i (1982)).

5. Migratory Bird Hunting Stamp Act, Pub. L. No. 73-124, § 4, 48 Stat. 451, 451 (1934) (codified as amended at 16 U.S.C. §§ 718-718i, 718d (1982)).

6. Act of Aug. 1, 1958, Pub. L. No. 85-585, § 3, 72 Stat. 486, 487 (codified as amended at 16 U.S.C. § 718d(c) (1982)).

7. 72 Stat. at 487.

8. 107 CONG. REC. 12,203 (1961) (statement of Rep. Johnson).

9. Wetlands Loan Act, Pub. L. No. 87-383, § 3, 75 Stat. 813, 813 (1961) (codified as amended at 16 U.S.C. § 715k-5 (1982)).

10. 16 U.S.C. § 715k-5 (1982).

1929 Act requires both legislative and executive or administrative consent for the acquisition of inviolate sanctuaries, but state legislative consent is not necessary for the acquisition of waterfowl production areas.

B. THE INITIAL STATE RESPONSE

The Governor of North Dakota was immediately contacted in 1961 concerning the federal plans for acquisition of waterfowl production areas in North Dakota. At the request of officials of the United States Fish and Wildlife Service (FWS), Department of the Interior, Governor Guy approved the acquisition of easements over 1.2 million acres of wetlands in North Dakota for waterfowl production areas.¹¹ Governor Guy, however, reserved the right to individually review each proposed fee acquisition of a waterfowl production area.¹²

The waterfowl production area acquisition program encountered one problem immediately: FWS acquisition of fee waterfowl production areas caused financial problems for the affected political subdivisions. Governor Guy, therefore, announced that he would not approve the acquisition of fee waterfowl production areas until Congress authorized payments to affected political subdivisions for the diminished tax base.¹³ Governor Guy's efforts were partially responsible for the passage of ameliorating legislation in 1964, which allowed a more equitable distribution of revenues derived from lands of the National Wildlife Refuge System (NWRS).¹⁴ Fee waterfowl production area acquisitions resumed after passage of the 1964 Act.

C. THE NATIONAL WILDLIFE REFUGE SYSTEM ADMINISTRATION ACT OF 1966

Congress enacted comprehensive legislation to reorganize the

11. Joint Appendix at 4-5, *North Dakota v. United States*, 460 U.S. 300 (1983).

12. *Id.* at 54.

13. See H.R. REP. NO. 1753, 88th Cong., 2d Sess. 2, reprinted in 1964 U.S. CODE CONG. & AD. NEWS 3265, 3266; *More Equitable Payments to Counties Having Wildlife Refuges: Hearings on S. 179, S. 1363, S. 1720, and S. 2498 Before the Senate Comm. on Commerce*, 88th Cong., 2d Sess. 67-69 (1964) (statement of William L. Guy, Governor of North Dakota). See also *Authorize Increased Payments to Counties for Wildlife Refuges: Hearings on H.R. 10714, H.R. 12145, H.R. 11535, H.R. 12143, H.R. 12144 and H.R. 12145 Before the Subcomm. on Fisheries and Wildlife Conservation of the House Comm. on Merchant Marine and Fisheries*, 87th Cong., 2d Sess. 12-32 (1962) (statement of William L. Guy, Governor of North Dakota); N.D. S. CON. RES. W., 38th Leg., 1963 N.D. Sess. Laws 960 (urging Congress to provide for payment of bonded indebtedness and special assessments of property acquired by federal government by condemnation).

14. Act of Aug. 30, 1964, Pub. L. No. 88-523, 78 Stat. 701 (codified as amended at 16 U.S.C. § 715s (1982)).

NWRS in 1966.¹⁵ The legislation was designed to consolidate management responsibilities for varied components of the system. Section 4(a) of the Act provided:

For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary of the Interior for the conservation of fish and wildlife, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as wildlife refuges, areas for the protection and conservation of fish and wildlife that are threatened with extinction, wildlife ranges, game ranges, wildlife management areas, or waterfowl production areas are hereby designated as the "National Wildlife Refuge System" (referred to herein as the "System") which shall be subject to the provisions of this section. . . .¹⁶

D. ACQUISITION POLICIES

The FWS targeted North Dakota wetlands as a national priority during the initial years of the waterfowl production area acquisition program.¹⁷ There was, therefore, substantial pressure within the FWS to meet the ambitious goals that had been described to Congress.

In an effort to minimize landowner opposition to the WPA acquisition program, the FWS assured some landowners during negotiations that certain local farm practices would be authorized. When the landowners continued these farming practices after conveying the easements, however, the FWS began enforcement actions.¹⁸ Some easement contracts have been renegotiated after

15. National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (codified as amended at 16 U.S.C. §§ 668dd-668ee (1982)). The short title was provided in 1969. Act of Dec. 5, 1969, Pub. L. No. 91-135, § 12(f), 83 Stat. 275, 283.

16. Pub. L. No. 89-669, § 4(a), 80 Stat. 926, 927 (1966) (codified as amended at 16 U.S.C. § 668dd(a) (1) (1982)). Arguably, the 1964 amendments to § 715s technically made waterfowl production areas a part of the NWRS. The 1964 Act amended § 715s to state, in part: "The National Wildlife Refuge System . . . includes those lands and waters administered by the Secretary as wildlife refuges, wildlife ranges, game ranges, wildlife management areas, and waterfowl production areas established under any law, proclamation, Executive, or public land order." Pub. L. No. 88-523, 78 Stat. 701, 701 (1964) (codified as amended at 16 U.S.C. § 715s (1982)).

17. See S. REP. No. 594, 94th Cong., 2d Sess. 3, reprinted in 1976 U.S. CODE CONG. & AD. NEWS 271, 273.

18. See, e.g., *Werner v. United States Dep't of Interior*, 581 F.2d 168 (8th Cir. 1978). The court in *Werner* focused on the negotiated agreements:

In 1964, appellants or their predecessors in title were approached by Roy Brasch and William Resman, two employees of the Fish and Wildlife Service assigned to negotiate

complaints about the acquisition practices.¹⁹

E. THE STARKWEATHER WATERSHED PROJECT

The Starkweather Watershed Project was initiated in 1950 when landowners in Ramsey County filed a petition with the Ramsey County Drain Board for a flood control project.²⁰ The United States Soil Conservation Service (SCS) received authorization in 1967 to provide detailed planning assistance for watershed management in the Starkweather Watershed.²¹ Cooperative efforts by the involved agencies ultimately led to development of an agreement that was executed by local entities, the FWS, the North Dakota Game and Fish Department, and the North Dakota State Water Commission.²² Among other things, the agreement provided for best management practices on farmland and the acquisition of wetlands to mitigate the impact of the project upon migratory waterfowl habitat.²³ The FWS Regional Director observed in a 1970 letter to the Governor, "If all parties to the Agreement carry out their work in good faith, we should have the needed flood protection there *plus* wetland preservation for waterfowl. It will be a model for the whole Nation."²⁴

Pursuant to the agreement, the FWS acquired wetlands in the

with local landowners to acquire wetlands easements. It is undisputed that in their negotiations with appellants, Brasch and Resman made oral representations to the effect that certain local farming practices, such as the use of plow furrows to drain shallow potholes and the burning of certain sloughs, would still be permitted under the terms of the proposed easements. These oral representations did not accord with the terms of the written easements which appellants and others ultimately signed. . . .

Appellants claim that they were induced to sell the easements to the Fish and Wildlife Service by the false oral representations by Brasch and Resman. . . .

By the late 1960's the Fish and Wildlife Service began enforcement against violations of the waterfowl easements created by certain farming practices.

Id. at 169-70.

Landowners in Minnesota have experienced similar problems. *See, e.g.,* United States v. Schoenborn, CR No. 81-0145 (D. Minn. Mar. 26, 1982). In *Schoenborn*, the magistrate also found that the FWS employee misled the grantors. The court noted, "There was significant evidence at trial to support defendant's contentions that the [FWS] agent, Benjamin Lukes, made unauthorized oral representations which were inconsistent with the written terms of the easement and map." *Id.*, slip op. at 9. The magistrate also suggested that the FWS employee had forged the grantor's signature on a letter which indicated that the Schoenborns reviewed the map which the agent had prepared after the parties signed the easement agreement. *Id.*, slip op. at 6.

19. *See Warner*, 581 F.2d at 170.

20. North Dakota State Water Commission Project File No. 842.

21. *Id.*

22. *See* Preliminary Planning Criteria for Fish, Wildlife, and Agriculture, Starkweather Watershed — Ramsey and Cavalier Counties, North Dakota 4-8 (Feb. 23, 1968).

23. *See id.* The agreement specifically stated: "Wetlands to be preserved and areas needed for mitigation development will be acquired by easement or purchase for each construction entity or segment before construction bids are let." *Id.* at 7. Specific terms for a mitigation plan were subsequently developed. *See* Agreement on Criteria for Wetlands Acquisition in the Starkweather Watershed (Jan. 19, 1970).

24. Letter from Fish and Wildlife Service Assistant Director James T. McBrooni to Governor William L. Guy (Mar. 16, 1970) (emphasis in original).

watershed. The FWS Regional Director advised Governor Guy in 1972 that the wetland acquisition goal had been met.²⁵

The State Water Commission concurrently recommended approval of the proposed acquisition of land for the Lake Alice National Wildlife Refuge. The authorization was based upon:

[t]he condition that the [FWS] recognize the need for comprehensive regional water resource and related land resource planning and development and accept the responsibility to work with all agencies involved at the national, state, and local level in the interest of total water management in order to minimize flood damages and to provide the maximum benefits from those water resources and related lands for the majority of our citizens.²⁶

Governor Guy subsequently approved the acquisition of land for the Lake Alice National Wildlife Refuge.²⁷

In anticipation of the project, the FWS began an "accelerated program of wetland acquisition."²⁸ The Department of the Interior, however, reversed its position in 1972. Secretary of the Interior Morton expressed concern that the Starkweather project would cause the loss of natural wetlands.²⁹ The SCS work on the project was suspended in 1973.³⁰

State officers subsequently made efforts to have the FWS wetland easements reconveyed to the grantors. The efforts were rebuffed by the Department of the Interior.³¹

25. Devils Lake Journal, May 30, 1972, at 1, col. 1.

26. Minutes of the North Dakota State Water Commission (Devils Lake, N.D., June 21, 1972).

27. Letter from Governor William L. Guy to Fish and Wildlife Service Regional Director Travis S. Roberts (June 26, 1972).

28. *Id.* Secretary of the Interior Morton stated:

The Starkweather Watershed Project, Ramsey and Cavalier Counties, North Dakota, presently being planned under the authority of P.L. 83-566, poses problems of grave concern to this Department. . . .

Specifically, and of greatest concern, the Starkweather Project will cause systematic and unwarranted losses of natural prairie marsh resources in the pothole area of North America. In anticipation of the construction of this project, the Bureau of Sport Fisheries and Wildlife [FWS] has conducted an accelerated program of wetland acquisition. By purchasing easements or fee title with Duck Stamp funds the Bureau has insured the preservation of 6,472 acres of wetlands out of the 18,400 acres that still remain undrained within the Starkweather watershed, this in accordance with an agreement between the project sponsors and the Bureau.

Id.

29. Letter from Secretary of the Interior Rogers Morton to Secretary of Agriculture Earl Butz (Dec. 12, 1972).

30. Letter from State Conservationist Allen L. Fisk to Governor Arthur A. Link (Nov. 13, 1973).

31. Devils Lake Journal, Mar. 22, 1974, at 1, col. 4. The Devils Lake Journal stated:

When advised in 1983 that the Starkweather Watershed Project would be deauthorized, Senator Mark Andrews contacted the Secretary of the Interior about the interests in land that FWS acquired for Starkweather mitigation. A responsive letter from the Department stated, in part:

It is important to understand that for some time prior to the planning for the Starkweather Watershed, the Service was acquiring wetlands under the Small Wetlands Acquisition Program (SWAP). This program embraced not only the Starkweather Watershed, but the entire Prairie Pothole Region. It was simply a coincidence that the SWAP effort was in place and ongoing at the time the Starkweather Watershed Project was being formulated. It was, however, by design that the SWAP acquisition goals were made to complement those of the watershed project. Thus, it was agreed by all parties that fee and easement acquisitions by the Service under SWAP would count toward the mitigation goal (13,500 acres) for the Starkweather Watershed Project.³²

The Starkweather Watershed Project, accordingly, remains a controversial issue in federal-state relations.

F. CHANNEL A

Channel A was a key feature of the Starkweather Watershed Project. Channel A was designed to divert flood waters from Dry Lake to Six Mile Bay of Devils Lake.³³

Local sponsors were determined, by 1974, to construct Channel A without federal funds or interferences.³⁴ In 1975 the North Dakota Legislature established the Devils Lake Basin Advisory Committee³⁵ to address the general issue and appropriated

In a letter to North Dakota Sen. Milton R. Young (R), Curtis Bohlen, deputy assistant secretary for Fish and Wildlife and Parks, said fee and easement purchases "were individual transactions with landowners, separate and apart from the overall agreement." He added that while the watershed agreement was instrumental in obtaining former Gov. William Guy's approval of the wetland purchases, the Interior Department sees no justification for disposing of these lands since they still serve their program purpose — preservation of wetland habitat.

Id.

32. Letter from Assistant Secretary of the Interior for Fish and Wildlife and Parks G. Ray Arnett to Senator Mark Andrews (Mar. 26, 1983).

33. For a brief description of the Channel A project, see *National Wildlife Fed'n v. Alexander*, 613 F.2d 1054 (D.C. Cir. 1979).

34. See, e.g., Minutes of the North Dakota State Water Commission (meetings of May 28, 29 & July 24, 1974).

35. Act of April 8, 1975, ch. 577, 1975 N.D. Sess. Laws 1502. The Legislature gave an

\$600,000 to the State Water Commission for possible future use on a Channel A project.³⁶

Preliminary planning indicated that the Channel A right-of-way would bisect a tract that was subject to a waterfowl production area easement. In response to an inquiry about the easement from the Ramsey County Water Management District Board, the FWS refused to allow construction of Channel A through the tract: "Concurrence with Channel A passing through easements would be possible only if protection of all Type III, IV and V wetlands in the basin is assured."³⁷ In response to a second request from the Water Management District, the FWS stated: "[O]ur position throughout the Devils Lake Basin study has been that we do not oppose Channel A as long as no wetlands are drained in the basin and impacts to easement wetlands are mitigated."³⁸

The Water Resource District then modified the plans for Channel A and constructed the channel, at an additional cost of approximately \$250,000, around the waterfowl production area.³⁹ Several small wetlands would have been drained under the original plans for the channel; construction of the modified channel drained several small wetlands and a large wetland complex.⁴⁰

G. CRIMINAL PROSECUTIONS FOR BREACHES OF THE EASEMENT CONTRACT

North Dakota governors approved "the acquisition of easements by the United States of America . . . for Waterfowl Production Area purposes. . . ."⁴¹ The form easement utilized by the FWS provided that the grantors "covenant and agree that they

additional two year authorization to the Committee in 1977. Act of April 6, 1977, ch. 574, 1977 N.D. Sess. Laws 1236.

36. Act of April 8, 1975, ch. 38, § 4, 1975 N.D. Sess. Laws 86, 87-88.

37. Letter from Fish and Wildlife Service Area Manager James C. Gritman to Governor Arthur A. Link (June 28, 1974). The following year the Fish and Wildlife Service urged the Corps of Engineers to deny a \$ 10 permit for the Channel A project. Letter from W. Reid Goforth, Director, Fish and Wildlife Service Northern Prairie Wildlife Research Center, Jamestown, North Dakota, to Colonel Max W. Noah, District Engineer, St. Paul District, Corps of Engineers (May 13, 1975); Letter from James C. Gritman, Fish and Wildlife Service Area Manager (signed by the Acting Area Manager) to Colonel Max W. Noah, District Engineer, St. Paul District, Corps of Engineers (May 20, 1975). The State later successfully challenged the Corps' \$ 10 jurisdiction over Devils Lake. *National Wildlife Fed. v. Alexander*, 613 F.2d 1054 (D.C. Cir. 1979).

38. Letter from Fish and Wildlife Service Area Manager William Aultfather to the Ramsey County Water Management District (Mar. 21, 1977).

39. Interview with Stephen M. Hoetzer, P.E., (former drainage engineer with the North Dakota State Water Commission) (Mar. 25, 1984). The FWS purchased the blocking waterfowl production area easement on July 29, 1970, for \$33.33 per wetland acre. Easement No. 452X-1 covered, among other tracts, the E 1/4 SE 1/4 of sec. 2, T.154N., R.65W.

40. *Id.*

41. This language was used on form consents and adjustments to consents that the FWS prepared and the governors signed during 1961-1977. Joint Appendix at 3, *North Dakota v. United States*, 460 U.S. 300 (1983).

will cooperate in the maintenance of the aforesaid lands" by not conducting draining, filling, or leveling activities on the land.⁴²

The enactment of the National Wildlife Refuge System Administration Act of 1966 created an entirely different situation, however, when Congress declared waterfowl production areas to be a part of the National Wildlife Refuge System.⁴³ "Easement violations" on privately owned land are no longer merely contractual transgressions; they are crimes and are punished accordingly.⁴⁴

42. Jurisdictional Statement at 7a, *North Dakota v. United States*, 460 U.S. 300 (1983). The FWS form easement provided as follows:

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or recurring due to natural causes on the above-described tract, by ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter recurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Id. Although the easement form was modified at least once between 1958 and 1976, recorded easements reflect that these basic provisions were in pre-1976 easement contracts. The 1976 form contemplated that a map, which delineated the wetlands subject to the easement provisions, would be attached to, and filed with, the easement contract.

43. National Wildlife Refuge System Administration Act of 1966, Pub. L. No. 89-669, 80 Stat. 926 (codified as amended at 16 U.S.C. §§ 668dd-668ee (1982)). *See also* 50 C.F.R. § 25.12 (1982). Section 25.12 states, in part:

"National Wildlife Refuge System" means all lands, waters, and interests therein administered by the U.S. Fish and Wildlife Service as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, and other areas for the protection and conservation of fish and wildlife including those that are threatened with extinction.

"National wildlife refuge" means any area of the National Wildlife Refuge System except wildlife management areas.

....

"Waterfowl production area" means any wetland or pothole area acquired pursuant to section 4(c) of the amended Migratory Bird Hunting Stamp Act (72 Stat. 487; 16 U.S.C. 718d(c)), owned or controlled by the United States and administered by the U.S. Fish and Wildlife Service as a part of the National Wildlife Refuge System.

Id.

44. *See* 16 U.S.C. § 668dd(c) (1982). Section 668dd(c) provides in part: "No person shall knowingly disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the [National Wildlife Refuge] System." *Id.* *See United States v. Seest*, 631 F.2d 107 (8th Cir. 1980) (conviction of farmer for violation of FWS easement); *United States v. Welte*, 696 F.2d 999 (8th Cir. 1982).

Earlier enforcement actions relied upon injunctive remedies. *See, e.g., United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974) (court did not suggest that the land might be a part of the National Wildlife Refuge System nor did it mention the criminal penalty in § 668dd(c)).

Incorporation within the National Wildlife Refuge System also created secondary problems that the FWS has failed to resolve. Although the federal government has frequently asserted that "the easement restrictions apply only to wetlands acres,"⁴⁵ it has also claimed that the easement controls activities on the upland.⁴⁶

In addition, the regulations that were adopted to implement the National Wildlife Refuge Administration Act of 1966 conflict with the terms of the easement. The regulations in part 26 of title 50 of the Code of Federal Regulations technically prohibit any farming and ranching activity on private land subject to a waterfowl production area easement.⁴⁷ Yet the disclaimer in the easement agreement specifically states that "this indenture imposes

As of March 1982, the FWS had investigated 735 alleged easement violations. The investigations led to 90 prosecutions in North Dakota, 18 prosecutions in South Dakota, and 10 prosecutions in Minnesota. Defendant's Response to Plaintiffs' Request for Admissions, Interrogatories, and Demand for Production to Defendants at 22, Board of Managers v. Key, Civ. No. A2-81-178 (D.N.D. Mar. 26, 1982), *dismissed sub nom.* North Dakota v. Buterbaugh, 575 F. Supp. 783 (D.N.D. 1983).

45. Brief for the United States at 19, North Dakota v. United States, 460 U.S. 300 (1983). A pamphlet given by the FWS to prospective easement grantors assured that "[o]nly the wetlands on your property are affected by the Easement." U.S. FISH & WILDLIFE SERV., WETLANDS CAN YIELD DOLLARS (1971) (emphasis in original). See also *Wetland Conservation: Hearings on S. 978 and S. 1329 Before the Subcomm. on Environmental Pollution of the Senate Comm. on Environment and Public Works*, 98th Cong., 1st Sess. 356, 358 (1983). FWS Regional Director Galen Buterbaugh stated:

[W]e have purchased, from willing sellers, I repeat, *willing* sellers, their rights to drain, burn, fill or level approximately 758,000 acres of wetlands on their land; the landowner retains title to the land, and may use the surrounding uplands in any way he chooses, and continue to farm, hay, or carry out other compatible activities in the basin of the wetland itself during periods it is naturally dry.

Id. (emphasis in original).

46. Letter from Fish and Wildlife Service Director (signed by Acting Associate Director James W. Pulliam, Jr.) to Senator Larry Pressler (July 30, 1980). The letter commented about waterfowl production area easements:

We consider only the wetlands to be affected, although owners are prevented from digging a ditch or taking other actions on the upland portions to drain the wetlands. The whole purpose of the easement is to prevent wetland destruction. Pumping water from the wetlands or diverting natural water courses flowing into the wetlands is interpreted as drainage.

Id. The United States has successfully argued in other situations that congressional power over federal lands includes authority to regulate activities outside the federal land. See *United States v. Brown*, 552 F.2d 817 (8th Cir.), *cert. denied*, 431 U.S. 949 (1977). See also Brief for the United States at 18 n. 14, North Dakota v. United States, 460 U.S. 300 (1983). The Solicitor General observed in the brief, "As the easement documents themselves provide . . . a landowner remains free to conduct on the uplands farming practices and any other activities so long as those activities are not inconsistent with the easement restrictions." *Id.*

47. See 50 C.F.R. pt. 26. The Solicitor General attempted to explain this problem in North Dakota v. United States as follows:

[T]he Secretary has not taken the position that the regulations governing the National Wildlife Refuge System, 50 C.F.R. Subchapter C, apply to uplands areas. Indeed, in the view of the Secretary, only those portions of 50 C.F.R. Subchapter C that prohibit activities that already are restricted by the easement document (Part 25, Subparts A and D; 27.11, 27.51, 27.61, 27.84, 27.92, 27.04(a), 27.95(a), 28.11, 28.21, 28.31, 28.32(a); and Part 29, Subpart B (except for those provisions that by their terms are irrelevant)) apply even to the extent of the interest granted in the wetlands themselves.

Brief for the United States at 18 n. 14, North Dakota v. United States, 460 U.S. 300 (1983).

no other obligations or restrictions" other than the prohibitions against draining, burning, and filling.⁴⁸

H. HURRICANE LAKE

Hurricane Lake is a very shallow lake located in Pierce and Towner Counties. The lake drains, via Mauvais Coulee, into Devils Lake.⁴⁹

Minor fluctuations in the elevation of Hurricane Lake will cause major problems to littoral landowners.⁵⁰ These problems led to attempts by the board of managers of local water management districts to more effectively manage the lake. Lake management planning resulted in an application to the North Dakota State Engineer in 1975 by the Board of Directors, Pierce County Water Management District, to improve the outlet of the lake and to partially drain the lake.⁵¹

The State Engineer reviewed the application and conducted public hearings on the matter. In August 1976 the State Engineer established a definite outlet elevation for Hurricane Lake and authorized the improvement of the outlet channel.⁵²

Substantial construction work on the channel was completed during the fall of 1976. In December 1976, however, the Corps of Engineers ordered the Board to "cease and desist" from further work in the channel because of a perceived violation of section 404 of the Federal Water Pollution Control Act Amendments of 1972.⁵³

48. Jurisdictional Statement at 7a, *North Dakota v. United States*, 460 U.S. 300 (1983). The federal district court in *Albrecht* stated:

The easement created no burden on the land except that the landowners in their use of the land covered by the easement may do nothing to disturb the natural state of the wetland and pothole areas. The only other burden imposed was that authorized representatives of the United States have access to those areas.

United States v. Albrecht, 364 F. Supp. 1349, 1351 (D.N.D. 1973), *aff'd*, 496 F.2d 906 (8th Cir. 1974).

49. North Dakota State Water Commission Project File No. 559.

50. *Id.*

51. *Id.* The application is dated October 24, 1974. *Id.*

52. Application to Drain Hurricane Lake, Admin. No. 76-5, at 2 (Aug. 2, 1976) (final determination of State Engineer).

53. See letter from Colonel Max W. Noah (signed by his deputy), District Engineer, St. Paul District, Corps of Engineers, to Special Assistant Attorney General Murray G. Sagsveen (Oct. 6, 1975). The District Engineer advised the state in 1975 that he had not determined whether to exercise jurisdiction over Hurricane Lake under the newly promulgated regulations implementing § 404 of the Federal Water Pollution Control Act Amendments of 1972. See 40 Fed. Reg. 31,320-32 (1975). The Corps of Engineers (Corps), however, subsequently informed the Board that the Corps was exercising jurisdiction over the area adjacent to Hurricane Lake and that the Board must "cease and desist from the discharge of dredge and fill materials into these wetlands." Letter from Lieutenant Colonel Norman C. Hintz, Acting District Engineer, St. Paul District, Corps of Engineers, to John Axtman, Chairman, Pierce County Water Management District (Dec. 23, 1976). The Board submitted an application for a § 404 permit, but the application was denied. Letter from

The FWS, meanwhile, acquired waterfowl production area easements over tracts through which the outlet channel flows.⁵⁴ The acquisitions were consistent with an FWS policy to prevent drainage by the purchase of strategic waterfowl production areas.⁵⁵ The FWS immediately objected to the proposed Hurricane Lake outlet channel project work.⁵⁶

After a several-year delay, the water resource boards of Towner, Pierce, Benson, and Rolette counties entered into a joint powers agreement,⁵⁷ applied for funding from the State Water Commission,⁵⁸ and resumed efforts to complete the project. As a result of continued FWS objections to the project, the water resource boards initiated an action challenging the validity of the waterfowl production area easements and the right of an easement owner to interfere with stream maintenance activities.⁵⁹

Although the FWS had earlier approved some maintenance

William W. Badger, District Engineer, St. Paul District, Corps of Engineers, to Murray G. Sagsveen (June 1, 1982). The dispute has not been resolved.

54. See easement contracts 364X (Sept. 18, 1975), 363X (Sept. 18, 1975), 649X (Sept. 12, 1975), 646X (Sept. 18, 1975), 648X (Sept. 22, 1975), 365X (Sept. 29, 1975).

55. The FWS had, as early as 1961, a policy to selectively acquire waterfowl production areas to frustrate water management projects:

In areas where the projects or drainage districts are a *potential*, we should proceed, as planned, to purchase suitable brood areas and take as many easements as appropriate around the purchase units. Enough easements should be taken in such areas so that if a small watershed project is organized they will forestall drainage as part of the project or in the case of drainage districts, to forestall their establishment.

Memo entitled "Wetland Acquisition Within Small Watershed Projects (P.L. 566) and County or Judicial Drainage Districts," from Chief, Division of Technical Services, Fish & Wildlife Service, Minneapolis, Minnesota, to Supervisors, Area Acquisition Offices: Jamestown and Devils Lake, North Dakota (Mar. 15, 1961) (emphasis in original).

The acquisitions, however, violated a recently adopted policy that "[a]reas lying within well-defined intermittent or permanent streambeds should . . . be deleted from the easement agreement." Memo entitled "Exclusion of Artificial Impoundments and Streambeds from Wetland Easements," from Regional Director, Fish & Wildlife Service Region 6, to Wetland Acquisition Offices (Feb. 14, 1975).

56. Project Leader Ralph F. Fries stated, "Our trump card is the fact that they have to go through some of our easements and I've told them that they cannot touch our easements until such time as the WPA is protected, and any wetlands under easement which might be destroyed are mitigated." Memo entitled "Information on Hurricane Lake Drainage," from Project Leader Ralph F. Fries, Devils Lake Fish & Wildlife Service Office, to Fish & Wildlife Service Area Manager (Dec. 2, 1976). An FWS employee also verbally advised the contractor doing the channel work that the FWS would confiscate any equipment if channel improvements were made on land subject to the waterfowl production area easements without FWS approval. Interview with Ernest Stave (Nov. 25, 1983).

57. See Joint Exercise of Powers Agreement for Water Resource Districts Concerning Hurricane Lake 2 (Mar. 11, 1983). The Hurricane Lake Joint Water Resource Board consists of one member from the water resource boards of Towner County, Pierce County, Benson County, and Rolette County. The joint powers agreement states that the "Hurricane Lake Joint Water Resource Board shall have the power and authority to improve and maintain the outlet to Hurricane Lake." *Id.*

58. See Minutes of the North Dakota State Water Commission (Apr. 6-7, 1982). The State Water Commission allocated \$28,000 to the outlet reconstruction project in 1982 upon a condition "that all pending litigation has been resolved. . . ." *Id.* The State Water Commission has, however, approved payment for the 1983 work even though the waterfowl production area dispute has not been resolved. Minutes of the North Dakota State Water Commission (Feb. 21, 1984).

59. See Board of Managers v. Key, No. A2-81-178 (D.N.D. filed Nov. 16, 1981), *dismissed sub nom.* North Dakota v. Buterbaugh, 575 F. Supp. 783 (D.N.D. 1983).

work that was accomplished in 1983,⁶⁰ the FWS changed its position and sought a preliminary injunction in the pending declaratory action.⁶¹ The motion was granted and the Hurricane Lake Joint Water Resource Board (Joint Board) was enjoined from further maintenance or reconstruction of the outlet channel.⁶²

The action was subsequently dismissed because the Joint Board had not applied for a right-of-way permit from the FWS to maintain or reconstruct the outlet channel.⁶³ The Joint Board submitted an application and it was immediately denied.⁶⁴ About 2500 feet of the outlet channel remains unmaintained or unreconstructed.⁶⁵

I. THE 1977 STATE LAWS AND THE FEDERAL CHALLENGE

The controversy about waterfowl production areas led to a two year legislative review of the state policy concerning federal land acquisitions in North Dakota.⁶⁶ The legislative review, in turn, resulted in a major shift in state policy. Legislation was enacted that:

1. Withdrew unconditional consent to federal refuge acquisitions under the Migratory Bird Conservation Act;⁶⁷

2. Established procedures for public participation in the decision-making process concerning federal fee and easement waterfowl production area acquisitions;⁶⁸

3. Placed certain limitations on easements acquired by the United States with moneys from the Migratory Bird Conservation Fund;⁶⁹

60. Letter from Fish & Wildlife Service Project Leader Ralph F. Fries to John S. Axtman, Chairman, Pierce County Water Management Board (Nov. 4, 1976) (approval of work in SW ¼ of sec. 32, T.157N., R.68W). Letter from Fish & Wildlife Service Acting Project Leader Eugene C. Patten to John S. Axtman (July 19, 1977) (approval of work in sec. 2, T.156N., R.69W.).

61. *North Dakota v. Buterbaugh*, Civ. No. A2-81-178, slip. op. at 4 (D.N.D. Nov. 30, 1983). The court concurrently considered a similar motion by the State to enjoin the FWS from interfering with channel maintenance work. *Id.*

62. *Id.*, slip op. at 8-9.

63. *North Dakota v. Buterbaugh*, 575 F. Supp. 783, 784 (D.N.D. 1983). Even though the State was challenging the necessity of complying with administrative requirements, the court ruled that the administrative remedies had not been exhausted. *Id.*

64. Letter from Fish & Wildlife Service Regional Director Galen Buterbaugh to Warren Anderson, Hurricane Lake Joint Water Resource Board (Feb. 13, 1984). The application was received by Regional Director Buterbaugh on January 17, 1984. *Id.*

65. Interview with Stephen M. Hoetzer, P.E., Consulting Engineer for the Hurricane Lake Joint Water Resource Board (Mar. 1, 1984).

66. N.D. Sen. Con. Res. 4048, 44th Leg. 1975 N.D. Sess. Laws 1729. See N.D. LEGIS. COUNCIL, REPORT OF THE N.D. LEGISLATIVE COUNCIL 18-22 (1977).

67. Act of Apr. 21, 1977, ch. 204, § 1, 1977 N.D. Sess. Laws 461, 461-62. The conditional consent was later suspended until December 31, 1985. Act of Mar. 16, 1981, ch. 258, § 2, 1981 N.D. Sess. Laws 654; Act of Mar. 14, 1983, ch. 267, § 1, 1983 N.D. Sess. Laws 676 (codified as amended at N.D. CENT. CODE § 20.1-02-18.3 (1983)).

68. Act of Apr. 21, 1977, ch. 204, § 2, 1977 N.D. Sess. Laws 461, 462-63 (codified as amended at N.D. CENT. CODE § 20.1-02-18.3 (1983)).

69. Act of Apr. 21, 1977, ch. 204, § 3, 1977 N.D. Sess. Laws 461, 463 (codified as amended at N.D. CENT. CODE 20.1-02-18.2 (1983)).

4. Provided that state consent to federal acquisitions for migratory bird refuges would be nullified if the Department of the Interior did not "agree to and comply with" the limitations placed upon easement acquisitions;⁷⁰

5. Limited all easements in North Dakota to 99 years and required that all easements "shall be properly described."⁷¹

Passage of the 1977 legislation caused the FWS to suspend the waterfowl production area easement acquisition program in North Dakota.⁷² This coincided with a policy statement by Governor Arthur A. Link: "I will not approve any further wetland acquisitions by the Fish and Wildlife Service, pursuant to 16 U.S.C. § 715k-5, until all mitigation and enhancement lands are acquired for the Garrison Diversion unit."⁷³

The United States, at the request of the FWS, filed a complaint seeking declaratory relief in 1979.⁷⁴ The United States successfully argued in the trial court that the gubernatorial consent provision did not govern the acquisition of waterfowl production areas and that the statutes were unconstitutional "[t]o the extent they encumber the federal statutes which provide for the acquisition of waterfowl habitat."⁷⁵

In *North Dakota v. United States* the United States Supreme Court did not summarily affirm the lower courts' decisions. Rather, the Court declared that the gubernatorial consents were irrevocable and that the 1977 state laws could not be applied to the waterfowl production area easements acquired pursuant to the existing consents.⁷⁶ The Court, however, did not suggest that the 1977 state laws would be an unconstitutional obstruction to the acquisition of fee waterfowl production areas or to easements that the FWS may secure under future gubernatorial consents. The FWS resumed its acquisition program after the decision in *North Dakota v. United States*.⁷⁷

70. *Id.*

71. Act of Mar. 31, 1977, ch. 426, § 1, 1977 N.D. Sess. Laws 923 (codified as amended at N.D. CENT. CODE § 47-05-02.1 (1978)).

72. Complaint at ¶ 15, *United States v. North Dakota*, Civ. No. A1-79-62 (D.N.D. filed May 30, 1979).

73. Letter from Governor Arthur A. Link to Fish & Wildlife Service Area Manager William Aultfather (Apr. 16, 1979). The dispute concerning the Garrison Diversion Unit mitigation and enhancement lands has been substantially resolved. See *infra*, note 79.

74. *United States v. North Dakota*, Civ. No. A1-79-62 (D.N.D. July 14, 1980).

75. *United States v. North Dakota*, 650 F.2d 911 (8th Cir. 1981).

76. *North Dakota v. United States*, 460 U.S. 300 (1983).

77. Letter from Fish & Wildlife Service Regional Director Galen L. Buterbaugh to Governor Allen I. Olson (Dec. 23, 1983). The FWS obtained the first easement, 532X, in Stutsman County, on September 19, 1983.

J. THE IMPACT ON RECLAMATION PROJECTS

Waterfowl production areas have hindered the development of projects by the Bureau of Reclamation in North Dakota. The Apple Creek Unit provides a striking illustration of the problem.⁷⁸ A memo from the FWS Area Bureau of Reclamation stated that the Bureau's development of irrigation projects in the Apple Creek Unit would adversely affect existing wetland easements and waterfowl production areas.⁷⁹ The Area Manager stated: "I do not believe that increased agricultural production is of higher priority national interest than the retention of naturally occurring wetlands. It is not our intention to release easement rights where project facilities develop irrigable lands."⁸⁰

Although the Garrison Diversion Unit (GDU)⁸¹ has encountered similar problems, a federal-state committee agreed to a mitigation plan for the GDU that accommodated the easement issue by the replacement of easement wetlands with fee wetlands.⁸² Implementation of the agreement, however, has not been accomplished, primarily because the FWS has refused to release

78. See Act of Oct. 27, 1974, Pub. L. No. 93-493, § 1301, 88 Stat. 1486, 1498 (directing the Secretary of the Interior to engage in feasibility studies of the Apple Creek Unit).

79. Memo entitled "Service Position on Fish & Wildlife Service Easements and Waterfowl Production Areas in the Apple Creek Unit," from Fish and Wildlife Service Area Manager William Aulfather to Project Manager, Bureau of Reclamation (May 19, 1978). The memo stated:

Congressional mandates and Service objectives stress both wetland preservation and waterfowl production as primary features of the Small Wetland Acquisition Program. The development of irrigation through the Apple Creek project on existing easements and waterfowl production areas will be in direct conflict with these mandates and objectives. The Government's vested interest in these lands, established prior to initiation of the Apple Creek project, will be jeopardized or lost.

Id.

80. *Id.* The Area Manager also stated:

[F]or these reasons, the position of this office is that there be no subordination of Service easements and waterfowl production areas in Federal water projects. . . . Accordingly, in continued planning of the Apple Creek project, we suggest that the Bureau redesign or delete project features and irrigable areas to successfully avoid destruction or adverse impacts to wetland easements or waterfowl production areas.

Id.

81. See Act of Aug. 5, 1965, Pub. L. No. 89-108, 79 Stat. 433 (authorizing Garrison Diversion Unit).

82. I COMMITTEE REPORT, FISH AND WILDLIFE MITIGATION AND ENHANCEMENT PLAN, PHASE I - GARRISON DIVERSION UNIT, PICK-SLOAN MISSOURI RIVER BASIN PROJECT 26-27 (Dec. 1982). The committee stated:

The Committee has determined that all the values of these wetlands under easement can be replaced by the purchase in fee of restorable wetland complexes. The replacement for the wetland easements will be based on replacing an easement wetland acre with a restored wetland acre. These restorable wetlands will be purchased in wetland complexes. . . . Since these wetlands under easement will be fully replaced with restored wetlands of at least equal value, there will be no net loss of wetlands as required by 16 U.S.C. § 668dd(b) (3).

Id. See also U.S. DEP'T OF THE INTERIOR, FINAL SUPPLEMENTAL ENVIRONMENTAL STATEMENT ON FEATURES OF THE GARRISON DIVERSION UNIT FOR INITIAL DEV. OF 85,000 ACRES (FES 83-85) II-1 (July 15, 1983).

waterfowl production area easements on lands acquired by the Bureau of Reclamation for project features. Instead, the FWS is insisting on a revocable permit that would authorize the FWS to use project right-of-way and require replacement of lost wetlands.⁸³

K. WHITE SPUR DRAIN

White Spur Drain was established in 1983 after years of planning by the Bottineau County Water Resource District Board of Managers.⁸⁴ Investment Rarities, Inc.⁸⁵ purchased, during the period that the Board was planning White Spur Drain,⁸⁶ an interest in a tract that would be required for the White Spur Drain right-of-way.⁸⁷ Investment Rarities immediately donated a perpetual⁸⁸ waterfowl production area easement to the FWS.⁸⁹ Although the governor objected to the donation because it would interfere with the plans for the proposed White Spur Drain,⁹⁰ the FWS accepted the easement.⁹¹ Internal FWS documents reveal that the donation was a coordinated effort by the owner of Investment Rarities, Inc. and the FWS to frustrate construction of the drain.⁹²

83. Interview with Darrell Krull, Project Manager for the Garrison Diversion Unit, in Bismarck, North Dakota (Mar. 5, 1984).

84. Order to Establish Drain, Construction of White Spur Drain and Channel Improvements to Stone Creek, Board of Managers, Bottineau County Water Resource District (June 20, 1983).

85. Newspaper articles have explained the ownership and purpose of Investment Rarities, Inc. See, e.g., Fargo Forum, Oct. 11, 1981, at D-15, col. 1.

86. Investment Rarities, Inc., purchased the SW $\frac{1}{4}$ NE $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ and S $\frac{1}{2}$ NW $\frac{1}{4}$ of sec. 13, T. 160N., R. 77W (Bottineau County, North Dakota) under a contract for deed dated Dec. 19, 1980. The contract contained a provision in which the seller agreed "to join in and execute, upon request of Buyer, a wetland easement in favor of the U.S. Fish & Wildlife Service. . . ."

87. Memo entitled "Easement donation, Investment Rarities Inc.," from Fish & Wildlife Service Acquisition Supervisor Donald Fitzgerald to Fish & Wildlife Service Wetland Coordinator (Feb. 4, 1981). The memo stated: "This tract is a key area lying directly on one part of the proposed White Spur drain. . . ." *Id.*

88. Although § 47-05-02.1 of the North Dakota Century Code limits the term of easements to 99 years, the grantors conveyed "a permanent easement (in perpetuity)." See N.D. CENT. CODE § 47-05-02.1 (1978). The FWS did not consider this matter to be important. An FWS memo stated: "The North Dakota law limiting the duration of easements to a maximum of 99 years should be disregarded. A perpetual easement could not be defeated by the aforementioned law." Memo entitled "Proposed Easement Donation—Investment Rarities, Inc." from Realty Specialist Carol S. Rueff, Fish & Wildlife Service Region 6, to Don Fitzgerald, Fish & Wildlife Service Area Office (Feb. 27, 1981).

89. The document is similar to the form easement used by the FWS. See *supra* note 42 for the FWS form easement. The easement was conveyed on April 28, 1981.

90. See Fish & Wildlife Serv., Region 6, Wetland Easement Donation to the U.S. Fish and Wildlife Service, from Mr. James R. Cook, Investment Rarities, Inc. of Minneapolis, Minnesota 3 (Mar. 1981). The report states: "The FWS contacted the North Dakota Governor's Office and reviewed the matter with his representative. The representative orally stated opposition from the State to FWS's acceptance of the donation." *Id.* The report also recognized that "[a]cceptance of the Cook easement is likely to be viewed by the State as another hostile action by the FWS." *Id.* at 4. See *also* Letter from State Engineer Vernon Fahy to Derrell P. Thompson, Special Assistant to the Secretary of the Interior for Western Governors (Mar. 26, 1981).

91. The easement was accepted by the FWS Regional Director on July 9, 1981.

92. See Fish & Wildlife Serv., Region 6, Wetland Easement Donation to the U.S. Fish and Wildlife Service, from Mr. James R. Cook, Investment Rarities, Inc. of Minneapolis, Minnesota 4 (Mar. 1981). The report states: "Mr. Cook is president of the largest precious metal investment firm in America and is in a prominent position to exert powerful influence on hundreds of thousands of

L. THE REFUGE REVENUE SHARING ACT PAYMENTS

County entitlements under the Refuge Revenue Sharing Act are determined, in part, by the appraised value of fee land in a county.⁹³ Frequently, however, the FWS is unable to pay the county entitlement because of insufficient refuge revenues and inadequate supplemental appropriations.⁹⁴

Another potential problem area is also being reviewed by the Natural Resources Committee of the North Dakota Legislative Council: the integrity of the FWS appraisal process.⁹⁵ Initial investigations by the committee suggest that FWS lands may be substantially undervalued by the FWS appraisals.⁹⁶

III. THE CURRENT FEDERAL-STATE DISPUTES

A. STATE CONTROL OVER WATERCOURSES

The primary federal-state disputes may be easily defined but not so easily answered: does the conveyance of a waterfowl production area easement by a private landowner to the FWS deprive the State of its governmental powers over watercourses? An analysis of this issue will require addressing two subissues:

1. What is the state interest in the waterway?
2. What is the effect of the easement conveyance?

1. *What is the State Interest in a Waterway?*

The State of North Dakota has consistently recognized that all land in the state is subject to a servitude concerning the flow of

investors who read the company's newsletter." *Id.* See also Memo from Acting Regional Director Robert H. Shields to the Fish & Wildlife Service Director (Mar. 27, 1981). The memo states, "Acceptance of the easement is considered important to maintaining good relations with Mr. Cook, a prominent financial figure who has dedicated considerable effort toward wetland preservation throughout North Dakota." *Id.* Much of the "considerable effort" has been the funding of lawsuits by the North Dakota Chapter of the Wildlife Society in an effort to stop water management projects sponsored by water resource districts, such as Russell Drain No. 1 in Bottineau County and Wimbledon Drain in Barnes County. Wetland Consultants Report to the 1984 Annual Meeting, North Dakota Chapter of the Wildlife Society (Feb. 8, 1984).

93. 16 U.S.C. § 715s (1982). Funds paid to a county are distributed pursuant to § 11-27-09.1 of the North Dakota Century Code. See N.D. CENT. CODE § 11-27-09.1 (1976).

94. Payments constituted 73% of the FWS-computed entitlement in FY76; 74% in FY77; 52% in FY78; 76% in FY79; 100% in FY80; 88% in FY81. U.S. DEP'T OF INTERIOR, FISH & WILDLIFE SERV., PAYMENTS TO COUNTIES, REFUGE REVENUE SHARING ACT AS AMENDED (Dec. 14, 1981).

95. The Natural Resources Committee has the responsibility to "study the impacts of refuges and waterfowl production areas on the State of North Dakota." N.D. H. CON. RES. 3091, 48th Leg., 1983 N.D. Sess. Laws 2339.

96. See Appendix E, Minutes of the Natural Resources Committee, N.D. Leg. Council (Feb. 23, 1984).

waters. Specifically, the North Dakota Constitution has contained, since statehood, a provision that claims a property right in flowing streams and natural watercourses: "All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating, and manufacturing purposes."⁹⁷

This provision has been supplemented by numerous statutes to prohibit obstructions to watercourses and to provide a vehicle for maintaining the watercourses. The prohibitions are now codified in chapter 61-01 of the North Dakota Century Code.⁹⁸ Title 61 contains the governmental mechanisms for maintaining the watercourses.

An early law required landowners riparian to nonnavigable streams to maintain the integrity of the watercourse.⁹⁹ The State and its political subdivisions later assumed this responsibility.¹⁰⁰ The primary responsibility for maintenance of watercourses, however, soon fell upon the board of county commissioners, township supervisors, and the local drain boards.¹⁰¹ When the drain board was authorized in 1895, the general purpose of the board was to provide for the drainage of sloughs and low lands.¹⁰²

Drainage and maintenance of watercourses became a secondary water-related concern during the dry years of the Depression. Water conservation was a critical concern and led to

97. N.D. CONST. art. XI, § 3.

98. N.D. CENT. CODE § 61-01-06 (Supp. 1983). Section 61-01-06 states:

A watercourse entitled to the protection of the law is constituted if there is a sufficient natural and accustomed flow of water to form and maintain a distinct and a defined channel. It is not essential that the supply of water should be continuous or from a perennial living source. It is enough if the flow arises periodically from natural causes and reaches a plainly defined channel of a permanent character. . . .

Id. See also N.D. CENT. CODE § 61-01-07 (1960 & Supp. 1983) (penalty provision for obstruction of waterways).

99. Act of Mar. 10, 1917, ch. 116, § 1, 1917 N.D. Sess. Laws 162.

100. N.D. CENT. CODE § 61-01-23 (1960 & Supp. 1983) (authority of state and local agencies to remove obstructions from nonnavigable streams).

101. Act of Marc. 8, 1895, ch. 51, 1895 N.D. Sess. Laws 65. See COMP. LAWS DAKOTA TERR. §§ 2047-2078 (1887).

102. 1895 N.D. Sess. Laws 65 (currently codified at N.D. CENT. CODE § 61-21-01 (1960 & Supp. 1983); § 61-21-02 (1960)). Section 1 of the 1895 legislation stated:

Water courses, ditches and drains for the drainage of sloughs and other low lands may be established, constructed and maintained in the several counties of this State whenever the same shall be conducive to the public health, convenience or welfare under the provisions of this act. The word "drain" when used in this act shall be deemed to include any natural water course opened, or proposed to be opened, and improved for the purpose of drainage and any artificial drains constructed for such purpose.

Act of Mar. 8, 1895, ch. 51, § 1, 1895 N.D. Sess. Laws 65.

The North Dakota Supreme Court recently reemphasized that "[a] drain includes any natural watercourse, opened or to be opened and improved, for drainage purposes. . . ." North Dakota State Water Comm'n v. Bd. of Managers, 332 N.W.2d 254, 259 n.6 (N.D. 1983).

the 1935 emergency legislation authorizing water conservation districts¹⁰³ and a state water conservation commissioner.¹⁰⁴ The State Water Conservation Commission was established only two years later.¹⁰⁵

The water conservation districts were created by the State Water Conservation Commission in response to petitions filed by qualifying persons or entities. A board of water conservation commissioners had plenary authority over water resources in the district and could control watercourses within the district.¹⁰⁶ These boards later assumed all the powers of a drain board¹⁰⁷ and finally replaced the drain board.¹⁰⁸

These statutes reveal that a mechanism has been created by the state for maintenance of the state's watercourses. The following review of the case law indicates that the state's authority over the watercourses is substantial.

Several years after statehood, the North Dakota Supreme Court in *Bigelow v. Draper*¹⁰⁹ focused on section 210 of the Constitution. The case involved a condemnation action by the Northern Pacific Railway Company to reroute a short segment of the Heart River. The court resisted arguments that the broad language of section 210 divested riparian owners of common law rights in the waters and the bed of nonnavigable watercourses. The

103. Act of Mar. 12, 1935, ch. 228, 1935 N.D. Sess. Laws 319. The name was changed to "water conservation and flood control district" in 1957, *See* Act of Mar. 20, 1957, ch. 383, § 1, 1957 N.D. Sess. Laws 740, to "water management district" in 1963, *see* Act of Mar. 21, 1963, ch. 421, § 1, 1963 N.D. Sess. Laws 806, and "water resource district" in 1981, *see* Act of Mar. 26, 1981, ch. 632, § 1, 1981 N.D. Sess. Laws 1713, 1714 (codified as amended at N.D. CENT. CODE § 61-16.1-02 (Supp. 1983)).

104. Act of Mar. 12, 1935, ch. 228, 1935 N.D. Sess. Laws 319.

105. Act of Mar. 12, 1937, ch. 255, 1937 N.D. Sess. Laws 483 (codified as amended at N.D. CENT. CODE § 61-02-01 to -74, 61-02 (1983)).

106. Act of Mar. 12, 1935, ch. 228, § 6, 1935 N.D. Sess. Laws 319, 322-323. Section 1 provided:

Each Board of Water Conservation Commissioners shall have the power:

(5) To plan, locate, re-locate, construct, reconstruct, modify, maintain and repair and to control all dams and water conservation devices of every nature and water channels and to control and regulate the same and all reservoirs, artificial lakes and other water storage devices within the district.

(6) To maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation projects within their districts.

(7) To make rules and regulations concerning the use to which such waters may be put and to prevent the pollution or contamination, or other misuse, of the water resources, streams or bodies of water included within the district.

Id.

107. Act of Mar. 14, 1967, ch. 473, 1967 N.D. Sess. Laws 1128 (codified as amended at N.D. CENT. CODE § 61-16.1-09(11) (Supp. 1983) (Board of Water Commissioners granted same statutory powers as conferred on a Board of County Drain Commissioners).

108. Act of Mar. 26, 1981, ch. 632, § 1, 1981 N.D. Sess. Laws 1713, 1745-46 (codified as amended at N.D. CENT. CODE § 61-16.1-61 (Supp. 1983)) (provides for the taking over of the assets and liabilities of the drain boards by the water resource districts).

109. 6 N.D. 152, 69 N.W. 570 (1896).

court, however, clearly declared that the constitutional language meant that the state had control over a watercourse notwithstanding the ownership.¹¹⁰

In 1910 the court in *Freeman v. Trimble*¹¹¹ had another opportunity to focus on governmental control of a waterway when the authority of the Joint Board of Drain Commissioners for Bottineau County and McHenry County (Joint Board) was challenged concerning the establishment of Mouse River Drain No. 9 — an improvement to the Mouse River channel.¹¹² The court recognized that the “improvement in this case consists in dredging, deepening, widening, and straightening the river bed and channel.”¹¹³ Yet the court opined that the Joint Board need not acquire right-of-way for this type of stream improvement project. The court declared that the “right to increase the flow of the river . . . has naught to do with the title to the land through which the river flows.”¹¹⁴

The same river/drain was the subject of another appeal five years later in *State ex rel Trimble v. Minneapolis, St. Paul & Sault Ste. Marie Railway Co.*¹¹⁵ The Joint Board had established Mouse River Drain No. 9 and began to dredge the channel. When the railroad refused to remove a bridge to allow passage of the floating dredge, the Joint Board sued the railroad.

When commenting upon the respective rights of the parties, the court observed:

The right of both the lower and upper riparian owners to the unimpeded passage of the water, as far as the water is concerned is, of course, conceded, even in unnavigable streams, as well as the right of the public to condemn

110. *Bigelow v. Draper*, 6 N.D. 152, 163, 69 N.W. 570, 573 (1896). The court in *Draper* stated:

[W]e do not wish to be understood as expressing such a view as to its proper interpretation as would utterly emasculate it. So far as it can have constitutional effect, it should be construed as placing the integrity of our water courses beyond the control of individual owners. Should all the riparian proprietors along the course of a stream so join in the sale of their riparian rights as to work an utter destruction of the stream so far as its channel was within the bounds of this state, it might be that the sovereignty of the state could invoke this provision of the constitution against such attempted annihilation of the water course.

Id. at 163, 69 N.W. at 573.

111. 21 N.D. 1, 129 N.W. 83 (1910).

112. The official name of the Souris River is “Mouse River.” N.D. CENT. CODE § 61-01-24 (Supp. 1983).

113. *Freeman v. Trimble*, 21 N.D. 1, 16, 129 N.W. 83, 89 (1910).

114. *Id.* at 17, 129 N.W. at 90.

115. 28 N.D. 621, 150 N.W. 463, 465 (1915).

property for drainage purposes if such condemnation is necessary.¹¹⁶

The court did not agree with the Joint Board that the railroad must remove the bridge at its own expense. Rather, the court declared that the bridge must only accommodate the flows and not the floating dredge. In addition, the court declared that a landowner had a duty to accommodate future improvements to the stream.¹¹⁷

The Joint Board also claimed "that the easement of drainage along and through an unnavigable watercourse carries with it the easement of navigating dredges. . . ."¹¹⁸ The court noted that requiring the removal of artificial obstructions may be within the police power,¹¹⁹ yet the court indicated that the Joint Board could not compel the railroad to remove the bridge, at the railroad's expense, for the floating dredge.

The court then referred to section 210 of the Constitution and observed: "It may be conceded that the drainage board had the right as agents of the parties interested and perhaps of the state as a whole to require the removal of any material and artificial obstructions to the flowage of the water in the stream."¹²⁰

The North Dakota Supreme Court expanded its concept of section 210 in a pair of cases in 1949.¹²¹ In both cases the state claimed title to the beds of nonnavigable lakes under the authority of section 210. The court rejected the claims, but agreed that

116. *State v. Minneapolis, St. Paul & Sault Ste. Marie Ry. Co.*, 28 N.D. 621, 635-36, 150 N.W. 463, 465 (1915).

117. *Id.* at 638, 150 N.W. at 466. The court noted:

[I]f a railway crosses an unnavigable stream which serves for the drainage of any given area of land, it must accommodate itself to the drainage that may be reasonably anticipated, both present and prospective. . . . It may not, in short, obstruct the flow of the water and of the drainage area, even though that flow is the result of modern improvements and the draining into the stream of areas which, though belonging to the general district, did not formerly flow readily into the stream, and for the accommodation of which the improvements are made.

Id.

118. *Id.* at 640, 150 N.W. at 467 (on rehearing).

119. *Id.* The court stated: "It may be true that drainage is an exercise of the police power, and that under that so-called power, and in the promotion of the public health and interest, the public may require the removal of all artificial obstructions to the drainage of nonnavigable rivers." *Id.*

120. *Id.* at 648, 150 N.W. at 470.

121. *State v. Brace*, 76 N.D. 314, 36 N.W.2d 330 (1949); *Ozark-Mahoning Co. v. State*, 76 N.D. 464, 37 N.W.2d 488 (1949). The court in *Ozark-Mahoning* suggested that a nonnavigable stream is not a watercourse. *See id.* at 472, 37 N.W.2d at 493. This suggestion conflicts with many other decisions of the court on this issue. *See, e.g., Ferderer v. Northern Pac. Ry. Co.*, 77 N.D. 169, 42 N.W.2d 216 (1950) (stream considered to be watercourse); *State ex rel. Trimble v. Minneapolis, St. Paul & S. Ste. M. Ry. Co.*, 28 N.D. 621, 150 N.W. 463 (1915) (nonnavigable stream treated as watercourse); *Freeman v. Trimble*, 21 N.D. 1, 129 N.W. 83, 90 (1910) (the court referred to the Mouse River, which was considered nonnavigable by the parties, as a "natural watercourse"); *Bigelow v. Draper*, 6 N.D. 152, 69 N.W. 570 (N.D. 1896) (the court referred to the Heart River as "a nonnavigable watercourse"). *See also Amoco Oil Co. v. State Highway Dep't*, 262 N.W.2d 726 (N.D. 1978); *Bissel v. Olson*, 26 N.D. 60, 143 N.W. 340 (1913).

section 210 is more than authority for the exercise of a police power. The court in *State v. Brace* stated: "Section 210 of the Constitution does not purport to vest in the state absolute ownership of flowing streams and watercourses, including title to the beds. It contemplates a limited property right for the purposes of mining, irrigating and manufacturing."¹²²

The most recent case concerning state control over watercourses concerns Rush Lake in Cavalier County. In *North Dakota State Water Commission v. Board of Managers*¹²³ the State argued that the defendants had drained Rush Lake in violation of state law. The court again agreed that the State had control over nonnavigable lakes notwithstanding private ownership of the bed.¹²⁴

It is useful to compare the state's easement for watercourses with the state's easement for roads. Under the public trust doctrine, the state is the trustee of the highways. The landowner holds the fee title to land on which a highway easement is located and can use the land as long as his use does not interfere with the state's easement. The landowner's use, however, is subject to the police power of the state.¹²⁵

122. *State v. Brace*, 76 N.D. 314, _____, 36 N.W.2d 330, 335 (1949).

123. 332 N.W.2d 254 (N.D. 1983). In considering § 3 of Article XI of the North Dakota Constitution, the court noted:

The State holds the navigable waters in "trust" for the public. . . . The State does not lose its right to exercise authority over a lake merely because its lake bed is subject to private ownership. As the Supreme Court of Minnesota noted, "[t]he ownership of beds of streams and lakes is quite a different matter from the right to control waters."

North Dakota State Water Comm'n v. Bd. of Managers, 332 N.W.2d 254, 257-58 (N.D. 1983) (quoting *State v. Adams*, 251 Minn. 521, 546, 89 N.W.2d 661, 678 (1957), *cert. denied*, 358 U.S. 826 (1958)).

124. 332 N.W.2d at 258. The court stated:

Protecting the integrity of the waters of the state is a valid exercise of the Commission's duties pursuant to § 61-02-14, NDCC, as well as being part of the state's affirmative duty under the "public trust" doctrine. Accordingly, we are satisfied that the Commission has the authority to control the drainage of waters from Rush Lake.

Id. See also Brignall v. Hannah, 34 N.D. 174, 157 N.W. 1042 (1916) (federal patentee's rights to land bounded by nonnavigable lake determined by state law).

125. Note, *The Public Trust Doctrine in North Dakota*, 54 N.D.L. Rev. 565, 575, 576 (1978). The author notes:

Landowners, too, have certain defined rights and duties. Landowners have consistently been held to have retained the fee to land on which the easement is located. . . . The fee owner can use the land on which an easement is located so long as his use thereof does not interfere with the public's easement overlying the land. The landowner does have a duty to keep the highways clear of obstructions due to the use of adjacent land.

. . . The public's use of the easement is subject to restrictions placed on it by the police powers of the state. The public is also generally liable in tort for obstructing the easement.

Id. at 575-76 (footnotes omitted).

Presumably, the same type of public trust or state easement exists over waterways as it does over roads. A landowner could not, of course, sell an easement over a road right-of-way to deprive the state of a road. Yet the FWS has consistently claimed that a private landowner may convey an easement, thereby depriving the state of its police powers and trust responsibilities over waterways.

The state exercises a police power over navigable and nonnavigable watercourses *and* has a limited property interest, in the nature of an easement, in the watercourses. This combined police power and easement enables the state to regulate, maintain, and improve the watercourses for the benefit of the state's citizens notwithstanding objections by riparian landowners.

2. *What is the Effect of the Easement Conveyance?*

A waterfowl production area is established by the conveyance of an easement to the United States by a landowner. Accordingly, it is necessary to examine the terms of the easement document to determine precisely what it purports to convey.¹²⁶

The terms of a form waterfowl production area easement indicate that the United States only purchases a nonpossessory,¹²⁷ incorporeal,¹²⁸ negative easement¹²⁹ in gross.¹³⁰

126. See *Sun Pipe Line Co. v. Altes*, 511 F.2d 280 (8th Cir. 1975). The court in *Sun Pipe Line* stated, "The easement for the pipeline right-of-way had originally been created by a conveyance. . . . In such a situation the rights and liabilities of the parties are determined by the terms of the agreement." *Id.* at 283-84. A thorough review of the document may prevent problems. In *United States v. Seest*, Seest's attorney argued to the court of appeals that:

In contrast to the sweeping prohibitions contained in 16 U.S.C. 668dd, Subdivision (c), the easement itself grants the government only limited rights to the use of this land and expressly reserves or permits the landowner to use the land in certain ways. The terms of the statute and the terms of the easement may seem to be in conflict; however, this conflict can easily be reconciled by recognizing the terms of the easement as a permission granted by the government to the landowner to use the land for certain purposes.

....
In short, the easement gives the government the right to manage the land for waterfowl production purposes.

....
In short, the easement expressly reserves for the landowner the right to engage in normal farming practices, and the right to use his land in the customary manner except for draining, burning, filling and leveling.

Brief of Defendant/Appellant at 20-22, *United States v. Seest*, 631 F.2d 107 (8th Cir. 1980).

127. See *United States v. Welte*, No. C2-81-49 (D.N.D. Mar. 1, 1982), *aff'd*, 696 F.2d 999 (8th Cir. 1982). The trial court in *Welte* observed: "While an easement does not grant possession in fee of the servient estate (tract 16X), an easement is 'an interest in land in the possession of another. . . . and is, therefore, property. Thus, the easement covering 16X was property of the United States.'" *Id.*, slip op. at 3-4 (citation and footnote omitted).

128. See RESTATEMENT OF PROPERTY § 450 (1944).

129. *Id.* at § 452.

130. See *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974). The court in *Albrecht* noted:

The specific responsibilities of a grantor are concisely outlined in the agreement: the grantor and his heirs, successors and assigns are to cooperate in the maintenance of the land as a waterfowl production area and may not fill, burn, drain, or permit draining of any wetlands on the tract. No more is required by the document. A reservation¹³¹ is also concisely stated: "It is understood and agreed that this indenture imposes no other obligations or restrictions upon the [grantor]. . . ."¹³²

By its own terms, the easement acts as a limitation only on the grantor or his heirs, successors and assigns. The agreement does not and, of course, could not interfere with vested property rights nor contract away the powers of a water resource district.¹³³

It is fundamental that the purchaser of an easement takes the easement subject to prior interests.¹³⁴ As previously explained, the

The classification of the interest in land conveyed in this case according to the traditional analysis of easements is difficult. Here is created a non-appurtenant restriction on changing the natural contour of the land for the benefit of migratory birds. Traditionally, the interest in land conveyed would be an easement in gross, since such an easement "belongs to the owner of it [the United States] independently of his ownership or possession of any specific land." . . . By the terms of the document, the Herbels conveyed to the United States this interest in property "for themselves and for their heirs, successors and assigns." This right to property use conveyed can be seen traditionally as an easement in gross for the benefit of the United States and to run indefinitely, as such easement in gross can.

Id. at 909-910 (citations omitted).

131. § 5 N.D. CENT. CODE 47-09-13 (1978). Section 47-09-13 states: "A grant shall be interpreted in favor of the grantee, except that a reservation in any grant . . . is to be interpreted in favor of the grantor." *Id.* This statute should be read in conjunction with *Farmers Union Grain Terminal Ass'n v. Nelson*, in which the court observed, in a contract dispute, that:

There are two principles of contract interpretation which should be given special weight in this situation. (1) A contract is construed most strongly against the party who prepared it, and who presumably looked out for his best interests in the process. . . . (2) An agreement which is essentially a "contract of adhesion" should be examined with special scrutiny by the courts to assure that it is not applied in an unfair or unconscionable manner against the party who did not participate in its drafting.

Farmers Union Grain Terminal Ass'n v. Nelson, 223 N.W.2d 494, 497 (N.D. 1974) (citations omitted). See *Oakes Farming Ass'n v. Martinson Bros.*, 318 N.W.2d 897, 908 (N.D. 1982) (ambiguity in contract construed against party who caused the uncertainty). Reservations in grants, of course, are generally "interpreted in like manner with contracts." *McDonald v. Antelope Land & Cattle Co.*, 294 N.W.2d 391, 393 (N.D. 1980). See *Mueller v. Strangeland*, 340 N.W.2d 450, 452 (N.D. 1983) (when language of deed is ambiguous, court may look to extrinsic evidence).

132. Jurisdictional Statement at 7a, *North Dakota v. United States*, 460 U.S. 300 (1983). This is consistent with traditional property law concepts: "Whenever an easement exists, the servient owner is privileged to use the servient land in any way not inconsistent with the limited use vested in the easement owner." 3 R. POWELL, *THE LAW OF REAL PROPERTY* § 405 (P. Rohan ed. 1981). The court in *United States v. Albrecht* also summarized the easement language as follows:

The easement created no burden on the land except that the landowners in their use of the land covered by the easement may do nothing to disturb the natural state of the wetland and pothole areas. The only other burden imposed was that authorized representatives of the United States have access to those areas.

United States v. Albrecht, 364 F. Supp. 1349, 1351 (D.N.D. 1973).

133. See *National League of Cities v. Usery*, 426 U.S. 833, 855 (1976) (the federal government may not exercise power in a fashion that impairs the state's integrity or ability to function effectively in a federal system).

134. See *Brown v. Jackson*, 16 U.S. (15 Wheat.) 449 (1818) (deed ineffective to convey interest

state has a superior property interest in its watercourses. Even if the state did not have a property interest in its watercourses, the state has a government authority over the watercourses.

The Department of the Interior has long recognized that even the acquisition of a fee waterfowl production area does not divest a district of its statutory authority. A 1961 field solicitor's opinion stated: "If [the FWS] acquires fee title by conveyance of lands which are already within the exterior boundaries of a drainage district, then those lands would be subject to the jurisdiction and functions of the drainage district."¹³⁵

A 1968 assistant solicitor's opinion also addressed the waterfowl production area easement. The assistant solicitor agreed that the existence of a district is a significant factor.¹³⁶

Despite the substantial acreage subject to waterfowl production area easements in North Dakota,¹³⁷ *North Dakota v. Buterbaugh*¹³⁸ is the only case that has addressed the issue of the relationship between waterfowl production area easements and a water resource district's authority. The court in *Buterbaugh* did not, however, reach the merits.¹³⁹

that grantor does not have); *Adkins v. Williams*, 429 F. Supp. 32 (D. Wyo. 1977) (deed passes only the interest the grantor owns at time of deed); *Van Sickle v. Olson*, 92 N.W.2d 777 (N.D. 1958) (mineral deed passes only what mineral rights the grantor has).

135. Memo entitled "Propriety of Wetland Acquisition in Small Watershed Projects (Public Law 566)," from Department of the Interior Field Solicitor, Minneapolis, Minnesota, to Chief, Division of Technical Services, Fish & Wildlife Service, Minneapolis, Minnesota (Feb. 1, 1961).

136. Memo entitled "Adjustments of Wetlands on Waterfowl Production Area Easements," from the Assistant Solicitor, Department of the Interior, to the Director, Bureau of Sport Fisheries and Wildlife (Apr. 22, 1968). The assistant solicitor stated:

We are dealing here, not with the fee in land, but with a rather unique type of easement under which the United States acquires a right of use for maintenance of waterfowl habitat in cooperation with the landowner who agrees not to drain, fill, or burn the area involved. It would be possible for a State, or a political subdivision thereof, to exercise its power of eminent domain by condemnation of part of the land or interests therein, but only in such a manner as not to interfere with the easement of the United States. For instance, it might condemn a right-of-way for a main drainage canal which in no way interfered with the enjoyment of the wetland easement. This is the general rule of law. However, if, when the United States acquired the easement, the land was already burdened with the rights of a drainage district, we have a different situation. Under such circumstances, the United States, by accepting the easement, would take subject to all prior rights to which the land was subject, including the drainage district rights. No grantee, even the Federal Government, except for its rights incident to sovereignty, can acquire a greater interest in land than that possessed by the grantor. Therefore, if the grantor's interest was subject to drainage district rights when the United States acquired the easement, the easement would be subject to those rights also. This rule applies, however, only to those rights which were obtained prior to the acquisition by the United States.

Id.

137. The FWS has acquired waterfowl production area easements over nearly 4.8 million acres of privately owned land. Joint Appendix at 50, *North Dakota v. United States*, 460 U.S. 300 (1983).

138. 575 F. Supp. 783 (D.N.D. 1983).

139. *North Dakota v. Buterbaugh*, 575 F. Supp. 783 (D.N.D. 1983). In *Buterbaugh* the court dismissed the action because the State did not exhaust its administrative remedies. *Id.* at 785. See *supra* notes 50-65 and accompanying text for a discussion of the facts of *Buterbaugh*.

United States v. Spring Creek Township,¹⁴⁰ which involved a township road in Minnesota, may be the only reported case that involved a dispute between a political subdivision and the FWS concerning a waterfowl production area easement. Spring Creek Township established a road in 1912 and the road had been used since that date. In 1972 the FWS purchased, as a waterfowl production area, a tract of land through which the road passes. The FWS subsequently claimed that the road was not established in accordance with statutory procedures and that the waterfowl production area included the township road.¹⁴¹ The United States District Court rejected the federal claim that the road was improperly established.¹⁴² The court did not declare that the mere purchase of the waterfowl production area divested Spring Creek Township of its jurisdiction over the road.¹⁴³ This issue is not likely to be resolved until litigation directly addresses the limitations, if any, that a waterfowl production area easement places on the state or water resource districts.

B. THE ACREAGE ISSUE

A secondary issue primarily concerns landowners, but it also involves the state and water resource districts: how many wetland acres are subject to FWS control because of waterfowl production area easements? An analysis of this issue requires that two subissues be reviewed:

1. the FWS-landowner transaction;¹⁴⁴ and
2. gubernatorial consent.

1. *The FWS-Landowner Transaction*

If a landowner offers to sell a waterfowl production area easement, the FWS will assess the value of the tract for migratory waterfowl and will calculate the number of wetland acres on the tract.¹⁴⁵ The FWS then prepares an "easement summary," which contains the legal description of the tract, the name of the landowner, the easement number, the date of the grant, the date of

140. 452 F. Supp. 144 (D. Minn. 1978).

141. *United States v. Spring Creek Township*, 452 F. Supp. 144, 146 (D. Minn. 1978).

142. *Id.* at 148.

143. *Cf. Minnesota Gas Co. v. Public Serv. Comm'n*, 523 F.2d 581 (8th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) (public control over private contracts).

144. The procedures used by the FWS prior to the suspension of acquisitions in 1977 will be explained. The FWS will probably follow similar procedures when the acquisition program is resumed.

145. The acreage calculation has been computed from photographs, which may have been retained in the file, or by using an average wetland acreage per square mile for the area.

acceptance by the FWS, the wetland acreage,¹⁴⁶ the total acreage of the tract, the wetland cost per acre, and other data.

The FWS and the landowner will negotiate. If the FWS is successful, the landowner will sign a document entitled "Conveyance of Easement for Waterfowl Management Rights." Payment is made when the easement is formally accepted by the FWS.

Easement No. 363X, which covers the outlet channel to Hurricane Lake in Towner County, provides an example.¹⁴⁷ The easement covers 160 acres although the "easement summary" reflects that only 23 wetland acres were identified. The FWS paid \$1,800 for the easement — \$78.26 per wetland acre. The easement was conveyed on May 9, 1975, and accepted by the FWS on September 18, 1975. The conveyance of an easement by a landowner to the FWS is, therefore, similar in many respects to most other conveyances.

2. *The Gubernatorial Consent*

Federal law is clear about the necessity for gubernatorial consent. Section 714k-5 of title 16 of the United States Code provides that the FWS must obtain the consent of the governor or appropriate state agency before acquiring land.¹⁴⁸ Section 715k-5, therefore, makes the governor a third party in the easement purchase transaction.

North Dakota governors have consented, on a county-by-county basis, to the acquisition of easements over 1.2 million acres of wetlands.¹⁴⁹ Easement 363X in Towner County illustrates how the gubernatorial consent has been handled by the FWS.

The FWS is authorized to acquire easements over 27,000 acres

¹⁴⁶ FWS appraisers had strict instructions to avoid discussing wetland acreage with a landowner. A 1965 memo to FWS supervisors stated:

Appraisers have been cautioned many times not to discuss *wetland acres* or *price per wetland acre* with landowners when negotiating for the easement contract. You know the easement encumbers all the land described in the document even though only wetlands are affected by the terms. You should be sure to fix in the vendor's mind at the time of signing that the easement contract covers the total acres that have been described in the document.

Memo entitled "Easement Appraisals and Negotiations," from Regional Supervisor Robert S. Jorgenson, Division of Realty, Fish & Wildlife Service, Minneapolis, Minnesota, to Fish & Wildlife Service Supervisors (Dec. 10, 1965) (emphasis in original).

¹⁴⁷ Easement 363X covers the W $\frac{1}{2}$, SE $\frac{1}{4}$, NE $\frac{1}{4}$, SE $\frac{1}{4}$, and SW $\frac{1}{4}$, NE $\frac{1}{4}$ of Section 31-T157N-R68W.

¹⁴⁸ 16 U.S.C. § 715k-5 (1982). Section 715k-5 provides, "No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or the appropriate State agency." *Id.* See *North Dakota v. United States*, 460 U.S. 300, 310 (1983) (gubernatorial consents are irrevocable).

¹⁴⁹ Joint Appendix at 4-5, *North Dakota v. United States*, 460 U.S. 300 (1983).

of wetlands in Towner County. Although the FWS now claims to have only 24,199 wetland acres under easement in Towner County,¹⁵⁰ the total acreage subject to waterfowl production area easements in the county is 151,743.39 acres.¹⁵¹

Further, although easement 363X covered 160 acres, the FWS paid the landowner for only 23 wetland acres *and* deducted only 23 acres from the 27,000 authorized in the county by North Dakota governors. None of the wetland acres are described in the agreements by a metes and bounds description or a map.

The failure by the FWS to describe the size and location of all wetlands subject to a waterfowl production area easement in a county jeopardizes the ability of the FWS to acquire further waterfowl production area easements. The number of wetland acres subject to a waterfowl production area easement during a wet year or a wet season when wetlands are full could exceed the number of wetland acres authorized by the governors for FWS acquisition. Specifically, there could be more than 27,000 wetland acres subject to a waterfowl production area easement in Towner County at any one time.

The result, at the county level, could be that the FWS has exhausted gubernatorial consent in a county and that wetlands may lose waterfowl production area easement protection. For example, if 30,000 acres of wetlands on the tracts are subject to waterfowl production area easements in Towner County in April 1984, is the FWS precluded from purchasing additional easements in the county without securing further approval from the governor? In addition, is the FWS precluded from commencing criminal enforcement actions because 3,000 unidentified acres of wetlands are no longer subject to protection?

The failure by the FWS to describe the size and location of all wetlands subject to a waterfowl production area easement in a specific tract jeopardizes the integrity of the easement. Again referring to easement 363X, the FWS identified and paid for 23 wetland acres somewhere in a 160-acre tract when the easement was purchased but the grantor and the grantee did not discuss the location of the 23 wetland acres.¹⁵²

In *Mitchell v. Nicholson*¹⁵³ the North Dakota Supreme Court

150. This acreage, taken from the easement summary, was used to compute the payment for the easement to the grantor.

151. Defendants' Response to Plaintiffs' Request for Admissions, Interrogatories and Demand for Production of Documents (Exhibit G-1), Board of Managers v. Key, Civ. No. A2-81-178 (D.N.D. Mar. 26, 1982), *dismissed sub nom. State v. Buterbaugh*, 575 F. Supp. 783 (D.N.D. 1983).

152. See Memo, *supra* note 146. The FWS appraisers were under strict instructions to avoid discussing wetland acreage. *Id.*

153. 71 N.D. 521, 3 N.W.2d 83 (1942).

declared a quit claim deed to be void for indefiniteness of description when it purported to convey "[t]wo acres of land located on the North West corner of the southwest quarter of section eighteen. . . ."¹⁵⁴ The court held that the description of the deed was so indefinite "as to render the deed . . . nugatory."¹⁵⁵ The same principle would apply, of course, to an easement that is limited to 23 wetland acres somewhere in a 160-acre quarter section.¹⁵⁶

IV. FEDERAL-STATE RECONCILIATION

Apparently, an impasse exists between the state and the FWS concerning state control over its watercourses. The present FWS position is that a state must submit an application for a right-of-way permit to maintain or reconstruct watercourses.¹⁵⁷ Permits may be withheld if the state-proposed work is inconsistent with FWS objectives. Reconciliation on this issue would probably require a reversal in FWS policy to accommodate state interests concerning its watercourses.

Lately, there has been an improvement in relations between North Dakota and the FWS over the acreage issue. The Assistant Secretary of the Interior for Fish, Wildlife and Parks, Ray Arnett, and Governor Allen I. Olson agreed, in concept, to the delineation of location and acreage of wetlands subject to waterfowl production areas.¹⁵⁸ A six member federal-state committee is addressing the details of the delineation program.¹⁵⁹

The FWS could, in coordination with the joint committee, begin the delineation process in 1985.¹⁶⁰ How the delineation

154. *Mitchell v. Nicholson*, 71 N.D. 521, 523, 3 N.W.2d 83, 84 (1942).

155. *Id.* at 529, 3 N.W.2d at 87.

156. The courts have not addressed the relationship of 16 U.S.C. § 715k-5 to this issue.

157. Memorandum in Support of Defendant's Motion to Dismiss at 10, *Board of Managers v. Key*, Civ. No. A2-81-178 (D.N.D. Apr. 8, 1982). The brief for the United States noted:

The FWS has taken the position that the plaintiffs cannot dredge the Hurricane Lake channel across wetlands subject to FWS's easement for waterfowl management rights without FWS authorization. The FWS has an established procedure for obtaining that authorization. Pursuant to 50 CFR Part 29 Subpart B (1981), the plaintiffs may apply for a right-of-way permit. The permit requirement applies not just to [National Wildlife Refuge System] lands which the United States owns in fee, but specifically applies to lands in which the United States owns only an easement interest.

Id. (citing 50 C.F.R. § 29.21-1(b) (1981)).

158. Interview with Gary S. Helgeson, Counsel to the Governor, in Bismarck, North Dakota (Feb. 2, 1984).

159. North Dakota Game and Fish Commissioner Dale Henegar has been designated as the primary representative for the State and FWS Regional Director Galen Buterbaugh has been designated as the primary representative for the Department of the Interior.

160. Interview with Gary S. Helgeson, past Counsel to the Governor, in Bismarck, North Dakota (Apr. 2, 1985).

process will involve the landowner is still unclear.¹⁶¹

V. SUGGESTIONS FOR THE PRACTITIONER

A. THE TITLE OPINION

An attorney who is representing the purchaser of real property in North Dakota should advise the purchaser if the real property is encumbered by a waterfowl production area easement. The easement will affect the value of the land because of the easement restrictions and because of the potential that the FWS may exercise additional control over the land by regulations governing the National Wildlife Refuge System.

The following statement should be inserted into any title opinion that involves real property subject to a waterfowl production area easement:

The abstract reveals that a prior owner conveyed a waterfowl production area easement to the United States on [date]. The document conveying the easement states, among other things, that the grantors for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the . . . lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or recurring due to natural causes on the . . . tract on which surface water or marsh vegetation is now existing or hereafter recurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the [landowners] and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural

¹⁶¹ If, for example, the FWS now identifies 30 acres of wetlands (instead of 23 acres) on the tract subject to easement 363X, can the FWS "perfect" its easement, for example, by filing a map (with the register of deeds) without a supplemental agreement with the landowner? Such an action could represent a "taking" of private property without just compensation. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 438 U.S. 419 (1982) (permanent physical occupation of real property is a taking).

causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.¹⁶²

Because of the easement, the land is considered a part of the National Wildlife Refuge System and activities on the land may be subject to federal regulations which govern the National Wildlife Refuge System (50 C.F.R. Subchapter C).¹⁶³

B. DEFENDING A LANDOWNER CHARGED WITH DRAINING, BURNING, OR FILLING A WATERFOWL PRODUCTION AREA EASEMENT WETLAND

An attorney may be retained by a landowner who has received a "Violation Notice" or a "Summons" and "Information" for draining, burning, or filling a wetland subject to a waterfowl production area easement.¹⁶⁴ The maximum penalty that may be imposed under 16 U.S.C. §668dd(c) (1982) is a fine of not more than \$500 or imprisonment of not more than six months, or both.¹⁶⁵ In addition, the landowner should expect the court to order restoration of affected wetlands to a natural state.¹⁶⁶

If a landowner enters a plea of not guilty, the trial will be before a United States magistrate or a United States district judge.¹⁶⁷ Several defenses should be considered if a trial is contemplated:

1. *Did the landowner "knowingly" damage a waterfowl production area?*

It may be impossible to prove that a landowner did not know that his land was subject to a waterfowl production area easement, but it may be possible to prove that the landowner did not know a wetland had been affected or that his land was a part of the

162. The FWS periodically changed the forms. Accordingly, the actual text from the recorded document should be used if it differs from the language quoted above.

163. See *United States v. Seest*, 631 F.2d 107 (8th Cir. 1980); *North Dakota v. Buterbaugh*, 575 F. Supp. 783 (D.N.D. 1983).

164. The violation notice, which is similar to a traffic ticket, will cite § 668dd(c) of title 16 of the United States Code. See 16 U.S.C. § 668dd(c) (1982).

165. *Id.*

166. See *United States v. Seest*, 631 F.2d 107, 110 (8th Cir. 1980) (when probation conditioned on restoration of wetlands, court should spell out requirements for restitution).

167. The landowner would not be entitled to a jury trial. *Id.* at 109. The landowner would have the option of appearing before a magistrate or a judge. RULES OF PROCEDURE FOR THE TRIAL OF MISDEMEANORS BEFORE UNITED STATES MAGISTRATES 2(b)(5) (1980).

National Wildlife Refuge System.¹⁶⁸ For example, the easement, by its terms, applies to ephemeral wetlands;¹⁶⁹ yet, such wetlands may be located only by a skilled biologist. Easements purchased by the FWS prior to 1976 did not reference a map identifying the location of wetlands¹⁷⁰ and maps which may have been prepared by the FWS probably were not revealed to the grantor.¹⁷¹ Failure of the United States to prove that a defendant knew affected property to be a part of the National Wildlife Refuge System has resulted in dismissal of at least one case.¹⁷²

2. *Is the easement too indefinite to be enforced against the landowner?*

The easement may be limited to the number of wetland acres listed on the easement summary since this number was used for gubernatorial consent purposes.¹⁷³ If so, the number of wetland acres subject to the easement may be impossible to locate within a larger tract. This discrepancy would call into question the integrity

168. If the landowner is not the grantor, the landowner should be aware of the recorded easement document. In addition, the FWS has notified purchasers when the acquired land is subject to a waterfowl production area easement. The letter notice, however, has not mentioned that the land is a part of the NWRs.

169. See S. SHAW & C. FREDINE, WETLANDS OF THE UNITED STATES: THEIR EXTENT AND THEIR VALUE TO WATERFOWL AND OTHER WILDLIFE 20 (FWS Circular 39, 1956).

170. See Joint Appendix at 14-18 & Brief for the United States at 18 n.13, *North Dakota v. United States*, 460 U.S. 300 (1983) (easement document covering the SW ¼ of sec. 20, T.149N., R.78W., McLean County).

171. See Memo, *supra* note 146.

172. See *United States v. Schoenborn*, CR No. 81-0145, slip op. at 11-12 (D. Minn. Mar. 26, 1982). The magistrate in *Schoenborn* stated:

The government has failed to prove beyond a reasonable doubt that defendant "knowingly" disturbed or injured property of the National Wildlife Refuge System within the meaning of 16 U.S.C. § 668dd(c) (1973).

Congress intended that a person could be found guilty of draining protected wetlands only if he intended to do the acts prohibited by § 668dd(c). Knowingly is undefined by the statute; in addition, it is not mentioned in the statute's legislative history, nor has case law established its meaning. The problem of definition is complicated by the grammatically ambiguous manner in which it is used since it is unclear precisely what elements of the offense are modified by the term. For example, a person may knowingly disturb or injure property without knowing that the property is part of the National Wildlife Refuge System.

This court construes § 668dd(c) to require that a person act with the knowledge that his act will disturb or injure property, and that he know the property affected is part of the National Wildlife Refuge System. Although current federal law lacks any general statutory rule of construction in this regard, the Supreme Court recently held that a mental state should be assigned to each element of an offense if not otherwise stated in the statute. . . . Also . . . any ambiguity in criminal laws should be resolved in favor of the defendant. . . .

Id. (citations omitted). Another court, however, observed that "[s]ubsection 668dd(c) should not be construed as requiring specific intent." *United States v. Welte*, No. C2-81-49, slip op. at 4 n.4 (D.N.D. Mar. 1, 1982), *aff'd*, 696 F.2d 999 (8th Cir. 1982).

173. See *supra* notes 148-56 and accompanying text for a discussion of the gubernatorial consent requirement.

of the easement and, at the same time, it would raise the issue of knowledge. Although defendants have unsuccessfully argued that the United States may not acquire an easement over an entire tract (a quarter section),¹⁷⁴ the issue has not been addressed in the context of the gubernatorial consent requirement.¹⁷⁵

3. *Did the FWS make misrepresentations to the grantor?*¹⁷⁶

This has been an unsuccessful defense because the United States is usually not bound by the unauthorized representations of its agents.¹⁷⁷ The United States, however, has been bound by the unauthorized representations of its agents in other types of actions.¹⁷⁸

4. *Can a landowner physically damage an incorporeal interest?*

It could be argued that a waterfowl production area easement is only an incorporeal, nonpossessory interest in property and that the prohibitions of section 668dd(c) do not apply to such interests.¹⁷⁹ Section 668dd(c) prohibits the damaging or destruction of United States property, language that could be construed to include only possessory interests of the federal government.¹⁸⁰

C. CIVIL ACTIONS CHALLENGING THE VALIDITY OF WATERFOWL PRODUCTION AREA EASEMENTS

The only reported attempt to rescind waterfowl production area easements was unsuccessful. In *Werner v. United States*

174. See, e.g., *United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974) (waterfowl production easement not void merely because it covered entire quarter section of land).

175. The issue was briefly mentioned in *United States v. Welte*. The court of appeals, however, had previously declared that § 715k-5 did not apply to waterfowl production area easements. See *United States v. North Dakota*, 650 F.2d 911, 916 (8th Cir. 1981). The Supreme Court later corrected this error. *North Dakota v. United States*, 460 U.S. 300, 310 n.13 (1983).

The United States generally ignored the issue in *Welte*. The United States Attorney argued that "all wetlands within the 160-acre tract are within the National Wildlife Refuge System. Due to water level fluctuations, this may be more or less than the 22 acres used for estimate purposes here of the 35 acres used for estimate in *Albrecht*." Brief for the United States at 14-15, *United States v. Welte*, 696 F.2d 999 (8th Cir. 1982).

176. This defense may not be available if a previous landowner was the grantor. The current landowner-defendant would not be misled or induced by the government to enter into an easement contract. Rather, the current landowner-defendant purchased the property subject to the easement. See *United States v. Schoenborn*, CR No. 81-0145, slip op. at 10 (D. Minn. Mar. 26, 1982).

177. *Werner v. United States Dep't of Interior*, 581 F.2d 168, 170 (8th Cir. 1978).

178. See, e.g., *Pence v. Brown*, 627 F.2d 872, 874 (8th Cir. 1980) (federal government can be held responsible for misrepresentations of its agents when the remedy sought is rescission).

179. See 16 U.S.C. § 668dd(c) (1982). The prohibitions in § 668dd(c) address physical acts — "disturb, injure, cut, burn, remove, destroy, or possess" — to tangible property. *Id.* The civil courts have distinguished actions involving possessory and nonpossessory interests. 3 R. POWELL, *supra* note 132, § 420.

180. See 16 U.S.C. § 668dd(c) (1982).

Department of Interior,¹⁸¹ the rescission action was jurisdictionally based on the Tucker Act.¹⁸² The court ruled that the complaint was properly dismissed because the landowners' "claim for damages is clearly incidental to their primary action for injunctive relief and rescission or reformation of the waterfowl easements."¹⁸³

Apparently, landowners have made no other attempt to rescind a waterfowl production area easement under the Federal Quiet Title Act¹⁸⁴ or any other statute. The passage of time will reduce the possibility of a civil challenge by landowners because of conveyances,¹⁸⁵ statutes of limitation,¹⁸⁶ and federal-state programs that may address the problem issues.¹⁸⁷

The State of North Dakota challenged the validity of waterfowl production area easements in the Hurricane Lake litigation.¹⁸⁸ The court, however, did not address this issue when the complaint was dismissed for procedural reasons.¹⁸⁹

VI. CONCLUSION

The waterfowl production area easement could have been a simple, uncontroversial issue. However, the administrative decision to use blanket easements without identifying the location and acreage of wetlands, the enactment of the gubernatorial consent provision, the enactment of the National Wildlife Refuge System Administration Act of 1966, and the phenomenal success of the easement acquisition program in the State of North Dakota have combined to complicate an otherwise simple issue. This Article has been an attempt to untangle and explain these complexities.

181. 581 F.2d 168 (8th cir. 1978).

182. *Werner v. United States*, 581 F.2d 168, 170 (8th Cir. 1978). See Tucker Act, ch. 359, 24 Stat. 505 (1887) (codified at 28 U.S.C. § 1346 (1982)). The court in *Werner* observed that § 1346 "has long been construed as limited to actions for money judgments and not to include suits for equitable relief." 581 F.2d at 171.

183. 581 F.2d at 171.

184. Pub. L. No. 92-562, § 3(a), 86 Stat. 1176 (1972) (codified at 28 U.S.C. § 2409a (1982)). The United States would probably assert a statute of limitations defense in any action arising under this jurisdictional authority.

185. Rescission may be available only to the original grantor. See *United States v. Schoenborn*, CR No. 81-0145, slip op. at 10 (D. Minn., Mar. 26, 1982).

186. See 28 U.S.C. § 2409(a) (1982).

187. See *supra* notes 157-61 and accompanying text for a discussion of federal-state reconciliation.

188. *North Dakota v. Buterbaugh*, 575 F. Supp. 783, 784 (D.N.D. 1983).

189. *Id.* at 785.

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Article

*861 WATERFOWL PRODUCTION AREAS: AN UPDATED STATE PERSPECTIVE

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I. INTRODUCTION

The relationship between the State of North Dakota and the U.S. Fish and Wildlife Service (FWS) concerning waterfowl production area easements has been contentious for over thirty years. The genesis of the dispute and the early controversies were explained in a previously published article. [FN1] This article will address significant federal and state developments during the intervening quarter-century, relating to waterfowl production area easements.

II. THE WATERFOWL PRODUCTION AREA EASEMENT ACQUISITION PROGRAM IN NORTH DAKOTA

A. The Status of the Easement Program in North Dakota

The origination of the waterfowl production area easement program was explained in the previous article:

The 1929 Migratory Bird Conservation Act authorized the acquisition of land for in-violate migratory bird sanctuaries. Section 7 of the Act contained an unusual accommodation to the federal-state relationship: the federal government could not acquire land unless a state consented "by law." The State of North Dakota gave its consent in 1931.

The 1934 Migratory Bird Hunting Stamp Act soon provided a funding mechanism for the refuge acquisition program. The 1934 Act authorized the sale of migratory bird hunting and conservation stamps (duck stamps) to generate *862 revenue for the newly created Migratory Bird Conservation Fund.

A 1958 amendment to the Migratory Bird Hunting Stamp Act gave the Secretary flexibility to acquire lands or interests in land for “waterfowl production areas.” Unlike lands acquired under the Migratory Bird Conservation Act, waterfowl production areas were not to be “inviolable sanctuaries.” In addition, the amendment provided that the Secretary could acquire waterfowl production areas without the state legislative consent required in the 1929 Act. [FN2]

Since 1958, the FWS has engaged in an aggressive program to purchase property for waterfowl protection area easements and acquired property interests in 1,136,332.87 acres for waterfowl production areas in North Dakota. [FN3] The initial FWS practice was to purchase an easement covering all wetlands in the entire tract of land described in the easement document. Accordingly, the number of acres covered by the easements far exceeded the number of actual wetland acres on the easement tracts. [FN4]

B. The Key Easement Language

The language of the standard form easement has caused significant problems during the past twenty years. The origins of this controversy may be traced to the acquisition methods of the FWS during the 1960s and 1970s. Prior to 1976, the FWS standard easement conveyance agreement referred to the entire tract of land, rather than the wetland area itself. [FN5] The easement initially used by the FWS contained the following key paragraph:

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including the lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or recurring due to natural causes on the above-described tract, by *863 ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter recurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above. [FN6]

In addition, the FWS prepared an administrative easement summary for each of the recorded easement conveyances. [FN7] The easement summaries provided information such as tract description, tract acreage, wetland acreage, and cost per wetland acre even though they were not part of the easement agreement itself. [FN8] Thus, while the easement agreement itself described the easement as encumbering the entire tract of land, the corresponding easement summaries actually delineated the acreage of wetlands restricted by the easement.

III. SIGNIFICANT DEVELOPMENTS CONCERNING WATERFOWL PRODUCTION AREA (WPA) EASEMENTS

Developments in the area of WPA easements have taken place in several contexts. Litigation has attempted to define the areas subject to WPA easements entered into prior to 1976 and there has been subsequent federal commentary upon this litigation. Recently adopted hunting regulations for WPA easements have complicated matters for landowners and hunters alike. The ability to pump the groundwater under WPA easements has also resulted in controversy. Finally, the state of North Dakota has entered into agreements with the U.S. **Fish** and **Wildlife** Service concerning WPA easements.

*864 A. Definition of Wetlands Covered by WPA Easements: United States v. Johansen

United States v. Johansen [FN9] is the culmination of twenty years of contention between the FWS and North Dakota's farmland owners. [FN10] In 1996, a case arose in which two brothers were charged with violating the terms of their mid-1960s easement agreement. [FN11] After two successive wet years in North Dakota, the Johansen brothers contacted the FWS with a request to drain certain wetlands on their property that were subject to a federal easement. [FN12] The FWS refused, arguing that all wetlands on the encumbered parcel were subject to the easement restrictions. [FN13] The Johansens drained the wetlands and were charged with the unauthorized drainage of a waterfowl production area, a violation of federal law governing National Wildlife Refuge Systems. [FN14]

As part of their defense at trial, the Johansens planned to introduce the original number of acres contracted for in the easement summaries, along with proof that each parcel contained wetland acreage in excess of what was contained within the easement summaries, even after the *865 wetlands were drained. [FN15] The United States sought to exclude this evidence as irrelevant in a motion in limine, arguing that the easement summaries were not part of the official recorded easement. [FN16] The federal district court held that the defense of using the acreage from the easement summaries was improper. [FN17] As a result, the Johansens entered a conditional guilty plea pending the outcome of their appeal. [FN18]

In Johansen, the Eighth Circuit was not convinced by the government's argument that its prior decisions [FN19] held that easements encompass all wetlands on the encumbered parcel. [FN20] The Johansen Court reasoned that the government's attorney had "failed to acknowledge the ramifications" of the United States Supreme Court's decision in North Dakota v. United States. [FN21] The decision stated that the United States had acquired interests in only the wetland acres described in the easement summaries. [FN22]

Part of the problem with the easement was the method employed by the FWS in recording easements; the entire tract of land that the wetlands were located on was considered to be subject to the easement language, rather than specific wetlands within the tract of land. [FN23] The United

States attorney's position was that all wetlands found on the tract were National Wildlife Refuge System (NWRS) property. [FN24] The Johansens' position was that only the acreage delineated in the easement summary was *866 NWRS property. [FN25] The government countered this argument by stating that the easement summary figures were not part of the official easement [FN26]--that they were merely used as a yardstick for price. [FN27]

The Johansen Court proceeded to examine the government's arguments by comparing them to the ruling in North Dakota. [FN28] Pursuant to the decision in North Dakota, since the easement was limited to the wetland acres, the FWS only owned the wetland acres in the easement summaries. The United States attorney argued that "[t]here is nothing inconsistent with the FWS conceding that only the wetlands within the larger tract are covered by the drainage limitations . . . and contending that all wetlands within a particular easement tract are subject to the limitations." [FN29] However, the Johansen Court pointed out that the Solicitor General's brief in North Dakota did not state that the United States has an interest in all wetlands on the parcel, [FN30] simply that the United States had only acquired easements over the summary acreage. [FN31]

The problem of creating a fluctuating easement was also addressed by the Johansen Court. [FN32] The government's argument was that any action that would inhibit the collection of water on a parcel would violate the terms of the easement. [FN33] The Johansen Court reiterated the Supreme Court's decision in North Dakota, by explicitly rejecting the FWS interpretation of North Dakota. [FN34] Again, this was in reference to the Solicitor *867 General's brief which indicated wetland restrictions only applied to the set figure of acreage specified in the easement summaries. [FN35]

Subsequently, the Johansen Court rejected the government's argument that the summary figures could only be used to compile a total of wetland acreage to be applied against the gubernatorial consent, but not actually relate to the potholes covered by the restrictions. [FN36] Accordingly, the Johansen Court held that the easements were limited to the acreage listed in the easement summaries. [FN37]

Within its decision, the Johansen Court also dispensed with the apparent contradictory ruling by the court in *United States v. Vesterso*. [FN38] The United States attorney in Johansen argued that Vesterso had rejected limiting the easement to summary acreage. [FN39] The Johansen Court addressed this argument and explained: "it is sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements." [FN40] The Johansen Court clarified that this language must be understood within the context of the case. [FN41] It further explained that the United States must prove beyond a reasonable doubt that the identifiable wetlands that were damaged, existed at the creation of the easement, and were described in the easement summary. [FN42]

The Johansen Court held that the United States acquired a property interest in the acreage designated in the easement summaries. [FN43] It concluded by reasoning that the culpability of this crime was fulfilled, because the brothers knew that the parcel was subject to an easement.

[FN44] The government had to prove that the wetlands recorded in the easement summaries were improperly drained, but the landowner could introduce evidence proving that the acreage in the easement summaries was not drained. [FN45]

*868 Johansen appeared to be a change in the standard to determine what is NWRS property that may or may not favor the landowner, but the decision was obviously subject to different interpretations. [FN46] Michael R. McEnroe, supervisor of the wetland habitat office of the U.S. Fish & Wildlife Service, argued that wetland easements continue to be enforceable after Johansen:

Wetlands easements are perpetual contracts with the landowner. Drainage rights to these tracts were owned by the people of the United States, having been purchased by the service. This case was never about private-property rights.

Our staff met with one or both of the Johansens four times in the spring of 1995 over the brothers' concerns about perceived water problems. We allowed them to drain three areas of artificially ponded water from their fields. The remaining water on the three tracts was in potholes or clearly defined wetland basins. . . .

During these four meetings, the Johansens never asked for a map or a measurement of the wetlands. Sometime during late April or May, after the meetings, the Johansens drained 52 separate wetlands--drained them to the bottom, not just tapped them to remove the excess water. When asked by our staff to restore the wetlands and fill the ditches, the Johansens responded by draining 10 more wetlands

. . . .

The case and the settlement have proved that the terms of the wetland easement are still legal and enforceable. [FN47]

One of the attorneys for the Johansens obviously disagreed with the FWS interpretation.

[Private-property rights] is exactly what the case was about.

. . . .

The 8th Circuit, in a unanimous decision, agreed with the Johansens that the only wetland acres encumbered by the easements were those "in existence" at the time of the easement purchase in 1964 and 1966. That number was less than one-half the number of acres of wetlands USFWS sought to *869 encumber in 1995. . . . The unencumbered wetlands . . . cause[d] excessive water and sheetwater to cover the tracts. That is a taking of private property without compensation by the government and is prohibited by the 5th Amendment.

Not once during the "four meetings" in March and April, 1995, between the Johansens and USFWS concerning their request to drain unencumbered wetlands did USFWS bring to their at-

tention a program--in existence for nine years between the state of North Dakota and USFWS--to map the encumbered wetlands. That program came to light only after "court-appointed attorneys" pointed it out to the service and made the request.

The first maps USFWS provided of what it believed to be the encumbered wetland acres showed every wetland on the tracts, and greatly exceeded its own records for the number of acres of wetlands purchased in 1964 and 1966.

The final agreement . . . does not provide for restoration on "all 62 wetlands" It calls for restoration of 89 acres of wetlands on the tracts instead of the 216 acres USFWS attempted to restrict. [FN48]

B. Federal Interpretation of United States v. Johansen

On October 27, 1999, North Dakota Attorney General Heidi Heitkamp requested an administrative interpretation of the Johansen case from the FWS. [FN49] The letter concerned the interpretation of the Johansen decision and questioned whether the FWS agreed that "pre-1976 easements [were] limited to the acreage amounts set forth in the Easement Summaries." [FN50] Additionally, she questioned whether a landowner could drain, "without violating the easement, wetland acreage that exceed[ed] the amount referred to [in] the Easement Summaries." [FN51]

*870 The FWS responded by indicating that Attorney General Heitkamp's interpretation of Johansen may have been incorrect. [FN52] The letter stated that the FWS would continue to enforce the provisions of the wetland easement contracts in accordance with the Johansen decision. [FN53] Further, the FWS asserted that any landowner, subject to an easement, would have to obtain its approval prior to the draining of any wetlands. [FN54]

Attorney General Heitkamp interpreted the FWS response as unhelpful and unresponsive. [FN55] She also expressed surprise about the FWS position because the Johansen holding appeared to be unambiguous. [FN56] The Attorney General believed that the FWS would welcome any opportunity to clarify the decision and discuss its proper interpretation. [FN57]

On January 7, 2000, John Schneider, the North Dakota United States Attorney responded to correspondence from the North Dakota Attorney General's office by stating that "our interpretation of the Johansen decision . . . [is that] the wetlands easements are legal, binding, and enforceable agreements, but are limited to the 'Summary Acreage.'" [FN58] However, Schneider noted that much of the Johansen case depended on the individual facts relating to the wetland easements on the Johansen property, and that the case reaffirmed that drainage of a covered wetland was a violation of the law. [FN59] Further, he stated that a landowner should contact the FWS before doing any draining or taking any action that could harm the wetland under the easement. [FN60] Schneider *871 specifically refused to answer any hypothetical questions relating to easements, acreage, and draining, based upon the rationale that each case should be viewed on a case-by-case basis.

Accordingly, although the courts have seemed to substantially clarify the FWS's property interest in waterfowl production area easements, it is still possible that future disputes may arise between the FWS and landowners about this issue.

C. Hunting Regulations on Waterfowl Production Area Easements

The National **Wildlife** Refuge Administration Act specifically provides that waterfowl production areas are part of the National **Wildlife** Refuge System:

For the purpose of consolidating the authorities relating to the various categories of areas that are administered by the Secretary for the conservation of **fish** and **wildlife**, including species that are threatened with extinction, all lands, waters, and interests therein administered by the Secretary as **wildlife** refuges, areas for the protection and conservation of **fish** and **wildlife** that are threatened with extinction, **wildlife** ranges, game ranges, **wildlife** management areas, or waterfowl production areas are hereby designated as the "National **Wildlife** Refuge System" [FN61] The terms in the statute are further defined by regulations adopted by the FWS:

"National wildlife refuge" means any area of the National Wildlife Refuge System, except coordination areas.

"National **Wildlife** Refuge System" means all lands, waters, and interests therein administered by the U.S. **Fish** and **Wildlife** Service as **wildlife** refuges, **wildlife** ranges, **wildlife** management areas, waterfowl production areas, and other areas for the protection and conservation of **fish** and **wildlife** including those that are threatened with extinction.

. . . .

"Waterfowl production area" means any wetland or pothole area acquired pursuant to section 4(c) of the amended Migratory Bird Hunting Stamp Act (72 Stat. 487; 16 U.S.C. 718(c)), owned or controlled by the United States and *872 administered by the U.S. **Fish** and **Wildlife** Service as a part of the National **Wildlife** Refuge System. [FN62]

Therefore, by statute and regulation, a wetland subject to a waterfowl production area easement is a national wildlife refuge. Hunting on national wildlife refuges is strictly governed by the National Wildlife Refuge Administration Act and implementing regulations. For example, archers may not possess drug-tipped arrows on national wildlife refuges. [FN63] The use of nails, wire, screws or bolts to attach a stand to a tree, or hunting from a tree into which a metal object has been driven to support a hunter is prohibited on wildlife refuge areas. [FN64] Further, hunters on waterfowl production areas may only use or possess nontoxic shot. [FN65]

The laws governing hunting on waterfowl production area easements present a substantial risk to hunters who are unaware that a wetland is a waterfowl production area because the easements and the wetlands are unmarked. [FN66] The landowner-hunter may also be at risk--even if hunting

with a map that illustrates the delineated wetlands on the tract.

D. The Appropriation of Groundwater Under WPA Easements

In the 1990s, the FWS began to assert that the pumping of groundwater for irrigation purposes may violate the “not draining or permitting the draining” language in the easement document. Examples of this policy were revealed by the FWS's actions related to several water permits.

The FWS's actions concerning Water Permit No. 4977 illustrate the agency's evolving position that the easement restricted the appropriation of groundwater under the entire tract covered by the easement. [FN67] The FWS purchased an easement over a tract in Kidder County, North Dakota, in 1966. The easement contained the standard language quoted above. [FN68]

*873 The landowners filed an application for a water permit with the state engineer on January 23, 1996. The application requested approval to annually pump 202.5 acre-feet of ground water annually, at a pumping rate of 1,000 gallons per minute, to irrigate 135 acres. The requested point of diversion (i.e., the location of the well) and the land to be irrigated were on the tract covered by the easement.

State law requires the applicant to notify all landowners within a one-mile radius of the proposed well. [FN69] The FWS subsequently wrote to David Sprynczynatyk, North Dakota State Engineer, requesting “that a determination be made of the impacts of these proposals upon the Service's interests before any action is taken on the applications.” [FN70]

Sprynczynatyk granted the application on October 10, 1996. The FWS promptly wrote a second letter to the state engineer, requesting that the state engineer reconsider his decision. The letter explained in part:

In our April 3 letter, we advised that the proposed place of use was under easement to the **Fish and Wildlife** Service. I am sure that you are aware that under the Service's Small Wetlands Acquisition Program, the landowner agrees and is paid to protect the wetlands under easement from being drained, burned, filled or leveled

Parts of the N 1/2 of Section 12 are under easement, in addition to the S 1/2. The office memo from Scott Parkin documents the evaluation of existing data which leads to the conclusion that a well pumping 50 acre-feet at a rate of 250 gpm [gallons per minute] would cause a drawdown of the water table of about 2.4 feet at a radial distance of 660 feet. Seasonal decline in the level of a wetland within the same radius is estimated to be less than 5 inches. Five inches of water is significant, since temporary wetlands have an average depth of 10 inches. This projected drawdown will cause the wetlands to dry up much more quickly, given the average evaporation of over 7 inches annually in this area. Since the approved permit allows the withdrawal of four times this amount, the affect on protected wetlands is obviously much greater.

....

*874 Based on the above information, I request that you reconsider your decision to approve Conditional Water Permit No. 4977. [FN71]

The state engineer responded by explaining that the “drawdown of the water table due to withdrawal of ground water would not have an impact on temporary wetlands” and subsequently denied the FWS request. [FN72]

In a letter, the FWS concurrently warned the permit holders that the agency was considering legal proceedings against them if they developed their irrigation project. The letter stated in part:

I am writing to explain why the Service is concerned about your proposed project and to make sure that you understand that if you proceed, the United States may take you to court for violating the terms of the waterfowl protection easement on your property.

The conveyance of easement for waterfowl management rights which you signed in 1966 states that you “will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water” On page 1 of the North Dakota *875 State Water Commission Office Memo are statements that the proposed irrigation overlies the Marstonmoor Plain aquifer, and identifying this as an unconfined aquifer. That means that pumping groundwater from this aquifer has an effect on surface water bodies which are connected to it. In the case of your project, that means that as water is pumped by a well, water in shallow wetlands overlying this aquifer will infiltrate, or leak into the ground, to make up for the water that is being removed by pumping. . . .

The **Fish and Wildlife** Service considers drainage to include groundwater pumping causing the water level in a wetland to decline. Therefore, you may be cited for violating the terms of your easement if you construct and pump the wells covered by conditional water permit No. 4977. [FN73]

The FWS raised further objections to a second application from Kidder County the same year. The landowner filed an application on November 12, 1996, for 219 acre-feet of groundwater to irrigate 125 acres. [FN74]

The FWS protested the application, contending that the withdrawal of groundwater under the easement would harm the National Wildlife Refuge System:

The Service is concerned about the impacts of this proposed diversion, as the SE 1/4 Section 21, T140N R71W, and adjacent land, is covered by a wetland easement and is part of the National Wildlife Refuge System (System). Approximately 2 miles away is a tract of land that was withdrawn from the public domain on August 14, 1962 The easement, other easements in the area, and the withdrawn land, are subject to the provisions of 16 U.S.C. section 668dd(c), which prohibits persons from knowingly disturbing or injuring

property of the United States in any area of the System. A seasonal type III wetland is located in Section 21, and may be impacted by groundwater pumping. If the wetland area is connected to the aquifers, then water table drawdown caused by well pumping would aggravate the effects of annual evaporation losses and climatic cycles. If pumping adversely affects the wetland area, *876 then the proposed appropriation would not be in the public interest because of (1) the effect on fish and game resources; (2) harm to the Service and its real property interests; and (3) the inability of the applicant to complete the appropriation if it would violate the terms of the wetland easement.

....

In the event you determine that there would be no adverse impact to the Service's interests and you issue a conditional water permit, please interpret this letter as a request to you to condition that permit to prevent violation of the Service's easement and to protect the public interest. The applicant should be required to install a meter on each well and provide water use information to the Service on a weekly basis during the irrigation season. The conditions should include the right of the Service to monitor the effect of groundwater pumping on the wetlands by installing piezometers and/or other measuring equipment, and require that if the easement interest is affected, pumping must be curtailed or halted to prevent further injury. [FN75]

The FWS protest triggered a response to the state engineer from the applicant's attorney, who defended the Johansens in *United States v. Johansen*. The attorney argued:

The wetland easements held by the government are identical to the easements involved in a recent Eighth Circuit Court of Appeals decision in *U.S. v. Johansen*. The Court held that wetland easements "are limited to the acreage provided in the Easement Summaries." The Court ruled that the government must prove that "identifiable, covered wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged and that the defendant knew that the parcel was subject to a federal easement."

The government's interest in each of the tracts is limited to the number of wetland acres included in the Easement Summary and in existence at the time of the easement conveyance. . . .

It is speculative at best that subsurface waters are subject to the limitations imposed by the easement. The easements only discuss surface waters. N.D.C.C. 61-01-01 clearly distinguishes*877 between the two and states that subsurface waters are public and subject to appropriation for beneficial use pursuant to the permit process.

For someone to be in violation of the law and easement obligations, he would have to drain, fill, level or burn covered wetlands on the tract. It would be a difficult position for the government to maintain that the pumping of subsurface water drained a particular wetland. . . .

....

We believe that the proposed irrigation wells will not impact the government's interest in their

wetland easements. Under the terms of the easement, "It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors . . . shall in any way be restricted from carrying on farming practices . . . and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above." [FN76]

The North Dakota State Engineer's staff sidestepped the legal issues raised by the FWS and the applicant's attorney. In a thorough analysis of the application, the staff hydrologist commented:

Regarding potential damage to "real property interests of the U.S. **Fish and Wildlife Service**," the nature of those rights and interests is stipulated by the terms of the easement. Because the easement is, in some respects, permissive of agricultural activities, and because the easement contains no explicit reference to prohibition of irrigation or pumping, the exact nature of the real property rights of the U.S. **Fish and Wildlife Service** with reference to the applications of water permit & number;5070 is not clear, and according to the letter of Donald Becker (dated April 22, 1997), attorney of the applicant, there appears to be some area of possible legal dispute. It is not appropriate that the State Engineer should make a legal determination over the rights and interests contained in the easement, or that disputes over such rights and interests, if they exist, should be decided by a prohibition of a water permit. These matters should be resolved by the U.S. **Fish and Wildlife Service** and the landowners. [FN77]

*878 The North Dakota State Engineer approved the application and issued Conditional Water Permit No. 5070.

The FWS explained another policy position in a letter objecting to the granting of Conditional Permit No. 5073. During an exchange of correspondence, the state engineer asked for a map delineating the wetlands on an easement tract. The FWS responded:

In your July 3, 1997, letter, the Service was asked to provide the location and size of the wetlands that we are concerned about. The Service is currently having the Bismarck office prepare a wetland easement map for your office, and you should have it within a few days. We do not typically provide sizes of these wetlands as they are subject to natural fluctuations with climate, and size is relatively meaningless at any given point in time. [FN78] A number of other applications for water permits have also triggered similar objections from the FWS. [FN79]

E. Agreements Between North Dakota and the U.S. **Fish and Wildlife Service**

In an attempt to resolve evolving conflict, the North Dakota and FWS representatives entered negotiations in 1985 concerning waterfowl production areas and other issues. The initial agreement, approved November 1, 1985, established the terms and conditions for the governor's approval of the North Dakota Migratory Bird Habitat Acquisition Plan.

After negotiating two additional years, the parties signed agreements addressing maintenance of watercourses, delineation or identification of wetlands located on easement tracts, weed control, crop depredation, emergency haying, and other matters. The 1985 and 1987 agreements were renewed in 1990 and 1993.

When the agreements were renewed in 1993 by Governor Edward T. Schafer and Ralph O. Morgenweck, regional director of the FWS, the parties addressed the following issues:

1. Coordination and communication between North Dakota and the FWS;
2. Resolution of disputes and conflicts through mediation;
3. Exercise of state law by the state affecting fee and easement interests of the FWS;
- *879 4. Easements acquired under the small wetlands acquisition program;
5. Identification of wetlands protected by pre-1976 wetland easements taken under the small wetlands acquisition programs;
6. Enhancement of upland habitat around wetlands under easement;
7. Revenue sharing payments by the service to political subdivisions;
8. Depredation control;
9. Weed control;
10. Emergency haying or grazing on FWS lands;
11. Wetland classification;
12. Water levels and river management on national wildlife refuges on North Dakota rivers.

[FN80]

Although the agreements were helpful to address certain issues that arose after 1985, the governor and FWS representatives have not been able to negotiate an extension of the agreements. Accordingly, they expired at the end of 1996. [FN81]

V. CONCLUSION

The relationship between the State of North Dakota and the U.S. **Fish and Wildlife Service** continues to be strained, in part because of the FWS's continued expansion of control over waterfowl production area easements.

When the landowners signed the easement documents several decades ago, the FWS paid a specific amount related to a specific number of acres per tract to prevent “the draining . . . of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or recurring due to natural causes . . .” [FN82] The FWS also assured the landowners:

It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and *880 cropping wetlands when the same are dry of natural causes, and they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above. [FN83]

However, the FWS--through a series of statutes, regulations, and administrative actions--has asserted that the easements are now national wildlife refuges within the National Wildlife Refuge System, that the easements included all land within the described tract, and that the easements prevent normal farming activities such as irrigation. North Dakota has responded by supporting the defendants in Johansen and by resisting FWS efforts to expand control over waterfowl production area easements.

Based on the events of the past four decades, it seems the conflicts between the state and FWS concerning waterfowl production areas will not soon be resolved.

[FNal]. B.A., Concordia College, 1968; J.D., University of North Dakota, 1973; member of the North Dakota Bar; currently the North Dakota State Health Officer.

[FNaa1]. B.A., Concordia College, 1995; J.D., University of North Dakota, 1999; member of the North Dakota Bar; currently a North Dakota assistant attorney general.

[FN1]. See Murray G. **Sagsveen**, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. Rev. 659 (1984). Much of the dispute centers around the fact that waterfowl production area easements are part of the national refuge system; thus, they have the same protections as any officially designated waterfowl refuge. See 16 U.S.C. § 668dd(a)(1) (Supp. IV 1998). The primary issue, as shall be illustrated, concerns easement wetlands that are often poorly identified and are continually expanding or contracting. See *id.*

[FN2]. **Sagsveen**, *supra* note 1, at 659-60.

[FN3]. See 1999 U.S. **Fish & Wildlife Service Ann. Rep. of Lands Under Control of the U.S. Fish & Wildlife Service** 29. There are roughly 45,250,560 acres of land in North Dakota. See U.S. Census Bureau, U.S. Dep't of Commerce, *Statistical Abstract of the United States* 240 (119th ed. 1999).

[FN4]. See Sagsveen, supra note 1, at 684-87; see also Paul D. Odegaard, Case Comment, Waters and Water Courses-Game: What Does the Future Hold for Eleven Thousand Federal Wetland Easements in North Dakota? United States v. Johansen, 93 F.3d 459 (8th Cir. 1996), 73 N.D. L. Rev. 345 (1997).

[FN5]. United States v. Johansen, 93 F.3d 459, 463 (8th Cir. 1996).

[FN6]. Sagsveen, supra note 1, at 667 n.42 (quoting Jurisdictional Statement at 7a, North Dakota v. United States, 460 U.S. 300 (1983)).

[FN7]. See Johansen, 93 F.3d at 462.

[FN8]. See *id.*

[FN9]. 93 F.3d 459 (8th Cir. 1996).

[FN10]. See generally United States v. Schoenborn, 860 F.2d 1448 (8th Cir. 1988); United States v. Vesterso, 828 F.2d 1234 (8th Cir. 1987); United States v. Seest, 631 F.2d 107 (8th Cir. 1980); United States v. Welte, 635 F. Supp. 388 (D.N.D. 1982).

[FN11]. See Johansen, 93 F.3d at 462.

[FN12]. See *id.* at 460. According to the easement summaries, the wetland acres purchased were 33 acres in two separate tracts, labeled 21X and 24X, and 35 acres in tract 30X. See *id.* at 462. North Dakota and the FWS had an agreement concerning the easements at the time. See North Dakota and U.S. **Fish and Wildlife** Service Agreements, signed on July 27, 1993, by Ed Schafer, Governor of North Dakota, and Ralph Morgenweck, Regional Director, U.S. **Fish & Wildlife** Service. In Section V. Part B., Identification of Wetlands, the document states:

It is agreed by North Dakota and the Service that the Service will identify wetlands protected by pre-1976 wetland easements on a case by case basis, if requested to do so by the landowner, a local entity of government, or the Governor. It is further agreed that if requests by individuals or the Governor exceed the administrative capability of the Service, the Service will provide for identification of wetlands protected by wetland easements in accordance with a priority based on need and availability of funds.

Id.; see also *infra* Part III.E.

[FN13]. See Johansen, 93 F.3d at 460. The letter from the FWS stated in part:

Your area has been hard hit in the last two years This particular tract of land has a high number of basins on it. This, I'm sure, combined with the high rain amounts has caused you some difficulty farming in the past year ... The only provisions of the easement that allow for drainage are when [there] are safety or health concerns involved. Another way of saying this is unless your roads or farmstead is in danger of being flooded, no drainage can take place.

Id. at 462 (quoting Letter from Hoistad to Kerry Johansen (Mar. 17, 1995) (Ex. D-121)). It does not seem that the FWS had followed the spirit of the document, which was to provide a mechanism

by which wetlands protected prior to 1976 would be identified to provide certainty and clarity. [FN14]. See *id.* at 462. The Johansens alleged that in 1995, there were 83.8, 64.9, and 67.1 wetland acres on tracts 21X, 24X, and 30X, respectively. See *id.* at 462 n.3.

[FN15]. See *id.* at 462.

[FN16]. See *id.*

[FN17]. See *id.*

[FN18]. See *id.*

[FN19]. See, e.g., United States v. Vesterso, 828 F.2d 1234, 1241-42 (8th Cir. 1987).

[FN20]. See United States v. Johansen, 93 F.3d 459, 462 (8th Cir. 1996).

[FN21]. *Id.* at 463 (citing North Dakota v. United States, 460 U.S. 300 (1983)). The United States filed suit against North Dakota because the North Dakota legislature had enacted a statute that effectively restricted the United States' ability to acquire wetland easements in North Dakota. See North Dakota, 460 U.S. 300; see also Act of Apr. 21, 1977, ch. 204, § 2, 1977 N.D. Laws 461, 463 (codified as amended N.D. Cent. Code § 20.1-02-18.1 (Supp. 1999)). The law requires that the governor submit proposed wetlands acquisitions for approval by the board of county commissioners of the county where the land is located. See N.D. Cent. Code § 20.1-02-18.1. If the county does not recommend the acquisition, the governor may not recommend it. See Act of Apr. 21, 1977, ch. 204, § 3, 1977 N.D. Laws 461, 463 (codified as amended at N.D. Cent. Code § 20.1-02-18.2 (1991) (authorizing the landowner to negotiate the time period of the easement, to restrict the easement by legal description to land, wetland, or water, and to drain any after-expanded wetland or water area in excess of the legal description)); see also Act of Mar. 31, 1977, ch. 426, § 1, 1977 N.D. Laws 923 (codified as amended at N.D. Cent. Code § 47-05-02.1 (1999) (restricting all easements to 99 years)). Note that in *Johansen*, the Eighth Circuit did not mention *Vesterso* and its interpretation of North Dakota v. United States, 460 U.S. 300 (1983). The Eighth Circuit made reference to and gave much weight to the representations made by the United States in North Dakota, that the United States had in fact acquired easements for 4,788,300 acres. See *Johansen*, 93 F.3d at 464-65 (citing North Dakota, 460 U.S. 300, 311 n.14 (1983)).

[FN22]. See *id.*

[FN23]. See *id.* at 463.

[FN24]. See *id.*

[FN25]. See *id.* Therefore, the Johansens argued that the easement did not cover every wetland that might develop on the larger tract contained within the easement description. See *id.*

[FN26]. See *id.* at 464. The Johansen Court cited to Schulz v. Hauck, 312 N.W.2d 360, 363 (N.D. 1981), for the proposition that unrecorded, extrinsic evidence may be permissible to interpret ambiguous language. The issue of whether the terms of the easement are ambiguous is a question of law. See, e.g., Atlas Ready-Mix v. White Props., Inc., 306 N.W.2d 212, 220 (N.D. 1981).

[FN27]. See Johansen, 93 F.3d at 464.

[FN28]. See *id.* at 464-65 (citing North Dakota v. United States, 460 U.S. 300 (1983)).

[FN29]. *Id.* at 465. The Johansen Court reasoned that the easement might be acceptable because the easement described entire tracts of land, relying on Eighth Circuit precedent, which bolstered the government's position. See *id.* at 464.

[FN30]. See *id.* at 465.

[FN31]. See *id.*

[FN32]. See *id.* at 465-66. The Johansen Court acknowledged that, although troublesome, one might be able to interpret the Court's decision in North Dakota to allow the easement restrictions to cover all of the wetlands on the encumbered tract. See Johansen, 93 F.3d at 466. Compare *id.* with Odegaard, *supra* note 4, at 368-69 (reasoning that this narrow interpretation may be inconsistent with the Supreme Court in North Dakota because of the Court's ruling that North Dakota's law allowing drainage of after-expanded wetlands was hostile to federal law).

[FN33]. See Johansen, 93 F.3d at 465.

[FN34]. See *id.* at 465, 466. The Johansen Court further reasoned that this could complicate the gubernatorial consent provision of the authorizing statute. See *id.* The obvious problem with the fluctuating easement would be the additional acreage component. See *id.* at 465. The gubernatorial consents only authorize approximately 1.5 million acres of wetlands easements. See *id.* Therefore, the fluctuating easement would require constant attention to the amount of acres actually under water. See *id.* at 466; see also *infra* Part III.E.

[FN35]. See Johansen, 93 F.3d at 466.

[FN36]. See *id.* The Johansen Court noted that there must be a correlation between the acreage figures applied against the consent and the actual restricted acreage. See *id.* at 465, 466.

[FN37]. See *id.* at 468.

[FN38]. 828 F.2d 1234 (8th Cir. 1987).

[FN39]. See United States v. Johansen, 93 F.3d 459, 467 (8th Cir. 1996).

[FN40]. See *id.*

[FN41]. See *id.* at 467 (citing United States v. Vesterso, 828 F.2d 1234, 1242 (8th Cir. 1987)). The context in which the statement was made was to reject the defendant's allegation that the federal government had not complied with the gubernatorial limitation by identifying all wetlands covered by the federal easements.

[FN42]. See *id.*

[FN43]. See *id.* at 468.

[FN44]. See *id.*

[FN45]. See *id.* This order should require the FWS service to delineate the wetlands, if it is to prove that NWRS property was injured.

This case was remanded to the district court, and the parties settled out of court. See Stipulation for Settlement, Johansen (Aug. 19, 1997) (No. C3-95-62) (stipulating that once the boundaries of the original wetland tracts are delineated by the FWS, the Johansens will plug and fill the tracts and all criminal charges will be dropped). The Johansen brothers agreed to plug ditches into and out of the drained wetlands, and the federal government agreed to dismiss the criminal charges. See Letter from Michael D. Nelson, Attorney for Kerry Johansen, to Hon. Edward T. Schafer, Governor, State of North Dakota (Aug. 21, 1997) (on file with authors).

[FN46]. See, e.g., Michael R. McEnroe, *Feds No Loser in Wetlands Case*, Bismarck Trib. (Bismarck, N.D.), Sept. 8, 1997, at 4A.

[FN47]. *Id.*

[FN48]. Donald R. Becker, *Property Rights Did Prevail in Wetlands Case*, Bismarck Trib. (Bismarck, N.D.), Sept. 14, 1997, at 3C.

[FN49]. See Letter from Heidi Heitkamp, North Dakota Attorney General, to Ralph Morgenweck, Regional Director, U.S. **Fish & Wildlife** Service (Oct. 27, 1999) (on file with authors).

[FN50]. *Id.*

[FN51]. *Id.* The Attorney General provided a hypothetical to aid any FWS interpretation which provided:

Assume that an Easement Summary contains an acreage amount of 30 acres and that during a wet cycle the lone wetland on the parcel expands to 40 acres. Is it the FWS's position that the landowner is allowed to drain down that wetland so that it contains no more than 30 acres? Or

is it the FWS's position that the landowner can't do anything to reduce the size of the wetland no matter how large it may become?

Id.

[FN52]. See Letter from Ralph Morgenweck, Regional Director, U.S. **Fish & Wildlife** Service, to Heidi Heitkamp, North Dakota Attorney General (Nov. 19, 1999) (on file with authors) (“This case received much media attention and, as a result, there seems to be many interpretations about what the final decision said.”).

[FN53]. See id.

[FN54]. See id. Specifically, Morgenweck wrote that “[u]nder the Service's [FWS] easement contracts and the provisions of the National Wildlife Administration Act, no one may do any draining ... without prior consultation and the approval of the Service. These activities are normally allowed for limited circumstances and then only through temporary permits issued by the Service.” Id. The FWS did not respond to the Attorney General's hypothetical. See id.; see also Letter from Heidi Heitkamp, supra note 49.

[FN55]. See Letter from Heidi Heitkamp, North Dakota Attorney General, to Ralph Morgenweck, Regional Director, U.S. **Fish & Wildlife** Service (Dec. 6, 1999) (on file with authors) (“[Y]ou [Morgenweck] did not respond to most of my letter and gave the rather unhelpful reply that the FWS enforces its easements ‘in accordance with that decision.’ That is good to know, but my question was, and still is, how does the FWS interpret Johansen?”).

[FN56]. See id.

[FN57]. See id. The Attorney General repeated the hypothetical situation in the first letter. See id. (quoting Letter from Heidi Heitkamp, supra note 49).

[FN58]. Letter from John Schneider, North Dakota United States Attorney, to Heidi Heitkamp, North Dakota Attorney General (Jan. 7, 2000) (on file with authors).

[FN59]. See id.; see also Letter from Ralph Morgenweck, Regional Director, U.S. **Fish & Wildlife** Service, to Heidi Heitkamp, North Dakota Attorney General (Jan. 25, 2000) (on file with authors) (reiterating the statements made by Schneider).

[FN60]. See Letter from John Schneider, supra note 58. Schneider suggested that if a dispute arose, the parties should mediate the dispute and re-institute the North Dakota and U.S. **Fish and Wildlife** Service Agreements pamphlet of 1993. See id.; see also infra Part III.E.

[FN61]. 16 U.S.C. § 668dd(a)(1) (Supp. IV 1998).

[FN62]. 50 C.F.R. § 25.12 (1999). The regulations were originally adopted in 1976. See 41 Fed. Reg. 9166-9167 (March 23 1976).

[FN63]. See 50 C.F.R. § 32.2(g) (1999).

[FN64]. See id. § 32.2(i).

[FN65]. See id. § 32.2(k).

[FN66]. The statute provides in part: “No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States, including natural growth, in any area of the System; or take or possess any fish, bird, mammal, or other wild vertebrate or invertebrate animals or part or nest or egg thereof within any such area” 16 U.S.C. § 668dd(c) (Supp. IV 1998). “Any person who violates or fails to comply with any of the provisions of this Act or any regulations issued thereunder shall be fined under Title 18, or imprisoned for not more than 1 year, or both.” Id. § 668dd(f)(1).

[FN67]. The water permit files are maintained in the office of the North Dakota State Engineer, Bismarck, North Dakota, in accordance with section 61-04-02 of the North Dakota Century Code.

[FN68]. See supra Part II.B.

[FN69]. See N.D. Cent. Code § 61-04-05 (Supp. 1999).

[FN70]. Letter from Cheryl C. Williss, Chief, Division of Water Resources, Mountain-Prairie Region, **Fish and Wildlife** Service, U.S. Department of the Interior, to David A. Sprynczynatyk, North Dakota State Engineer (Apr. 3, 1996) (on file with authors).

[FN71]. Letter from Cheryl C. Williss, Chief, Division of Water Resources, Mountain-Prairie Region, U.S. **Fish & Wildlife** Service, U.S. Department of the Interior, to David A. Sprynczynatyk, North Dakota State Engineer (Oct. 24, 1996) (on file with authors). The letter provided some historical background to explain the FWS actions:

North Dakota is one of six states comprising the Prairie Pothole Region, which contains thousands of depressions that fill with water and become wetlands ranging in size from small puddles to hundreds of acres. This area provides the nesting and rearing habitat for millions of migratory waterfowl and other water-dependant migratory birds. Scientists around the world recognize this area as the most important breeding ground for waterfowl in the United States. The relatively recent case of North Dakota v. United States, 460 U.S. 300 (1963), stated at 310 that “[t]he protection of migratory birds has long been recognized as a ‘national interest of very nearly the first magnitude.’”, citing Missouri v. Holland, 252 U.S. 416 (1920).

In addition to supporting habitat for wildlife, wetlands serve a variety of ecological functions and provide thousands of hours of recreational pursuits, such as hunting, bird watching, boating and wildlife observation. These benefits are enormously important to the public.

Between the drought years of 1989 through 1992, wetland habitat conditions in this area were so depleted that there was national concern regarding whether or not waterfowl populations

could survive and if some species, such as the canvasback duck, would become endangered. Permitting additional groundwater development which will aggravate the effects of climatic conditions could be devastating to waterfowl populations.

[FN72]. Letter from David A. Sprynczynatyk, North Dakota State Engineer, to Cheryl C. Williss, Chief, Division of Water Resources, Mountain-Prairie Region, U.S. **Fish & Wildlife** Service, U.S. Department of the Interior (Dec. 24, 1996) (on file with authors).

[FN73]. Letter from Cheryl C. Williss, Chief, Division of Water Resources, Mountain-Prairie Region, U.S. **Fish and Wildlife** Service, U.S. Department of the Interior, to Lorenz and Opal Rohde, Applicants for a conditional water permit (Nov. 4, 1996) (on file with authors).

[FN74]. The water permit files are maintained in the office of the North Dakota State Engineer, Bismarck, North Dakota, in accordance with section 61-04-02 of the North Dakota Century Code.

[FN75]. Letter from Cheryl C. Williss, Chief, Division of Water Resources, Mountain-Prairie Region, U.S. **Fish & Wildlife** Service, U.S. Department of the Interior, to David A. Sprynczynatyk, North Dakota State Engineer (Feb. 14, 1997) (on file with authors).

[FN76]. Letter from Donald R. Becker, Attorney, to David A. Sprynczynatyk, North Dakota State Engineer (Apr. 22, 1997) (on file with authors).

[FN77]. Memorandum from Scott Parkin, Hydrologist, North Dakota State Water Commission, to David A. Sprynczynatyk, North Dakota State Engineer and Milton O. Lindvig, Director, Water Appropriation Division (Apr. 3, 1998) (on file with authors).

[FN78]. Letter from Ralph Morgenweck, Regional Director, U.S. **Fish & Wildlife** Service, to David A. Sprynczynatyk, North Dakota State Engineer (Sept. 3, 1997) (on file with authors).

[FN79]. See, e.g., Water Permit No. 5297 and Water Permit No. 5147.

[FN80]. See North Dakota and U.S. **Fish & Wildlife** Service Agreements (July 1993).

[FN81]. Interview with Robert Harms, attorney for Edward T. Schafer, Governor, State of North Dakota (Oct. 9, 2000).

[FN82]. See supra Part II.B.

[FN83]. See supra Part II.B.

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North Dakota Chapter

THE WILDLIFE SOCIETY

P.O. BOX 1442 • BISMARCK, ND 58502



**TESTIMONY OF MICHAEL R. McENROE
NORTH DAKOTA CHAPTER, THE WILDLIFE SOCIETY
HOUSE BILL 1399
HOUSE AGRICULTURE COMMITTEE
FEBRUARY 8, 2013**

Chairman Johnson and members of House Agriculture Committee:


For the record I am Mike McEnroe, representing the North Dakota Chapter of The Wildlife Society, a professional organization representing over 350 wildlife biologists, land managers, law enforcement officers, university professors and researchers in the natural resource field. I am here today to oppose House Bill 1399.

HB 1399 directs the Attorney General to bring legal action against the U.S. Fish and Wildlife Service to delineate and properly describe every wetland easement that has been acquired in North Dakota.

Since 1976, every easement purchased from a willing seller landowner has been provided with a map of the easement. In fact, the landowner signs the map when he/she accepts the easement offer. The map is filed with the easement at the county courthouse.

On easements acquired prior to 1976, admittedly most of the easements, the Service provides easement maps to landowners when requested. The Service also provides maps to interested third parties for projects such roads, wind farms, oil and gas development. The Service has been providing such maps to landowners and interested parties since the mid-1990s.

It seems to make little sense to sue the Fish and Wildlife Service to make them provide a service they have been providing for the last 15-20 years,



or longer in the case of post-1976 easements. The Chapter urges a Do Not Pass on HB 1399.

Thank you, and I will try answer any questions from the Committee.





Your voice for wheat and barley. www.ndgga.com

North Dakota Grain Growers Association Testimony on HB 1399 Senate Natural Resources Committee March 7, 2013

Chairman Lyson, members of the Senate Natural Resources Committee, for the record my name is Brad Thykeson, President of the North Dakota Grain Growers Association. I appear before you today in support of HB 1399.

HB 1399 directs the Attorney General to look into the feasibility of bringing a lawsuit to force the United States Fish and Wildlife Service (USFWS) to delineate and properly describe ALL of the USFWS wetland easements in North Dakota. Up until now the agency has refused or has improperly defined its purported easement holdings in the state to the detriment of landowners, political subdivisions, as well as the agriculture and energy industries in our state. Such action/inaction being taken by USFWS is an economic inhibitor for the state of North Dakota.

Chairman Lyson, Members of the Senate Natural Resources Committee, you have heard many times the North Dakota Grain Growers Association expound on the need for orderly water management in the state. This is a critical component for the continued success in our state's economy. Policies and procedures adopted by USFWS in regards to wetland easements stand in the way of that success. Time and again orderly water management as well as orderly energy development has been stymied by USFWS policies and procedures in the definition of purported easement boundaries. It seems that easement boundary lines and definitions vary like the North Dakota weather which confounds management efforts at every turn. HB 1399 is an effort to bring common sense to USFWS policies and procedures by forcing an agency to define its holdings in the state. In any other land transaction that would be good business; it's time for North Dakota to force the USFWS to follow this common sense approach.

I would like to refer the Committee to the United States Fish and Wildlife Service easement maps which I have handed out. Each dot on the map represents a conservation easement in the state of North Dakota. Do you know the size of each of these tracts? That's alright because neither does the United States Fish and Wildlife Service, nor do they intend on defining that acreage unless forced to do so.

NDGGA provides a voice for wheat and barley producers on domestic policy issues – such as crop insurance, disaster assistance and the Farm Bill – while serving as a source for agronomic and crop marketing education for its members.

Note the USFWS caveat on the bottom right hand corner of their map which says “the USFWS makes no claim as to the accuracy or completeness of the displayed information.”

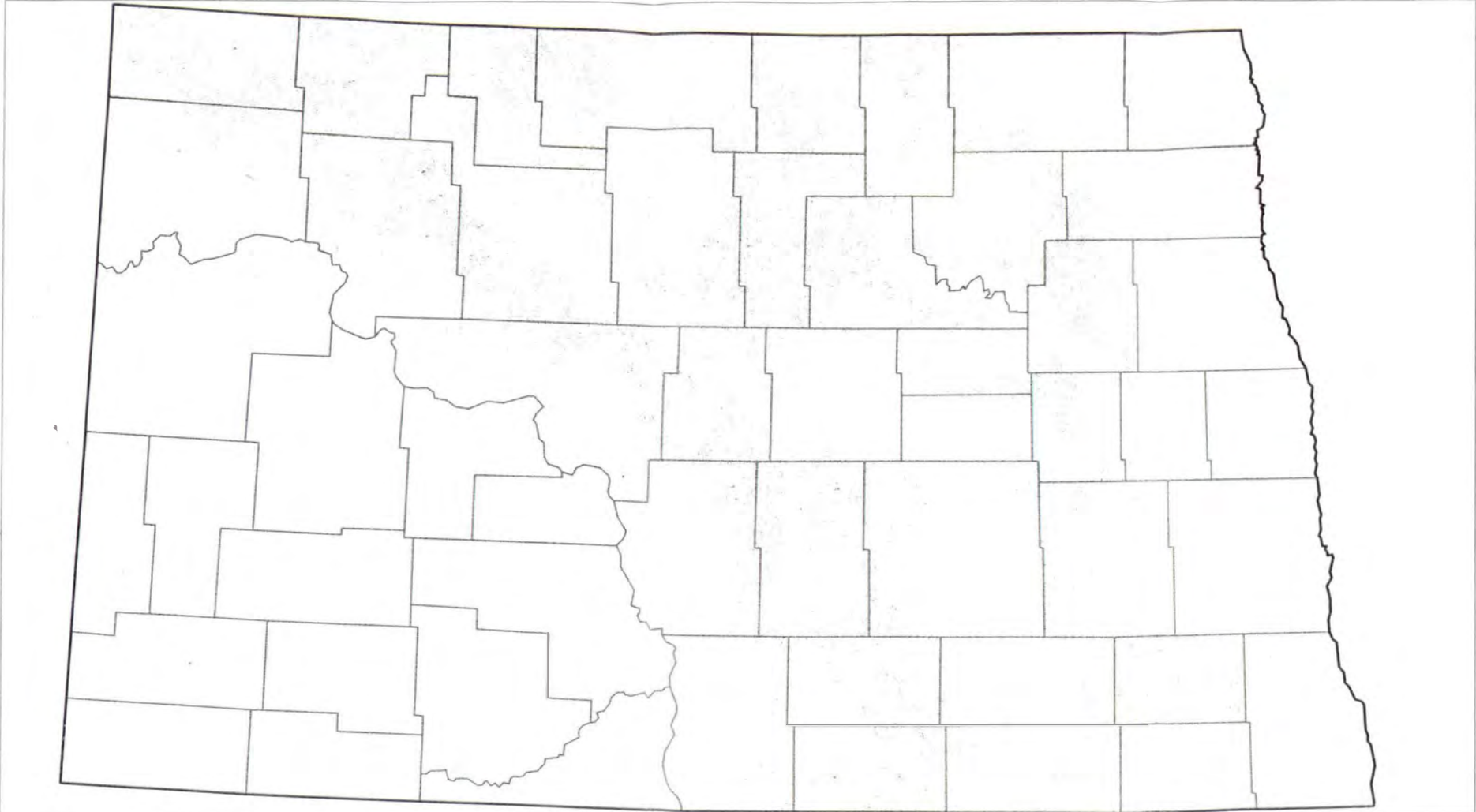
Some will argue that mapping easements takes time. Mr. Chairman, members of the Committee, some of these easements began in the 1960’s and 1970’s; in a 40-50 year timespan shouldn’t the federal government know where their easement properties begin and end and shouldn’t they let landowners know on a definitive basis?

Some will argue this is not a matter of defining easement boundaries but is a dispute on what constitutes a “wetland” in the state. While I do not agree with the USFWS contention that any spot of any size that stays wet for more than 3 minutes is a wetland in North Dakota, this issue is about the definition easement boundaries not the definition of a wetland..

Chairman Lyson, members of the Senate Natural Resources Committee, it is a sad day when the State of North Dakota has to sue the federal government to force a federal agency to adhere to good faith efforts put forth in laws and contractual obligations to North Dakota citizens. HB 1399 seeks to force USFW to conduct reasonable cooperation with the landowners which was the intention of the easement program’s authorizing legislation. Therefore the North Dakota Grain Growers Association asks for your favorable consideration of HB 1399 and would urge the Senate to concur.



#2



Scale 1:750,000



Produced by the Region 6 HAP/ET Office
Bismarck, ND
Current to 2009

Legend

- State Boundary
- County Boundary

Conservation Easement (1,194,444 acres)

Map Location



DISCLAIMER

The USFWS makes no claim as to the accuracy or completeness of the displayed information.

See the "Annual Report of Lands Under Control of the U.S. Fish and Wildlife Service", USFWS Division or Realty for detailed acquisition information.

For more detailed information on USFWS conservation easements, please contact the USFWS Realty Office, Bismarck, North Dakota or Huron, South Dakota.

#1 pm.

HB 1399

Good morning, Chairman Lyson and members of the Senate Natural Resources Committee. My name is Julie Ellingson and I represent the North Dakota Stockmen's Association.

We stand in support of HB 1399 to consider bringing legal action against the U.S. Fish and Wildlife Service regarding the delineation and description of wetland easements.

The expanded interpretation of easement boundaries have resulted in what we would consider "takings" and breeches in private property rights and constitute serious action to seek resolution.

For these reason, we ask for your do-pass recommendation.



United States Department of the Interior

FISH AND WILDLIFE SERVICE
Audubon National Wildlife Refuge
3275 11th St. NW
Coleharbor, ND 58531-9419

#2 pm



March 7, 2013

Senator Stanley Lyson, Chairman
Senate Natural Resources Committee

Re: Testimony on H.B. 1399

Dear Chairman Lyson,

My name is Lloyd Jones and I represent the U.S. Fish and Wildlife Service (FWS). I would like to provide testimony on HB 1399.

The bill requires the Attorney General to consider legal action against the FWS to delineate and properly describe every wetland easement acquired by the FWS. First, the U.S. Congress authorized the easement program in 1958. Every wetland easement acquired by the FWS since that time, is delineated and properly described by legal description and recorded in the courthouse. Every wetland easement ever acquired in North Dakota, already meets the criteria in this bill.

If the intent of the bill was to have the FWS identify the location of individual wetlands within the easement delineation, that is also being addressed. Every wetland easement acquired after 1976 has an accompanying map that identifies the location of wetlands that are included in the easement agreement. The landowner signs the map and the easement agreement. Both the easement agreement and the map are provided to the landowner and also recorded in the courthouse. For those easements acquired before 1976, the FWS is in the process of producing wetland location maps. We have a dedicated staff that is completing this mapping and have a priority process in place that addresses any individual landowner request.

Hopefully this information clarifies issues that were raised in HB 1399.

Lloyd Jones, Project Leader
U.S. Fish and Wildlife Service

#3



2 of 8 DOCUMENTS



Positive
As of: Jan 03, 2013

United States of America, Appellee, v. Kerry Johansen, Michael Johansen, Appellants.

No. 95-3996

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

93 F.3d 459; 1996 U.S. App. LEXIS 20640; 26 ELR 21644

**June 11, 1996, Submitted
August 19, 1996, Filed**

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of North Dakota. CR C3-95-62-01. Honorable Rodney G. Webb, District Judge.

DISPOSITION: Reversed.

COUNSEL: Counsel who presented argument on behalf of the appellant was Michael D. Nelson, Fargo, ND. Additional attorney appearing on the brief was Donald R. Becker. Counsel who presented argument on behalf of the Amicus (State of ND) was Charles M. Carvell, AG, Bismark, ND.

Counsel who presented argument on behalf of the appellee was Lynn E. Crooks, USA, Fargo, ND.

JUDGES: Before BEAM and HEANEY, Circuit Judges, and BOGUE, District Judge.

* The Honorable Andrew W. Bogue, United States District Judge for the District of South Dakota, sitting by designation.

OPINION BY: HEANEY

OPINION

[*460] HEANEY, Circuit Judge.

In the early 1960s, the federal government purchased easements on the farmland tracts of Kerry Johansen and Michael Johansen (the Johansens) for the maintenance of waterfowl production areas. After two unusually wet years in North Dakota, the Johansens requested the United States Fish and Wildlife Service (FWS) to delineate the extent of its wetland easements. The FWS refused, arguing that any wetlands that develop during wet years are subject to the easements' restrictions. Nevertheless, the Johansens proceeded to drain portions of their farmland tracts to contain the surface and subsurface [*461] water. The United States then charged the Johansens with unauthorized draining of wetlands in a Waterfowl Production Area, a violation of 16 U.S.C. § 668dd (1994). In response to a motion in limine by the United States Attorney, the United States District Court [**2] for North Dakota prohibited the Johansens from arguing that the federal wetland easements covered only 105 acres on the three tracts and that more than that number of wetland acres remained intact after the draining. After entering a conditional guilty plea, the Johansens now appeal that order. We reverse.

I.

A. History of the Federal Conservation Program.

In 1929, Congress enacted the Migratory Bird Conservation Act, 45 Stat. 1222, ch. 257 (1929) (codified as 16 U.S.C. § 715 et. seq. (1994)). Recognizing the importance of preserving potholes for migratory waterfowl,¹ the Act authorized the Secretary of the Interior to acquire lands to be used for migratory bird sanctuaries. 16 U.S.C. § 715d. Acquisition was made subject to the consent of the state in which the land was located. 16 U.S.C. § 715f.² The Migratory Bird Hunting and Conservation Stamp Act was passed in 1934 to fund the acquisition of bird sanctuaries. 48 Stat. 451 (1934) (codified as 16 U.S.C. § 718 et seq. (1994)). Subsequently, the conservation effort's strategy shifted away from the creation of large bird sanctuaries toward the preservation of wetlands on private property. Accordingly, federal law was amended [**3] in 1958 to permit the acquisition of wetland easements on individual parcels which were designated "Waterfowl Production Areas." Pub. L. 85-585, § 3, 72 Stat. 487 (1958) (codified as 16 U.S.C. § 718d(c) (1994)). The source of funding was later increased, but the acquisition of the wetland easements was conditioned on the consent of the governor of the state (as opposed to the state legislature as under the Migratory Bird Conservation Act). The Wetlands Act of 1961, Pub. L. 87-383, § 3, 75 Stat. 813 (codified as 16 U.S.C. § 715k-5 (1994)). From 1961 to 1977, the governors of North Dakota consented to the acquisition of easements covering 1.5 million acres of wetland. See *North Dakota v. United States*, 460 U.S. 300, 311, 75 L. Ed. 2d 77, 103 S. Ct. 1095 (1983). These consents further specified the maximum acreage that could be acquired in each county of North Dakota.

1 Much of the State of North Dakota, as well as parts of the Canadian Provinces of Manitoba, Saskatchewan, and Alberta, constitutes what marine biologists call the northeastern drift plain. As a prairie pothole region, each square mile of the drift plain is dotted by as many as seventy to eighty potholes, three to four feet deep, that retain water through July or August because of the soil's poor drainage capacity. These geographical attributes are of particular importance to certain migratory waterfowl that prefer these potholes as a habitat to raise their young because they provide isolated protection and a source of aquatic food.

[**4]

2 North Dakota, the state in question here, gave its consent to the acquisition by the United States of areas in the State of North Dakota "as the United States may deem necessary for the establishment of migratory bird reservations." 1931 ND Laws, ch 207, p. 360.

B. The Steele County Tracts.

In the mid-1960s, as part of the Waterfowl Production Area Program, the FWS purchased easements on three tracts of land from the Johansens' predecessors. These tracts, described as Steele County tracts 21X, 24X, and 30X, consist of two half sections (319.58 acres and 317.70 acres) and a half section plus eighty acres (395.98 acres), respectively. As with most wetland easement purchases, the FWS used a standardized wetland conveyance developed for the program. The conveyance instrument granted the United States "an easement or right of use for the maintenance of the land described below as a waterfowl production area in perpetuity" As was standard practice prior to 1976, the conveyance then legally described the whole parcel. In exchange for the easement, the property owner was given \$ 600 for each [*5] of the half-section parcels and \$ 700 for tract 30X. The conditions imposed by the easement on the servient tenement are as follows:

The parties of the first part . . . agree to cooperate in the maintenance of the aforesaid [*462] lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or reoccurring due to natural causes on the above-described tract, by ditching or any other means

Along with the recorded easement conveyance, the FWS prepared an Easement Summary which provided information including the tract description, the tract acreage, the wetland acreage, and the cost of the wetland per acre. According to each of the summaries, the wetland acres purportedly purchased were thirty-three acres in both tract 21X and tract 24X and thirty-five acres in tract 30X (Summary Acreage). The FWS has subsequently published annual reports in which it continues to represent that it controls thirty-three, thirty-three, and thirty-five acres of wetland on the tracts in question. *See, e.g.*, Annual [**6] Report of Lands Under Control of the U.S. Fish and Wildlife Service (Sept. 30, 1980) (Ex. D-154); U.S. Fish and Wildlife Service, Acreage Summary Record for Steele County Waterfowl Production Area (Ex. D-157).

C. The Johansens.

The spring of 1995 was a wet one in North Dakota. The Johansens, farmers in Steele County, North Dakota, were faced with the second consecutive wet year and farmland that could not support farm machinery due to the surface and subsurface water. ³ Aware that their farmland tracts were burdened by wetland easements, Kerry Johansen wrote the FWS to explain his problem and to ask "what water [he could] contain to get back to [his] normal farming practices." Letter from Kerry Johansen to Hoistad (Jan. 1, 1995) (Ex. D-120). In response, the FWS concurred that "your area has been hard hit in the last two years. . . . This particular tract of land has a high number of basins on it. This, I'm sure, combined with the high rain amounts has caused you some difficulty farming in the past year." Letter from Hoistad to Kerry Johansen (Mar. 17, 1995) (Ex. D-121). Despite its sympathy for the Johansens' difficulty, however, the FWS concluded: "The only provisions of the [**7]

easement that allow for drainage are when [there] are safety or health concerns involved. Another way of saying this is unless your roads or farmstead is in danger of being flooded, no drainage can take place." *Id.* In spite of this admonition, the Johansens dug ditches on the tracts to contain the water. ⁴

3 The Johansens allege that in 1995 there were 83.8, 64.9, and 67.1 wetland acres on tracts 21X, 24X, and 30X, respectively.

4 The extent and impact of the ditching have not been determined by a trier of fact. It is undisputed that some wetlands were drained as a result of the ditches.

As a result of their ditching, the Johansens were charged with draining wetlands covered by FWS easements in violation of 16 U.S.C. § 668dd (1994). In their defense, the Johansens planned to introduce the Easement Summaries and proof that each parcel, after the draining, contained wetland acreage in excess of the acreage provided for in the Easement Summaries. The United States, in a motion *in limine*, sought [****8**] to exclude the evidence as irrelevant, arguing that the Easement Summaries were not part of the recorded easement and that defense theories claiming any limitation of the wetland easements had been rejected by this court. Relying on this court's decision in *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987) (Heaney, J.), the district court held the defense was improper and excluded the proffered evidence. The Johansens then entered conditional guilty pleas, subject to the outcome of this appeal, from that pretrial order.

II.

The government's prosecution of this case has been described by the Johansens as a shell game. We cannot disagree. The United States Attorney argues that prior decisions by this court have specifically interpreted the wetland easements to encompass all wetlands on the encumbered parcel. The government's argument, however, fails to acknowledge the ramifications of both the intervening Supreme Court decision in *North Dakota*, in which the Court adopted a more [***463**] restricted interpretation of the wetland easements, and the representations made by the Solicitor General during that litigation. ⁵ The broad interpretation now advanced by the United States [****9**] Attorney is not only inconsistent with the representations made by other federal officials, it would also raise serious questions with respect to limitations imposed by the easement program's enabling statute. Moreover, the stringent posture assumed in this enforcement prosecution does not comport with the efforts toward a "cooperative and helpful relationship between North Dakota, its farmers and political subdivisions, and the U.S. Fish and Wildlife Service" which is fundamental to the success of conservation programs. *See North Dakota and U.S. Fish and Wildlife Service Agreements 1* (July, 1993) (Ex. D-159). ⁶

5 Implicit within the figures quoted in the Solicitor General's brief is the representation that the United States had acquired title to thirty-three, thirty-three, and thirty-five acres on tracts 21X, 24X, and 30X, respectively. *See infra* at 9-10. The United States Attorney argues that "even if this Court would accept an argument that the federal government must pick only 33 or 35 acres (as the case may be) in each tract to protect, what makes the defendant think we would not pick the acreage they have drained? Indeed, we have already done so by charging them with illegal draining." Appellee's Br. at 11. Given the Johansens' attempts to involve the federal government in the delineation of its rights to the land, this declaration is repugnant to the notions of fair notice.

[**10]

6 This court notes that North Dakota has filed an amicus brief on behalf of the Johansens.

A. Interpretation of the Wetland Easements.

In essence, this case revolves around the interpretation of the wetland easements purchased by the federal government. State law will generally govern the interpretation of a real property conveyance instrument, either through direct application or through the "borrowing" principles of federal law, so long as it is neither aberrant nor hostile to federal property rights. *See United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 591-96, 37 L. Ed. 2d 187, 93 S. Ct. 2389 (1973); *cf. United States v. Albrecht*, 496 F.2d 906, 911 (8th Cir. 1974). Under North Dakota law, while the principles of contract law guide the inquiry, *see* N.D. Cent. Code § 47-09-11 (1978); *Royse v. Eastern Seal Society for Crippled Children & Adults, Inc.*, 256 N.W.2d 542, 544 (N.D. 1977), the "primary purpose in construing a deed is to ascertain and effectuate the intent of the grantor." *Malloy v. Boettcher*, 334 N.W.2d 8, 9 (N.D. 1983).

This suit, as well as numerous other suits involving wetland [**11] easements, arises in large part because prior to 1976, the FWS described wetland easements by referring to the entire tract of land rather than to the particular area of the covered wetlands. Since 1976, the FWS has recorded a map locating the covered wetland acres as part of every easement document. However, as a consequence of the former practice and the fact that prairie potholes, by nature, are ill-defined and subject to fluctuation, there has been a considerable amount of confusion regarding what the earlier wetland easements actually covered. *See, e.g., Albrecht*, 496 F.2d 906; *United States v. Seest*, 631 F.2d 107 (8th Cir. 1980); *United States v. Welte*, 635 F. Supp. 388 (D.N.D. 1982), *aff'd*, 696 F.2d 999 (8th Cir. 1982).

The United States Attorney for North Dakota takes the position that all wetlands found on an encumbered tract at any given time are covered by the easement and cannot be drained in any fashion. In other words, there are no "uncovered wetlands" on the parcel described by the easement. The Johansens, however, claim that the easements cover only a portion of their property and not every wetland that might develop during any given year. In support [**12] of their interpretation that only the potholes existing at the time of the easement conveyance are covered by the easement's restrictions, the Johansens point to the easement document language limiting drainage of potholes "now existing or reoccurring due to natural causes on the above-entitled land." Primarily, however, the Johansens rely on the Easement Summaries which indicate that thirty-three wetland acres were purchased on tracts 21X and 24X and thirty-five wetland acres were purchased on tract 30X.

[*464] The United States Attorney rejects the Johansens' reliance on the Easement Summaries for two reasons. First, the United States Attorney points out that the summary figures were not recorded as part of the easement document. This fact, however, is not necessarily preclusive. *See Schulz v. Hauck*, 312 N.W.2d 360, 363 (N.D. 1981) (holding that use of unrecorded, extrinsic evidence is permissible to interpret ambiguous grant language). Second, the United States Attorney contends that these summaries do not evidence the parties' intent, but were merely "used by government negotiators as a yardstick of the purchase price." Appellee's Br. at 10.

The government's interpretation is not [**13] unreasonable, given that the legal description of the easement includes the whole tract. More importantly, this interpretation has been given to the easements by this court in past decisions. *See, e.g., Albrecht*, 496 F.2d at 912 (holding that ditching encumbered parcel violated terms of easement); *Seest*, 631 F.2d at 108 (holding that ditching parcel,

although not diminishing the surface water, altered the natural flow of surface and subsurface water, violating the terms of the easement); *Welte*, 635 F. Supp. at 389 ("Had the government obtained an easement on only 22 acres [the acreage identified in the Easement Summary], appellants would have a valid point. The government obtained its easement on all 160 acres [the entire parcel], however."). Thus, at least as of the early 1980s, there was considerable case law to support the government's position that the easements prevented drainage on any portion of the described parcel.

B. The Impact of *United States v. North Dakota*.

The interpretation given the easements by this court in the early 1980s was rejected by the Supreme Court. Starting in the 1970s, the cooperation that had marked the joint effort between the [**14] federal and state governments to provide waterfowl habitats began to break down. After North Dakota enacted a series of laws intended to restrain further federal purchase of wetlands, the United States brought suit seeking to have the laws declared invalid. One of the objections raised by North Dakota during the litigation was that the total area described by the wetland easements, 4,788,300 acres, exceeded the gubernatorial consents which had limited the FWS to 1.5 million wetland acres. This court held that the gubernatorial consents were not required for the acquisition of waterfowl production areas. *United States v. North Dakota*, 650 F.2d 911, 916 (8th Cir. 1981), *aff'd on other grounds*, 460 U.S. 300, 75 L. Ed. 2d 77, 103 S. Ct. 1095 (1983). The Supreme Court rejected that view, acknowledging that "Congress has conditioned any such acquisition upon the United States' obtaining the consent of the Governor of the State in which the land is located." 460 U.S. at 310 & n.13.

While conceding that the limitations imposed by the gubernatorial consent were applicable, the United States represented that it had not exceeded the maximum wetland acreage. In its brief to the Supreme Court, the United States contended: [**15]

While the total gross area described in the easement documents is 4,788,300 acres, because the easement restrictions apply only to the wetlands acres North Dakota's contention that the United States already has acquired more acreage than the gubernatorial approvals encompass is without merit. By contrast, since the United States obtained gubernatorial consent to acquire easements over 1,517,437 acres of wetlands and has only acquired easements over 764,522 wetland acres, it is entitled to acquire [] additional [] acres

Brief for the United States at 19, *North Dakota v. United States*, 460 U.S. 300, 75 L. Ed. 2d 77, 103 S. Ct. 1095 (1983) (No. 81-773) (citations omitted) (*North Dakota* Brief). The latter figure, 764,522, was based on the acreage figures provided in the Easement Summaries. ' In other words, for the purposes [*465] of that litigation, the United States contended that the wetland easement restrictions applied only to the thirty-three, thirty-three, and thirty-five acres on the Johansens' tracts. The Supreme Court accepted the federal government's interpretation of the easement restrictions:

North Dakota next argues that the gubernatorial consents, if valid, have already [**16] been exhausted by acquisitions prior to 1977. This argument stems from the practice of including within each easement agreement the legal description of the entire parcel on which the wetlands are located, rather than merely the wetland areas to which the easement restrictions apply. If the entire parcels are counted toward the acreage

permitted by the gubernatorial consents, the United States already has acquired nearly 4.8 million acres, far more than the 1.5 million acres authorized. The United States has conceded as much in its answers to North Dakota's interrogatories. App. 49 ("The total acreage described in the permanent easements . . . is 4,788,300 acres . . ."). As the easement agreements make clear, however, the restrictions apply only to wetland areas and not to the entire parcels. . . . The fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired.

North Dakota, 460 U.S. at 311 n.14.

7 In response to an interrogatory asking, "How was the '764,522 wetland acres' figure computed," the FWS stated, "the 764,522 wetland acres is a summation of the wetland acres reported on the Easement Summary Sheets for all waterfowl production area easements acquired in North Dakota. The figure is used for record keeping and reporting purposes." Defendants' Response to Plaintiffs' Request for Admissions, Interrogatories, and Demand for Production to Defendants, filed on April 5, 1982, Answer to Interrogatory No. 40(a), in *Board of Managers et al. v. Key, et al.* (later changed to *North Dakota v. Butterbaugh*), Civ. No. A2-81-178, on file in the trial court. Exhibit D-115, at 23.

[**17] Although this interpretation of the easements, that the restrictions "apply only to wetland areas and not to the entire parcel," seems clearly at odds with this court's prior decisions holding the contrary, the United States Attorney contends there is no inconsistency:

There is simply nothing inconsistent between the U.S. Fish and Wildlife Service conceding that *only* the wetlands within the larger tract [are] covered by the drainage limitations and therefore that only that acreage counted against the "county consents" and . . . at the same time contending that *all* wetlands within a particular easement tract are subject to its limitations.

Appellee's Reply Br. at 3. What the United States Attorney fails to acknowledge, however, is that the Solicitor General's brief did not claim that the United States had acquired an interest in all wetlands on the parcel, but rather explicitly stated that the United States "had only acquired easements over 764,522 wetland acres," *i.e.*, the Summary Acreage. *North Dakota* Brief at 19. The implication of the United States' brief in *North Dakota* is clear: the United States acquired easements over thirty-three acres [**18] on tracts 21X and 24X and thirty-five acres on tract 30X.

It is important to note, however, that although the Supreme Court generally accepted the federal government's argument limiting the easement restrictions to the encumbered parcels' wetlands, it did not explicitly limit the wetland easement to the Summary Acreage. The Court merely stated that "the fact that the easement agreements include descriptions of much larger parcels does not change the acreage of the wetlands over which the easements have been acquired." *North Dakota*, 460 U.S. at 311 n. 14. * Statements made by the Solicitor General in his *North Dakota* brief and the FWS response to interrogatories are not a binding statement of the rights of the United States. *See Federal Crop Ins. Corp. v. Merrill*, 332 U.S. 380, 383-84, 92 L. Ed. 10, 68 S. Ct. 1 (1947).

8 The Court's treatment of this argument implicitly suggests, however, that the "acreage" is a set figure and not subject to fluctuation.

C. Problems with a Fluctuating Easement.

Although the Court's language [**19] in *North Dakota* permits an interpretation of the easement to cover all wetlands on the encumbered [*466] tract rather than limiting the easements' scope to the Summary Acreage, doing so would create a host of problems. Under this interpretation, the number of wetland acres subject to the easement restrictions would fluctuate with the amount of rainfall. Not only is this inconsistent with the FWS Annual Summaries of the number of wetland acres under its control and traditional norms of real property conveyance, *see* Restatement of Property § 451, cmt. m (1944) (requiring definiteness), it would prohibit ditching on the entire, legally-described parcel. According to the government's theory, any action that would inhibit the collection of water in a particular depression would violate its interest in existing and future wetlands. Given that these properties are pocketed by depressions of various depths, however, any ditching will impact the formation of wetland. *See Albrecht*, 496 F.2d at 909 ("An expert in water biology testified that the ditching had the same effect as a drought . . . and that the usefulness of the [] land as a waterfowl production area had been 'significantly [**20] reduced.'). Thus, the wetland easements' restrictions, as interpreted by the United States Attorney, would apply to the entire parcel. This was clearly and explicitly rejected by the Supreme Court in *North Dakota*.

This interpretation also presents problems with respect to the gubernatorial-consent component of the program's authorizing statute. If the easement restrictions expanded with the amount of wetland present on a parcel at any particular time, the acreage of federal wetlands counted against the gubernatorial limitation would fluctuate as well. This figure would also need to be kept current to ensure compliance with the gubernatorial consents, something that the federal government has been reluctant to do in the past. *See Vesterso*, 828 F.2d at 1242. The United States Attorney's suggestion that the Easement Summary figures may be used to compile a total of wetland acreage to be applied against the gubernatorial consents, but need not relate to the potholes actually covered by the restrictions, Appellee's Reply Br. at 2, can be rejected out of hand. Clearly, in order for the gubernatorial consent provision of the enabling statute to be meaningful, there must be a [**21] direct correlation between the figure of federal wetland acres applied against the consents and the actual acreage restricted by the wetland easements. Even were the federal government to assume the task of maintaining an accurate and current tally of the existing wetlands, that fluctuating figure could conceivably exceed the gubernatorial limitation during a wet year, thereby violating the terms of the easement program's enabling statute. 9 In its reply brief, the United States Attorney's Office responds to this possibility as follows:

In the unlikely event the State could prove that the total wetland acres under easement in a particular county, when at maximum fill, exceeded the gubernatorial consents previously given, such an assumption might give rise to a right to bring a declaratory judgment or contract action against the federal government. *What such a suit might yield is unclear*, but what is clear is that it would not void all easements taken in that county or confer upon either the State or the landowners the right to choose which wetlands within each easement the federal government gets to keep.

Appellee's Reply Br. at 4 (emphasis added). We decline to [**22] follow the "cross-that-bridge-when-you-get-to-it" approach espoused by the United States Attorney's Office. Given the choice, we believe it more prudent to avoid this possibility by interpreting the easements' scope in a manner that fixes the federal acreage counted against the gubernatorial consent limitation.

9 This court has not received any assurances that there is enough room under the cap to make this possibility unlikely. Given that a wet year is likely to impact the water levels of an entire county similarly and that the gubernatorial limitations are imposed on a county-by-county basis, the possibility of exceeding the gubernatorial consents' acreage limitation could not be discounted.

Therefore, we hold that the federal wetland easements are limited to the acreage provided in the Easement Summaries. This approach has the additional advantage of consistency with prior representations by the federal government of its interest in the [*467] properties, including the FWS Annual Survey and the Solicitor General's [**23] position in the *North Dakota* litigation.

D. Post-*North Dakota* Case Law.

In its motion *in limine* to the district court, the United States Attorney argued that this court's decision in *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987), rejected limiting the federal wetland easements to the Summary Acreage. In *Vesterso*, this court considered a case in which a North Dakota county water board had undertaken two drainage projects on properties subject to federal wetland easements. *Id.* at 1237. Despite being advised of the federal easements by the state water commission, the county water board completed the projects without conferring with or notifying the FWS. *Id.* at 1238.

In affirming the convictions, we wrote, "it is sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements." *Id.* at 1242. The United States Attorney interprets this language to mean that the drainage of any wetlands on a burdened parcel violates section 668dd. This language, however, must be understood within its context in the opinion: rejecting the defendants' [**24] assertion that the federal government had not ensured compliance with the gubernatorial limitation by identifying all wetlands covered by the federal easements. *Id.* at 1241. In the same section, we wrote:

Before the United States can prove a person damaged federal property as prohibited by section 668dd(c), it does not have to describe legally each wetland to which the restrictions apply and further determine whether the total wetland acreage exceeds the limits imposed by the gubernatorial consent for the county.

Id. at 1242. In this context, our discussion is simply understood to mean that the government did not need to legally describe the confines of each covered wetland under the pre-1976 easements to ensure compliance with the gubernatorial consent limitation, a question already answered by the Supreme Court in *North Dakota*.

The language in *Vesterso* regarding what the United States must prove is better understood to mean that the United States must prove beyond a reasonable doubt that identifiable, *covered* wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged and that the defendant [**25] knew that *the parcel* was subject to a federal easement. See *Vesterso*, 828 F.2d at 1244 (holding that defendants, who knew that the parcel was encumbered by a wetland easement, cannot claim that they did not know a particular wetland was covered by the easement because such a lack of knowledge would be caused by "willful blindness."). This meaning is made clearer later in *Vesterso* when we concluded:

We realize that the federal wetland easements in North Dakota have generated controversy and, in some instances, frustration for landowners. We point out, however, that the State of North Dakota and landowners are not without recourse if the easements cause flooding, for example, which results from nonnatural obstructions to water flow. *The prudent course in any event requires consultation with the Fish and Wildlife Service before undertaking drainage on parcels covered by easements.* . . . There is no evidence in the record indicating that [] cooperation would not have been forthcoming in this case. Instead of seeking cooperation, the appellants acted on their own by digging a ditch approximately three feet deep and fifteen feet wide across the easement in clear [**26] violation of the Wildlife Refuge Act.

Id. at 1245 (emphasis added). Having been so advised by this court, the Johansens sought cooperation from the FWS to contain the flooding that emersed their farmland. Unfortunately, the cooperation to which we alluded was not forthcoming.

Our decision in *United States v. Schoenborn*, 860 F.2d 1448 (8th Cir. 1987), reiterates this court's revised interpretation of the wetland easements. In that case, we reviewed the district court's finding that a Minnesota farmer had violated a wetland easement. Specifically, Schoenborn's violations consisted of draining four basins (as potholes are [*468] known in Minnesota) and filling nine ditches. On review of each individual alleged violation, this court examined evidence that the specific potholes existed at the time of the easement conveyance, a clear departure from our prior practice focusing on any ditching of the burdened parcel, *cf.* *Albrecht*, 496 F.2d at 911, as well as the state of the basin at trial. Thus, *Schoenborn* implicitly acknowledged the limited scope of the wetland easements.

E. The District Court's Pretrial Order.

In this case, the district court's decision was predicated [**27] on a fundamental (albeit understandable) misinterpretation of this circuit's case law with respect to the scope of federal wetland easements. Therefore, we review the district court's pretrial order excluding evidence *de novo*. See *United States v. Singer Mfg. Co.*, 374 U.S. 174, 192-93, 10 L. Ed. 2d 823, 83 S. Ct. 1773 (1963). We hold that the United States' wetland easements acquired title on the acreage specified in the Easement Summaries. Although the mens rea element of this crime is fulfilled by proof that the defendant knew the parcel was subject to a wetland easement, *see Vesterso*, 828 F.2d at 1244, the government must still prove that the defendant drained the Summary Acreage covered by the federal wetland easement. The converse is also true: a defendant must be permitted to introduce evidence proving that they did not drain the Summary Acreage.

III. CONCLUSION

The wetland acquisition program was conceived of as a partnership between the federal government, the states, and individual property owners. As with any partnership, success requires good faith and reasonability. Although the United States Attorney pays lip service to the program's goal of co-existence between Waterfowl Production Areas and [**28] "normal farming practices," the government ignores the obvious potential consequence of its interpretation: the reduction of cultivable land on tract 21X by over sixteen percent would be a significant economic impediment to the continued viability of normal farming practices. It strikes this court as contrary to the program's goal of reasonable cooperation to refuse a request to identify the scope of the federal government's interest in a property and then prosecute the property owner for making his best efforts to contain surplus water to the protected federal wetlands. Therefore, we remand this case to the district court for action consistent with this opinion.

BUREAU OF SPORT FISHERIES AND WILDLIFE
CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS

59X #4

THIS INDENTURE, by and between Wallace F. Radtke and Mabel Radtke, his wife, of Hurdsfield, North Dakota and The State of North Dakota.

parties of the first part, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part.

WITNESSETH:

WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec. 718d (c)), authorizes the Secretary of the Interior to acquire small wetland or pothole areas suitable for use as waterfowl production areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of Four Hundred Dollars (\$400.00), the parties of the first part hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within SIX months of the execution of this indenture by the parties of the first part, or any subsequent date as may be mutually agreed upon during the term of this option, an easement or right of use for the maintenance of the land described below as a waterfowl production area in perpetuity, including the right of access thereto by authorized representatives of the United States:

Wells County, North Dakota
T. 146 N., R. 73 W., 5th P. M.
section 34, E $\frac{1}{2}$

Subject, however, to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, and all outstanding mineral rights.

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or reoccurring due to natural causes on the above-described tract, by ditching or any other means; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above. Excepted are certain drainage ditches which the parties of the first part may maintain and/or wetlands which are deleted from the provisions of this easement. The above exceptions are shown on a map certified by the Regional Director at the time of acceptance.

SPECIAL PROVISIONS

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as heretofore described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

2. Notice of acceptance of this agreement shall be given the parties of the first part, by certified mail addressed to Wallace F. Radtke at Hurdsfield, North Dakota, and such notice shall be binding upon all the parties of the first part without sending a separate notice to each.

3. The parties of the first part warrant that no person or selling agency has been employed or retained to solicit or secure this contract upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the vendors for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or

company, where such contract is made for the general benefit of such incorporation or company.

5. Payment of the consideration will be made by Disbursing Officers check after acceptance of this indenture by the Secretary of the Interior or his authorized representative; and after the Attorney General or in appropriate cases, the Field Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals
this 8 day of July 1965

Wallace F. Rattke

Wallace F. Rattke (L.S.)

STATE OF NORTH DAKOTA

BY: Otto Bewick (L.S.)

DEPUTY STATE LAND COMMISSIONER

_____ (L.S.)

Hubert S. B. [Signature] (L.S.)
(Witness)

_____ (L.S.)

ACKNOWLEDGEMENT

STATE North Dakota)
COUNTY OF Wells) ss

On this 8 day of July, in the year 1965 before me personally appeared Wallace F. Rattke and Mabel Rattke, his wife, known to me to be the persons described in and who executed the foregoing instrument and acknowledged to me that they ~~had~~ executed the same as their ~~own~~ free act and deed.

Raymond L. Brasch
Raymond L. Brasch

Notary Public
(Official Title)

(SEAL)

My commission expires June 20, 1970

ACCEPTANCE

This indenture is accepted on behalf of the United States this _____ day of SEP 21 1965, 19____, under the authority contained in section 4 of the Migratory Bird Hunting Stamp Act, as amended, and pursuant to authority delegated by 210 DM 1.3, Commissioner of Fish and Wildlife Order No. 4, and 4 AM 4.5D(1).

THE UNITED STATES OF AMERICA

By W. P. Schaefer
W. P. Schaefer

(Title) ACTING REGIONAL DIRECTOR
Bureau of Sport Fisheries and Wildlife, 24100

59X

United States Department of the Interior
Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realty

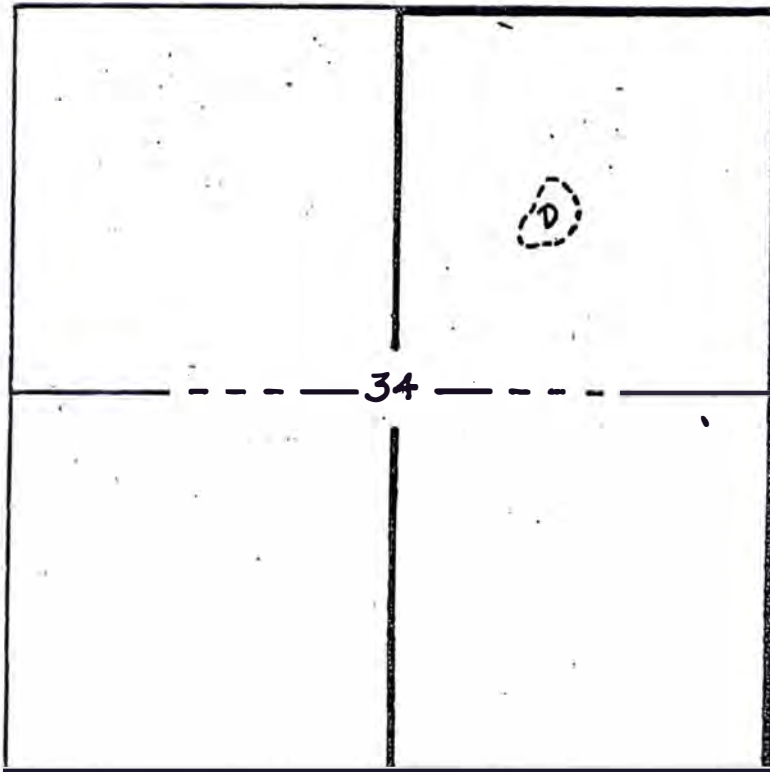
DRAINAGE FACILITY MAP

RADTKE ET AL, WALLACE F.
WATERFOWL PRODUCTION AREA
EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED
DESCRIPTION:

TRACT (59X)
WELLS COUNTY
FIFTH PRINCIPAL MERIDIAN

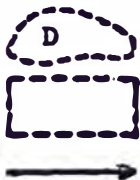
320.00 ACRES
NORTH DAKOTA

T. 146 N., R. 73 W. , section 34, E $\frac{1}{2}$



I hereby certify that this map represents the excepted drainage
ditches and/or deleted wetlands referred to in the easement
agreement executed July 8, 1965 and accepted on SEP 21 1965

/s/ W. P. Schaefer
Acting Regional Director



Wetlands Deleted from the Provisions of the Easement
Wetlands Drained
Open Ditch

Scale - 4" = 1 mile

Map drawn by: R.L.B. Date: 7-9-65

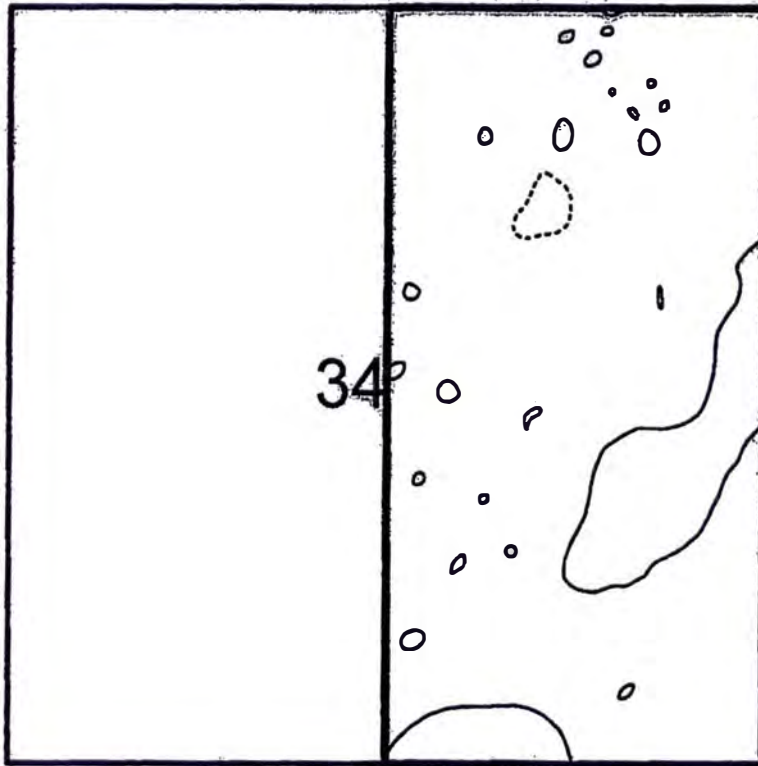
UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

Tract: 59X

Map 1 of 1

WATERFOWL PRODUCTION AREA WELLS COUNTY, STATE OF NORTH DAKOTA EASEMENT
AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED.
T. 146N., R. 73W., 5th PRINCIPAL MERIDIAN

SECTION 34, E1/2



1 inch = 0.25 miles






The U.S. Fish and Wildlife Service (Service) has purchased and owns perpetual rights which restrict or prohibit the right to drain, burn, level, and fill any wetland basins depicted on this map. This map represents the Service's effort to depict the approximate location, size and shape of all protected wetlands based on information and maps available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetland in any given year. The Service reserves the right to revise this map, provided the mapped acreage remains consistent with the Easement's Summary Acres.

Prepared by: Kristina Hanson
Kristina Hanson

Approved by: Neil Shook
Neil Shook

Date: 1/16/2013

LEGEND

-  Section Boundary
-  Boundary of Easement Description
-  Wetlands Covered by Provisions of the Easement
-  Wetlands Deleted from the Easement
-  Approved Drainage Facility

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

Easement Summary

State : North Dakota
County : Wells
Location: T. 146 N., R. 73 W., 5th P.M.
sec. 34, E₂



Tract Name : Radtko et al, Wallace F.
Tract Number: 59X
Easement Dated : 7-8-65 Easement Option Expires: 1-7-66
Easement Accepted: SEP 21 1965 Term of Easement: Perpetual
Easement Consideration: \$400.00
Tract Acreage : 320.00 Cost per acre: \$1.25
Wetland Acreage: 40.00 Wetland cost per acre: \$10.00
Estimate of Value: \$400.00
Accounting Number 14-16-0003-1154

Authorization to acquire easements in Wells County,
North Dakota, given by Governor William Guy
in letter dated 12/18/61

Certified Wetland Determination

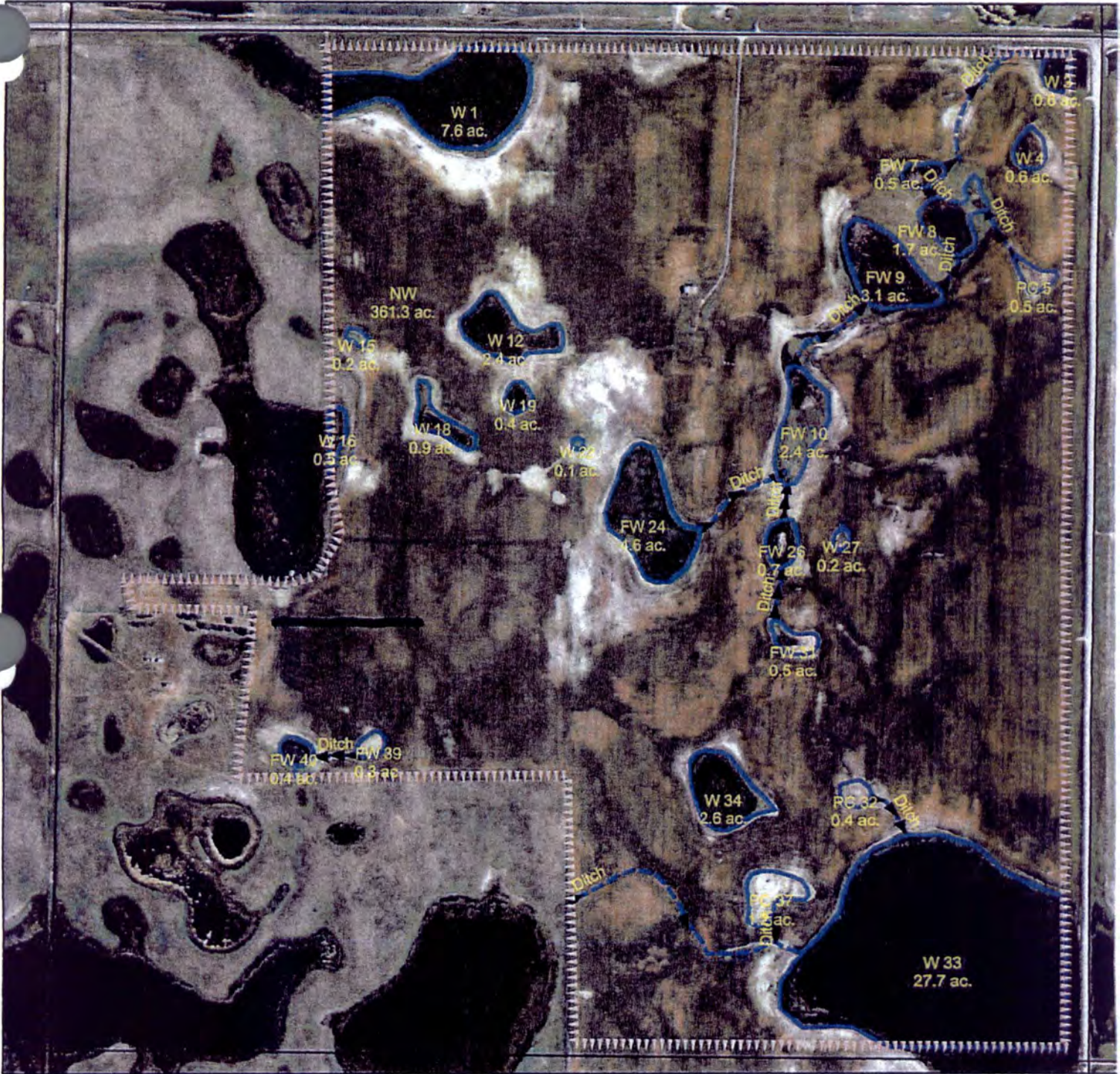
Field Office: Fessenden FO

Legal Desc: 28-146-73

Easements

Agency: USDA-NRCS

Tract: 12255



Legend

Certified Wetland Determination Boundary

Wetlands

Ditch

0 225 450 900 1,350 1,800 2,250 2,700 Feet

W Wetland
 FW Farmed Wetland Drained or modified & cropped prior to 12-23-1985, but still meets wetland criteria
 PC Prior Converted
 NW Non Wetland
 NI Not Inventoried Potential Waters of the US
 See NRCS CPA-O26E for definitions and additional info.



- easements -

#5

Mr. Chairman and fellow committee members.

I am Greg Daws, I farm in Nelson County, ND near Michigan. I am here today to show support for HB 1399.

I must give many thanks to my Grandfather and Father for not signing any of the wetland easements but saving all of the documentation for a day like today. As you can see I have brought a mini-filing cabinet containing brochures, Q and A's from the U.S. Fish and Wildlife Service trying to coax farmers to sign them during hard times for very little money but that is not what we are talking about today.

I do have documentation that my Father and I received through a Freedom of information request (page 3) that I made but it is all such poor copies that you cannot read it. A little story on the request. In June of 1996 I traveled to Bismarck to request documentation of an easement on some property we had purchased. In Bismarck at the Wetland habitat office they told me the info was in the Minot office. I then drove to the Minot office and they told me it was in Bismarck. I motored back to Bismarck and told them Minot said the documentation was in Bismarck. Bismarck then told me they had it but it would take a while to get it. I then drove back to Michigan empty handed and on October 17, 1996 we received the copies I am showing you.

Extremely frustrated would be an understatement; really pissed off was how I viewed my father when he opened the letter. As you can see on the Easement summary (page 2) of one of the parcels of land I have purchased it lists Wetland acreage as 118 acres. I have seen this parcel contain more than 225 acres of water which means there was 107 acres of excess water.

In Nelson County we are currently trying to lower Lake Loretta by 7 feet but the Fish and Wildlife Service is now claiming lateral effects to wetlands, many of which did not even exist when the easements were taken It has become another roadblock in our 17 year process. To see the documentation is like pulling horse teeth, nearly impossible. Lake Loretta has grown from about 250 acres to 39,000 and made many miles of road impassable. Passage of this bill would lead to better info for the landowners. The Johannes court cased directed the U.S. Fish and Wildlife to provide the info but when my family asked you can see what we got. I urged you to pass the bill so we can have greater clarity in dealing with the excess water.

Page 3 is a document I found in my NRCS file at the local office. You will notice someone took liberty to do some extra artistic expression.

If anyone would like a history lesson on Fish and Wildlife easements, my mini-file can give it. Are there any questions or documents you would like copies of?



United States Department of the Interior

FISH AND WILDLIFE SERVICE

Wetland Habitat Office
1500 East Capitol Avenue
Bismarck, North Dakota 58501

October 17, 1996

Richard E. Daws
Box 107
Michigan, North Dakota 58259

Dear Mr. Daws:

Enclosed are copies of materials you requested in a recent Freedom of Information Act Request. The following documents are provided:

- 1) Copies of the easement contract(s) covering lands referenced in your letter.
- 2) Copy of the easement summary sheet(s) for the respective easement.
- 3) A copy of aerial photographs that may have been used at the time this easement was purchased.

Please be aware that the easement summary and the photograph are not a part of the easement document that is filed with the Registrar of Deed's office at the county courthouse.

If you have questions, please contact this office (701/250-4418) or your local Fish and Wildlife Service office.

Sincerely,

Michael R. McEnroe
Supervisor, ND Wetland Habitat Office

Enclosures

cc: Realty, Minot
WHO, Bismarck
Devils Lake WMD

#6

NEISON LG 15.3 50 sec. ← 5 74

127X

A



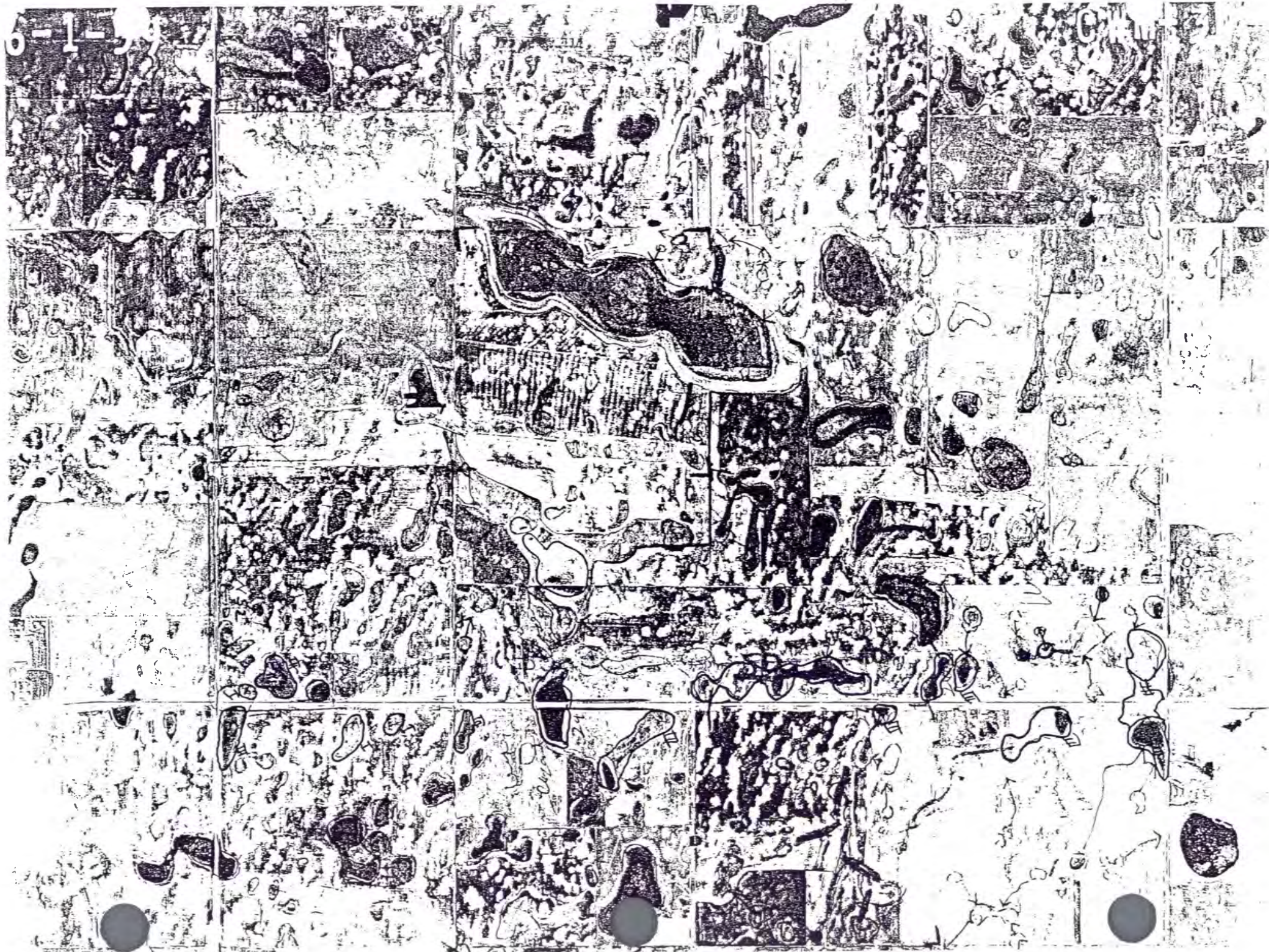
196-AM-106

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24

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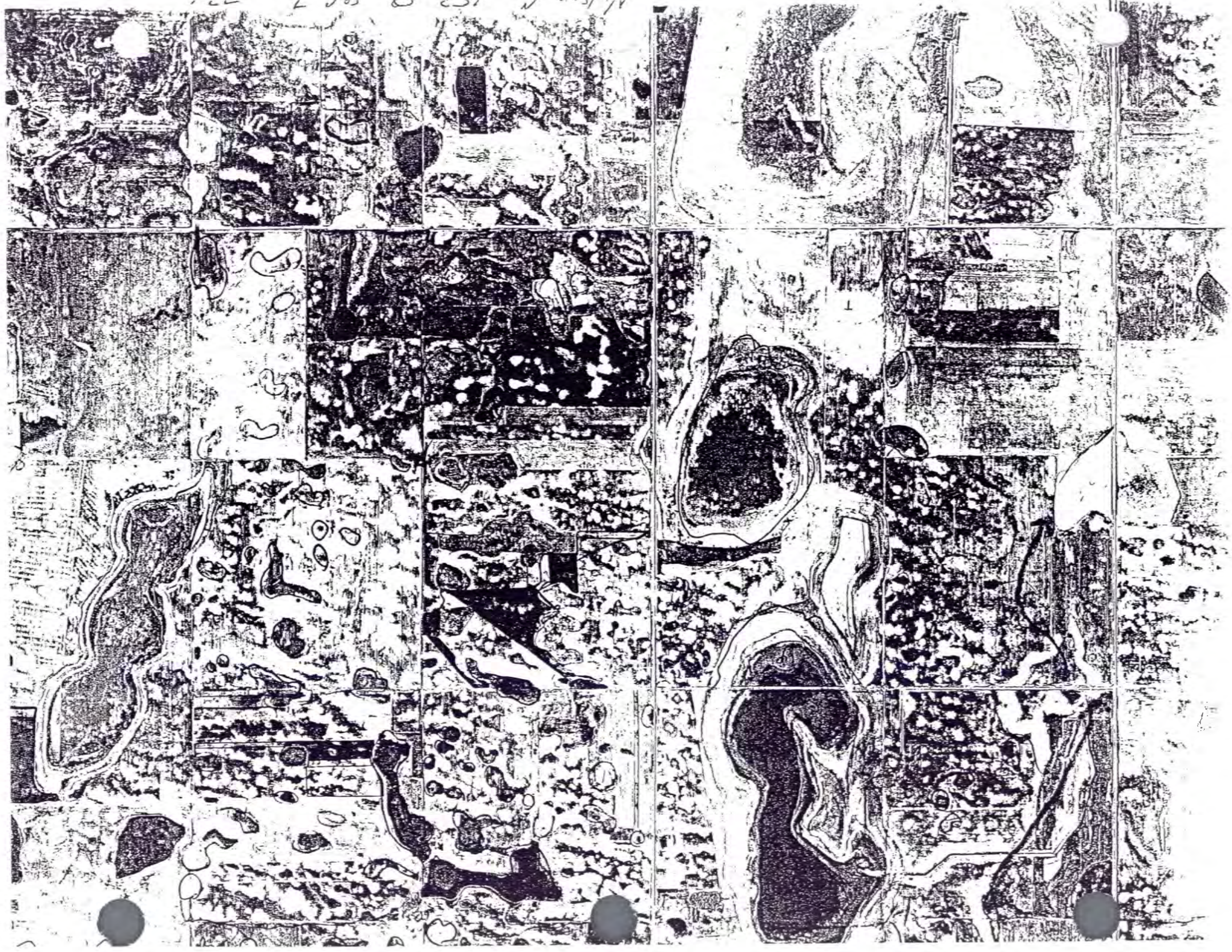
Nelson LO. 153 50 sec. 8 73X, 121X



Nelson Co. 153 58 sec. 18

240X





March 18, 2013

#1

PROPOSED AMENDMENTS TO ENGROSSED HOUSE BILL NO. 1399

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to amend and reenact subsection 2 of section 47-05-02.1 of the North Dakota Century Code, relating to duration of waterfowl production area easements; and to provide an effective date.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Subsection 2 of section 47-05-02.1 of the North Dakota Century Code is amended and reenacted as follows:

2. The duration of the easement, servitude, or nonappurtenant restriction on the use of real property must be specifically set out, and in no case may the duration of any interest in real property regulated by this section exceed ninety-nine years. The duration of an easement for a waterfowl production area acquired by the federal government, and consented to by the governor or the appropriate state agency after July 1, 1985, may not exceed fifty years. A waterfowl production area easement that exceeds fifty years or which purports to be perpetual may be extended by negotiation between the owner of the easement and the owner of the serviant tenement. A waterfowl production area easement that exceeds fifty years or which purports to be permanent and is not extended by negotiation is void. The duration of a wetlands reserve program easement acquired by the federal government pursuant to the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, may not exceed thirty years.

SECTION 2. EFFECTIVE DATE. This Act becomes effective on June 30, 2017."

Renumber accordingly