North Dakota Sovereign Land Management Plan

Office of the State Engineer

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Introduction

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

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

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

The State Engineer's authority to manage sovereign land is derived from North Dakota Century Code (N.D.C.C.) § 61-33-05, which states that the State Engineer shall "manage, operate, and supervise" sovereign land. The State Engineer has adopted administrative rules to create a framework to follow legislative directives.[4] But, the Attorney General has indicated management of sovereign land requires that the State Engineer incorporate the Public Trust Doctrine into any management scheme. Specifically, that the State Engineer create a plan pursuant to the Doctrine to manage sovereign land.

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

1. Continue to fulfill the State Engineer's duty to manage sovereign land pursuant to the Public Trust Doctrine;

2. Satisfy requirements outlined in N.D.A.G. 2005-L-01;

3. Provide improved consistency in the management of sovereign land and administration of regulations;

[1] N.D.C.C. § 61-33-01(3).
[2] The state's mineral interests in sovereign lands are managed by the State Land Department under the authority of the Board of University and School Lands. N.D.C.C. § 61-33-03.
[3] N.D.A.G. 2005-L-01.
[4] N.D.A.C. ch. 89-10-01.

4. Serve as a complement to North Dakota's Administrative Code (N.D.A.C.) ch. 89-10-01 concerning sovereign land management; and

5. Generally improve management of the state's sovereign land for present and future generations.

The Planning Process

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

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

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

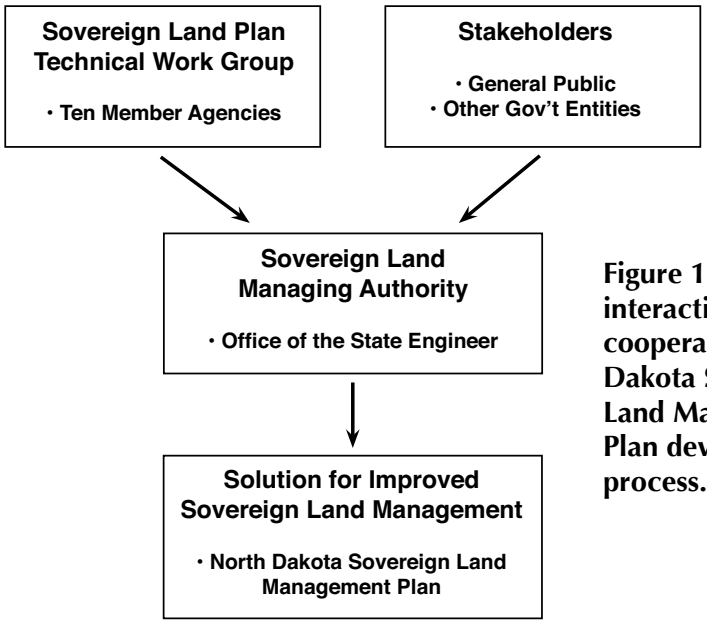


Figure 1: The interactive and cooperative North Dakota Sovereign Land Management Plan development process.

[5] N.D.C.C. §§ 61-33-08 and 61-33-09.

Applicable Laws and Rules

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

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

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

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

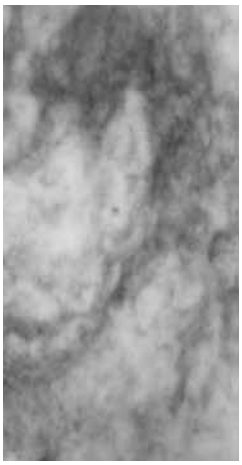
[6] Black's Law Dictionary 1246 (7th ed. 1999).
[7] J.P. Furlong Enterprises, Inc. v. Sun Explor. & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988).
[8] United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 462 (N.D. 1976) (citing Payne v. Kassab, 312 A.2d 86, 93 (Penn. 1973).
[9] United Plainsmen, at 463.

Application of the Public Trust Doctrine

The Public Trust Doctrine provides the general framework for North Dakota's Sovereign Land Management Plan by placing significant limitations and affirmative duties on the state. As such, the best interests of the public require the conservation and preservation of the state's sovereign land. The Doctrine, however, has exceptions for activities with equal benefit to the public including, but not limited to bridges, boat ramps, and water supply intakes. Private use of sovereign land may also be permissible under the Doctrine so long as the public's interests are not materially compromised.[10]

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

Sovereign Lands: Where Are They?



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

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

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

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

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

The Federal Standard Under the United States Constitution Commerce Clause

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

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

There are several similarities between the Commerce Clause test of navigability and the standard under the Equal Footing Doctrine, but there are also important differences. One difference is that reasonable improvements to the waterway to facilitate travel may be considered.[17] Closely related is the issue that navigability for Commerce Clause purposes can develop after statehood with waterway improvements.[18] And lastly, the Commerce Clause test requires that a waterway must serve as a link in interstate or foreign commerce, whereas the Equal Footing Doctrine test does not.[19]

North Dakota's Navigable Waters

In the past, North Dakota has affirmatively asserted jurisdiction over a relatively small number of the state's waters based on both federal tests of navigability.

[11] The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871).
[12] U.S. Const. art. I sec. 8, cl. 3.
[13] 33 U.S.C. 401-406.
[14] 16 U.S.C. 791 *et seq*.
[15] 311 U.S. 377 (1940).
[16] Gollatte v. Harrell, 731 F.Supp. 453, 458 (S.D. Ala. 1989); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-08 (1940).
[17] The Montello, 87 U.S. (20 Wall) 430 (1874).
[18] Appalachian Elec. Power, at 408.
[19] Oregon v. Riverfront Protection Ass'n, 672 F.2d 792, 794 n.1 (9th Cir.1982); Utah v. United States, 403 U.S. 9, 10 (1971).

Meaning that some of North Dakota's waters were identified as navigable because of the federal standard under the Equal Footing Doctrine. Others were determined to be navigable because they were listed as Section 10 (of the Rivers and Harbors Act of 1899) "waters of the United States" under the Constitution's Commerce Clause test.[20]

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

However, failure to be identified as a navigable waterway by the courts or the U.S. Army Corps of Engineers does not prevent the State Engineer from asserting jurisdiction over additional lands. In fact, the State Engineer has a responsibility under the Public Trust Doctrine to use prudent judgment in identifying all of the rivers and lakes throughout the state that should be included on the state's list of navigable waters, based on their location, physical characteristics, and/or historic and present use.

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

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

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

[20] The listing of waters as Section 10 navigable waterways is a function of the U.S. Army Corps of Engineers.
[21] Appalachian Elec. Power, at 410-13; United States v. Utah, 283 U.S. 64, 83 (1931); The Montello, at 441-42; Alaska v. United States, 662 F. Supp. 455, 463 (D. Alaska 1987).
[22] The Montello, at 441-42.
[23] Charles M. Carvell, *ND Waterways: The Public's Right of Recreation and Questions of Title*, 65 N.D.L. Rev 7, at 17 (1988), citing United States v. Utah, at 83; Loving v. Alexander, 548 F. Supp. 1079, 1089 (W.D. Va. 1982).

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

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

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

[24] Memorandum from Assistant Attorney General Charles Carvell to Deputy Land Commissioner Rick Larson (June 17, 2005).
[25] Id. (citing State V. Aucoin, 20 So.2d 136, 154 (La. 1944).
[26] Lefevre v. Washington Monument & Cut Stone Co., 81 P.2d 819, 822 (Wash. 1938); United States v. Utah, at 83, 86.

The Ordinary High Water Mark

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

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

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

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

> [W]hat its language imports - a water mark. It is co-ordinate with the limit of the bed of water; and that only is to be considered the bed that the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . .
>
> In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks. In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian owner and the public. It is the point up to which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop.[28]

General Guidelines for Ordinary High Water Mark Delineations

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

[27] N.D.A.C. § 89-10-01-03.

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

The Office of the State Engineer recognizes the need for such standards, and as a result, members of the sovereign land workgroup initiated the process of developing specific guidelines. However, that level of effort exceeded the original scope of the sovereign land management planning process, but proceeded independently as a related project.

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

In Minnesota, the primary physical features looked for in order of significance are trees, water-formed evidence, and vegetative evidence.[29] In Washington, the hierarchical order of significance is hydrology, soils, and then vegetation.[30] In Wisconsin, the state provides an inventory of what to look for, though no order of significance is provided for each of the indicators.[31]

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

Correlative Rights Between the State and Riparian Landowners

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

This issue of correlative rights was addressed in N.D.A.G. 2004-L-33, where it was explained that between the ordinary high water mark and the low water mark there is a zone along the shoreline wherein the state and the landowner have correlative rights.[34] In State ex rel. Sprynczynatyk v. Mills, the North Dakota Supreme Court

[29] John Scherek and Glen Yakel, *Guidelines for Ordinary High Water Level (OHWL) Determinations*, Minnesota Department of Natural Resources Technical Paper 11, 1993.
[30] Erik Stockdale and Alan Wald, *Methods for Delineating an Ordinary High Water Line or Ordinary High Water Mark on Streams and Rivers in Washington State (Draft Version 1.1)*, Washington Department of Fish and Wildlife, Washington Department of Ecology, 2005.
[31] *Wisconsin Department of Natural Resources, Waterway and Wetland Handbook (Chapter 40, Ordinary High Water Mark),* 2004
[32] South Dakota Wildlife Fed'n v. Water Mgmt. Bd., 382 N.W.2d 26, 27 (S.D. 1986).
[33] Slauson v. Goodrich Transp. Co., 69 N.W. 990, 992 (Wis. 1897).
[34] N.D.A.G. 2004-L-33.

declined to specify the rights of riparian landowners and the state:

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

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

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

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

[35] State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 544 (1994).
[36] Id. at 543-44 (quoting State v. Korrer, 148 N.W. 617 (Minn. 1914)).

Plan Strategies and Recommendations

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

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

It should be noted that the following recommendations and action strategies are just that—recommendations. Actual changes or additions to state Century Code or Administrative Rules, as a result of this planning process, may differ from what is recommended. Any additions or modifications to state statutes and rules will be conducted through established legal protocol.

Sovereign Land Management Plan Recommendations and Action Strategies

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

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

  "Navigable ~~streams or~~ waters" means any waters which were in fact navigable at time of statehood, ~~including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake~~ that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.

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

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

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

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

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

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

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

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

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

aesthetics, environment, erosion, fish and wildlife, water quality, and alternative uses.

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

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

1. When on government-established trails;

2. When on sovereign land areas adjacent to the Kimball Bottoms off-road riding area;

3. When on state-designated off-road use areas, provided the area is managed and supervised by a government entity, the government entity has developed a management plan for the off-road area that must be submitted to the State Engineer, and the managing government entity has obtained a sovereign land permit for off-road use in the designated area;

4. To cross a stream by use of a ford, bridge, culvert, or similar structure provided the crossing is in the most direct manner possible;

5. To launch or load a boat, canoe, or other watercraft in the most direct manner possible;

6. To access and operate on the frozen surfaces of any navigable water, provided the crossing of sovereign land is in the most direct manner possible;

7. To access private land that has no other reasonable access point, provided that access across sovereign land is in the most direct manner possible;

8. By disabled persons who possess a totally or permanently disabled person's fishing license or shoot from vehicle permit;

9. When operation is necessary as part of a permitted activity or project; and

10. By the riparian owner or the riparian owner's lessee in the shore zone adjacent to the riparian owner's property.

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

Recommendation 7: For the Office of the State Engineer to fulfill its duty to manage, operate, and supervise activities on the state's sovereign land, a more visible presence – particularly regarding enforcement and general compliance checks will be required in the future.

• Action Strategy 7.1: The Office of the State Engineer will work to develop interim cooperative agreements with the Game and Fish Department and other law enforcement to address sovereign land-related disputes, violations, and enforcement.

• Action Strategy 7.2: The Office of the State Engineer will request from the Governor and Legislative Assembly additional funding and FTEs to deal with the increasing workload associated with sovereign land delineations, navigability determinations, management, and enforcement.

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

• Action Strategy 8.1: The Office of the State Engineer, in cooperation with other state agencies and professional consultants, will begin to make ordinary high water mark and sovereign land delineations on an as needed basis (particularly in the Bismarck-Mandan area along the Missouri River and near the confluence of the Yellowstone and Missouri Rivers) to prevent private encroachment on sovereign land.

• Action Strategy 8.2: If large-scale delineations are made, the Office of the State Engineer may produce general maps of those areas to be used as educational tools for landowners, local governments, and developers.

• Action Strategy 8.3: Where practical, and particularly in high-use or conflict areas, the Office of the State Engineer may mark and maintain sovereign land boundaries.

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

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

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

• Action Strategy 10.1: A bill will be developed for the 60th Legislative Assembly to amend N.D.C.C. § 61-03-21.3 so it applies to all navigable waters, and any illegal projects or objects that occur on the state's sovereign land.

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

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

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

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

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

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

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

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

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

(Also see Action Strategy 7.1)

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

Watercraft may not be left unattended on or moored to sovereign land for more than twenty-four hours except:
1. When moored to privately owned docks;
2. When moored to private property above the ordinary high water mark with a rope, chain, or other type of restraint that does not cause unreasonable interference with navigation or the public's use of the shore zone; or

3. By riparian landowners in the shore zone.
A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

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

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

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

(Also see Action Strategy 7.1)

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

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

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

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

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

Camping for longer than ten consecutive days in the same vicinity or leaving a tent or camper unattended for more than twenty-four hours is prohibited

on any state sovereign land area. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

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

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

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

(Also see Action Strategy 7.1)

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

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

(Also see Action Strategy 7.2)

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

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

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

(Also see Action Strategy 7.1)

Plan Evaluation

An important outcome of this first-ever North Dakota Sovereign Land Management Plan was to develop a product that could serve as a foundation for future planning efforts. As such, this plan is not the final result of a planning process - rather, it is more appropriately viewed as the first step. After two years, the Office of the State Engineer, along with the sovereign land planning workgroup, will review the performance of the overall plan, the recommendations, and action strategies, and begin the process of incorporating modifications as necessary to improve the document for future users.

Addendum

Since the completion of the Final Draft North Dakota Sovereign Land Management Plan in January 2007, several advancements have occurred as a result of various recommendations included in the Plan. Some of the advancements that will be reported in this addendum required the passage of Senate Bill 2096 (SB 2096) during the 60th Legislative Assembly. On April 26, 2007, SB 2096 was signed by Governor, John Hoeven, and a day later, it was signed by Secretary of State, Al Jaeger. It will become effective August 1, 2007.

SB 2096 had four purposes: 1) to provide the Game and Fish Department with the authority to enforce sovereign land-related rules and regulations on the state's sovereign lands; 2) to allow the State Engineer to enter into agreements with the North Dakota Game and Fish Department or other law enforcement entities to enforce sovereign land-related rules and regulations; 3) to provide the State Engineer with the authority to manage the removal, modification, or destruction of dangers in the state's navigable waters that have been determined to be navigable by a court of law; and 4) to provide a penalty for violations of sovereign land-related rules and regulations.

As of May 2007, the following progress had been made on Plan recommendations:

• Recommendation 5 and Action Strategy 5.1 were completed in January 2007. The Office of the State Engineer contracted with an environmental services consulting firm to develop Ordinary High Water Mark Delineation Guidelines for North Dakota. The guidelines are available on the State Engineer and Water Commission's website at www.swc.nd.gov under "Reports and Publications."

• Progress toward the completion of Recommendation 7 and Action Strategy 7.1 occurred with the passage of SB 2096. When SB 2096 becomes effective August 1, 2007, cooperative agreements will be signed with the Game and Fish Department to provide law enforcement on the state's sovereign lands.

• Implementation of Recommendation 8 and Action Strategies 8.1, 8.2, and 8.3 are well underway. In April 2007, the Office of the State Engineer requested proposals for the completion of ordinary high water mark delineations near the confluence of the Missouri and Yellowstone Rivers, and along the Missouri River north of Bismarck.

• Recommendation 10 and Action Strategy 10.1 were completed with the passage of SB 2096. On August 1, 2007, the State Engineer will have the authority to manage the removal, modification, or destruction of dangers in all of the state's navigable waters.

As the Plan continues to be implemented in the future, progress will be tracked, and updated information will be provided on the State Engineer and Water Commission's website at ww.swc.nd.gov, under "Special Projects."

LETTER OPINION
2005-L-01

January 3, 2005

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

Dear Mr. Royse:

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

ANALYSIS

Background – Missouri River land development and regulation.

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

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

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

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

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

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

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

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

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

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

State title to navigable waters.

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

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

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

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

The public trust doctrine.

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

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

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

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

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

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

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

North Dakota's public trust doctrine.

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

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

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

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

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

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

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

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

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

Applying the public trust doctrine.

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

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

states, the public trust doctrine does not prohibit all development, but it does require controlled development. 247 N.W.2d at 463.[4]

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

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

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

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

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

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

Riprap, on the other hand, is not entirely benign. It inhibits, by both foot and by boat, public access to the shore. It can adversely affect the environment. Installing riprap often requires that the riverbank be reshaped to ensure that the riprap stays in place. See Corps' WW Ranch Decision at 5, 22. The North Dakota Game and Fish Department believes that bank stabilization reduces the river's spawning and rearing habitat and that if more riprap is installed, it could have significant adverse effects on the Missouri River fishery. Id. at 27. See also id. 36, 46, 54-55, 70; Game & Fish Dep't 1998 Report at 6-8.[6] Riprap presents aesthetic considerations. Id. at 10; Corps' WW Ranch Decision at 31, 55. Further, while the effect of one riprap project on the ecosystem and river aesthetics may be minimal, the cumulative effect of these projects may cause problems. E.g., id. at 25, 40-42; Game & Fish Dep't 1998 Report at 10-11. It is the cumulative effects of individual projects that the State Engineer would be best able to consider if management decisions were made under a comprehensive plan.

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

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

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

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

Public trust doctrine - conclusions.

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

The constitution's gift clause.

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

The gift clause states:

> The state, any county or city may make internal improvements and may engage in any industry, enterprise or business . . . but neither the state nor any political subdivision . . . shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor.

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

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

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

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

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

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

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

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

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

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

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

Sincerely,

Wayne Stenehjem
Attorney General

cmc

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

MEMORANDUM

TO: Rick Larson, Deputy Land Commissioner

FROM: Charles M. Carvell, Asst. Attorney General

DATE: June 17, 2005

RE: Ownership of White Lake

Issue

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

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

Answer

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

Discussion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

The "'true criterion'" for navigability is "'usefulness . . . to the population . . . as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise,'" and if the water in question "'may be prudently relied upon and used for that purpose at some seasons of the year recurring with tolerable regularity, then, in the American sense, it is navigable.'" *McGahhey v. McCollum*, 179 S.W.2d 661, 664 (Ark. 1944) (citing *Little Rock, M.R. & T.R. Co. v. Brooks*, 39 Ark. 403, 43 Am Rep. 277).

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

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

LETTER OPINION
2004-L-33

May 11, 2004

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

Dear Mr. Connor:

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

ANALYSIS

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

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

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

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

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

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

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

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

The boundary of a tract of land abutting a navigable body of water is ordinarily formed by a water line. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143.[3] The boundary is generally discussed by reference to the ordinary low water mark, the ordinary high water mark, and the area between those two marks which is referred to as the "shorezone." The State owns absolute title to the bed of navigable bodies of water up to the low watermark. State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 540 (N.D. 1994) (citing Hogue v. Bourgois, 71 N.W.2d 47, 52 (1955)). The adjacent or upland owner owns title to the ordinary high water mark. Both the State and the upland owner have correlative rights between the ordinary high water mark and the ordinary low water mark known as the shorezone. State ex rel. Sprynczynatyk, 523 N.W.2d at 544-45.

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

> "'High Water Mark' means what its language imports -- a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . . In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks.
>
> In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian[4] owner and the public. It is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

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

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

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

Sincerely,

Wayne Stenehjem
Attorney General

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