



Presentation Submitted to the
North Dakota 69th Legislative Interim
Agriculture and Water Management Committee
For the March 31, 2026 Meeting
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About Jeffrey McCoy and Pacific Legal Foundation

Pacific Legal Foundation is a public interest law firm that defends Americans' liberties when threatened by government overreach and abuse. Since its founding in 1973, PLF has brought 20 cases to the United States Supreme Court and won 18 victories, including landmark cases in property rights and administrative law. Every year PLF represents hundreds of Americans, free of charge, who seek to improve their lives but are stymied by government.

Jeffrey McCoy is a senior attorney in Pacific Legal Foundation's Property Rights practice. He joined PLF in 2017. Since then, he has focused his litigation on separation of powers and private property rights, with a focus on environmental litigation. He has won two cases at the Supreme Court that have opened the courthouse doors for private property owners looking to defend their rights against the government.

History of Waterfowl Production Easements in North Dakota

North Dakota is in the "Prairie Pothole" region of the Upper Midwest. Prairie potholes are soil depressions that were formed by glacial melt. Some of these wetlands are permanently filled with water, but others simply flood during wet periods and are naturally dry during the majority of the year.

During the early 1960s, the farming industry hit a downturn with many farmers struggling. During this time, the U.S. Fish and Wildlife Service took acquired conservation easements over many prairie potholes. Before 1976, however, these easements did not describe where they applied or what

“wetlands” they covered. Instead, the easements all used identical language saying that the owner would “cooperate in the maintenance of the ... lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any such surface water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or reoccurring due to natural causes ... by ditching or any other means.” *See United States v. Johansen*, 93 F.3d 459, 461–62 (8th Cir. 1996). The easements also specifically allowed “farming practices ... [and] working and cropping wetlands when the same are dry of natural causes” and are “subject to existing rights-of-way for highways” and “roads[.]”

The only clue to how much land was governed by these easements was an agreement between the Governor of North Dakota and the Service that 1.5 million acres had been encumbered. *Johansen*, 93 F.3d at 461. This was because the statute allowing the Service to acquire these easements required consent of the state involved. *See id.*

Since 1976, the Service has recorded a map locating the covered wetland acres as part of every easement document. However, as a consequence of the former practice and the fact that prairie potholes, by nature, are ill-defined and subject to fluctuation, there has been a considerable amount of confusion regarding what the earlier wetland easements actually covered.

Id. at 463.

Despite not being part of the easements, the Service later published an Easement Summary for each tract of land, which purported to identify the covered wetlands and the acreage subject to the easement on each tract. *Id.* at 462.

These easements are enforceable criminally. *See* 16 U.S.C. § 668dd(c) (“No person shall disturb, injure, cut, burn, remove, destroy, or possess any real or personal property of the United States” acquired under the Act.). And the United States has prosecuted farmers in North Dakota for allegedly draining potholes subject to these easements. *See Johansen*, 93 F.3d at 463.

Legal Standards for Interpreting Easements

Easements are contractual nonpossessory property interests that give the easement holder the right to use property owned by another in a certain manner. Pursuant to N.D. Cent. Code § 47-05-07, “[t]he extent of a servitude is determined by the terms of the grant” State law will generally govern the interpretation of a real property conveyance instrument, either through direct application or through the “borrowing” principles of federal law, so long as it is neither aberrant nor hostile to federal property rights. *Johansen*, 93 F.3d at 463.

Case law holds that restrictions contained in these FWS waterfowl production area easements only apply to wetland areas on the property at the time the easement was conveyed and do not apply to fluctuating, after-expanded, or after-developed wetland areas. *Johansen*, 93 F.3d at 465–66 (citing *North Dakota v. United States*, 460 U.S. 300 (1983)). The key inquiry when interpreting contracts that convey an interest in real property “is to ascertain and effectuate intent of the grantor.” *Id.* at 463 (citing *Malloy v. Boettcher*, 334 N.W.2d 8, 9 (N.D. 1983)).

Accordingly, and absent a negotiated and agreed-upon map between the grantor and FWS showing areas subject to the easement’s restrictions, the location and boundaries of wetland areas on the property that were in existence at the time the easement was conveyed are protected by the easement because those are the areas that the grantor knew were present on the landscape and intended to be subject to the easement’s restrictions. *Id.* at 467.

Restrictions contained in FWS waterfowl production area easements are also limited, at a maximum, to the number of acres that FWS noted it paid the landowner in the summary record. *Id.* at 465–66. The court in *Johansen*—after looking to “traditional norms of real property conveyance—held that interpreting the easement’s restrictions as covering fluctuating, after-expanded, or after-developed wetland areas violates the easement program’s enabling statutes because the number of protected acres would constantly fluctuate and could thereby exceed the gubernatorial consent limitation. *Id.*

Fish and Wildlife Service Guidance and Rules

Subsurface drainage is a common farming practice that lowers the water table to provide better soil aeration. University of Minnesota Extension, *How Agricultural Drainage Works*.¹ Farmers install drain tiles to prevent water from stagnating on the surface, and instead allow water to drain into the water table. This prevents erosion, improves use of water by crops, and prevents salination of soil from surface evaporation.

Recently, the Fish and Wildlife Service has issued guidance and regulations about where farmers can install drain tiles near where the Service has waterfowl production easements.

1. 2020 Guidance

In 2020, in response to the legal uncertainty concerning the Service's wetland easements and the growing use of drain tile on farmlands with such easements, the agency issued a guidance memo titled "Drain Tile Setbacks and Legal Action on U.S. Fish and Wildlife Services Wetland Easements" (Feb. 26, 2020).² Pursuant to the memo, the Service informed landowners that it would issue estimates of what it believed to be the scope of existing wetland easements and calculate where farmers could install drain tile on their encumbered properties. In issuing these estimates, the agency would use the van Schilfgaarde equation to calculate where farmers could install drain tiles.³ The van Schilfgaarde equation was developed to determine the effect of drainage systems on water table drawdown in saturated soil conditions.

The Service would thus provide a "setback" from the wetland potholes where drain tiles could be used. The Service informed landowners that it would

¹ <https://extension.umn.edu/agricultural-drainage/how-agricultural-drainage-works#what-subsurface-drainage-is-1361661>

² <https://www.fws.gov/sites/default/files/documents/Guidance-Memo-Drain-Tile-Setbacks-Wetland-Easements.pdf>

³ For more information on the van Schilfgaarde equation, see Minnesota Board of Water and Soil Resources, *Van Schilfgaarde Equation and Parameters*, https://bwsr.state.mn.us/sites/default/files/2021-07/Appendix%205_Van%20Schilfgaarde%20Equation%20and%20Parameters.docx.

take no enforcement action if they complied with these recommendations, even if they ultimately drained potholes that were, in fact, protected.

2. 2024 Rule

Following a change in Presidential administration, the Service rescinded its 2020 guidance, and instead proposed a new rule, *National Wildlife Refuge System; Drain Tile Setbacks*, 88 Fed. Reg. 26244 (Apr. 28, 2023). The new rule largely tracks the process considered by the Service in its guidance, creating a safe harbor process if farmers comply with the agency's estimates of drain tile setbacks and a process by which a landowner can request an agency calculation. *See id.* at 26244-45.

The proposal, however, also insisted that any use of drain tiles on any encumbered lands, even if the wetlands were periodic or otherwise not significantly affected by drainage, would be construed as a violation of law. "The proposed regulations in this document clarify that drain tile may be installed on lands encumbered by a wetland easement provided that protected wetland areas are not drained, directly or indirectly. This proposed rule distinguishes Service wetland easements from the 'Swampbuster' provisions of the Food Security Act of 1985 (also known as the 'Farm Bill'; Pub. L. 99-198), which allow drain tile to have a 'minimal effect' to wetlands. Service wetland easement agreements with landowners include provisions that allow for *no effect*; hence, the proposed regulations would clarify that tile may be installed on a wetland easement tract provided that the tile does not drain a protected wetland area." *Id.* at 26245 (emphasis added).

On May 13, 2024, the Service issued the final rule, without making any changes from the proposed rule. 89 Fed. Reg. 41336 (May 13, 2024).

Current and Past Litigation

Pacific Legal Foundation has represented local governments, small businesses, and farmers in challenges against the Fish and Wildlife Service's interpretations of the scope of the agency's waterfowl production easements. Below is a summary of the cases.⁴

⁴ Up-to-date information on the litigation can be found at <https://pacificlegal.org/case/prairie-potholes-fws/>.

1. Northland Township

Northland Township is in Ransom County, North Dakota. The Fish and Wildlife Service owns a waterfowl production easement near one of the Township's roads. Several Township residents live on this road, and it is the only access point to and from their homes. In some years, the water level of the nearby wetland entirely covers the road and makes it impassable.

To make the road passable, in 2024 Township officials dug a small ditch to slightly lower the water level of the wetland to below the road. In response, the Fish and Wildlife Service threatened the Township with fines and other enforcement actions if the Township did not refill the ditch.

In response, Pacific Legal Foundation argued that waterfowl production easements were taken "Subject ... to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, and all outstanding mineral rights." As shown on maps since at least the 1950s, the Township's road existed prior to the Fish and Wildlife Service's acquisition of the easements in 1970 and 1971. Thus, the Township's right to use the road takes precedence over the Service's easement and the Township can take reasonable steps to ensure that its road is usable.

Ultimately, the Township and the Service reached an agreement that allows the Township to maintain the road and make it usable, while ensuring that the nearby wetlands are protected.

2. *Ellingson v. USFWS*

Ellingson Drainage, Inc. (Ellingson) is a third generation, family-owned company that provides construction planning, design, and installation services to farmers throughout the Midwest. One service Ellingson provides to farmers is the installation of subsurface drainage systems that improve the soil for agricultural use. Many of Ellingson's clients farm in the Prairie Pothole region of the Upper Midwest, including North Dakota, South Dakota, Minnesota, and Iowa.

PLF represented Ellingson in a lawsuit challenging the legality of the 2024 Rule. The lawsuit argued that the “no effect” standard in the 2024 Rule exceeds the scope of the waterfowl production easements. Specifically, the lawsuit argued that the rule goes beyond outlawing damage to wetlands, and advances an interpretation that is inconsistent with traditional norms of real property conveyance. At common law, “the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.” Restatement (Third) of Property (Servitudes) § 4.9 (2000). Likewise, “the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.” Restatement (Third) of Property (Servitudes) § 4.10 (2000). “In resolving conflicts among the parties to servitudes, the public policy favoring socially productive use of land generally leads to striking a balance that maximizes the aggregate utility of the servitude beneficiary and the servient estate.” *Id.* at comment b.

The lawsuit argued that the Service’s interpretation of its easement results in unreasonable interference with the enjoyment of the servient estate. Based on the prior use of the lands covered by the easements, regular farming practices are a reasonable use of the servient estate. Indeed, the language of the conservation easements contemplate that farming will continue. And while installing drain tiles may have some minimal effect on the wetlands, it does not unreasonably interfere with the purpose of the easement. As demonstrated by the Department of Agriculture’s regulations implementing Swampbuster—a statute intended to protect wetlands—farming practices that may cause minimal effect on wetlands is still consistent with the preservation and protection of wetlands. The lawsuit argued that the Service’s interpretation of its rights under the easement fails to strike a balance that maximizes the aggregate utility of protecting wetlands and allowing normal farming practices and is not a reasonable interpretation of the scope of the conservation easement.

The United States District Court for the District of Columbia dismissed the suit, however, because Ellingson does not own any land covered by an easement and concluded that it does not have standing to challenge the rule. *Ellingson Drainage, Inc. v. United States Fish & Wildlife Serv.*, No. CV 25-541 (JDB), 2025 WL 2926381 (D.D.C. Oct. 15, 2025).

3. *Cody Peterson v. United States*

Cody Peterson is a third-generation farmer in LaMoure County, North Dakota. In 2021, the Service sent Mr. Peterson its proposed drain tile map on one portion of his farmland. It identified 21 wetlands, which the Service claimed existed in the original easement, and the agency also declared that the use of drain tiles within 190 feet of the outer boundary of any such wetland was prohibited. As a result of the map, approximately 40% of the tract could not be drained, significantly decreasing the production of the land.

In addition to challenging the 2024 Rule for the same reasons as the *Ellingson* case, Mr. Peterson's lawsuit challenges the Service's map of his property. Mr. Peterson hired Wenck Associates—an environmental consulting firm—who looked at historic maps of the property and concluded that the wetlands that existed at the time the easement was conveyed were much smaller than the ones that were mapped by the Service. The following two maps compare the Service's map (first map) with the report from Wenck Associates (second map). Mr. Peterson's case is ongoing in the U.S. District Court for the District of North Dakota. *See Peterson v. United States*, No. 3:25-cv-00078-PDW-ARS.

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LaMoure County, North Dakota



