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EFFECT OF THE NATIONAL WILDLIFE REFUGE AND NATIONAL WILDLIFE REFUGE SYSTEM IMPROVEMENT ACTS ON PROJECTS SUCH AS AN EAST END DEVILS LAKE OUTLET

This memorandum discusses the effect of the National Wildlife Refuge Act and the National Wildlife Refuge System Improvement Act on construction of an outlet from the east end of Devils Lake to West Stump Lake. For purposes of this memorandum, it is assumed that construction of an outlet from the east end of Devils Lake to West Stump Lake would severely impact, if not inundate, a national wildlife refuge located in the Stump Lake system.

The Acts are codified at 16 U.S.C. § 668dd et seq. Section 668dd(a)(2) provides that the mission of the National Wildlife Refuge System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans. There are at least three options under the Acts which the state could explore in constructing an outlet from east Devils Lake to West Stump Lake. These include acquiring the refuge or exchanging state land for the refuge, pursuing a determination that construction of the outlet is compatible with the refuge, or seeking to invoke the emergency power of the Secretary of the Interior concerning activity in the refuge.

ACQUISITION OR EXCHANGE

Section 668dd(a)(5) provides that acquired lands that are or become a part of the National Wildlife Refuge System may be transferred or disposed of if the Secretary of the Interior determines with the approval of the Migratory Bird Conservation Commission the lands are no longer needed for the purposes for which the National Wildlife Refuge System was established and the lands are transferred or otherwise disposed of for an amount not less than the acquisition costs of the lands, in the case of lands of the system that were purchased by the federal government with funds from the migratory bird conservation fund, or fair market value, whichever is greater, or the fair market value of the lands in the case of lands that were donated to the system. Section 668dd(6)(b) provides that the Secretary of the Interior is also authorized to acquire lands or interests in lands by exchange for acquired lands or public lands, or for interests in acquired or public lands that the Secretary of the Interior finds to be suitable for disposition. This section provides that the values of the properties to be exchanged must be approximately equal, or if they are not approximately equal, the values must be

equalized by the payment of cash to the grantor or to the Secretary of the Interior as the circumstances require.

COMPATIBILITY

Section 668dd(d)(3)(A)(i) provides that the Secretary of the Interior may not initiate or permit a new use of a refuge, or expand, renew, or extend an existing use of a refuge, unless the Secretary of the Interior determines the use is a compatible use and the use is not inconsistent with public safety. Compatible use is a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the director of the United States Fish and Wildlife Service, will not materially interfere with or detract from the fulfillment of the mission of the National Wildlife Refuge System or the purposes of the refuge. Under current regulations, the regional director of the United States Fish and Wildlife Service or that person's designee may require mitigation measures, as determined appropriate, within the easement area, in order to make the proposed use compatible with the purposes for which the easement was acquired. These mitigation measures are solely for the purpose of complying with the requirement of the National Wildlife Refuge System Administrative Act that the use be compatible with the purpose for which the area was established. If the proposed use cannot be made compatible through permit stipulations or mitigation, the permit will be denied. 50 C.F.R. § 25.44(d). The Code of Federal Regulations at 50 C.F.R. § 29.21-7(c) provides that "[i]n instances where damage to a unit of the National Wildlife Refuge System will result, the Regional Director may require mitigation measures, as determined by him, within the easement or permit area or on adjacent Service land or replacement land to make the proposed use compatible with the purposes for which the unit of the system was established. Such mitigation measures, and/or the replacement of land, are solely for the purpose of complying with the requirement of the National Wildlife Refuge System Administrative Act that the use be compatible with the purpose for which the area was established and shall be in addition to the payment of fair market value." Thus, it appears that under current regulations, mitigation is an option to meet the compatibility requirements of the Acts.

However, the National Wildlife Refuge System Improvement Act of 1997 (16 U.S.C. § 668dd(d)(B)) requires the Secretary of the Interior to issue final

regulations establishing the process for determining whether the use of a refuge is a compatible use not later than 24 months after October 9, 1997. Although the United States Fish and Wildlife Service did not meet this date, the service intends to publish final rules in October. According to service officials, it is anticipated the proposed rules will be revised to address the large number of public comments received, but the final rules will be similar to the proposed rules. Compatibility determinations in existence on October 9, 1997, remain in effect until the new regulations take effect. Under the proposed compatibility regulations, compatible use is defined as a proposed existing wildlife-dependent recreational use or any other use of a national wildlife refuge that, in the sound professional judgment of the refuge manager, does not materially interfere with or detract from the fulfillment of the National Wildlife Refuge System mission or the major purposes of the affected national wildlife refuge. The proposed rules note that the United States Fish and Wildlife Service is removing the option of using mitigation measures to make uses of easement areas of a national wildlife refuge compatible. Thus it is anticipated that once the proposed regulations become final, mitigation will no longer be available to make a use compatible to comply with the National Wildlife Refuge System Administrative Act. The basis the United States Fish and Wildlife Service uses for this provision is that there is no authority in law to allow an incompatible use in instances where the service receives some sort of compensatory mitigation.

EMERGENCY

Concerning the emergency power of the Secretary of the Interior, 16 U.S.C. § 668dd(k) provides that "[n]otwithstanding any other provision of this Act, the Secretary [of the Interior] may temporarily suspend, allow, or initiate any activity in a refuge in the [National Wildlife Refuge] System if the Secretary determines it is necessary to protect the health and safety of the public or any fish or wildlife population." The proposed draft compatibility policy provides:

The Refuge Administration Act states that the Secretary may temporarily suspend, allow, or initiate any use in a refuge in the Refuge

System if the Secretary determines it is necessary to act immediately in order to protect the health and safety of the public or any fish or wildlife population. Authority to make decisions under this emergency power is delegated to the Refuge Manager. Temporary actions should not exceed 12-months and will usually be of shorter duration. Such emergency actions are not subject to the compatibility determination processes outlined in this chapter. When using this authority, the Refuge Manager will notify the Regional Office supervisor or designee in advance of the action, or in cases where the nature of the emergency requires immediate response, as soon as possible afterwards, and typically no later than the start of business on the first normal workday following the emergency action. The Refuge Manager will create a written record (memorandum to the file) of the decision, the reasons supporting it, and why it was necessary to protect the health and safety of the public or any fish or wildlife population.

Thus, it appears the refuge manager may allow impacts to a refuge if it is necessary to protect the health and safety of the public. However, it appears the danger to the public must be imminent and the proposed use must be temporary.

CONCLUSION

It appears that although the state could pursue acquisition of the refuge or an exchange of state land for the refuge, seek a determination that construction of an outlet is compatible with the use of the refuge, or request that the refuge manager invoke the emergency provisions, no option appears to be a feasible solution. Based upon press reports and past committee testimony, it appears that the refuge, if not unique, is not regarded as no longer needed for the purposes for which it was established, that construction of an outlet from the east end of Devils Lake to West Stump Lake would severely impact the refuge and thus not be compatible with its use as a national wildlife refuge, and that the flooding of Devils Lake, although disastrous, does not meet the imminence requirements, and that any use of the refuge would probably be more than 12 months in duration.