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Waterfowl Production Areas: A State Perspective

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WATERFOWL PRODUCTION AREAS: A STATE PERSPECTIVE

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I. INTRODUCTION

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

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

II. HISTORICAL CONTEXT OF THE FEDERAL-STATE DISPUTE

A. THE AUTHORIZATION OF WATERFOWL PRODUCTION AREAS

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

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

Section 7 of the Act contained an unusual accommodation to the federal-state relationship: the federal government could not acquire land unless a state consented "by law."[2] The State of North Dakota gave its consent in 1931.[3]

The 1934 Migratory Bird Hunting Stamp Act[4] soon provided a funding mechanism for the refuge acquisition program. The 1934 Act authorized the sale of migratory bird hunting and conservation stamps (duck stamps) to generate revenue for the newly created Migratory Bird Conservation Fund.[5]

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

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

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

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

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

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

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

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

7. 72 Stat. at 487.

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

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

10. 16 U.S.C. § 715k-5 (1982).

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

B. THE INITIAL STATE RESPONSE

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

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

C. THE NATIONAL WILDLIFE REFUGE SYSTEM ADMINISTRATION ACT OF 1966

Congress enacted comprehensive legislation to reorganize the

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

12. *Id.* at 54.

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

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

NWRS in 1966.[15] The legislation was designed to consolidate management responsibilities for varied components of the system. Section 4(a) of the Act provided:

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

D. ACQUISITION POLICIES

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

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

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

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

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

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

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

complaints about the acquisition practices.[19]

E. THE STARKWEATHER WATERSHED PROJECT

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

Pursuant to the agreement, the FWS acquired wetlands in the

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

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

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

Id. at 169-70.

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

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

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

21. *Id.*

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

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

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

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

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

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

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

In anticipation of the project, the FWS began an "accelerated program of wetland acquisition."[28] The Department of the Interior, however, reversed its position in 1972. Secretary of the Interior Morton expressed concern that the Starkweather project would cause the loss of natural wetlands.[29] The SCS work on the project was suspended in 1973.[30]

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

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

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

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

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

> The Starkweather Watershed Project, Ramsey and Cavalier Counties, North Dakota, presently being planned under the authority of P.L. 83-566, poses problems of grave concern to this Department. . . .
>
> Specifically, and of greatest concern, the Starkweather Project will cause systematic and unwarranted losses of natural prairie marsh resources in the pothole area of North America. In anticipation of the construction of this project, the Bureau of Sport Fisheries and Wildlife [FWS] has conducted an accelerated program of wetland acquisition. By purchasing easements or fee title with Duck Stamp funds the Bureau has insured the preservation of 6,472 acres of wetlands out of the 18,400 acres that still remain undrained within the Starkweather watershed, this in accordance with an agreement between the project sponsors and the Bureau.

Id.

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

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

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

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

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

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

F. CHANNEL A

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

Local sponsors were determined, by 1974, to construct Channel A without federal funds or interferences.[34] In 1975 the North Dakota Legislature established the Devils Lake Basin Advisory Committee[35] to address the general issue and appropriated

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

Id.

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

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

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

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

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

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

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

G. CRIMINAL PROSECUTIONS FOR BREACHES OF THE EASEMENT CONTRACT

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

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

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

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

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

39. Interview with Stephen M. Hoetzer, P.E., (former drainage engineer with the North Dakota State Water Commission) (Mar. 25, 1984). The FWS purchased the blocking waterfowl production area easement on July 29, 197^, for $33.33 per wetland acre. Easement No. 452X-1 covered, among other tracts, the E½SE¼ of sec. 2, T.154N., R.65W.

40. *Id.*

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

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

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

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

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

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

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

> "National Wildlife Refuge System" means all lands, waters, and interests therein administered by the U.S. Fish and Wildlife Service as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, and other areas for the protection and conservation of fish and wildlife including those that are threatened with extinction.
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> "National wildlife refuge" means any area of the National Wildlife Refuge System except wildlife management areas.
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> . . . .
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> "Waterfowl production area" means any wetland or pothole area acquired pursuant to section 4(c) of the amended Migratory Bird Hunting Stamp Act (72 Stat. 487; 16 U.S.C. 718d(c)), owned or controlled by the United States and administered by the U.S. Fish and Wildlife Service as a part of the National Wildlife Refuge System.

Id.

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

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

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

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

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

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

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

Id. (emphasis in original).

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

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

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

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

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

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

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

H. HURRICANE LAKE

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

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

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

Substantial construction work on the channel was completed during the fall of 1976. In December 1976, however, the Corps of Engineers ordered the Board to ''cease and desist'' from further work in the channel because of a perceived violation of section 404 of the Federal Water Pollution Control Act Amendments of 1972.[53]

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

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

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

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

50. *Id.*

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

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

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

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

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

Although the FWS had earlier approved some maintenance

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

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

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

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

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

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

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

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

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

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

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

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

I. THE 1977 STATE LAWS AND THE FEDERAL CHALLENGE

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

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

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

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

60. Letter from Fish & Wildlife Service Project Leader Ralph F. Fries to John S. Axtman, Chairman, Pierce County Water Management Board (Nov. 4, 1976) (approval of work in SW¼ of sec. 32, T.157N., R.68W). Letter from Fish & Wildlife Service Acting Project Leader Eugene C. Patten to John S. Axtman (July 19, 1977) (approval of work in sec. 2, T.156N., R.69W.).

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

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

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

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

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

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

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

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

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

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

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

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

The United States, at the request of the FWS, filed a complaint seeking declaratory relief in 1979.[74] The United States successfully argued in the trial court that the gubernatorial consent provision did not govern the acquisition of waterfowl production areas and that the statutes were unconstitutional "[t]o the extent they encumber the federal statutes which provide for the acquisition of waterfowl habitat."[75]

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

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70. *Id.*

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

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

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

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

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

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

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

J. THE IMPACT ON RECLAMATION PROJECTS

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

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

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

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

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

Id.

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

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

Id.

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

82. 1 COMMITTEE REPORT, FISH AND WILDLIFE MITIGATION AND ENHANCEMENT PLAN, PHASE I - GARRISON DIVERSION UNIT, PICK-SLOAN MISSOURI RIVER BASIN PROJECT 26-27 (Dec. 1982). The committee stated:

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

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

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

K. WHITE SPUR DRAIN

White Spur Drain was established in 1983 after years of planning by the Bottineau County Water Resource District Board of Managers.[84] Investment Rarities, Inc.[85] purchased, during the period that the Board was planning White Spur Drain,[86] an interest in a tract that would be required for the White Spur Drain right-of-way.[87] Investment Rarities immediately donated a perpetual[88] waterfowl production area easement to the FWS.[89] Although the governor objected to the donation because it would interfere with the plans for the proposed White Spur Drain,[90] the FWS accepted the easement.[91] Internal FWS documents reveal that the donation was a coordinated effort by the owner of Investment Rarities, Inc. and the FWS to frustrate construction of the drain.[92]

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

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

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

86. Investment Rarities, Inc., purchased the SW¼ NE¼, N½ SW¼ and S½ NW¼ of sec. 13, T. 160N., R. 77W (Bottineau County, North Dakota) under a contract for deed dated Dec. 19, 1980. The contract contained a provision in which the seller agreed "to join in and execute, upon request of Buyer, a wetland easement in favor of the U.S. Fish & Wildlife Service. . . ."

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

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

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

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

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

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

L. THE REFUGE REVENUE SHARING ACT PAYMENTS

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

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

III. THE CURRENT FEDERAL-STATE DISPUTES

A. STATE CONTROL OVER WATERCOURSES

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

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

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

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

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

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

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

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

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

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

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

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

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

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97. N.D. CONST. art. XI, § 3.

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

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

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

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

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

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

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

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

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

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

the 1935 emergency legislation authorizing water conservation districts[103] and a state water conservation commissioner.[104] The State Water Conservation Commission was established only two years later.[105]

The water conservation districts were created by the State Water Conservation Commission in response to petitions filed by qualifying persons or entities. A board of water conservation commissioners had plenary authority over water resources in the district and could control watercourses within the district.[106] These boards later assumed all the powers of a drain board[107] and finally replaced the drain board.[108]

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

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

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

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

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

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

> Each Board of Water Conservation Commissioners shall have the power:
>
> . . . .
>
> (5) To plan, locate, re-locate, construct, reconstruct, modify, maintain and repair and to control all dams and water conservation devices of every nature and water channels and to control and regulate the same and all reservoirs, artificial lakes and other water storage devices within the district.
> (6) To maintain and control the water levels and the flow of water in the bodies of water and streams involved in water conservation projects within their districts.
> (7) To make rules and regulations concerning the use to which such waters may be put and to prevent the pollution or contamination, or other misuse, of the water resources, streams or bodies of water included within the district.

Id.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

property for drainage purposes if such condemnation is necessary.[116]

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

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

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

The North Dakota Supreme Court expanded its concept of section 210 in a pair of cases in 1949.[121] In both cases the state claimed title to the beds of nonnavigable lakes under the authority of section 210. The court rejected the claims, but agreed that

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

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

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

Id.

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

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

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

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

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

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

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

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

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

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

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

124. 322 N.W.2d at 258. The court stated:

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

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

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

> Landowners, too, have certain defined rights and duties. Landowners have consistently been held to have retained the fee to land on which the easement is located. . . . The fee owner can use the land on which an easement is located so long as his use thereof does not interfere with the public's easement overlying the land. The landowner does have a duty to keep the highways clear of obstructions due to the use of adjacent land.
>
> . . . The public's use of the easement is subject to restrictions placed on it by the police powers of the state. The public is also generally liable in tort for obstructing the easement.

Id. at 575-76 (footnotes omitted).

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

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

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

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

The terms of a form waterfowl production area easement indicate that the United States only purchases a nonpossessory,[127] incorporeal,[128] negative easement[129] in gross.[130]

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

> In contrast to the sweeping prohibitions contained in 16 U.S.C. 668dd, Subdivision (c), the easement itself grants the government only limited rights to the use of this land and expressly reserves or permits the landowner to use the land in certain ways. The terms of the statute and the terms of the easement may seem to be in conflict; however, this conflict can easily be reconciled by recognizing the terms of the easement as a permission granted by the government to the landowner to use the land for certain purposes.
>
> . . . .
>
> In short, the easement gives the government the right to manage the land for waterfowl production purposes.
>
> . . . .
>
> In short, the easement expressly reserves for the landowner the right to engage in normal farming practices, and the right to use his land in the customary manner except for draining, burning, filling and leveling.

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

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

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

129. *Id.* at § 452.

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

The specific responsibilities of a grantor are concisely outlined in the agreement: the grantor and his heirs, successors and assigns are to cooperate in the maintenance of the land as a waterfowl production area and may not fill, burn, drain, or permit draining of any wetlands on the tract. No more is required by the document. A reservation[131] is also concisely stated: "It is understood and agreed that this indenture imposes no other obligations or restrictions upon the [grantor]. . . ."[132]

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

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

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

Id. at 909-910 (citations omitted).

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Id.

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

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

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

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

B. THE ACREAGE ISSUE

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

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

1. *The FWS-Landowner Transaction*

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

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

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

142. *Id.* at 148.

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

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

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

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

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

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

2. *The Gubernatorial Consent*

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

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

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

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

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

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

147. Easement 363X covers the W½, SE¼, NE¼, SE¼, and SW¼, NE¼ of Section 31-T157N-R68W.

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

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

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

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

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

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

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

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

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

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

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

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

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

IV. FEDERAL-STATE RECONCILIATION

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

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

The FWS could, in coordination with the joint committee, begin the delineation process in 1985.[160] How the delineation

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

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

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

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

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

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

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

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

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

process will involve the landowner is still unclear.[161]

V. SUGGESTIONS FOR THE PRACTITIONER

A. THE TITLE OPINION

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

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

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

161. If, for example, the FWS now identifies 30 acres of wetlands (instead of 23 acres) on the tract subject to easement 363X, can the FWS "perfect" its easement, for example, by filing a map (with the register of deeds) without a supplemental agreement with the landowner? Such an action could represent a "taking" of private property without just compensation. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) (permanent physical occupation of real property is a taking).

> causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.[162]
>
> Because of the easement, the land is considered a part of the National Wildlife Refuge System and activities on the land may be subject to federal regulations which govern the National Wildlife Refuge System (50 C.F.R. Subchapter C).[163]

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

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

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

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

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

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

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

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

165. *Id.*

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

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

National Wildlife Refuge System.[168] For example, the easement, by its terms, applies to ephemeral wetlands;[169] yet, such wetlands may be located only by a skilled biologist. Easements purchased by the FWS prior to 1976 did not reference a map identifying the location of wetlands[170] and maps which may have been prepared by the FWS probably were not revealed to the grantor.[171] Failure of the United States to prove that a defendant knew affected property to be a part of the National Wildlife Refuge System has resulted in dismissal of at least one case.[172]

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

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

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

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

170. *See* Joint Appendix at 14-18 & Brief for the United States at 18 n.13, North Dakota v. United States, 460 U.S. 300 (1983) (easement document covering the SW¼ of sec. 20, T.149N., R.78W., McLean County).

171. *See* Memo, *supra* note 146.

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

> The government has failed to prove beyond a reasonable doubt that defendant "knowingly" disturbed or injured property of the National Wildlife Refuge System within the meaning of 16 U.S.C. § 668dd(c) (1973).
>
> Congress intended that a person could be found guilty of draining protected wetlands only if he intended to do the acts prohibited by § 668dd(c). Knowingly is undefined by the statute; in addition, it is not mentioned in the statute's legislative history, nor has case law established its meaning. The problem of definition is complicated by the grammarically ambiguous manner in which it is used since it is unclear precisely what elements of the offense are modified by the term. For example, a person may knowingly disturb or injure property without knowing that the property is part of the National Wildlife Refuge System.
>
> This court construes § 668dd(c) to require that a person act with the knowledge that his act will disturb or injure property, *and* that he know the property affected is part of the National Wildlife Refuge System. Although current federal law lacks any general statutory rule of construction in this regard, the Supreme Court recently held that a mental state should be assigned to each element of an offense if not otherwise stated in the statute. . . . Also . . . any ambiguity in criminal laws should be resolved in favor of the defendant. . . .

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

180. *See* 16 U.S.C. § 668dd(c) (1982).

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

Apparently, landowners have made no other attempt to rescind a waterfowl production area easement under the Federal Quiet Title Act[184] or any other statute. The passage of time will reduce the possibility of a civil challenge by landowners because of conveyances,[185] statutes of limitation,[186] and federal-state programs that may address the problem issues.[187]

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

VI. CONCLUSION

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

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

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

183. 581 F.2d at 171.

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

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

186. *See* 28 U.S.C. § 2409(a) (1982).

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

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

189. *Id.* at 785.