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Robert E. Beck

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NORTH DAKOTA WEED CONTROL LAW

BY ROBERT E. BECK*¹

Farmers generally have been subject to a variety of government restrictions on what they do with or how they use their land. These range from various production control laws on the federal level to water pollution control laws on the state level to county and township anti-junk ordinances at the local level. This article will focus on North Dakota's weed control law not only to learn what the requirements regarding weed control are, but to see if it has anything to offer about the general scope of controls placed on North Dakota farmers. For example, there is now much concern in North Dakota about air and water pollution resulting from soil erosion. Will regulation of the farmer follow? Can we learn from the weed control law how it might work in terms of erosion control?

A weed control law was first enacted in North Dakota in 1890;² a territorial law existed as early as 1885.³ The 1890 law consisted of one page; by 1971 the weed laws covered 18 pages in the North Dakota Century Code.⁴ These 1971 laws included four different chapters: "Destruction of Noxious Weeds Generally;" "Noxious Weed Commission;" "Weeds on Highways;" and "Barberry Bushes and Hedges." In 1971 the North Dakota Legislative Assembly repealed these statutes and enacted a modified and consolidated law.⁵ It is the purpose of this article to review the 1971 enactment. One immediate problem arising with the new law should be noted. As can be seen from the foregoing chapter references, the first two chapters dealt with "noxious weeds" whereas the third chapter dealt with "weeds" which might or might not be noxious. The consolidated law

* Professor of Law and Director, Agricultural Law Research Program, University of North Dakota. LL.B. University of Minnesota; LL.M. New York University.

1. As Director of the Agricultural Law Research Program at the University of North Dakota, this author participated in a Program study of the North Dakota weed control law that resulted in the publication of AGRICULTURAL ECONOMICS MISCELLANEOUS REPORT No. 12 entitled *North Dakota Noxious Weeds Law and Regulations*. This publication was co-authored by Jerome E. Johnson, Thomas Andrews, and Robert E. Beck.

2. Ch. 102, [1890] N.D. Sess. Laws 292.

3. 1885 Laws Dak. Terr. (Supp. Noxious Weeds).

4. N.D. CENT. CODE tit. 63 (1960).

5. N.D. CENT. CODE ch. 63-01.1 (Supp. 1973). North Dakota does have controls on the marketing of seeds that in part may relate to the presence of noxious weed seeds. See N.D. CENT. CODE ch. 4-09 (1960) establishing the State Seed Department and N.D. CENT. CODE ch. 4-25 (1960) dealing with Seed Sales Regulations. This article does not deal with those statutes.

enacted in 1971 is entitled "Control of *Noxious Weeds*,"⁶ yet internally it deals with both noxious weeds and weeds along highways, whether noxious or not. Thus, there is a structural inconsistency in the new law. Part I of this article will treat the noxious weeds provisions of the new law; Part II will treat the weeds generally provisions; and Part III will evaluate the law as a whole.

I. NOXIOUS WEEDS

The first point to be determined is what are noxious weeds. The early territorial and North Dakota state laws specified the noxious weeds. This approach carried through until the 1971 revisions. The territorial laws enacted in 1885 specified three noxious weeds: Canada thistle, cockle burr, and mustard.⁷ The 1890 state law added three more: wild oats, French weeds (*arena fatua*), and Russian cactus (*solsola colina pall*).⁸ By 1971 the list contained eight noxious weeds: Canada thistle, sow thistle, quack grass, leafy spurge (*Euphorbia esula* or *Euphorbia virgata*), field bindweed, Russian knapweed (*Centaurea picris*), hoary cress (*Lepidium draba*, *Lepidium repens*, and *Humenophysa pubescens*), and dodder.⁹ This 1971 list differed considerably from the 1885-1890 lists. In 1971 the Legislative Assembly abandoned the approach whereby it specified the noxious weeds, and in its place enacted a general definition of a noxious weed delegating to administrative authority the duty to provide specific content: "[a noxious weed is] any plant propagated by either seed or vegetative parts which is determined by the commissioner [of agriculture]¹⁰ after consulting with the state cooperative extension service, to be injurious to public health, crops, livestock, land, or other property."¹¹ It would seem a reasonable conclusion after reading this definition that the only function of the Commissioner and the state cooperative extension service was to declare which particular plants were injurious to public health, crops, livestock, land, or other property. But the regulations issued pursuant to this section do not appear to be so limited. The Commissioner stated in his regulations that he was limiting noxious weeds to those "that are difficult to control, easily spread *and* injurious to public health, crops, livestock, land, or other property."¹² This may well reduce the num-

6. N.D. Sess. Laws, ch. 594 (1971) (Emphasis added).

7. 1885 Laws Dak. Terr. (Supp. Noxious Weeds).

8. Ch. 102, [1890] N.D. Sess. Laws 292.

9. Law of March 4, 1935, ch. 285 § 2817 [1935] N.D. Sess. Laws (repealed 1971).

10. To be referred to hereafter simply as Commissioner.

11. N.D. CENT. CODE § 63.01.1-02(4) (Supp. 1973). In N.D. CENT. CODE § 63-01.1-03(2) (Supp. 1973), the Commissioner's duty to determine which weeds are noxious is specified.

12. North Dakota Noxious Weeds Reg. No. R63-01.1-2 (Emphasis added). This article while it comments on the substantive scope of the promulgated regulations does not examine the procedure used in promulgating the regulations; it merely assumes that the proper procedure was followed to give them the force and effect of law.

ber of weeds that would otherwise be declared noxious, but the Commissioner's authority to do so is not at all clear. Perhaps the Commissioner is saying that weeds that are easy to control and difficult to spread are not injurious to public health, crops, livestock, land, or other property. Regardless, pursuant to this refined definition, the Commissioner promulgated a list of nine noxious weeds.¹³ This promulgation eliminated quack grass and dodder from the 1971 legislative list, but it added absinth wormwood, hemp (marijuana), and musk thistle.

Having determined what noxious weeds are, what must be done or not done with respect to them? The law states generally that it is the duty of every person owning or controlling¹⁴ land in North Dakota to "eradicate" or to "control" the spread of noxious weeds.¹⁵ According to the statute to *control* means to *prevent* the spread of noxious weeds.¹⁶ The Commissioner in his regulations adds to this statutory definition by stating that control means to *destroy* the weeds where possible.¹⁷ Since the Legislative Assembly used both "eradicate" and "control," it is difficult to conclude that control also means to eradicate as the Commissioner stipulates.

Is it, as a result of the foregoing statutory duty, the obligation of every landowner and person in control of land to be able to recognize hoary cress and each of the other listed noxious weeds? The law places the general duty on "persons." In the statute "person" is defined to mean individuals, partnerships, firms, corporations, companies, societies, associations, the state or any of its departments, agencies, or subdivisions, or any other entities that occupy or control land in North Dakota.¹⁸ This definition is broad enough to cover counties and probably even park districts, for example, as state subdivisions. The "other entity" language seems broad enough to cover the federal government and its agencies; but very probably this was not intended. Practical and even constitutional problems

13. The promulgated list reads as follows:

- a. Absinth Wormwood—(*Artemisia absinthium*).
 - b. Canada Thistle—(*Cirsium arvense*).
 - c. Field Bindweed—(*Convolvulus arvensis*). Also known as creeping Jenny.
 - d. Hemp—(*Cannabis sativa*). Also known as marijuana.
 - e. Hoary Cress—(*Cardaria draba*). Also known as perennial peppergrass or white top.
 - f. Leafy Spurge—(*Euphorbia esula*).
 - g. Musk Thistle—(*Carduus nutans*).
 - h. Perennial Sowthistle—(*Sonchus arvensis*).
 - i. Russian Knapweed—(*Centaurea repens*).
- North Dakota Noxious Weeds Reg. No. R63-01.1-2.

14. "Control", "controlled", or "controlling" includes being in charge of or being in possession of land, whether as owner, lessee, renter, tenant, under statutory authority, or otherwise." N.D. CENT. CODE § 63-01.1-02(2) (Supp. 1973).

15. N.D. CENT. CODE § 63-01.1-01 (Supp. 1973).

16. N.D. CENT. CODE § 63-01.1-02(6) (Supp. 1973).

17. North Dakota Noxious Weeds Reg. No. R63-01.1-1.

18. N.D. CENT. CODE § 63-01.1-02(1) (Supp. 1973).

might arise in trying to impose such regulations on either the federal government or Indian tribes. Beyond the general duty to eradicate and control already mentioned, the law provides that it is the specific duty of county commissioners to eradicate or control noxious weeds along all county highways within the county and the specific duty of township supervisors in organized townships and county commissioners in unorganized townships to eradicate or control noxious weeds along all township roads and highways.¹⁹

The law also provides that it is the specific duty of state agencies that control land within the state to provide for the eradication or control of noxious weeds on such lands.²⁰ This duty relates only to "control" of land and not to ownership. More generally, the law instructs the Commissioner to make every possible effort to arrange satisfactory noxious weed eradication and control programs with all state and federal agencies owning, controlling, or having jurisdiction over land within the state.²¹ The law makes no attempt to direct the federal agencies to respond, however.

The focus of the foregoing general and specific duties is on the landowner or controller. The act is not limited to that attack, however. It also seeks to limit the dissemination of weed seeds and propagating parts through transportation by imposing duties on the Commissioner and on certain transporters.²² The Commissioner is required to publish a list of "possible methods of disseminating the propagating parts of such weeds."²³

As to transporters, the law requires "[c]ustom or commercial operators of tillage, seeding, and harvesting equipment" to clean that equipment before moving the equipment on public highways,

19. N.D. CENT. CODE §§ 63-01.1-09, 63-01.1-10 (Supp. 1973).

20. N.D. CENT. CODE § 63-01.1-13 (Supp. 1973).

21. *Id.*

22. N.D. CENT. CODE § 63-01.1-12 (Supp. 1973).

23. The Commissioner has promulgated the following methods list:

METHODS OF DISSEMINATING NOXIOUS WEEDS

All noxious weeds produce seeds which can be spread in many different ways; some produce creeping roots which also start new plants.

Some of the more common methods of disseminating noxious weeds are:

Seed

Sown with crop seed.

Carried by wind.

Carried by water.

Carried by animals and birds.

Blown from trucks carrying screening or wind [sic weed] infested grain.

Moved with weed infested hay.

Transported by combines and other machinery.

Moved with soil or sod.

Propagating Parts (Roots)—spread by

Tillage equipment in fields or on roads and highways.

Highway maintenance equipment.

Earth moving equipment including road building machinery.

Moved with soil or sod.

Form NW6-2-72, N.D. Noxious Weeds Law with Regulations Procedures and Forms 22. This list seems so basic that it is difficult to speculate as to what purpose it serves.

airways, waterways, or by any other means of public or private conveyance.²⁴ It also requires trucks or trailers that transport grain screenings to be constructed and covered so as to prevent weed seed dissemination.²⁵ Finally, it requires that material containing noxious weed seeds or propagating parts not be scattered or dumped on land or in water unless the material has been processed or treated or unless it is buried deep enough to destroy the seeds or propagating parts.²⁶

Since general duties as well as specific duties have been legislated, an exploration of the sanctions provided for in the act may give a better understanding of the scope of the duties. The law contains two penalty provisions.²⁷ First, any person who violates the provisions designed to prevent the dissemination of weed seeds through transportation is guilty of a misdemeanor.²⁸ Such a person is subject to a fine not to exceed \$100 plus costs for the first offense and \$500 plus costs for any subsequent offense. Second, any person who fails to comply with the rules, regulations, and notices promulgated pursuant to the act is subject to a civil penalty not to exceed \$500.²⁹ There are several interesting distinctions between the two sanctions. The first sanction imposes a criminal penalty and calls into operation the full range of constitutional protections otherwise available in misdemeanor cases. The second sanction imposes only a *civil penalty*, whatever that is, and there is substantial doubt of what significance there is in labeling as a civil penalty that which one would ordinarily expect to be a criminal penalty.³⁰ Can the state thereby avoid providing constitutional safeguards otherwise attendant in criminal proceedings?

It is very likely that this weed control law civil penalty provision is of no force and effect. In its entirety the provision reads as follows:

Persons failing to comply with the rules, regulations, and

24. N.D. CENT. CODE § 63-01.1-12(2) (Supp. 1973).

25. *Id.*

26. *Id.*

27. N.D. CENT. CODE § 63-01.1-15 (Supp. 1973).

28. N.D. CENT. CODE § 63-01.1-15(1) (Supp. 1973).

29. N.D. CENT. CODE § 63-01.1-15(2) (Supp. 1973).

30. *See, e.g.*, 1 Working Papers of the Nat'l Comm'n on Reform of Federal Criminal Laws 406 (1970) (footnote number omitted):

The present law of civil penalties is chaotic and requires reconsideration, perhaps at a later state of the present reform project, or as a separate enterprise. These penalties are intended as punishment, although imposed in civil proceedings (compare exemplary damages in tort law and treble damages in antitrust suits). The imposition of civil penalties for regulatory offenses, without the usual safeguards that surround criminal prosecution, can be rationalized on several grounds. Nothing is at stake in the proceedings except a money judgment; there is no conviction of crime with the associated disgrace and disabilities. Furthermore, recovery by the government can be regarded as reimbursement for the cost of the enforcement system.

notices promulgated pursuant to the provisions of this chapter shall be subject to a civil penalty not to exceed five hundred dollars. Necessary court actions may be pursued by the weed control officer or authority.³¹

In 1900, the Supreme Court of North Dakota had to interpret a similar provision in the then existing weed control law.³² It read as follows:

Whenever an overseer of highways or supervisor shall neglect or refuse to comply with the provisions of this article after having received notice as provided for herein, he shall be subject to a fine of fifty dollars, and it is the duty of the state's attorney to enforce the provisions of this article.³³

Despite the use of the word "fine" in the statute, the Court found this to be a civil penalty or forfeiture. Thus, the two statutes are generally identical. Each indicates a failure of duty to be followed by a civil penalty and an indication of who is to bring enforcement proceedings. The North Dakota Supreme Court found this to be insufficient in the earlier statute, stating:

If the legislature intends that penalties shall be recovered in civil actions, it must designate for whose benefit the recovery can be had. Failing in that, the penalty cannot be recovered.³⁴

If in the law struck down in 1900 it was not a sufficient designation for whose benefit the penalty was imposed to say "it is the duty of the state's attorney to enforce the provisions of this article," then it is probably not enough to say in 1973 that "necessary actions may be pursued by the weed control officer or authority." Review of the North Dakota statutes relied on by the Court in 1900 does not reveal any change in wording that would obviate the requirement specified by the Court back then.³⁵ The current North Dakota code does state in part: "All fines, forfeitures, and pecuniary penalties prescribed as a punishment for a violation of state laws, when collected, shall be paid into the treasury of the proper county to be added to the state school funds. . . ."³⁶ At first glance this might be thought to provide a general disposition of civil penalties, but not so; this language is

31. N.D. CENT. CODE § 63-01.1-15(2) (Supp. 1973).

32. *State v. Messner*, 9 N.D. 186, 82 N.W. 737 (1900).

33. REV. CODE 1899 § 1686.

34. *State v. Messner*, 9 N.D. 186, 188, 82 N.W. 737, 738 (1900).

35. REV. CODE § 5786 (1899) is currently found in N.D. CENT. CODE § 32-14-02 (1960). REV. CODE § 5792 (1899) is currently N.D. CENT. CODE § 32-14-08 (1960).

36. N.D. CENT. CODE § 12-01-18 (1960).

essentially identical to a portion of the Revised Code of 1899 referred to in the 1900 case:

All fines, forfeitures and pecuniary penalties, prescribed as punishment, by any of the provisions of this code, when collected, shall be paid into the treasury of the proper county, to be added to the state school fund.³⁷

The key language is "as punishment." The Court found that the civil penalty involved in the 1900 case was not prescribed as punishment. If that was not punishment, is it any more likely that the current weed control law provision is designed as punishment? Two distinctions do exist between the old and new laws. The current provision applies generally to any person who fails to perform his duty whereas the 1899 provision was directed at an official who failed to perform his duty. The current provision is in an amount up to \$500 whereas the 1899 provision was limited to \$50. Very probably these differences should not bring a difference in result. If the legislature intends it as punishment, it should so state. Thus, the only hope to preserve the civil penalty clause as it now appears would be in having the 1900 case overruled.

The Court in 1900 did give an example of what it apparently considered a sufficient specification of disposition:

Section 1119, Rev. Codes, provides for another penalty against this same officer for neglect of duty, but there it is specified that the penalty shall be 'sued for by the chairman of the board of supervisors of the township and when recovered, applied by him in making and improving the roads and highways therein.'³⁸

Until the Legislative Assembly amends the current civil penalty provision to specify the disposition of the funds obtained thereunder, it is doubtful that the provision has any force and effect.

Another distinction between the two current penalty provisions is that while the first penalty is directed against violations of the law, the second penalty is directed against violations of rules, regulations, and notices issued pursuant to the law. So not only would it appear that all landowners and controllers must be familiar with the law, they must be familiar with the rules, regulations, and notices issued pursuant to the law. It is true that the Commissioner states in his forward to the promulgated regulations that the law will "provide a means of penalizing *flagrant* violators who do not comply in a

37. REV. CODE § 7736 (1899).

38. State v. Messner, 9 N.D. 186, 187, 82 N.W. 737 (1900).

reasonable manner.”³⁹ This may be the enforcement pattern that the Commissioner would like to see developed and such a pattern may well develop, but the penalty provisions of the law say nothing about “flagrant” violators, and the citizenry certainly cannot rely on a pattern of enforcement that to date has not been established. What is the general enforcement mechanism that the new law establishes?

Obviously the Commissioner is involved, and the statute gives him certain duties. Besides the Commissioner, other individuals and entities involved are the County Control Authority, the Weed Control Officer, and Special Weed Control Authorities. Their respective roles will be discussed in the foregoing order beginning with the Commissioner.

The office of the Commissioner is designated as the State Weed Control Authority and the basic duty to enforce the weed control law is placed in the Commissioner himself, although he may use other department employees and local weed control officers to act in his behalf.⁴⁰ As previously indicated the Commissioner must determine the noxious weeds, and once he has done so he must compile a list and keep it current. Furthermore, it is the Commissioner’s job to specify procedures, prepare and supply official notices, posters, report forms, and any other documents that are necessary to implement the statute.⁴¹ Where official notices or posters are to be published or posted, the Commissioner is to prepare them for publication or for posting as the case may be. The Commissioner is not given authority to disseminate information or conduct educational campaigns. This is to be done by the state cooperative extension service. Nor does the Commissioner bring enforcement proceedings. Whenever he receives a complaint in writing, it is his duty to refer it to the proper local officer and authority. He does have authority to publish rules, regulations, and procedures to carry out the statute. He must require reports from local officers or authorities so that he keeps informed on control progress. Finally, he is to call an annual meeting of weed control officers.

The Board of County Commissioners is the county control authority.⁴² They must appoint a county weed control officer, determining as well his rate of pay and term of office, and certify his appointment to the Commissioner. Costs are to be paid out of the county general funds. However, the Board may on its own motion, or when

39. North Dakota Noxious Weeds Law with Regulations Procedures and Forms 2 (1972) (Emphasis added).

40. N.D. CENT. CODE § 63-01.1-03 (Supp. 1973).

41. Three of his products may be seen in the Appendices.

42. N.D. CENT. CODE § 63-01.1-04 (Supp. 1973).

petitioned by five per cent of the voters voting in the last general election, submit the question of whether to levy a tax on the assessed valuation of all taxable property within the county to the county electorate.⁴³ This tax may not exceed two mills and can be used for specified purposes. With a sixty per cent approval of those voting, this tax can be levied to exceed the general mill levy permitted by law. Apparently only a majority need approve the tax if it is not to exceed the general mill levy limit, but the law is unclear on this point.

As previously indicated, the weed control officer for the county is appointed by the Board of County Commissioners. He may be a member of the Board or "any other interested and able person."⁴⁴ Furthermore, the same person may serve as weed control officer for more than one county. The Board provides for tenure and compensation. The statute prescribes numerous duties.⁴⁵ The officer must "become acquainted with the location of noxious weeds on all land within the county."⁴⁶ This of itself seems to be both a tremendous task and unrealistic. Through *personal contact* he must encourage weed control or eradication by landowners or occupants throughout the control area. He must investigate all complaints that he, the control authority, or the Commissioner receives.⁴⁷ If he determines that the complaint is justified, he must issue a written notice to the person controlling the land requiring that person to control or eradicate the noxious weeds on the land within five days.⁴⁸ If not so controlled or eradicated, the recipient of the notice becomes subject to the civil penalty already discussed. The officer may initiate complaints himself provided he has approval of the control authority. He also must prepare, publish, and post appropriate notices as well as submit required reports⁴⁹ and attend required meetings.

Special weed control authorities also can be formed under the law.⁵⁰ They may be either individual or collective. They are individual if created independently by the governing body of any town-

43. N.D. CENT. CODE § 63-01.1-06 (Supp. 1973).

44. N.D. CENT. CODE § 63-01.1-04(2) (Supp. 1973). He will be hereafter referred to simply as the "officer".

45. N.D. CENT. CODE § 63-01.1-05 (Supp. 1973).

46. N.D. CENT. CODE § 63-01.1-05(2) (Supp. 1973).

47. N.D. CENT. CODE § 63-01.1-16 (Supp. 1973) specifically provides that any landowner or occupant may call attention to noncompliance with the law or the rules, regulations, and notices promulgated under it by filing a complaint in writing with the local weed control officer.

48. The Commissioner has promulgated a notice form which is reproduced in Appendix A. Two questions about the form arise immediately. First, should not the form specify the penalty rather than refer to the Code citation? Why should the farmer have to go look it up. Second, should not the form inform the recipient of the notice that he may apply to the control authority for more time since the control authority is given the power to grant additional time? N.D. CENT. CODE § 63-01.1-05(4) (Supp. 1973). Also, the Commissioner has promulgated a follow-up compliance form which is reproduced in Appendix B.

49. See Appendix C for the annual report form promulgated by the Commissioner.

50. N.D. CENT. CODE § 63-01.1-07 (Supp. 1973).

ship, city, irrigation district, soil conservation district, or other political subdivision. The creating governing body constitutes the authority. The authority is collective if any two or more of the foregoing governing bodies join to create such an authority. In that event, the membership of the authority is limited to "six persons" as designated by the governing bodies. It is unclear whether the statutory definition of "person"⁵¹ is to be used in defining persons in this section on special weed control authorities. Probably the legislature meant "natural" persons in this context, but the statutory definition is not so limited. This special authority may appoint its own weed control officer and finance its operations with funds "already available." Any special tax levy to support such activities would have to be approved by a majority of the electors within the geographical area of the authority. The law does not specify how the number of electors within the area is to be determined so that it will be ascertainable whether a majority has approved or not. Apparently electors are persons 18 years of age or older who have resided in the area at least 30 days before the relevant date.⁵² These special authorities may carry on such weed control activities as they deem necessary.

The Commissioner, any control authority, any officer and, apparently, anyone authorized by any of the foregoing may enter on any land within their jurisdiction in pursuit of doing their duty under the weed control law, including taking specimens of weeds or other materials, without consent of the landowner or controller and without being subject to an action for trespass or damages if reasonable care is exercised.⁵³ This provision seems overly broad. May entry occur at any time, whether midnight or two a. m.?

Other North Dakota agencies and agents are required to assist an officer and the Commissioner when requested to do so by the officer or a weed control authority.⁵⁴ These agencies and agents are the state highway patrol, county sheriffs, and truck regulatory division. They are given authority to enforce the weed seed anti-dissemination provisions where vehicles are moving on state, federal, county, or township highways or roads.

II. WEEDS OTHER THAN NOXIOUS WEEDS

The 1971 law contains an extensive provision dealing with the

51. N.D. CENT. CODE § 63-01.1-02(1) (Supp. 1973). See text accompanying note 18 *supra*.

52. N.D. CENT. CODE § 16-01-03 (1960), *as amended*, (Supp. 1973) provides that electors are persons 18 years of age or older who are citizens of the United States and who have resided in the precinct for 30 days immediately preceding the election. N.D. CENT. CODE § 16-01-04 (1960) disqualifies from voting persons who have been convicted of a felony or treason and have not yet had their civil rights restored and persons under guardianship, *non compos mentis* or insane.

53. N.D. CENT. CODE § 63-01.1-08 (Supp. 1973).

54. N.D. CENT. CODE § 63-01.1-14 (Supp. 1973).

duty of landowners or operators with land adjoining regularly travelled county and township highways to cut the weeds along those highways.⁵⁵ "Operator" is defined to mean the person that is chiefly responsible for the farming or whatever other operation is being performed on the land whether for his own benefit or someone else's.⁵⁶ The purpose of this section is to create conditions that will prevent snowdrifts on roads as much as possible.⁵⁷

The township supervisors in organized townships and the Board of County Commissioners in unorganized townships must designate which are regularly travelled township highways. The Board must also designate the regularly travelled county highways. The landowner or operator of land adjoining these highways then has the duty to cut all the weeds and grasses along such highways both on his private land and on the public right-of-way. The law does not define "along," so it is unclear for how many feet back from the highway this cutting must take place. The Board has a choice in specifying whether the cutting is to be completed by September 15 or by October 1.

Furthermore, the Board must publish notice of the highways to be cut and the cutting time in the official county newspaper at least twice, the last publication to appear not less than two weeks before the cutting deadline. If there is no such official newspaper, notice is to be given by posting in the same manner as election notices are posted.

If the landowner or operator fails to do his required cutting, the township supervisors or Board may have it done and certify the actual cutting expense to the county auditor. This expense would then become a part of the taxes levied against the land for the following year, to be collected in the same manner as real estate taxes. Perhaps the legislature intended that this tax liability for expenses would be the only sanction for noncompliance; however, the law does provide for the publication of notices in this section and the civil penalty section states that a civil penalty may be imposed for violating any "notices promulgated pursuant to the provisions of this chapter."⁵⁸ Thus an ambiguity as to sanctions for failure to cut exists.

III. EVALUATION

The North Dakota weed control law represents what is today a fairly well established regulatory pattern. The legislature enacts an

55. N.D. CENT. CODE § 63-01.1-11 (Supp. 1973).

56. N.D. CENT. CODE § 63 01.1-11 (4) (Supp. 1973).

57. N.D. Noxious Weeds Law with Regulations Procedures and Forms 14.

58. N.D. CENT. CODE § 63-01.1-15(2) (Supp. 1973).

enabling statute indicating the basic evil that it seeks to remedy and the basic approach for the remedy to take. It delegates to an administrative agency the duty and authority of refining and supervising the process through which the legislature's purpose is to be accomplished. The administrative agency then promulgates the rules and regulations that perform this refining function and that indicate how supervision will proceed. Once these rules and regulations have been promulgated, the administrative agency has the basic responsibility to see to their enforcement as well as the basic provisions of the enabling law. The North Dakota Legislative Assembly has followed this pattern in many instances, for example regarding control of air and water pollutants.⁵⁹ Differences in detail do arise. For example, with air and water pollution the full regulatory function is vested essentially in the state agency. However, in the weed control area the authority is divided between the state agency and local agencies. If it is feasible to regulate noxious weeds through the cooperation of state and local agencies, then it probably would be feasible to regulate soil erosion in the same manner. Institutions for this purpose already exist in the form of soil conservation districts.⁶⁰

A specific concern that arises from the North Dakota weed control law relates to ecological questions. There is an active concern in North Dakota for the preservation of native prairie species and *natural* prairie grassland. How much control can be tolerated consistent with preservation of natural prairie grassland? Fortunately, the North Dakota law does not specify any particular method of control; nor does it authorize the Commissioner to specify a method. There is, for example, no directive that herbicides be used for the purpose. Handpulling of weeds might well suffice in natural prairie grassland areas. Then what about wildlife habitat? Some of the declared noxious weeds may provide excellent wildlife habitat, such as is true of hemp (marijuana). Furthermore, tall grass along roadsides provides excellent bird nesting grounds. As to the latter, roadside weed cutting is not required prior to September 15 at the earliest, when nesting season is over. Thus there are concerns relevant to preservation of a natural environment that might militate against the concerns for the man-made agricultural environment. The North Dakota law is not as weighted in favor of the latter and against the former as it might have been. It is unclear as to whether it was planned that way or just happened.

Another important question that arises is whether the North Dakota weed control statute creates a duty for which private remedy can be sought. Suppose that A allows Canada thistle to grow in his

59. N.D. CENT. CODE chs. 23-25 ; 61-28 (Supp. 1973).

60. N.D. CENT. CODE ch. 4-22 (Supp. 1973).

field in violation of his statutory duty. Suppose it goes to seed and that neighbor B can prove that it spread from A's field to B's field with a resultant diminution in the value of B's crop. May B sue A under the statute and recover damages? It seems fairly clear that A would not be under any common law duty to prevent Canada thistle from spreading, the courts being extremely reluctant to require landowners to abate natural conditions.⁶¹ In other words, A did not plant the Canada thistle, and that A may through cultivation have created the conditions that allowed Canada thistle to prosper would not necessarily change this result.⁶²

The North Dakota Supreme Court decided only one case under the pre-1971 North Dakota weed control law that dealt with whether the statute created a privately enforceable duty.⁶³ However, that case was decided on the basis that no landowner had any duty to curtail weed growth until the Board of County Commissioners prescribed the time and manner of curtailment, and the Board had never prescribed the time or manner. Therefore, plaintiff's action had to fail. The Court specifically declined to make any ruling on the question whether a private duty would have arisen had the Board prescribed the time and manner of curtailment, stating: "[t]he question . . . is not before us now, and need not be considered."⁶⁴ Regardless of this disclaimer the Court stated:

To give to this statute the interpretation which the appellant claims, would open a vast field of litigation, destroy the peace and harmony of communities, and set "every man's hand against his neighbor." The construction that will best promote the general welfare is to be preferred. . . . If the Legislature intended to make one liable in such a case as this, it would have been an easy matter to express such an intention in plain, unequivocal language. There is a vast difference between injuries which result in cases where a man brings upon his own land great quantities of anything which, if it escaped from his land, would injure his neighbor, and a case where, under the law of nature, noxious weeds grow upon a man's land in spite of his wish, desire, and effort.⁶⁵

This is strong language supporting the view that if the legislature intends the weed control law to create private rights, it must so state specifically. This the legislature did not do in the present law.

61. "The appellant concedes that no such liability was incurred at common law." *Langer v. Goode*, 21 N.D. 462, 131 N.W. 258, 259 (1911).

62. See *Giles v. Walker*, 24 Q.B.D. 656 (Q.B. 1890).

63. *Langer v. Goode*, 21 N.D. 462, 131 N.W. 258 (1911).

64. *Id.* at 470, 131, N.W. at 261.

65. *Id.*

Appendix A

Address
Date

Addressee

OFFICIAL NOTICE TO DESTROY NOXIOUS WEEDS

You are hereby required by the _____ County
Weed Control Authority to destroy the _____
located on _____ 1/4 Sec. _____ Twp. _____ Rge. _____
_____ Other Descriptive Location
_____ no later than _____

Date

The method used to destroy these weeds is up to you and may include mowing, tillage, herbicides or any other means that will prevent seed production and spread of seed or other propagating parts.

This request is made pursuant to section 63-01.1-02 and section 63-01.1-05 of Chapter 63-01.1 of the North Dakota Century Code requiring the control of noxious weeds.

Should you fail to destroy these noxious weeds by the above date you will be subject to the penalties provided in section 63-01.1-15 of the noxious weed law.

Your cooperation is appreciated.

Dated this _____ day of _____,
_____ Month

Year

Signed:

County Weed Control Authority

By:

Weed Control Officer

CC: Commissioner
Landowner

Form NW4-2-72, N.D. Noxious Weeds Law with Regulations Procedures and Forms 20.

Appendix B

Address
Date

Addressee

CERTIFICATE OF COMPLIANCE

With Written Notice To Destroy Noxious Weeds

This is to certify that you have satisfactorily controlled the _____
_____ located on _____ 1/4
Sec. _____ Twp. _____ Rge. _____ as requested by
the _____ County Weed Control Authority
in a written notice dated _____

Our inspection made on the _____ day of _____,
_____ Month

Year

Method

We appreciate your cooperation.

County Weed Control Authority
By:

Weed Control Officer

CC: Commissioner
Landowner

Form NW5-2-72, N.D. Noxious Weeds Law with Regulations Procedures and Forms 21.

Appendix C
ANNUAL REPORT

County, N. Dak.

Date

Weed Control Officer

Name

Address

Was noxious weed list (NW 2-2-72)

Published in county paper? Yes No

or

Posters made and posted? Yes No

Have noxious weed infestations been located and mapped?

Yes No

Estimate number of acres infested with each noxious weed:

Public Land Private Land Total

Absinth Wormwood	_____	_____	_____
Canada Thistle	_____	_____	_____
Field Bindweed	_____	_____	_____
Hemp	_____	_____	_____
Hoary Cress	_____	_____	_____
Leafy Spurge	_____	_____	_____
Musk Thistle	_____	_____	_____
Perennial Sowthistle	_____	_____	_____
Russian Knapweed	_____	_____	_____

Educational programs conducted by you, county agent and others:

No. meetings
No. different circular letters
No. printed circulars distributed
No. personal contacts including letters and phone

Complaints of noncompliance received:

No. oral
No. written
No. from commissioner's office

Official written notices to eradicate or control noxious weeds:

No. written
No. compliance certificates issued
No. court cases pending
No. prosecuted

Dissemination of noxious weeds on public highways, airways or waterways:

No. warnings given
Estimated number complied

No. court cases pending _____

No. prosecuted _____

Destruction of weeds and grasses along county and township roads for snow control—

Were roads designated by:

county board	_____	_____	_____	_____
		Yes	No	
township board	_____	_____	_____	_____
		Yes	No	

Were notices in official newspaper published on time

_____	_____	_____	_____
	Yes	No	

Was cutting necessary by:

county board	_____	_____	_____	_____
	Yes	Much	Little	None
township board	_____	_____	_____	_____
	Yes	Much	Little	None

General comments on your county program: _____

Suggestions for improving the county or state program: _____

Signature

Date

CC: County Weed Control Authority
Commissioner of Agriculture
County Extension Agent

Form NW9-2-72, N.D. Noxious Weeds Law with Regulations Procedures and Forms 25-26.