



North Dakota Legislative Council

Prepared for the Agriculture and Natural Resources Committee
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WILDLIFE EASEMENTS STUDY - BACKGROUND MEMORANDUM

[House Concurrent Resolution No. 3019 \(2021\)](#) directs the Legislative Management to study the fiscal and safety impacts of United States Fish and Wildlife Service (FWS) easements in North Dakota on the Department of Transportation (DOT), Department of Agriculture, and the counties of the state. Representatives of the North Dakota Grain Growers Association, the North Dakota Farm Bureau, and the North Dakota Stockmen's Association testified in support of the study. Testimony expressed concerns regarding negative impacts of FWS perpetual easements on North Dakota infrastructure and taxpayers. The testimony suggested the FWS has mismanaged both land and water under the easements relating to highways, roads, and landowners subjected to the easements. The testimony further suggested the FWS places its interests above the safety and financial interests of the state, and the mismanagement of the easements results in DOT, other state agencies, and political subdivisions using their own limited resources to mitigate the damage caused by the easement mismanagement. The testimony also suggested wet conditions in past years have increased the size of many wetlands in the state under FWS control, and poor management of those wetlands resulted in political subdivisions spending large amounts of money on road maintenance. Finally, the testimony suggested the regulations imposed by the federal government burden political subdivisions and delay improvements to important construction projects, and the federal government should be held accountable for its actions.

PRAIRIE POTHOLE REGION

North Dakota exists in an area known as the "prairie pothole region." According to the FWS, the prairie pothole region consists of areas of the North American prairie covered in millions of small shallow wetlands, created by glaciers thousands of years ago, which are vitally important to hundreds of migratory bird species for breeding and migration. Approximately 175 species of resident and migratory birds rely on North Dakota's potholes. The prairie pothole region provides habitat for waterfowl and produces roughly one-half of North America's waterfowl production. North Dakota is in the FWS Mountain-Prairie Region (Region 6). The nine wetland management districts in the state under FWS control are Arrowwood, Audobon, Chase Lake, Crosby, Devils Lake, J. Clark Salyer, Kulm, Lostwood, and Valley City. There are over 28,000 FWS wetland easements in the prairie pothole region of North Dakota, South Dakota, Minnesota, and Montana protecting over 1.5 million acres of wetlands. As of 2020, FWS held approximately 15,000 wetland easements protecting about 994,000 acres of wetlands, and 1,600 grasslands easements protecting about 556,544 acres of land in the state.

UNITED STATES FISH AND WILDLIFE SERVICE EASEMENTS

History of the Fish and Wildlife Service, Easements, Acquisition Process, and the Federal Law

Congress established the original precursor to the FWS in 1871 and the FWS was established in 1956. The FWS primarily is responsible for the conservation and management of fish, wildlife, and plants, and their habitats through the implementation of many federal environmental laws relating to migratory birds and endangered species. Conservation easements are agreements for the protection of wetlands, floodplains, riparian corridors, and endangered species habitats. Easements are rights created by an express voluntary legal agreement to allow a person to make lawful and beneficial use of the land of another without possessing the land. Wetland easements allow the FWS to acquire the right to maintain wetlands on described tracts of land and restrict the landowner from draining, burning, filling, or leveling the wetlands. Easements are recorded on an abstract of title to keep a record of the history of the property. An easement is specific to acreage purchased. As held by the United States District Court of North Dakota in *United States v. Albrecht*, 364 F.Supp. 1349 (1973), an agreement granting the FWS an "... easement or right of way for the maintenance of the land ... as a waterfowl production area in perpetuity ..." is a "permanent interest" that continues with the land even if there is a change in ownership.

An FWS easement can be a standard conservation easement or a nonstandard conservation easement. A standard conservation easement conveys (transfers property or an interest in property) a perpetual (never ending) interest in the lands covered by the easement and provides authorities, legal description, covenants by the landowner, rights reserved by the United States, easement management, and general provisions. A nonstandard

conservation easement is similar to the standard conservation easement except it includes a variance allowing farming activity on all or some wetlands. Farming activities include grazing, haying, cutting, plowing, working, and cropping when the wetlands are dry due to natural causes.

The FWS follows a 16-point process when acquiring easements:

- Evaluating property proposed for easements;
- Providing the proposed delineated easement map to the appropriate refuge supervisor for approval;
- Logging the approved delineation package into the FWS's land acquisition tracking system;
- Inspecting the property;
- Finalizing the legal description to be included in the easement area;
- Conducting an abstract of title to ascertain ownership of the property;
- Determining whether there are judgments, liens, or unpaid taxes on the property proposed for easement;
- Sending a formal offer letter to the landowner with a compensation offer, maps, and legal descriptions of the proposed easement area;
- Preparing the easement conveyance document if an offer is accepted;
- Obtaining of title insurance;
- Receiving a check for consideration;
- Closing; and
- Recording of original documents with the county.

The wetland easement program is authorized by the Migratory Bird Conservation Act of 1929 [Pub. L. 70-770; 45 Stat. 1222; 16 U.S.C. 715 et seq.] and the Migratory Bird Hunting Stamp Act of 1934 [48 Stat. 452; 16 U.S.C. 718 et seq.]. Under the Migratory Bird Conservation Act, "[t]he Secretary of the Interior is authorized to purchase or rent such areas as have been approved for purchase or rental by the commission ... and to acquire by gift or devise, for use as inviolate sanctuaries for migratory birds, areas which he shall determine to be suitable for such purposes" (16 U.S.C. 715d). The Act also provides, "[n]o deed or instrument of conveyance shall be accepted by the Secretary of the Interior under ... (the Act) ... unless the state in which the area lies shall have consented by law to the acquisition by the United States of lands in that state." (16 U.S.C. 715f). Nor shall land "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." (16 U.S.C. 715k-5). The North Dakota Legislative Assembly consented "to the United States acquiring, by purchase, gift, devise, or lease, land or water in this state as the United States may deem necessary to establish migratory bird reservations" in accordance with the required consent provision of the federal Act. The consent is codified in North Dakota Century Code Section 20.1-02-18.

Under the Migratory Bird Hunting Stamp Act, the Secretary of the Interior is authorized to sell stamps and use the migratory bird conservation fund "to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase, or exchange of, small wetland and pothole areas, interests therein, and right-of-way to provide access thereto." (16 U.S.C. 718d (c)). All money received for the stamps are paid into a special fund known as the migratory bird conservation fund. (16 U.S.C. 718d). The fund "shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the migratory bird conservation Act" (16 U.S.C. 718d (b)). A 1958 amendment, known as the Small Wetlands Acquisition Program, gave the Secretary of the Interior flexibility to acquire lands or interests in land (easements) for waterfowl production areas.

The North Dakota Game and Fish Department receives federal funds for wildlife purposes under the Wildlife Restoration Act (16 U.S.C. 669), which provides the "Secretary of the Interior is authorized to cooperate with the states, through their respective state fish and game departments, in wildlife-restoration projects ...; but no money apportioned under this chapter to any state shall be expended therein until its legislature ... shall have assented to the provision of this chapter and shall have passed laws for the conservation of wildlife The Secretary of the Interior and the state fish and game department of each state accepting the benefits of this chapter, shall agree upon the wildlife-restoration projects to be aided in such state under the terms of this chapter and all projects shall conform to the standards fixed by the Secretary of the Interior." The term "wildlife-restoration project" must be construed to mean and include "the selection, restoration, rehabilitation, and improvement of areas of land or water adaptable as feeding, resting, or breeding places for wildlife, including acquisition by purchase, condemnation,

lease, or gift of such areas ... as are suitable ... therefor" (16 U.S.C. 669a). If the Secretary of the Interior finds the projects conform to standards established by the secretary and approves the plans, "he may finance up to 75 per centum of the cost of implementing segments of those plans meeting the purposes" of the chapter. (16 U.S.C. 669e (a) (1)). The North Dakota Legislative Assembly assented to the Wildlife Restoration Act in Section 20.1-02-17.

Under the Acts previously discussed, North Dakota governors approved or consented to the acquisition of easements by the FWS of over 1.2 million acres of wetlands for waterfowl production areas between 1961 and 1977.

In *Sagsveen Waterfowl Production Areas: A State Perspective*, 60 N.D.L. Rev. 659, 659-661, the author summarized the authorization of waterfowl production areas in reviewing the historical context of the federal-state dispute over these areas. The author noted the 1929 Migratory Bird Conservation Act authorized the acquisition of land for inviolate migratory bird sanctuaries. 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." The State of North Dakota gave its consent in 1931. The 1934 Migratory Bird Hunting Stamp Act, which provided a funding mechanism for the refuge acquisition program, authorized the sale of migratory bird hunting and conservation stamps (duck stamps) to generate revenue for the newly created migratory bird conservation fund. In addition, the 1958 amendment provided the Secretary of the Interior could acquire waterfowl production areas without the state legislative consent required in the 1929 Act. However, Congress also recognized the tradition of state involvement should be extended to all acquisitions involving money from the Migratory Bird Conservation Fund. The legislation, as finally enacted, states, "[n]o 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."

Following the enactment and consent to the federal Acts by the state, issues arose concerning the duration of easements and the areas covered by FWS easements which led to the enactment of several statutory provisions in 1977 and subsequent litigation discussed later in this document. The terms of pre-1976 easements prohibited the draining, filling, leveling, or burning of all wetlands located on the easement acres. The FWS estimated pre-1976 easements protected 758,645 wetland acres. However, wetland acres in pre-1976 easements were not delineated, and the actual number of wetland acres protected by the pre-1976 easements is unclear as the tracts of land considered by the easements totaled approximately 4.8 million acres. The easements described the entire parcel of land as subject to an easement instead of the wetland area itself. Pre-1976 easements did not include an agreed upon easement map showing areas protected by the easement, but the easement summaries described the wetland acres restricted under the easement conveyance which led to disagreements over the location and boundaries of the covered easement areas. In 1977, the Legislative Assembly attempted to limit the duration of wetland easements with the enactment of Section 47-05-02.1.

Statutory Provisions

Chapter 20.1-02 provides the statutory provisions for the North Dakota Game and Fish Department. Section 20.1-02-17 was enacted in 1973 to provide state assent to the Wildlife Restoration Act, subject to the conditions of Section 20.1-02-17.1. Section 20.1-02-17.1, also enacted in 1973, provided the procedures and conditions for land acquisitions for wildlife and fish restoration under the Wildlife Restoration Act.

Section 20.1-02-18, enacted in 1973, gives the state's conditional consent to the United States' acquisition of land or interests in land for migratory bird reservations, subject to gubernatorial consent. Section 20.1-02-18.1, enacted in 1977, requires the submission of proposed federal wildlife area acquisitions to the board of county commissioners of the county or counties where the land is located, requires an opportunity for public comment, and requires an impact analysis before the acquisition may be approved.

Section 20.1-02-18.2, enacted in 1977, allowed landowners to negotiate the terms of leases, easements, and servitudes for wildlife production purposes. Under the section, as originally enacted, easements terminated upon the death of the landowner or the transfer of ownership. However, the section was amended in 1985 to remove the requirement that an easement terminates upon the death of a landowner or upon change of ownership. The section also was amended in 1985 to require the duration of an easement for a waterfowl production area acquired by the federal government, and consented to by the Governor or appropriate state agency after July 1, 1985, to be limited to 50 years.

Section 20.1-02-18.3, enacted in 1981, prohibited the United States from acquiring land or interests in the state for migratory bird reservations, and prohibited the Governor from approving acquisitions with money from the migratory bird conservation fund until December 31, 1985, or until the date a management plan, jointly prepared by the Secretary of the Interior and the Governor, for the land was approved by the Legislative Assembly and the Governor.

Chapter 47-05 provides statutory provisions relating to servitudes (easements) in the title on property. Section 47-05-02.1, enacted in 1977 in an attempt to limit the duration of wetland easements, established conditions governing easements, servitudes, and other restrictions on the use of real property and restricted easements to a duration of 99 years. The section was amended in 1985 to limit easement durations for waterfowl production areas acquired by the federal government, and consented to by the Governor after July 1, 1985, to 50 years. The section was amended again in 1991 to limit the duration of wetland reserve program easements acquired by the federal government under the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, to 30 years. However, in *North Dakota v. United States*, 460 U.S. 300 (1983), the United States Supreme Court found the provisions of Section 47-05-02.1 which purport to limit wetland easements to a term of 99 years may not be applied to wetland easements acquired by the United States under gubernatorial consents previously given. Since the FWS still was acquiring wetland easements under the consents given in 1983, it appears the state was not allowed to limit the duration of the pre-1976 easements. After the finding in *North Dakota v. United States*, it appears the duration of wetland easements under consents given before 1976 are perpetual, the duration of easements for waterfowl production areas consented to by the Governor or an appropriate state agency after July 1, 1985, is 50 years, and the duration of wetlands reserve program easements acquired pursuant to the Food, Agriculture, Conservation, and Trade Act of 1990 after July 1, 1991, is 30 years.

Section 47-05-02.1 was amended by House Bill No. 1399 (2013) to provide waterfowl production area easements exceeding 50 years or which purport to be perpetual may be extended by negotiation between the owner of the easement and the owner of the servient tenement. The amendment also provided waterfowl production easements exceeding 50 years or purporting to be perpetual, which are not extended by negotiation, are void. The legislative history of the bill indicated the bill was intended to provide a method of pushing back against the federal government's policy of perpetual waterfowl easements.

Litigation

In 1979 the United States brought an action against the state seeking declaratory judgment that the state's statutes restricting the acquisition of land for migratory bird refuges and waterfowl production areas enacted in 1977 were unconstitutional. In *North Dakota v. United States*, the United States Supreme Court ruled the consent of the Governor required for land acquisition previously given cannot be revoked at-will by an incumbent governor. The Court further held the state may not revoke its consent based on noncompliance with the conditions set forth in the 1977 legislation. The Court held to the extent the 1977 legislation authorized landowners to drain wetlands that had increased in size after the granting of the easement contrary to the terms of the easement agreement, it was hostile to federal law and interests and could not be applied to easements under previously given gubernatorial consents. For the same reason the statutes limiting perpetual easements to 99 years were found to be unconstitutional as applied to wetlands to which acquisitions by the United States had been approved previously under prior gubernatorial consent. The Court held North Dakota may not restrict the acquisition of easements under previously given gubernatorial consents.

In *United States v. Johansen*, 93 F.3d 459, 463 (8th Cir. 1996), two brothers were charged with violating the terms of an easement agreement entered in the 1960s by draining wetlands on their property after being denied permission by the FWS. The brothers argued only the original number of acres contracted for in the easement summaries were covered by the agreement, not the wetland areas that expanded after a rainy season. The United States argued the easement summaries were not a part of the official recorded easement and the recorded easements described and covered larger tracts of land, and the easements encompassed all wetlands on an encumbered parcel. The Eighth Circuit Court of Appeals held federal wetland easements are limited to the wetland acreage provided in the easement summaries because the easement is limited to wetland acres only. The court of appeals largely based its opinion on the United States Supreme Court decision of *North Dakota v. United States* (U.S., 1983 103 S. CT. 1095) and the district court decision of *United States v. Vesterso*, 828 F.2d 1234 (8th Cir. 1987). The court of appeals held the FWS acquired an easement and paid the landowner based upon the wetland easement acreage summary sheet. Further, the defendant must have had knowledge the parcel was encumbered by a wetland easement, and the drained wetlands must be part of the easement summary. The court of appeals, interpreting the *Vesterso* decision, also noted the United States must prove beyond a reasonable doubt that identifiable, covered wetlands, as existing at the time of the easement's conveyance and described in the easement summary, were damaged and the defendant knew the parcel was subject to a federal easement.

United States Fish and Wildlife Service pre-1976 waterfowl production area easements describe the entire parcel of land as subject to an easement; however, courts have held the FWS only purchased the right to prohibit the draining, filling, and burning of wetlands on the property when the easement was conveyed. Nonwetland areas on the property are not covered by the easements. However, following the decision in *United States v. Johansen*, there still are disputes regarding the acreage covered by FWS easements.

DELINEATING BOUNDARIES OF FISH AND WILDLIFE SERVICE WETLAND EASEMENTS

In 2019, the United States Department of the Interior issued guidance to prioritize mapping of all pre-1976 FWS waterfowl production area perpetual easements to help delineate the wetland easements and settle the issue of what are the protected areas of the easements by using high-quality aerial images and including the acreage believed to be protected by the easements. According to the guidance, owners who object to the location or acreage of the new FWS easement map can appeal within 40 days of the date of receipt of the map. The FWS issued guidance encouraging FWS personnel and landowners to work on protecting wetland easements without restricting landowner activities on their property. The FWS also is providing landowners opportunities to participate in an administrative appeal process to resolve questions about compliance and help avoid unnecessary legal actions.

DEPARTMENT OF TRANSPORTATION ROAD CONSTRUCTION PROJECTS ON STATE HIGHWAYS IMPACTING UNITED STATES FISH AND WILDLIFE SERVICE LAND INTERESTS

The FWS also acts upon requests for right of way for various projects including highway improvement projects by DOT. Formal requests for right-of-way projects regarding FWS land interests are governed by the rules and regulations under Title 50, Code of Federal Regulations, part 29, regarding land use management for wildlife and fisheries. If federal money is involved with the road project, including most county road projects, additional requirements may apply, such as compliance with Executive Order No. 11990 regarding the protection of wetlands. The department also is required to comply with additional rules and regulations when undertaking road construction projects on state highways, including Title 23, Code of Federal Regulations, part 771, regarding environmental impacts and related procedures; Title 23, Code of Federal Regulations, part 774, regarding parks, recreation areas, wildlife and waterfowl refuges, and historic sites; and Title 23, Code of Federal Regulations, part 777, regarding mitigation of impacts to wetlands and natural habitats. The department routinely coordinates highway projects with the FWS which may impact property interests held by the FWS. The property impacts may be in the form of easements that encumber the subject property or may be in the form of fee title property owned outright by the FWS.

Procedures have been developed to assist in both the replacement of the natural or ecological impacts and the replacement of property value impacts for the loss of property. The Department of Transportation practices avoidance and minimization of impacts to FWS property interests while undertaking a project. The project development activities include early and ongoing coordination in a manner that keeps both parties informed of the project, impacts, and mitigation to occur.

According to DOT, the process of undertaking a road construction project of state highways which may impact an FWS property interest includes numerous steps such as:

- Surveying the field to determine where a project needs to occur;
- Researching necessary property titles;
- Submitting a solicitation letter to the FWS indicating the intent to start a project and requesting whether the FWS has an interest that will be impacted;
- Receiving information for a contact person within the FWS for the project;
- Establishing a memorandum of understanding between DOT and the FWS;
- Completing an environmental impact statement for the project necessary to remain in compliance with federal requirements, including identified property interests and proposed mitigation for unavoidable impacts that may include an exchange of property; and
- Obtaining a special use permit issued by the FWS to DOT to begin the project.

According to DOT, the process of determining where to initiate a project, planning the project, and mapping can take a year. The designing of a project can take approximately 6 months, and processing and receiving a special use permit for the project from the FWS can take up to 3 months after the project plan is in place and the permit application has been drafted. If a DOT construction project will be located within an FWS easement area but will not impact a delineated wetland within the easement area, no mitigation or wetland exchange process is necessary; however, the project requires an FWS special use permit to proceed.

In addition to the work with the FWS, DOT is required to work with the State Engineer, local flood plain managers, the Federal Highway Administration, and the Army Corps of Engineers when undertaking road construction projects where wetlands are impacted. According to DOT, 41 special use permit applications for projects have been granted by the FWS and processed since 2009, and easement exchanges were required in 31 special use permit applications.

PREVIOUS LEGISLATIVE MANAGEMENT STUDIES OF UNITED STATES FISH AND WILDLIFE SERVICE EASEMENTS

The 1975-76 interim Agriculture Committee studied FWS programs and policies pertaining to land purchase and easement acquisition for waterfowl production areas and wildlife refuges. The committee found the FWS had approximately 4.6 million acres of land in the state under easement for wildlife production areas, but only 730,000 acres were actual wetlands. The committee found landowners were required to cooperate in the maintenance of the waterfowl production areas and the surrounding acres, and were restricted from draining, filling, or burning in the easement area of surface waters existing or recurring due to natural causes. The committee believed much of the land surrounding the wetlands could be used for agricultural purposes, and the broad FWS easements prevented the effective use of the lands. The committee believed the FWS should delineate the exact wetland acreage covered by the easements, and provide only the delineated acres are covered by the easement. The committee also believed the easements should be limited in time and not be perpetual. The committee recommended a number of bills related to the study which ultimately resulted in the enactment of Sections 20.1-02-18.1, 20.1-02-18.2, and 47-05-02.1. Some changes recommended by the committee and enacted by the Legislative Assembly in 1977 to limit federal authority to acquire North Dakota wetland easements were declared unconstitutional in *North Dakota v. United States*, 460 U.S. 300 (1983).

The 1983-84 interim Natural Resources Committee studied the impact of federal waterfowl production areas and refuges, focusing on necessary changes to state procedure to acquiesce to federal acquisition of wetland easements, easement acreage delineation, and payments in lieu of taxes on federal lands. The committee recommended House Bill No. 1079 (1985), which included various amendments to Section 20.1-02-18 regarding state consent to wildlife area land acquisitions, Section 20.1-02-18.1 to eliminate language requiring affirmative recommendations from the board of county commissioners of a county where waterfowl production area acquisition is sought before the Governor may approve the acquisition because the language conflicted with the finding in *North Dakota v. United States*, and Section 20.1-02-18.2 to eliminate language requiring the Department of the Interior to comply with the negotiation of provisions of waterfowl production area easement agreements, and the removal of language that a failure to comply would result in the state's consent to the acquisition of migratory bird conservation easements by the federal government being nullified because the language conflicted with the finding in *North Dakota v. United States*.

The 1985-86 interim Agriculture Committee studied issues related to the state's wetlands, including the economic and other impacts to the state's drainage permit laws. The committee recommended a bill to establish a wetlands mediation advisory board in Sections 20.1-02-18.4, 20.1-02-18.5, and 20.1-02-18.6, to provide an alternative dispute resolution mechanism to resolve conflicts between landowners and the FWS related to wetlands. The wetlands mediation advisory board sections were repealed in 1997 after it was determined the advisory board had not met since the board's creation.

The 2017-18 interim Agriculture Committee studied the desirability and feasibility of creating a state wetlands bank to restore, create, or enhance wetlands for the purpose of compensating for unavoidable impacts to wetlands caused by development or agriculture at another location. The committee made no recommendations concerning the study.

STUDY APPROACH

In conducting this study, the committee may wish to receive testimony from representatives of:

- The North Dakota Grain Growers Association, North Dakota Farm Bureau, and the North Dakota Stockmen's Association regarding perceived issues with FWS easements in the state;
- The FWS regarding information and data on easements, the history of easements, the process of obtaining easements, and federal rules and regulations regarding the management and maintenance of easements;
- DOT, the North Dakota Association of Counties, and townships, regarding the process of completing road construction projects in the state which are related to and impact FWS easements, impacts of the easements, and the costs to mitigate easement issues that arise as a result of construction projects;
- The Department of Agriculture; and
- Other interested stakeholders, including the State Engineer, the Federal Highway Administration, and the Army Corps of Engineers.

The committee also may wish to seek additional information from organizations such as the National Conference of State Legislatures.