

N.D.A.G. Letter to Peterson (Aug. 9, 1990)

August 9, 1990

Jeffrey Peterson
Burke County State's Attorney
P. O. Box 39
Bowbells, ND 58721-0039

Dear Mr. Peterson:

Thank you for your March 20, 1990 letter requesting my opinion regarding whether the United States Fish and Wildlife Service could purchase property pursuant to the Migratory Bird Conservation Act without complying with N.D.C.C. § 20.1-02-18.1. I apologize for the delay in responding. In your letter you explained that the Fish and Wildlife Service recently purchased some land that was included in Executive Order #7171. Executive Order #7171 was issued in 1935, and authorized the acquisition of land to establish Lostwood Migratory Waterfowl Refuge. Because I have received additional information from the Fish and Wildlife Service that puts your question in a different light, I am writing this letter instead of a formal opinion.

To better understand the issue you present, it is useful to consider some history of the Migratory Bird Conservation Act. The Migratory Bird Conservation Act was established in 1929, and authorized the acquisition of inviolate migratory bird sanctuaries. Pub. L. No. 70-770, 45 Stat. 1222 (1929) (codified as amended at 16 U.S.C. §§ 715-715s (1980)). This Act also contained a provision requiring legislative consent prior to purchasing land. 16 U.S.C. § 715f (1988). Five years later, Congress passed the 1934 Migratory Bird Hunting Stamp Act, which required hunters to buy duck stamps. Pub. L. No. 73-124, 48 Stat. 451 (1934) (codified as amended at 16 U.S.C. §§ 718-718i (1988)). The monies from duck stamp purchases were used to fund the acquisition of land under the 1929 Act. See 16 U.S.C. § 718c (1988).

Because the amount of money generated by the duck stamp sales was insufficient, in 1961 Congress gave a \$105,000,000.00 loan to the fund. Sagsveen, Waterfowl Production Areas: A State Perspective, 60 N.D.L. Rev. 659, 660 (1984). In addition, Congress enacted a provision limiting land acquisition using Migratory Bird Conservation Fund monies to those parcels "approved by the governor of the state or appropriate state agency."

16 U.S.C. § 7015K-5 (1988). Thus, consent must be obtained prior to the use of these funds. See generally Sagsveen, supra, at 659-61 (discussing Migratory Bird Conservation Act and subsequent acts).

In addition to the federal provisions discussed above, the North Dakota State Legislature has enacted provisions relating to acquisitions and purchases under the Migratory Bird

Conservation Act. N.D.C.C. § 20.1-02-18 provides in part:

North Dakota consents, subject to the approval of the governor for each proposed acquisition, along with the conditions of sections 20.1-02-18.1 and 20.1-02-18.2, 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 federal Migratory Bird Conservation Act.

In addition to N.D.C.C. § 20.1-01-18, N.D.C.C. § 20.1-02-18.1 imposes additional requirements including public notice and an impact analysis on the Fish and Wildlife Service when it is acquiring land under the Migratory Bird Conservation Act with Migratory Bird Conservation Fund money. According to the Fish and Wildlife Service, however, the land you described in your letter was not purchased with Migratory Bird Conservation Fund money. Therefore the provisions of N.D.C.C. § 20.1-02-18 through 18.2 do not apply to this particular acquisition.

The land described in your letter was purchased with Land and Water Conservation Fund money. Letter from Michael R. McEnroe, Supervisor North Dakota Wetlands Habitat Office, United States Fish and Wildlife Service to Pat Stevens, Assistant Attorney General (July 19, 1990) (copy enclosed).

16 U.S.C. § 460-9 specifies how Land and Water Conservation Fund money can be used. Section 460-9 provides in part:

Moneys appropriated from the fund for Federal purposes shall, unless otherwise allotted in the appropriation Act making them available, be allotted by the President to the following purposes and subpurposes:

(1) For the acquisition of land, waters, or interests in land or waters as follows:

...

National wildlife refuge system. Acquisition for . . . (c) national wildlife refuge areas under section 7(a)(4) of the Fish and Wildlife Act of 1956 (16 U.S.C. 742(f)(a)(4)) and wetlands acquired under section 304 of the Emergency Wetlands Resources Act of 1986; (d) any areas authorized for the National Wildlife Refuge System by specific Acts.

16 U.S.C. § 460-9 (1988).

According to the Fish and Wildlife Service, the lands were acquired and purchased pursuant to this section. Under federal law land acquired with Land and Water Conservation Fund monies does not require state consent. Moreover, the provisions of

N.D.C.C. 20.1-02-18.1 are not applicable because they deal only with purchases under the Migratory Bird Conservation Act. In addition, N.D.C.C. § 20.1-02-18.1 does not apply unless state consent to an acquisition is needed. Consequently, the Fish and Wildlife Service was not required to comply with N.D.C.C. § 20.1-02-18.1 to purchase the land discussed in your letter.

I hope this information is useful to you.

Sincerely,

Nicholas J. Spaeth
Attorney General

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Enclosure