

N.D.A.G. Letter to Enget (March 21, 1989)

March 21, 1989

Mr. Wade G. Enget
Mountrail County State's Attorney
P.O. Box 369
Stanley, ND 58784

Dear Mr. Enget:

Thank you for your March 9, 1989, letter concerning the effect of alleged procedural deficiencies in the making of a county commission's recommendations for property acquisition pursuant to N.D.C.C. § 20.1-02-18.1. You have inquired whether the Mountrail County Commissioners failure to give public notice as required by N.D.C.C § 20.1-02-18.1 will void the county commissioners' recommendations regarding a proposed property acquisition by the United States Department of Interior.

Although you refer to the State Game and Fish Department in your letter, I have been advised that the Game and Fish Department is not involved in this acquisition. Instead, this is a matter involving a federal agency.

N.D.C.C. § 20.1-02-18 currently requires the governor's prior consent to a federal agency's acquisition of property for wildlife purposes. This section provides that North Dakota consents to such an acquisition "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."

N.D.C.C. § 20.1-02-18 was originally adopted by the 1931 Legislative Session and codified as N.D.C.C. § 20-11-13. That section provided an unconditional consent to acquisition of property by the United States for the establishment of migratory bird reservations subject only to the state retaining jurisdiction and authority over the property to the extent that this jurisdiction did not conflict with federal law. This section remained unchanged until 1973 when it was recodified as N.D.C.C. § 20.1-02-18, as a part of the game and fish law revision. The statutory language did not change at that time.

During the mid-1970's, problems surfaced between landowners, the state, and the federal government regarding land and easement acquisitions for the migratory bird reservations. These problems led to the 1977 Legislature amending N.D.C.C. § 20.1-02-18 and adopting N.D.C.C. § 20.1-02-18.1 and 20.1-02-18.2. 1977 N.D. Sess. Laws ch. 204. These new provisions restricted the United States Government's ability to obtain property for the enumerated wildlife purposes.

The 1977 amendment to N.D.C.C. § 20.1-02-18 made North Dakota's consent to the acquisition "subject to the conditions of sections 20.1-02-18.1 and 20.1-02-18.2."

N.D.C.C. § 20.1-02-18.1 required an affirmative recommendation by the board of county commissioners prior to the final approval of the proposed acquisition. This section also set forth the procedures for the board of county commissioners to follow in providing notice and a hearing before making a recommendation. The section also required an impact analysis for the board of county commissioners' consideration in making recommendations.

N.D.C.C. § 20.1-02-18.2 placed restrictions upon the use and term of the lease, easement, or servitude of the property used for wildlife production purposes. If the Department of Interior failed to agree or comply with these restrictions, the statute mandated the nullification of any consent to the acquisition North Dakota may have granted pursuant to N.D.C.C. § 20.1-02-18.

These 1977 amendments specifically conditioned North Dakota's consent to the property acquisition by the United States for wildlife production purposes on the board of county commissioners' approval of the acquisition.

After the adoption of these statutory provisions, the United States' acquisition of wetlands ended and an attempt was made to withdraw the consents of governors to earlier federal acquisitions. As a result of these actions, the United States brought a lawsuit against the state of North Dakota seeking to void the 1977 legislative enactments. The United States Supreme Court finally resolved this lawsuit in North Dakota v. United States, 460 U.S. 300 (1983). In its decision, the Court held:

1. Acquisitions of wetland easements for use as waterfowl habitats require the consent of the governor;
2. Gubernatorial consents given for such acquisitions cannot be revoked; and
3. The 1977 laws restricting such acquisitions did not affect the previously given gubernatorial consents.

Although this case did not decide whether the 1977 legislative restrictions were applicable to future acquisitions, the 1985 Legislature considered this case in amending N.D.C.C. §§ 20.1-02-18, 20.1-02-18.1, and 20.1-02-18.2.

The 1985 amendments to N.D.C.C. § 20.1-02-18 left that section virtually unchanged except for adding the requirement that the governor approve each proposed acquisition.

The 1985 amendments to N.D.C.C. § 20.1-02-18.1 left unchanged the provisions pertaining to the impact analysis and the notice and hearing to be conducted by the board of county commissioners. However, the Legislature removed the following language from the statute:

An affirmative recommendation by the board must be obtained prior to final approval of all such proposed acquisitions, whether by transfer of title, lease, easement, or servitude.

The 1985 amendments to N.D.C.C. § 20.1-02-18.2 deleted the following language:

Failure by the department of the interior, its bureaus or agencies, to agree to and comply with the above provisions shall nullify North Dakota's consent to the federal act under section 20.1-02-18.

These amendments and the applicable legislative history of the amendments show that the Legislature did not intend an affirmative recommendation of the board of county commissioners to be a condition precedent to the governor's approval of the acquisition.

After the North Dakota v. United States decision, the Natural Resources Committee reviewed the effect of that case upon existing North Dakota law. In the 1985 Report of the North Dakota Legislative Council, that committee proposed the amendments to N.D.C.C. § 20.1-02-18, 20.1-02-18.1, and 20.1-02-18.2 discussed above. The Report explained the amendments as follows:

An amendment of NDCC Section 20.1-02-18 to require gubernatorial consent for each proposed acquisition by the federal government of land or water for migratory bird conservations was reviewed. Testimony to the committee indicated there have been attempts to use other funding sources for waterfowl area acquisitions to avoid the necessity to obtain gubernatorial consent.

An amendment of NDCC Section 20.1-02-18.1 to eliminate language requiring an affirmative recommendation from the board of county commissioners of the county where a waterfowl area acquisition is sought before the Governor may approve the acquisition was considered by the committee. This is a technical amendment to have state law comply with the United States Supreme Court decision in North Dakota v. United States that no additional state restrictions could be imposed on these land acquisitions.

The committee examined an amendment of NDCC Section 20.1-02-18.2 to eliminate language which states that failure by the Department of the Interior to comply with the provisions in that section relating to negotiations of provisions of waterfowl production area easement agreements results in the nullification of North Dakota's consent to the acquisition of migratory bird conservation by the federal government. This is also a technical amendment to comply with North Dakota v. United States in that no additional conditions can be imposed by the state on these federal waterfowl land acquisitions.

Report of the North Dakota Legislative Council, 49th Leg. Assembly, at 174 (1985).

In addition, the Natural Resources Committee made the following recommendations concerning these three sections:

1. Section 20.1-02-18 would be amended to require gubernatorial consent for each proposed acquisition by the federal government of land or water for migratory bird conservations. This amendment would make all such land acquisitions subject to gubernatorial consent and not just those using the migratory bird conservation fund moneys.
2. Section 20.1-02-18.1 would be amended to eliminate language requiring an affirmative recommendation from the board of county commissioners [sic] of a county where a waterfowl area acquisition [sic] is sought before the Governor may approve the acquisition [sic]. The language conflicts with North Dakota v. United States.
3. Section 20.1-02-18.1 would be amended to eliminate language which states that, if the Department of Interior fails to comply with the provisions in that section relating to negotiations of provisions of waterfowl production area easement agreements, North Dakota's consent to the acquisition of migratory bird conservation by the federal government will be nullified. The language conflicts with North Dakota v. United States.

Report of the North Dakota Legislative Council, 49th Leg. Assembly, at 175 (1985).

Under the amended statute, the board of county commissioners may still make recommendations as to whether the governor should or should not approve the proposed acquisition. The procedures to make that recommendation are set forth in N.D.C.C. § 20.1-02-18.1.

However, a failure by a board of county commissioners to make the recommendation or to follow the procedures set forth in that section for making the recommendation will not affect the governor's authority to approve the proposed acquisition. Current law does not mandate an affirmative recommendation by the board of county commissioners before the governor may approve the acquisition. Therefore, a failure by the board of county commissioners to comply with the procedures to make its recommendation will neither void the governor's approval nor nullify an acquisition made as a result of such gubernatorial approval.

I trust that my response has adequately responded to your inquiry.

Sincerely,

Nicholas J. Spaeth

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