STATE OF NORTH DAKOTA

ATTORNEY GENERAL'S OPINION 88-28

Dated issued: December 30, 1988

Requested by: Representative Gordon Berg

- QUESTION PRESENTED -

Whether the United States Fish and Wildlife Service, in advancing the purposes of its waterfowl production areas, must comply with state law when seeking to close a section line, a public road that is not on a section line, or an "established trail."

- ATTORNEY GENERAL'S OPINION -

It is my opinion that the United States Fish and Wildlife Service, in advancing the purposes of its waterfowl production areas, must comply with state law when seeking to close a section line, a public road that is not on a section line, or, in some cases, an "established trail."

- ANALYSIS -

The issue considered in this opinion is the authority of the U.S. Fish and Wildlife Service (FWS) with regard to section lines, public roads, and "established trails." To close any of these routes, the FWS must comply with state law. Because each type of route has a distinct legal nature, however, there is a different reason the FWS must comply with state law to close each of the three. Thus, this opinion separately discusses section lines, public roads, and "established trails."

Section Lines

Because they were granted to North Dakota by Congress, section line roads have a unique legal status. In the Act of July 26, 1866, Congress provided that: "the right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted." Act of July 26, 1866, ch. 262, § 8, 14 Stat. 251, 253 (1866) (codified at 43 U.S.C. § 932), repealed by Federal Land Policy and Management Act of 1976, Pub. L. No. 94-579, § 706(a), 90 Stat. 2743, 2793 (1976). This provision constituted an offer of public land for highway purposes that could be accepted by the states in various ways. DeLair v. County of LaMoure, 326 N.W.2d 55, 59 (N.D. 1982). The Dakota Territory accepted the grant in an 1871 law, which provided: "hereafter all section lines in this Territory shall be and are hereby declared public

highways as far aspracticable." An Act Regulating the Laying Out of Public Highways, ch. 33, § 1, 1870-1871 Laws of Dakota Terr. 519, 519-520 (1871) (codified at ch. 29, § 1, 1877 Rev. Code 125).

Once the grant of highways over the public domain was accepted, the public became vested with an absolute right to use section lines. Small v. Burleigh County, 225 N.W. 2d 295, 298 (N.D. 1974); see also Walcott Township of Richland County v. Skauge, 71 N.W. 544, 546 (N.D. 1897). This vested right "could not be revoked by the general government.'" Small v. Burleigh County, 225 N.W.2d at 298 (quoting Wenburg v. Gibbs Township, 153 N.W. 440, 441 (N.D. 1915)). This right has never been surrendered. Small v. Burleigh County, 225 N.W.2d at 297. Upon vesting of this right, state or local officials need take no formal action to open a section line road or otherwise declare the road's status as a public highway. Id. "'Section lines whether traveled or not were already highways by virtue of legislative declaration, and might be traveled and subjected to such use as far as practicable, . . .'" Id. at 299 (quoting Koloen v. Pilot Mound Township, 157 N.W. 672, 673 (N.D. 1916) (emphasis in Small v. Burleigh County)).

This opinion request arose from a concern that the FWS may seek to close section line roads crossing waterfowl production areas. The 1934 Migratory Bird Hunting Stamp Act, as amended in 1958, gave the FWS authority to acquire land to establish waterfowl production areas. Act of Aug. 1, 1958, Pub. L. No. 85-585, § 3, 72 Stat. 486, 487 (1958) (codified at 16 U.S.C.S. § 718d(c) (1978)). Such areas are part of the National Wildlife Refuge System and are managed by the FWS. 16 U.S.C.S. § 668dd(a)(1) (1978).

Nothing in the 1934 Stamp Act or other federal law specifically gives the FWS authority to close section lines crossing waterfowl production areas. Further, even if, either explicitly or implicitly, federal law gave the FWS authority to close public roads, such authority would not be applicable to section line roads. Faxon v. Lallie Civil Township, 163 N.W. 531 (N.D. 1917), appeal dismissed (for lack of jurisdiction), 250 U.S. 634 (1919); Minidoka & S.W.R. Co. v. Weymouth, 113 P. 455 (Idaho 1911).

In Faxon a North Dakota township had established a public highway on a section line. Faxon, the landowner, claimed compensation for the taking of his land for the road. The township responded that it owed nothing because it had a highway easement by virtue of the 1866 congressional grant and the 1871 acceptance of this grant. 163 N.W. at 532.

Faxon's land was in the Devils Lake Indian Reservation, which was set apart by an 1874 treaty. Faxon claimed the establishment of the reservation repealed the 1866 grant. The court, however, said that by 1874 the 1866 act had been in effect eight years and accepted for three. Id. at 532-33. The court continued:

> It is also clear that the right granted to the state was not in the nature of a license, revocable at the pleasure of the grantor,

> but that highways once established over the public domain under and by virtue of the act became vested in the public, who had an absolute right to the use thereof which could not be revoked by the general government . . . .

Id. at 533.

The court added that nothing in the 1874 treaty creating the Indian reservation would cause the court to believe Congress intended to divest the public of the highway rights it had granted in 1866. Id. While Congress could set aside public land for Indians, "the vested [highway] rights could not be taken away." Id.

The reasoning of Faxon has been accepted by the Eighth Circuit Court of appeals. Bird Bear v. McLean County, 513 F.2d 190, 192 (8th Cir. 1975). See also Sierra Club v. Hodel, 675 F. Supp. 594, 604 (D. Utah 1987), aff'd in part and rev'd in part (on other grounds), 848 F.2d 1068 (10th Cir. 1988).

Minidoka & S.W.R. Co. v. Weymouth, 113 P. 455 (Idaho 1911), also involved a situation in which a later enacted federal law was interpreted as subject to an earlier right of way grant. In 1904 the railroad company built a railroad track pursuant to Congress's 1875 Railroad Right of Way Act. The Secretary of Interior then built reclamation canals on the railroad's right of way. Significantly, the Secretary of Interior said the 1890 Reclamation Act authorized him to build the canals. The railroad sought an injunction. Id. at 456. The Secretary of Interior's defense was that the 1890 grant applied to all lands, rights of way, and easements granted by Congress under any law. The railroad responded that the 1890 right of way grant was never intended to apply to a railroad right of way granted under the 1875 act. To do so, argued the railroad, would destroy the purposes of the 1875 act. Id. at 457. The Idaho court agreed, saying that Congress did not intend the canal right of way to apply to other congressionally granted rights of way. Id. at 457-58.

By analogy, Congress did not intend its 1934 Stamp Act to allow the FWS to close highway rights of way Congress granted North Dakota in 1866, at least not without adhering to North Dakota law if the FWS sought to do so.

The Idaho court also noted that statutes are to be construed to give meaning and effect to each provision of the statutes. Id. at 458. This proposition also led to the conclusion it was not the purpose of the 1890 act to include railroad rights of way within its operation. Id.

In summary, the 1866 congressional grant and its 1871 acceptance by the Dakota Territory establishing section lines as highways takes precedence over any authority the FWS might have to close section lines. Thus, if it seeks closure, the FWS may only do so in accordance with the method provided by law, which is explained in N.D.C.C. § 24-07-03.

Because N.D.C.C. ' 24-07-03 says "a person" may petition for the closing of a section line, a question

The concept of Federalism might also be used to conclude that the FWS must comply with state law to close a section line. Federalism is discussed in the next section.

Public Roads

The analysis used to conclude that the FWS may only close section line roads in conformance with North Dakota law cannot be used vis-a-vis closure of public roads not on section lines. This is because the unique legal nature of section line roads does not apply to other public roads. Nonetheless, other theories protect North Dakota public roads from unilateral closure by the FWS.

Before these theories are discussed it is appropriate to define public road. A public road is a way open to members of the public for passage at their pleasure and may only be closed with governmental approval. 1987 N.D. Op. Att'y Gen. 71, 74.

The tenth amendment to the United States Constitution says that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." By this amendment, states retained all power not surrendered to the federal government. Fry v. United States, 421 U.S. 542, 547 n.7 (1975). The Constitution, however, also contains the supremacy clause. U.S. Const. art. VI, § 2. Under this clause federal law preempts state law if it:

1. Is expressly preempted by federal law;

2. Actually conflicts with federal law; or

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arises whether the FWS is a "person." N.D.C.C. ' 24-01-01.1(29) defines "person" as "any person, firm, partnership, association, corporation, organization or business trust." The FWS falls within this definition because it is an organization. United States v. California State Auto Ass'n, 385 F. Supp. 669, 671 (E.D. Cal. 1974) ("'Organization' is defined as a corporation, government or governmental subdivision, or agency"), aff'd, 530 F.2d 850, 851 (9th Cir. 1976) ("The government certainly is an 'organization'"); Farmers Ins. Exch. v. Jones, 515 P.2d 1275, 1276 (Utah 1973) ("It seems obvious to us that the United States of America is a person, and certainly it is an organization within the meaning of [a trust agreement referring to 'person or persons, organization, association or corporation']") (emphasis in original).

It might also be noted that past Attorney General opinions have raised a question whether the Legislature even has the authority to allow the permanent closure of section lines. 1976 N.D. Op. Att'y Gen. 142, 145; 1976 N.D. Op. Att'y Gen. 146, 150.

3. Is in an area where Congress has evidenced an intent to occupy an entire field of regulation.

State v. Liberty National Bank and Trust Co., 427 N.W.2d 307, 309 (N.D.), cert. denied, 109 S. Ct. 393 (1988).

No federal law has been found which expressly preempts state law concerning the closure of public roads.

The second factor of the Liberty National Bank and Trust Co. test, whether state law conflicts with federal law, is also absent. A conflict between state and federal law arises if "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or if state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (footnote omitted). See also State v. Liberty National Bank and Trust Co., 427 N.W. 2d at 309-10. Application of North Dakota law would not appear to frustrate the purposes of the FWS's waterfowl production areas or to be physically impossible. North Dakota law governing closure of public roads does not prohibit, limit, or make more difficult the acquisition of wetlands. It has a neutral effect on their integrity. Furthermore, the FWS began purchasing waterfowl production areas in North Dakota in the early 1960s. The amount of wetland acreage it now controls is at least 750,000 acres. It appears the FWS's program in North Dakota has never involved the closure of a public road. This history of the

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The acreage the FWS has purchased as waterfowl production areas is uncertain. There has been considerable debate about this. See, e.g., United States v. Vesterso, 828 F.2d 1234, 1241-42 (8th Cir. 1987). In litigation between the United States and North Dakota, the State claimed that by 1977 the FWS had acquired 4.8 million acres. North Dakota v. United States, 460 U.S. 300, 311 n.14 (1983). The FWS says it has purchased about 750,000 acres. N.D. Legislative Council, Minutes of the January 19-20, 1988, Meeting of the Water Resources Committee 12 (quoting L. Jones of the FWS). By law, the FWS may purchase up to 1.5 million acres in North Dakota. See North Dakota v. United States, 460 U.S. at 305.

It may be noted that in a recent wildlife refuge proposal, the draft prepared by the Bureau of Reclamation and the U.S. Fish and Wildlife Service states: "Some road and trail closures may be recommended to reduce vehicular disturbance to wildlife species, protect the vegetative cover, and reduce maintenance costs. Closures will be evaluated in relation to development and management plans. Proposed abandonment of section lines will be presented to Sargent County Commissioners. County Road No. 2 and the Soo Line Railroad will remain open through the refuge." Draft Acquisition and Development Plan for Kraft Slough National Wildlife Refuge at 19 (July, 1988). However, even that proposal recognizes the need to follow state law and obtain local concurrence.

FWS's program is evidence that should the FWS wish to close a road, following North Dakota law in doing so would not frustrate the program.

Finally, while it is true the FWS has authority over fish and wildlife, the issue here involves control of roads. Control of roads is an integral function of state, not federal, government. San Antonio Metropolitan Auth. v. Donovan, 557 F. Supp. 445, 447 (W.D. Tex. 1983), rev'd on other grounds sub nom. Garcia v. San Antonio Metropolitan Auth., 469 U.S. 528 (1985) ("Overseeing, maintaining, and regulating local and regional transportation systems historically has been a state responsibility. . . . These functions are matters of a 'peculiarly local nature', and the states' exercise of their prerogatives in this field has been given great deference."); Enrique Molina-Estrada v. Puerto Rico Highway Auth., 680 F.2d 841, 845-46 (1st Cir. 1982). Congress has left control of this area to the states. Peel v. Florida Dep't of Transp., 600 F.2d 1070, 1083 (5th Cir. 1979) ("Overseeing the transportation system of the state has traditionally been one of the functions of state government, and thus appears to be within the activities protected by the tenth amendment."); Ross v. Trustees of Univ. of Wyoming, 30 Wyo. 433, 222 P. 3, 5 (1924) ("The power of a state to provide highways for public use has been likened to the power of taxation and said to be well-nigh as essential to the existence of government.") This is not a field which Congress has evidenced an intent to occupy the field.

In sum, state law is not preempted. Nonetheless, because the operation of a federal program may be at stake, it is necessary to determine what law the FWS must follow to close public roads. In certain instances where Congress has failed to act and overriding interests of the federal government are at stake, "'it is for the federal courts to fashion the governing rule of law according to their own standards.'" United States v. Kimbell Foods, Inc., 440 U.S. 715, 726 (1979) (quoting Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943)). In making this determination, the court must decide whether to develop a uniform nationwide rule or adopt state law as the appropriate rule of decision. Id. at 727-28.

Kimbell Foods sets forth three considerations relevant to the determination of whether state law should be adopted: one, whether there exists a need for a nationally uniform body of law with respect to the federal program; two, whether application of state law would frustrate specific objectives of the federal program; and, three, the extent to which application of a federal rule would disrupt state interests and existing relations. Id. at 728-29.

The first consideration is whether there is a need for the FWS to use uniform procedures to close roads. There appears to be no need for a uniform federal rule governing these procedures. One basis for this conclusion is that in all the years the FWS has been purchasing and managing waterfowl production areas in North Dakota, especially in light of the large amount of the acreage involved, there have been many situations where the FWS has allowed a public

road to remain open. As road closures are highly unusual, there seems little need for a national uniform law on closure. (Courts should "reject generalized pleas for uniformity as substitutes for concrete evidence that adopting state law would adversely affect administration of the federal programs." Kimbell Foods, 440 U.S. at 730.)

The second Kimbell Foods factor is whether application of state law would frustrate the objectives of the federal program. As explained above, the objectives of the FWS's program would not be frustrated by application of state law.

It is true that state laws hostile to the United States' protection of migratory birds have been held unenforceable. North Dakota v. United States, 460 U.S. 300 (1983); United States v. Little Lake Misere Land Co., 412 U.S. 580, 592-97 (1973); United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974). But in these cases the state statute at issue was specifically directed at limiting the federal government's ability to protect waterfowl.

In Albrecht landowners argued that their predecessors in title could not convey to the FWS an easement for the protection of a wetland because North Dakota law did not specifically allow for such an easement. 496 F.2d at 909. Little Lake Misere concerned the validity of certain landowners' mineral rights on land the United States had acquired in Louisiana for use as a wildlife refuge, reserving mineral rights to the prior landowners for ten years (subject to extensions under certain circumstances). A Louisiana statute, however, sought to extend the mineral rights indefinitely for land acquired by the United States. 412 U.S. at 582-84. North Dakota v. United States involved application of several North Dakota laws restricting the United States' ability to acquire wetlands. 460 U.S. at 302-09. Each of these cases, therefore, involved state statutes that directly affected the federal government's ability to carry out its operations to protect waterfowl. Here, on the other hand, the North Dakota law is directed at regulation of public roadways, not waterfowl, and as discussed above, it has little, if any, effect on the FWS's ability to protect waterfowl. These first two factors of the Kimbell Foods test, uniformity and accomplishment of federal program purposes, are to be weighed against the third factor, state interests and the preservation of existing relations. In this instance, the focus is upon North Dakota's interests in having its roads closed in conformance with its statutes.

As stated above, state control over its roads is an integral function of state government. If the FWS had the authority to close public roads, state or local government might be required to incur the cost of building replacement roads, North Dakota citizens could be inconvenienced, and state policy as to how services are to be delivered to citizens would be displaced. Additional evidence of the important state interest in roads is the fact North Dakota has established specific mechanisms to be followed when closing a public road, N.D.C.C. ch. 24-07, and by the state's close involvement with roads since territorial days, see, e.g., 1877 Rev. Code ch. 29; 1862 Laws of Dakota Terr.

ch. 70-78 (1862).

Also, the law "which controls acquisition, transmission, and transfer of property, and defines the rights of its owners in relation to the state or to private parties" has traditionally been found in the statutes and decisions of the state. Davies Warehouse Co. v. Bowles, 321 U.S. 144, 155 (1944). See also Sunderland v. United States, 266 U.S. 226, 232-33 (1924) (Property questions "are matters which rest exclusively with the State where the property lies."); United States v. Albrecht, 496 F.2d 906, 911 (8th Cir. 1974) ("We fully recognize that laws of real property are usually governed by the particular states . . . ."); (footnote omitted); United States v. Smith, 479 F. Supp. 804, 806 (N.D. Ga. 1979) ("[I]n the absence of a contravening federal statute or policy, suits by the [Federal] Government to protect its proprietary interests in land are local in nature, such that the law of the state where the land is located should be applied."); Mashunkashey v. Mashunkashey, 134 P.2d 976, 977 (Okla. 1942) (Property interests "can be acquired and lost only in the manner prescribed by the law of the place where such land is situated.").

North Dakota's interest in its transportation system and in resolving property questions in accordance with its law "should be overridden . . . only where clear and substantial interests of the National Government, which cannot be served consistently with respect for such state interests, will suffer major damage if the state law is applied." United States v. Yazell, 382 U.S. 341, 352 (1966) (emphasis added).

On balance, an analysis of the three Kimbell Foods factors leads to the conclusion that the appropriate choice of law for the closing of public roads is North Dakota law, not federal law. It should also be noted that the courts have stated that adoption of state law is preferred. See Wilson v. Omaha Indian Tribe, 442 U.S. 653, 672-74 (1979); Georgia Power Co. v. Sanders, 617 F.2d 1112, 1116 (5th Cir. 1980) (there is a presumption favoring adoption of state law as the federal rule). Indeed, "in many situations . . . rights, interests and legal relations of the United States are determined by application of state law, where Congress has not acted specifically." United States v. Standard Oil Co., 332 U.S. 301, 308 (1947). The FWS must, therefore, follow state law when it seeks to close a public road.

"Established Trail"

The inquiry regarding the FWS's authority to close an "established trail" arose out of the following facts. A North Dakota farmer had commonly used a route across a tract of land to reach his pasture. The FWS -- either through the purchase of the tract in fee or by the purchase of an easement -- established a waterfowl production area on the tract. Initially, the FWS stopped the farmer's use of the route -- the "established trail" -- across the tract, but has since permitted him to continue its use.

"Established trail" is a term that appears neither in the North Dakota Century

Code nor in state case law. The term could have three meanings. One, it may be a public road which is neither on a section line nor formally opened by government but which is a public road by prescription. Two, an "established trail" may mean a road across the land of another, when the use of the road constitutes a private easement. Three, the term may mean a road across the land of another when the use of that road is only permissive. Each of these three possibilities is addressed to determine the extent of the FWS's authority in each case.

A route may ripen into a public road by prescriptive use. The public must have used the route for a period of 20 years under a claim of right and in a manner that has been general, continuous, uninterrupted, and adverse. N.D.C.C. § 24-07-01; Berger v. Berger, 88 N.W.2d 98, 100 (N.D. 1958); Kirtzberger v. Traill County, 242 N.W. 913, 915 (N.D. 1932). The creation of a public road by prescription is a matter of property law and, as explained in the preceding section, property interests are regulated by state law. Thus, if the FWS were to establish a waterfowl production area on land on which a public road exists by prescription, its production area is subject to the road, which may only be closed pursuant to North Dakota law.

"Established trail" may also mean a route that is a private easement allowing a right of way across the land of another. Such an easement may exist under North Dakota law, N.D.C.C. ' 47-05-01(4), and may have been created by express grant or implicitly by prescriptive use. North Dakota law sets forth the ways in which a right of way easement may be extinguished. See N.D.C.C. § 47-05-12. Thus, based on the authority cited in the preceding section, if

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N.D.C.C. ' 47-05-12 states:

> A servitude is extinguished:
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> 1. By vesting of the right to the servitude and the right to the servient tenement in the same person;
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> 2. By the destruction of the servient tenement;
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> 3. By the performance of any act upon either tenement by the owner of the servitude or with his assent if it is incompatible with its nature or exercise; or
>
> 4. When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by prescription.

the FWS bought land on which a private right of way easement exists, the FWS's waterfowl production area is subject to the easement and the FWS may only extinguish the easement in accordance with North Dakota law. Even if the FWS could ignore North Dakota law, the fifth amendment to the United States Constitution would require the FWS to pay just compensation to the holder of the easement.

The third possible meaning of "established trail" is a route across the land of another used without a legally enforceable right; that is, when the use of the route is but permissive. The permission to use such a route may be withdrawn at any time by the landowner. If the FWS owns land that someone is using as a road without a legal right to do so, the FWS may close the road. If the FWS owns only an easement on the land, then it may or may not have the power to close such a road depending upon the terms of its easement.

In summary, the FWS may not unilaterally close an "established trail" if such route is a public road established by prescription. Nor may it unilaterally close an "established trail" that is a private easement. It must follow state law to vacate a public road or to extinguish a private easement. If an "established trail" is a road used only with the permission of the landowner, then the FWS, if it is the landowner, has the right to close the road whenever and by whatever means it chooses.

- EFFECT -

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.

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