



North Dakota Sovereign Land Management Plan

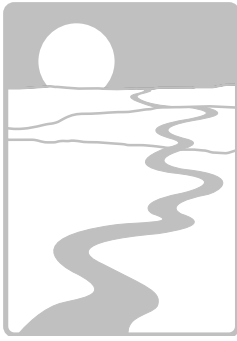


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Introduction

North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams.¹ The State of North Dakota plays an important role in the management of sovereign land through the State Engineer, who is responsible for administering the state's non-mineral interests in North Dakota's sovereign land.²

The goal of the State Engineer in managing this vital resource is: to manage, operate, and supervise North Dakota's sovereign land, for multiple uses, that are consistent with the Public Trust Doctrine, and are in the best interest of present and future generations.

Background and Purpose of the Sovereign Land Management Plan

On January 3, 2005, the North Dakota Attorney General issued an opinion, North Dakota Attorney General (N.D.A.G.) 2005-L-01, regarding the ability of land developers to construct wildlife habitat on sovereign land to satisfy federal mitigation requirements.³ In that opinion, the Office of the State Engineer was advised to, among other things, issue sovereign land permits only when they are consistent with a comprehensive sovereign land management plan.

The State Engineer's authority to manage sovereign land is derived from North Dakota Century Code (N.D.C.C.) § 61-33-05, which states that the State Engineer shall "manage, operate, and supervise" sovereign land. The State Engineer has adopted administrative rules to create a framework to follow legislative directives.⁴ But, the Attorney General has indicated management of sovereign land requires that the State Engineer incorporate the Public Trust Doctrine into any management scheme. Specifically, that the State Engineer create a plan pursuant to the Doctrine to manage sovereign land.

In response, the Office of the State Engineer has developed a North Dakota Sovereign Land Management Plan to:

1. Continue to fulfill the State Engineer's duty to manage sovereign land pursuant to the Public Trust Doctrine;
2. Satisfy requirements outlined in N.D.A.G. 2005-L-01;
3. Provide improved consistency in the management of sovereign land and administration of regulations;

¹ N.D.C.C. § 61-33-01(3).

² The state's mineral interests in sovereign lands are managed by the State Land Department under the authority of the Board of University and School Lands. N.D.C.C. § 61-33-03.

³ N.D.A.G. 2005-L-01.

⁴ N.D.A.C. ch. 89-10-01.

4. Serve as a complement to North Dakota's Administrative Code (N.D.A.C.) ch. 89-10-01 concerning sovereign land management; and
5. Generally improve management of the state's sovereign land for present and future generations.

The Planning Process

In developing North Dakota's Sovereign Land Management Plan, the Office of the State Engineer recognized the need for diverse technical expertise, and therefore sought assistance from the North Dakota Sovereign Land Advisory Board provided for in the North Dakota Century Code.⁵ In response, a technical working group, including, but not limited to, representatives from all of the advisory board member agencies, was formed to bring a broad spectrum of interests and expertise into the planning process. Member agencies on the sovereign land technical working group included (in alphabetical order) the:

- Attorney General's Office
- Department of Agriculture
- Game and Fish Department
- Garrison Diversion Conservancy District
- Health Department
- Historical Society
- Land Department
- Parks and Recreation Department
- Office of the State Engineer
- State Water Commission

This plan is the product of a cooperative planning effort between the above agencies, coordinated by the Office of the State Engineer and State Water Commission staff. In addition, comments from other government entities and the general public were sought and considered in the final version of the plan.

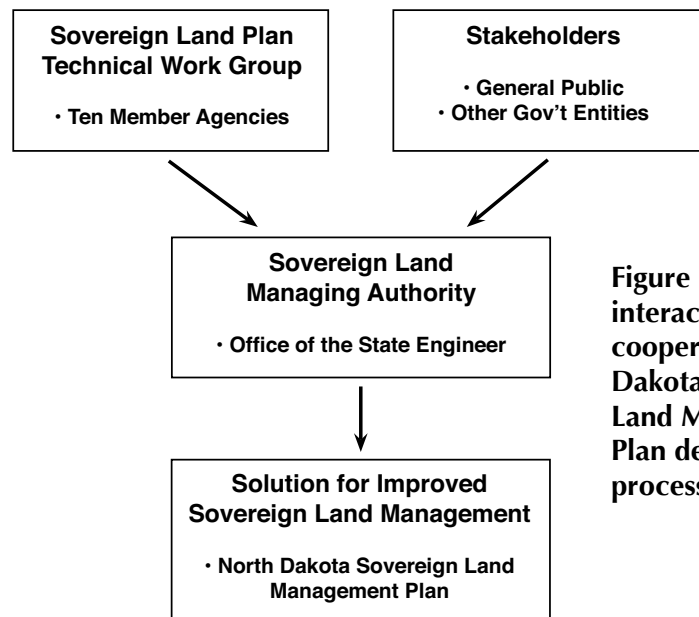
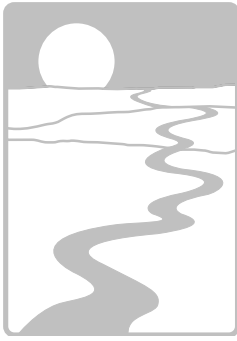


Figure 1: The interactive and cooperative North Dakota Sovereign Land Management Plan development process.

⁵ N.D.C.C. §§ 61-33-08 and 61-33-09.



Applicable Laws and Rules

The source of the state's authority to manage sovereign land emanates most centrally from the Equal Footing Doctrine. N.D.A.G. 2005-L-01 provides a comprehensive discussion of the Doctrine and the basis of the state's authority to manage sovereign land. But the Public Trust Doctrine provides the framework for the state to manage sovereign land.

Black's Law Dictionary defines the Public Trust Doctrine as "the principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use."⁶ Thus, in the simplest of terms, the Public Trust Doctrine provides for the legal right of the public to use certain lands and waters. Further, the North Dakota Supreme Court, in United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d, 457, 463, stated that the Doctrine permits alienation and allocation of such precious state resources, only after an analysis of present supply and future demand.

The Public Trust Doctrine, as interpreted by the North Dakota Supreme Court, imposes on the state the duty to manage sovereign land to foster not only the "public's right of navigation" but also "other important aspects of the state's public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies."⁷ The Doctrine further requires the protection and preservation of other interests including "natural, scenic, historic, and aesthetic values."⁸

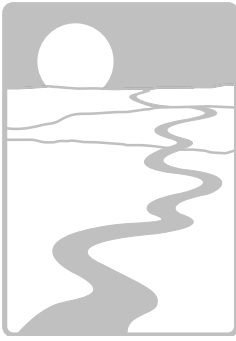
The North Dakota Supreme Court has also stated that the Public Trust Doctrine includes an element of planning, and that the Doctrine requires, at a minimum, evidence of planning in the allocation of public water resources.⁹ This in fact became the original source of the planning requirement that prompted the development of a sovereign land management plan for the state.

⁶ Black's Law Dictionary 1246 (7th ed. 1999).

⁷ J.P. Furlong Enterprises, Inc. v. Sun Explor. & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988).

⁸ United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 462 (N.D. 1976) (citing Payne v. Kassab, 312 A.2d 86, 93 (Penn. 1973)).

⁹ United Plainsmen, at 463.

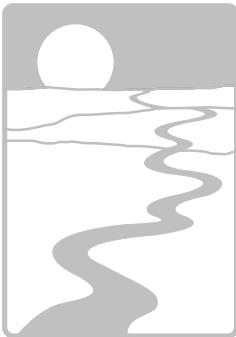


Application of the Public Trust Doctrine

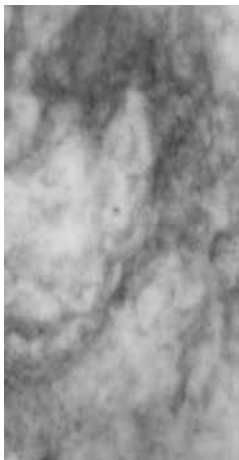


The Public Trust Doctrine provides the general framework for North Dakota's Sovereign Land Management Plan by placing significant limitations and affirmative duties on the state. As such, the best interests of the public require the conservation and preservation of the state's sovereign land. The Doctrine, however, has exceptions for activities with equal benefit to the public including, but not limited to bridges, boat ramps, and water supply intakes. Private use of sovereign land may also be permissible under the Doctrine so long as the public's interests are not materially compromised.¹⁰

¹⁰ E.g., Caminiti v. Boyle, 732 P.2d 989, 995-96 (Wash. 1987) (private docks not necessarily inconsistent with the trust); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 p.2d 1085, 1094 (Idaho 1983) (private marina permitted); State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983) (ski jump acceptable if it does not "materially obstruct navigation" and "is not detrimental to the public interest"); Morse v. Oregon Div. of State Lands, 590 P.2d 709, 712 (Or. 1979) (private grants acceptable if they do not substantially impair the public's interests); State v. Pub. Serv. Comm'n, 81 N.W.2d 71, 74-75 (Wis. 1957) (small part of a lake could be filled to expand a park); Boone v. Kingsbury, 273 P. 797, 817 (Cal. 1923) (drilling derricks would not significantly impede the public trust, particularly since the state retained authority to have the derricks moved if they did interfere with the trust).




Sovereign Lands: Where Are They?



One of the more challenging aspects of applying the Public Trust Doctrine is to clearly identify what land is sovereign and subject to state control. Again, North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams. In North Dakota, two interrelated federal standards may be considered for determining whether a given water body is navigable. The first is the federal standard for establishing state title to sovereign land under the Equal Footing Doctrine. The second is also a federal standard, where water bodies are defined as navigable waters of the United States under the Commerce Clause of the United States Constitution.

The Federal Standard Under the Equal Footing Doctrine

When applying the federal standard under the Equal Footing Doctrine, waterways are navigable if they were navigable in fact at statehood:



And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.¹¹

Thus, if historical investigations determine that a water body was used as a highway for commerce, then it would likely be considered navigable. However, in a sparsely populated state like North Dakota, where historical records around the time of statehood are limited or are non-existent, the standard of being susceptible to use for commerce becomes very important.

The susceptibility test requires that a water body need only be capable of supporting commerce in its natural state, and that it need not ever have supported navigation for commerce, as long as its characteristics and location could lend itself to those types of activities. Additional discussions of susceptibility, as it pertains to North Dakota, will be presented in greater detail later in the plan.

The Federal Standard Under the United States Constitution Commerce Clause

The Commerce Clause of the United States Constitution states: “The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . .”¹² As such, federal jurisdiction over navigable waterways has been asserted through various statutes, such as Section 10 of the Rivers and Harbors Act of 1899¹³ and the Federal Power Act.¹⁴

The most influential case that defined standards for navigability determinations under the Commerce Clause test was United States v. Appalachian Elec. Power Co. in 1940.¹⁵ In that case, the Supreme Court determined that navigability may be established by: (1) present use or suitability for use; (2) suitability for future use with reasonable improvements; or (3) past use or suitability for past use.¹⁶

There are several similarities between the Commerce Clause test of navigability and the standard under the Equal Footing Doctrine, but there are also important differences. One difference is that reasonable improvements to the waterway to facilitate travel may be considered.¹⁷ Closely related is the issue that navigability for Commerce Clause purposes can develop after statehood with waterway improvements.¹⁸ And lastly, the Commerce Clause test requires that a waterway must serve as a link in interstate or foreign commerce, whereas the Equal Footing Doctrine test does not.¹⁹

North Dakota’s Navigable Waters

In the past, North Dakota has affirmatively asserted jurisdiction over a relatively small number of the state’s waters based on both federal tests of navigability.

¹¹ The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871).

¹² U.S. Const. art. I sec. 8, cl. 3.

¹³ 33 U.S.C. 401-406.

¹⁴ 16 U.S.C. 791 *et seq.*


¹⁵ 311 U.S. 377 (1940).

¹⁶ Gollatte v. Harrell, 731 F.Supp. 453, 458 (S.D. Ala. 1989); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-08 (1940).

¹⁷ The Montello, 87 U.S. (20 Wall) 430 (1874).

¹⁸ Appalachian Elec. Power, at 408.

¹⁹ Oregon v. Riverfront Protection Ass’n, 672 F.2d 792, 794 n.1 (9th Cir.1982); Utah v. United States, 403 U.S. 9, 10 (1971).



Meaning that some of North Dakota’s waters were identified as navigable because of the federal standard under the Equal Footing Doctrine. Others were determined to be navigable because they were listed as Section 10 (of the Rivers and Harbors Act of 1899) “waters of the United States” under the Constitution’s Commerce Clause test.²⁰

Before development of this plan, the courts had determined the Missouri and James Rivers, and Devils, Painted Woods, and Sweetwater Lakes to be navigable because of the federal standard under the Equal Footing Doctrine. In addition, the Missouri River, the James River from the North Dakota/South Dakota border to the railroad bridge in Jamestown, the Yellowstone River, the Red River from the confluence of the Bois De Sioux and Ottetail Rivers in Wahpeton to the Canadian border, the Bois De Sioux River from the North Dakota/South Dakota border to its confluence with the Ottetail River in Wahpeton, and the Upper Des Lacs Lake were determined to be Section 10 waterways, and thus navigable.

However, failure to be identified as a navigable waterway by the courts or the U.S. Army Corps of Engineers does not prevent the State Engineer from asserting jurisdiction over additional lands. In fact, the State Engineer has a responsibility under the Public Trust Doctrine to use prudent judgment in identifying all of the rivers and lakes throughout the state that should be included on the state’s list of navigable waters, based on their location, physical characteristics, and/or historic and present use.

In order to address North Dakota’s waters that have no prior federal navigability determinations, it will be necessary for the state to identify other water bodies that are likely navigable, and therefore involve sovereign land under the jurisdiction of the State Engineer. To make those determinations, the state will rely on the federal standard for navigability under the Equal Footing Doctrine – in particular, whether a water body was “susceptible” to navigation at statehood, or if historical documentation warrants a navigability determination.

Since the navigability test requires only that a water body be susceptible or capable of being used as a highway for commerce, susceptibility as a commercial highway may be shown several ways, including through an examination of a river’s physical characteristics.²¹ If a water body is “capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a navigable river or highway.”²²

In consideration of modes of transportation, the types of watercraft used around the time of statehood can be used to measure navigability. Thus, canoes; small, flat-bottomed boats; and any other shallow-draft boats can suffice. Further, if a river’s present characteristics make it useful for commerce, and if hydrological evidence or other technical proof indicate that present characteristics are similar to those at statehood, then that may be considered proof of navigability.²³

²⁰ The listing of waters as Section 10 navigable waterways is a function of the U.S. Army Corps of Engineers.

²¹ Appalachian Elec. Power, at 410-13; United States v. Utah, 283 U.S. 64, 83 (1931); The Montello, at 441-42; Alaska v. United States, 662 F. Supp. 455, 463 (D. Alaska 1987).

²² The Montello, at 441-42.

²³ Charles M. Carvell, *ND Waterways: The Public’s Right of Recreation and Questions of Title*, 65 N.D.L. Rev 7, at 17 (1988), citing United States v. Utah, at 83; Loving v. Alexander, 548 F. Supp. 1079, 1089 (W.D. Va. 1982).



With regard to lakes and other water basins, technical standards and physical characteristics alone may be inadequate to determine susceptibility of use. This issue, as it relates to North Dakota, was addressed comprehensively in a recent Attorney General memorandum on the ownership of White Lake in Mountrail County.²⁴ Generally speaking, it has been determined with respect to lakes that geography, not hydrological characteristics, is a more important overriding factor, in the absence of historic evidence of use for commerce. Even if any type of boat could traverse a given lake, it is more important that the lake is “so situated that it becomes or is likely to become a valuable factor in commerce.”²⁵ Thus, isolated bodies of water, or dead-end lakes, that are not situated to be used as a means of transportation or a highway of commerce may not be navigable.²⁶

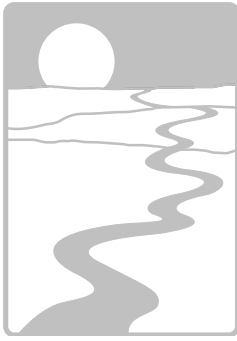
Since river, stream, and lake navigability determinations are dependent on several circumstances, and since there are thousands of miles of rivers and streams and hundreds of lakes throughout the state that have not been subjected to navigability determinations, an inventory of existing navigable water bodies is all but impossible to develop during the course of this planning process. Therefore, the state will proceed with the development of navigability determination standards, followed by the implementation of those standards for jurisdictional determinations on a case-by-case basis in the future.

In the interim, anyone pursuing a project occurring in or around any river or stream, or meandered water body, shall be required to submit an application to the Office of the State Engineer for a sovereign land permit. The State Engineer’s authority to regulate activities on those water bodies will be reviewed, based on the best available evidence at that time.

²⁴ Memorandum from Assistant Attorney General Charles Carvell to Deputy Land Commissioner Rick Larson (June 17, 2005).

²⁵ *Id.*, (citing *State V. Aucoin*, 20 So.2d 136, 154 (La. 1944).

²⁶ *Lefevre v. Washington Monument & Cut Stone Co.*, 81 P.2d 819, 822 (Wash. 1938); *United States v. Utah*, at 83, 86.



The Ordinary High Water Mark

The delineation of the ordinary high water mark is a critical component of sovereign land management, because it identifies the specific areas in and around the state's navigable waters that are under the jurisdiction of the State Engineer. Another way of looking at it is that the ordinary high water mark delineates the boundary between uplands owned by riparian landowners and state-owned sovereign land.

As defined in North Dakota's Administrative Code, ordinary high water mark means:

[T]hat line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety.²⁷

The North Dakota Supreme Court has further defined high water mark as:

[W]hat its language imports - a water mark. It is co-ordinate with the limit of the bed of water; and that only is to be considered the bed that the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . .


In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks. In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian owner and the public. It is the point up to which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop.²⁸

General Guidelines for Ordinary High Water Mark Delineations

The above definitions do provide some guidance for ordinary high water mark delineations in North Dakota, wherein the courts determined that hydrology and impacts upon the soil are the primary indicators, followed by vegetative impacts. But, beyond those definitions, the State of North Dakota does not have a specific set of standards or guidelines established for ordinary high water mark delineations.

²⁷ N.D.A.C. § 89-10-01-03.

²⁸ *State ex rel. Sprynczynatyk v. Mills*, 1999 ND 75, ¶ 13, 592 N.W.2d 591 (citing *In re Ownership of the Bed of Devils Lake*, 423 N.W.2d at 144-5 (quoting *Rutten v. State*, 93 N.W.2d 796, 799 N.D. 1958)).



The Office of the State Engineer recognizes the need for such standards, and as a result, members of the sovereign land workgroup initiated the process of developing specific guidelines. However, that level of effort exceeded the original scope of the sovereign land management planning process, but proceeded independently as a related project.

To develop a specific set of standards or guidelines, other states were consulted (particularly Minnesota, Wisconsin, and Washington). All have or are in the process of developing technical guidelines for ordinary high water mark delineations. Though all of the above states have descriptions of what to look for in ordinary high water mark delineations, they do not all agree on the importance of specific indicators.

In Minnesota, the primary physical features looked for in order of significance are trees, water-formed evidence, and vegetative evidence.²⁹ In Washington, the hierarchical order of significance is hydrology, soils, and then vegetation.³⁰ In Wisconsin, the state provides an inventory of what to look for, though no order of significance is provided for each of the indicators.³¹

A commonality for all ordinary high water mark delineation techniques, no matter where they are being conducted, is that they must be multidisciplinary in nature. Ordinary high water mark delineations should consider hydrology, soils, vegetation, and other physical indicators (i.e. ice scars, erosion, mud/sediment/water stains, wrack, sediment deposition, etc). Thus, it is probably less important to focus on the order of importance of all the potential water mark indicators than it is to recognize that several indicators are important.

Correlative Rights Between the State and Riparian Landowners

The Office of the State Engineer is required to manage sovereign lands, which include those areas from high water mark to high water mark on navigable waters. However, there is also the issue of correlative rights between the state and riparian landowners between the ordinary high water mark and the ordinary low water mark, where that area is often referred to as the shore-zone. The ordinary low water mark is defined as a mark that is “the low level reached by waters of a lake under ordinary conditions, unaffected by periods of extreme and continuous drought.”³² It has also been defined as “the line or level at which the waters of a lake usually stand when free from disturbing causes.”³³

This issue of correlative rights was addressed in N.D.A.G. 2004-L-33, where it was explained that between the ordinary high water mark and the low water mark there is a zone along the shoreline wherein the state and the landowner have correlative rights.³⁴ In State ex rel. Sprynczynatyk v. Mills, the North Dakota Supreme Court

²⁹ John Scherek and Glen Yakel, *Guidelines for Ordinary High Water Level (OHWL) Determinations*, Minnesota Department of Natural Resources Technical Paper 11, 1993.

³⁰ Erik Stockdale and Alan Wald, *Methods for Delineating an Ordinary High Water Line or Ordinary High Water Mark on Streams and Rivers in Washington State (Draft Version 1.1)*, Washington Department of Fish and Wildlife, Washington Department of Ecology, 2005.

³¹ *Wisconsin Department of Natural Resources, Waterway and Wetland Handbook (Chapter 40, Ordinary High Water Mark)*, 2004

³² South Dakota Wildlife Fed'n v. Water Mgmt. Bd., 382 N.W.2d 26, 27 (S.D. 1986).

³³ Slauson v. Goodrich Transp. Co., 69 N.W. 990, 992 (Wis. 1897).

³⁴ N.D.A.G. 2004-L-33.



declined to specify the rights of riparian landowners and the state:

The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise. Any precise delineation of parties' rights in this situation would be advisory.³⁵

The Court did, however, cite a Minnesota Supreme Court decision wherein that Court explained:

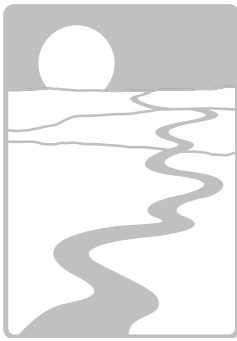
While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the right of the public to use the same for the purpose of navigation or other public purpose. The state may use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation. Restricted only by that paramount public right the riparian owner enjoys proprietary privileges, among which is the right to use the land for private purposes.³⁶

Thus, neither the state nor the riparian landowner has absolute title to the shore-zone, although the riparian landowner can use this land for private purposes as long as the use does not interfere with or adversely affect the public's use or interest in the zone.

³⁵ *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 544 (1994).

³⁶ *Id.* at 543-44 (quoting *State v. Korner*, 148 N.W. 617 (Minn. 1914)).





Plan Strategies and Recommendations

In managing, operating, and supervising North Dakota's sovereign land, the Office of the State Engineer is guided primarily by N.D.A.C. ch. 89-10-01. However, in order to achieve the state's sovereign land management goal contained in this plan and to address more contemporary issues that have evolved in recent years, several recommendations and action strategies were developed.

The Sovereign Land Management Plan recommendations and corresponding action strategies listed below were developed in consideration of comments from all of the state agencies involved in the sovereign land technical workgroup. Considerations were also made after receiving input from other local and regional entities, as well as the general public.

It should be noted that the following recommendations and action strategies are just that—recommendations. Actual changes or additions to state Century Code or Administrative Rules, as a result of this planning process, may differ from what is recommended. Any additions or modifications to state statutes and rules will be conducted through established legal protocol.


Sovereign Land Management Plan Recommendations and Action Strategies

Recommendation 1: The definition of "navigable streams or waters" in N.D.A.C. § 89-10-01-03 contains inconsistencies and should be updated to consider federal standards.

- Action Strategy 1.1: It is proposed that the definition of "navigable streams or waters" in N.D.A.C. § 89-10-01-03 be amended to consider federal standards and to read as follows:

"Navigable streams or waters" means any waters which were in fact navigable at time of statehood, including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.

Recommendation 2: Any authorization by the Office of the State Engineer for activities impacting sovereign land should be conditional and revocable if the action is in the best interest of the public trust.

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- Action Strategy 2.1: N.D.A.C. § 89-10-01-14 should be amended to include language specifying that all authorizations are conditional and revocable if new information or circumstances deem that the action is in the best interest of the public trust. The actions should not be restricted to incidence of grantee non-compliance with the original conditions of the authorization.

Recommendation 3: The Office of the State Engineer should consider the impacts of actions on sovereign land to cultural and historic resources before granting or modifying permits.

- Action Strategy 3.1: Though the State Historical Society is included in the list of agencies consulted for sovereign land permit application reviews under N.D.A.C § 89-10-01-06, cultural and historic resources are not included in the list of “general permit standards” in N.D.A.C. § 89-10-01-08. Therefore, N.D.A.C § 89-10-01-08 should be amended to include cultural and historic resources.

Recommendation 4: The state’s annually updated Section 303(d) list of water quality-limited waters should be an important consideration in the review of any sovereign land permit application. Section 303(d) of the federal Clean Water Act and its accompanying regulations (CFR Part 130 Section 7) require each state to list water bodies (i.e., lakes, reservoirs, rivers, streams, and wetlands) that are considered water quality-limited and require load allocations, waste load allocations, and Total Maximum Daily Loads (TMDLs). This list has become known as the “TMDL list” or “Section 303(d) list.”

- Action Strategy 4.1: Since the State Department of Health is included in the list of agencies consulted for sovereign land permit application reviews under N.D.A.C § 89-10-01-06, it is expected that the Office of the State Engineer would be made aware of the significance of any action on the state’s Section 303(d) listed waters. However, the Office of the State Engineer should keep a copy of the most recent Section 303(d) list for reference.

Recommendation 5: It is recommended that a subcommittee of the sovereign land workgroup continue to work on the development of more specific standards or guidelines for water mark delineations in North Dakota.

- Action Strategy 5.1: The Office of the State Engineer will retain an environmental services consulting firm, with expertise in hydrology, soils, and wetland vegetation to assist with the development of ordinary high water mark delineation guidelines for North Dakota. Technical input from the sovereign land planning workgroup agencies will also be sought to improve the effectiveness of the guidelines.

Recommendation 6: The Office of the State Engineer should play a more active role in regulating and supervising the use of motor vehicles on the state’s sovereign land. Under N.D.A.C. § 89-10-01-12, the public has the right to recreate on sovereign land so long as those activities are “nondestructive.” In addition, general permit standards under N.D.A.C § 89-10-01-08 require the Office of the State Engineer to consider impacts of actions on riparian landowners’ rights, recreation,



aesthetics, environment, erosion, fish and wildlife, water quality, and alternative uses.

- Action Strategy 6.1: N.D.A.C. § 89-10-01-13 should be amended as follows:


The use of motorized vehicles ~~other than boats~~ on land below the ordinary high watermark ~~is authorized in conjunction with the use of navigable waters for transportation or recreation, or as reasonably necessary for activities allowed pursuant to these rules~~ water bodies is prohibited, except:

1. When on government-established trails;
2. When on sovereign land areas adjacent to the Kimball Bottoms off-road riding area;
3. When on state-designated off-road use areas, provided the area is managed and supervised by a government entity, the government entity has developed a management plan for the off-road area that must be submitted to the State Engineer, and the managing government entity has obtained a sovereign land permit for off-road use in the designated area;
4. To cross a stream by use of a ford, bridge, culvert, or similar structure provided the crossing is in the most direct manner possible;
5. To launch or load a boat, canoe, or other watercraft in the most direct manner possible;
6. To access and operate on the frozen surfaces of any navigable water, provided the crossing of sovereign land is in the most direct manner possible;
7. To access private land that has no other reasonable access point, provided that access across sovereign land is in the most direct manner possible;
8. By disabled persons who possess a totally or permanently disabled person's fishing license or shoot from vehicle permit;
9. When operation is necessary as part of a permitted activity or project; and
10. By the riparian owner or the riparian owner's lessee in the shore zone adjacent to the riparian owner's property.

This section does not authorize use of property above the ordinary high watermark ~~but does authorize the use of trails established by a government agency, such as those established for snowmobiles, which are located below the ordinary high watermark~~ This section does not authorize use of property above the ordinary high watermark. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 7: For the Office of the State Engineer to fulfill its duty to manage, operate, and supervise activities on the state's sovereign land, a more visible presence – particularly regarding enforcement and general compliance checks will be required in the future.

- Action Strategy 7.1: The Office of the State Engineer will work to develop interim cooperative agreements with the Game and Fish Department and other law enforcement to address sovereign land-related disputes, violations, and enforcement.

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- Action Strategy 7.2: The Office of the State Engineer will request from the Governor and Legislative Assembly additional funding and FTEs to deal with the increasing workload associated with sovereign land delineations, navigability determinations, management, and enforcement.

Recommendation 8: The Office of the State Engineer should begin to make sovereign land delineations in areas that are under high development or use pressure, and that are currently in question as to their ownership.

- Action Strategy 8.1: The Office of the State Engineer, in cooperation with other state agencies and professional consultants, will begin to make ordinary high water mark and sovereign land delineations on an as needed basis (particularly in the Bismarck-Mandan area along the Missouri River and near the confluence of the Yellowstone and Missouri Rivers) to prevent private encroachment on sovereign land.
- Action Strategy 8.2: If large-scale delineations are made, the Office of the State Engineer may produce general maps of those areas to be used as educational tools for landowners, local governments, and developers.
- Action Strategy 8.3: Where practical, and particularly in high-use or conflict areas, the Office of the State Engineer may mark and maintain sovereign land boundaries.

Recommendation 9: An educational program should be developed and administered to inform the general public, government agencies and entities, and developers about new and existing sovereign land regulations, the consequences associated with violations, and the location of areas containing sovereign land.


- Action Strategy 9.1: The Office of the State Engineer will develop public announcements, magazine articles, informational brochures, maps, and other publications as sovereign land management-related educational tools. Regional seminars may also be conducted to improve awareness.

Recommendation 10: No established penalties currently exist to discourage illegal projects or use, or the placing of unpermitted objects on sovereign land. N.D.C.C. § 61-03-21.3 deals with the removal, modification, or destruction of dangers in, on the bed of, or adjacent to navigable lakes. Since the current language only applies to lakes, the State Engineer should pursue an amendment that would make N.D.C.C. § 61-03-21.3 applicable to all navigable waters.

- Action Strategy 10.1: A bill will be developed for the 60th Legislative Assembly to amend N.D.C.C. § 61-03-21.3 so it applies to all navigable waters, and any illegal projects or objects that occur on the state's sovereign land.

Recommendation 11: The Office of the State Engineer should play a more active role in the prevention and control of noxious weeds on sovereign land.

- Action Strategy 11.1: The Office of the State Engineer will work with the State Department of Agriculture, county weed boards, and other federal, state, and local entities to monitor, inventory, and control the spread of noxious weeds and invasive species on the state's sovereign land.

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- Action Strategy 11.2: The Office of the State Engineer will work to secure additional funding to monitor and control noxious weeds and invasive species infestations on sovereign land.

Recommendation 12: The number of people using sovereign land for summer recreation has increased dramatically in recent years. Along with increased use has come increased incidence of littering. In particular, broken glass containers that get mixed into the soil are becoming a serious health risk for recreators. Thus, in the interest of public health and safety, it is necessary for the Office of the State Engineer to put controls in place that specifically prohibit littering, the abandonment of property, and the possession of glass containers on sovereign land.

- Action Strategy 12.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits littering, the abandonment of property, and the possession of glass containers on sovereign land. Possession of glass containers inside of boats will not be subject to this rule. Proposed language might read:

The disposal of refuse, rubbish, bottles, cans, or other waste materials is prohibited except in garbage containers where provided. Abandonment of vehicles or other personal property is prohibited. Holding tanks of campers or boats may not be dumped on sovereign land. Glass containers are prohibited on sovereign land. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 13: Hunting, boating, fishing and trapping are all activities that have minimal long-term impacts and commonly occur on sovereign land throughout the state. However, language is required in the North Dakota Administrative Code to allow for the management and supervision of these activities on sovereign land, since none currently exists.

- Action Strategy 13.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses public access and use. Proposed language might read:

All sovereign land areas are open for public hunting, fishing, and trapping, except as provided in other rules and regulations or laws, or as posted at public entry points. Posting sovereign land with signage by anyone other than the State Engineer is prohibited without a sovereign land permit. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

- Action Strategy 13.2: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses watercraft. Proposed language might read:

Watercraft may not be left unattended on or moored to sovereign land for more than twenty-four hours except:

- 1. When moored to privately owned docks;*
- 2. When moored to private property above the ordinary high water mark with a rope, chain, or other type of restraint that does not cause unreasonable interference with navigation or the public's use of the shore zone; or*

3. *By riparian landowners in the shore zone.*

A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 14: Specific rules and regulations regarding the removal and destruction of natural resources occurring on the state's sovereign land are required to protect the integrity of these public areas for generations to come.

- Action Strategy 14.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits unpermitted activities that remove or destroy natural resources occurring on the state's sovereign land. Specific language might read:

Trees, shrubs, vines, plants, soil, gravel, fill, rocks, fossils, sod, water, firewood, posts, poles, or other public property may not be removed from sovereign land without a permit issued by the state engineer, except that firewood may be removed under certain stated conditions from designated firewood cutting plots, and the riparian landowner or their lessee may hay or graze land in the shore zone. Commercial cutting of firewood is prohibited on all sovereign land. Gathering of downed wood for campfires is permitted. Removal of property from sovereign land by permit shall only be in a manner, limit, and condition specified by the permit. Berries and fruit may be picked for non-commercial use, unless prohibited by posted notice. Property may not be destroyed or defaced. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

Recommendation 15: Specific rules and regulations regarding the removal and destruction of cultural resources occurring on the state's sovereign land are required to protect the integrity of these resources for generations to come.


- Action Strategy 15.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits the unpermitted removal or destruction of cultural resources occurring on the state's sovereign land. Specific language might read:

Artifacts, or any other cultural or historic resources occurring on sovereign land may not be destroyed or removed without formal written approval from the state historical society. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 16: Language is required in the North Dakota Administrative Code to allow for the management and supervision of camping on sovereign land, since none currently exists.

- Action Strategy 16.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses camping on the state's sovereign land. Specific language might read:

Camping for longer than ten consecutive days in the same vicinity or leaving a tent or camper unattended for more than twenty-four hours is prohibited



on any state sovereign land area. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

Recommendation 17: In the interest of public health and safety, the management and supervision of organized group activities on the state's sovereign land should be more closely managed in the future.

- Action Strategy 17.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses organized group activities. Specific language might read:

Organized group activities that are publicly advertised or are attended by more than twenty-five persons are prohibited without a permit issued by the Office of the State Engineer. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

Recommendation 18: Since there are thousands of river and stream miles and hundreds of lakes throughout the state that have no prior navigability determinations, the Office of the State Engineer should consider means of determining navigability where appropriate in the interest of the public trust.

- Action Strategy 18.1: The Office of the State Engineer will develop standards for making navigability determinations, using the federal standard under the Equal Footing Doctrine as a foundation.

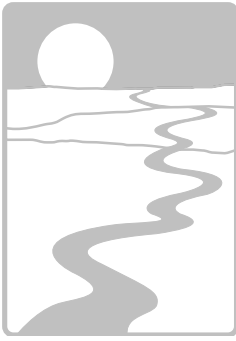
(Also see Action Strategy 7.2)

Recommendation 19: The State Engineer will take a more active role in managing the presence of pets at large on higher-use sovereign land areas, particularly in the Bismarck-Mandan corridor of the Missouri River. In the future, additional sovereign land areas may be considered for restrictions on an as needed basis.

- Action Strategy 19.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits pets at large in a six-mile corridor of the Missouri River near the Bismarck-Mandan area. Specific language might read:

Pets may not be permitted to run unattended on sovereign land in and around the Missouri River between the railroad bridge near the south border of Fort Lincoln state park (approximately river mile marker 1,310) and the Interstate 94 bridge (approximately river mile marker 1,315.4). Pets in this corridor of the Missouri River must be leashed by a restraint of no more than ten feet. A pet's solid waste must be disposed of properly. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)



Plan Evaluation



An important outcome of this first-ever North Dakota Sovereign Land Management Plan was to develop a product that could serve as a foundation for future planning efforts. As such, this plan is not the final result of a planning process - rather, it is more appropriately viewed as the first step. After two years, the Office of the State Engineer, along with the sovereign land planning workgroup, will review the performance of the overall plan, the recommendations, and action strategies, and begin the process of incorporating modifications as necessary to improve the document for future users.



Addendum

Since the completion of the Final Draft North Dakota Sovereign Land Management Plan in January 2007, several advancements have occurred as a result of various recommendations included in the Plan. Some of the advancements that will be reported in this addendum required the passage of Senate Bill 2096 (SB 2096) during the 60th Legislative Assembly. On April 26, 2007, SB 2096 was signed by Governor, John Hoeven, and a day later, it was signed by Secretary of State, Al Jaeger. It will become effective August 1, 2007.

SB 2096 had four purposes: 1) to provide the Game and Fish Department with the authority to enforce sovereign land-related rules and regulations on the state's sovereign lands; 2) to allow the State Engineer to enter into agreements with the North Dakota Game and Fish Department or other law enforcement entities to enforce sovereign land-related rules and regulations; 3) to provide the State Engineer with the authority to manage the removal, modification, or destruction of dangers in the state's navigable waters that have been determined to be navigable by a court of law; and 4) to provide a penalty for violations of sovereign land-related rules and regulations.

As of May 2007, the following progress had been made on Plan recommendations:

- Recommendation 5 and Action Strategy 5.1 were completed in January 2007. The Office of the State Engineer contracted with an environmental services consulting firm to develop Ordinary High Water Mark Delineation Guidelines for North Dakota. The guidelines are available on the State Engineer and Water Commission's website at www.swc.nd.gov under "Reports and Publications."
- Progress toward the completion of Recommendation 7 and Action Strategy 7.1 occurred with the passage of SB 2096. When SB 2096 becomes effective August 1, 2007, cooperative agreements will be signed with the Game and Fish Department to provide law enforcement on the state's sovereign lands.
- Implementation of Recommendation 8 and Action Strategies 8.1, 8.2, and 8.3 are well underway. In April 2007, the Office of the State Engineer requested proposals for the completion of ordinary high water mark delineations near the confluence of the Missouri and Yellowstone Rivers, and along the Missouri River north of Bismarck.
- Recommendation 10 and Action Strategy 10.1 were completed with the passage of SB 2096. On August 1, 2007, the State Engineer will have the authority to manage the removal, modification, or destruction of dangers in all of the state's navigable waters.

As the Plan continues to be implemented in the future, progress will be tracked, and updated information will be provided on the State Engineer and Water Commission's website at ww.swc.nd.gov, under "Special Projects."