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THE EIGHTH CIRCUIT DECLARES NEW LAW FOR OWNERS OF LAND ENCUMBERED BY FWS EASEMENTS: DRAIN THOSE AFTER-EXPANDED WETLANDS, BUT ASK NICELY FIRST

United States v. Johansen[1]

by Laura Krasser

I. INTRODUCTION

Since the early twentieth century the United States Government has committed itself to the protection of migratory birds.[2] Toward that end, the United States Fish and Wildlife Service has been charged with the procurement and administration of wetlands easements over migratory bird production areas, many purchased from private landowners.[3] Uncertainty about the scope of easement restrictions has posed a problem both for landowners and the courts who have interpreted the easements.

In 1983, the United States Supreme Court made its interpretation of the scope of wetlands easements in dicta found in *North Dakota v. United States*.[4] The opinion left unclear several important issues that were later interpreted by the Eighth Circuit in *United States v. Vesterso*[5] and *United States v. Johansen*.[6] In the former case the Court followed the implications of the dicta from *North Dakota*, which indicated that the restrictions of wetlands easements apply only to wetlands areas and not to the entire parcel of land.[7] In the latter case, the Eighth Circuit reinterpreted its decision in *Vesterso* and held that the easement restrictions apply only to land specifically delineated in the easement summaries.[8]

II. FACTS AND HOLDING

In the 1960s, the United States Fish and Wildlife Service (FWS) purchased easements on tracts of land in Steele County, North Dakota, as waterfowl production areas.[9] The easements covered tracts of land encompassing wetlands areas and granted the United States "an easement or right of use for the maintenance of the land described below as a waterfowl production area in perpetuity . . . ."[10] The easement agreements prohibited the draining of wetlands areas on the encumbered tracts.[11] Three such easements were purchased from the predecessors of the appellants farmers in North Dakota.[12]

The standard conveyance instruments used by FWS in the three transactions legally described the whole parcel of each tract burdened by an easement.[13] In addition to the easement conveyances, FWS prepared an Easement Summary for each easement, containing information about the tract, the tract acreage, and the wetlands acreage.[14] These Summaries indicated that FWS had purchased thirty-three acres of wetlands in two tracts and thirty-five wetlands acres in the third.[15] Although the conveyance instrument itself was properly filed, the Easement Summaries were not recorded.[16]

After two consecutive rainy seasons, the appellants were unable to engage in normal farming practices due to the surface and subsurface water on their land.[17] In January of 1995, appellants contacted FWS to determine the extent of the wetlands easements, so that he could drain water from portions of the land unencumbered by the easements.[18] In response, FWS informed Appellant that only safety or health concerns would warrant the draining of any portion of the tracts.[19] Despite this warning, appellants proceeded to dig ditches to control the water.[20] They were subsequently

[1] 93 F.3d 459 (8th Cir.1996).
[2] *See infra* notes 28-53 and accompanying text.
[3] *See* 16 U.S.C. section 668dd(a)(1) (1994).
[4] 460 U.S. 300 (1983).
[5] 828 F.2d 1234 (8th Cir. 1987).
[6] 93 F.3d 459 (8th Cir. 1996).
[7] *North Dakota*, 460 U.S. at 311 n.14.
[8] *Johansen*, 93 F.3d at 468.
[9] *Id.* at 461.
[10] *Id.*
[11] *Id.* at 461-462. According to the Court, the conditions imposed by the easement were as follows: "The parties of the first part . . . agree to cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any water including lakes, ponds, marshes, sloughs, swales, swamps, or potholes, now existing or reoccurring due to natural causes on the above-described tract, by ditching or any other means. . . . "
[12] *Id.* at 461.
[13] *Id.*
[14] *Id.* at 462.
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.*
[19] *Id.*
[20] *Id.*

charged with draining wetlands covered by FWS easements in violation of the National Wildlife Refuge System.[21]

In the United States District Court for North Dakota, the appellants sought to prove that the federal wetland easements on their land covered only the acres delineated in the Easement Summaries, a total of 105 acres.[22] Additionally, they sought to introduce evidence that even after the drainage, the tracts contained wetland acreage in excess of the 105 designated in the summaries.[23] Through a motion in limine, the United States moved to exclude the proffered evidence.[24] The United States Attorney argued that prior decisions of the Eighth Circuit Court of Appeals had rejected any argument claiming limitation of the wetland easements.[25] The District Court granted the motion and the appellants subsequently entered conditional pleas of guilty pending the outcome of their appeal.[26]

The United States Court of Appeals for the Eighth Circuit reversed, clarifying its previous easement interpretations and holding that the federal wetland easements are limited to the acreage provided in the Easement Summaries and that a defendant must be permitted to introduce evidence proving that he or she did not drain the acreage included in the Summaries.[27]

III. LEGAL BACKGROUND

For more than eighty years federal statutes and treaties have sought to protect many species of migratory birds.[28] The first treaty was proclaimed by President Woodrow Wilson in 1916, and its aim was to protect migratory birds who traveled through both the United States and Canada.[29] The United States has also signed similar treaties with other nations.[30]

Congress passed the Migratory Bird Treaty Act in 1918 to prevent killing, possession, and trade in migratory birds except as permitted by regulations made by the Secretary of Agriculture.[31] The treaty was challenged in the famous case of *Missouri v. Holland*,[32] where the state argued that the Act violated the Tenth Amendment by interfering with Missouri's sovereign ownership of migratory birds within the state.[33] The United States Supreme Court upheld the treaty and the statute and cited the important national concern for the continued existence of migratory birds as cause for national action.[34]

In 1926, Congress passed the Migratory Bird Conservation Act as a companion to the Treaty Act to enable the United States to meet its treaty obligations with Great Britain.[35] It allowed the United States, through the Secretary of the Interior, to acquire areas used as habitats by migratory birds for their protection.[36] These areas were to be held inviolate as bird sanctuaries.[37] Although the Act granted the Secretary the authority to acquire the lands, that acquisition was contingent upon the consent of the state legislature of the state in which the land was located.[38]

Congress provided the funds needed to acquire the migratory bird sanctuaries by enacting the Migratory

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[21] 16 U.S.C. section 668dd (1994).

[22] *Johansen*, 93 F.3d at 462.

[23] *Id.*

[24] *Id.*

[25] *Id.*, (citing Vesterso, 828 F.2d 1234 (8th Cir. 1987)) (stating that it is sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements).

[26] *Id.*

[27] *Id.* at 468.

[28] North Dakota, 650 F.2d at 913, *aff'd*, 460 U.S. 300 (1983); DAVID SALVESEN, WETLANDS: MITIGATING AND REGULATING DEVELOPMENT IMPACTS, 1-2 (2d ed., 1990); U.S. Department of the Interior, The Impact of Federal Programs on Wetlands, Vol. II, A Report to Congress by the Secretary of the Interior, Washington, DC, 35 (March, 1994); Murray G. Sagsveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659, 662 (1984); Robert E. Beck, *Movement in the United States to Restoration and Creation of Wetlands*, 34 NATURAL RESOURCES J. 781, 783-787 (1994).

[29] *See* Convention for Protection of Migratory Birds, Aug. 16, 1916, U.S.-Gr. Brit., 39 Stat. 1702.

[30] *See* Convention for the Protection of Migratory Birds and Game Mammals, United States-Mexico, Feb. 7, 1936, 50 Stat. 1311; Convention for the Protection of Migratory Birds, United States-Japan, March 4, 1972, 25 U.S.T. 3329.

[31] Codified at 16 U.S.C. Section 703-711 (1994).

[32] 252 U.S. 416 (1920).

[33] *Id.* at 432.

[34] *Id.* at 434. The Court stated: "Here a national interest of very nearly the first magnitude is involved. It can be protected only by national action in concert with that of another power. The subject matter is only transitorily within the State and has no permanent habitat therein. But for the treaty and the statute there soon might be no birds for any powers to deal with. We see nothing in the Constitution that compels the Government to sit by while a food supply is cut off and the protectors of our forests and our crops are destroyed. It is not sufficient to rely upon the States. The reliance is vain, and were it otherwise, the question is whether the United States is forbidden to act. We are of opinion that the treaty and statute must be upheld." Id. at 435.

[35] 16 U.S.C. Section 715 et seq. (1994).

[36] *See* 16 U.S.C. section 715 (d) (1994).

[37] *Id.*

[38] *See* 16 U.S.C. section 715 (f) (1994). The section provides: "No deed or instrument of conveyance in fee shall be accepted by the Secretary of the Interior under this subchapter unless the State in which the area lies shall have consented by law to the acquisition by the United States of lands in that State."

Bird Hunting and Conservation Stamp Act,[39] commonly referred to as the "Duck Stamp Act".[40] The Duck Stamp Act requires hunters of migratory birds to purchase a hunting stamp, the revenues from which are deposited in the Migratory Bird Conservation Fund.[41] The money is then used to purchase the sanctuary areas.[42]

After the passage of the Duck Stamp Act in 1934, land acquisition lagged, causing the conservation strategy of the Secretary of the Interior to move away from the sanctuary notion toward preserving wetlands existing on privately-owned land.[43] The Duck Stamp Act was amended in 1958 to allow the Secretary to acquire so-called "water-fowl production areas," which are defined by the statute as "small, wetland and pothole areas."[44] These waterfowl production areas are designated as part of the National Wildlife Refuge System and are administered by the United States Fish and Wildlife Service.[45]

Before FWS may purchase land for these purposes, it must conform to the consent requirements of Section 3 of the Wetlands Act of 1961.[46] The Act provides that no land suitable for waterfowl habitats can be acquired with money from the fund established for such acquisitions unless the acquisition "has been approved" by the Governor or an appropriate agency of the State in which the land is located.[47] The acquisition of "interests therein, and rights-of-way to provide access thereto" was conditioned by the amendments on the consent of the governor of the state in which the areas existed,[48] rather than by the state legislature as the Migratory Bird Conservation Act had required.[49]

Wetlands serve as nurseries for many waterfowl.[50] The major areas of waterfowl breeding and nesting in the United States are found in North and South Dakota, Montana, and Minnesota.[51] Consequently, acquiring lands for waterfowl breeding in the Great Plains, especially North Dakota, has been an important priority for the United States government.[52] Since 1961, the governors of the state of North Dakota have consented to the United States acquiring easements over 1.5 million acres of wetlands in the state.[53]

In the 1970s, the atmosphere of cooperation between the state and federal governments began to deteriorate with regard to the waterfowl production areas.[54] This deterioration stemmed possibly in part from FWS activities relating to drainage of Hurricane Lake,[55] from North Dakota's accusations that the United States misled landowners and reneged on some unrelated flood-control agreements,[56] and also possibly from the decision of the Eighth Circuit in *United States v. Albrecht*.[57]

The issue in *Albrecht* was whether or not the type of easement conveyed to the government was permitted under

[39]16 U.S.C. section 718 *et seq.* (1994).

[40]*See North Dakota*, 460 U.S. at 302 (1983); *Albrecht*, 496 F.2d at 910.

[41]16 U.S.C. section 718 (d) (1994).

[42]*Id.* The statute provides in part: "All moneys received for such stamps shall be paid into the Treasury of the United States, and shall be reserved and set aside as a special fund to be known as the migratory bird conservation fund, to be administered by the Secretary of the Interior. (b) [T]he remainder shall be available for the location, ascertainment, and acquisition of suitable areas for migratory bird refuges under the provisions of the Migratory Bird Conservation Act and for the administrative costs incurred in the acquisition of such areas."

[43]*See Johansen*, 93 F.3d at 461; Robert E. Beck, *Movement in the United States to Restoration and Creation of Wetlands*, 34 NATURAL RESOURCES J. 781, 783-84 (1994).

[44]16 U.S.C. section 718d(c) (1994).

[45]16 U.S.C. section 668dd(a)(1) (1994).

[46]16 U.S.C. section 715k-5 (1994).

[47]*Id.*

[48]*Id.*

[49]16 U.S.C. section 715f (1994). *See also supra* note 34 and accompanying text.

[50]*See* MARK S. DENNISON AND JAMES F. BERRY, WETLANDS: GUIDE TO SCIENCE, LAW, AND TECHNOLOGY 57 (1st ed. 1993). *See generally*, U.S. Department of the Interior, *The Impact of Federal Programs on Wetlands, Vol. I, A Report to Congress by the Secretary of the Interior, Washington, DC*, (March 1994).

[51]*See generally* U.S. Department of the Interior, *The Impact of Federal Programs on Wetlands, Vol. I, A Report to Congress by the Secretary of the Interior, Washington, DC*, (March 1994); Harold A. Kantrud & Robert E. Stewart, *Use of Natural Basin Wetlands by Breeding Waterfowl in North Dakota*, 41 J. WILDLIFE MANAGEMENT 243 (1977); *Prairie Potholes: Draining the Duck Hatchery*, NATIONAL WILDLIFE 6 (Oct-Nov. 1981).

[52]H.R. REP. NO. 95-1518, 95th Congress, 5 (1978); S. Rep. No. 594, 94th Congress, 2d Session, 3; Murray A. Sagsveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659, 662 (1984).

[53]*North Dakota*, 460 U.S. at 304-305.

[54]*Id.* at 309; *Johansen*, 93 F.3d at 464.

[55]*See* Murray G. Sagsveen, *Waterfowl Production Areas: A State Perspective*, 60 N.D. L. REV. 659, 669-671 (1984). There is evidence that the 1977 legislation may have been in response to activities of FWS regarding Hurricane Lake, a shallow lake crossing two counties in the state. The State Engineer approved a plan to establish a drainage outlet for the lake and FWS, in an effort to frustrate the project, proceeded to purchase as many easements as possible on land through which the drainage channel would flow. This caused much delay and controversy.

[56]*North Dakota*, 460 U.S. at 306.

[57]496 F.2d 906 (8th Cir. 1974).

North Dakota statutory law.[58] At the time of the conveyance of the easement covering the Albrechts' land, the Albrechts themselves did not own the land, but were lessees.[59] The United States Department of the Interior purchased the easement from the lessors in 1964, who, in accordance with the terms of the easement, agreed to maintain the wetlands areas as a waterfowl production area and to refrain from draining any surface water.[60] The Albrechts purchased the land with prior knowledge of the easement conveyance in 1967.[61] In 1969 and 1970, the Fish and Wildlife Service (FWS) discovered that the Albrechts had dug a ditch five feet deep, and 25-30 feet long across their property for the purpose of draining surface water.[62] Subsequently, the Albrechts were charged with violating the terms of the easement.[63]

While recognizing that the laws of real property are usually the domain of the particular state, the Eighth Circuit Court of Appeals found that the property right conveyed to the Government by the Albrechts' predecessors served an important national concern, and that any North Dakota law prohibiting this type of conveyance would be "aberrant" or "hostile."[64] The Court concluded that the easement was "a valid conveyance under federal law and vested in the United States the rights as stated therein."[65] In response to appellants' contention that the United States acted beyond its authority in acquiring an easement over the whole of a one-quarter section of land, when potholes only covered approximately 35 acres, the Court concluded that it was within the power of the Secretary of the Interior to acquire this easement.[66] After holding the easement to be valid, the court affirmed the District Court's order requiring the Albrechts to restore the land to its previous state.[67]

Three years after *Albrecht*, in 1977, the North Dakota legislature passed a series of laws specifically designed to curtail any further federal acquisition of wetlands easements.[68] One statute required the Governor to submit for approval proposed wetlands acquisitions to a board of county commissioners for the county in which the land was to be acquired.[69] The statute further required FWS to furnish a comprehensive impact analysis to the same board.[70] Under another statute, the landowner was allowed to negotiate the terms and limitations of the easement and even to drain water areas in excess of those specified in the conveyance.[71] Another statute restricted easements to a maximum duration of 99 years.[72]

In 1979, the United States sought to have the North Dakota statutes declared null and void by bringing suit in the U.S. District Court for the District of North Dakota.[73] The U.S. argued that the North Dakota laws were hostile to federal law and should be declared invalid.[74] Additionally, the U.S. contended that any easement acquired in violation of the 1977 laws should be considered valid,[75] and that the legislative-consent provision of the Conservation Act did not apply to

[58]*Id.* at 912. The Albrechts' major argument was that the types of easements conveyed to FWS were not specifically allowed under N.D.Cent.Code Sections 47-05-01 and 47-05-02 (1960) which both provided lists of various easements or servitudes which could be attached to land but did not specifically list the waterfowl production easements.

[59]*Albrecht*, 496 F.2d at 907.

[60]*Id.*

[61]*Id.* at 908.

[62]*Id.* at 909.

[63]*Id.* at 907.

[64]*Id.* at 911.

[65]*Id.*

[66]*Id.*

[67]*Id.* at 911-912.

[68]1977 N.D. Laws, chapters 204 and 426.

[69]N.D.Cent.Code Section 20.1-02-18.1 (1977) provides in part: "Federal wildlife area acquisitions—Submission to county commissioners, opportunity for public comment, and impact analysis required. The governor, the game and fish commissioner, or their designees, responsible under federal law for final approval of land, wetland and water acquisitions by the United States department of the interior . . . shall submit the proposed acquisitions to the board of county commissioners of the county . . . in which the land, wetland, and water areas are located for the board's recommendation. 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. . . ."

[70]N.D. Cent. Code Section 20.1-02-18.1 (1977) provides in part: "A detailed impact analysis from the federal agency involved shall be included with the acquisition proposal for board of county commissioner consideration in making recommendations."

[71]N.D.Cent.Code Section 20.1-02-18.2 (1977) provides in part: "Negotiation of leases, easements, and servitudes for wildlife production purposes. . . . A landowner may: . . . 2. Restrict a lease, easement, or servitude by legal description to the land, wetland, or water areas being sought, and may drain any after-expanded wetland or water area in excess of the legal description in the lease easement or servitude."

[72]N.D. Cent. Code Sec. 47-05-02.1 (1978) provides in part: "2. The duration of the easement, servitude, or nonappurtenant restriction on the use of real property shall be specifically set out, and in no case shall the duration of any interest in real property regulated by this section exceed ninety-nine years."

[73]*North Dakota*, No. A1-79-62, 1980 WL 6207 (D.N.D. 1980), *aff'd*, 650 F.2d. 911 (8th Cir. 1981), *aff'd* 460 U.S. 300 (1983).

[74]*Id.*

[75]*Id.*

easements acquired under the Duck Stamp Act.[76] North Dakota alleged that, although the state had consented to the acquisition of wetlands easements by the United States, it now could withdraw that consent and force the federal government to adhere to the 1977 laws.[77]

During the interim between the United States filing suit against the state of North Dakota and the United States Supreme Court's ultimate decision in the matter, the Eighth Circuit Court of Appeals decided three cases involving similar factual situations.[78] These decisions were consistent with the interpretation which the Eighth Circuit had applied to wetlands easements in *Albrecht*.[79]

One year after the passage of the 1977 legislation, the Eighth Circuit issued its opinion in *Werner v. United States Department of Interior, FWS, Bureau of Sport Fisheries and Wildlife*, a dispute involving landowners who sought an injunction against enforcement of FWS easements, rescission of wetland easement agreements due to misrepresentations made by FWS employees, and damages.[80] It was undisputed that the FWS employees lied to the landowners by indicating that they would still be able to ditch and drain their land despite the language of the easement agreements.[81] Eventually FWS began a program of renegotiating the easements that had been procured under the false representations and Werner and the other plaintiffs had refused the FWS offer to renegotiate.[82]

The Court denied the relief sought, and emphasized that the landowners had taken a risk when they signed the easement agreements containing language clearly contrary to the oral representations which had been made.[83] The Court cited its decision in *Albrecht*[84] for the proposition that draining surface water from wetlands areas encumbered by Waterfowl Production Area easements was a clear violation of the terms of the easements and merited injunctive relief.[85]

While the United States' suit against North Dakota was pending in District Court, the Eighth Circuit decided *United States v. Seest*.[86] Charles Seest, a farmer in Minnesota, appealed his conviction for violating the terms of a FWS easement acquired over a quarter section of Seest's land for use as a waterfowl production area.[87] As in *Albrecht*[88] and *Werner*,[89] the easement conveyance signed by Mr. Seest expressly prohibited ditching of the land covered by the easement for drainage purposes.[90] Mr. Seest, in spite of the easement, commenced construction on the easement land to collect water for irrigation of his farm and was subsequently charged with violation.[91] On appeal to the Eighth Circuit, Seest claimed, *inter alia*, that the Government had not established a violation of law.[92] The Court stated, "We think it is clear that the ditching and trenching . . . altered the flow of natural waters, both surface and subsurface, and constituted a clear violation of the easement."[93]

In 1982, Peter Welte appealed to the United States District Court for the District of North Dakota in *United States v. Welte*.[94] Welte had been found guilty by a magistrate of placing drain tiles in a ditch on property encumbered by a FWS easement.[95] The tract subject to the easement was designated in the conveyance as a "waterfowl production area" and draining of any surface water by ditching or other methods was prohibited.[96] On appeal Welte contended, among other things, that private land encumbered by an easement for waterfowl production did not fall under the National Wildlife Refuge System[97] (NWRS), or, in the alternative, that the United States had failed to prove that the area drained by Welte was part

[76] 16 U.S.C. 715k-5 (1994).
[77] *North Dakota*, No. A1-79-62, 1980 WL 6207 (D.N.D. 1980).
[78] *Werner*, 581 F.2d 168 (8th Cir. 1978); *Seest*, 631 F.2d 107 (8th Cir. 1980); *Welte*, 635 F. Supp. 388 (D.N.D. 1992), *aff'd* 696 F.2d 999 (8th Cir. 1982).
[79] *Albrecht*, 496 F.2d 906 (8th Cir. 1974) (holding that the terms of a FWS easement are violated when the land has been ditched, water has been drained from the property, and the land is significantly less useful as a waterfowl production area).
[80] *Werner*, 581 F.2d at 169.
[81] *Id.*
[82] *Id.* at 170.
[83] *Id.* at 172.
[84] 496 F.2d 906 (8th Cir. 1974).
[85] *Werner*, 581 F.2d at 170 n.3.
[86] 631 F.2d 107 (8th Cir. 1980).
[87] *Seest*, 631 F.2d at 108-109.
[88] 496 F.2d 906 (8th Cir. 1974).
[89] 581 F.2d 168 (8th Cir. 1978).
[90] *Seest*, 631 F.2d at 108.
[91] *Id.* It was unclear from the opinion whether Seest drained wetlands existing at the time of the easement conveyance or after-expanded wetlands.
[92] *Id.* at 109.
[93] *Id.*
[94] 635 F. Supp. 388 (D.N.D. 1982), *aff'd*, 696 F.2d 999 (8th Cir. 1982).
[95] *Id.* at 388.
[96] *Id.* at 389.
[97] 16 U.S.C. section 668dd (1994). *See also* 50 C.F.R. Section 25.12 (1995), which provides in part: "'National Wildlife Refuge

of the NWRS.[98] Welte's arguments were based on an Easement Summary prepared by FWS concerning the encumbered tract.[99]

According to the Summary, the tract in question included twenty-two acres of wetlands.[100] Welte argued that FWS should have to identify in particular the twenty-two acres in order to prove that he had actually drained any restricted area.[101] The District Court rejected this claim out of hand by concluding that the government had obtained an easement over all of the acres in the tract, relying on *Albrecht* for the proposition that FWS acted within its power.[102] This holding was subsequently affirmed by the Eighth Circuit.[103]

Meanwhile, the District Court in *United States v. North Dakota* held that the 1977 North Dakota statutes were invalid to the extent they conflicted with federal law, and that the governor was not required to give his or her consent prior to the acquisition of waterfowl production areas.[104] The Eighth Circuit affirmed and North Dakota appealed.[105] The United States Supreme Court granted certiorari in 1982 and decided the case in 1983.[106]

The Supreme Court found that the United States may acquire wetlands without gubernatorial consent if there is no contrary federal law.[107] The contrary federal law in the case was The Migratory Bird Conservation Act, which requires gubernatorial consent whenever waterfowl production areas are purchased with Duck Stamp money.[108] The Court concluded that the issue before it was whether North Dakota could revoke its consent to easement acquisition and whether the state could impose conditions and restrictions on the power of the United States to acquire the easements.[109]

The Court looked first to the language of The Migratory Bird Conservation Act and determined that the statute clearly requires gubernatorial approval,[110] and that nothing in the Act gives the state the power to withdraw its previously given consent.[111] The Justices were unwilling to presume that Congress would allow revocation of consent after it had expressed such a firm belief that more wetlands need to be preserved.[112]

Turning to the 1977 legislation, the Court looked at each statute individually to see if any could be deemed hostile to federal law.[113] The Court found that two of the statutes were indeed hostile to federal law, but found it unnecessary to reach a decision on N.D.Cent.Code, Section 20.1-02-18.1, because it had no application to the purchase of easements previously consented to by the state.[114] The Government did not challenge the portion of N.D.Cent.Code Section 20.1-02-18.2 which permits a landowner to negotiate the restrictions and scope of the easement.[115] It did, however, challenge that portion of the statute which permits a landowner to "drain any after-expanded wetland . . . in excess of the legal description in the easement."[116]

System' means all lands, waters, and interests therein administered by the U. S. Fish and Wildlife Service as wildlife refuges, wildlife ranges, wildlife management areas, waterfowl production areas, and other areas for the protection and conservation of fish and wildlife including those that are threatened with extinction. 'Waterfowl production area' means any wetland or pothole area acquired pursuant to section 4(c) of the amended Migratory Bird Hunting Stamp Act (72 Stat. 487; 16 U.S.C. 718d(c)), owned or controlled by the United States and administered by the U.S. Fish and Wildlife Service as a part of the National Wildlife Refuge System."

[98]*Welte*, 635 F. Supp. at 389.

[99]*Id.*

[100]*Id.*

[101]*Id.* at 389-390.

[102]*Id.* (citing *Albrecht*, 496 F.2d at 911).

[103]*Welte*, 696 F.2d 999.

[104]*North Dakota*, No. A1-79-62, 1980 WL 6207 (D.N.D. 1980).

[105]*North Dakota*, 650 F.2d 911, 919 (8th Cir. 1981).

[106]*North Dakota*, 460 U.S. 300 (1983).

[107]*Id.* at 310.

[108]16 U.S.C. section 715k-5 (1994) provides: "No land shall be acquired with moneys from the migratory bird conservation fund unless the acquisition thereof has been approved by the Governor of the State or appropriate State agency."

[109]*North Dakota*, 460 U.S. at 311.

[110]*Id.*, 460 U.S. at 311 n.14 (citing16 U.S.C. section 715k-5).

[111]*Id.* Although the Court did not refer to the consent given by North Dakota in 1931 to the United States for the purchase of migratory bird reservations, the law is clearly contrary to the Court's assertion that there is no evidence that the State has the power to revoke its consent once given. Although the 1931 law refers to consent given prior to the Duck Stamp Act, when the legislature's consent was required, it may give insight as to whether the Governors of North Dakota thought that their consent was permanent. 1931 N.D.Laws chapter 207 provides in part: "Consent of the State of North Dakota is given to the acquisition by the United States by purchase, gift, devise, or lease of such areas of land . . . as the United States may deem necessary for the establishment of migratory bird reservations . . . reserving, however, to the State of North Dakota full and complete jurisdiction and authority over all such areas not incompatible with the administration, maintenance, protection, and control thereof by the United States . . . ." Additionally, it is difficult to believe that the State would consent to easements over 1.5 million acres of land knowing that even if circumstances changed, the State would be unable to restrict easement purchases.

[112]*North Dakota*, 460 U.S. at 315.

[113]*Id.* at 316.

[114]*Id.* at 317. For full text, *see supra* note 69.

[115]*Id.* For full text, *see supra* note 70.

[116]N.D.Cent.Code Section 20.1-02-18.2(2) (1977). For full text *see supra* note 71.

The Court found this provision to be hostile to federal interests because it would seriously undermine the Congressional scheme underlying the Migratory Bird Conservation Act and other programs of similar ilk, and because the standard easement agreement used by the federal government prohibits such draining.[117] The Court addressed the issue of wetland fluctuation briefly, stating only that as long as landowners in North Dakota were willing to agree to easements which encumber after-expanded wetlands, the agreements could not be nullified by state law.[118]

North Dakota statute N.D.Cent.Code Section 47-05-02.1 limits the terms of nonappurtenant easements to a maximum of 99 years.[119] The Supreme Court found that the consents made by North Dakota governors between 1961 and 1977 authorized permanent easements, and that landowners in the state had repeatedly agreed to permanent easements.[120] Thus, the Court concluded that this statute was also hostile to federal law.[121]

The Supreme Court rejected North Dakota's argument that the gubernatorial consents, if valid, had already been exceeded by easement acquisitions prior to the 1977 legislation.[122] The Court discussed the practice of FWS of including the entire parcel in the legal description of each easement agreement, rather than delineating the exact acres encumbered by wetlands easements, and determined that the restrictions apply only to wetlands areas and not to the entire parcel of land.[123] The Court conceded that if all of the acres from each encumbered parcel were to be counted against the gubernatorial consent amount of 1.5 million, the total number of acres encumbered by Government easements would total almost 4.8 million.[124] The Court stated that "[t]he fact that the easement agreements include legal descriptions of much larger parcels does not change the acreage of the wetlands over which easements have been acquired."[125] The Supreme Court's decision in *North Dakota v. United States* rejected the interpretation that the Eighth Circuit Court of Appeals had given the wetlands easements in the late 1970s and early 1980s.[126]

In *United States v. Vesterso*,[127] the Eighth Circuit was confronted with issues similar to those it addressed in *Albrecht*, *Werner*, and *Welte*. *Vesterso* was decided in 1987, four years after the United States Supreme Court's decision in *North Dakota v. United States*.[128] Three members of a county water resource board were convicted in federal District Court of violating the terms of wetlands easements and damaging federal property.[129] The board undertook two drainage projects on three parcels of land, all encumbered by FWS easements, after landowners complained of flooding.[130] The board applied to the North Dakota Water Commission for permission to complete the two projects, and although the Water Commission granted the board permission to proceed, the Commission expressly advised the board to comply with the terms of the FWS easements.[131] The board disregarded this advice, did not contact FWS, and proceeded to dig ditches on the encumbered parcels.[132]

The members of the water resource board contended that the United States had not properly identified the specific wetlands acres encumbered by easements, and thus had not proven that the defendants had damaged federal land.[133] The defendants sought to introduce evidence that in Towner County the governor had consented to a total of 27,000 acres for waterfowl

[117]*North Dakota*, 460 U.S. at 317 (1983) (citing from United States v. Little lake Misere Land Co., 412 U.S. 580, 597 (1973)). "The typical easement agreement contained a legal description of a parcel of land, and imposed restrictions on all wetland areas within the parcel 'now existing or subject to recurrence through natural or man-made causes,' including 'any enlargements of said wetland areas resulting from normal or abnormal increased water.' The easements prohibit the owner from draining, filling, leveling or burning the wetlands, but permit farming and other activities whenever the wetlands 'are dry of natural causes.'"

[118]*North Dakota*, 460 U.S. at 319.

[119]For full text *see supra* note 72.

[120]*North Dakota*, 460 U.S. at 320.

[121]*Id.*

[122]*Id.*, at 311 n.14.

[123]*Id.*

[124]*Id.*

[125]*Id.*

[126]*Johansen*, 93 F.3d 459, 464 (8th Cir. 1996) (citing *Albrecht*, 496 F.2d at 911-912) (holding that the terms of a FWS easement are violated when the land has been ditched, water has been drained from the property, and the land is significantly less useful as a waterfowl production area); *Werner*, 581 F.2d at 170 n.3 (affirmed grant of permanent injunction against landowner forbidding draining of land encumbered by easement); *Seest*, 631 F.2d at 109 (affirmed conviction of landowner for ditching and trenching, which constituted a clear violation of the easement); *Welte*, 635 F. Supp. at 389-90 (holding that circumstantial evidence that landowner drained land encumbered by FWS easement was sufficient to sustain a finding that landowner violated the terms of the easement).

[127]828 F.2d 1234 (8th Cir.1987).

[128]460 U.S. 300 (1983).

[129]*Vesterso*, 828 F.2d at 1238.

[130]*Id.* at 1237.

[131]*Id.*

[132]*Id.*

[133]*Id.* at 1238.

production areas and that the acreage encumbered totaled over 150,000 acres.[134] The trial court denied this offer of proof and the Eighth Circuit found the denial to be proper,[135] despite its conclusion that restrictions stated in the easement agreements apply only to areas which meet the definition of a wetland as described in the agreements.[136]

The Eighth Circuit emphasized that landowners were not without recourse if their land was flooded, and that the wisest course would have been for the water board members to contact FWS before draining any water.[137] The Court noted that there was no reason to believe that FWS would not have cooperated with the landowners.[138]

The Court went on to announce that the United States is not required to legally describe each wetland encumbered by restrictions or to determine whether the acreage acquired in a particular county exceeds the amount to which the governor consented.[139] The Court further stated that "it is sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements."[140]

United States v. Schoenborn presented a slight variation on the issues the Eighth Circuit had confronted in its previous decisions.[141] FWS purchased an easement from the father of the defendant in 1965.[142] The elder Schoenborn negotiated for a less comprehensive agreement with excepted wetlands areas delineated on a map subject to his approval.[143] The easement provided for the maintenance of the land as a waterfowl production area, and prohibited the draining of any surface water and the filling of any potholes or ditches.[144] The easement specifically exempted from the restrictions the areas indicated on an attached map.[145] However, contrary to FWS advice, the Schoenborns deposited their payment check, which constituted an endorsement of the map, without verifying the accuracy of the map.[146] The younger Schoenborn bought the property in 1972 with knowledge of the FWS easements, but without examining the easement documents, including the map.[147]

FWS suspected that the terms of the easement were being violated by the Schoenborns and in 1979 sent a representative to investigate.[148] The investigator later sent a detailed letter to the Schoenborns outlining the restoration that needed to be made to return the encumbered wetlands to their previous state, however the Schoenborns did not comply.[149] The District Court for the District of Minnesota granted an injunction against further violations in favor of the United States and Schoenborn appealed.[150] The District Judge stated that "[t]heir neglect was unjustifiable," referring to the Schoenborns' failure to verify the map before cashing the check.[151] The Eighth Circuit affirmed the restoration order in part, exempting two ditches that the District Court had ordered the Schoenborns to restore.[152] The Eighth Circuit found that the two ditches existed at the time of the original conveyance—they appeared in aerial photos taken in 1966—and that there was no evidence that any modifications had been made to them.[153]

Eight years later, the Eighth Circuit was again faced with interpreting the scope of a wetlands easement in *United States v. Johansen*.[154]

IV. THE INSTANT DECISION

In *United States v. Johansen*, the United States Court of Appeals for the Eighth Circuit clarified its previous easement interpretations and held that federal wetland easements are limited to the acreage provided in the Easement Summaries and that a defendant must be permitted to introduce evidence proving that he or she did not drain the acreage included in the Summaries.[155]

[134] *Id.* at 1242.
[135] *Id.*
[136] *Id.* The court stated that "[T]he restrictions mentioned in the easement agreements do not apply to portions of property, which, although included within the easements' legal description, do not meet the definition of a wetland as expressed in the easement agreements."
[137] *Id.* at 1245.
[138] *Id.*
[139] *Id.* at 1242.
[140] *Id.*
[141] *Schoenborn*, 860 F.2d 1448 (8th Cir. 1988).
[142] *Id.* at 1449.
[143] *Id.*
[144] *Id.* at 1449-50.
[145] *Id.* at 1450.
[146] *Id.*
[147] *Id.* at 1451.
[148] *Id.*
[149] *Id.*
[150] *Id.* at 1451 n.6.
[151] *Id.* at 1451.
[152] *Id.* at 1455.
[153] *Id.* at 1453-55.
[154] 93 F.3d 459 (8th Cir. 1996).
[155] *Id.* at 467-68.

The Court attributed much of the confusion over interpretation of FWS easements to the practice of FWS, prior to 1976, of including the entire parcel in easement agreements rather than delineating the particular wetlands acres encumbered.[156] Additionally, the Court cited the fluctuating nature of wetlands as cause for uncertainty about the easements.[157]

The Government's argument centered on the notion that ditching or draining of any water on a tract of land encumbered by an easement constituted a violation of the terms of the easement.[158] For support it relied on the decision of the Eighth Circuit in *Vesterso*, where the Court stated that "it is sufficient for the United States to prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements."[159] The Court rejected the Government's argument, although it acknowledged its reasonableness based on the Court's past interpretations of wetlands easements.[160] The Court stated that the quoted language had been taken out of its larger context, where it was better understood to mean that "the United States must prove beyond a reasonable doubt that identifiable, covered wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged and that the defendant knew that the parcel was subject to a federal easement."[161]

Additionally, the Court cited *Schoenborn* as evidence that the Court had altered it's pre-*North Dakota v. United States* interpretations.[162] The Court pointed out that its analysis in *Schoenborn* consisted of a discussion of which basins existed at the time of the original easement conveyance—clearly, in the Court's view, a departure from its previous reasoning that any draining on an encumbered tract constituted a violation.[163]

The Court relied heavily on *North Dakota v. United States* for the proposition that the wetlands covered by the easement were those delineated in the Easement Summaries.[164] The Eighth Circuit acknowledged, however, that the Supreme Court did not expressly limit the wetlands easements in this way.[165] The Court in *Johansen* asserted that its interpretation of *North Dakota* was in accord with the Supreme Court's, as it would avert the problems that the Government's interpretation would create.[166]

The Court found the specific problems that might be generated by the Government's contention to be closely related to the fluctuating nature of wetlands.[167] If the number of wetland acres encumbered were to fluctuate with each rainfall, the Court concluded, it would be nearly impossible for the U.S. Government to comply with the gubernatorial consent limitations.[168] The Court opined that the gubernatorial consents would lose their meaning if they had no correlation to the actual acreage encumbered by the easements.[169] Additionally, the Court reasoned, landowners would be held in violation if any action taken by them inhibited or foreclosed the collection of water in any area on the parcel.[170] The Court found that this would undermine the goals of the conservation program by discouraging cooperation with the federal government.[171]

The Court found the appellants' argument, that the easements applied only to the acres listed in the Easement Summaries, to be in accord with its post-*North Dakota* interpretations.[172] The Court heavily emphasized the partnership aspects of the wetland program and the fact that the appellants made a good faith effort to comply with the FWS easement on their land.[173] In addition, the opinion chastised the Government for paying only "lip service" to the cooperative goals of the program, and for ignoring the devastating economic consequences to

[156]*Id.* at 463.
[157]*Id.*
[158]*Id.*
[159]*Vesterso*, 828 F.2d at 1242.
[160]*Johansen*, 93 F.3d at 464.
[161]*Id.* at 467.
[162]*Schoenborn*, 860 F.2d 1448 (8th Cir. 1988).
[163]*Johansen* at 467-68 (citing *Schoenborn*, 860 F.2d 1448 (8th Cir. 1988)). *See also, Albrecht*, 496 F.2d at 911-912 (holding that the terms of a FWS easement are violated when the land has been ditched, water has been drained from the property, and the land is significantly less useful as a waterfowl production area); *Werner*, 581 F.2d at 170 n.3 (affirmed grant of permanent injunction against landowner forbidding draining of land encumbered by easement); *Seest*, 631 F.2d at 109 (affirmed conviction of landowner for ditching and trenching, which constituted a clear violation of the easement); *Welte*, 635 F. Supp. at 389-90 (holding that circumstantial evidence that landowner drained land encumbered by FWS easement was sufficient to sustain a finding that landowner violated the terms of the easement).
[164]*North Dakota*, 460 U.S. 300 (1983).
[165]*Johansen*, 93 F.3d at 465-66 (citing *North Dakota*, 460 U.S. at 311 n.14).
[166]*Id.*
[167]*Id.* at 466.
[168]*Id.*
[169]*Id.*
[170]*Id.*
[171]*Id.* at 468.
[172]*Id.* at 467-468.
[173]*Id.* at 468.

landowners.[174] The Court stated that it felt the conduct of the federal government in refusing to identify the scope of the easement and later prosecuting the landowner for violation of that scope to be contrary to the goals of the conservation program.[175]

V. COMMENT

Though inconsistent with *North Dakota v. United States*,[176] the Eighth Circuit's decision in *United States v. Johansen*[177] is correct. The uncertainty of the scope of easements due to their fluctuating nature was an important reason for finding the Government's argument untenable. Additionally, the practice of including only the actual wetlands acres against the gubernatorial consents while enforcing the easements against the entire tracts of land is not only unworkable, but it is contrary to the cooperative goals of the Fish and Wildlife Service.

Although the Eighth Circuit came to a correct and workable result in *Johansen*, the decision is not consistent with the United States Supreme Court's decision in *North Dakota v. United States*.[178] In *North Dakota*, the Court struck down the North Dakota statute which allowed landowners to drain after-expanded wetlands, calling it hostile to federal law.[179] The Court found the law to be inconsistent with federal law because the FWS easements expressly included after-expanded wetlands.[180] However, the Court rejected, in dicta, the notion that the easement restrictions apply to the entire parcel of land.[181] There are at least two propositions implicated by this dicta in *North Dakota*: (1) that the easement restrictions apply to only the wetlands described in the easement summaries, or; (2) that the easement restrictions apply to the wetlands described in the easement summaries *plus* any after-expanded wetlands. It hardly seems likely that the Court was implicitly adopting the former proposition, since if that were indeed its interpretation, the North Dakota statute would not have been inconsistent with federal law. The Court would be striking a law that permitted draining of after-expanded wetlands because they were restricted by the scope of the easements and, at the same time, implying that after-expanded wetlands are not restricted by the scope of the easements. Therefore, the latter proposition—that the easements restrict wetlands delineated in the summaries and any after-expanded wetlands—seems to be the most logical implication. The Eighth Circuit's decision in *United States v. Vesterso*[182] is completely consistent with this latter proposition.

In *Vesterso*, the Court specifically stated that the restrictions denoted in the easement conveyance instruments did not apply to land on the encumbered tract that did not meet "the definition of a wetland as expressed in the easement agreements."[183] The Court concluded that this clearly was consistent with the purpose of the gubernatorial consents, i.e., to limit the number of wetlands that could be encumbered by the Government, although it did not discuss how easement fluctuation would affect the consents. The Court held that the defendants could be found guilty of violating the terms of FWS easements if the Government could "prove beyond a reasonable doubt that identifiable wetlands were damaged and that those wetlands were within parcels subject to federal easements."[184] Clearly, the Court was rejecting its prior interpretations of wetlands easements and following the dicta of *North Dakota v. United States*.

The Eighth Circuit's re-interpretation of *Vesterso* in *United States v. Johansen* is not consistent with the dicta of *North Dakota*. The Court rejected the Government's argument in *Johansen* that the decision in *Vesterso* precluded the appellants from attempting to prove that they did not drain wetlands actually encumbered by the easement.[185] The Court stated that the language in *Vesterso* was better interpreted as meaning that the government must "prove beyond a reasonable doubt that identifiable, covered wetlands (as existing at the time of the easement's conveyance and described in the Easement Summary) were damaged . . . ."[186] This interpretation is clearly contrary to what was implicated by the dicta in *North Dakota*—if it were consistent with the dicta, the Supreme Court would not have stricken the statute because it would not have been hostile to federal law.

It is not surprising that the Eighth Circuit was forced to clarify its interpretation of FWS easements, since the United States Supreme Court left a great deal unresolved in *North Dakota v. United States*.[187] For instance, the Supreme Court barely touched on the issue of easement fluctuation due to after-expansion of wetlands. The Court struck down as hostile to federal law the North Dakota statute which allowed

[174] *Id.*
[175] *Id.*
[176] 460 U.S. 300 (1983).
[177] 93 F.3d 459 (8th Cir. 1996).
[178] 460 U.S. 300 (1983).
[179] *See supra* note 116 and accompanying text.
[180] *See supra* note 116 and accompanying text.
[181] *See supra* notes 122-126 and accompanying text.
[182] 828 F.2d 1234 (8th Cir. 1987).
[183] *See supra* text accompanying note 132.
[184] *See supra* text accompanying notes 133-136.
[185] *See supra* text accompanying notes 172.
[186] *See supra* text accompanying notes 161.
[187] 460 U.S. 300 (1983).

draining of these wetlands, but did not address how after-expansion would affect the amount of wetlands covered by the easements. The Court stated that no matter that FWS included the entire parcel in the conveyance instrument, the easements were acquired over a certain amount of acres and that amount should be counted toward the gubernatorial consents.[188] However, by prohibiting landowners from draining any after-expanded areas, the easement, for all practical purposes, would extend to these after-expanded wetlands, yet the after-expanded acreage would not necessarily be counted against the gubernatorial consents. This hardly seems to be within the spirit of the gubernatorial consents. After all, the consents are a limitation on the government's ability to purchase easements.[189] By including only the actual wetlands acres against the consents, FWS would be able to comply with the consents while enforcing the easements against many more millions of acres of expanded weylands.

The decision in *Johansen* resolves the issue of easement fluctuation that the United States Supreme Court failed to address in *North Dakota v. United States*. *Johansen* seems to provide that a landowner may drain after-expanded wetlands as long as the landowner is able to show that he/she did not drain wetlands covered by the easement.[190] This decision, however, must be read in the light of the Court's two other post-*North Dakota* easement interpretation decisions—*Vesterso*[191] and *Schoenborn*.[192] The major distinction between the Eighth Circuit's decisions in *Vesterso*, *Schoenborn*, and *Johansen* appears to be the conduct of the defendants and the proof protection they were afforded as a consequence of that conduct.

In *Johansen*, the defendants made a good faith effort to solicit the help of FWS prior to draining their land.[193] When this help was not forthcoming they drained the land so it could support their farm equipment and they could continue to earn a living.[194] The Eighth Circuit reversed the District Court's denial of proof and expressly stated that defendants must be allowed to show that they did not drain encumbered land.[195]

In *Vesterso*,[196] however, the defendants expressly disregarded the advice of the water commission and did not contact FWS or investigate in any way the scope of the wetlands easements encumbering the lands they drained.[197] At trial they sought to prove that the government had failed to show that the defendants had damaged federal land, since FWS had not specifically delineated which acres were encumbered.[198] The Eighth Circuit approved of the District Court's denial of this proffered evidence.[199]

In *Schoenborn*,the defendants claimed ignorance of the terms of a map that they approved. The District Court chastised the defendants for neglecting to check the accuracy of the easement map and for not restoring the drained areas to their previous state, as directed by FWS.[200]

The Eighth Circuit's decision in *United States v. Johansen* announces new law. The number of wetlands acres encumbered by an easement will be determined by the number of wetlands acres included in the easement summary.[201] Furthermore, it appears that in order to get the proof protection afforded the appellants, some cooperation on the part of the defendants must be present. The Court's several pointed references to the fact that the appellants made a good faith effort to determine which wetlands were covered by the easement prior to draining, and that they had no reason to believe that FWS would not cooperate with their request, indicate that the Court is looking beyond the prosecutorial power of FWS to the overall goals of the wildlife production area program. Certainly there is little to be gained from prosecuting landowners who are attempting to comply with the easements. In fact, FWS has emphasized the cooperative philosophy behind the purchasing of easements from private landowners.[202] If this is indeed the response and attitude which FWS wishes to foster, it would do well to act more as a partner and less as an inflexible bureaucracy.

Many individuals concerned with the state of the environment have been baffled by the hostility with which many private landowners view governmental regulation. The government, after all, is just trying to protect nature for future generations. That proposition is what makes the conduct of the Fish and

[188] *See supra* text accompanying notes 123-126.
[189] *Vesterso*, 828 F.2d at 1242.
[190] *See supra* text accompanying note 155.
[191] 828 F.2d 1234 (8th Cir. 1987).
[192] 860 F.2d 1448 (8th Cir. 1988).
[193] *See supra* text accompanying notes 18 and 164.
[194] *See supra* text accompanying notes 14-18.
[195] *See supra* note 171 and accompanying text.
[196] 828 F.2d 1234 (8th Cir. 1987).
[197] *See supra* text accompanying notes 125-126.
[198] *See supra* text accompanying notes 127-128.
[199] *See supra* text accompanying note 129-130.
[200] *Schoenborn*, 860 F.2d at 1450-51.
[201] *See supra* text accompanying notes 173, 176-179.
[202] North Dakota and U.S. Fish and Wildlife Service Agreements I (July 1993) provide in part that: "[a] cooperative and helpful relationship beween North Dakota, its farmers and political subdivisions, and the U.S. Fish and Wildlife Service" is fundamental to conservation success.

Wildlife Service in the *Johansen* case so troubling. Here a private landowner takes the initiative to contact FWS to prevent drainage of wetlands and is met with rigid and illogical policy enforcement. If the goal of FWS in purchasing wildlife production area easements is to preserve these areas in cooperation with private landowners, it should be more than willing to work with the landowners in ensuring preservation without detriment to the landowner's livelihood.

From an administrative standpoint, the failure of FWS to specifically delineate in the easement agreements the land encumbered by the easement is without justification. Why would any landowner, especially someone who derives his/her livelihood from the land, consent to basically forfeiting his/her rights to the land if severe flooding occurs? That seems to be the position of FWS in *Johansen*—that once there is after-expansion, the farmer is simply without recourse unless health and safety are at issue. Who benefits from such a policy? FWS will develop a reputation for being inflexible and uncooperative, fewer private landowners will be willing to risk losing the use of their land, and the ultimate purpose of the program will be subverted.

If the goals of the Migratory Bird Treaty Act and other legislation are to protect natural resources and certain species from harm, then a cooperative relationship with private landowners would appear to be a top priority for the government. There seems to be little justification for behavior on the part of governmental agencies which only serves to heighten feelings of animosity. Just because the government or its subdivisions are authorized to pursue certain courses of action does not always translate into action which is productive or in keeping with the ultimate goals of the agency/governmental body.

VI. CONCLUSION

The decision in *Johansen* will be extremely important in the next few years because of the volume of flooding occurring in North Dakota right now. Farmers throughout the prairies will be dealing with flooding greater than any they have seen this decade, and the flooded areas are within the Eighth Circuit. Since FWS has decided not to petition for certiorari to the United States Supreme Court, *Johansen* is the new law in the Eighth Circuit.