

**LETTER OPINION
2003-L-62**

December 23, 2003

Mr. Ladd R. Erickson
McLean County State's Attorney
PO Box 1108
Washburn, ND 58577-1108

Dear Mr. Erickson:

Thank you for your letter asking for my opinion relating to the duty of federal agencies, specifically the U.S. Army Corps of Engineers ("USACE"), to control noxious weeds.¹ You first ask whether federal agencies which own or manage public land in North Dakota are required to comply with state noxious weed laws.

Under North Dakota law, every person in charge of or in possession of land in this state, whether as landowner, lessee, renter, or tenant, under statutory authority or otherwise, has a duty to eradicate or to control the spread of noxious weeds on those lands. N.D.C.C. §63-01.1-01. "Landowner" includes any owner of federal land. N.D.C.C. § 63-01.1-02(8). "Person" includes "any other entity which occupies or owns land." N.D.C.C. § 63-01.1-02(11). Thus, section 63-01.1-01 imposes a duty on a federal landowner to eradicate or to control the spread of noxious weeds. This, however, does not end the inquiry because federal agencies owning or managing public land in North Dakota are only required to comply with state noxious weed law where state law is not preempted under the Constitution's Supremacy Clause. "Federal preemption of state law may occur if: (1) Congress explicitly preempts state law; (2) Congress impliedly preempts state law by indicating an intent to occupy an entire field of regulation; or (3) state law actually conflicts with federal law." NoDak Bancorporation v. Clarkson, 471 N.W.2d 140, 142 (N.D. 1991).

¹ Section 7-06-01-02, N.D.A.C., identifies the twelve weeds currently declared by the Agriculture Commissioner to be "noxious" under state law. N.D.C.C. § 63-01.1-03(2). In addition to the Agriculture Commissioner's listed weeds, counties may declare additional weeds to be "noxious," but the Agriculture Commissioner may overturn these declarations. N.D.C.C. § 63-01.1-04.1(3).

Congress may enact laws under the Property Clause of the United States Constitution respecting property belonging to the United States. U.S. Const. art. IV, § 3, cl. 2.²

If Congress so chooses, federal legislation, together with the policies and objectives encompassed therein, necessarily override and preempt conflicting state laws, policies, and objectives under the Constitution's Supremacy Clause, U.S. Const. art. VI, cl. 2. See Kleppe, 426 U.S. at 543, 96 S.Ct. 2285 (“A different rule would place the public domain of the United States completely at the mercy of [the State]”) (quoting Camfield v. United States, 167 U.S. 518, 526, 17 S.Ct. 864, 42 L.Ed. 260 (1897)).

Wyoming v. U.S., 279 F.3d 1214, 1227 (10th Cir. 2002). The plenary power Congress has over public lands necessarily includes the power to eradicate or control the spread of noxious weeds on those lands, if it so chooses. The extent to which Congress has exercised this power must be examined to fully address your inquiry.

Congress, in various laws, has addressed a federal agency's duty to eradicate or control noxious weeds on federal lands. The Carlson-Foley Act (43 U.S.C. § 1241 et seq.) authorizes and directs federal agencies to permit a state agriculture commissioner, or other proper agency head, to enter federal land to destroy noxious plants growing on such land if the state has in effect its own noxious plants control program for privately owned land. 43 U.S.C. § 1241.³ See Northwest Coalition for Alternatives to Pesticides (NCAP) v. Lyng, 844 F.2d 588, 590 (9th Cir. 1988) (“The BLM is required to control and eradicate noxious weeds on public lands by the Carlson-Foley Act.”). The Carlson-Foley Act also allows states to be reimbursed for control costs, but only to the extent Congress appropriated funds specifically to carry out the purposes of state control of noxious weeds on federal land during the fiscal year in which the expenses are incurred. 43 U.S.C. § 1242.

A statutory duty is also found in the Federal Noxious Weed Act of 1974⁴ (7 U.S.C. § 2814). Under it, each federal agency has a duty to develop and coordinate an

² However, the Property Clause alone does not withdraw federal land within a state from the state's jurisdiction. See California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 580 (1987). It merely gives Congress the power to exercise jurisdiction over federal land within a state if Congress so chooses. See Kleppe v. New Mexico, 426 U.S. 529, 543-45 (1976). When exercised, Congress' power over federal land is “plenary,” Granite Rock, 480 U.S. at 581, and “without limitations.” Kleppe, 426 U.S. at 539.

³ The Carlson-Foley Act (43 U.S.C. § 1241 et seq.) does not define “noxious plants.”

⁴ Except for Section 2814, all sections of the Federal Noxious Weed Act of 1974 (7 U.S.C. §§ 2801-2813) were repealed June 20, 2000, and replaced by the Federal Plant Protection Act, 7 U.S.C. § 7701 et seq.

undesirable plants⁵ management program, establish and adequately fund such program through its budgetary process, enter into cooperative agreements with state agencies, and establish integrated management systems for controlling noxious weeds under such cooperative agreements. 7 U.S.C. § 2814. Similar to the Carlson-Foley Act, the Federal Noxious Weed Act does not require federal agencies to carry out noxious weed control programs on federal lands unless similar programs are being implemented on state or private lands in the same area. 7 U.S.C. § 2814(d).

In addition to these federal laws, the President has issued an Executive Order to “prevent the introduction of invasive species and provide for their control and to minimize the economic, ecological, and human health impacts that invasive species cause.” Executive Order No. 13112, 64 Fed. Reg. 6183 (Feb. 3, 1999), as amended by Executive Order No. 13286, 68 Fed. Reg. 10619 (Feb. 28, 2003). The President’s Order directs federal agencies to use relevant programs and authorities to “detect and respond rapidly to and control populations of [invasive] species.” 64 Fed. Reg. 6183 at 6184. An agency may “not authorize, fund, or carry out actions that it believes are likely to cause or promote the introduction or spread of invasive species” unless the agency determines and makes public its determination that the benefits outweigh the harm, and the agency takes “all feasible and prudent measures to minimize the risk of harm.”⁶ *Id.* As with the Carlson-Foley Act, compliance with the Executive Order is “subject to the availability of appropriations.” *Id.*

Congress, in enacting the Carlson-Foley Act and the Federal Noxious Weed Act, directed federal agencies to control or eradicate noxious weeds on public lands. However, those Acts do not provide mechanisms allowing states to enforce state noxious weed laws against federal agencies. Rather, the Acts express a congressional intent to “occupy the field,” and thereby prevent application of state law under the Supremacy Clause. See Billey v. North Dakota Stockmen’s Ass’n, 579 N.W.2d 171, 178 (N.D. 1998).

You also ask whether the USACE is required to control noxious weeds below the high watermark around Lake Sakakawea, that is land exposed by reliction,⁷ as the Lake’s

⁵ “Undesirable plant” includes plants classified as “noxious” under state or federal law. 7 U.S.C. § 2814(e)(7).

⁶ The President’s Executive Order, in this sense, appears highly relevant to the USACE’s lowering Lake Sakakawea water levels and the resulting increase in noxious weeds on lands previously inundated.

⁷ “Technically, ‘reliction’ refers to the sudden baring of land resulting from a sudden change in the course of a waterbody. However, the word ‘reliction’ is also commonly used to describe the gradual receding of water resulting in the gradual baring of previously submerged land.” North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 301 n.3 (N.D. 1995).

waters recede below the high watermark. Section 47-01-15, N.D.C.C., states, in part, that “[e]xcept when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low watermark.” In State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 542 (N.D. 1994), the Supreme Court held that N.D.C.C. §47-01-15 is a rule of construction under which an upland owner “takes” the interest granted in a conveying instrument to the low watermark, unless otherwise limited by terms of the grant. For purposes of this opinion, we presume the USACE owns or controls considerable upland around Lake Sakakawea as shown by its license agreements with the North Dakota Game and Fish Department (G & F) (under which G & F manages approximately 46,500 acres of USACE land), and the USACE would not likely deny that it owns the area of reliction between the high and low watermark. With this “ownership” comes duties to control or eradicate noxious weeds. This duty, as discussed above, derives from federal law.

You next ask whether a political subdivision has any remedies against federal agencies that fail to comply with noxious weed laws on federal lands in the political subdivision’s jurisdiction.

Under N.D.C.C. § 63-01.1-13(1), county and city “[w]eed control officers shall attempt to arrange a satisfactory noxious weed . . . eradication or control program with cities, park boards, cemeteries, school boards, counties, and other local entities owning or controlling public land within the control authority.” Beyond this limited and local remedy, the Agriculture Commissioner is the elected official charged with “attempt[ing] to arrange a satisfactory noxious weed” control program with federal agencies. Id. Local weed control authorities do play a role. If a federal agency fails to control or establish a management program to the local weed control authority’s satisfaction, the weed control officer must notify the federal agency. N.D.C.C. § 63-01.1-13(2). Thereafter, the federal agency is required to report to the Agriculture Commissioner regarding its noxious weed control efforts, or lack thereof. Id. If a federal agency fails to “control” noxious weeds, a county may notify the Agriculture Commissioner, who may hold a public hearing. The public hearing’s purpose is to determine the reason for the federal agency’s failure or refusal to “control” noxious weeds. Id. Section 63-01.1-13, N.D.C.C., stops short of requiring a federal agency to “eradicate” noxious weeds on public lands.

Except for N.D.C.C. § 63-01.1-13, I am unaware of any state remedies under N.D.C.C. ch. 63-01.1 that may be used against federal agencies failing to comply with noxious weed laws on federal lands in the political subdivision’s jurisdiction. If the Agriculture Commissioner (in cooperation with a county weed control board) finds that a federal agency is not complying with relevant federal noxious weed control laws (after informally meeting with the agency or formal review under N.D.C.C. § 63-01.1-13), the

Agriculture Commissioner or county could explore litigation, including bringing a declaratory judgment seeking a court order forcing compliance.⁸

Finally, you ask who is responsible for controlling noxious weeds on islands in the Missouri River below Garrison Dam.⁹ Ownership depends on how the island was formed.

The Missouri River is a navigable body of water. State v. Mills, 523 N.W.2d 537, 539 n.2 (N.D. 1994). The state owns the beds of all navigable waters. See, e.g., J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co., 423 N.W.2d 130, 132 (N.D. 1988). North Dakota law provides:

Islands and accumulations of land formed in the beds of streams which are navigable belong to the state, if there is no title or prescription to the contrary. The control and management . . . of islands, relictions, and accumulations of land owned by the state of North Dakota in navigable streams and waters and the beds thereof, must be governed by chapter 61-33.

N.D.C.C. § 47-06-08. Chapter 61-33, N.D.C.C., requires the State Engineer to manage, operate, and supervise the state's sovereign lands.¹⁰ Thus, the state owns the islands formed in the bed of the river and is responsible for weed control on them.

There may be instances where a particular tract of upland had its origin as an island but accretions caused it to be joined to the mainland. If so, the state still owns it and remains responsible for weed control. Hogue v. Bourgois, 71 N.W.2d 47, 54 (N.D. 1955).

⁸ Federal government agencies may generally not expend more than that which Congress has appropriated. Thus, "lack of appropriation" may be raised in defense. Only the Carlson-Foley Act contains a clause tying its reimbursement to appropriations specifically made by Congress to carry out its purposes. The Federal Noxious Weed Act requires that federal agencies "establish and adequately fund" through their budgetary process a program for noxious weed control. Where the controlling federal law does not specify that a lack of appropriated funds is a defense, courts have imposed orders to comply with federal law on federal agencies even where the federal agency has demonstrated a lack of funds to comply. See Center for Biological Diversity v. Norton, 163 F. Supp. 2d 1297 (D. N.M. 2001).

⁹ In a phone conversation with my office, you clarified that at this time you are only interested in having this question answered for islands below Garrison Dam. This opinion does not, therefore, address islands in Lake Sakakawea. Additionally, this opinion does not address the question for islands in non-navigable bodies of water.

¹⁰ The State Engineer administers all possessory interests in sovereign lands except oil, gas, and related hydrocarbons. N.D.C.C. § 61-33-03.

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Also, islands created by an avulsive event may not be owned by the state. "If a [navigable] stream . . . in forming itself a new arm divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to such owner." N.D.C.C. § 47-06-10.

In summary, all of the islands below the dam are owned by the state, with the exception of those identified in N.D.C.C. § 47-06-10. There may also be areas along the river that no longer appear to be islands, but because they had their origins as islands they are owned by the state. The state then has a duty to control noxious weeds in those areas.

Sincerely,

Wayne Stenehjem
Attorney General

pcg/pg