LETTER OPINION
2005-L-01

January 3, 2005

Mr. Ken Royse
Chairman
Burleigh County Water Resource District
221 North 5th Street
Bismarck, ND 58501

Dear Mr. Royse:

Thank you for your letter asking whether the state may allow land developers to construct wildlife habitat on Missouri River sandbars to satisfy federal mitigation requirements. It is my opinion that the state may allow land developers to construct wildlife habitat on Missouri River sandbars to satisfy federal mitigation requirements provided the state permit is issued under a comprehensive river management plan, the habitat serves a public purpose, the habitat's presence does not unreasonably interfere with public use of the river, and the constitution's "gift clause" is satisfied.

ANALYSIS

Background – Missouri River land development and regulation.

Recently, considerable development has occurred on land adjoining the Missouri River, particularly in the Bismarck-Mandan area. Nearly all of the development has been for housing. Development projects often include work to prevent bank erosion, which is usually achieved by riprap.

The United States Army Corps of Engineers asserts jurisdiction over bank stabilization projects under the Clean Water Act and the Rivers and Harbors Act. U.S. Army Corps of Engineers, Department of the Army Decision Document: WW Ranch Bank Stabilization Proposal 1-2 (Mar. 21, 2001) (hereafter "Corps' WW Ranch Decision"). The Corps believes that bank stabilization adversely affects sandbar development. E.g., id. at 49, 84. Sandbars are of interest to the Corps because sandbar habitat is relied on by the piping plover and interior least tern. E.g., id. at 50; In re Operation of the Missouri River System Litigation, 03-MD-1555, 2004 WL 1402563 at *8 (D. Minn. June 21, 2004) ("sandbar habitat essential to plover and tern survival"). The tern is listed as "endangered" under the federal Endangered Species Act ("ESA") and the plover is considered "threatened."[1] Furthermore, the United States Fish & Wildlife

[1] Endangered and Threatened Wildlife and Plants; Interior Population of the Least Tern Determined to be Endangered, 50 Fed. Reg. 21784 (May 28, 1985) (to be codified at 50 C.F.R. pt. 17); Endangered and Threatened Wildlife and Plants; Determination of

Service states that if bank stabilization continues on the river in the stretch from Bismarck to Garrison Dam, the cumulative effect could require listing additional species under the ESA and slow recovery of listed species. U.S. Army Corps of Engineers, Supplement: March 21, 2002 WW Ranch Decision Document at 3 (Jan. 31, 2002) (hereafter "Corps' Supp. WW Ranch Decision").

The Corps applied the ESA when the WW Ranch, a partnership, sought permission to protect the river bank at its housing development, the River Place Subdivision, located six miles north of Mandan. Because of its concerns for the listed tern and plover, the Corps imposed a mitigation requirement on the bank stabilization permit it issued WW Ranch. The permit was conditioned on constructing sandbar habitat. Corps' WW Ranch Decision at 83, 86. The Corps is considering whether to require habitat construction as mitigation for a bank stabilization permit sought by the Misty Waters Development, a housing subdivision under construction a few miles north of Bismarck. Letter from Michael Gunsch, Houston Engineering, Inc., to Dale Frink, State Engineer (Aug. 30, 2004) (hereafter "Gunsch Letter").

The federal government, however, is not the only government with regulatory authority over activities on the river. The state plays a significant role because it owns the bed of navigable waters, and the Missouri River is navigable. State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 539 (N.D. 1994). The state's title extends from ordinary high watermark to ordinary high watermark. Id. See also Shively v. Bowlby, 152 U.S. 1, 26 (1894); Harrison v. Fite, 148 F. 781, 783 (8th Cir. 1906); 43 U.S.C. § 1301(a)(1).[2] Consequently, a state permit is required for bank stabilization projects and for any mitigation work a developer desires to carry out within the river. Permits are issued by the State Engineer, the state official responsible for administering the state's non-mineral interests in navigable waters. N.D.C.C. ch. 61-33. The State Land Board manages the mineral interests. N.D.C.C. § 61-33-03. The State Engineer has adopted rules regulating river activities. N.D.A.C. ch. 89-10-01.

Endangered and Threatened Status for the Piping Plover, 50 Fed. Reg. 50726 (Dec. 11, 1985) (to be codified at 50 C.F.R. pt. 17).

[2] In the area between the ordinary high watermark and the ordinary low watermark, the shorezone, the riparian landowner holds an interest. State v. Mills, 523 N.W.2d at 544. Although the state and riparian landowner have "correlative interests" in the shorezone, id., the state's interest, to ensure compliance with its duties under the public trust doctrine, is predominant. Id. at 543-44. See also id. at 545 (Levine, J., concurring) (whatever rights the riparian landowner may hold, they must be assessed "in the context of the State's sovereign duty to hold the shore zone in trust for the public"). See also, e.g., Ashwaubenon v. Pub. Serv. Comm'n, 125 N.W.2d 647, 653 (Wis. 1963) ("It cannot be denied that the riparian owners have only a qualified title to the bed of the waters. The title of the state is paramount").

In 2002, the State Engineer issued WW Ranch a permit allowing it "to establish a 10-acre nesting, brood-rearing and foraging habitat" on a sandbar at a location a few miles north of Mandan. Sovereign Land Permit No. S-1326 (July 31, 2002). Earlier, the State Engineer had issued a bank stabilization permit for WW Ranch's River Place Subdivision. Sovereign Land Permit No. S-1204 (Apr. 14, 1997). In August of 2004, a permit application was filed for the Misty Waters Development. Sovereign Land Permit Application No. S-1365. The developer seeks permission to create piping plover habitat a few miles north of the Misty Waters Development. Id. The application was filed because the developer contemplates that the Corps of Engineers will condition its riprap permit on constructing wildlife habitat. Gunsch Letter. The State Engineer has not acted on the Misty Waters mitigation application, but he did issue the development a bank stabilization permit. Sovereign Land Permit No. S-1348 (Oct. 31, 2003).

These recent events raise the question whether the state may permit navigable waterways, also known as sovereign lands, to be used by private persons to satisfy federal mitigation requirements. This question raises a closely related one, that is, the propriety of permitting bank stabilization. These issues implicate the nature of the state's title to sovereign lands, a title impressed with unique public trust responsibilities. Also implicated is the state constitution's "gift clause."

State title to navigable waters.

Upon achieving independence from Great Britain, each American colony became sovereign. As such, they held "'the absolute right to all their navigable waters and the soils under them.'" Idaho v. Coeur d'Alene Tribe, 521 U.S. 261, 283 (1997) (quoting Martin v. Lessee of Waddell, 41 U.S. (16 Pet.) 367, 410 (1842)). New states admitted to the Union were entitled to the same rights as those held by the original states. Id.; State v. Mills, 523 N.W.2d at 539. Thus, upon North Dakota's admission to the Union it took title to sovereign lands in the state. Id.; see also 101 Ranch v. United States, 714 F.Supp. 1005, 1013 (D.N.D. 1988), aff'd 905 F.2d 180 (8th Cir. 1990).

This title is "absolute." Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 372, 374 (1977). It is also unique. "The State holds the navigable waters, as well as the lands beneath them, in trust for the public." United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976). See also State v. Mills, 523 N.W.2d at 540; State v. Sorenson, 436 N.W.2d 358, 361 (Iowa 1989) (the state's interest "in public trust lands is, in a sense, only that of a steward").[3] Because they are an attribute of the state's sovereignty, sovereign lands "are

[3] The public trust doctrine, to protect navigable waters, might extend to non-navigable waters. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 714 (Cal. 1983). See also Mineral County v. State, 20 P.3d 800, 807-08 (Nev. 2001) (Rose, J., and Shearing, J., concurring).

distinguished from lands the State holds in a proprietary capacity." State ex rel. Bd. of Univ. & School Lands v. Andrus, 671 F.2d 271, 274 (8th Cir. 1982), rev'd on other grounds sub nom., Block v. North Dakota, 461 U.S. 273 (1983). The state holds sovereign lands under the public trust doctrine, which North Dakota formally recognized in the 1976 United Plainsmen decision. 247 N.W.2d at 460 ("the discretionary authority of state officials to allocate vital state resources is not without limit but is circumscribed by what has been called the Public Trust Doctrine").

The public trust doctrine.

In adopting the public trust doctrine, the North Dakota Supreme Court relied on Illinois Central Railroad v. Illinois, 146 U.S. 387 (1892), the primary case on the doctrine. E.g., Joseph Sax, The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention, 68 Mich. L. Rev. 471, 489 (1970); 4 Waters & Water Rights 30-29 n.140 (R. Beck ed. 1991). Illinois Central held that the Illinois Legislature could not convey the state's title to a portion of Lake Michigan. The attempted transfer was unlawful because it abdicated the Legislature's duty to regulate, improve, and secure submerged lands for the benefit of every citizen. Id. at 455-60. It could not convey sovereign lands because the state's title is "different in character" from other state land. Id. at 452. "'The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace.'" United Plainsmen, 247 N.W.2d at 461 (quoting Illinois Central, 146 U.S. at 453).

The essence of the doctrine prohibits the state from conveying sovereign lands or otherwise relinquishing its authority to protect and preserve these lands for the public. The traditional interests protected are navigation, commerce, and fishing. E.g., Illinois Central, 146 U.S. at 452. But the public trust doctrine is flexible. It can account for modern and changing community needs. E.g., Matthews v. Bay Head Improvement Ass'n, 471 A.2d 355, 365 (N.J. 1984); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971). It is "not limited to the ancient prerogatives." Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972). "[L]ike all common law principles, [the doctrine] should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit." Id.

Thus, over time, the public interests in sovereign lands have been recognized as considerably broader than just the traditional triad of navigation, commerce, and fishing. The doctrine is commonly held to protect the public's interests in hunting, swimming, boating, and general recreation. E.g., Friends of Hatteras Is. v. Coastal Resources Comm'n, 452 S.E.2d 337, 348 (N.C. Ct. App. 1995); Orion Corp. v. Washington, 747 P.2d 1062, 1073 (Wash. 1987); Shokal v. Dunn, 707 P.2d 441, 451 (Idaho 1985); Montana Coalition for Stream Access v. Curran, 682 P.2d 163, 171 (Mont. 1984); State v. Sorenson, 436 N.W.2d 358, 363 (Iowa 1989); Wisconsin's Envtl. Decade, Inc. v.

Dep't of Natural Resources, 271 N.W.2d 69, 72 (Wis. 1978); Marks v. Whitney, 491 P.2d 374, 380 (Cal. 1971); Nelson v. DeLong, 7 N.W.2d 342, 346 (Minn. 1942).

In addition, the doctrine is often applied to protect more general public interests in streams and lakes. Hawaii has concluded that the public has an interest in maintaining sovereign lands "in their natural state." In re Water Use Permit Applications, 9 P.3d 409, 448-449 (Hawaii 2000). California recognizes that the public trust doctrine protects "the people's common heritage" in sovereign lands. Nat'l Audubon Soc'y v. Superior Court, 658 P.2d 709, 724 (Cal. 1983). In some states the doctrine protects aesthetics and scenic beauty. United States v. State Water Res. Control Bd., 227 Cal.Rptr. 161, 201 n.41 (Cal. Ct. App. 1986); Idaho Forest Indus., Inc. v. Hayden Lake Watershed Improv. Dist., 733 P.2d 733, 737 (Idaho 1987); United States v. 1.58 Acres, 523 F.Supp. 120, 122 (D. Mass. 1981); Wisconsin's Envtl. Decade, 271 N.W.2d at 72.

> The natural beauty of our northern lakes is one of the most precious heritages Wisconsin citizens enjoy. It is entirely proper that that natural beauty should be protected as against specific structures that may be found to mar that beauty.

Claflin v. State, 206 N.W.2d 392, 398 (Wis. 1973).

North Dakota's public trust doctrine.

North Dakota has also expanded the doctrine. The North Dakota public trust doctrine imposes on the state the duty to manage sovereign lands 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." J.P. Furlong Enterprises, Inc. v. Sun Explor. & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988). This list of protected interests, because it is preceded by the phrase "such as," is illustrative, not exhaustive. See Nish v. Cohen, 95 F.Supp.2d 497, 504 (E.D. Virg. 2000); Bouchard v. Johnson, 555 N.W.2d 81, 83 (N.D. 1996); Peterson v. McKenzie County Pub. School Dist. No. 1, 467 N.W.2d 456, 459-60 (N.D. 1991). Consequently, other interests are likely protected by North Dakota's public trust doctrine. Indeed, United Plainsmen cites with approval authority holding that the doctrine requires the state to preserve "'natural, scenic, historic and esthetic values.'" United Plainsmen, 247 N.W.2d at 462 (citing Payne v. Kassab, 312 A.2d 86, 93 (Penn. 1973)).

Relying on United Plainsmen, a North Dakota administrative law judge held that North Dakotans "have a right . . . to the preservation of the natural, scenic, and esthetic values of the environment." In re Application for Authorization to Construct a Project Within . . . Lake Isabel, Recommended Findings of Fact, Conclusions of Law and Order 8 (Office of State Engineer, Sept. 8, 1999).

> The public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the state must conserve and maintain them for the benefit of all the people.

Id. The State Engineer adopted the administrative judge's recommendations. In re Application for Authorization to Construct a Project Within . . . Lake Isabel, Order of the State Engineer, Order No. 99-7 (Sept. 22, 1999). Further, rules governing review of sovereign land permit applications require that the State Engineer consider, among other interests, aesthetics, the environment, recreation, and fish and wildlife. N.D.A.C. § 89-10-01-08. In sum, the North Dakota public trust doctrine, like that in many other states, protects a broad range of interests.

North Dakota has also interpreted the doctrine in a novel way. In United Plainsmen, the plaintiffs asserted that the doctrine required the State Engineer to prepare a comprehensive plan for developing the state's natural resources, in particular, Missouri River water, before water permits could be issued for power plants. 247 N.W.2d at 459. The court agreed.

> The development and implementation of some short- and long-term planning capability is essential to effective allocation of resources 'without detriment to the public interest in the lands and waters remaining.'

Id. at 462 (quoting Illinois Central, 146 U.S. at 455-456). Water permits for energy development could be issued by the State Engineer consistent with the public trust only if, "at a minimum," the State Engineer examined the potential effect of the water appropriation on the present water supply and the state's future needs. Id. The public trust doctrine "permits alienation and allocation of . . . precious state resources only after an analysis of present supply and future need." Id. at 463. Thus, the North Dakota public trust doctrine includes a planning component. See also Matter of the Application for Permits to Drain Related to Stone Creek Channel and White Spur Drain, 424 N.W.2d 894, 903 (N.D. 1988) (State Engineer satisfied his duties by fully analyzing the challenged drainage permits and their consequences).

Planning before acting is particularly appropriate for the Missouri River. From Bismarck to Garrison Dam the river is a significant historic, cultural, and natural resource. N.D. Parks & Recreation Dep't, Missouri River Study and Action Plan 1, 5 (Jan. 1989). Indeed, it "is one of North Dakota's most spectacular natural resources." Missouri River Centennial Comm'n, A Comprehensive Plan for Recreational Use of the Riparian Public Lands in Burleigh and Morton Counties 7 (Aug. 1986) (hereafter "Centennial Comm'n 1986 Report"). It is a "tremendous public recreational resource." Id. at 1. The river may be the "last of [its] kind." Corps' WW Ranch Decision at 57.

The need for comprehensive planning has been expressed by state and local agencies. A 1986 study concluded that the lack of a comprehensive plan for managing the river has resulted in its "under-utilization" for recreation, while at the same time the river experiences "over-crowding and conflicts between incompatible uses." Centennial Comm'n 1986 Report at 1. To meet public needs, "an objective assessment of management possibilities and formulation of and adherence to a well thought-out plan is an absolute necessity." N.D. Game & Fish Dep't, The Missouri River in North Dakota: Garrison Reach at 2 (Aug. 1998) (hereafter "Game & Fish Dep't 1998 Report"). A "vision group" has been formed by the Burleigh, Oliver, Morton, Mercer, and McLean Counties Joint Water Resource Board, along with representatives of state agencies, federal agencies, and private organizations with interests in the river. N.D. Legis. Council Memorandum, Missouri River Issues Study - Background Memorandum at 17 (June 2000). The "vision group's" objective is to develop a river management plan. Id.

Applying the public trust doctrine.

While the public trust doctrine places significant limitations and affirmative duties on the state, the state has flexibility in satisfying its trust obligations. The contours of the state's duties, however, are difficult to assess because the doctrine is not fully defined in North Dakota. Guidance must be found in the case law of other states.

"[W]hat one finds in the cases is not a niggling preservation of every inch of public trust property against any change, nor a precise maintenance of every historical pattern of use." Sax, 68 Mich. L. Rev. at 488. For example, encroachments on sovereign lands that serve the public interest are acceptable. E.g., Nat'l Audubon, 658 P.2d at 724. Thus, public boat ramps are acceptable. They can significantly enhance public access to and recreation on a river, while only marginally disturbing the river's natural characteristics and aesthetics. Even the private use of sovereign land may be permissible under the public trust doctrine so long as the public's interests are not materially disrupted. 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). As United Plainsmen

states, the public trust doctrine does not prohibit all development, but it does require controlled development. 247 N.W.2d at 463.[4]

Constructing wildlife habitat on sovereign lands is not necessarily inconsistent with the trust. Work authorized by the State Engineer under the WW Ranch permit allows construction of habitat needed by the endangered least tern and threatened piping plover, birds that have always been a part of the Missouri River ecosystem. Because the public trust doctrine includes a duty to preserve, to some degree, the river's natural characteristics, habitat construction is not inconsistent with the state's role as guardian of the river. The doctrine does not necessarily prohibit the State Engineer from allowing sovereign lands to be used for constructing wildlife habitat. The State Engineer, however, should ensure that the mitigation is actually effective; otherwise there is unlikely to be a public benefit for the private use of sovereign land. Indeed, the Game and Fish Department concludes that the Corps would help the terns and plovers more by adjusting its water flow regime, and that creating "sandbar habitat is a poor second choice." Letter from Michael McKenna, N.D. Game and Fish Dept., to Timothy Fleeger, U.S. Army Corps of Engineers (Sept. 26, 2003). [5]

Establishing tern and plover habitat may adversely affect habitat relied on by other species, such as whitetail deer, pheasants, Canada geese, beavers, etc. Id. It will also limit public use of that area. The Endangered Species Act provides significant protection to the habitat of listed species. It is unlawful to "take" a listed species, 16 U.S.C. § 1538(a)(1)(B), and "take" has a broad meaning. It includes not only "kill" but also "harm or harass." 16 U.S.C. § 1532(19). "Harm" and "harass" are broadly defined to cover activities that "disrupt" a species' behavioral patterns, including "breeding, feeding and sheltering." 50 C.F.R. § 17.3. See also Strahan v. Coxe, 939 F.Supp. 963, 983 (D. Mass. 1996), aff'd in part and vacated in part, 127 F.3d 155 (1st Cir. 1997) ("take" to be liberally construed). A person can be guilty of a criminal violation under the Act without intending to violate it. United States v. Ivey, 949 F.2d 759, 766 (5th Cir. 1991).

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[4] In what may be North Dakota's only contested administrative sovereign lands case, the State Engineer denied, on public trust grounds, a request from the owner of a lot on Lake Isabel to place fill in the lake to expand his lot. The lake covers about 773 acres; the fill would have covered .20 acres. Findings, Conclusions, and Recommendations Concerning Authorization to Construct a Project on Sovereign Lands Application No. S-1251 at 8 (Nov. 27, 1998).

[5] The Corps is yet uncertain whether artificial habitat actually provides any substantial assistance to listed species. E.g., U.S. Fish & Wildlife Serv., 2003 Amendments to the 2000 Biological Opinion on the Operation of the Missouri River Main Stem Reservoir System 287 (Dec. 16, 2003).

Thus, allowing habitat construction on sovereign lands indirectly transfers to the federal government some control over the land and inhibits public use of it. Neither of these consequences necessarily violate the trust, but they are factors for the State Engineer to weigh in considering applications to use sovereign lands for habitat construction, particularly if more land developers seek permission to use Missouri River sandbars to mitigate the environmental consequences of their developments. More mitigation projects means more federal control of the river. The State Engineer should also consider indirect consequences of issuing habitat mitigation permits, one of which will be the continued development of land adjoining the river, which in turn can have adverse effects on the river's aesthetics.

Habitat construction, as explained, is a consequence of the Corps' decision to place conditions on its bank stabilization permits. A common sovereign land application submitted to the state seeks permission for bank stabilization. About 41 miles of the bank from Bismarck-Mandan to Garrison Dam have been stabilized. Corps' WW Ranch Decision at 43, 60. As much as 40% of the river in the Bismarck-Mandan area has been stabilized. Game & Fish Dep't 1998 Report at 10. The State Water Commission believes that erosion control provides significant benefits. N.D. State Water Comm'n, Missouri River Bank Erosion: Garrison Dam to Lake Oahe at 1-2, 13 (Dec. 1997) (erosion can cause losses of personal and business income, property tax revenue, irrigation pump sites, riparian woodlands, and it contributes to the creation of a delta in the Bismarck area).

Riprap, on the other hand, is not entirely benign. It inhibits, by both foot and by boat, public access to the shore. It can adversely affect the environment. Installing riprap often requires that the riverbank be reshaped to ensure that the riprap stays in place. See Corps' WW Ranch Decision at 5, 22. The North Dakota Game and Fish Department believes that bank stabilization reduces the river's spawning and rearing habitat and that if more riprap is installed, it could have significant adverse effects on the Missouri River fishery. Id. at 27. See also id. 36, 46, 54-55, 70; Game & Fish Dep't 1998 Report at 6-8.[6] Riprap presents aesthetic considerations. Id. at 10; Corps' WW Ranch Decision at 31, 55. Further, while the effect of one riprap project on the ecosystem and river aesthetics may be minimal, the cumulative effect of these projects may cause problems. E.g., id. at 25, 40-42; Game & Fish Dep't 1998 Report at 10-11. It is the cumulative effects of individual projects that the State Engineer would be best able to consider if management decisions were made under a comprehensive plan.

Allowing sovereign land to be used to mitigate the environmental consequences of riprap projects, and allowing riprap itself, provide significant benefits to landowners. In one assessment, waterfront housing is considered the most valuable, sought after, and

[6] The walleye fishery in the Bismarck to Garrison Dam reach "is one of the best in the nation." Game & Fish Dep't 1998 Report at 5.

expensive type of residential real estate in the region. Corps' WW Ranch Decision at 6, 7. (Riverfront lots can sell for more than $100,000. Id. at 7.) But the attractiveness of land along the river for housing, and consequently its value, largely depends on assurances that the bank will not erode. Prospective buyers will pay substantially more for lots with a protected bank. Id. at 8, 32, 56. The financial gain a land developer or landowner may derive from being allowed to use sovereign land for a habitat mitigation project, or to install riprap, is not directly relevant for the public trust analysis. Because it is the river that the state must protect, its focus must be on preserving public interests in the trust resource. The propriety of allowing sovereign land, the public's land, to be directly or indirectly used to significantly enhance the value of private land may be a policy consideration for the State Engineer in managing the river, but it is not a factor that the public trust doctrine requires the State Engineer to weigh.

As noted earlier, the State Engineer has adopted rules governing sovereign lands and the permitting process. Those rules prohibit sovereign lands from being permanently relinquished and require them to be held in perpetual trust for the citizens of North Dakota. N.D.A.C. § 89-10-01-02. Thus, any permit to use sovereign lands must be conditional or revocable. This is necessary because in the future, it may be determined that the permitted use harms the public interest or is no longer consistent with the public trust doctrine.

Public trust doctrine - conclusions.

The public trust doctrine requires that the state preserve and protect the public's interests in the Missouri River. And the public's interests are broad. This duty, however, does not necessarily prohibit the state from allowing the river to be used for private purposes. Whether an individual project is in fact appropriate depends on the particular facts. The State Engineer, as the guardian of the trust, must carefully review all relevant considerations before acting on permit applications. He must conduct the review under a comprehensive plan. United Plainsmen, 247 N.W.2d at 462-63. The review should not be narrow. See Arizona Ctr. for Law in the Pub. Interest v. Hassell, 837 P.2d 158, 170-71 (Ariz. 1992); Kootenai Envtl. Alliance, Inc. v. Panhandle Yacht Club, 671 P.2d 1085, 1092-93 (Idaho 1983). It should examine all interests and consequences, including the cumulative effects of the proposed activity and existing and other proposed projects. Sovereign lands are entitled to the "highest degree of protection." Morse, 581 P.2d at 524. After all, "a river is more than an amenity; it is a treasure." New Jersey v. New York, 283 U.S. 336, 342 (1931) (Holmes, J.).

The constitution's gift clause.

In considering whether the Legislature could convey to riparian landowners a portion of the state's navigable waterways, the North Dakota Supreme Court recognized the potential applicability of the constitution's gift clause. It restrictively construed a statute "to avoid" violating the clause. State v. Mills, 523 N.W.2d at 542. Other state constitutions have similar "anti-gift" clauses and they have been applied in disputes involving state sovereign land management. E.g., Arizona Ctr. v. Hassell, 837 P.2d at 169-71. Thus, the State Engineer needs to consider the gift clause -- as well as the public trust doctrine -- when reviewing requests to use the Missouri River for a private purpose.

The gift clause states:

> The state, any county or city may make internal improvements and may engage in any industry, enterprise or business . . . but neither the state nor any political subdivision . . . shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor.

N.D. Const., art. X, § 18. The provision, in general, prohibits the state from transferring public assets into private hands. Gripentrog v. City of Wahpeton, 126 N.W.2d 230, 237-38 (N.D. 1964); Petters & Co v. Nelson County, 281 N.W. 61, 64-65 (N.D. 1938).[7] It applies not only to money, but also to transfers of property and other tangible assets. Solberg v. State Treasurer, 53 N.W.2d 49, 53-54 (N.D. 1952) (state-owned minerals); Herr v. Rudolf, 25 N.W.2d 916, 922 (N.D. 1947) (state-owned land); N.D.A.G. 2000-F-13 (books); N.D.A.G. 2000-L-13 (school district land). The gift clause applies to sovereign lands. State v. Mills, 523 N.W.2d at 542.

The limitations imposed by the gift clause do not apply in three situations: in making "internal improvements," in assisting the poor, and in furthering an "industry, enterprise or business" that the governmental entity is authorized to pursue. N.D.A.G. 2003-L-51 at 1. Permitting activities on sovereign land is unlikely to involve assisting the poor or involve a state industry or business. But some projects could constitute an "internal improvement" or further an "enterprise" the State Engineer has authority to pursue and, if so, would not violate the gift clause.

"Internal improvements" includes an array of activities that generally can be described as relating to "development" or "public improvement" projects, such as constructing and maintaining roads, building bridges, and improving waterways for commerce. N.W. Bell

[7] A history and phrase-by-phrase review of the gift clause is at N.W. Bell Tele. Co. v. Wentz, 103 N.W.2d 245, 252-54 (N.D. 1960).

Tele. Co. v. Wentz, 103 N.W.2d 245, 254 (N.D. 1960); N.D.A.G. 98-F-30 at 2; Rippe v. Becker, 57 N.W. 331, 334 (Minn. 1894); Welch v. Coglan, 94 A. 384, 387 (Md. 1915). Constructing wildlife habitat is a conservation effort and probably not an "internal improvement," but other sovereign land projects could be "internal improvements," such as constructing boat ramps and shoreline facilities that further public use and enjoyment of the river.

"Enterprise" is any activity, especially one of some scope, complication, or risk. N.D.A.G. 93-F-11 at 2. While this definition is broad, the activity undertaken or permitted by a state agency must be one that the law authorizes the agency to itself undertake or to permit another to undertake. See, e.g., N.D.A.G. 2003-L-51 at 1. This requires examining the agency's scope of authority. If the State Engineer is to allow an activity on sovereign land, some authority must permit the activity and the State Engineer's approval of it. The duties imposed by the public trust doctrine have been delegated to the State Engineer. N.D.C.C. ch. 61-33. The duties imposed mandate, to some degree, that the state preserve the Missouri River's ecosystem, scenic beauty, and natural characteristics. These objectives can be furthered by constructing habitat that effectively supports species making their home on the river and, therefore, a sound habitat construction project could be considered an "enterprise" allowed by the gift clause.

Additional considerations affect the gift clause's application. The provision, at its core, requires that the activity or transaction in question promote a public benefit. If a public benefit justifies or serves as a basis for the grant, an unconstitutional gift can be avoided. Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944).

This does not mean that if a private benefit is obtained, the gift clause is violated. The clause is not necessarily violated if a private person receives a "special" or "incidental" benefit. N.D.A.G. 87-L-02 at 2; Stutsman v. Arthur, 16 N.W.2d 449, 454 (N.D. 1944). In State v. Mills, 523 N.W.2d 537, the court interpreted N.D.C.C. § 47-01-15, which states the riparian landowner "takes" to the ordinary low watermark. The court rejected the view that the statute nullifies the state's interest in the shorezone, that is, the area between the low and high watermarks. Having done so would have been inconsistent with the public trust doctrine and the gift clause. 523 N.W.2d at 542-43. The court nonetheless recognized that there can be private interests in sovereign land. Id. at 544. The case thus confirms that the gift clause, in some contexts, does not impose an absolute prohibition. At the same time, however, the court cited with approval authority that in the shorezone, state interests predominate. Id. at 543-44. See also id. at 545 (Levine, J., concurring) (whatever rights the riparian landowner may hold, they must be assessed "in the context of the State's sovereign duty to hold the shore zone in trust for the public").

In Stutsman v. Arthur, the court made a somewhat similar ruling. It found that where an appropriation of public funds is primarily for a public purpose, the gift clause is not necessarily violated if, as an incidental result, a private benefit is extended. 16 N.W.2d at 454. But, if the result is chiefly a private benefit, then an incidental or ostensible public purpose will not save its constitutionality. Id. Thus, while Stutsman v. Arthur and State v. Mills each allow a private benefit, each requires a prominent public benefit.

The public benefit does not need to be money. A public benefit can be a result that promotes "the public health, safety, morals, general welfare, security, prosperity, contentment, and equality . . . of all the citizens." Green v. Frazier, 176 N.W. 11, 17 (N.D. 1920). Even "equitable" and "moral" consideration may suffice. Solberg v. State Treasurer, 53 N.W.2d at 53; Petters & Co v. Nelson County, 281 N.W. at 65. But the connection between the activity in question and its public benefit cannot be tenuous. E.g., N.D.A.G. 2003-L-51 at 2 (paying wages owed by a defunct business is insufficiently related to economic development); N.D.A.G. 2002-F-09 (county's cash contribution to nonprofit's July Fourth celebration, which involved fireworks, is not justified on a concern for fire safety).

Whether or not a sovereign land permit issued to a private person satisfies the gift clause is a question of fact. E.g., N.D.A.G. 2003-L-09 at 3; N.D.A.G. 98-F-19 at 2; N.D.A.G. 96-L-93 at 3; N.D.A.G. 87-02 at 2. Compliance with the clause must be determined on a case-by-case basis with regard to the unique circumstances presented by each request to use sovereign land.

Sincerely,

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cmc

This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).