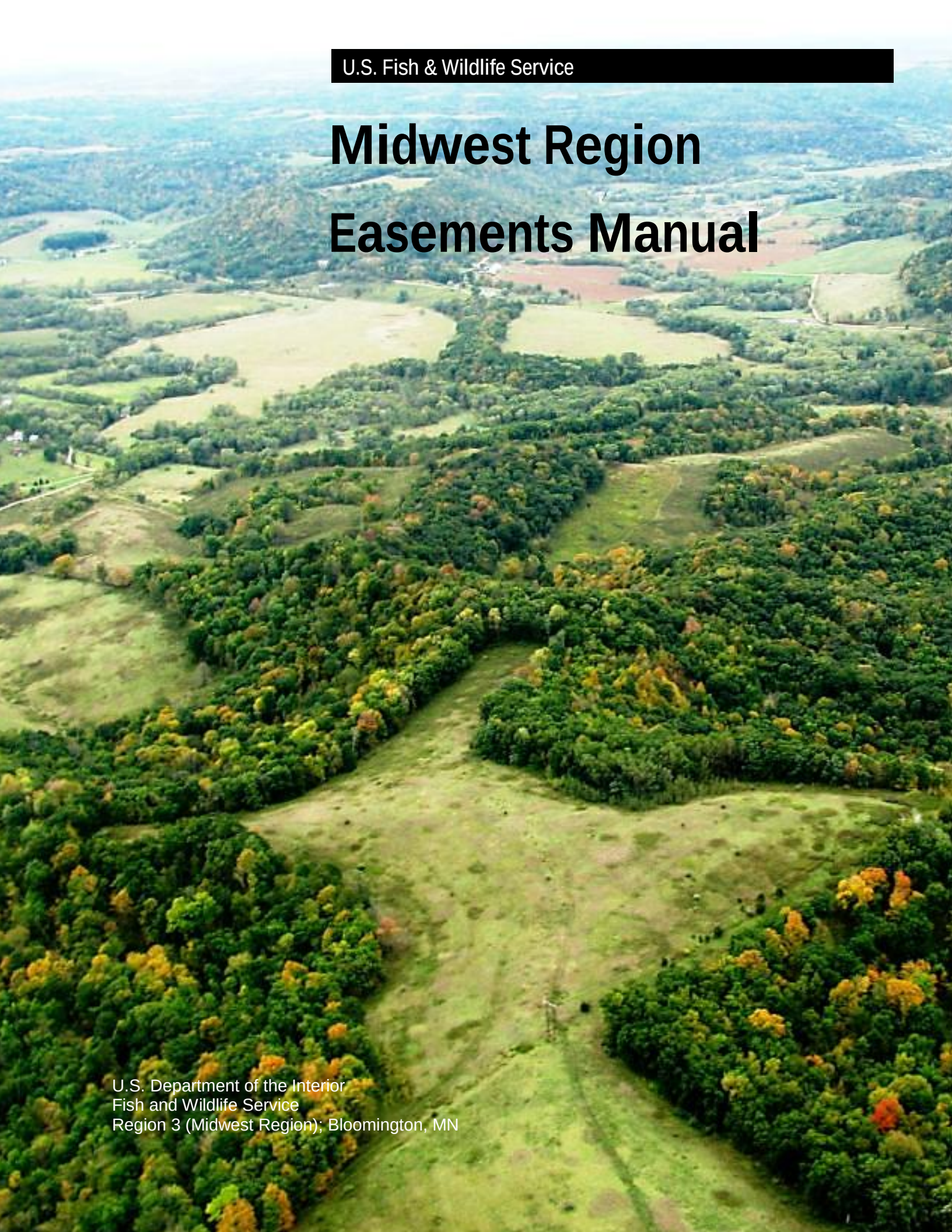
U.S. Fish & Wildlife Service

Midwest Region Easements Manual



U.S. Department of the Interior
Fish and Wildlife Service
Region 3 (Midwest Region); Bloomington, MN

The mission of the U.S. Fish & Wildlife Service is working with others to conserve, protect, and enhance fish and wildlife and their habitats for the continuing benefit of the American people.

The mission of the National Wildlife Refuge System is to administer a national network of lands and waters for the conservation, management and, where appropriate, restoration of the fish, wildlife and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

U.S. Fish and Wildlife Service,
Midwest Region Easements Manual

APPROVED:

DEC 7 2012

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Table of Contents

Chapter 1: Purpose, Need, and Background 1
1.1 Purpose and Need 1
1.2 Background 2
Chapter 2: Acquisition of Easement Properties 4
2.1 Criteria for Acquisition 4
2.2 The Acquisition Process 4
2.3 Official Easement Records 6
Chapter 3: Administration of Rights-of-Way on Easement Properties 8
3.1 50 CFR 29 for Rights-of-Way 8
3.2 ROW Evaluation Guidelines 8
3.2.1 Requested Work within Existing ROWs 8
3.2.2 Minor Disturbance-Type Projects 10
3.2.3 Minor Expansion or Realignments of Existing ROWs 10
3.2.4 Formal Rights-of-Way Permit 10
3.3 Exchange Option 11
3.4 Cultural Resource Issues Associated with Rights-of-Way 11
3.5 Cultural Resource Issues Associated with Divested Property as a Result of an Exchange 11
Chapter 4: Easement Exchange Policy, Guidelines, and Format 12
4.1 Service Policy 12
4.2 Region 3 Policy 12
4.3 Exchange Request Submission Guidelines 13
4.4 Exchange Request Format 13
4.5 Property or Interest Divestiture Requirements 14
4.6 Release of Easement Rights 15
Chapter 5: Refuge Compatibility and How it Relates to Easement Interests and Other Regulatory Requirements 16
5.1 Compatibility 16
5.2 General NEPA Guidance 19
Chapter 6: Easement Terms and Acquired Property Interest 23
6.1 FSA Deed-Restricted Easements; Debt for Nature Contracts (Non-perpetual FSA) 23
6.1.1 Introduction and Background: 23
6.1.2 Quitclaim Deed Reservations 24
6.1.3 Service Responsibility 24
6.1.4 Surveys, Posting and Fencing 24
6.1.5 Conservation Easement Reservations 25
6.1.5.1 Caretaker Agreement 26
6.1.5.2 Rights Granted to the Service 26
6.2 Habitat Easements 27
6.3 Wetland Easements 29
6.3.1 Acquired Property Interests 30
Chapter 7: Easement Administration 32
7.1 Official Easement Records 32
7.2 Permanent Field Station Files 33
7.2.1 Realty-Provided Records 33
7.2.2 Field Station Documentation 34
7.3 New Easement Inspection 34
7.3.1 Posting Easement Boundaries for Management Purposes 35
7.3.2 General Photo-Documentation 36
7.3.3 Use of Digital Equipment 37
7.4 Actions to Help Prevent Future Violations 37
7.4.1 Land Ownership Notifications 37
7.4.1.1 Easement Mapping Associated with Landowner Notifications 37
7.4.2 Inter-Agency Coordination/Cooperation 37
Chapter 8: Uses of Easement Properties and Permitted and Prohibited Activities 39

8.1 General Discussion 39
8.1.1 Evaluating Use Requests 39
8.1.2 Easement Request Decision Flowchart 39
8.1.3 Issuance of Permits 42
8.2 Compatibility Determinations 44
8.3 Permitted Uses 44
8.3.1 Economic Uses 44
8.3.1.1 Prescribed Grazing 44
8.3.1.2 Stock Watering 45
8.3.1.3 Haying and Mowing 46
8.3.1.4 Farming 46
8.3.1.5 Wood Cutting/Timber Harvest 47
8.3.1.6 Seed Harvest 47
8.3.2 Landowner/General Uses 47
8.3.2.1 Vehicle Access 48
8.3.2.2 Collecting Edible Plants for Personal Use 49
8.3.2.3 Trail Construction (Hunting/Environmental Education/Interpretation) 49
8.3.2.4 Temporary Structures (Deer Stands) 49
8.3.2.5 Minor Expansions of Existing Rights-of-Way 50
8.3.2.6 Short-Term Upland Disturbance for Highway or Other Public Interest Project with no ROW Expansion and Full Restoration 50
8.3.2.7 Utility Lines 50
8.3.2.8 Culvert Replacement 50
8.3.2.9 Beaver Dam Removal 51
8.3.2.10 Wetland “Texas” Crossing/Irrigation Waterways 52
8.3.2.11 Tiling 53
8.3.3 Habitat Management Activities 54
8.3.3.1 Prescribed Burning 55
8.3.3.2 Nesting Islands 55
8.3.3.3 Farming 56
8.3.3.4 Tree Removal 56
8.3.3.5 Invasive Species Management 57
8.3.3.6 Wetland Restoration/Sediment Basins 57
8.3.4 Health and Safety Requests 59
Chapter 9: Easement Surveillance 62
9.1 Aerial Inspection 64
9.1.1 Pre-Flight Preparations 65
9.1.1.1 GIS 65
9.1.1.2 Paper 66
9.1.2 Wetland Easement Flight Scheduling (Fall and Spring) 67
9.1.3 Habitat or FSA Easement Flight Scheduling 68
9.1.4 Flight Activities 68
9.1.4.1 Service Plane and Pilot 68
9.1.4.2 Charter Aircraft and Pilots 69
9.1.4.3 Aviation Safety Policy Pertinent to Easement Monitoring 69
9.1.4.4 Miscellaneous Procedural Items and Tips 70
9.1.4.5 Aviation Safety Training 72
9.1.5 Follow-up Flights 72
9.1.5.1 Pre-Flight Preparation 73
9.1.5.2 Flight Parameters 73
9.1.5.3 Flight Activities 73
9.1.5.4 Video Equipment 74
9.1.5.5 Habitat Easements 74
9.2 Ground Inspections 74
9.2.1 Pre-Ground Inspection Requirements 74
9.2.2 Ground Investigation 75

9.3 Easement Tracking 77
Chapter 10: Compliance Contacts 79
10.1 Pre-contact Preparation 79
10.2 Landowner Contact 80
10.2.1 Interview Phase 80
10.2.2 Compliance Requirements 82
10.2.3 Post-interview Procedures 85
10.2.4 Compliance Check 86
10.2.5 Assume Every Case Will Go to Court 87
Chapter 11: Mapping Procedures for Wetland Easements 88
11.1 Establishing Policies, Guidelines, and Procedures 88
11.1.1 Service Requirements 88
11.1.2 Fluctuating Water Levels 89
11.1.3 Mapping Issues 89
11.2 Specific Mapping Instructions 90
11.3 Mapping Easement Wetlands Instructions 95
11.4 Revising Easement Maps that have been Finalized and Distributed 99
Chapter 12: Prosecution 100
12.1 General Discussion 100
12.2 Determining Prosecutable Violations and Issuing Violation Notices 100
12.2.1 Drainage Violations 101
12.2.2 Burning Violations 101
12.2.3 Fill and Level Violations 102
12.2.4 Sheet Water 102
12.2.5 Pumping 102
12.2.6 Enlargements and “Topping Off” of Wetlands 102
12.2.6.1 Pre-1976 Easements 103
12.2.6.2 Post-1976 Easements 103
12.2.7 Co-owned Wetlands 104
12.2.8 Unauthorized Maintenance of Non-DFM Ditches 104
12.2.9 Farming/Breaking/Cultivation Violations 105
12.2.9.1 FSA Easements 105
12.2.9.2 Habitat Easements 106
12.2.9.3 Wetland Easements 106
12.2.10 Haying Violations 107
12.2.10.1 FSA Easements 107
12.2.10.2 Habitat Easements 107
12.2.11 Seed Harvest 108
12.2.11.1 FSA Easements 108
12.2.11.2 Habitat Easements 108
12.2.12 Other Grassland Altering Practices 108
12.2.13 Other Violations 108
12.3 Easement File Review Preparation 110
12.4 Responsibilities of the Project Leaders and the RLEZO 112
12.5 General Case Brief Preparation 114
12.6 Wetland Easement Case Briefs 116
12.7 U.S. Department of Justice Acceptance of Easement Case 117
12.8 Other Legal Aspects 118
12.8.1 General Definitions 118
12.8.2 Easement Authority 119
12.8.3 Applicable Easement Enforcement Authorities 120
12.8.4 Burden of Proof (Criminal) 120
12.8.5 Burden of Proof (Civil) 120
12.8.6 Statute of Limitations (Civil and Criminal) 120
Chapter 13: Relevant Court Decisions 122
13.1 General Discussion (Historical) 122

13.2 Federal Magistrate Decisions 122
13.2.1 United States v. Earl P. Morehouse [CIV No. 86-1034, U.S.D.C., D. S.D. (1986)] 122
13.2.2 United States v. Myron D. Lhotka [CR No. 4-84-116 U.S.D.C. D. Minn (1985)] 123
13.2.3 United States v. Alvin Peterson, [Case No. 2:08-mj-16 (2008), U.S. Dist. Court, Dist. Of ND] 123
13.2.4 United States v. Kurt A. Skinnemoen [CR No. 03-268 U.S.D.C.: D. Minn (2004)] 124
13.3 Federal District Court Decisions 124
13.3.1 United States v. Jerome J. Schoenborn [CIV No. 3-84-1662 U.S.D.C.: D. Minn (1986)] 124
13.3.2 United States v. Vesterso et al. [CR No. 2-86-1 U.S.D.C.: D. N.D. (1986)] 125
13.3.3 United States v. Conrad Rostvet [Civil No. A2-01-007, U.S.D.C.: D.N.D.-NE Div. (2001)] 126
13.4 Appellate Court Decisions 126
13.4.1 United States v. Albrecht [496 F.2d 906 (1974)] [CIV No. 4758, D. North Dakota, C.A. 8, No.73-1814] 126
13.4.2 Werner et. al. v. U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife [581 F.2d 168 (1978)] (No. 77-1958 8th Cir. Ct.) 127
13.4.3 United States v. Seest [631 F2d 107 (1980)] (No. 80-1348 8th Cir. Ct.) 127
13.4.4 United States v. Welte [696 F.2d 999 (1982)] (No. 82-1340 8th Cir. Ct.) 128
13.4.5 United States v. Kerry Johansen, 93 F.3d 459 (8th Cir. 1996) 128
13.4.6 United States v. Alvin Peterson [2:04-cr-102 (2005)][05-4248(8th Circuit)] 129
13.4.7 United States Appellate Court, v. Alvin Peterson (CR No. 10-1577- 8th Circuit) 130
13.5 U.S. Supreme Court Decisions 130
13.5.1 North Dakota v. United States [U.S.. 1983 103 S. CT. 1095] 130
13.6 Additional Easement Court Cases Involving Other Agencies 131
13.6.1 United States (NRCS) v. Arthur Polk (Case No. 08-CR-128, District of Wisconsin 2008) 131
13.6.2 United States (Forest Service) v. Edward Higley (Civil No. 92-04448-N-HLR, District Court of Idaho 1994) 133
Exhibits 134

Chapter 1: Purpose, Need, and Background

The *U.S. Fish and Wildlife Service, Midwest Region Easements Manual* provides policies, establishes procedures, and sets guidelines to administer easement interests. It is used primarily by National Wildlife Refuge managers, Wetland Management District managers, and complex managers in the Midwest Region (Region 3)—collectively referred to in this manual as "project leaders." The manual's administrative and enforcement procedures are mandatory. They are effective immediately and are considered a minimum requirement.

1.1 Purpose and Need

At the beginning of the Small Wetlands Acquisition Program (SWAP) over 50 years ago, the U.S. Fish and Wildlife Service (FWS, Service) believed that easements would require little or no maintenance or enforcement efforts. It soon became apparent that in order to protect the Government's interest in these easements, a more systematic approach was necessary for easement administration and enforcement, and a number of manuals were developed to help guide project leaders with this responsibility.

The *U.S. Fish and Wildlife Service, Midwest Region Easements Manual* replaces:

- *2005 Region 3/Region 6 Administrative and Enforcement Procedures for FWS Easements,*
- *Administrative and Enforcement Procedures for Waterfowl Management Easements for Region 3* (1980,revised in 1982)*,*
- *Perpetual Habitat Easements Administrative and Enforcement Guidelines and Procedures Manual for Region 3,*
- the non-formalized guidance issued for administration of Farm Service Agency (FSA) easements and deed-restricted properties, and
- various policy letters and memos issued by each region addressing specific easement issues.

The easements manual is intended to standardize how Service personnel collect and preserve information and make decisions in order to effectively enforce the terms and conditions of easements. It aims to ensure consistent application among field stations and states.

Policies set the direction, and procedures provide the step-by-step details of what to do, when, and how. Guidelines allow individual project leaders flexibility to adapt the procedures to unique situations. Some activities are expressly prohibited, others are authorized under specific circumstances. Where a requested activity is authorized, that request must be honored within the limits of the guidelines, unless the project leader can articulate why the request should be denied.

The *U.S. Fish and Wildlife Service, Midwest Region Easements Manual* is a "living document" and will be revised as new information or issues arise. An appointed Easement Manual Committee will meet as needed to consider changes to the manual. Changes to the manual recommended by the Easement Manual Committees will be published under the signature of the Regional Chief of National Wildlife Refuge System.

1.2 Background

The North American Prairie once formed the largest expanse of grassland in the world, and the glaciated northern part of the North American Prairie—the Prairie Pothole Region—was covered with millions of small, shallow wetlands. Wetland densities in this area originally averaged an astonishing 83 per square mile. These wetlands, and their associated grassland habitats, are vitally important to hundreds of migratory bird species for breeding and migration. In any given year, up to 50 percent of North America's waterfowl production takes place here.

Unfortunately, the Prairie Pothole Region has suffered severe habitat loss. North Dakota has only 50 percent of its wetlands remaining, Minnesota only 10 percent, and Iowa less than 2 percent. Upland degradation is even more severe, and Northern Tallgrass Prairie is some of the most threatened habitat in all of North America.

The conversion and destruction of habitat within the Prairie Pothole Region has long been recognized as a major factor in the decline of waterfowl populations. As early as 1938 the *Yearbook of Agriculture* drew attention to the loss of waterfowl by stating, "Drainage of the most productive waterfowl breeding places in the Northern Great Plains was one of the prime factors in reducing the continental populations of waterfowl."

Wetland drainage and conversion of grassland acres continued to take their toll, and by the late 1950's the need to act and the need to preserve some of what was left were overwhelmingly apparent. The SWAP was authorized by Congress in 1958 by an amendment to the Migratory Bird Hunting and Conservation Stamp Act. The purpose of the program was to ensure long-term protection of breeding habitat for waterfowl and other migratory bird species located primarily within the Prairie Pothole Region of North America.

While the program was initiated in the 1950's, the legislative foundation upon which the program was built dates back over 75 years. Prior to 1929, the United States entered into treaties and enacted legislation to protect migratory birds by limiting the numbers and methods of taking migratory birds and providing for the enforcement of the provisions of the treaties and legislation. The Migratory Bird Conservation Act of 1929 was the first piece of legislation that gave what is now the U.S. Fish and Wildlife Service the ability to acquire land without a special act from Congress. The Act also established a Migratory Bird Conservation Commission to approve areas recommended by the Secretary of the Interior for acquisition. The Migratory Bird Conservation Act authorized the acquisition of inviolate migratory bird sanctuaries and was later amended in November 1978 to authorize the acquisition of land for purposes other than inviolate sanctuaries. This Act was the legislative precursor to the Migratory Bird Hunting and Conservation Stamp Act of 1934, better known as the "Duck Stamp Act."

The Duck Stamp Act was a significant piece of legislation for the Service's early acquisition efforts, because it provided a means to generate funds for land acquisition by requiring each waterfowl hunter 16 years of age or older to possess a valid federal hunting stamp. The receipts from the sale of the federal hunting stamps, now called "Federal Duck Stamps," were deposited into a special Treasury Department account known as the "Migratory Bird Conservation Fund" and were used to acquire migratory bird sanctuaries, which are now referred to as national wildlife refuges. On August 1, 1958, the Duck Stamp Act was amended by the passage of Public Law 85-585, which provided for the acquisition of Waterfowl Production Areas (WPAs) and Easements for Waterfowl Management Rights, which are also known as "wetland easements."

On October 4, 1961 the Wetlands Loan Act (P.L. 87-383) was passed. This legislation allowed the Service to develop a significant migratory waterfowl habitat protection effort known as the Small Wetlands Acquisition Program (SWAP). The Wetlands Loan Act authorized the advance of funds against future revenues from the sale of duck stamps as a means of accelerating the acquisition of migratory waterfowl habitat. This act also contained the stipulation that "no land shall be acquired with moneys from the Migratory Bird Conservation Fund unless the acquisition has been approved by the governor of the state or appropriate state agency." Appropriations under the Wetlands Loan Act were to be merged with duck stamp receipts for a 15-year period beginning in 1962, and the total appropriations were not to exceed $105 million. Public Law 94-215, passed February 18, 1976, increased the loan ceiling to $200 million and extended the loan period to September 30, 1983. Two other extensions were granted in 1983 and 1984 that moved the repayment of the loan back to September 30, 1986. In November 1986, Public Law 99-645 forgave the advances made to the Migratory Bird Conservation Fund through the Wetlands Loan Act.

Acquisition of the first WPA took place on January 19, 1959 when the McCarlson WPA parcel was purchased in Day County, South Dakota. After the Wetlands Loan Act was passed, approvals were sought by the Service for fee and easement acquisition from states within the Prairie Pothole Region with varying degrees of success. Service acquisitions varied from state to state and ranged from statewide blanket approval of easements to case-by-case approvals for both fee and easement acquisitions. Eventually the Service obtained authority to acquire WPAs and/or wetland easements in 198 counties within the Prairie Pothole Region.

From 1958 through 1962, all wetland easements acquired by the Service were for a term of 20 years. Since that time the perpetual easement has become the standard wetland easement offered by the Service. In 1991, the Service began to purchase perpetual habitat easements in consort with existing or new wetland easements.

WMDs were created in 1962 as the SWAP accelerated due to the appropriations made available through the Wetlands Loan Act. As of 2012, 37 WMDs throughout the Prairie Pothole Region administer and manage fee title WPAs and wetland and habitat easements acquired as part of the SWAP. Approximately 95 percent of these fee and easement lands are located within the prairie pothole states of Minnesota, Montana, North Dakota, and South Dakota.

In Region 3 the following easements may be located within a National Wildlife Refuge (NWR, refuge) or Wetland Management District (WMD):

- FSA
- Habitat
- Wetland

Chapter 2: Acquisition of Easement Properties

2.1 Criteria for Acquisition

Over the course of the Small Wetlands Acquisition Program (SWAP), different criteria have been used to guide the acquisition process. However, the quality of the habitat has always been the major criterion. The best waterfowl breeding habitat in the Prairie Pothole Region includes wetland complexes and quality upland nesting habitat in close proximity to one another. Generally, the higher the number of wetlands, the higher the number of waterfowl breeding pairs; and the larger the tract of wetlands and quality upland cover, the better the nest success. These two elements—large numbers of wetlands and large tracts of quality upland habitat—are the cornerstones of the habitat preservation program. Easements represent a means to preserve this habitat.

Preserving migratory bird breeding habitat within the Upper Great Plains has always been a partnership effort with Realty personnel acquiring the easement and Wetland Management District (WMD) personnel administering and enforcing the easements after acquisition. It is important for project leaders and Realty specialists to work together to ensure that only quality habitats are purchased as easements.

For wetland easements, examples of areas that do not qualify for the program are: sewage lagoons, stock dams, fish ponds, reservoirs, intermittent streams, coulees, levees, man-made wetlands and other artificial impoundments. Also, careful consideration is necessary before purchasing wetland easements in areas that likely are problematic in the future. Examples include wetland basins within housing developments, industrial parks, near airports, or where zoning ordinances foretell of imminent development.

For habitat easements, active farm residences (i.e., houses, outbuildings, feedlots, etc.) and facilities should be excluded from the easement. Active gravel pits, with little to no habitat value, should be excluded. However, remnant pits, especially when their boundary is ill-defined, might be included in the easement offer.

The delineation process is found in the *U.S. Fish and Wildlife Service Manual,* “341 FW 6, Minimally Restrictive Conservation Easement Acquisition”*;* 6.8E*,* The Wetland Management District (WMD) Managers (http://www.fws.gov/policy/341fw6.html).

2.2 The Acquisition Process

The acquisition process is as follows:

1. WMD personnel evaluate the property proposed for easement.
2. After the property is determined to be eligible for the type of easement to be acquired, the delineation is passed on to the appropriate refuge supervisor for approval.
3. The final approved delineation package is forwarded to the supervisory Realty specialist at the Fergus Falls Wetland Acquisition Office (WAO), or to the Region 3 Division of Realty, as appropriate.
4. Once received in the Region 3 Realty office, the delineation is logged into the Region 3 land acquisition tracking system. The delineation is then assigned to a U.S. Fish and Wildlife Service (FWS, Service) Realty specialist to begin the acquisition process.

5. The Service Realty specialist contacts the landowner to discuss the easement program and to make arrangements to inspect the property for contaminants and finalize the legal description to be included in the easement area.

   Note that the term "landowner" is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

6. Afterward, the Service Realty specialist visits the county courthouse to:

   a. conduct an abstract of the title to ascertain ownership of the property being proposed for easement;

   b. determine if the property taxes are current or if unpaid taxes pose a lien on the property;

   c. determine if a court has ordered a judgment against the landowner that involves the property proposed for easement; and,

   d. determine if a lien has been filed against the property proposed for easement.

   Service policy *341 FW 6, Minimally Restrictive Conservation Easement Acquisition* (http://www.fws.gov/policy/341fw6.html) has authorized the use of the Adjusted Assessed Land Value (AALV) administrative calculation. The AALV replaces the easement appraisal process for determining both wetland and habitat easement payments. The AALV administrative calculation is also employed when easement rights are donated or exchanged.

7. Once payment for the easement rights has been determined, an offer is either sent by mail or hand-delivered directly to the landowner. The offer consists of:

   - a formal letter with a copy of the easement document,
   - Exhibit A maps, and
   - legal description of the easement area, the rights being acquired, and the amount being offered for the easement rights.

   In addition, a separate document required by Public Law 91-646, known as a "Statement of Just Compensation," is included with the offer and contains similar information as the formal offer letter.

8. If the landowner accepts the offer, the Service Realty specialist prepares the easement conveyance document, and the landowner(s) sign it.

9. The easement file is prepared, title insurance is obtained from the title company, and the easement file is processed by the Region 3 Division of Realty.

   a. In the State of Minnesota, county commissioner certification and Land Exchange Board approval are required and must be obtained prior to transferring the easement file to the Region 3 office.

10. The Region 3 Division of Realty prepares additional documents for the easement file and sends the file to the U.S. Department of the Interior's Office of the Solicitor (Solicitor) for a preliminary opinion of title.

11. The Service Realty specialist remedies any objections to title found by the Solicitor so that valid title vests in the United States.

12. Objections to title are listed on a “Certificate as to Rights-of-Way, Easements and Reservations,” commonly referred to as the CROW.
13. The project leader and the Region 3 Chief, Division of Realty review the CROW. If they determine that the objections do not interfere with the use of the property, then the Realty chief approves the CROW and accepts the easement on behalf of the Secretary of the Interior.
14. After the easement has been accepted by the United States:
    a. the landowner receives written notice;
    b. the check for consideration is ordered;
    c. arrangements are made for the closing;
    d. title insurance policy is ordered;
    e. original document(s) are recorded with the County;
    f. payment is made to the landowner;
    g. final title opinion is requested from the Solicitor;
    h. digitized final easement file is created; and,
    i. easement documents are filed in the appropriate office.
15. The original easement and Exhibit A maps are sent to the appropriate WMD office.
16. The WAO maintains a copy of the easement document and Exhibit A maps in its files. In addition, the WAO retains a copy of the easement acreage summary sheet, appraisal or easement calculation sheet, and acceptance letter.

2.3 Official Easement Records

The Region 3 Division of Realty is responsible for the maintenance of all real property records within the Service, and is also responsible for land status records. Although field stations (Realty and management offices) may have original and duplicate files, the official land records (i.e., *signed* documents) are maintained by Realty at the Region 3 office level.

These files and records consist of the following:

- statistical record for each parcel of land acquired or interest acquired therein
- status map for each parcel
- surveyors report
- appraisal report
- original easement file for each parcel

The process for maintaining the file is as follows:

1. Once recorded on microfiche, forward the original easement file to the appropriate WMD office. The original easement file includes information such as:
    - type of real estate interest maintained by the Service (fee, easement, etc.)

- name of the vendor
- date of the transfer
- acres
- dollars
- legal description
- county recording information, etc.

2. Prior to transferring the easement file to the field, the Region 3 office updates the Service's official Land Record System (LRS) with the new tract information. In Region 3, a backup card system is also maintained for identical land status records. Cards and maps are stored in the Region 3 Realty office as part of the official LRS; a duplicate LRS is located at Service headquarters. Original easement files are returned to the WMD for field use, safekeeping, and storage.

IMPORTANT: While the WAO and the Region 3 office maintain copies and microfiche of the easement files, the records that are transferred to the WMD contain many original documents. As such, it is critical that the WMD maintain and protect the official easement files.

Chapter 3: Administration of Rights-of-Way on Easement Properties

An important part of administering U.S. Fish and Wildlife Service (FWS, Service) easement properties is the process of evaluating and acting upon requests for rights-of-way (ROW). These can take the form of highway improvement projects, buried pipelines, utility crossings, and rural water system developments. While it is important to work with the requester to develop ROW applications, particularly for non-invasive or minimal impact-type projects, it is also expected that the ROW requesters will do their part by trying to avoid impacting Service lands or interests to the extent possible and reasonable.

3.1 50 CFR 29 for Rights-of-Way

The procedures governing formal ROWs with regard to Service land interests are discussed in 50 CFR 29 (Title 50 – Wildlife and Fisheries, Code of Federal Regulations, Part 29—Land Use Management; http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-part29.pdf). Section 29.1 of 50 CFR 2 describes the need for economic uses to meet a higher standard of compatibility than other proposed uses. This new standard is not intended to cover the uses associated with ROWs. Therefore, the general standard of not "materially interfering with or detracting from" the purposes or acquired rights apply when evaluating ROW requests rather than the need to "contribute to" the refuge area.

After the request is received from the applicant, along with project maps and a description of what work is actually required, the project leader evaluates the proposal in terms of alternatives, reasonableness, and potential impacts to Service interests. Once the project's potential impact to Service interests has been determined, the project leader should use the following ROW Evaluation Guidelines.

3.2 ROW Evaluation Guidelines

3.2.1 Requested Work within Existing ROWs

If the requested work can be accomplished within the confines and context of an existing ROW (statutory, reserved, or prior-granted) and no Service interests are impacted, the Service has no jurisdiction to regulate the activity so Compatibility Determinations (CD), Environmental Assessments (EA), ROW permits, and station-generated permits are not needed.

Similarly, If a ROW expansion goes beyond the existing ROW, but no Service interests are impacted (i.e., a ROW expands into a wetland easement property, but impacts only uplands with no involvement of protected wetlands) the Service has no jurisdiction to regulate the activity.*

In both of these situations however, project leaders should communicate Service concerns about potential damages to the holders of the ROW or their contractors in writing and if necessary, inspect the easement during their activities. Common examples of situations where ROW work could impact easement areas include road projects that affect wetlands through changes in culvert elevations or sedimentation and chemical applications under power lines that damage protected upland vegetation via drift or runoff.

**NOTE: This represents a change of interpretation of 50 CFR 29.21-1(b) (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-sec29-21.pdf),*

which states, in summary, that the Regional Director may respond, via letter, to applications for ROW across lands in which the Service only owns an easement interest, where the ROW will not adversely affect the United States' interest. The change of interpretation centers on the definition of "land." Previously, the Service interpreted "land" to be the entire wetland easement tract as described on the contract (e.g., the SW1/4 of section 23). However, the Service now defines "land" as those interests the Service has protected. In the case of a wetland easement, the Service owns the rights to drain, burn, fill, or level certain wetland basins. If a proposed ROW crosses an easement tract, but does not cross an "interest" (protected basin), then the Service lacks jurisdiction to regulate the use.

Easement-protected wetlands within existing ROWs, whether statutory or not, represent an area where project leaders need to evaluate the potential impacts as a result of a proposed maintenance or improvement project. Easements are acquired "subject to valid existing and/or statutory" ROW. If protected wetlands are impacted within ROWs established prior to the Service's easement interest, and for purposes specifically authorized by the ROW, then the Service has no jurisdiction. Project leaders should be satisfied that projects proposed within existing ROWs, which may impact protected wetlands, are legitimate and not part of a guise or ruse just to drain wetlands that may occur within a ROW.

If federal monies are involved with the road project, including most county road projects, then additional requirements may apply, such as:

- compliance with Executive Order 11990, Protection of Wetlands, or
- Federal Highway Administration Section 4(f) criteria.

These issues are not related to the provisions of the easement, however.

Wetland impacts that may extend beyond the existing or statutory ROW are a different matter. The Service has the right to enforce easement-protected wetlands outside the existing ROW. Proposals that may affect wetlands, or portions thereof, outside an existing ROW must be evaluated by the Public Service/Government/Corporate section (blue-colored blocks) of the Easement Request Flowchart located in Chapter 8: Uses of Easement Properties and Permitted and Prohibited Activities.

If the requested work cannot be accomplished within the confines or boundaries of an existing ROW, then the project must be evaluated using the Easement Request Flowchart and guidelines found in chapter 4, 4.4 Exchange Request Format.

ROW requests may involve more than one easement because of the linear distance associated with highway improvement projects or rural water system installations. Each easement must be evaluated for potential impacts when evaluating compatibility, but only one CD is required to evaluate the project in total. The proposal is evaluated under the Public Service/ Corporate/ Governmental (blue) part of the Easement Request Flowchart. The proposal must be determined to be appropriate and compatible; otherwise, an exchange of interests is necessary. If impacts are only temporary, then project leaders have other options as discussed below.

Easement-protected uplands within existing or statutory ROWs are generally not an issue when evaluating proposals. However, as is the case with protected wetlands, the use proposed within an existing ROW must be the use authorized by the ROW. The one exception to this is stated in a letter issued by the U.S. Department of the Interior's Office of the Solicitor (Exhibit 3-1:

March 1, 1994 Solicitor Opinion, "Public Utilities Rights of Way – Minnesota") that reinforces the state statutory authority that allows public utilities to use ROWs purchased for transportation in Minnesota and Wisconsin.

3.2.2 Minor Disturbance-Type Projects

Exhibit 3-2: ROW Help Sheet provides examples of situations where an Easement Permit can be issued by the local National Wildlife Refuge (NWR, refuge) or Wetland Management District (WMD) for work within an existing ROW. If Service interests will likely be impacted a CD will be required. Midwest Region (Region 3) WMDs have a programmatic CD for this situation, which may apply (this use is described in more detail in chapter 4, 4.4 Exchange Request Format). If the discussion in the programmatic CD does not fit the situation exactly, then an individual CD may be required.

3.2.3 Minor Expansion or Realignments of Existing ROWs

Minor expansion or realignments of existing ROW is authorized in accordance with the policies described in *U.S. Fish and Wildlife Service Manual,* "603 FW 2, Compatibility"; 2.11 D, Existing rights-of-way (http://www.fws.gov/policy/603fw2.html). Project leaders may use this option to authorize projects if the appropriate conditions apply.

If the ROW request falls under this category but unavoidable impacts occur to Service lands or interests, then project leaders are permitted to use mitigation to offset these impacts provided that:

- the project design "adopts appropriate measures to avoid resource impacts and includes provisions to ensure no net loss of habitat quality and quantity,"
- the mitigation area(s) are permanently protected under the National Wildlife Refuge System, and
- all mitigation/restoration work is completed prior to any title transfer or easement recording.

A CD is required and must describe the mitigation and indicate that the project has been found to be compatible, only with the replacement habitat in place and according to the stipulations specified in the CD.

For future maintenance of the newly expanded or realigned ROW, a formal ROW permit should be completed.

3.2.4 Formal Rights-of-Way Permit

If a formal ROW permit is necessary, then Exhibit 3-3: Checklist for ROW Permits can be used to help project leaders gather the necessary information for the Region 3 Division of Realty to process the application. Project leaders must complete a CD and ensure the National Environmental Policy Act (NEPA) and cultural resource requirements are met. The discussions in Chapter 5: Refuge Compatibility and How it Relates to Easement Interests and Other Regulatory Requirements on NEPA and cultural resources should be reviewed.

3.3 Exchange Option

Each ROW request is handled individually, on its own merit. While exchanges involving ROWs are rare, they can be considered, but project leaders should consult with their supervisors for specific guidance.

3.4 Cultural Resource Issues Associated with Rights-of-Way

Proposed activities associated with ROWs need to be reviewed under laws protecting cultural resources. Under the National Historic Preservation Act of 1966, projects on federal lands, with federal funding, or those permitted, licensed, or approved by a federal agency are subject to the provisions of the Act. Unless a programmatic agreement has been implemented with the State Historic Preservation Officer (SHPO)/Tribal Historic Preservation Officer (THPO), and the Advisory Council on Historic Preservation (ACHP), all ROW projects need to be reviewed by the appropriate Service Cultural Resources staff.

Many projects that are under the purview of other federal agencies have cultural resource surveys already completed as part of the project compliance needs. These include projects such as highway improvements, rural water system installations, utility line installations, etc. Project leaders can obtain the cultural resource reports from the ROW applicant and submit the reports along with any compliance documentation to the appropriate Region 3 Cultural Resource staff for review. Any time federal funding is associated with a ROW project, cultural resource issues should be addressed.

Proposed projects like a township road improvement that may exceed the existing ROW, although uncommon, do occur, and if they require a formal ROW permit, cultural resource issues still need to be addressed. If project leaders encounter a situation like this, they need to discuss the project with their appropriate Cultural Resource staff. The Cultural Resource staff consults with the SHPO, THPO, and ACHP.

3.5 Cultural Resource Issues Associated with Divested Property as a Result of an Exchange

Easement exchanges are not usually considered “undertakings” under federal cultural resource laws. If the protection of cultural resources is a stipulation of an easement, then an easement exchange would be subject to cultural resource laws. Several years ago the Service exchanged fee land with a private landowner. To avoid major mitigation costs for archaeological resources on the divested land, a habitat easement was instituted. An easement exchange of that parcel would be an “undertaking” under the National Historic Preservation Act of 1966.

If uncertain about cultural resource issues associated with ROWs and/or exchanges, contact your Region 3 Cultural Resources staff for guidance.

There are additional administrative requirements associated with property divestiture or interest relinquishment, which are addressed elsewhere in this manual (see chapter 4, 4.5 Property or Interest Divestiture Requirements).

Chapter 4: Easement Exchange Policy, Guidelines, and Format

The Midwest Region (Region 3) discourages altering easements by amendments or through an exchange except when it has been clearly shown to benefit the National Wildlife Refuge System (NWRS, Refuge System). Then, the U.S. Fish and Wildlife Service (FWS, Service) is authorized to effect such an agreement subject to certain restrictions. Wetland and habitat easements can be exchanged for fee title, wetland easements, or other habitat easements based on equal monetary value. Region 3 project leaders wishing to consider an exchange should contact their supervisors and the Region 3 Division of Realty for additional information.

The following policies and guidelines may be helpful for project leaders involved with exchanging easement interests.

4.1 Service Policy

Service policy governing property or property interest exchanges is detailed in *U.S. Fish and Wildlife Service Manual,* "342 FW 5, Non-Purchase Acquisition"; 5.7, Exchange (http://www.fws.gov/policy/342fw5.html). Exchange authorities are listed in *U.S. Fish and Wildlife Service Manual,* "340 FW 1, Policies, Authorities, and Responsibilities" (http://www.fws.gov/policy/340fw1.html).

Regional Directors have the authority to exchange easement interests of any size or value acquired as part of the Waterfowl Production Area (WPA) program, subject to the limitations discussed below. WPA program easement interests are those acquired, by purchase or donation, under the authority of the Migratory Bird Hunting and Conservation Stamp Act, as amended.

All other easement interests, such as those acquired with Land and Water Conservation funds or received from another agency—such as the U.S. Department of Agriculture and Farm Service Agency (FSA; previously known as Farm and Home Administration [FmHA])—are subject to requirements and restrictions set forth in the Department of the Interior, Environment, and Related Agencies Appropriations Act; reprogramming guidelines, which are subject to change by Congress. Changes could occur with every new Appropriations Act. The Act, refuge supervisor, and Region 3 Realty office are all sources that should be consulted to ensure current guidance is followed.

4.2 Region 3 Policy

Region 3 treats all easements, including FSA easements, as part of the Refuge System. Exchanges follow guidance found in existing authorities. Managers and project leaders seeking to exchange any easement should discuss each project first with their refuge supervisor. If agreement is reached to move ahead with an exchange, technical guidance should be sought from the Region 3 Realty office.

Wetlands impacted by a requester must be replaced with similar wetlands. The restored replacement wetlands must then be encumbered with a Service wetland easement. Upon completion of the restoration of the replacement wetlands and transfer of the easement interests to the Service, the project leader issues the requester a permit to conduct the requested activity that initiated the replacement of wetland values.

Grasslands impacted by a requester must be planted back to a seed mixture similar or *better in quality* to what existed prior to the disturbance.

Requested activities resulting in the alteration or destruction of native prairie should be avoided, with all available options to avoid impacts explored. Work with the requester to find alternative solutions to their needs that do not result in impacts to native prairie; impacts to native prairie should be a last resort.

4.3 Exchange Request Submission Guidelines

To facilitate the administrative process of performing the exchange functions within the Region 3 Division of Realty, it is necessary to submit requests for exchange using the following guidelines.

- **Number of Requesters**—If there is one requester such as a landowner, a corporation, or a government entity, submit one request for exchange. If there are two requesters (two different landowners, corporations, etc.), submit a separate exchange request for each requester. Also include legible maps to illustrate the area being considered for an exchange.
- **Location of the Easement Interests to be Divested**—Identify the state, county or counties, and tract number(s) in which the easement interests to be divested are located. A request for exchange involving more than one county should have the easement interests impacted organized by the number of easement acres impacted for each tract in each county.
- **Type of Easement Interests to be Divested**—Wetland easement interests impacted should be quantified on a wetland acre basis to the nearest whole acre and identified by tract number and county. Habitat easement interests should be quantified on an acre basis to the nearest whole acre and identified by tract number and county.

4.4 Exchange Request Format

The request for exchange should be submitted in the form of a memorandum to the appropriate refuge supervisor from the project leader of the National Wildlife Refuge or Wetland Management District. The subject title of the memorandum should be “Request for Exchange of Wetland/Habitat Easement(s), Tract Number(s), County, State.” The request should always include the signature routing slip entitled, “National Wildlife Refuge System Boundary Addition and Land Exchange Approval.”

Each request should include the following information in a narrative format:

1. Briefly describe the situation that has led to the request for exchange. Include as part of this section a brief “biological analysis” of the property to be relinquished to evaluate any special values to the property which would interfere with the reason to propose the exchange.
2. Explain why the situation meets the criteria for an exchange.
3. Explain how the exchange benefits the Service.
4. Briefly describe the request for exchange.

5. For the party with whom the Service is exchanging interests, describe:
    - interests to be divested
    - state, county, tract number, and number of wetland acres to be divested
    - state, county, tract number, and number of grassland acres, tame or native, to be divested
6. For the interests to be acquired describe:
    - state, county, number of replacement wetland acres, existing or restored, to be acquired
    - state, county, number of replacement grassland acres, tame or native, to be acquired
7. On the last page of the memorandum, provide an approval signature line for the "Refuge Supervisor" and a concurrence signature line for the "Chief, Division of Realty, Region 3."
8. Attach copies of aerial photographs to the request for exchange.
    a. Delineate the wetland or habitat to be divested on a copy of the aerial photograph, and at the top of the aerial photograph identify the interest being divested as either "Wetland(s) to be Divested" or "Habitat to be Divested."
    b. Delineate the wetland or habitat to be acquired on a copy of the aerial photograph, and at the top of the aerial photograph identify the interest to be acquired as either "Wetland to be Acquired" or "Habitat to be Acquired."

4.5 Property or Interest Divestiture Requirements

The following paragraphs describe requirements associated with land or interest divestiture. It is a complex process that requires input from many levels of the Service and includes gaining concurrence through the Regional Director.

Before divesting any lands of the United States, compliance with the following is required:

- National Historic Preservation Act of 1966 (16 U.S.C. 470 et seq.)
- Archeological and Historic Preservation Act of 1974 (16 U.S.C. 469 et seq.)
- Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (94 Stat. 2767 et seq.)
- Resource Conservation and Recovery Act (98 Stat. 3221 et seq.)
- Executive Orders (EOs) 11988 (Floodplains Management) and 11990 (Protection of Wetlands)

Service policy is included in *U.S. Fish and Wildlife Service Manual,* "613 FW 1, Floodplain Management (EO 11988)" (http://www.fws.gov/policy/613fw1.html) and *U.S. Fish and Wildlife Service Manual,* "613 FW 2, Wetland Protection (EO11990)" (http://www.fws.gov/policy/613fw2.html). As to lands or interest in lands being conveyed out of United States ownership by exchange, the Regional Director must make a determination

whether or not the lands are within a floodplain or wetlands within the scope of EO 11988 and EO 11990. The conveyance of land identified as being restricted by either of these orders must contain appropriate restrictive language. Any restrictive language to be used in the deed must also be included in the exchange agreement. The exchange agreement in such cases cannot be accepted until the procedures for public notices have been completed. The lands exchanged are still protected by EO 11988 and EO11990. The new owner is responsible for complying with those Executive Orders—generally meaning avoid, minimize, and mitigate—in that priority order. The intent is to protect against a net loss of wetland and/or floodplain habitat, especially a net loss that could be viewed as having been facilitated by the Service.

4.6 Release of Easement Rights

Once accepted, easements become part of the Refuge System. The National Wildlife Refuge Administration Act of 1966, as amended, limits disposition of lands in the Refuge System. The Act states that no acquired lands or interest in lands, which are part of the Refuge System may be transferred or otherwise disposed of (except by exchange) unless the Secretary of the Interior determines, with the approval of the Migratory Bird Conservation Commission, that such lands or interest in lands is no longer needed for the purposes for which the Refuge System was established.

The Director's approval is required for the acquisition of lands or interests by exchange in accordance with *U.S. Fish and Wildlife Service Manual,* “341 FW 1, Policy and Responsibilities” (http://www.fws.gov/policy/341fw1.html). The Director's approval is also required for the disposal of lands or interests using a similar, or what might be considered, a "reverse acquisition process." Regional Directors may approve exchanges of 16.19 hectares (40 acres) or less of equal value. This may be on a case-by-case basis or on an overall project basis. In the case of the WPA program, the Regional Directors may approve exchanges.

Chapter 5: Refuge Compatibility and How it Relates to Easement Interests and Other Regulatory Requirements

5.1 Compatibility

Project leaders are often confronted with many issues and proposed projects including: right-of-way improvements, utility line crossings, rural water system installations, oil and gas exploration, and farm site expansions. New issues, such as wind energy developments, will require attention and continue to challenge project leaders. The purpose of this chapter is to provide guidance on how to make decisions as these issues arise, consistent with compatibility policy requirements (*U.S. Fish and Wildlife Service Manual,* "603 FW 2, Compatibility"; http://www.fws.gov/policy/603fw2.html).

The concept of "refuge compatibility" existed prior to1920, but the National Wildlife Refuge System Administration Act of 1966 brought compatibility issues to the forefront and required project leaders to consider and evaluate compatibility every time they were confronted with a proposed use of refuge lands, including U.S. Fish and Wildlife Service (FWS, Service) land interests known as "easements." The 1966 Act established that any use of a refuge must be compatible with the purposes for which the area was established.

The passage of the Refuge Improvement Act in 1997 strengthened compatibility directly but also resulted in a new Service policy on compatibility that was developed and finalized in 2000. This policy included some major changes for project leaders evaluating proposed uses.

In addition to refuge or unit purposes, the fulfillment of the mission of the National Wildlife Refuge System (Refuge System) was added as criteria under which to evaluate compatibility. The public is now afforded a due process provision and must be provided an opportunity to comment on compatibility issues. The most significant change is that compensatory mitigation can no longer be used to achieve compatibility, except under very limited circumstances, which are discussed later. Under the 1992 policy on compatibility, mitigation was authorized to offset long-term and unavoidable impacts to Service lands. This practice was used for many years to accommodate requested uses of Refuge System lands for projects such as highway improvements.

The 2000 policy on compatibility does not allow compensatory mitigation to make a proposed use compatible, except that a process of replacement of lost habitat values may be used for minor expansions or realignments of existing rights-of-way (ROWs). This is the only circumstance under which a form of mitigation can still be used to achieve compatibility (see Chapter 8: Uses of Easement Properties and Permitted and Prohibited Activities). All other proposed uses or requests for use on Refuge System lands must be compatible, with or without stipulations, or the use must be denied.

In general, compatibility applies anytime National Wildlife Refuge (NWR, refuge) or Wetland Management District (WMD) personnel are required to evaluate a proposed use of Refuge System land interest. Personnel should always ask: Does the Service have the jurisdiction or authority to permit or deny the proposed use? If the answer is Yes, then compatibility always applies.

The current compatibility determination (CD) format is depicted on the *Compatibility Determination Flowchart* (http://www.fws.gov/policy/e1603fw2.pdf). The CD form is a stepped, systematic process that must be completed to:

- come to a logical and justifiable conclusion on compatibility,
- document the decision, and
- obtain Midwest Region (Region 3) office concurrence with the decision on refuge compatibility.

The September 2000 *Refuge Compatibility* manual has more detail on how to complete a CD.

Under the 2000 Compatibility Policy (also referred to as compatibility policy), project leaders must now consider how a proposed use affects both the purposes for which the area was acquired and how a proposed use impacts the mission of the Refuge System. See the *2000 Refuge Compatibility Training Manual* and the *U.S. Fish and Wildlife Service Manual*, "603 FW 2, Compatibility" (http://www.fws.gov/policy/603fw2.html) for details.

For limited real property interests (e.g., wetland and habitat easements), the specific rights acquired by the Service also relate to compatibility. Specifically, the policy states: "Compatible use means a wildlife-dependent recreational use or any other use of a refuge that, in the sound professional judgment of the Director [NWR/WMD manager*], will not materially interfere with or detract from the fulfillment of the mission of the Refuge System or the purposes of the NWR." (The terms used in this section are defined in the Refuge Compatibility manual and in the 2000 Compatibility Policy).

* NOTE: The NWR/WMD manager recommends approval of a compatible use. There may be several reviewers after the NWR/WMD manager recommends approval, but approval rests with the Regional Refuge Chief. This authority has been delegated from the Service's Director, to the Regional Directors, and then to the Regional Refuge Chiefs.

Purposes and/or acquired rights for the various land categories administered by the Service may vary, but the mission of the Refuge System remains the same:

The mission of the System is to administer a national network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generations of Americans.

There are listed purposes (taken from the 1958 amendment to the Migratory Bird Hunting and Conservation Stamp Act of 1934) for Waterfowl Production Areas and easements. They are as follows:

. . . as Waterfowl Production Areas subject to . . . all of the provisions of such Act [Migratory Bird Conservation Act] ...except the inviolate sanctuary provisions. Migratory Bird Hunting and Conservation Stamp (16 U.S.C. 718(c));

. . . for any other management purpose, for migratory birds. Migratory Bird Conservation Act (16 U.S.C. 715d);

. . . for conservation purposes. Consolidated Farm and Rural Development Act (7 U.S.C. 2002).

These purposes are derived from the legislation authorizing the Small Wetlands Acquisition Program (SWAP). Following is an excerpt from the 1958 amendment to the Migratory Bird Hunting and Conservation Stamp Act of 1934:

> *"The Secretary of Interior is authorized to utilize funds made available under subsection (b) of this section for the purposes of such subsection, and such other funds as may be appropriated for the purposes of such subsection, or of this subsection, to acquire, or defray the expense incident to the acquisition by gift, devise, lease, purchase or exchange of, small wetland and pothole areas, interests therein, and rights of way to provide access thereto. Such small areas, to be designated as 'Waterfowl Production Areas' may be acquired without regard to the limitations and requirements of the Migratory Bird Conservation Act, but all the provisions of such Act which govern the administration and protection of lands acquired thereunder, except the inviolate sanctuary provisions of such Act, shall be applicable to areas acquired pursuant to this subsection."*

Equally important, however, when dealing with the limited real property interests administered by the Service, are the acquired rights or the land interests that contribute to the definition of the refuge or refuge area.

The above-cited purposes refer to "Waterfowl Production Areas" whether the Service interest is fee-title or easement, purchased under the authority of the Migratory Bird Conservation Act. However, to determine if Compatibility applies, one must evaluate whether the proposed use may affect a specific right acquired by the Service. Any proposed use of easements must be evaluated according to the criteria of not materially interfering with or detracting from the purposes but only to the extent that the proposed use affects an acquired interest. In essence then, what is being evaluated under compatibility for less-than-fee-title interests are potential impacts to the interests acquired with the easement. The *Compatibility Determination Flowchart*, (http://www.fws.gov/policy/e1603fw2.pdf) screens out potential issues that do not impact rights acquired by the Service early in the process. The discussion found in 50 CFR 25.44 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-sec25-44.pdf) is also very helpful for guidance on compatibility issues involving limited property interests, as well as when ROWs and other permits are required.

If there is a question about whether a proposed use is appropriate, the AU policy and form are used prior to completing a CD. As observed on the AU form (FWS 3-2319; http://www.fws.gov/forms/3-2319.pdf) and the Compatibility Determination flowchart, there are several areas where project leaders can deny proposed uses without completing a CD. One is if the proposed use conflicts with any field station goal or objective as found in an approved refuge management plan. Another is if the proposed use conflicts with other resource or management objectives. This provision allows project leaders to deny proposed uses, without having to complete a CD.

Project leaders must evaluate Associated Impact or Secondary Impact as part of the evaluation process. These are defined more fully in the *2000 Compatibility Policy* [Section 2.11 B(3)], and in chapter 12, 12.4, Responsibilities of the Project Leaders and the RLEZO of this manual.

When confronted with a proposed use of a Service-owned realty interest, project leaders must begin decisions with the following questions:

- Will the requested use or activity impact one of the interests acquired by the Service?
- Does the Service have the legal authority to permit or deny the proposed activity?

If the answers to both questions are yes, then the compatibility policy applies, and a CD must be made, unless the use is denied without the benefit of a CD.

Any authorized economic use of refuge areas (including easements) must benefit the refuge area and not just result in a "non-material" impact. This is discussed in the more recent editions (post-2001) of 50 CFR 29.1 http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-part29.pdf) . All easement documents also have a "subject to" section that provides exceptions to the acquired interests. These include statutory ROWs for road maintenance and/or reserved or excepted rights that pre-date the easement. The Government's interests, then, are acquired subject to outstanding rights, which may be held in third party. These reservations are generally not itemized on individual easements. Project leaders can find them in the servicing Realty office by reviewing the title insurance retained in the title file of each easement agreement (note that there are some easement agreements without title insurance). Proposed activities or uses that are authorized as a result of a reservation or an assignment in the easement agreement are not subject to compatibility requirements.

5.2 General NEPA Guidance

National Environmental Policy Act (NEPA) is not easily explained in a few paragraphs; the purpose of this section is to provide a few basic generalities that can help guide project leaders. Whenever you are in doubt or have questions, you should contact your Regional Environmental Coordinator (REC) and do so as early as possible. NEPA and other compliance requirements should be started early so adjustments, if necessary, can be made easily.

Three basic premises of NEPA are as follows:

1. NEPA is a planning process for environmentally sound decisions.
2. The Service must inform public officials and citizens prior to making decisions or taking action.
3. The Service must fully disclose its actions and impacts.

Premise two isn't always accomplished at the categorical exclusion level of action. Determining that an action should be categorically excluded still falls under the NEPA umbrella, and while a categorical exclusion may not have impacts to disclose, you should document that you have considered all potential impacts. In cases where there may be some doubt whether a categorical exclusion is appropriate, or if the action potentially could generate public controversy, include public disclosure and seek comment as appropriate. In all cases, you are to complete NEPA and other compliance prior to taking action.

When does NEPA apply?

NEPA applies to every action that the agency takes. However, the Service does not initiate NEPA documentation every time a routine action is performed (e.g., when a light switch is turned on). Most basic actions including operating an office and personnel actions are covered

under Department of Interior (DOI) categorical exclusions ("Proposed Revised Procedures," *DOI Department Manual,* 516 DM 2, Appendix 1; http://www.fws.gov/r9esnepa/DOINEPAProced/DOI-PROPOSED%20CX%27S.pdf). Typically, these are not documented.

Actions that are beyond these very routine duties, particularly where there is a possibility of having environmental impacts, should include documentation for NEPA and other appropriate compliance.

Actions that should be documented include, but are not limited to the following:

- granting permits for special uses
- granting ROWs
- creation and reclaiming of wetlands
- earth disturbing activities
- any activity that has a potential to impact a listed species or migratory birds, changes in public use, and most actions that would require a CD

In order to address repetitive actions, some field stations will combine a list of similar actions to cover a year's activities and cover them with a single categorical exclusion form.

What are the levels of NEPA compliance?

Basically, there are only three levels of NEPA review that are available to cover federal actions regardless of scale. They are:

- Categorical Exclusions
- Environmental Assessment (EA)
- Environmental Impact Statement (EIS)

Categorical Exclusions

An action may be categorically excluded if it is listed as a categorical exclusion in the departmental categorical exclusions (*DOI Department Manual, 516 DM 2, Appendix 1*; http://www.fws.gov/r9esnepa/DOINEPAProced/DOI-PROPOSED%20CX%27S.pdf). In order to utilize a categorical exclusion, the "Categorical Exclusions; Extraordinary Circumstances" (*DOI Department Manual,* 516 DM 2, Appendix 2; http://www.fws.gov/r9esnepa/DOINEPAProced/PROPOSED%20DOI%20EXTRAORDINARY.pdf) must be reviewed. If any of the extraordinary circumstances apply, a categorical exclusion cannot be used for a proposed action.

NOTE: Revised departmental categorical exclusions were published in the *Federal Register* on Monday, March 8, 2004. At the same time, the DOI Exceptions to Categorical Exclusions were revised, published, and renamed to Categorical Exclusions: Extraordinary Circumstances. The concept remains the same. If any of the extraordinary circumstances apply, a categorical exclusion cannot be used for a proposed action.

Service actions can qualify under either Service categorical exclusions or departmental categorical exclusions, although the former tends to be more applicable to our actions than the latter. Interpretation of categorical exclusions is not always straightforward, and consulting with the REC for confirmation is advised.

EAs and EIS

If a categorical exclusion does not apply to the proposed action, or if one of the departmental extraordinary circumstances negates the categorical exclusion, then an EA needs to be prepared. Most Service actions are covered by categorical exclusions, and the vast majority of Service actions are covered by either a categorical exclusion or an EA. For less than 1 percent of our actions, an EIS may be required. An EIS may be prepared and reviewed by an employee, cooperator, or contractor, but usually an EIS is prepared and reviewed by an interdisciplinary team.

A very few Service actions relating to the listing, de-listing, and developing recovery plans under the Endangered Species Act don't undergo NEPA review as a result of court decisions. If an action is already covered by an existing EA (e.g., the action was covered in the EA for the Comprehensive Conservation Plan [CCP]), it is still best to document that the action has already been addressed in an existing NEPA document. Contrary to popular belief, addressing a specific action in an EA doesn't convert the action to a categorical exclusion; it simply is an action that has already been addressed in an existing NEPA document.

How is compliance documented?

There is no formal standard for NEPA documentation. Written documentation is preferred and should be included in the field station files pertaining to the specific project.

NEPA documentation is usually kept with the project files and the official record. Depending on the action, copies may be in several locations and/or offices. Many activities requiring NEPA documentation are not written or reviewed by Region 3 Division of Realty personnel.

The *NEPA Compliance Checklist* (FWS Form 3-2185; http://www.fws.gov/forms/3-2185.pdf) is an excellent tool for documentation of categorical exclusions or actions covered by the existing EA. The *U.S. Fish and Wildlife Service Environmental Action Statement for Categorical Exclusion* (http://www.fws.gov/habitatconservation/EAS_revised_8_21_02_form.pdf) is used for approval of a new EA. Other sources available to project leaders include the Region 3 NEPA Coordinator and Service intranet sites. While there are specific forms for specific circumstances, field stations having something written in their files is far more important than which form was used.

There are other forms that are used by field stations to document compliance with categorical exclusions. In Region 3, the most recent version of a form, can be found under NEPA Section 7 and Related Forms at the NEPA Intranet website: https://intranet.fws.gov/region3/nepa/.

If the documentation needs Region 3 office approval, it must get the additional required signatures there, but documentation must be kept in the field station files. For projects that do not require Region 3 office approval , ensure the form is signed by the project leader and kept in the field station files. It should be noted that as per Director's Order No. 127, the NEPA Compliance Checklist requires the REC's signature for grants unless special provisions have been made. All EAs and EISs require a signature by the REC and ultimately from the Regional

Director. For many actions, an “Intra-Service Section 7 Biological Evaluation Form” is also required, and Section 106 of the National Historic Preservation Act [16 U.S.C. 470f] (archeological review) documentation may also be necessary.

The Service’s online version of the *NEPA Reference Handbook* http://www.fws.gov/r9esnepa/ provides useful information about NEPA and general managerial responsibilities when evaluating potential impacts associated with proposed uses.

Chapter 6: Easement Terms and Acquired Property Interest

This chapter includes details about the terms and acquired rights for:

- FSA Deed-Restricted Easements; Debt for Nature Contracts (Non-perpetual FSA)
- Habitat Easements
- Wetland Easements

These easement interests are held by the U.S. Fish and Wildlife Service (FWS, Service) and managed as part of the National Wildlife Refuge System (Refuge System). As such, specific interests acquired by the Service are subject to the same appropriate use (AU) policy and compatibility regulations that govern administration of lands in the Refuge System.

Determining the property interest acquired by the Service is the first step in easement administration and enforcement. All of these easements must list the specific interest acquired by the Service in a document recorded at the courthouse in the county where the easement is located. Because of the high degree of variability associated with the Region's conservation easements, when evaluating a compatibility issue or a potential violation associated with an easement, it is essential to first review the document to determine whether the potential violation or requested use may affect a property interest held by the Service.

6.1 FSA Deed-Restricted Easements; Debt for Nature Contracts (Non-perpetual FSA)

6.1.1 Introduction and Background:

Farm Service Agency (FSA) conservation easements are for the following:

- conservation purposes under the Consolidated Farm and Rural Development Act (7 U.S.C. 2002)
- additional purposes derived from the Memoranda of Understanding with various state FSA offices, and the 1985 Farm Bill (Food Security Act of 1985)

FSA conservation easements vary substantially across the Region. In a few instances, direct fee title transfers to the Service occurred, but generally, only certain rights were conveyed to the Service through deed restrictions granted by the FSA. FSA easements range from full coverage, where practically all land management rights are retained by the Service, to easements that only protected wetlands, grasslands, riparian areas, floodplains, or shelterbelts from certain activities.

FSA conservation easements are also known as Farmers Home Administration (FmHA) conservation easements, Rural Economic Community Development (RECD) easements, FSA Ag-credit easements, and U.S. Department of Agriculture (USDA) conservation easements, depending on the status of the USDA program responsible for these properties at the time they were in inventory.

6.1.2 Quitclaim Deed Reservations

All FSA inventory lands were sold with a quitclaim deed. The early “no drain, burn, fill, or level” type of restrictions were stated on the front of page of the quitclaim deed and referenced in an attached Exhibit A map showing the locations of the wetlands, and all wording was very similar to the Service wetland easement documents. As the complexity of the FSA conservation easement documents increased, the wording on the front page of the quitclaim deed was modified.

A copy of the recorded FSA conservation easement quitclaim deed and exhibits is recommended for the field station’s files. Make sure that the recorded documents include all pages and exhibits. On a few occasions, when the landowner purchased the property from FSA, the landowner may have been responsible for recording the quitclaim deed and easement document. If you discover that the easement document was not recorded with the deed, you need to contact your Realty specialist and zone refuge law enforcement officer regarding how to proceed.

Note that the term “landowner” is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

6.1.3 Service Responsibility

The Midwest Region (Region 3) Realty office can query their database and provide acres by county and tract. Each field station is responsible for verifying FSA conservation easement acres as recorded by the Region 3 Realty office. Easement acres should not be duplicated even though some areas may have overlapping easement protection. Any discrepancies should be corrected and reported to the Region 3 Realty office.

“Covenants by the Landowner” determine the level of protection on each FSA conservation easement. Some FSA conservation easements may have additional discretionary protection to protect such resources as native tree claims, native sod, or even grass that had been established on a highly erodible location. The key to managing and enforcing FSA conservation easements is to become fully aware of each individual easement and the covenants. FSA conservation easements are not as standardized in the level of protection as other Service conservation easements.

6.1.4 Surveys, Posting and Fencing

Surveys

All FSA conservation easements are posted and permanently marked with surface and subsurface monuments in the field. This posting and marking reflects the boundaries of the easement as described in the easement document and, if applicable, the Exhibit A map.

Posting

The Service field office responsible for managing the FSA conservation easement is also responsible for coordinating the posting and permanent marking of the easement boundaries as well as regular maintenance of these boundary markers. The procedure is as follows:

1. Drive surface markers, consisting of 1-inch diameter steel pipe and approximately 18 inches long, into the ground at each corner of the FSA conservation easement.
2. Ensure that the pipes are no more than 1 inch above the surface of the ground.
3. Bury subsurface magnetic markers immediately below the surface marker but not less than 18 inches below the surface of the ground.
4. Mark FSA conservation easements with irregular boundaries with metal surface and magnetic subsurface markers at a maximum of 1/10 mile intervals along the length of the irregular boundary.
5. Demarcate all corner points on easement boundaries with permanent corner posts.
    - The corner point demarcation shall consist of 6-foot to 8-foot steel posts and signs.
6. Place boundary signs within 3 feet of each corner to properly identify converging boundaries of the easement.
    - Between corner posts the recommended post placement is at maximum intervals of 1/10 of a mile.
    - Where easement boundaries correspond to permanent existing use lines, posting at ¼ mile intervals is sufficient.

An example of the sign used for boundary posting is shown as Exhibit 6-1: FSA Easement Boundary Sign. The dimensions of the sign are approximately 3-inch by 4 ½-inch. The signs can be obtained through the Region 3 Sign Coordinator.

Fencing

Rights conveyed to the Service by FSA conservation easements may include the construction and maintenance of fences in order to prevent grazing or other types of encroachment on the easement area. Landowners, however, can be permitted access to water within these areas when it is deemed necessary for stock watering. The Service is responsible for any expense involved for the construction and/or maintenance of such fences. All fences constructed should be designed, depending upon their intended usage, for individual easement requirements (i.e., the control of cattle or horses). Project leaders may also want to review state fencing laws. Adoption of state law requirements may help avoid a tort claim or provide a better legal position should a claim be filed.

6.1.5 Conservation Easement Reservations

Conservation easements on FSA inventory property are agreements between FSA and the Service for the protection of wetlands, floodplains, riparian corridors, and endangered species habitat. These agreements convey important resource interests from FSA into the Refuge System. These easements restrict the landowner from altering the important natural resources on the lands covered by the easement. Region 3 has four different conservation easement documents that have been used to transfer the rights from FSA into the Refuge System. They are:

1 – Standard Conservation Easement

Conveys a perpetual interest in the lands covered by the easement and provides authorities, legal description, covenants by the landowner, rights reserved by the United States, easement management, and general provisions. The document includes an Exhibit A map of the easement area.

2 – Non-standard Conservation Easement

Similar to the standard conservation easement except that it includes a variance that allows farming activity on all or some wetlands identified as “C” wetlands on the Exhibit A map. These farming activities include grazing, haying, cutting, plowing, working, and cropping when the “C” wetlands are dry of natural causes.

3 – Conservation Easement Deed

This easement is very similar to the standard conservation easement. The only difference is the method for which the easement was transferred into the Refuge System.

4 – Debt Restructure Conservation Easement

FSA may grant debt relief to a landowner by placing a debt restructure conservation easement on the property for a term of not less than 50 years. In the past, the Service had the option to retain enforcement authority and accept the easement into the Refuge System. If the Service did not wish for the easement to become part of the Refuge System it may assist FSA in reviewing the property, but FSA would be assigned the enforcement authority.

In Region 3 the Service accepted a small number of easements under this program before the Service’s policy was clarified. The current policy states that the Service “will neither accept debt cancellation conservation contract areas into the National Wildlife Refuge System nor manage them.”

Those existing debt restructure conservation easement areas that the Service does manage are consistent with Service policy on FSA conservation easements until the term of the protection expires. More definitive guidance is provided in the *U.S. Fish and Wildlife Service Manual,* “504 FW 2, Debt Cancellation Conservation Contract Program” (http://www.fws.gov/policy/504fw2.html).

6.1.5.1 Caretaker Agreement

At one time the Service and FSA used “Caretaker Agreements” to manage potential conservation easements prior to transfer into the Refuge System. These agreements are no longer in use, and all lands previously covered by caretaker agreements have been transferred in the Refuge System or sold to private landowners.

6.1.5.2 Rights Granted to the Service

Regardless of what easement document was used, there are a number of landowner prohibitions and rights granted to the Service that are common to all four easement documents. Rights granted to the Service are:

- The right of ingress and egress to conduct management, monitoring, and easement enforcement activities.
- The right to install, operate, and maintain structures for the purpose of reestablishing, protecting, and enhancing wetland functional values.
- The right to establish or reestablish vegetation through seedings, plantings, or natural succession (except for “C” wetlands).
- The right to manipulate vegetation, topography, and hydrology on the easement area.
- The right to conduct predator control.

The following landowner prohibitions and rights granted to the Service are specific to certain easement documents. Each easement document needs to be checked to determine if these stipulations are part of the easement. Rights granted to the Service are:

- The right to construct and maintain fences in order to prevent grazing or other types of encroachment on the easement area.
- The right to prohibit or regulate hunting or fishing or other taking of migratory birds, fish, and wildlife.
- The right to exclude landowner and/or public entry.
- The right to allow access to and use of waters within the area necessary for stock watering under such terms and conditions as the Service deems necessary to protect and further the purposes of the easement—provided that the easement project leader or landowner (depending on the document) bears the cost of building and maintaining fencing or other facilities reasonably necessary to preclude stock from entering the easement area. Access for stock watering need not be permitted where other waters are reasonably available from other sources outside the easement area.

For an example of an FSA conservation easement that has both the most restrictive provisions and least restrictive provisions for wetland protection involving the “no drain, burn, fill, or level” type covenants by the landowner, refer to Exhibit 6-2: Conservation Easement Reservations in the United States.

6.2 Habitat Easements

Habitat easements protect both wetland and upland habitat.

Four different versions or formats are used to convey different interests to the Service and different restrictions on the grantor. The complete documents are found in Exhibit 6-3: Grant of Easement.

The following table displays the basic differences among the four documents:

Document	Permits Haying, Mowing or Seed Harvest	Permits Grazing	Protects Wetlands
Form 01*	Yes – after July 15	Yes – no restrictions	Yes
Form 02	Yes – after July 15	No	Yes
Form 03**	No	No	Yes
Form 04	No	Yes – no restrictions	Yes

* Least restrictive ** Most restrictive

All four versions of the easement documents have the following in common; they all:

- are perpetual and binding on all successors in title
- provide a one lump sum payment
- cover only those lands described by legal description and/or identified on the attached Exhibit A map(s)
- prohibit any alteration of permanent vegetative cover (including trees) except those alterations approved in writing by the project leader
- prohibit agricultural crop production except when approved in writing by the project leader
- authorize representatives of the United States the right of ingress and egress for purposes of enforcing the terms of the easement
- prohibit dumping refuse, wastes, sewage, or other debris
- prohibit burning by the landowner unless approved in writing by the project leader
- prohibit draining, filling, or leveling of wetlands
- denote that landowners pay all taxes on land and assessments
- denote that landowners are responsible for noxious weed control with the exception of the first two post planting seasons on new seedings
    - a permit must be issued for any type of control except mowing or haying after July 15 on Forms 1 and 2
- prohibit buildings, structures, and dwellings
- denote that the Service has the right to sign, post, or otherwise identify the easement area
    - posting is not required
    - if posted, guidelines conform to those used on Waterfowl Production Areas except a sign is developed that clearly states that the property is not open to the public
- denote that the Service has the right to restore and/or maintain grasslands and wetlands on the easement area
- generally prohibit motor vehicle trespassing since the grantor may not alter or destroy the vegetation

- exceptions include vehicular travel needed to execute functions permissible under the easement document or by Special Use Permit (SUP)
- casual recreational travel, such as retrieving a deer during the hunting season or occasional travel by a few horsemen can generally be tolerated
- a use such as the establishment of any kind of permanent trail is generally not permitted

Region 3 also acquires Northern Tallgrass Prairie easements with Land and Water Conservation funds. Even though the funding source is different, the same four habitat easement documents are used for this habitat preservation program.

6.3 Wetland Easements

The Wetland Easement program began in the early 1960's. Over the history of the program, there have been multiple wetland easement documents, but they generally fall into three categories:

1 – Pre-1964 Documents: These are among the oldest of the perpetual easement agreements. Nearly all of these agreements have a map showing the wetlands and existing drainage facilities. Two versions of these older easements exist. They are:

- **Documents containing connecting language to the map**: Maps within these documents include language that detail "areas of existing marsh vegetation and depression, which may hold water during certain periods. . . " as well as the presence of "existing drainage facilities. . . on the described land."

  Wetlands protected within these documents are shown on the map. If a wetland is physically present on the ground, but not on the map, then it is not a protected wetland.

  See Exhibit 6.4 Conveyance of Easement for Waterfowl Management Rights (1) for an example of this type of wetland easement and map.

- **Documents without connecting language**: These documents do not have any connecting language marked on the maps. All wetlands within the easement are protected, including those that may have been missed when the map was drawn. However, in instances where a Drainage Facility Map (DFM) is appended, wetlands exhibited on the DFM are not subject to the terms of the easement agreement.

  See Exhibit 6-5: Easement Summary for an example of this type of easement and map.

  NOTE: The maps for both documents are often referred to as "Difficulty to Drain Maps." Wetlands identified on these maps have cross-hatching indicating whether they are easy, moderate, or difficult to drain.

2 – Pre-1976 Documents: These documents protect ALL wetlands occurring or reoccurring due to natural causes on the described property. Only those wetlands that are not protected by the provisions of the easement agreement are illustrated on an attached DFM. These wetlands are either already drained or are intact but not included for protection in the easement agreement.

If there is no DFM attached to the pre-1976 document and no exception language in the document, then there are NO deleted wetlands, unless specific wetlands have been administratively deleted and documented in the file.

See Exhibit 6-6: Conveyance of Easement for Waterfowl Management Rights (2) for an example of a pre-1976 easement and accompanying DFM.

Case law resulting from a 1997decision in North Dakota (Johansen; see chapter 13, 13.4.5 United States v. Kerry Johansen, 93 F.3d 459 [8th Cir. 1996]) and upheld by the Eighth Circuit Court of Appeals, now requires that the Service is entitled to protect the wetland acreage that appears on the easement acreage summary sheet. This decision applies to pre-1976 wetland easements. Mapping of pre-1976 easements needs to be completed for law enforcement issues, SUPs, and refuge compatibility issues.

3 – Post-1976 Documents: In the post-1976 wetland easements the Exhibit A maps show the wetlands protected by the easement. A statement printed on the Exhibit A map states that lands covered by the conveyance include any enlargement of the delineated wetland areas resulting from normal or abnormal increased water. Therefore, on post-1976 easements, the wetlands shown on the Exhibit A map, and any enlargements thereof, are protected by the easement. The Johansen decision does not apply to these easements.

See Exhibit 6-7: Conveyance of Easement for Waterfowl Management Rights (3) for an example of a post-1976 easement document and the attached Exhibit A map.

Post-1976 easement documents with wetland restorations can have a statement added that references the restorations and the Government's rights relative to the restored wetlands. The restored wetlands typically have mean sea level (MSL) elevations established for them. If MSL elevations are established, they are identified on the Exhibit A map. The following language is incorporated into the easement document when there are restored wetlands included on the Exhibit A map:

> "The United States and its authorized representatives shall have the right to construct, reconstruct, and maintain all wetland restorations structures shown on Exhibit A map."

If MSL elevations are established, then an additional statement is added including the right to maintain structure outlets at the MSL elevations specified.

Exhibit 6-8: Conveyance of Easement for Waterfowl Management Rights (4) is an example of a post-1976 easement document with restored wetlands. Exhibit 6-9: Exhibit A Map is an example of an Exhibit A map with the MSL elevation information added.

Common to ALL wetland easement documents, past as well as current versions, is the right of access by authorized Service personnel to inspect, conduct investigations, and determine compliance with the terms of the easement agreement.

6.3.1 Acquired Property Interests

Property interests acquired from landowners are their rights to drain, burn, fill, or level the wetlands. As a rule of thumb, any proposed use that may drain, burn, fill, or level a protected wetland needs to be evaluated under the AU and compatibility standards. If the activity does not comply with these standards, then it should be pursued as a potential violation. Activities that

would occur on the uplands without involvement of protected wetlands are generally not subject to AU or compatibility requirements.

As indicated by the descriptions of the different wetland easement documents above, when confronted with an issue (either a potential violation or a requested use related to compatibility) the project leader must be sure that the potentially impacted wetland is a protected wetland. If it is a pre-1976 easement, the project leader may have to map the wetland basins. If it is a post-1976 document, then verify the wetland is identified on the Exhibit A map.

Chapter 7: Easement Administration

7.1 Official Easement Records

The Midwest Region (Region 3) Division of Realty is responsible for the maintenance of the official real property and land status records within the U.S. Fish and Wildlife Service (FWS, Service). Field stations may have duplicate documents in their files.

Field files and records consist of:

- statistical record for each parcel of land acquired or interest acquired therein
- status map for each parcel
- original easement file for each parcel

Realty records include information such as:

- type of real estate interest maintained by the Service (fee, easement, etc.)
- name of the vendor
- date of the transfer
- acres
- dollars
- legal description
- county recording information

Data are used to compile periodic reports on the status of lands and interests maintained by the Service. The Real Property Management Information System (RPMIS) is the database that contains this information. In Region 3, a backup card system is maintained for land status records. The official easement file for each parcel of land is converted to microfiche, which is maintained by the Region 3 Realty office. The easement file includes:

- original easement document
- title insurance documents
- U.S. Department of the Interior (Field) Office of the Solicitor's title opinion
- original maps, including Drainage Facility Maps (DFMs), Exhibit A maps, and other maps associated with the easements
- cadastral survey reports, if applicable
- other documents collected during the acquisition process

Appraisal reports are maintained for a period of 5 years and then purged from the files. The approving memo for the appraisal and the summary page are retained.

The original easement files are generally no longer available at the Region 3 Realty office due to storage space limitations. Starting in 1984 all land and easement acquisition files are now on microfiche within each Region 3 Realty office. Copies of the microfiche for any parcel of land can be obtained from the Region 3 Realty office.

It is now the policy that once data have been placed on microfiche by the Region 3 Realty office, the original easement files are sent to the field station for final disposition. Even though the official record is retained in the Region 3 office, it is strongly recommended that management offices maintain these easement files, or at a minimum, go through them to retain any pertinent information not necessarily part of the official easement file.

7.2 Permanent Field Station Files

7.2.1 Realty-Provided Records

After acquisition of an easement each field station receives the following documents from the Region 3 Realty office:

- copy of acceptance letter
- title vesting memorandum
- copy of the easement document, which includes:
  - Exhibit A map (included for all acquired easements)
  - original evaluation worksheets containing management office approvals
  - pertinent information regarding survey data, or mean sea level elevations on wetlands

When this package arrives the rights have been conveyed to the United States, the area is now part of the National Wildlife Refuge System, the landowner has been paid, and the easement has been recorded in the courthouse in the county where the easement is located. Technically, the terms of the easement are binding on the part of the landowner as soon as he or she signs the option (easement agreement). There are administrative exceptions to this. For habitat easements, grasslands hayed before the approved date, depending on location, or wetland vegetation burned during this ”option” period may be acceptable, but any permanent alteration of the landscape such as converting grassland, wetland filling, or draining is treated as a violation of the agreement, even if conducted during this ”option” period.

Note that the term “landowner” is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

The project leader sets up a permanent field station file for each easement. Because of the Privacy Act of 1974, easement files should be titled by tract number as opposed to landowner name. The easement document, acceptance letter, Exhibit A and/or wetland easement map, and all other correspondence, notes, letters, etc. relevant to the easement should be included in the easement file. The file serves as the official field office record.

The "Chronological List of Events" form (Exhibit 7-1: Waterfowl Management Easement Chronological List), if used, provides a list of events, notes, observations, conversations, etc. concerning the easement. Suspected violations and resulting corrective actions should be

noted on the form. Visits to the easement area and observations such as wildlife usage, water conditions, land use practices, and other items of interest about the easement can also to be documented and noted on the form. If the "Chronological List of Events" form is in use, it should be used consistently to ensure a complete account of all events and actions.

7.2.2 Field Station Documentation

It is not expected, nor required, that every casual observation for every easement be recorded and placed in the easement file, but experience has taught project leaders an important rule to remember in easement administration: DOCUMENT, DOCUMENT, DOCUMENT. To ensure proper documentation, record in memo format or in the "Chronological List of Events" form every conversation, every phone call, and every map given out.

Never give out a map or aerial photo without a legend on the same page. A map without a legend can be misinterpreted at a later time and weaken a case. If items are indicated on the map by certain colors, make sure the file copy is also in color. These easements are *perpetual*; your documentation is needed for 100 years or more, and if project leaders and their staff do not record conversations, etc., future enforcement efforts may be compromised. In some cases a certified letter to the owner and/or tenant may be necessary to document conversations. If a landowner requests permission to do something that violates the terms of the easement, then project leaders should document conversations in writing so there is no misunderstanding. Copies of such letters with the returned receipt should be kept in the easement file.

7.3 New Easement Inspection

Upon completion of the acquisition and filing of an easement, management and compliance become the focus of the project leader. At this point, it is recommended the project leader meet with the landowner to review all the terms of the easement and answer questions. On-the-ground inspections are mandatory for every new easement to document all resources within the easement. In some instances, benchmarks may need to be established to document the condition of the drainage facilities at the time of acquisition.

FSA Easements

As of 2012, there are no deed-restricted conservation easement properties currently being assigned to the Service in Region 3 where the Service functions as the easement project manager. If, however, new easement properties are received from Farm Service Agency (FSA) state offices, project leaders should use the guidance outlined below for new properties.

Habitat Easements

New habitat easements should be aerially photographed to document existing conditions when the easement is acquired. The photographs should be labeled as detailed in the "General Photo-documentation" sub-section below. It is a good idea to obtain an 8-inch FSA map of the area, outline the easement boundary on the map, and keep the map in the easement file for future reference.

Wetland Easements

Wetland easements with existing drainage facilities are allowed within the Region as long as the basin exhibits seasonal wetland characteristics or better. Acquiring easements on partially-drained wetlands under the pretense that the ditch will eventually fill in is no longer acceptable.

Many of the field stations resolve potential problem areas before acquisition is pursued; some do not. If after an initial review of the new easement file there seems to be unusual circumstances such as drainage facilities present, alfalfa included in the easement area, a questionable boundary, or something that just doesn't correspond with the easement document, then a field inspection accompanied with the landowner should be conducted to resolve any misunderstandings or misconceptions.

7.3.1 Posting Easement Boundaries for Management Purposes

All Service easements should have Exhibit A maps prepared depicting protected tracts at the time the easement was purchased or accepted. When they are prepared, these maps are based on legally defined tracts and are recorded based on the appropriate legal description. Unlike Service wetland easements, habitat and FSA easements delineate an exact area that must be protected or adjacent to permanent vegetative cover that may make the boundary difficult to discern without Service assistance. Therefore, it is important to post the boundaries as accurately as possible to prevent disturbance from operations on adjoining land. A combination of Geographic Information Systems (GIS) techniques and field work are necessary to identify and mark the easement boundary.

The following procedure was developed to post habitat/FSA easement boundaries in an accurate, repeatable, and most importantly, fair and defendable manner.

1. Verify the fact that you intend to post the easement as depicted in the Exhibit A maps, and ensure that the legal description is appropriate.
2. Use a spatial representation (polygon) of the easement boundary developed with standardized procedures that accurately represent the location, size, and configuration of the easement.
3. Use GIS techniques to identify target marker locations, and generate a list of coordinates to consider marker placement in the field (UTM, local zone, NAD 83).
4. Using a GPS capable of ≤ 1-meter horizontal accuracy, input the target marker locations created in the previous step.
5. Prepare a field map if necessary.
6. In the field, use the GPS to navigate to the target coordinates, and place Carbonite markers or fence posts that identify to the landowner the protected area(s) that cannot be disturbed.
    a. Markers should be placed as needed to provide line-of-sight from marker to marker. Document the marker locations (coordinates) so future project leaders are able to use this information should it be necessary to return to the field and re-post areas that have been disturbed. Actual marker placement in the field may be a subset of the target marker locations identified earlier in the process.
7. Once posting is completed, the permanent easement file should contain:

- a list of the coordinates of all markers or posts
- documentation describing the equipment used and the associated projection information (coordinate system and datum)
- a map with the following elements:
  - image backdrop
  - easement boundary
  - marker locations
  - legend
  - scale
  - North arrow
  - developer
  - file location (pdf)
  - easement contract number
  - general legal description
  - date
  - the disclaimer; “This map is only a representation of the easement boundary for management purposes. It is not a legal survey.”

8. Finally, obtain the landowner’s signature on the map, provide him or her with a copy, and retain the original for the easement folder.

7.3.2 General Photo-Documentation

Field stations are required to obtain background photography of all new easements. There have been efforts in the past to photo-document all new easements with high altitude vertical photography, but the practice was not accomplished consistently. Photo-documentation must take place to show what was present on the land at or near the time the Service acquired an interest in the property. Photographs can be obtained from sources such as FSA.

IMPORTANT: As a result of the Johansen decision, the courts now require the Service to prove the wetland(s) that have been negatively impacted through a prohibited activity, existed at the time the Service acquired the wetland easement. The Service must also demonstrate the pre-1976 wetland(s) have existed over the period of time the Service has retained the easement. To aid in this court requirement, Service law enforcement officers may document the existence of the wetlands through the interpretation of historical aerial photographs, both at or near the time of the easement being acquired. One dark spot on an aerial photograph does not fulfill the Service’s obligation in this matter, and an expert witness may need to be contracted to interpret aerial photographs. The Service has the obligation and responsibility to review as many aerial photographs as is reasonably necessary to develop an aerial photograph timeline for each wetland that has a violation.

Even though the Johansen decision does not apply to post-1976 wetland easements, it is still a good idea to photo-document the wetlands for future reference. Project leaders should use a

label similar to Exhibit 7-2: Example of Label and adhere it to the back of the photo to help identify the image taken on the easement.

7.3.3 Use of Digital Equipment

Digital equipment can be used to photo-document easement properties, law enforcement, and case preparation needs. For a digital photographic equipment procedure developed by the National Fish and Wildlife Forensics Lab see Exhibit 7-3: FWS Forensics Lab Digital Imagery Procedure. Also see the FBI Laboratory Services website for useful information about digital technology as an evidentiary tool (http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/jan2000/swigit.htm). For general photo-documentation needs, normal photographic procedures should be acceptable.

7.4 Actions to Help Prevent Future Violations

There are many opportunities for field offices to reduce the number of easement violations by maintaining an effective and proactive program that informs the public of easement programs and notifies property owners with lands encumbered by easements.

7.4.1 Land Ownership Notifications

Landowner notifications are an important practice required of every field station. County records should be checked annually for new landowners on existing easements. Letters and maps notifying new landowners of the presence of an easement on their land and applicable restrictions should be included in the notification. Long-term easement holders need only be notified with a letter every 3 years.

The value of notifying landowners of protective easements on their land serves as a reminder of the restrictions placed on their land and helps to avoid inadvertent violations. Additionally notifications provide the “knowledge” element in case a violation occurs.

7.4.1.1 Easement Mapping Associated with Landowner Notifications

As a result of the Johansen case in North Dakota, the Service’s pre-1976 wetland easements are limited to wetland acreages identified on the easement acreage summary sheet (Exhibit 7-4: Easement Summary) prepared by Realty at the time the easements were acquired. Whenever the Service has contact with a landowner regarding the conditions and terms of the easement and the wetlands encumbered or protected by the easement, the project leader must be prepared to make a map of the easement-protected wetlands. If an approved map has been completed for the pre-1976 easement, it should be included with the landowner notification. If the easement is a post-1976 easement, the Exhibit A map serves as the easement map.

7.4.2 Inter-Agency Coordination/Cooperation

For those field stations with an active Small Wetlands Acquisition Program, it is recommended that they share location information annually for newly acquired easements with the FSA and the Natural Resource Conservation Service to help with their review of landowner requests that may affect Service interests. When sharing digital data, such as GIS shape files, purge the landowner information from the database so that only easement or tract numbers are used to identify the eased land. For further information on the distribution of digital data, see Exhibit 7-5: Guidance on the Use and Distribution of Digital Easement and Fee Boundary Information.

Coordination with other agencies, particularly the state and county road departments, is also important to ensure Service interests are not disturbed. A Service representative should meet annually with road supervisors to not only share information, such as digital data, but also to offer assistance in project reviews.

Any of these proactive measures help to keep other agencies informed, thus reducing or eliminating unnecessary disturbance to the resources within the easements.

Chapter 8: Uses of Easement Properties and Permitted and Prohibited Activities

8.1 General Discussion

This chapter provides guidance for project leaders to make consistent decisions concerning easement use requests regardless of the use type, easement type, or location. It is not the intent of this section to allow for the exchange or amendment of easements for matters of convenience or just because landowners don't like the easement on their property.

Note that the term "landowner" is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

When wetland and habitat easements are purchased, the U.S. Fish and Wildlife Service (FWS, Service) acquires certain rights in the described property. All of the documents are perpetual, and the intent is that project leaders enforce the provisions of every easement according to the rights acquired at the time of acquisition. When easements are acquired, consideration needs to be given to future uses of the property that may conflict with the easement purposes. Measures should be taken during acquisition to eliminate future conflicts if possible. However, landowners and/or third parties (such as public utilities) frequently request specific uses on lands encumbered by Service easements, and it is the responsibility of the project leader to determine if the requested use can be allowed under the terms of the easement and other Service policies.

Much of the required administrative processes for authorizing uses of easement properties have been accomplished for many field stations through the approved Comprehensive Conservation Plans (CCPs), compatibility determinations (CDs), and Environmental Assessments (EAs) developed specifically for these authorized uses.

8.1.1 Evaluating Use Requests

Project leaders are able to use the guidance provide in this chapter under 8.3, Permitted Uses to issue a permit or deny a request. If a CD is also needed, guidance is provided that may be used as stipulations for the CD. Most permit fees may be waived, but fair market value must be charged for cash rent farming.

Appeals of decisions relative to permits are in accordance with 50 CFR 25.45 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-sec25-45.pdf).

8.1.2 Easement Request Decision Flowchart

The Easement Request Flowchart (Figure 8-1) guides project leaders through a logical process when evaluating requested uses of easement properties. The basis of the flowchart and the potential authorization of use requests are the approved list of permitted activities.

When considering use requests, project leaders need to:

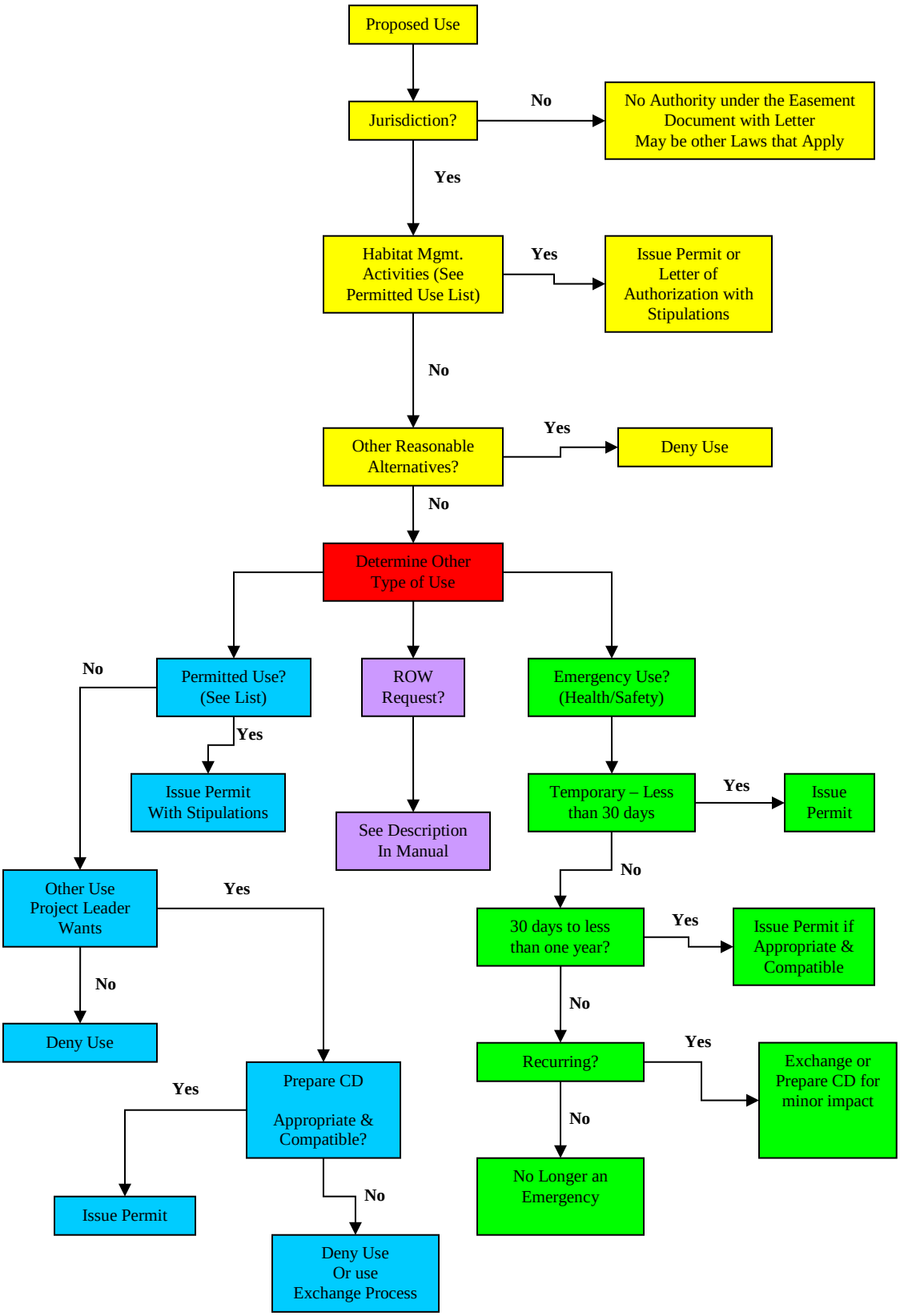
1. Determine jurisdiction (whether the Service has the authority to regulate the proposed use under the terms and requirements of the easement).

2. Determine whether the proposed use is either a habitat management activity or a refuge economic use—each requiring different levels of compatibility compliance.
3. Evaluate whether there are any reasonable alternatives to possibly accommodating the request off easement property.

If the request falls under Service jurisdiction, is not a habitat management activity, and there are no reasonable alternatives off easement property, then project leaders can continue to use the lower part of the flowchart to evaluate the proposed use as a health and safety issue, a rights-of-way (ROW) request, or another request not fitting either of the other two categories.

Activities that do not impact the rights acquired by the Service are allowable without the need for a permit. For example, for an easement with unrestricted grazing rights, activities like fencing needs, corrals, temporary hay storage (Forms 1 and 2), or temporary watering tanks are allowed on easement properties without the need for a permit or advanced approval from the National Wildlife Refuge (NWR, refuge) or Wetland Management District (WMD) office.

Figure 8-1: Easement Request Flowchart



8.1.3 Issuance of Permits

When issuing permits:

- The permit application (use request) should be in writing.
- In all cases the project leader must know exactly what is being requested.
- In no case is the authorization to be verbal, even though use requests can be made verbally. The authorization must be on a Special Use Permit (SUP), with stipulations and a map if necessary.
- Requests received from a third party (e.g., utility company, highway department, etc.) must be in writing.
- The project leader must visit the site of any proposed activity prior to issuing authorization to impact any easement area. If the request is to resolve an emergency, authorization can be granted prior to visiting the site, but the project leader must visit the site as soon as practicable.
- No "after-the-fact" permits shall be issued. All permits must be issued *before* acts of burning, draining, filling, and leveling in wetlands, or cultivation or alteration of grasslands or other protected habitats are allowed.
- All non-permitted acts of burning, draining, filling, and leveling of wetlands, or cultivation or alteration of grassland vegetation are treated as easement violations and referred to the zone or field station refuge law enforcement officer (i.e., federal wildlife officer) for resolution.
- Permits can only be issued upon satisfactory compliance with the following requirements:
    - preparation and approval of appropriate use (AU) and CDs (use stipulations outlined below to ensure consistency in the Region; authorized habitat management activities excluded),
    - documentation of National Environmental Policy Act (NEPA) compliance,
    - cultural resource compliance, and
    - Endangered Species Act compliance.

Current Midwest Region (Region 3) guidelines, policies, and delegations of authority apply to the preparation and processing of NEPA and endangered species documentation as well as AU and CDs. Applicants should be advised that issuance of an SUP does not relieve them of any compliance required for other local, state, or federal regulations. Permits issued for any request involving economic activities must meet the higher standard of compatibility by "contributing to the achievement of the refuge area purposes and the System mission." See 50 CFR 29.1 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-part29.pdf) and the 2000 Compatibility Policy for definitions and examples of "economic activities."

In some situations, field stations have an approved CCP that describes the permitted activities and includes CDs, EAs, and intra-Service Section 7 Biological Consultations. These documents should meet the above requirements. Field stations without an approved CCP or whose CCP does not include the above additional documents need to ensure that all needed clearances are obtained prior to issuing a permit for which they are required.

Where the Service has purchased or acquired an easement interest to preserve wetland, grassland, or other habitats, certain acts of draining, burning, filling, and leveling of a limited nature may be allowed in protected wetland(s) or cultivation or alteration of grasslands by issuance of a permit. The Regional Director, or his designee, may issue a permit when such activities do not detract from or impair the basic purposes for which the easement was acquired. The U.S. Department of the Interior's Office of the Solicitor's opinion of August 14, 1980 (Exhibit: 8-1 Proposed Guidelines for Wetland Easement Enforcement) further discusses the legal aspects of permitting limited acts of draining, burning, filling, or leveling in wetlands under easement. While this opinion is specifically for wetland easements, the intent applies to other types of easement interests.

Form 3-1383 G, General Special Use Application and Permit (http://www.fws.gov/forms/3-1383-G.pdf) is an example of a permit with the standard wording that is to be used in the Statement of Effect and Compatibility section to the permit. This statement is used on all SUPs issued (except emergencies and authorized habitat management activities as discussed below in this chapter).

Authorized burning is considered a habitat management activity and does not require a compatibility statement. For authorized activities, other than habitat management activities, the statement to be used on the Statement of Effect and Compatibility section of the permit will read as follows:

> "The activity described and allowed by this permit is hereby determined to be compatible with the purposes for which the easement interest was acquired."

This statement represents only the decision made on compatibility and does not represent a determination of compatibility. As stated above, compatibility must be addressed independently of this statement.

Proposed uses that are authorized use different forms of authorization:

- Activities that are authorized for a specified length of time or which result in no permanent impact to easement interests are issued an SUP.
- An SUP may also be issued to provide stipulations/conditions for temporary impacts due to the construction/installation, etc.

If the requested activity is ultimately approved:

- The requesting entity receives the original of the SUP.
- The issuing office retains copies in the appropriate easement file.
- NEPA compliance documents, cultural resource compliance documents, and any other documents requiring approval must be forwarded to the Region 3 office for approval/concurrence prior to issuing the permit.
- A copy of the permit should also be forwarded to the Region 3 office.

If circumstances apply, requesters may also need a formal ROW permit from the Region 3 office. See the following sub-sections of this chapter for guidance on the ROW permit process.

8.2 Compatibility Determinations

All activities for which permits are issued are subject to review/approval under the Service's CD policy. For many field stations, the commonly requested uses have approved CDs, which were completed during the NWR or WMD comprehensive conservation planning process.

8.3 Permitted Uses

8.3.1 Economic Uses

If the request is considered to be a "refuge management economic activity," then it must meet a higher standard of compatibility by "contributing to the achievement of the national wildlife refuge purposes or the National Wildlife Refuge System mission." If the request is approved, the project leader must be able to demonstrate how the economic use contributes to the achievement of the purposes and mission statement and justify such in the CD. The "normal" compatibility standard of not "interfering with or detracting from" the purposes or mission does not suffice for economic use requests.

"Economic use" is defined in 50 CFR 29.1 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-part29.pdf) as "including, but not limited to grazing livestock, harvesting hay and stock feed; removing timber, firewood, or other natural products of the soil; removing shell, sand, or gravel; cultivating areas, or engaging in operations that facilitate approved programs on national wildlife refuges." Another way of defining an economic use is if the activity results in the "harvest of the interest" the Service acquired in the easement.

A differentiation is made between refuge economic use and potential commercial use. Authorizing a communications cable to cross easement properties is a use request from a commercial entity, but it does not fit the definition of "economic use" for this section. Other examples of commercial use that do not meet the definition of "refuge economic use" include: buried water pipelines completed by incorporated rural water companies, electric utility cables, and television cable crossings.

If the request falls under the category of a "refuge economic use," then the project leader must complete a CD written to the higher standard and submit for approval. After approval, the project leader must issue an SUP.

8.3.1.1 Prescribed Grazing

Habitat easements Forms 2 and 3 and some of the Farm Service Agency (FSA) documents restrict grazing. Where restricted, the authorized use of grazing must conform to the compatibility criteria found in 50 CFR 29.1 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-part29.pdf).

Habitat easement Forms 1 and 4 allow grazing with no restrictions; therefore, no permit is required. However, implementation of grazing plans should be encouraged through various partners. In those cases where native plant communities are being severely impacted, conversion to a more restrictive easement should be sought. All fencing costs, labor, and maintenance are the responsibility of the landowner (excluding FSA easements, which are generally the responsibility of the Service).

Forms 2 and 3 and some FSA easements require permits using the following guidelines:

- Grazing is authorized only to enhance the vegetation on the easement tract.
- Permits do not exceed 3 years in length, and the project leader must ensure permittees do not establish a long-term economic dependence on National Wildlife Refuge System (Refuge System) lands.
- Grazing rates are set based on prevailing private sector grazing rates.
- Management restrictions (e.g., grazing dates and rates of stocking) are developed by the project leader. Grazing restrictions should generally coincide with those on nearby Service fee lands.
- This activity represents an "economic use," which must meet the higher standard of compatibility by contributing to the achievement of the mission of the Refuge System and the purposes of the easement area.

8.3.1.2 Stock Watering

Dugout construction in wetlands under easement may be permitted, provided the landowner can show a need, such as for stock watering, the watering is a clear need associated with the permitted grazing, and there are no other practical alternatives. As is the case with nesting islands, issuance of a permit shall not preclude requirements for obtaining other approvals from the U.S. Army Corps of Engineers, the state, etc. A statement to this effect should be included in the "conditions" section of the SUP.

Permits for dugouts are issued upon request for easements purchased prior to April 1, 1981, provided the dugout is constructed according to state Natural Resource Conservation Service (NRCS) specifications. Permits for dugouts on easements, purchased after April 1, 1981, may be issued in accordance with the following conditions or stipulations:

- Dugouts are not permitted in wetlands 1 acre or smaller unless it is determined that there is no other suitable site or other source of water.
    - All spoil is removed from the wetland.
- Dugouts may be allowed in wetlands larger than 1 acre, provided they are constructed on the perimeter of the wetland in the seasonally flooded zone.
    - No spoil should be placed in the wetland basin. An exception can be made for spoil used for nesting island construction.
    - Spoil placed outside the wetland may be leveled so long as it is not used to fill other wetlands.
    - If the uplands are protected under a habitat easement, then the project leader must evaluate the need to level the spoil piles, particularly on native grasslands.
- Permits for dugout construction are issued by the project leader for a period not to exceed 12 months and are not assignable to subsequent landowners.
    - No maintenance is allowed without another permit.

8.3.1.3 Haying and Mowing

Haying and mowing grassland on FSA easements should only occur after landowners/operators are issued a permit specifically authorizing the conditions and locations for the activity.

Most easements require landowners to control noxious weeds in accordance with state and local regulations, and discretion should be used in confronting landowners who have obviously only mowed noxious weeds. Landowners who have hayed large areas of an easement under the guise of noxious weed control, however, should be provided with a written notice of the violation the first time such activity is documented and stronger enforcement actions should be undertaken if the haying/mowing is repeated.

Before a permit to hay or mow is issued the landowner/operator must demonstrate that:

- The haying or mowing is necessary to preserve or enhance the stand of grass (e.g., during establishment, for weed/brush control, to rejuvenate a decadent stand of grass), or
- the haying or mowing is necessary to meet noxious weed laws.
    - All haying or mowing is in accordance with conditions and restrictions developed by the project leader.
    - The beginning date for the permit is set by the project leader to avoid/minimize impacts on nesting birds or other wildlife.
    - If necessary, permits can be extended until December 31 of the same calendar year, but multiple year permits will not be issued.

8.3.1.4 Farming

Cash rent or cooperative farming may be used to prepare areas for seeding to native grass. Short-term permits/agreements may be issued to convert exotic grassland tracts (e.g., brome) to native grass or to prepare the proper seed bed for establishment of native grasses. An SUP or Cooperative Farming Agreement must be issued using the following guidelines :

- Cash rent or crop share agreements must be set at a fair market value. This may be lower than prevailing rates/arrangements if the Service requires the permittee to deviate from local farming practices (i.e., apply Roundup® as a final fallow technique).
- Farming should only be allowed for conversion of exotic grasslands to native grass and/or for the preparation of an adequate seedbed for the initial native grass seeding.
- The term of the farming permit/agreement should be the shortest possible to obtain the proper seed bed. Generally this does not exceed 3 years.
- The permit/cooperative agreement should specify the crop rotations, share arrangements, and other details to ensure success of the seedbed preparation.
- Current Region 3 farming policy prohibits all genetically modified organisms or genetically engineered organisms crops except for genetically modified glyphosate-tolerant (GMGT) corn and soybeans.

- Use of GMGTs is limited to 5 years for any individual tract in preparation for habitat restoration, and GMGT crops can only be used if they are "essential to accomplishing refuge purposes."
- If project leaders wish to use GMGT crops they must complete an Eligibility Questionnaire, and submit it to the Regional Chief of the Refuge System for approval. See link below for details.
- A link to the signed EA, which provides more information is given below:

  http://www.fws.gov/midwest/planning/farmingNEPA/eafinal.pdf

8.3.1.5 Wood Cutting/Timber Harvest

Tree cutting on wildlife habitat and FSA easements is a restricted activity and requires the advanced written approval of the project leader. Harvest of standing timber is not allowed until a forest management plan is developed by a trained, professional forester. Forest management plans must be consistent with the purpose of the easement and meet Refuge System compatibility requirements. Project leaders may issue permits for the removal of firewood cut from dead and downed trees for personal use only. See 8.3.3.4 Tree Removal in this chapter for additional information on invasive tree removal.

Project leaders may grant written permission for removal of individual trees or small groups of trees that are dangerous, damaging property, or blocking authorized access routes.

8.3.1.6 Seed Harvest

For habitat easements, seed harvest is not restricted with Forms 1 and 2 after July 15. Because the Service controls the method of noxious weed control, a possible conflict could arise here since the seed must comply with state seed laws. Management discretion should be used with herbicide application to ensure that no long-term harm occurs to the plant community. The permitting policy should adhere as closely as possible to the noxious weed control permitting guidelines. See 8.3.3.5 Invasive Species Management in this chapter for additional information on invasive species management.

Seed harvest on Forms 3 and 4 is not allowed except under the following conditions:

- Native prairie tracts may be harvested if the landowner or Service uses the seed to restore nearby croplands to grasslands.
- If the landowner agrees, the Service may enter into a cooperative or purchase agreement for the harvest of the native prairie seed. Agreements should parallel prevailing rates of payment or crop sharing in the local community.

8.3.2 Landowner/General Uses

This is a broad category of uses that are neither economic as described earlier (see 8.3.1. Economic Uses) nor habitat-based as discussed later (see 8.3.3 Habitat Management Activities). Generally many of these requests are from landowners or third parties (such as highway or utility departments) for short-term uses with no permanent impacts. That does not imply, however, that all use requests in this category are simple or straightforward. For example, pattern drainage tiling requests can be very complicated and, if not handled properly,

can have lasting, detrimental effects. Project leaders are cautioned that each request should be carefully analyzed prior to making a decision. See the following sub-sections for guidance when analyzing requests. They are:

- Vehicle Access
- Collecting Edible Plants for Personal Use
- Trail Construction (Hunting/Environmental Education/Interpretation)
- Temporary Structures (Deer Stands)
- Minor Expansions of Existing Rights-of-Way
- Short-term Upland Disturbance for Highway or Other Public Interest Project with no ROW Expansion and Full Restoration
- Utility Lines
- Culvert Replacement
- Beaver Dam Removal
- Wetland “Texas” Crossing/Irrigation Waterways
- Tiling

Keep in mind that the information below is provided for guidance and is not considered to be all-inclusive. Also know that all requests are subject to AU and CDs and all other applicable laws, regulations, and guidelines.

8.3.2.1 Vehicle Access

Vehicle trespass is not specifically addressed in wildlife habitat and FSA easements; however, the covenants of these easements do state that the landowner may not alter in any way the vegetative cover on the easement area.

Occasional driving on an easement may not impact the vegetation and, therefore, is not a prohibited activity. One example of acceptable vehicle access is the use of an all-terrain vehicle for spraying of noxious weeds or retrieval of deer during hunting season.

Any driving on an easement that has the potential to cause or result in damage to the vegetation requires a permit. Examples include:

- Operating a motor vehicle on the easement when the ground is saturated causing rutting.
- A trail is constantly used where there is no longer any vegetation; only dirt/surface material is present.
- Operating a motor vehicle through wetlands.

Region 3 requires the following stipulations when approving vehicle access permits:

- Impacts must be temporary in nature with full restoration of any damage to vegetation.

- Vehicles must be cleaned prior to access to an easement to prevent the transport of invasive species.

8.3.2.2 Collecting Edible Plants for Personal Use

Collecting edible plants for personal use is allowed without issuance of a permit. Examples include the collection of mushrooms, asparagus, wild mint, wild rice, ferns (fiddle heads), berries, and nuts.

8.3.2.3 Trail Construction (Hunting/Environmental Education/Interpretation)

Habitat and FSA easements prohibit the damage or alteration of vegetative cover. A permit that allows a trail may not be issued unless there is an approved management plan on file in the field station office. Consideration should be made for future habitat easement purchases for allowable trails that are identified on the easement map.

Region 3 requires the following stipulations when approving trail permits on FSA easements:

- A trail can be no larger than 4 feet in width.
- A trail can only be mowed. No material may be added to it.
- A trail will not be allowed through wetland areas.
- Use of a trail will cease in instances of loss of vegetation (e.g., bare ground).
- The proposed trail will be staked onsite by the Service in advance.
- A map indicating the location of the trail will be provided when the permit is issued. This map will be included in the easement folder.

8.3.2.4 Temporary Structures (Deer Stands)

The following guideline pertains to habitat and FSA easements. No structures are allowed on these types of easements, but an SUP could be issued for structures that are temporary in nature, easily moved, and define the length of time the temporary structure could be left on the property.

One hot issue often associated with temporary structures is the building or placement of “deer stands.” Deer stands can range from a portable ladder stand to a house on stilts that is permanent in nature. To accommodate this issue while still protecting the easement, project leaders could issue permits for structures that are temporary in nature, such as a deer stand on wheels that could be placed on the easement before hunting season and removed after.

Region 3 requires the following stipulations when approving temporary structures:

- Structures must be temporary in nature and should be removed after the hunting season so as to not damage vegetation.
- No food plots, shooting lanes, unpermitted trails, or other damage to vegetation are permitted in association with the temporary structure.

8.3.2.5 Minor Expansions of Existing Rights-of-Way

The 2000 Compatibility Policy allows project leaders to authorize minor expansions of existing rights-of-way (ROWs) that may impact Service easement interests. In most cases, however, a formal ROW permit is also necessary from the Region 3 Division of Realty. Project leaders must require that any impacted Service interest is satisfactorily mitigated or replaced. The 2000 Compatibility Policy has additional guidelines for the use of "replacement of lost values," which project leaders should review before issuing any permit. A CD, NEPA compliance, and possibly cultural resource compliance are also necessary.

Exhibit 8-2: Compatibility Determination shows a CD prepared for a "minor expansion" referencing the replacement habitat.

8.3.2.6 Short-Term Upland Disturbance for Highway or Other Public Interest Project with no ROW Expansion and Full Restoration

Every year requests are made by state and local government agencies and utility companies to do repairs and improvements to existing roadways and utility facilities associated with ROWs on Refuge System lands (including easements) throughout the Midwest. Many of these requests require temporary work outside the existing ROW boundaries, generally resulting in temporary disturbance to the associated vegetation. Frequently, the temporary work requested is required to reshape a slope immediately adjacent to a road ROW to improve transportation safety. Other times, the requested action can be merely for permission to turn around heavy equipment on land immediately adjacent to the ROW. Most often, the temporary work outside of the ROW is conducted during summer and fall, when construction conditions are optimal. The work typically involves temporary disturbance to previously farmed uplands that are then reseeded to native vegetation by the requesting organization. Consider the following suggested stipulations when reviewing requests:

- All work done outside of existing ROWs must be approved by the project leader.
- Conditions stipulated such as seeding mixes, weed control, etc. must be followed so that the land retains its quality as a compatible use NWR or WMD.
- No work that leads to permanent loss of wetlands or native prairie remnants is allowed without a site specific CD.

8.3.2.7 Utility Lines

Many existing easements have buried or above ground utility lines. Requests for maintenance for these established ROWs should be handled through the SUP process. The project leader must carefully review the existing ROW easement to determine if the requested activity requires an SUP.

Requests for new utility lines through easements should be handled in conjunction with the Region 3 Realty office.

8.3.2.8 Culvert Replacement

Culverts may be an effective tool in resolving certain conflicts. However, if not properly used, they can be very damaging to easement wetlands. Follow the guidelines below when

placing/replacing culverts. For prosecution information on the subject, see chapter 12, 12.2.13 Other Violations.

- Use extreme caution when agreeing to culvert placement where none previously existed. If a culvert is needed to protect a road, the elevation must be such that it protects the integrity of any easement wetland involved.
- Culverts that are replaced for any reason must be placed at or above the old or previous control elevation, no lower. The elevation of the bottom of the culvert is critical, regardless of the size of the culvert.
- The project leader should know the size and control elevation of the existing culvert before any work is done. Because culverts settle or may not have been installed with the proper slope, it is important to obtain the elevation of the flow line at both ends of the culvert.
    - In situations where culverts have been washed out or removed (or no culvert existed) and the control elevation is not known, reasonably accurate data can often be reconstructed by excavating two narrow trenches at right angles to the existing ditch.
    - The cuts for these trenches should be located in non-wetland soil about 10 yards upstream and downstream from the culvert location. In most situations the trenches reveal a line of mineral soil that corresponds to the original bottom of the excavated ditch and a darker layer of finer, more organic sediments that have been deposited in the ditch.
- Using a transit, the elevation and slope of the old ditch can be determined and an elevation for the control height of the replacement culvert calculated. This procedure is best used during low water flows, but if necessary, it can also be done using soil cores.
- In setting elevations for wetlands that are lowered for health, safety, or endangerment of property, it may be useful to use culverts to set permanent elevations at the outlet. This ensures that the set elevation is maintained.

The project leader should be observant when road improvement projects encounter easement-protected wetlands. Even though county or state highway departments may have statutory authority or a specific road easement that pre-dates the Service's protective easement, they are not entitled to drain wetlands that are not necessary for road maintenance purposes. They can do what is reasonably needed to maintain the road, but when plans call for drainage beyond what is reasonable, then the project leader must get involved to protect the property interests acquired by the easement. This is a judgment issue, but the project leader needs to be aware of wetland drainage that goes beyond what is necessary for road maintenance.

If federal funding is involved with the road project, then other requirements need evaluation, such as cultural resource issues, NEPA, and Section 4(f) of Federal Highway Administration regulations.

8.3.2.9 Beaver Dam Removal

Beaver dams may be removed from existing ditches or natural outlets without a permit, provided that no soil is removed from the bottom of the ditch or outlet.

8.3.2.10 Wetland "Texas" Crossing/Irrigation Waterways

Before a permit is granted the following must be adhered to, and the landowner must demonstrate to the project leader's satisfaction that:

- Modifications to equipment and/or to the topography cannot be made if it disturbs the wetland.
- Equipment is incapable of traversing wetlands in their natural condition.
- There will be no ground water impacts to protected easement wetlands.
  - If there are concerns over ground water related to easement wetlands, the Service will not issue an SUP for travelways.
- The term of the permit is ten (10) years.
  - The travelway permit is assignable to subsequent landowners and allows maintenance of the permitted facilities only under Service supervision.
  - All permits for irrigation travelways shall be issued by the Regional Director.
  - Permit distribution is as follows: original to landowner, copy to project leader, and copy to Regional Director.

Examples of travelways that can be permitted to accommodate sprinkler irrigation equipment are:

- Placement of 4-foot to 5-foot-wide wooden beams placed together with cable in a railroad track style.
- Placement of 4-foot to 5-foot-wide metal mats made of corrugated, expanded or punched metal.
- Removal of the muck layer not to exceed 10 feet in width in the bottom of the wetland and replacing it with sand or gravel to the natural bottom contour of the wetland.
  - Spoil material must be placed outside the basin.
- Exposure of the hard substrate by removal of muck layer not to exceed 10 feet width in the bottom of the wetland (only permitted in high water table wetlands).
  - Spoil material must be placed outside the basin.
  - In larger marshes where spoil deposition outside the marsh is impractical, use other approved travelway types.

Region 3 requires the following stipulations when approving travelway construction:

- Travelway construction shall be permitted during times of low wildlife use; that is, when wetland is naturally dry or in late summer after mating and nesting season (August 1).
- The Service should be present during construction and approves any maintenance or modification of travelways.

With the above pre-requisites and stipulations, impacts from this permitted use will be temporary during the construction phase and little-to-none during the operation. This use will not diminish the long-term productivity of the easement wetland(s) for waterfowl production or other migratory bird values. Thus, the use will not materially interfere with the waterfowl production or conservation purpose of the easement.

8.3.2.11 Tiling

Based on the best available science as well as the knowledge and expertise of project leaders, federal wildlife officers, hydrologists, and other scientists, the following are the Service's procedures for responding to requests for drain tile installation on lands protected by Service wetland easements. Through additional research, a better understanding of the impacts drain tile has on adjacent wetlands will likely be obtained. As a result, these guidelines are subject to modification if necessary to protect the Service's easement interests.

The Service generally considers the placement of drain tile within a protected wetland's catchment or contributing watershed a violation of the easement provisions when that tile diverts water away from the wetland. An exception exists when the lateral effect distance (LED) of the tile, as calculated by the Van Shilfgaarde equation modeling a 1-inch drawdown, is within the catchment. Based on initial analysis, this LED is outside the catchment in most cases. However, in rare circumstances where there exists a relatively large catchment compared to a small wetland, the LED may be within the catchment. In these cases, placement of drain tile within this LED, when the tile diverts water away from the wetland, is considered a violation of the easement provisions.

Use the following procedure to address drain tile installations on lands protected by Service wetland easements:

1. When a landowner contacts NWR/WMD office, obtain landowner's name, address, and legal description of the land he wants to tile.
2. Inform the landowner that the Service has an easement on his property.
3. Have the landowner provide the WMD with the NRCS-official wetland map, which has a detailed diagram of all tile/ditch routes, sizes, types, depths, and surface inlets and outlets marked clearly on it. Use the map as an evaluation tool.
4. Tell the landowner that after receiving the appropriately marked official wetland map, he will be informed whether or not his tiling plan will affect protected wetlands or if a ground check will be required.
5. Review the easement file and determine if the easement is a pre-1976 easement. If it is a pre-1976 easement, begin mapping procedures as outlined in Chapter 11: Mapping Procedures for Wetland Easements. If it is a post-1976 easement, include the Exhibit A map with the easement document.
6. After developing a wetland map for pre-1976 easements (NWR/WMD ground truths), send map(s) and a certified letter informing the landowner of the areas that are protected. Illustrate for the landowner where tile placement would violate the easement provisions. In most cases, this is within the protected wetlands' watersheds or catchments.

7. Review the NWR/WMD's certified letter, with attached wetland map, as it outlines the provisions of the easement and shows what is and is not protected. If the tile is allowed within the easement boundary, work with the landowner to accomplish the following:
    a. Flag the locations of the tile installation.
    b. Landowner informs the NWR/WMD 3 days in advance of any tiling.
    c. Landowner inform NWR/WMD when tiling has been completed.
    d. Ensure that there is no tillage for 5 days after tiling is completed.
    e. Provide an "as built" diagram of the tiling on the NRCS-certified wetland map.
8. Perform a ground check or take aerial pictures of the completed tiling project. If there are any discrepancies, conduct a follow-up using the same procedures as if a violation occurred.
9. Reviews the NRCS-certified wetland map and easement wetland map. If wetland map shows more wetlands, inform landowner and explain Service jurisdiction on all wetlands identified on the wetland map.
10. Keep all records in the easement file in case of any future requests for maintenance of drainage facilities.

A more in depth background discussion on this topic is provided on the Region 6 SharePoint site, under Easement Administration & Enforcement: https://sharepoint.fws.net/regions/r6/nwr/Easement%20Administration%20%20Enforcement/Forms/AllItems.aspx.

8.3.3 Habitat Management Activities

Habitat management activities are defined as an activity that could be conducted by the Service or a Service-authorized agent to fulfill one or more purposes of the refuge or Refuge System mission. Service-authorized agents include state or federal agencies, educational institutions, contractors, private organizations or individuals.

These activities must benefit wildlife populations, further the purposes and goals of the NWR/WMD and the mission of the Refuge System; and be commonly accepted as practices that are normally accomplished by natural resource agencies to promote wildlife populations. Examples include, but are not limited to:

- prescribed burning of upland or wetland vegetation to enhance vigor or provide better breeding pair habitat in wetlands
- inter-seeding upland areas to introduce more resilient grasses and/or forbs

Habitat management activities must be authorized by a permit and must be one of the below-listed permitted uses to be approved. They are, however, exempt from the compatibility requirements.

Permitted uses are listed here followed by a description of each:

- Prescribed Burning

- Nesting Islands
- Farming
- Tree Removal
- Invasive Species Management
- Wetland Restoration/Sediment Basins

8.3.3.1 Prescribed Burning

Habitat management rights purchased by the Service on both wetland and habitat easements (including most FSA easements) can include the use of prescribed burning. Improving protected habitats must be the management treatment objective of the prescribed burn. While landowners are specifically prohibited from burning under terms of the easement, an SUP may be issued to allow a landowner to burn his land under the following conditions:

- **Site Inspection:** The site is inspected by Service staff and has been determined that a prescribed burn is necessary to restore or maintain the vegetation on the easement area. This determination uses the same criteria Service personnel use in planning burns on nearby Service lands.
- **Percent of Area and Frequency:** Generally, no more than 33 percent of the easement area should be burned annually, or the entire tract should be burned no more frequently than 1 year out of every three. However, with input from Service staff, the management treatment objective(s) of the prescribed burn dictate how often or how much of the easement area is treated with fire. For that reason, burning more than 33 percent of the easement area annually or burning the entire tract more frequently than 1 year out of every three may be warranted when needed to meet specific habitat objectives.
- **Implemented in Accordance with Policy:** If either Service staff or funding is used to burn an easement, the burn must be implemented in accordance with the U.S. Department of the Interior and Service fire policy. A written prescribed fire plan must be prepared, reviewed, and approved according to Service and Region 3 policies and guidelines. Burns that do not use Service personnel or funding do not require a Service-prepared, reviewed, and approved prescribed fire plan and can be permitted by the Service as described above. Conditions of the permit must direct the landowner to obtain all other required permits, adhere to all state and local laws governing wildland fire management activities, and indicate that the landowner is solely responsible for the burn.

8.3.3.2 Nesting Islands

In some situations, nesting islands may be permitted in wetlands under the terms of the easement. Issuance of a Service permit does not subordinate the approvals that may be required from other agencies such as the U.S. Corps of Engineers, the state, and local units of government.

Benefit to waterfowl production should be the major goal, and avoidance or reduction of predation is a necessary requirement. Islands can be good waterfowl nesting sites in large, brackish marshes (Type IV) or open water lakes (Type V).

The following are characteristics of nesting islands that may be permitted in wetlands under the terms of the easement:

- The minimum basin size must be 50 acres.
- The island must be separated from the nearest shoreline by 600 feet to deter mammalian predators.
- If more than one island is constructed in a single wetland, a minimum of 600 feet shall be between islands.
- Minimum island size should be 50 feet by 100 feet.
- Islands over 1 acre in size are necessary to support dense aggregations of duck nests (100 nests or more).
- Wetlands for island placement must have a surface of at least 80 percent open water.
- Islands must be constructed of rock or other non-erodible base. They should be of irregular shape or resemble other natural islands in the vicinity.
- Tops must be leveled and covered with a minimum of 1 foot of soil capable of supporting good stands of vegetation. Usually, volunteer vegetation is adequate for nesting requirements.
- The top of the island must be at least 1 foot above the highest expected water level, but not more than 3 feet above such a level.

Permits for nesting island construction are issued by the project leader for a period of 12 months. No maintenance is allowed without another permit. This construction permit is not assignable to subsequent landowners. Permit distribution is as follows: original to landowner, copy for field station files, and copy to the Region 3 office.

8.3.3.3 Farming

The primary purpose of agricultural activity must be for a purpose other than providing food for wildlife. Farming for the sole purpose of providing food for wildlife is not allowed on grassland or FSA easements. If temporary agricultural use for the purpose of re-establishing more desirable permanent cover is permitted, all or a portion of the crop may be left over winter to provide food for wildlife. See 8.3.1.4 Farming in this chapter for guidance on farming .

8.3.3.4 Tree Removal

Removing invasive trees that have no economic value, whether along wetland edges or in grasslands, is permitted under the guidelines of habitat management. SUPs need to be issued to handle the following:

- method of removal
- restoration of area impacted
- method of disposal if tree removal occurs on the easement

8.3.3.5 Invasive Species Management

Invasive plant species management can become complicated, because habitat easement documents convey the rights to manage or alter vegetation to the federal government but state and county regulations (as well as the federal easement documents) require landowners to control noxious weeds.

SUPs are not required if noxious weeds are being managed appropriately and little or no other vegetation or wildlife habitat is being damaged. If activities such as excessive mowing, haying, or spraying herbicides are impacting desirable vegetation under the guise of weed control, the project leader must step in and let easement owners know that the Service takes its responsibility to manage (and alter) vegetation seriously.

Initial contacts with landowners can be informal. A phone call may be all that is needed to correct the problem, but a follow-up letter must be sent to make sure that both project leader and easement owners are clear as to what is expected.

This letter should convey the project leader's concern by stating which actions are not compatible with the terms of the easement and describe what weed control actions are acceptable. If appropriate, the project leader may want to include a copy of the easement and maps that show locations, approximate sizes, and acceptable dates for treatment.

If time and resources allow, the project leader may also consider offering assistance to landowners with such things as management, re-seeding, or the development of an integrated pest management plan to help them address their noxious weed/invasive species problems.

If problems persist, the project leader should work with the federal wildlife officer and notify landowners in writing that because of past problems, they are now required to obtain an SUP prior to any activity that alters the vegetation on their easement. The permits:

- may be issued for a period of up to 3 years,
- will describe the methods and dates of treatment, and
- state that failure to adhere to the conditions of the permit may result in the issuance of a "Notice of Violation" and federal court appearance or fine.

8.3.3.6 Wetland Restoration/Sediment Basins

Wetland Restorations

Restorations or manipulations of wetlands on Service-administered easements may be allowable within the terms of the easements. Project leaders should carefully read and fully understand the easement document when considering such activities on wetlands within the easement and when making the determination of who has the right to conduct the work. For instance, on many habitat and FSA easements, the Service has the right to restore or manipulate wetlands. On wetland easements, however, those rights depend on any number of possible scenarios, such as:

- whether the wetland is partially drained and protected by a Drainage Facility Map (DFM),

- whether the existing or drained wetland was excluded from the original easement, which may or may not be shown on a DFM,
- what the outcome of a new Exhibit A for pre-1976 easements may be, or
- if prior drainage agreements to third parties exist.

Occasions may arise when an easement landowner offers to restore a drained wetland or wetlands under the Service's Partners for Fish and Wildlife program, the U.S. Department of Agriculture's (USDA's) Conservation Reserve Program, USDA's Wetland Reserve Program, or a similar program. In these cases, the project leader should consult the easement files and photographs to determine if a potential violation has occurred but was undetected. It is necessary to determine if the landowner allowed/caused drainage after the purchase date of the easement, in which case it may be a violation.

Follow these guidelines if the existing drainage to protected wetlands is not a violation:

- The project leader is encouraged to work with the landowner to restore the wetlands at Service or other expense. Landowner's permission is needed.
- If a landowner decides to restore a protected wetland (e.g., fill in the ditch), then the restored outlet becomes the new elevation. Landowners do not have the option to lower the level of the ditch at a later date. The new elevation/outlet is recorded and must be maintained in the future.
- If the landowner wishes to restore and protect wetlands that were not protected by an easement previously acquired on the land, a second easement must be acquired. The project leader should contact the Region 3 Realty office and acquire the additional rights to protect the wetland or wetlands.
- If water control structures (ditch plugs, sheet pile weirs, tile risers, or intakes) are required, the new easement should document the specific mean sea level (MSL) elevation of the structure. It is also recommended that MSL elevations are documented on any drainage ditches on partially drained wetlands when easements are acquired.

Sediment Basins

The USDA is promoting projects for the installation of sediment basins to address erosion in highly erodible soils. These projects are often associated with tiling and often use drained wetlands to temporarily slow the flow of water through highly erodible lands to prevent further erosion/sediment transport. Caution should be used when evaluating landowner requests for installation of a sediment basin on an easement. However, this practice of installing sediment basins might be appropriate if a protected wetland, drained through natural erosion, can be fully restored.

If a project leader decides to pursue restoration of an easement wetland through a cooperative project using USDA's sediment basin program, the following guidelines should be followed to achieve consistency in the Region:

- Protected wetlands in good condition (have not been drained/damaged by erosion and have functioning hydrology) should not be altered with the installation of a sediment basin.

- Tile systems placed on the easement must comply with tiling guidance contained in this manual.
- Structures should be built to fully restore the protected basin and cannot be removed by the landowner to drain the wetland at a later date.
- Structures associated with the sediment basins should be designed so that failure of any structures does not result in drainage of the wetland. Structures that can break off and result in drainage of the wetland, such as risers, should be avoided.

Drained wetlands that are not protected by the covenants of the easement may be restored or re-drained without permission by the Service.

8.3.4 Health and Safety Requests

NWRs and WMDs frequently receive requests for use of or modification to wetlands protected by easement. Some requests may affect the Service interest acquired in private property and may require actions to avert or resolve a health and safety issue involving a Service-protected wetland. Requests may be received by NWRs and WMD's primarily from private property owners who are experiencing difficulties associated with easement-protected wetlands. At times, the requested use may impact Service easement interests. Project leaders must always try to resolve the issue or situation with measures that will be only a temporary disturbance to the Service interests. If temporary relief measures do not resolve the issue, major impacts may be necessary to resolve the health and safety issue. This should be addressed through an exchange as outlined in chapter 4, 4.4 Exchange Request Format.

The three main categories of requests are listed here followed by details for each:

- Emergencies for a duration up to 30 days – threats to human health and safety that can be resolved through temporary impacts to the easement that do not extend beyond 30 days
- Temporary requests for a duration that exceeds 30 days – impacts to easement last longer than 30 days, but are not permanent
- Minor permanent requests – minor impacts to easement that are permanent

Emergencies for a duration up to 30 days

The National Wildlife Refuge System Administration Act of 1966 states that the Secretary of the Interior may temporarily suspend, allow, or initiate any use in a refuge if the Secretary determines it is necessary to immediately act in order to protect the health and safety of the public or any fish or wildlife population. Authority to make decisions under this emergency power is delegated to the project leader. Temporary actions should not exceed 30 days and are usually of shorter duration. Such emergency actions are not subject to the CD process.

When using this authority, the project leader notifies the Regional Chief of the Refuge System in advance of the action, or in cases where the nature of the emergency requires immediate response, as soon as possible afterwards and typically no later than the start of business on the first normal workday following the emergency action. The temporary SUP outlines the emergency and why the temporary action was necessary to protect the health and safety of the public or any fish or wildlife population.

Temporary requests for a duration that exceeds 30 days

Occasionally, temporary impacts to protected easement interests might extend beyond 30 days in order to address a health and safety issue. An example of the kind of request anticipated under this category is the need to temporarily pump or drain easement-protected wetlands that are causing a health and safety problem (such as flooding a road or threatening a home). The project leader may issue permits for temporary drainage through pumping or ditching (preferably pumping) to alleviate flooding whenever there is a threat to human health, safety, or appurtenances.

If a project leader decides a temporary use is appropriate to remedy the health and safety concern, a CD must also be prepared based on site-specifics. To ensure consistency across the Region, CDs prepared for this use should contain the following baseline stipulations unless approval is granted by the refuge supervisor:

- The term of the permit shall not exceed that necessary to alleviate the emergency or 1 year, whichever is greater.
- When the health and safety threat has subsided, the altered easement interest must be allowed to revert to its natural condition. Any items installed on the easement (e.g., drainage facilities) will be completely removed or made non-functional, restoring the protected easement interest back to its original condition.
- Permits for emergency purposes are not assignable to subsequent landowners.
- Issuance of a permit does not preclude the requirements for obtaining necessary permits and/or approvals from other local governing units or county, state, or federal agencies.
- The permit is issued subject to the revocation and appeals procedure contained in 50 CFR 25 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-chapI-subchapC.pdf).

Minor permanent impacts

If a permanent impact to an easement interest is needed to address a health and safety issue, an exchange of rights or interests might be the best way to accommodate the request. If an exchange is necessary the project leader should follow the easement exchange process outlined in chapter 2, 2.3 Official Easement Records. If the project leader believes an exchange is not the best option to resolve the ongoing health and safety issue, he or she should discuss the situation with their refuge supervisor.

Rarely are health and safety issues resolved in such a way as to result in very minor impacts to the Service's acquired easement interest and where an exchange may not be the best solution. Examples include establishing a sill elevation on a wetland to lower it slightly to avoid flooding a building, or placing fill material in a protected wetland to widen a driveway or farm approach to more safely transport equipment. Most health and safety issues involve protected wetlands but could also occur with protected uplands such as tall, dry, easement-protected grasslands adjacent to farm buildings, which constitutes a fire hazard.

If a project leader decides to remedy the health and safety concern with a permanent impact to the acquired easement interest, a CD must be prepared based on site-specifics. To ensure

consistency across the Region, CDs prepared for this use should contain the following baseline stipulations unless approval is granted by the refuge supervisor:

- Issuance of a permit does not preclude the requirements for obtaining necessary permits and/or approvals from other local governing units or county, state, or federal agencies.
- The permit is issued subject to the revocation and appeals procedure contained in 50 CFR 25 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-chapI-subchapC.pdf).

Chapter 9: Easement Surveillance

This chapter and Chapter 10: Compliance Contacts provide procedures for easement enforcement.

- This chapter details aerial inspections of easement properties, which includes second flights if necessary, ground inspections, and easement tracking.
- Chapter 10 details landowner contacts and compliance requirements.

Note that the term “landowner” is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

Some flexibility by project leaders is permitted within these procedures, but these procedures are *required* of every National Wildlife Refuge (NWR, refuge) and Wetland Management District (WMD) that administers easements to ensure consistent application and enduring maintenance of the easement program. A violation tracking system has been implemented for all NWRs/WMDs to report and track easement violations.

Easement enforcement work is essential for the continued success of the U.S Fish and Wildlife Service (FWS, Service) program to preserve migratory bird habitat within the Great Lakes and Prairie Pothole Region. The procedures used for enforcing easements have been developed with the concurrence and support of law enforcement and, in some cases, the U.S. Attorney’s Office. The procedures have evolved over time, they have been tested, and they have been expanded to include new habitat easements and Farm Service Agency (FSA) properties.

All refuge law enforcement officers (i.e., federal wildlife officers) whose main duties involve protecting easements must be given the opportunity to acquire the required skills and training to be successful in easement enforcement. At a minimum, federal wildlife officers should receive instruction in easement enforcement issues and work with an officer with easement experience. The instruction for federal wildlife officers should cover many subjects including:

- easement contract language
- file and record reviews
- flight map preparation
- aerial reconnaissance and transects of suspected violations
- aerial photography and interpretation
- draft easement maps
- physical evidence of easement violations
- surveying techniques
- interviews/interrogations of suspected violators
- case documentation
- easement case reports
- instruction on sending out compliance and closure letters

- wetland types and descriptions
- soil science

After completing the instruction, each individual should be paired with a federal wildlife officer who is experienced in easement law enforcement. The training should run the whole course of an active easement investigation from start to finish.

Newly-hired federal wildlife officers attend the Natural Resources Police Training Program at the Federal Law Enforcement Training Center (FLETC). Upon completion of this training program, the federal wildlife officer is placed in the Service's Field Training and Evaluation Program (FTEP), a nationally-recognized training program. The FTEP is designed to help the federal wildlife officer make the transition from the classroom environment of the law enforcement academy to the practical application of skills in actual on-duty situations. It is recommended that the federal wildlife officer be placed at a training site that provides easement enforcement experience for a portion of the FTEP. For example, if the federal wildlife officer is to be stationed at a WMD, he or she should be assigned to a field training officer who is engaged in easement law enforcement. This would provide the new officer with several weeks of training with an experienced easement enforcement officer.

All easement enforcement officers should be given priority to attend the FLETC investigator and interviewer bridge class.

Non Law Enforcement

Any Service employee may conduct routine business and inspections on easements. When an employee without law enforcement authority is performing duties on an easement and observes a possible violation, the employee's course of action depends on the circumstances at that time. The employee's own safety and integrity of any possible evidence of the violation are the two main factors employees should consider when deciding whether to stay onsite or immediately leave. Elements of the employee's decision should include the following:

- whether the employee is alone (the only Service member onsite)
- if the landowner is present
- the nature of the possible violation (for example, tiling completed or ongoing logging)
- history of interactions/violations on this tract

It may be safer for the employee to complete his or her task for the day and report the observation upon returning to the office, or it may be best to immediately leave if the situation is unsafe or even awkward for the employee.

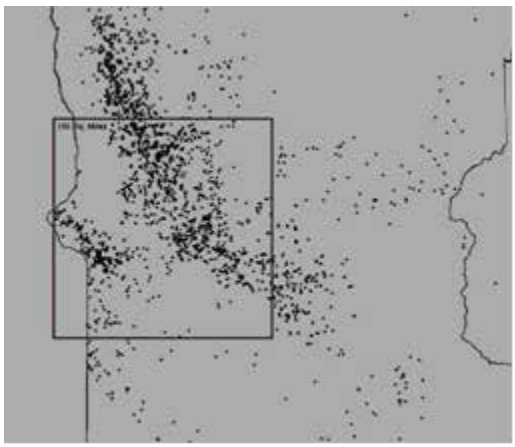
It is also recommended, for safety concerns, that all employees visiting an easement contact their NWR/WMD office to advise their supervisor when they arrive and again when they have left an easement.

9.1 Aerial Inspection

All easements will be checked for compliance at least once each year, either aerially or on the ground. In the Midwest Region (Region 3), there are over 700 Farm Service Agency (FSA) properties and approximately 3300 non-FSA easements, the majority of which are in the Minnesota's Prairie Pothole Region. Currently policy requires that all Small Wetland Acquisition Program (SWAP) and Northern Tallgrass Prairie refuge easements (wetland and habitat are the two main types) in Minnesota be checked aerially each year.

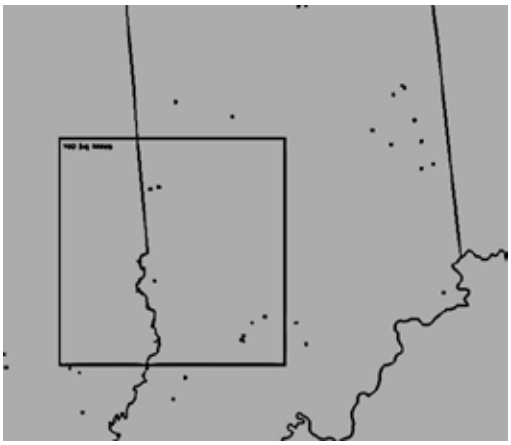
In geographic areas where easements are in high concentration, particularly in Minnesota (Figure 9-1), the most efficient way to monitor compliance is by aerial reconnaissance orthorectified.

Figure 9-1: High Concentration of Easement Properties



However, in geographic areas where concentrations of easement properties are very low (Figure 9-2), acquiring orthorectified imagery becomes more costly. For this reason annual flights are not required for FSA and other easements outside the Prairie Pothole Region in accordance with Department, Service, and Region aviation policies.

Figure 9-2: Low Concentration of Easement Properties



The objective of the aerial inspections is to detect activities that may constitute a violation, whether it is drainage, leveling, filling or burning of wetlands, construction, encroachment, early haying, or grassland altering violations for habitat and FSA easements.

For situations where an aerial flight is needed to address a known or possible problem, using Region 3's pilot, plane, and photography equipment, if available is recommended. If the Region 3 plane is not available, use a contract pilot.

Because of the timing of the aerial inspections, discussed below under "Wetland Easement Flight Scheduling (Fall and Spring)," and "Habitat or FSA Easement Flight Scheduling," wetland easements can be checked two times each year. However, July aerial surveys are primarily for habitat or FSA easements. Wetland-altering violations generally are not visible during this time of the year. FSA easements present a unique challenge for aerial inspection as many are wooded. An effort should be made to fly FSA easements once a year during optimum times of little to no leaf cover.

The following procedures are detailed below:

- Pre-flight Preparations
- Wetland Easement Flight Scheduling (Fall and Spring)
- Habitat or FSA Easement Flight Scheduling
- Flight Activities
- Follow-up Flights

9.1.1 Pre-Flight Preparations

9.1.1.1 GIS

In 2006, new techniques were developed for the use of in-flight navigation and surveillance equipment. Specifically, the use of Global Positioning System (GPS), Geographic Information Systems (GIS) software, and laptop computers to track the progress of the plane and display the locations of easements on-screen are now common. This technology replaces the use of a paper map as a means for navigating and recording violations from the plane.

The most relevant piece of GIS data for law enforcement compliance flights is the easement boundary layer.

Boundaries and tract information of all Service fee and less than fee lands (including easements) are recorded and managed as spatial data in the Service cadastral geodatabase, managed by the Cadastral Data Working Group (CDWG). The CDWG is comprised of Service realty and planning staff with GIS and/or surveyor backgrounds, with the Service Chief Cartographer serving as the team lead and data steward. The team records and updates all owned and managed land in the dataset, which is then provided to the Service and the public. In Region 3, tracts are spatially recorded in the Service cadastral database in addition to the tabular systems (Lands, Financial and Business Management System). Service Realty specialists work with the Service Realty cartographer to properly record each tract. For more detailed information on the process for maintaining and recording land status, see the CDWG

SharePoint site and Service Cadastral User's Manual at:
http://sharepoint.fws.net/Programs/irtm/gis/CDWG/Shared%20Documents/Forms/AllItems.aspx.

It is vitally important that this database be kept up-to-date and that federal wildlife officers monitor the accuracy of the database as it pertains to the easements in their jurisdiction. Minor easement boundary inaccuracies need to be addressed, but the information most important to aerial imagery acquisition is that all easements be present in the database and that the easement type is accurate. This information is used to develop flight plans for all of the easement flights. If the cadastral database is not accurate, there is a chance that some of the easements may be missed in the flight plan.

Another important function of the cadastral database is to target the correct easement types for the different flight periods. Flight plans could be more efficient if the easement attributes were accurate. For instance, conservation, FSA, and flowage easements could be eliminated from the spring flights if necessary and be targeted during the summer flights, when more flight time is available.

9.1.1.2 Paper

Some employees and federal wildlife officers may still prefer to produce and use traditional paper maps to navigate and document suspected violations. For those persons, information from the 2005 Region 3/Region 6 version of the easements manual (*Second Edition of the Administrative and Enforcement Procedures for FWS Easements*) on creating flight maps with GIS is provided for guidance:

1. Obtain all relevant GIS data. Features such as roads, section lines, township boundaries, and wetlands are universally available online. Other potential sources of GIS data include the state's Department of Transportation and the Department of Natural Resources. Individual field stations are responsible for maintaining and updating the various digital databases. The Region 3 office also has GIS data that can be obtained.
2. Create flight maps by displaying the data in GIS. Some experimenting with font and symbol shapes and sizes to create a map that is readable and informative in the air is necessary. The following are some tips to get started; however, project leaders may find other ways to customize maps to better suit their needs:
    a. Choose a map size approximately 34-inches wide by 22-inches high. This allows the map to be folded into quarters and is of a size that is easily handled in the confines of a small plane.
    b. Include on the map every section number and the townships and ranges in large print around the edges. It is not necessary to label every easement; easement tract numbers can be determined later.
    c. Stack the data layers in the order displayed below (Figure 9-3). This maximizes the visibility of the information map. For instance, the roads are viewable when displayed over the township boundaries, houses and other structures are not covered up by easements or Waterfowl Production Areas, etc.

Figure 9-3: Order of Stacked Data Layers

9.1.2 Wetland Easement Flight Scheduling (Fall and Spring)

Fall flights (after crops are harvested and before snowfall) are preferred for detection of wetland-impacting activities on wet easements and provide the best timing to detect and record suspected violations with a follow-up ground check.

Field stations wishing to aerially inspect their easements with the use of a Service plane and camera must:

1. Contact their respective refuge law enforcement one officer (RLEZO) and Service pilot with their request.
   a. These requests should be made during the winter (January or February) prior to inspection flight dates.
2. Once the request and dates have been confirmed the pilot contacts the designated GIS Wildlife Biologist who develops a flight plan for the area to be inspected through the use of GIS and camera software.
   a. If the Service plane and camera are not available other sources of aerial inspection should be investigated in accordance with Department, Service, and Region policies.

Due to the limited number of Service pilots and aircraft, combined with fewer vendors, the project leader should schedule flights as early as possible. If snow cover precludes completion

of the survey, reschedule flights for the spring after the snow cover melts, but before crops are planted.

Spring flights for wetland easements, which should assist in detection of older, previously missed ditches, should be considered at least every 3 years. Alternately, the project leader should consider aerially inspecting one-third of the WMD each spring. The primary drawback of spring flights is the reduced time available for ground checks, file review, loss of fresh evidence, and landowner contacts prior to the start of the busy field season. The primary benefit is the increased visibility of all ditching activity due to spring runoff with water in ditches.

9.1.3 Habitat or FSA Easement Flight Scheduling

The mid-summer flight is primarily to check habitat easements and upland-restricted versions of FSA easements that, due to the type of grassland and latitude, are most likely to be hayed or burned prior to July 15. Some NWRs/WMDs may not have habitat easement densities that would either require transects and/or second flights. If the project leader can accomplish required surveillance by flying from easement to easement, can evaluate the easements adequately with only one flight, and/or can adequately and safely accomplish the monitoring with only one observer (in addition to the pilot), then it is acceptable to do so. If monitoring is occurring by taking aerial photos with the Service's belly-mounted camera it is not necessary to have an observer in addition to the pilot.

Some NWRs/WMDs may experience limited or no haying violation issues and in this case may choose to combine the annual habitat surveillance flight with the fall wetland easement surveillance flight, resulting in a single, combined all-inclusive fall easement surveillance flight. The use of a single all-inclusive fall flight is at the discretion of the project leader and is dependent primarily on the NWR/WMD's violation history. Otherwise, the project leader should schedule the July flight close to July 15 (July 1-12) but early enough to ground-check, document, and measure the extent of any violation prior to the July 16 release date.

FSA flights should occur during the fall, early or late winter, or spring. The demand for the use of the Service's plane and equipment may make it difficult to schedule flights when wetland easements are being aerially inspected during the middle of October to the middle of November. If aerial inspections are not possible during these times summer flights will work. It is important to get aerial photos of FSA easements, even if it is during the summer.

Typical violations to watch for when flying over FSA easements include illegal cropping, encroachment, timber harvest, ditching of wetlands, and building construction. It is important to read the covenants of the easements as they vary from one FSA easement to another.

9.1.4 Flight Activities

9.1.4.1 Service Plane and Pilot

Schedule flights the prior winter through your respective RLEZO and Service pilot. Understand the following aspects of inspecting and photographing easements with the use of the Service plane, pilot, and equipment; and use these guidelines:

- The Service plane is equipped with a high resolution digital camera, GIS, and a flight following system. A pre-planned flight schedule will have been developed in advance by the Service's designated GIS Wildlife Biologist (GWB) for all confirmed easement flights.

- Depending upon the weather, use of the Service's belly-mounted camera may not be an option.
- Depending upon the weather, low level aerial inspection flights for wetland easements may have to be performed and if so, will require two employees in addition to the pilot. During the dates the NWR/WMD's wetland easements are scheduled to be flown, two employees need to be available as low level visual flights may be the only option.
- Paper easement maps must be available.
- All photographs taken with the Service's belly-mounted camera are saved on a hard drive.
    - At the end of the flight the pilot places the hard drive into a locked container that is picked up by the GWB.
    - The GWB then uses software to convert the data into aerial images and geo-referenced pictures.
    - The completed geo-referenced pictures are then sent overnight to the appropriate easement enforcement officer or federal wildlife officer. If the field station does not have an officer this information should be sent to the project leader.
    - For time sensitive photos, the total time for field stations to receive surveillance photos—which is the time the pictures are taken by the pilot, the GWB converts the images, to sending the data overnight—should be no more than 3 days. Certain conditions could delay this 3-day turnaround, but every effort should be made to avoid delays. The two most likely issues that could cause a delay are the pilot not returning to the home airport after each day of flying and instances where photography is delivered for processing on Friday or Saturday. See Exhibit 9-1: Easement Compliance Photography Procedure, Minnesota Wetland Management Districts, Fall, 2011 for more information on the digital aerial photography program.
- Once the officer receives this data he or she downloads the information, returns the hard drive, and starts reviewing the photographs looking for possible easement violations.
- These photographs are saved on the Region 3 office server.

9.1.4.2 Charter Aircraft and Pilots

If using charter aircraft and pilots, know that:

- High-wing aircraft offer better visibility and photographical capabilities than low wing aircraft.
- Vendor (contract) aircraft and pilots approved by the Region 3 office in cooperation with Aviation Management (AM) Directorate vary annually. Contact the Service's pilot for a current list.

9.1.4.3 Aviation Safety Policy Pertinent to Easement Monitoring

For flight profiles/altitudes less than 500 feet (which are the majority of a mission other than take-off, enroute, and landing), special pilot and aircraft qualifications as well as equipment requirements apply; contact the Regional Aviation Manager (RAM) for additional guidance.

Prior to each flight, passengers receive a safety briefing by the pilot.

Flight plans and flight-following responsibilities are required for all flights.

Project leaders should review the Regional Aviation Plan (Jan 2008) for additional policy guidance.

9.1.4.4 Miscellaneous Procedural Items and Tips

Field stations with historically high violation rates should arrange for two flights for easement monitoring. One flight may be sufficient in those areas with widely scattered easements. If only one aerial inspection is made, all violations or suspected violations must be photographed concurrently.

In general, visual or low level wetland easement monitoring should include two observers, neither of which are required to be federal wildlife officers. Areas with low densities of easements may only need one observer.

- The project leader must ensure all observers are properly trained (flight safety training and wetland identification training) and are familiar with the mission.
- New observers must only fly initially with another experienced observer.
- If using the Service's plane and belly-mounted camera for easement violation detection, no observers are needed with the pilot.

If not using a belly-mounted camera to photograph and survey the easements, fly over counties or blocks of easements at alternate directions every other year or 1 out of every 3 years. This enables better coverage of violations, which may occur immediately adjacent to the transect being flown; violations near the flight path are difficult to detect because they are directly under the plane.

On windy days the plane may need to 'crab' to stay over the established transect, forcing the observer to look ahead or behind in order to observe areas beneath the plane.

A technique of following the progress of the plane on the maps with a pencil may be useful. Also, at the end of a county or block of easements, mark the direction of flight and the return transect to help continually monitor the location, as well as for future reference in determining the direction easements were observed. If using the tablet computers interfaced with GPS, activate the flight log prior to the flight.

Due to the limited number of Service pilots and aircraft, combined with the narrow windows of opportunity for flying over easements, it is crucial all flight crew and air observers maximize the amount of flight time each day as well as availability (including weekends). However, duty day limitations for the pilot must not be exceeded under any circumstance.

Most observers photograph all suspected violations with a 35mm camera with a zoom lens (optimum range of this lens is about 50–100 mm).

- Observers later review these photographs, compare them to the maps in the easement files, and determine if suspected activities are violations of the easement.

- Take at least one photo that orients the viewer to the location and direction of the photographs.

Another method is to document any activity suspected as a violation on the plastic overlay map or the photograph of the easement.

Document all suspected violations, including older activities, which may have been missed in previous years.

- The potential exists to miss violations that occur after surveillance flights are located directly under the plane and that have been made difficult to observe due to farming practices, purposeful activity, etc.
- These violations in future years may not have fresh activity and may appear as established or old activities.
- Observers should note all suspected activity including those without recent, fresh work and document with aerial photographs.
- Treat old activities as a current violation until a ground check is made and when the file review or the mapping process verifies the activity is allowed. If an old activity is not allowed, it should be treated as a current violation.
- If the activity is allowed, label the photograph and place it in the easement file.
- Old violations may present a challenge in obtaining restoration and/or prosecution because of a lack of evidence, landowner/operator changes, etc. Nevertheless, the federal wildlife officer should try and collect as much evidence as possible.

U.S. Department of Agriculture (USDA) slides and photographs may be helpful to establish when the violation occurred.

Using a soil expert may aid in collecting evidence on the ground, and interviewing the landowner/operator may provide additional evidence. It is also recommended to discuss the case with the RLEZO especially if evidence is lacking.

Activities that experienced observers have documented in previous years do not have to be documented each year. These situations should be rare. If you are not certain that an activity was previously documented, photograph the activity from the air, and initiate further investigation.

Digital photographs are permissible for documenting suspected violations. For details, see Exhibit 7-3: FWS Forensics Lab Digital Imagery Procedure, which is a procedure developed by the National Fish and Wildlife Forensics Lab for use of digital photographic equipment. Additional details about digital technology as an evidentiary tool can also be found on the FBI Laboratory Services website (http://www.fbi.gov/about-us/lab/forensic-science-communications/fsc/jan2000/swigit.htm).

Keep written notes for each suspected violation, and reference them to the proper photograph and easement.

- Use abbreviations to speed up note taking, such as: (PF) for plow furrow drainage, (SD) for scraper ditch drainage, (F) for filling activity, and (B) for burning. These abbreviations are also helpful in aiding the observer on the follow-up flight to know what type of activity to look for.
- Maintain a key or cross-reference chart for all abbreviations and their meanings.

Aerial inspections during the summer can be flown either in transects or from tract-to-tract, depending on the density of easements. During the summer flight, look for indications of early haying/burning, cropland areas that should be in grass, encroachment of crops onto the habitat easement, and any suspicious looking wetland activities even though fall flights are better for observing wetland violations.

9.1.4.5 Aviation Safety Training

For all observers, the following modules (available at https://www.iat.gov) must be taken every 2 years:

A-101: Aviation Safety
A-105: Aviation Life Support Equipment
A-106: Aviation Mishap Reporting
A-108: Pre-Flight Checklist & Briefing/Debriefing
A-113: Crash Survival
A-200: DOI/USFS Accident Review FY<various dates> (annual refresher training required)

In addition, for those who carry hazardous materials (e.g., ammunition and pepper spray) aboard the aircraft, A-110:Transport of Hazardous Materials training is required every 2 years.

These modules are available online or are presented occasionally by the RAM and other AM Directorate-approved trainers upon request. Contact the RAM, who has access to AM Directorate's training database, regarding if training is current.

In addition to the modules above, supervisors of observers and/or those who are responsible and accountable for using aviation resources to accomplish bureau programs are required to attend M-3 Aviation Management for Supervisors training with online refresher training every 2 years.

9.1.5 Follow-up Flights

When monitoring wetland easements in the fall, some project leaders prefer to conduct second flights to screen out suspected violations before conducting ground checks; others prefer to do all the aerial documentation on the first flight. It is suggested that two flights be performed for field stations with historically high easement violation rates.

For field stations that conduct second flights in the fall, additional guidelines are listed below followed by details for each:

- Pre-flight Preparation
- Flight Parameters

- Flight Activities
- Video Equipment
- Habitat Easements

9.1.5.1 Pre-Flight Preparation

Pre-flight preparation is as follows:

1. Assemble aerial photographs (8-inch FSA aerial copies work very well) that contain the easement areas with potential violations.
2. Outline the area protected by the easement.
   a. If it is a pre-1976 easement, identify Drainage Facility Map (DFM)-deleted wetlands.
   b. If it is a post-1976 easement, identify wetlands in blue. Arrange the photographs numerically by county for easy retrieval during the flight.
3. Compare aerial photos taken during the first flight (if applicable) to the FSA map to determine whether the suspected violation is a deleted (i.e., DFM) wetland. If there is any doubt, include this possible violation for second flight photography.
4. Write the aerial photograph numbers that correspond to each suspected violation on your flight map so the corresponding photos can be retrieved as each suspected violation is inspected.
   - Two observers are desirable, but, if necessary, one observer should be sufficient to handle the task. Using one or two observers depends on the volume of suspected violations.
5. Assemble the camera, film, and note taking supplies needed. For digital cameras, bring extra media disks and batteries.

9.1.5.2 Flight Parameters

Fly low and slow enough to get a good view of the easements, and photograph without compromising safety. Keep in mind that sustained flights below 500 feet AGL (above ground level) require additional safety and administrative requirements.

9.1.5.3 Flight Activities

The purpose of second flights is to screen out suspected violations before performing ground checks and to obtain good photographic and written documentation of suspected violations from the air.

1. Assist the pilot with navigation between suspected violations.
2. Identify ditching and other suspected violation activities on base photographs to aid ground inspection.
3. If more than one type of violation is present, each should be identified and described on the photograph.
4. Record notes for each suspected violation.

9.1.5.4 Video Equipment

Consider using video equipment, especially in cases of serious or second-time violations. If the case is expected to go to court, videotape the entire violation. This includes aerial and ground coverage that would show the violation, actual work, wetland vegetation, etc. Video documentation is in addition to, not a substitute for, good 35 mm and/or digital photography.

9.1.5.5 Habitat Easements

Use the general guidelines above for documenting suspected violations from the air. Since follow-up flights are normally not conducted during summer evaluation flights, make sure the photo documentation is sufficient during the first flight for any suspected violations.

9.2 Ground Inspections

On-the-ground inspection of suspected violations must be completed as soon as possible. If early snow cover prevents fall flights and/or ground inspections, complete as early as possible the following spring (within two weeks after snow melt). Spring ground inspections need to be completed within 1 month after detection from the air or before landowners begin field work, whichever comes first.

9.2.1 Pre-Ground Inspection Requirements

Before actual inspection, complete a Waterfowl Management Easement Data Sheet (WMEDS) (Exhibit 9-2: Easement Data Sheet). Symbols are used in conjunction with colors because color photocopy machines may not be available, and federal wildlife officers may be working with a person who is color blind. If second flights were completed, then use the map from that as the ground check guide. If wetland easement second flights were not conducted, then complete the following:

1. Include on the WMEDS a photocopy of the section of the aerial photograph where the alleged violation is located, or transpose a copy of the Exhibit A onto the WMEDS.
2. Plot the boundary of the easement with a **black** outline.
3. If a drainage facility map exists for the easement in question, plot the allowable facilities in **green**.
4. Plot all alleged illegal activities as follows:
   a. Scraper ditches, single plow furrow, double plow furrow, dozer ditches, etc. with a **solid red line**.
   b. Filling of any type material (rocks, earth, trees) with a **red x**.
   c. Tiling with a **dotted red line**.
   d. Any stock pond, level ditch, or donut that may be in violation with a **small red rectangle**.
5. Show section numbers in black, and label and locate buildings or farmsteads with a **small black triangle**.

6. Identify all distinct coulees or natural drainages with black dash-dot lines and label. Coulees can be difficult to define. Those found on U.S. Geological Survey 7½-minute topographic maps can be used as a guide. Be aware that these maps may not show all coulees.
7. For FSA/habitat easements, plot the suspected violations on the map and indicate the concern—early haying, cultivation, construction, encroachment, etc.

Set up a case folder that includes:

- entire easement file
- complete WMEDS (Exhibit 9-2: Easement Data Sheet)
- verified identity of the landowner (use courthouse or other records)
- all memorandums, letters, maps, etc., which apply to the case.

Complete a file review to determine past history and if observed activity is authorized. Chances are extremely high that you will be contacted by the landowner during the ground check. It is imperative you know the easements history as your first contact is extremely important for gathering information, confessions, and evidence.

9.2.2 Ground Investigation

A ground check is required prior to a landowner contact to verify that a violation of the terms of the easement has actually taken place. This applies to suspected violations of all easement types; e.g., wetland, habitat, and FSA. Aerial photographs are not, by themselves, adequate for a case. They can only complement the ground inspection and photographs.

Although all easement documents contain language granting the right of access for authorized Service personnel to investigate a potential violation, the Service recognizes that vehicle use to access easements can be a sensitive issue for some landowners. If contacted by a landowner, federal wildlife officers should consider a property owner's access requests if the requests are reasonable. Service personnel should avoid entering standing crops or using a vehicle when field conditions are too wet. The Service also recognizes that it cannot honor every access request by a landowner. There may be a history with a landowner involving threats or other behavior that would make the request unreasonable or unacceptable due to safety concerns for the federal wildlife officer.

Using a vehicle while conducting easement ground inspections or compliance checks can greatly aid in the efficiency of the work and for transporting cameras, surveying equipment, law enforcement equipment, or file and photo information. In addition, a vehicle provides radio communication and cover in case of a threatening situation. If a specific issue or concern surfaces about vehicle access, contact the appropriate RLEZO for guidance.

Because of the chance of impromptu landowner contacts, which could be confrontational, all ground investigations should be made with at least two people, and both must have law enforcement authority. However, the project leader may authorize ground investigations to be completed by one person—with law enforcement authority, but it is strongly recommended that a minimum of two federal wildlife officers conduct the ground investigations. Non-law enforcement personnel will NOT participate in ground investigations unless accompanied by two

federal wildlife officers. Expert witnesses can be escorted by two federal wildlife officers to obtain information and evidence. Carrying a weapon and using other law enforcement-related safety equipment are required whenever law enforcement personnel conduct a ground investigation. See chapter 10, 10.2.1 Interview Phase for more information on law enforcement requirements.

Assume the evidence being collected will be presented in court. Most cases will not go to court, but a thorough documentation of the violation is necessary and required. Guidelines that help prosecution in court include the following:

- Record the size and extent of the violation.
- Record the cover type: grass, forb, or shrub species in the area, cropland, etc.
- Record the actual activity in terms that describe the violation of the provisions of the easement: protected wetland drained or filled; grassland hayed prior to July 15th, etc. Note anything else that might be pertinent (e.g., implement used to violate the provisions, any loss of wildlife species, dead nesting hens, disturbed nests observed during the ground check, etc.).
- Document other aspects of the violation and wetland, including excavated materials dumped in the wetland or near the ditch. Tan or light brown clay soils may be present in the excavated material, which generally demonstrates excavation beyond any sedimentation that may have occurred. It may be helpful to document evidence of the wetland prior to the violation. This includes verifying the existence of any aquatic plants or soils in the wetland as well as signs of previously standing water (e.g., crop residue washed up showing a high-water line).

Compile photographic evidence of all aspects of the alleged violation. Good quality photographs are often the best evidence. For wetlands:

- Use color print film or digital photography. It may be necessary to take more than one photograph from various viewpoints, especially on more serious violations.
- Photograph(s) should depict whether a wetland is burned, drained, or filled. Photograph ditches from both directions.
- Photograph the most serious aspect of the alleged violation. The use of red and white poles (range poles) is recommended. These poles show 1-foot increments and are used to prove the width and depth of ditches.
- Photograph those areas where arguments may later be anticipated concerning compliance. Try to show the general contour of the land so adequate compliance can be easier to achieve.
- Documentation with photographs is still needed in cases of fill that might not constitute a violation or require restoration. Future accumulation of the fill can then be documented, and enforcement action taken at a later time. For example, photographs of a rock pile can be used for enforcement if the rock pile grows in the future.
- Record all pertinent data concerning each photograph taken.
    - A small tape recorder is handy to record information such as time of day, weather conditions, and other factors that may influence the interpretation of the photo.

  - Make sure to include the federal wildlife officer's full name.
  - After the photographs are developed or printed, each must be labeled with the necessary information. See Exhibit 9-3: Large Photo Description and Exhibit 9-4: Double Photo Description for details.

- Prepare a map showing photo points and direction from which all photographs were taken. See Exhibit 9-5: Photo Reference Sheet for details.
- Map pre-1976 easements (including pre-1964 documents), and measure wetland acres using the dot-gridded or GIS method once a potential violation has been observed from the air and verified by a ground check. This is necessary to see if the violation of the wetlands covered by the easement occurred. There is no violation until the project leader has compared the map and acreage of the protected wetlands and verified that the potential violation has occurred on a protected wetland. See Chapter 11: Mapping Procedures for Wetland Easements for mapping procedures.

For habitat and FSA easements:

- Take photographs from various directions.
- Ensure photographs document the suspected violation (e.g., hayed, mowed, plowed, cultivated, timbered, constructed upon, or otherwise altered grass, and the extent of the alteration).
- Photograph the most serious aspect(s) of the alleged violation.
- Photograph those areas where arguments may be anticipated later concerning compliance. Try to show the general nature of the surrounding grasslands so that adequate compliance can be easier to achieve.
- Record all pertinent data concerning each photograph taken. After the photographs are developed or printed, each can be labeled with the necessary information.
- Prepare a map showing points from which all photographs were taken.

By the end of the ground inspection, if not before, federal wildlife officers should be in a position to determine whether or not a violation has taken place. If a violation has taken place, then the tracking system detailed in the "Easement Tracking" section that follows will provide an orderly method for recording pertinent information and reporting the progression of the enforcement process to the appropriate RLEZO.

IMPORTANT: The need to conduct a thorough investigation and complete the necessary documentation cannot be overstated. All phone calls, meetings, and/or casual conversations concerning violations must be documented. All subsequent onsite visits to the violation site should be documented with photos, survey notes, etc. This documentation could be the difference between winning and losing a case.

9.3 Easement Tracking

Tracking easement violations is critical to the integrity of the entire easement program. Beginning in October 2005, field stations were required to use a centralized tracking system. Region 6 developed and has been using an electronic easement register created by the Devils

Lake WMD. Region 3 will also use this system until the Law Enforcement Information Management and Gathering System (LE-IMAGS) is operational. Both systems provide the consistency needed throughout the easement enforcement program and contain all of the pertinent information needed to successfully conduct easement investigations. The procedure is as follows:

1. Upon completing the electronic easement register, export the information and send it to a master file for tracking.
    - The master file is maintained by the appropriate RLEZO.
    - A hard copy of the electronic easement register is included as part of the permanent easement file.

    The Service is currently developing a Law Enforcement Incident Management System. This case incident reporting system will track all law enforcement incidents that occur within the National Wildlife Refuge System. Easement investigations will also be incorporated into this reporting system. Until the incident reporting system is operational, it is imperative to export the data to the RLEZO as described above.

2. After confirming an easement violation, the investigating federal wildlife officer or person responsible for oversight of the specific easement must complete the applicable information fields within the electronic easement register within 7 days.
3. Within 14 days after documented completion of an easement investigation (e.g., compliance or court adjudication), the federal wildlife officer or person responsible for the specific easement completes the applicable information fields within the easement register.
4. To further augment the tracking process of easement violations, a semi-annual reporting requirement is instituted.
    a. Field stations shall provide a “fall outlook report” for easement violations. This report is submitted to the appropriate RLEZO by December 15 each year.
    b. Field stations shall also provide a “spring progress report” for easement violations identified in the fall and continued from previous years.
5. The respective RLEZOs provide an electronic version of the easement register to all Region 3 field stations.
6. This report is then submitted to the appropriate RLEZO by May 15 of each year.

Chapter 10: Compliance Contacts

Once a violation has been discovered, confirmed, and documented according to the criteria outlined in the previous chapter, it is time for the compliance contact with the landowner. Because of the high potential for encountering adversarial situations, refuge law enforcement officers (federal wildlife officers) should be thoroughly prepared for a frank discussion of the violation and be able to explain the terms of the required compliance.

Note that the term “landowner” is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

10.1 Pre-contact Preparation

Federal wildlife officers need to become familiar with the history of the easement before making contact with easement owners and/or tenants. This helps the officer determine the direction the investigation needs to go and the types of questions needed to be asked. Pre-contact preparation is accomplished by doing the following:

1. Verify the landowner. Verification can be accomplished by using field station records, courthouse records, Farm Service Agency (FSA) records, plat books, etc.
2. Review the easement file to become completely familiar with it. Knowing what is in the file is essential when discussing the case with the landowner. An interview can take many unexpected turns, so be prepared.
    a. On some easements with a known history of confrontation, the project leader should highlight the easement file to alert future easement project leaders of potential problems with ground checks and contacts. Information in the file indicating previous confrontational contacts, derogatory statements made by the landowner or a landowner that demonstrated unstable, highly emotional, or a vindictive type attitude would be basis for highlighting a particular file.
    b. The project leader may also want to check with county sheriff offices for potential problem landowners or pay particular attention to foreclosure actions or actions of individuals or groups of landowners who are objecting to taxing systems or government intervention in the farm community. Use special precautions in continuing with a case that has been highlighted.
    c. Be cautious when highlighting a file. Do not include statements that are derogatory, highly opinionated, or reflect a dislike for the landowner.
        - Remember, if the case ever results in court action, the entire easement file may be viewed by the defense.
        - Inappropriate statements could jeopardize the case and make U.S. Fish and Wildlife Service (FWS, Service) employees appear to be unprofessional or vindictive. However, the federal wildlife officer or project leader should accurately document statements even if the words used by the individual are vulgar.
    d. Contact your appropriate refuge law enforcement one officer (RLEZO) for assistance prior to contacting people with a known history of instability or violence.

3. Assemble the entire file, county atlas, etc. to take along on the interview for reference if needed.
4. Assemble all note-taking materials for documentation of interviews. This includes note paper for writing memos to the file or a tape recorder for dictated accounts that are typed later in memorandum form ("LE-9 [rev-4] Consensual Monitoring").
   - **Per department policy, LE-9 (rev-4) Consensual Monitoring: federal wildlife officers may record conversations with other parties under exemption (I.1.g).**
5. After the file review, if it is determined that there is a prior history of violations, field stations without easement enforcement officers should contact their respective RLEZO. If possible, the RLEZO will assign the easement violation to an easement enforcement officer with project leader approval.

10.2 Landowner Contact

10.2.1 Interview Phase

It is strongly recommended that two federal wildlife officers make landowner contacts. Prior to the interview the federal wildlife officers must prepare and conduct themselves as follows:

1. Before making these contacts, federal wildlife officers should contact the local sheriff's department, state patrol office, or local conservation officer to notify them of their location, that they are performing an interview, and the expected length of time they will be at that location.
2. Federal wildlife officers should notify the local sheriff's department, state patrol office, local conservation officer when they have left the area.
3. Project leaders may approve in advance the use of one federal wildlife officer for scheduled landowner contacts on a case-by-case basis. The project leader may also authorize federal wildlife officers to handle chance encounters and conduct unscheduled interviews if the opportunity presents itself.
4. Chance encounters are not predictable, but the project leader may authorize in advance federal wildlife officers to make landowner contacts if they occur. There is no justification for non-law enforcement personnel to participate in or take part in initial landowner contacts, particularly in a field setting. Contacts made within the National Wildlife Refuge (NWR, refuge) or Wetland Management District (WMD) office may be conducted by only one officer, and non-law enforcement personnel may participate if necessary.
5. If there are known special circumstances with the case at hand, ask the appropriate RLEZO to accompany the project leader when conducting the interview, but realize that RLEZOs cannot accompany the project leader on very many interviews.
   a. The initial interview phase of the investigation may determine if a violation is satisfactorily resolved. Federal wildlife officers should always conduct themselves in a highly professional and business-like manner. It is important to remain firm but also listen to and consider the landowner's point of view.
   b. The objective is to obtain a resolution to the violation. Most interviews will be accomplished with few problems, but federal wildlife officers always need to be prepared for the interviews that become violent and out of control.

   c. Training in conflict management, difficult conservations, and other communication skills are recommended for federal wildlife officers who work with easement enforcement.

6. Carrying a weapon and using other law enforcement and related safety equipment are ***required***.

   a. Federal wildlife officers are required to wear the full complement of leather/web gear while conducting landowner contacts; however, concealed weapons may be worn at the discretion and approval of the project leader.

   b. If federal wildlife officers are approved to wear non-conventional gear (pancake or shoulder options), then the officers should train with this non-conventional gear during re-qualification exercises.

During the interview federal wildlife officers must:

1. Immediately identify themselves, stating where they are from, and why they are there. Federal wildlife officers will always wear uniforms and will drive marked vehicles unless the project leader determines that there are compelling reasons for an incognito approach. The landowner must know who is confronting him or her.
2. Verify the identity of the individual being interviewed. Initially, this may be the landowner.

   a. Verify the individual's name, address, and date of birth or the individual's vehicle license plate number—which may be obtained from the sheriff's office before initiating the contact.

3. Always be aware of the landowner 's description.

   a. Note the sex, race, approximate age, height, weight, eye color, hair color, and any distinguishing features (e.g., beard, scars, etc.). This information is especially important if the landowner refuses to identify him- or herself.

4. Verify who is the operator or the individual that farms the land in question.
5. Before discussing the violation, establish whether or not the landowner is aware of the Service Easement for Waterfowl Management Rights on the land in question. This is necessary even if the current landowner is the original seller of the easement.

   a. If the individual is a second or subsequent owner, knowledge of the easement becomes very important. The extent of the landowner's knowledge will help to determine whether the case will be handled as a criminal or a civil matter if voluntary compliance is not accomplished.

6. Try to establish who is responsible for the activity that is considered a violation. Consider questions such as:

   - Who did the actual work?
   - Was the wetland drained by a contractor?
   - Who hayed the area prior to July 16?

7. If possible, establish who ordered the work done and whether it was done by an employee of the landowner or through contract.

8. Identify all persons involved with the activity that is considered a violation. An interview with each may be necessary.
9. Do not take the entire easement file into the actual contact interview. Take only the information necessary to conduct the interview leaving the file itself in the locked vehicle.
10. Do not show the individual the contents of the easement file during the interview.
    a. If the landowner requests to see the entire file, explain that the file is not available at that time.
    b. An appointment may be made to have the file reviewed at a later time at the NWR/WMD office.
    c. Closely control how much of the file the landowner is allowed to see. Sometimes, it is advisable to show the landowner some of the evidence, such as photos, contract, and/or field sketches. By doing this, the landowner may be convinced that he or she is unlikely to win in court.
11. Advise the landowner that additional investigative work will be conducted and he or she may be contacted again upon completion of the investigation.
    a. Consider additional interviews with the landowner especially if, at any point during the conversation, issues arise that may weaken or destroy the case.
12. Take the time to make a solid case. Contact staff members, a RLEZO, or the Midwest Region (Region 3) Solicitor's office before making any demands.

It is **extremely important** that federal wildlife officers and the project leader communicate before and after the interview stage and throughout the investigation. The project leader is ultimately responsible for decisions of management on the easement, so the project leader's involvement is a must. There may be instances in which the project leader has a good rapport with the easement landowner or the initial interview was positive and the project leader would like to be involved in a follow-up meeting and a second federal wildlife officer is not available. The project leader's participation will occur on a case-by-case evaluation that includes the easement landowner/operator's past history, behavior, and if the federal wildlife officer is comfortable with the project leader physically present at the follow-up meeting. Before a project leader accompanies a federal wildlife officer on a follow-up meeting, effort should be made to have the easement landowner/operator meet at the NWR or WMD office first.

10.2.2 Compliance Requirements

Based on all the evidence that was collected from aerial and ground inspections, federal wildlife officers should have a good idea what will be required for compliance in terms of restoration. In some cases, the landowner's explanation of events may change some of the pre-determined compliance requirements, but plan on going to the landowner with a reasonably firm and well thought out restoration plan, be it wetland-related or upland-related. In any event, federal wildlife officers must discuss compliance requirements with the landowner and obtain his or her verbal commitment to complete the necessary restoration if possible. A follow-up certified letter will also be sent to the landowner as discussed below.

Some violations, such as early haying do not require a compliance and restoration requirement. Others violations—like protected grasslands that have been converted to crop, or wetland

draining or filling—require restoration to be performed and a firm date set for the restoration. At some point during the interview, the federal wildlife officer must:

- Establish a date for which all restoration work must be completed.
- Ask the landowner for acknowledgment that he or she understands and will comply with the requirements.
- Ask the landowner if he or she has any questions about the restoration requirements, or what will be needed to bring the easement back into compliance.

Key points for federal wildlife officers to remember about establishing compliance requirements are as follows:

1. Explain in detail what is expected of the landowner in the way of compliance requirements.
   a. If a ditch is to be filled, require 10 percent overfill to allow for settling.
   b. In cases of filling violations, all fill must be removed.
   c. A visit to the site with the landowner may be helpful and should be made, if possible.
      - Sometimes, marking out the compliance requirements with stakes or flags is advisable to prevent misunderstandings.
      - It is a good practice for federal wildlife officers to be present during restoration to resolve any shortcomings.
      - Federal wildlife officers should make arrangements to be present if at all possible for all but the very minor restoration needs.
2. Incorporate commonly accepted seeding practices for an upland site violation requiring restoration (such as converting grass to cropland).
   - Depending upon when the violation is discovered, federal wildlife officers may have to wait until the following spring.
   - The compliance requirement should specify seed mixtures and seeding rates.
   - See Exhibit 10-1: Seeding Guidelines for details. The quality of the restored grassland must be at least as good as it was before the violation took place.
3. Establish a deadline by which the landowner must have all compliance requirements completed.
   a. If fall contacts are made and conditions allow, a fall deadline should be made. Under these conditions, a 48-hour or short deadline is appropriate.
   b. If a spring deadline is necessary, require that the landowner complete the work as soon as conditions allow, but not later than a set date, such as May 1 or May 15.
   c. Request that the landowner call the federal wildlife officer when the work is completed.
      - In some instances, it might be necessary for a Service representative to be present during the restoration work to ensure proper compliance.

- It is extremely difficult to get landowners to go back and do a small amount of additional work if the initial work is not satisfactory.

d. If it becomes necessary to extend the deadline, call or write the landowner as a reminder of the deadline.

- If extending a deadline by a phone contact with the landowner, make a note of the conversation for the easement file.
- Mitigating circumstances such as weather, high water levels, or illness should be taken into consideration.
- Seeding the crop or other work excuses are not extenuating circumstances. However, avoiding the destruction of already-planted crops would be considered as an extenuating circumstance in most cases.
- Plan to complete the needed restoration prior to spring seeding.

4. Consider the following restoration guidelines, related to wetland violations, when setting deadlines for landowners:

- 1st deadline: within 30 days after the first contact advising the landowner of a violation.
- 2nd deadline: two weeks after the first deadline.
- 3rd deadline: two weeks after the second deadline.

These deadlines may be extended at the discretion of the project leader.

In addition to the restoration guidelines, the table below shows a general timeline for conducting easement investigations.

Item	Timeline
Ground checks	within 30 days after flights (weather permitting)
Contacts	within 30 days after ground check
Contact follow-up	within 7 days after contact
Compliance check	1–3 days after compliance date
Contact for inadequate compliance	1–3 days after compliance check
Letter for unsatisfactory compliance	7 days after compliance date
Closure letter (satisfactory compliance)	within 14 days after compliance check

5. Explain to the landowner that non-compliance will result in the matter being referred to the U.S. Attorney's Office or the Midwest Region (Region 3) Solicitor's office for possible legal action.

a. Do not make threats that are unfounded, such as stating that the case will be processed through the criminal court system. The U. S. Attorney makes this decision, and an unfounded threat could ultimately jeopardize the case.

10.2.3 Post-interview Procedures

Upon departing from the landowner's location, federal wildlife officers need to pull off the road and begin ***a thorough job of documenting all evidence obtained during the interview***. Important evidence may be lost if trusted only to memory. Considerable time can pass between the interview and the time when the information may be needed in court. Therefore, the federal wildlife officers should immediately prepare written notes or a tape recording of all issues discussed during the interview. The importance of this cannot be overstated.

The post-interview procedure is as follows:

1. Complete the Easement Violation Interview Checklist using the format shown in Exhibit 10-2: Waterfowl Management Easement Violation Interview Checklist.
   a. Include the name, date of birth, address, and a complete description of the landowner. A landowner's date of birth is necessary for the new LE-IMAGS reporting system.
   b. Include a reference to the tract of land (legal description and easement number) covered by the easement.
   c. Federal wildlife officers may include comments on the attitude and cooperativeness of the landowner, but do not use derogatory statements. Remember that in court cases, the defendant has access to *everything* in the easement file, not just in the court case file. Do not write anything that you do not want seen by the landowner's attorney.
   d. Above all else, record direct quotes that the landowner made, either voluntarily or in response to specific questions. Do not hesitate to record profanity in direct quotes that the individual may have made during the interview. The individual's choice of words reflects that person's attitude.
2. Prepare a letter (Exhibit 10-3: Restoration Letter) to the landowner that reiterates what was told to the individual about compliance requirements, and restate the deadline date.
   a. Attach a map, showing where compliance is needed and how much.
   b. Make a copy of this letter and all attachments, and file it into the easement file.
   c. Send the letter via certified mail *with return receipt requested*. The certified mail receipt is the only evidence that will show later in court that the individual received the letter.
3. If tenants or renters are the primary contact for the violation, the project leader must also send copies of all correspondence to the landowner. This includes the certified letter just discussed and all other correspondence mentioned in this section.
   a. Some people do not accept a certified letter. If a certified letter is refused, the U.S. Postal Service will return it to the sender. The Postal Service will include documentation stating the certified letter was refused with the letter. Save the refused letter and documentation for possible use in court.
4. Follow up a refused letter that was sent via certified mail with either a hand-delivered letter by a federal wildlife officer, or mail the letter (using First-Class Mail) in a plain envelope.
   a. The letter should contain a valid return address of the NWR/WMD office.

b. Make a copy of the letter and its envelope, which includes the address of the individual, and file it into the easement file.

c. Document how this plain letter was sent by recording who mailed it, the date and time it was mailed, and from where it was mailed.

d. Have the post office date stamp the envelope by hand and, if possible, make a copy of the envelope containing the date stamp. If this letter does not come back to the return address, your documentation and photocopies will provide evidence that the landowner received the letter.

5. In any follow-up letters involving restoration, inform the landowner that if compliance is not obtained, the case will be referred to the U.S. Attorney's Office for possible prosecution. In the initial letter, it may not be necessary to mention prosecution in order to keep a positive tone to the communication.

10.2.4 Compliance Check

The compliance check process is as follows:

1. Request that a federal wildlife officer be onsite when restoration work is performed.

   a. Explain to the landowner that the officer's presence during restoration helps to ensure that the work will be completed thoroughly without the need of having the landowner return should any work in the officer's absence not have conformed to restoration specifications.

   b. If the work is done without an officer present, at minimum, follow-up inspections must be completed ***within 3 days*** after the restoration deadline to ensure that the restoration is satisfactory.

2. In many cases, federal wildlife officers will have been at the site during the compliance work. Ensure that a filled ditch has been packed and 10 percent overfill added, that all fill material has been removed from the basin, and there is no depression where the ditch was. *This may be the hardest part of easement enforcement work. If the work is unsatisfactory, officers must be prepared to require and enforce total restoration.*

3. Service personnel may have to work with the landowner over an extended period of time and require additional interim steps (e.g., clipping weeds) before a satisfactory restoration to pre-violation conditions or better has been completed.

4. Compliance requirements for upland sites will not be as definitive as with wetland compliance work. If a seeding is required to bring a violation back into compliance, determining that compliance has been achieved may take a year or more to assure that a satisfactory stand has been re-established.

5. Clearly explain to, and make sure the compliance requirement(s) are understood by, the landowner. The easement case will be considered open for the entire restoration period. The easement case can be closed only when satisfactory compliance has been achieved.

6. When the landowner has complied, send a letter (Exhibit 10-4: Case Closure Letter) notifying the individual that the Service is satisfied with the compliance and that the Government will close the case.

   a. Thank the landowner for his or her compliance, but also remind the landowner that future violations may be referred to the U.S. Attorney's Office for possible legal action.
   b. Letters sent as a result of satisfactory compliance do not need to be sent certified, but the project leader may do so.
   c. Make a copy and file into the easement file any letters sent.
7. Federal wildlife officers must also photo-document that compliance has been satisfactorily completed and file the photos into the easement file. These photos prove invaluable later if/when the same violation occurs and the extent of the required restoration from the past violation.
8. If the landowner does not comply with any of the deadlines given, notify the individual with a letter by certified mail of their failure to comply, and that the case is being sent to the RLEZO for follow up and possible referral to the U.S. Attorney's Office.

Remember that all correspondence is sent to the landowner if tenants or renters are the primary contact for the violation.

10.2.5 Assume Every Case Will Go to Court

Compliance is the ultimate goal of the Service's easement programs. The Service realizes that through enforcement of its easement program, conflicts will arise between landowners and the Service. If conflicts cannot be solved through contacts with the landowners, the final method of dispute resolution is through the court system. The Service must, at all times, maintain its professionalism when speaking to landowners and in documenting contacts and violations. The federal wildlife officers must keep and maintain each easement file, realizing that all of the contents could one day be used for trial purposes. With the understanding that each easement violation has the potential to be settled in court, the Service must pro-actively prepare to present its case-in-chief to the U.S. Attorney's Office and ultimately, the courts.

Chapter 11: Mapping Procedures for Wetland Easements

11.1 Establishing Policies, Guidelines, and Procedures

In response to the Eighth Circuit Court of Appeals ruling in the 1997 Johansen wetland easement case, the U.S. Fish and Wildlife Service (FWS, Service) has implemented a policy and guidelines, to be used in the Midwest Region (Region 3) regarding wetland mapping for pre-1976 wetland easements. Post-1976 easements are already mapped in Exhibit A maps and do not have to be re-mapped. Whether responding to a landowner's request for assistance in dealing with a water problem, a request specifically for a map, or prior to determining whether an actual violation of the easement contract has occurred, Service personnel must prepare a map of the subject wetland easement.

Note that the term "landowner" is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

The following guidelines and procedures are based on the Eighth Circuit Court of Appeals ruling. However, pre-1976 easement contracts were clear in identifying that all wetlands "now existing or reoccurring due to natural causes on the above-entitled land" are covered by the terms of the agreement and are not limited by that acreage in the easement summary. The circuit court even recognized a U.S. Supreme Court ruling in North Dakota v. United States 460 U.S. 300 (1983) that stated in part " . . . it [easement contract] did not explicitly limit the wetland easement to the Summary Acreage." However, the circuit court has specifically addressed easement summaries and held that the agreement is limited to those acres. Until the circuit court ruling is overturned, modified, or changed in some fashion, this manual will use the circuit court language as guidance to mapping pre-1976 easements.

These procedures for Regions 3 are consistent with the guidance from the U.S. Attorney's Office in North Dakota. According to the February 4, 1998 letter to the Honorable Rodney S. Webb (Chief Judge, U.S. District Court), Lynn Crooks (First Assistant United States Attorney) stated:

> *"It is accepted by everyone, following the Eighth Circuit opinion that in future easement enforcement actions, the U.S. Fish and Wildlife Service will be required to prove which potholes were present at the time of the easement acquisition and thus included in the Total Wetland Acres notation on the Easement Summaries."*

11.1.1 Service Requirements

These new elements of proof require the Service to show two things:1) the protected wetland existed at the time the easement was purchased, and 2) that the mapped acreage of the wetland basins is included in the easement summary acres. The first element requires the Service to prove which wetland basins were intended to be included in the "total wetland acres" figure on the easement acreage summary sheets. This is a task of location. The second element requires the government to prove that the total acreage of mapped wetlands so located does not exceed the "summary acreage" figure for that tract.

The eighth circuit has also affirmed that the Service's wetland easements are valid and our law enforcement efforts are legal. The Service, however, upon a qualified request, and in order to determine if a violation of an easement has occurred, must determine which wetlands are

protected and the approximate size and location of the wetlands. The Service's policy is to map a pre-1976 easement upon qualified request or when a potential violation is discovered. The form of a request will be liberally interpreted. For example, if a landowner or renter calls or comes into a Service office with a question concerning protected wetlands, the Service will interpret that to mean he or she wants a map showing which wetlands are protected.

The easement summary acre figure, calculated by the Service Realty specialists at the time of easement acquisition, plays an important role in the mapping exercise. The easement summary acreage figure was calculated in order to make a fair market offer to the prospective seller. The easement summary acreage figure was also reported to each state.

11.1.2 Fluctuating Water Levels

It is important to note that wetlands are hydrologically dynamic systems. Water levels within those systems expand and contract due to annual precipitation levels, ground water or soil interaction, runoff patterns and evaporation. The U.S. Attorney's February 4, 1998 letter to Judge Webb addresses this question in notation #2, second paragraph:

> *"The Eighth Circuit has always recognized the inherent expansion and contraction of prairie potholes. A pothole does not cease being a pothole just because it dries up. When it dries up it can be farmed, not ditched. There is no requirement anywhere that a pothole have water in it when the easement is acquired. Wetlands are defined by many factors other than the presence or absence of standing water on a particular day. Most North Dakota potholes are essentially dry by fall in a normal year."*

In addition, the inherent fluctuating nature of wetlands was upheld in the North Dakota v. United States, in the Supreme Court 81-773 – Opinion on March 7, 1983, page 19 lines 10-15:

> *"To respond to the inherently fluctuating nature of wetlands, the Secretary has chosen to negotiate easement agreements imposing restrictions on after-expanded wetlands as well as those described in the easement itself. As long as North Dakota landowners are willing to negotiate such agreements, the agreements may not be abrogated by state law."*

The easement map will represent the Service's effort to depict the approximate location, size, and shape of all protected wetland basins based on information and photography available at the time the map is prepared. This map is not meant to depict water levels in the basin in any given year.

11.1.3 Mapping Issues

The following points summarize the Service's position on mapping issues brought up by the Johansen case:

- Mapping will be completed with offsite resources.
- There are NO acreages set for individual wetlands. Summary acreage is for the entire easement.
- The Johansen case did not require the Service to set specific acreage for individual wetland basins.

- The wetland easement map only shows which wetland basins are protected and only provides approximate size, location, and shape of protected basins.
- Each question brought up on the size of an individual wetland will have to be evaluated on a case-by-case basis.
- The map identifies protected wetland basins, not water levels in individual wetlands.

11.2 Specific Mapping Instructions

1. Be somewhat liberal in your interpretation of a request for a map.

   Request examples: A landowner comes into the office asking about a particular wetland; health and safety issues; whenever an Easement Permit is needed; or when there is a suspected violation.

   a. We are required to provide a map anytime one is requested by a landowner, operator, local government entity, or the Governor.

   b. We are not required to map easements in response to third party request; e.g., from a wind company. However, we should always map an easement whenever the potential exists to impact a protected wetland basin.

   c. Upon qualified request, the Service is required to provide a map of protected wetlands. In this process, the Service is mapping, not delineating wetlands. The map will become part of the easement file(s). It will not be an Exhibit A map.

   d. The prepared easement map(s) should be sent to the requestor or alleged/potential violator on or shortly after the first landowner contact.

2. Determine if the easement is a pre- or post-1976 easement.

   a. In post-1976 easement, mapping is already done on Exhibit A maps and is part of the contract. No additional mapping will be necessary for post-1976 contracts.

   b. If it is a pre-1976 easement, consult easement files for renegotiated maps, Drainage Facility Maps (DFMs), Difficulty to Drain maps, or any other partial maps, or complete mapping that may already be done.

   Some of the early (pre-1976) easement contracts refer to maps that were prepared and given to both parties at the time the easement was purchased. These maps have connecting language in the contract and will be treated as the official easement map.

   Some of the easement files have Difficulty to Drain map(s) (Exhibit 11-1: Difficulty to Drain Map). In other situations, Wetland Enhancement Biologists with the Small Wetlands Acquisition Program (SWAP) made maps of a number of the early easements, often with field notes describing wetland type, vegetation, or waterfowl observations.

   All wetlands were protected in pre-1976 easements, unless wetlands were specifically excluded on a DFM (see below), including those that may have been missed when these maps were drawn. These are not official easement maps but should be used as a reference when drawing the easement map.

3. Before any maps are given to a requestor, calculate the basin acres on the map and compare it to the summary acres.

a. If the summary acres figure is encompassed within the mapped wetland basin acres standard range of error or the mapped acre figure is less than the summary acre figure, send a copy of the map to the landowner. The standard range of error for mapping easement is defined as plus or minus 10 percent of the measured mapped wetland basin acre figure. See Exhibit 11-2: Mapping Error Range for standard range of error details.

b. If the summary acre figure is not encompassed within the mapped wetland basin acres standard range of error (i.e., the lower end of the mapped acreage range of error exceeds the summary acres), wetland basins will be deleted from the map according to the mapping policy criteria until the summary acre figure is encompassed within the standard range of error or is less than the summary acre figure. Existing wetland size and shape cannot be adjusted on these maps.

4. Prepare a new map of the protected wetland basins and provide it to the requestor.

   a. All maps will be sent out using the standard easement map format.

Drainage Facility Maps (DFM)

5. Include deleted wetlands and ditches on the new map. These features can be found on the DFM if such a map exists for the easement (Exhibit 11-3: Drainage Facility Map). Trace the drained wetland(s) and ditch(es) onto the new map. The DFM serves as a reference point and identifies the wetland(s) not protected in the easement.

   a. The Service and the landowner negotiated which wetlands were to be considered for deletion on a DFM.

   b. There are two types of DFMs that were used to show which wetlands were not protected in an easement contract.

      - The first type of DFM has dashed-line circles with arrows extending from the circles.

        These wetlands are not protected. Once the new map is drafted and the dashed-line circles are drawn on the map, mappers may observe the line with an arrow extending from the dashed-line circle though a non-DFM wetland. The non-DFM wetland should be considered protected, because the arrow is not referencing that particular wetland. The arrow extending from a dashed-line wetland applies to the deleted wetland only. The arrow does not represent the actual length or location of the ditch draining the deleted wetland.

      - The second type of DFM includes maps indicating open ditches with solid arrowed lines where there are no dashed-lines identifying the wetlands deleted from the easement.

        These DFMs are a compilation of arrowed lines identifying specific locations of open ditches that may be maintained. These DFM-mapped arrows will be traced onto the map. If these arrowed lines intersect mapped wetlands, these wetlands are not protected.

Renegotiation Maps

In the late 1960s and early 1970s, several Service Realty specialists in the Devils Lake Wetland Management District (WMD) told landowners that annual fall drainage of wetlands by plow furrows was an acceptable farm practice. As a result, the Service offered to renegotiate these wetland easements with the landowners and certain wetlands were deleted from the easement(s). The renegotiation period ended in 1975. If the renegotiated map (Exhibit 11-4: Renegotiated Map) depicts the protect wetland basins as well as the deleted basins, it represent the easement summary acres and should be considered the official easement map.

6. Renegotiated maps can be photocopied and sent to the requesting entity if the maps include all the protected wetlands.
   a. A standard cover letter should be sent with the renegotiated maps.
   b. Often times the renegotiated maps only have deleted wetlands. In this case, use the mapping procedures to map protected wetlands and then trace deleted wetlands on the official map.

   Renegotiated easements will have a new easement summary acre figure. The wetland acres that may have been deleted through renegotiation were subtracted from the original summary acres.

Other Maps

The following maps can be used as tools when drawing the easement maps:

- draft maps
- easement information sheet maps
- maps that have been mailed to landowners that depict wetlands
- all other maps that may be in the file

7. If an easement map has a requestor, it should be reviewed before it is distributed.
8. Use all available offsite resources to map the protected wetlands.
   a. A ground check or aerial validation is valuable and encouraged, but not required in order to prepare an easement map. The lack of time to do a ground check or weather conditions should not prevent a response to the request for a map in a timely manner.
   b. Some stations may have funding to produce maps proactively. If mapping proactively (there has not been a request or there is no potential violation), do not distribute maps until they are validated. Aerial or ground validation is preferred; however, some stations may have a year of exceptional aerial photography, which can also serve as a validation tool.
   c. If there is any doubt as to the existence of a wetland while using aerial photography to validate a map, a ground visit will be required.
   d. If a violation is detected, then the map(s) should be provided to the landowner/operator following the confirmation of the violation.

e. Aerial and/or ground reviews should be conducted in a timely manner barring budget/staffing constraints.

9. Measure wetland acreage on the draft map using a dot-grid, digitizer, or Geographic Information Systems (GIS) program and compare it to the summary acre figure.

   Measuring acreage with offsite tools is, at best, an estimation of the wetland acreage on a property. It is not a precise measurement.

   NOTE: The easement summary acre figure is for the entire easement contract. If your request is for a portion of the original easement, project leaders will have to map and compare the acreage for the entire easement contract with the summary acre figure. There is no way to compare the wetland acreage for only a portion of the easement with the easement summary acres.

10. To ensure as much accuracy as possible, the map must be reviewed and approved by a second person.

    a. The preparer will do the initial work of drawing all wetlands on the map as they appear over time on available photographic resources.

    b. The approver/reviewer will make certain that protected wetland basins are consistent with the summary acres for that easement by following the policies/procedures/guidelines set forth in this chapter.

    c. It is the map approver/reviewer's responsibility to conduct a thorough file review of the easement contract, paying close attention to any wetlands with past violations, wetlands that may have been compromised administratively, ditches that were allowed to be maintained, or any other pertinent information. Wetlands with a violation history should remain on the map if possible.

    d. The person who reviews the file should have extensive experience in enforcing/administering wetland easement compliance.

11. The map is described as an approximation of the size, shape, and location of the protected wetlands (see Exhibit 11-5: New Easement Map).

    a. The preferred method is to use the most current guidance, such as Easement Mapping Using GIS Tutorial, which details methods to map wetland easement using ArcMap.

    b. When the map is completed, it will be signed and dated by each person who was involved in its preparation.

    c. The resources used in making the wetland map (e.g., National Wetland Inventory [NWI] map and Natural Resource Conservation Service [NRCS] photo #CWO 2HH 128, date 8-8-67) will be recorded on the Easement Mapping References form (Exhibit 11-6: Easement Mapping References). It may be useful to include copies of the photos and maps used to prepare the wetland easement map in the easement file.

    d. The map is to be prepared on a 4-inch/mile scale. Do not trace or photocopy over the 8-inch/mile U.S. Department of Agriculture (USDA)/ Farm Service Agency maps. USDA does not map wetlands with Service easements in mind. Do not write acreage figures on the map or aerial photos. Managers are only making a comparison between the easement map and summary sheet acreage for the wetlands on the entire easement contract.

There is Wetlands "Mapper" Utility Tool (WMUT) that the Service has made available to the public on the internet. Anyone can pick an area anywhere in the United States and find NWI wetlands on that location. If a wetland is selected with the identity tool, the WMUT has a data table that reveals characteristics of the wetland including acres.

The WMUT has potential to conflict with easement maps that the Service provides to landowners. It is well known that NWI does not capture all wetlands, especially in the Drift Prairie, and the wetlands depicted on NWI maps are determined from one year of aerial photography.

Several years of aerial photography, oblique photographs, and possibly ground truth visits are used in making easement maps. The Service needs to be able to explain the difference in the easement maps compared to the wetland maps generated by the WMUT.

12. The easement map will contain the following paragraph:

    "The U.S. Fish and Wildlife Service (Service) has purchased and owns perpetual rights, which will restrict or prohibit the right to drain, burn, level, and fill any wetland basin depicted on this map. This map represents the Service's effort to depict the approximate location, size, and shape of all protected wetland basins based on information and maps available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetlands in any given year. The Service reserves the right to correct this map, provided the resulting mapped acreage remains consistent with the easement's summary acres."

    a. Also include this statement in the text of the cover letter transmitting the wetland map to the requestor.

       The Exhibits in this chapter contain examples of three different letters to the landowners or others who have requested wetland easement maps.

       - Exhibit 11-7: Example of Letter that Transmits Easement Map Requested by a Landowner transmits the map to the landowner via certified mail in a non-violation situation. It states the map is an approximation of the wetland conditions and if the landowner or operators have questions, it is their responsibility to contact the Service.
       - Exhibit 11-8: Example of Letter Responding to Landowner Questions Regarding the Mapping Process responds to a landowner's questions about the mapping process or about the size of individual wetlands.
       - Exhibit 11-9: Example of Letter Transmitting Revised Map to Landowner transmits a revised easement map with an explanation of the revision.

13. Send a copy of the final map to the requestor by certified mail with a standard cover memo.
14. Retain the original map(s) in the easement acquisition file, and staple a copy in the easement folder.

15. If the map was completed as a result of a violation, a copy of the map should be sent to all parties involved including landowner, operator/renter, and government entities (e.g., NRCS).
16. A copy of the map will also be sent to the appropriate Wetland Acquisition Office (WAO), which in turn will send a copy to the Region 3 Realty office where it will be converted to microfilm.
17. The time frame for responding to a request for an easement map should not be more than 60 days. If you are unable to complete the map within 60 days, respond to the requestor and landowner in writing with an explanation. In no case should the Service allow a map request to go unanswered for longer than 60 days.

11.3 Mapping Easement Wetlands Instructions

1. Prepare a wetland map of all naturally-occurring wetland basins utilizing all offsite mapping tools available (see Exhibit 11-10: Offsite Mapping Tools).
   a. Map those basins which have historically been present over time; that is, basins present on historical aerial photos.
   b. Use all wetland photographic signatures to help determine the presence or absence of wetlands basins. Look for:
      - hydrophytic vegetation
      - surface water
      - saturated conditions
      - mud flats
      - flooded or drowned-out crops
      - unharvested crops
      - isolated areas that are not farmed with the rest of the field
      - areas of greener vegetation (especially during dry years)
      - mature uplands tree rings
      - recurring cropping patterns that avoid wet areas
   c. Each wetland basin will be mapped over time as accurately as possible utilizing all available offsite resources. The objective is to make our best effort to define wetland basins at the interface of hydric soils, hydrology, hydrophytic vegetation, and upland soils using representative signatures of offsite tools. This will be done by interpreting wetland signatures on aerial photographic resources understanding that there is inherent error in photo-interpretation (see Exhibit 11-2: Mapping Error Range).
   d. The draft mapper should identify all areas that appear to be wetland basins, and depict the approximate size, shape, and location based on all available resources.
2. The draft map is then approved by a map approver who will review the map and verify basin identification, approximate size, shape, and location of all drafted basins.
3. Once the approver has completed the verification task, the approver will then compare the summary acreage to the estimated acres drafted. The approver should not compare

estimated acres mapped to summary acres until an accurate representation of the wetland basins has been achieved.

4. Once the summary acreage is compared to the mapped basin acreage, size and shape of wetlands should not be changed unless, upon further review, the map approver believes mistakes have been made. The easement map will be completed using offsite tools, and field inspections will be conducted as the need arises.
5. Complete a thorough review of the easement file(s) to ensure that current mapping efforts undertaken are as consistent as possible with any historical information in the easement file. File reviews should ensure that only defendable wetlands basins are mapped.
   a. Do not map wetland basins that the Service has authorized to be completely drained. There may be particular basins that have certain maintenance limitations/restrictions that will continue to be protected by the easement.
   b. Do not map wetland basins that have been administratively removed from protection.
6. Calculate the acreage of the draft map wetland basins, and compare the acreage to the easement summary acres. One of two conditions will exist:

   Scenario One

   The wetland draft mapper makes a preliminary map, then the approver/reviewer compares it to the easement summary acre figure and finds that the estimated mapped wetland basin acre figure is less than or equal to the easement summary acre figure. In this case, prepare a final map according to the mapping guidelines.

   Scenario Two

   After completing the preliminary map and comparing it to the easement summary acre figure, the estimated mapped wetland basin acre figure for the draft map is greater than the easement summary acre figure. The court has made it clear that the mapped wetland acres must be consistent with the summary acre figure. In this case, the wetland map approver/reviewer must use the following process to assure the easement map will be consistent with the summary acres:

   a. The map approver will reevaluate mapped wetland basins and/or portions of basins. Basins that have inconclusive signatures such as basins that only show up on one or two aerial photo resources may be removed if warranted.
      - Basin boundaries may be redrawn only if evidence from a ground check and/or consultation with a second map approver/reviewer warrants modification of the basin size or shape.
      - **Modifications will only be made to better define the wetland basin, not to save acres or to fit the summary acres**.
      - If modifications are made, compare the newly-estimated mapped acre figure to the summary acre figure for the easement.
      - If the estimated mapped acre figure is still over the summary acre figure, go to the next step (b).

b. If the estimated mapped acre figure is still over the summary acre figure, then it must be determined if the summary acre figure is encompassed within the standard range of error for the mapped wetland basin acres.

- The standard range of error for mapping easement is defined as +/-10 percent of the estimated mapped wetland basin acre figure.
- If the summary acre figure is encompassed within the standard range of error for the mapped wetland basin acres, then the map may be approved and finalized (see Exhibit 11-2: Mapping Error Range). The standard range of error must be calculated as shown in the following example:

  Mapped acres = 50
  Summary acres = 46
  Error Range = Mapped acres +/- Standard Range of Error
  Error Range = From (50 – [50 x 10%]) to (50 + [50 x 10%])
  Error Range = 45 to 55

- In the above example, the summary acres falls within the standard range of error for the mapped wetland basins, so the map can be finalized.
- If the summary acre figure does not fall within the standard range of error, as in the example below, then go to the next step (c).

  Mapped acres = 50
  Summary Acres = 44
  Error Range = Mapped acres +/- Standard Range of Error
  Error Range = From (50 – ([50 x 10%]) to (50 + [50 x 10%])
  Error Range = 45 to 55

c. If the summary acre figure is below the standard range of error for the estimated mapped wetland basin acres, entire wetland basins must be removed from the map according to the wetland basin elimination criteria below.

- Basins will be removed until the error range (as calculated above) encompasses the summary acre figure or is less than the summary acre figure.
- Each time a basin is removed, a new standard range of error must be calculated. Once the summary acre figure falls within the range of error for the estimated mapped basin acre figure or is less, then the map will be finalized and approved.

Wetland Basis Elimination Criteria

Wetland elimination criteria are divided into three categories and are described below:

i) Potential Health and Safety Issues and Non-typical Wetlands
ii) Biological Factors
iii) Last Resort Considerations.

These categories are in priority order, but criteria within category “i” are not in priority order.

i) Potential Health and Safety Issues and Non-typical Wetlands

Remove wetlands that are not typically included in wetland easements purchased today and/or wetlands that may cause health and safety issues. The following criteria are not in priority order, so the manager has some flexibility in removing wetlands that may be of highest concern on the particular easement being mapped:

- wetlands within the landowner's curtilage
- co-owned wetlands
- wetlands that impact well-traveled access roads and have potential to cause flooding
- degraded wetlands (contaminated, in feedlots, not fully functional, silt-laden, or partially-drained wetlands)
- wetlands close to a town or city that are subject to development
- wetlands lying in well-defined intermittent or permanent stream beds
- intermittent streams, coulees, and impoundments
- inconclusive signatures, such as wetlands that do not show up on two or more usually reliable photographs

ii) Biological Factors

The next criterion to be used to identify wetlands protected by the easement summary acres is wetland type/classification. Wetlands that were not the primary focus of the SWAP prior to 1976 will be the next to be eliminated. This includes ephemeral wetlands (Steward and Kantrud, 1971) as these wetland basins would not likely have been identified from photographic evidence available to the Service Realty specialists. If the draft map is still over the easement summary acres, begin to eliminate lacustrine and semi-permanent wetlands. Consistent with the focus of the SWAP, temporary and seasonal wetlands are the last wetlands to be eliminated from a draft map.

iii) Last Resort Consideration

If wetland acres still need to be removed to make the map consistent with the easement summary acres, consider the following:

- Protect definable lobes within the larger basin that would likely still hold water as the water level in the basin decreases.
- Protect the lowest part of a larger basin by setting a mean sea level (MSL) elevation.

In order to consider either of these two options, surveying will be necessary to determine the overflow MSL elevation.

When eliminating basins on a draft map in order to remain consistent with the easement summary acres, "consistent" is defined as the summary acres falling within the standard range of error for the mapped wetland basins or the mapped acres are less than the summary acres.

11.4 Revising Easement Maps that have been Finalized and Distributed

It may become necessary to make changes to maps that have been distributed to landowners, operators, and WAOs. For instance, mapped wetland basins are not present when conducting later field work and/or an existing wetland was missed. The Service may correct previously prepared maps as long as they revised acreage remains consistent with the easement summary acres. The purpose for revising maps is to maintain as accurate a map as possible to help eliminate potential wetland basins jurisdiction issues.

1. When correcting an easement map, attach a signed and dated memo to the map describing the reasons for the change(s). Also, type a note on the revised map referencing the dated memo.
2. Place the original revised map and the memo in the acquisition file and a copy of both in the easement file. Do not just put another new map in the file without a signed and dated memo explaining why the previous map was amended.
3. On a revised map with fewer wetland basins, create a new map with the newly-deleted wetlands removed; do not merely cross out the deleted wetlands and re-date the old map.
4. Keep both the old and revised map in the file, as they are both part of the permanent history of the easement.
5. Send a copy of the new map (and memo describing the changes) to the appropriate WAO, which in turn will send it to the Region 3 Realty office. Both maps will remain part of the permanent record in the Regional Office microfiche files.
6. Send a copy of the amended map to the request or as well as any landowners or other parties that received the previous map. Follow the procedures outlined earlier. Exhibit 11-9: Example of Letter Transmitting Revised Map to Landowner transmits a revised easement map with an explanation.

Chapter 12: Prosecution

12.1 General Discussion

Before requesting prosecution of a violation, the U.S. Fish and Wildlife Service (FWS, Service) must determine if all the facts of the case are sufficient to support prosecution and likely to be considered a reasonable case by prosecutors. The Service must be able to prove a violation beyond a reasonable doubt. Decisions are to be made based on facts and evidence. Reason and legal standards are used to make decisions, not emotion. The Service must be prepared to demonstrate damage to protected resources.

The Service's role in easement enforcement is in the investigation, documentation, and presentation of the violation to the U.S. Attorney's Office. Exhibit 12-1: Solicitor Letter is a letter drafted in 1981, which established the protocol for the Service to work directly with the U.S. Department of Justice on easement cases. The U.S. Attorney's Office makes the decision on whether to prosecute and whom to prosecute for a violation of federal law. The decision whether or not to proceed with a civil easement case referred to the U.S. Attorney's Office by the Midwest Region (Region 3) U.S. Department of the Interior (Field) Office of the Solicitor ultimately belongs to the U.S. Attorney's Office. Once the U.S. Attorney's Office accepts the case, the Service is then responsible for preparation of the case for trial. This chapter addresses situations in which the Service has determined that there is need for further action and the U.S. Attorney's Office has tentatively accepted review of the case.

Note that the term "landowner" is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

12.2 Determining Prosecutable Violations and Issuing Violation Notices

Determining prosecutable violations and issuing violation notices apply to activities on bodies of water in or within any area of the National Wildlife Refuge System (Refuge System), as defined by 50 CFR 25.11 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-part25.pdf), which says in part that the Refuge System applies to areas of land and water held by the United States in fee title and to property interests in such land and water in less than fee, including but not limited to easements. This includes wetland easements for waterfowl management rights, habitat easements for waterfowl habitat protection, and Farm Service Agency (FSA) easements for conservation purposes.

It has always been the intent of the Service's easement enforcement program to gain compliance through wetland and/or grassland/habitat restoration. Issuing a violation notice in lieu of restoration gains nothing for the Service, as the habitat will be lost forever without full restoration.

There will be instances when compliance only does not remedy the situation and issuing a violation notice may be in order for violations of the easement contract. Violation notices ***will not*** be issued until the refuge law enforcement officer (i.e., federal wildlife officer) conducts an easement file review and works with the refuge law enforcement zone officer (RLEZO) for consistency and the possible need to coordinate with the U.S. Attorney's Office. The Service has sole discretion on whether to issue a violation notice for any violation of federal law for which the Service has been entrusted by Congress to enforce. However, in the case of easement violations, the Service has additional requirements that must be satisfied before

issuing any violation notice. The credibility and effectiveness of the easement program require a uniform and consistent policy for dealing with easement violations. When in compliance with this policy, issuing violation notices act as a future deterrent and helps to achieve compliance in other cases.

The following guidelines for issuing violation notices are categorized by violation type. Keep in mind that a violation may encompass more than one category type of violation.

12.2.1 Drainage Violations

Drainage violations represent one of the most common and complex violations of the wetland and FSA easement programs and can be very destructive to the wetland on a long-term basis. Violation notices may be warranted when the following conditions exist and are properly documented and filed.

- The landowner or operator must have knowledge of the easement and subsequently drain or cause to be drained, one or more of the easement-protected wetlands. Prior knowledge must be properly documented in the easement file. Examples of what may be considered prior knowledge include, but are not limited to:
  - an easement map having already been mailed to the landowner
  - previous easement violations on the same easement tract by the same landowner
  - documented phone or personal conversations regarding the easement in question
  - any other documented form of knowledge
- First-time offenders of a serious violation involving a scraper ditch, backhoe, or other activity having an effect on a wetland or series of wetlands usually involving seasonal, semi-permanent, and/or permanent wetlands.
- Repeat violations of any type, including plow furrow violations.

Once again, violation notices *will not* be issued until restoration work has been completed.

12.2.2 Burning Violations

A violation notice may be issued based upon case history and easement file documentation. Violation notices and warning letters related to burn violations must be sent via certified mail. Letters issued merely as a warning about the burning will not require mapping of pre-1976 easements; however, if the project leader is going to pursue the burning as a violation, then all investigative protocols must be followed, including mapping of pre-1976 easements (see mapping requirements in Chapter 11: Mapping Procedures for Wetland Easements).

In cases of roadside burning or insignificant burning without clear intent or culpability, notification is not necessary.

Burn violations require the same in-depth documentation as would be required for drain, fill, and level violations. Knowledge of the easement by the landowner or operator is essential, and documentation of the repeat violation is necessary. If repeat violations occur, preparation of an easement file review may be warranted.

12.2.3 Fill and Level Violations

Serious fill or level violations may constitute grounds for the issuance of a violation notice. Fill and level violations must cause significant harm and detriment to the wetland basin, thus impairing the wetland functions. One small rock pile in a 5-acre wetland would not constitute significant harm. All efforts should be made to have this type of violation corrected, but this example in and of itself would not be considered an instance to issue a violation notice.

In cases of fill that do not constitute a violation or require restoration, photographic documentation is *mandatory*. Any accumulation or increase in fill over time can then be documented and measured. If necessary, enforcement action may then be taken. Adding rocks to an existing rock pile is an example where documentation will aid in future action if the rock pile continues to grow. As a minimum, notification to the landowner and, if pertinent, the operator that continual dumping of rocks in the wetland could result in a violation is mandatory.

12.2.4 Sheet Water

Sheet water is yet another difficult issue. Sheet water, as defined by this manual, is a non-depressional area covered by shallow water that is generally moving off the land. A violation notice may be issued if a depressional area protected under the provisions of the easement is drained by a landowner provided the proper documentation has been collected. However, sole drainage of sheet water under this definition is not considered an easement violation and action *is not* required.

Landowners or operators should be encouraged to obtain written consent from the project leader prior to drainage of any sheet water. In doing so, the Service can help prevent the accidental drainage of protected wetland basins.

Federal wildlife officers should review all pertinent information such as photographs and soil surveys and complete a ground inspection before a sheet water drainage determination is made. If a sheet water drainage determination is made, officers should work with the landowner to ensure that the impact will not adversely affect easement-protected wetland basins. Pumping of sheet water is preferred to ditching or any other type of earth moving activity.

12.2.5 Pumping

Pumping is a problem in areas that are usually under high water conditions. Pumping is considered drainage and is a violation of the wetland and FSA easement contracts. Pumping can be a violation and warrant a violation notice, provided the landowner had previous knowledge of the wetland or FSA easement and the violation resulted in a significant impact to the wetland basin.

12.2.6 Enlargements and “Topping Off” of Wetlands

Enlargements of easement-protected wetland basins are an issue in wet years or successive years of high annual precipitation. Enlarged wetlands may expand onto areas that have been previously farmed, hayed, or grazed, thus causing the operator to want to reduce the size of a wetland to its “mapped” size. All requests for this activity will be evaluated individually.

12.2.6.1 Pre-1976 Easements

As a result of the Johansen court decision in North Dakota, as well as a decision by the Eighth Circuit Court of Appeals, wetland easements purchased before 1976 are limited by the easement acreage summary sheet, which was developed at the time the easement was acquired.

Water levels within wetland basins periodically change. During dry years, there may be fewer acres of water within the basins than in wet years. In wet years, there may be more wet acres on the ground than what are mapped. It is the Service's position that water levels within wetlands protected by an easement contract are allowed to naturally increase and decrease. A normal fluctuation of water levels is expected and is protected by the easement. If a specific wetland in question is depicted on the easement map, then it is protected. If the landowner believes the wetland contains an abnormally high amount of water and wishes to be given relief, then the project leader will evaluate the situation on a case-by-case basis. Relief may or may not be granted.

- Relief will not be granted if the fluctuation is determined by the project leader to be within a normal fluctuation.
- Relief may be granted if extraordinary circumstances apply, which go beyond what is considered to be a normal hydrological fluctuation. Exhibit 12-2: Request for Relief Guidance provides some guidelines for project leaders to consider if a request to provide relief for pre-1976 easements is received.

Additional information and guidance can be found in Chapter 11: Mapping Procedures for Wetland Easements.

12.2.6.2 Post-1976 Easements

Post-1976 easements have an Exhibit A map that shows the approximate location, size, and shape of protected wetland basins. The easement contract for post-1976 easements has wording that describes the fluctuation of water levels resulting from natural or man-made causes and states that enlargements from normal or abnormal water levels are still covered. However, the project leader must be reasonable in his or her interpretation of what water levels are protected. Three wetlands that are now overfilled and combined into "one" wetland, or a wetland flooded outside the "tree ring," or above any recent historical (i.e., last 50 years) records or memories, should receive temporary relief through a Special Use Permit, with conditions and stipulations for maintaining more normal water levels. The project leader should discuss this issue with the RLEZO for concurrence and consistency.

A difference with enlarged wetlands may exist on certain FSA easements. Specifically, the "B" covenant of a Service contract that protects some wetlands and an associated grass buffer does not afford protection outside the buffer strip. A landowner or operator may not remove the enlarged portion of an expanded wetland as long as the expansion does not increase beyond the buffer strip (presuming one is present) identified around the wetland basin on the Exhibit A map. In other words, the Service is allowed to have the wetland expand to the outside edge of the buffer strip without granting relief. However, if the "enlarged" wetland expands beyond the buffer strip, the Service would lack jurisdiction on that portion outside the buffer strip. The provisions of the easement, therefore, would not apply to this expanded area. Federal wildlife officers should make the landowner/operator aware that work performed outside the protected

basin that causes the wetland to start to erode or drain is a violation that they would be responsible for correcting. This information needs to documented and filed.

12.2.7 Co-owned Wetlands

Co-owned wetlands or partially protected wetlands on easement lands if drained present a difficult enforcement situation. Nevertheless, there are certain situations that may warrant a violation notice, provided the elements of the violation are supported through proper documentation. Situations that may warrant a violation notice include but are not limited to the following:

- Situations where the majority of the co-owned wetland is protected by the easement. The larger the percent protected by the easement, the more likely it will be to initiate an enforcement action.
- If the easement portion of the wetland is owned by the same landowner or family as the non-easement portion, the drainage of such a wetland may be grounds for enforcement action.
- If the easement landowner participated in or encouraged the drainage from the non-easement portion of the co-owned wetland, enforcement action may be warranted.

12.2.8 Unauthorized Maintenance of Non-DFM Ditches

During the negotiation process between the Service Realty specialist and the landowner, the landowner has the opportunity to identify ditches on their property that he or she wants to maintain. The wetlands and their ditches are identified by the landowner and are drawn on a Drainage Facility Map (DFM). The DFM is ultimately incorporated into the easement contract. Any other ditched wetland not identified by the landowner on the DFM cannot be maintained. The rationale is that if a non-DFM wetland had an existing drainage ditch, the ditch would fill in over time, and the full function and value of the wetland would be restored. However, time has shown that this is generally not the case; easement landowners occasionally clean out old ditches in an effort to maintain the drain and/or further drain a protected wetland basin.

The Service should attempt to restore the ditched wetland to the condition it was at the time the easement was purchased, but at minimum is must require restoration to the condition prior to the recent work constituting the violation. In other words, what just came out must go back in, but this is a very difficult and subjective decision. For guidance, consider these factors:

- Make sure the drained wetland is within the easement acreage summary sheet.
- Determine, if possible, from older photographs, the history and extent of the original drainage. The time the drain was constructed and its effectiveness is important.
    - It may be useful to review the FSA annual photographs. Examine recent aerial photographs and the remaining wetland vegetation at the site to help establish the wetland's normal high-water mark prior to the ditch cleanout.
- Attempt to ascertain the amount of fill removed.
    - If possible document and measure spoil piles or look for a vegetative line disturbance, which may help to establish the historical ditch depth.

- Negotiate with the landowner and/or operators to have that which was removed replaced. The extent of restoration that is requested will be based on the amount of background information collected on the old drain. Without specific information or obvious spoil piles remaining after restoration, the Service may have to accept the negotiated fill amount.
    - Whatever the result, document to the extent possible the elevation of the drain for future reference. Survey work is mandatory to have a basis for future enforcement action. This survey work should include, but is not limited to, photos, measurements, and elevations.

Cleaning out a non-DFM ditch by the landowner/operator is considered a drainage violation. A violation notice may be warranted when the elements listed in sub-section 12.2.1 Drainage Violations of this manual have been met and documented.

12.2.9 Farming/Breaking/Cultivation Violations

Farming, breaking, and cultivation violations come in many forms and may have different consequences depending upon which easement program applies. See the following sub-sections for a brief overview of some issues federal wildlife officers should consider when viewing a potential violation:

- FSA Easements
- Habitat Easements
- Wetland Easements

12.2.9.1 FSA Easements

FSA easements offer a blend of wetland and habitat easement issues. Federal wildlife officers may be faced with drainage through farming practices in protected wetland areas and loss of upland habitats through the breaking or cultivation of prairie, pasture, or previously-farmed land that is encumbered by the easement.

FSA easements are further compounded by having different rules that apply to the easement based upon the time it was acquired and the state in which it was acquired. Because of this, each FSA easement file should be thoroughly reviewed by the federal wildlife officer to determine if or what type of violation has occurred before any contact is made with the landowner. As with wetland and habitat easements, federal wildlife officers should attempt to answer why the activity was conducted by the landowner. Refuge offices should consider the following:

1. Attempt to communicate with the landowner, establishing knowledge of the easement.
2. Place boundary markers at the easement boundaries, if necessary, to form a visual indication for the landowner to see when farming around the easement-protected areas.
3. When boundary markers are placed photograph the posts, and draw a map with GPS coordinates indicating the locations of the posts.

4. Attempt to have the landowner comply with and restore any damage that may have been done. Landowners with knowledge of the easement, who violate for a second or subsequent time, may be issued a violation notice after restoration has been completed.

12.2.9.2 Habitat Easements

All habitat easements retain the right to have the easement boundary posted. If encroachment by farming is a problem, then the federal wildlife officer must meet with the landowner to explain the ramifications and ensure that the posting of the easement area is complete and well understood by the landowner.

Plowing of any protected habitat easement constitutes a serious violation and could result in a possible irreplaceable loss of habitat. Violations that occur when the landowner has previous knowledge of the easement will generally be a criminal violation; however, both civil and criminal penalties could be considered.

If the activity that results in a violation on the habitat easement cannot be proven beyond a reasonable doubt, only civil penalties are available. For civil prosecution, use value penalties and restoration. This should determine how much the resource was worth and how much it will cost to restore. National Wildlife Refuge (NWR, refuge) or Wetland Management District (WMD) personnel should convene a panel of knowledgeable individuals to determine the value penalties based on hay or forage value and documented or surveyed wildlife losses (number of nests destroyed or ducklings lost).

Restitution or restoration of tame grass, established vegetation from the Conservation Reserve Program, or seeded natives should be done to pre-violation grass and plant species compositions. Restoration includes reseeding and a period of idleness to allow reestablishment. Restoration is not complete until establishment of the grassland is satisfactory. The Natural Resource Conservation Service, county agent, or others may be able to assist the Service in this evaluation process.

Cultivation or plowing of native prairie grasslands represents the loss of an irreplaceable habitat. If the violation was knowingly committed, the Service will consider it an aggravated violation and seek a court-developed penalty plus value (wildlife resources and habitat) and restoration to a prescribed condition. The prescribed restoration will be based on an evaluation of soils and the condition of the tract after alteration or cultivation and may include forb and shrub plantings as well as reseeding of native grasses.

12.2.9.3 Wetland Easements

A landowner using a farming practice with the intent to drain a wetland would be doing so in violation of the easement. The federal wildlife officer must be able to discover the intent of any drainage activity. Obvious plow furrows that enter easement-protected wetlands and plow furrows that are unusually deep are two examples of earth-moving activity that is a violation. The Service must prove the landowner(s) or operator(s) drained or is draining the wetland basin. Violation notices may be warranted if the landowner had previous knowledge of the easement, and protected easement wetlands were drained.

12.2.10 Haying Violations

Haying violations may occur on FSA and habitat easements. Haying is regulated in different ways depending upon the type of easement. See the following sub-sections for a brief overview of some issues federal wildlife officers may consider when viewing a potential haying violation:

- FSA Easements
- Habitat Easements

12.2.10.1 FSA Easements

Some FSA easements prohibit the mowing or haying of upland areas; others do not. As with all FSA easement issues, federal wildlife officers must review the document of possible violations thoroughly to determine if any of the rights held by the Service have been violated. With any potential violation, the federal wildlife officer should attempt to answer why the activity was conducted by the landowner, and:

1. Attempt to communicate with the landowner, establishing knowledge of the easement.
2. Place boundary markers at the easement boundaries, if necessary, to form a visual barrier for the landowner to see when haying around the easement-protected areas.
3. When boundary markers are placed, photograph the posts and draw a map with GPS coordinates indicating the locations of the posts.
4. Attempt to have the landowner comply with and restore any damage that may have been done. Landowners with knowledge of the easement, who violate for a second or subsequent time, may be issued a violation notice after restoration has been completed.

12.2.10.2 Habitat Easements

All four documents restrict haying to some degree. Forms 1 and 2 restrict haying until after July 15 each year, and Forms 3 and 4 restrict haying in total. Haying or mowing prior to July 16 constitutes a serious violation of the habitat easement. Generally the earlier a grassland is hayed or mowed, the more extensive its loss of habitat and wildlife will be.

Both civil and criminal penalties could be considered if the landowner/operator had knowledge of the habitat easement. If knowledge of the habitat easement and the violation activity cannot be proven, only civil penalties are available. A civil penalty of 3 percent of the value of the hay per day prior to July 16 is recommended.

NWR/WMD personnel should confer with the RLEZO in regard to prosecuting repeat violators. It is recommended that repeat violations result in a fine that is equal to the amount of the hay's value. A repeat violation may be considered as an aggravated violation, subject to a greater criminal penalty (such as $500 plus hay value and restoration). The Service will use a court-developed bond schedule for criminal penalties and restitutions.

12.2.11 Seed Harvest

Seed harvesting is an issue that the federal wildlife officer must be aware of when dealing with FSA and habitat easements. Seed harvest may be allowed if the time and location within the easement are correct. See the following sub-sections for details about seed harvest:

- FSA Easements
- Habitat Easements

12.2.11.1 FSA Easements

Generally speaking, FSA easements treat seed gathering the same as haying or mowing. Seed gathering is prohibited in all of the easement areas, except for some of the protected wetlands and some of the discretionary easement areas. Like haying and mowing, any seed gathering completed outside of these two areas of the easement would be considered a violation of the easement contract.

12.2.11.2 Habitat Easements

In most situations, seed harvest prior to July 16 is a violation. Most seed harvest operations cut or remove the underlying forbs.

The landowner may receive a notice of violation by the United States court system under the appropriate schedule.

12.2.12 Other Grassland Altering Practices

Grassland may be altered in any number of ways and by any number of methods. Federal wildlife officers should attempt to determine why an alteration has taken place and specifically apply what has happened to the terms of the specific easement contract. All of the Service easements have specific prohibited activities. Many of the early FSA easements (deed restrictions) prohibit grazing unless authorized by the Service, which is the easement project leader. Unauthorized grazing of these areas are treated similarly to other violations of the easement agreements. Any activity not specifically prohibited by the contract is allowed. When a question arises regarding the legality of a specific action, consult with the RLEZO and possibly other project leaders for consistency. See 12.4 Responsibilities of the Project Leaders and the RLEZO below for details.

For habitat easements—again, other activities may alter or destroy protected habitat easement habitat. Such alterations will be handled as deemed appropriate by the Service in consultation with the U.S. Attorney's Office and/or the Region 3 Solicitor's office.

Possible activities that may be included here are intentional burning of protected upland habitats, chronic vehicle use (via trespassing), and grazing under some of the habitat easement documents (Forms 2 and 3).

12.2.13 Other Violations

Other violations encountered by federal wildlife officers that do not fit logically into one of the previous categories are addressed here. Listed below are instances or activities where some of

the more common violations may occur and the general guidance for Region 3 offices on how to handle each situation.

Coulee clean-outs: Coulee clean-outs are a difficult issue to address, but some direction can aid in enforcement of easement-protected wetlands. Wetlands within a coulee are protected by the wetland easement unless deleted on the DFM (pre-1976 easements); however, third party interests (e.g., viable legal drains) may have prior rights. In situations where a violation has already occurred, handle case documentation as with any other violation and if deemed appropriate, prepare a file review, and contact the appropriate RLEZO.

Maintenance or clean-out of a natural waterway: This can be addressed in some situations by allowing a clean-out to the upstream edge of the wetland basin. A no-maintenance/no clean-out buffer is then left untouched for 200–500 feet downstream of each wetland basin in the waterway. At the end of the last buffer, maintenance or clean-out may continue. Federal wildlife officers should:

- Encourage the landowner to leave the buffer strip in place without manipulation. The Service does not have a legal right to protect the buffer strip.
- Advise the landowner that compromising the buffer strip could cause the wetland sill to blow out, and it would be the landowner's responsibility to repair and maintain the wetland.

Project leaders or federal wildlife officers who encounter these kinds of potential easement issues are encouraged to contact their RLEZO for advice.

Plow furrows/dead furrows: Furrows are used to drain wetlands while maintaining the appearance that normal farming practices are in place. If a wetland was drained using this technique the Service will ask for restoration to stop the drainage. If the landowner and/or operator had knowledge the wetland was protected, and their intent was to drain with the use of this technique, a citation may be warranted after restoration.

Culverts: Culverts in existing township-, county-, or state-owned roads generally are located on a transportation easement or rights-of-way (ROW) that usually pre-dates the easement. In most cases, the local governing entity can do what is necessary within the road easement or ROW for transportation purposes and public safety. The Service may have few legal rights in setting culvert elevations within road ROWs unless federal funds or permits are involved.

A Service representative should recommend that the culverts are only set to a level to improve the safety of the road and not to accommodate drainage to wetlands protected by the easement. Culverts set lower than necessary to accommodate wetland drainage may warrant a violation of the easement, but the Service must be able to prove the intent to drain a protected wetland.

When dealing with these state and local governing entities, negotiation may be the best tool to protect or minimize adverse wetland basin impacts.

Replacement of culverts that may impact protected wetlands should be placed at the same level as the old culvert inverts unless it is shown that there is a negative safety impact in doing so.

Subsurface Tile Installation: Drain tile that is installed to directly drain a protected wetland should be treated as any other violation (i.e., perform an easement file review and contact

RLEZO if appropriate). Drain tile installation within the boundary of a wetland easement that does not directly intersect with a protected wetland can be a more difficult issue to address since the Service's jurisdiction is limited to the draining, burning, filling, and leveling of protected wetland basins. Of particular concern is the installation of tile that could potentially adversely affect a protected wetland basin by diverting water from its watershed.

If a wetland easement is purchased on a wetland that has been restored by the Service with a tile riser, the Service holds the rights to repair, replace, and maintain these lines. The wetland easement is not subject to any "distance requirements" that the Service may impose. New tile installed by the landowner, however, would be subject to these requirements.

Tile installation is generally not allowed on a habitat easement unless the tile is necessary to restore wetlands.

See chapter 8, 8.3.2.11 Tiling for guidance of tiling on easements.

Timber harvest: This mainly applies to FSA easements. Federal wildlife officers must:

1. Determine who authorized the cutting of timber, and locate the person or company responsible.
2. Collect all documents and invoices associated with the timber harvest, which will be filed later.
3. Determine the area that was affected and if possible, count the number of trees harvested and the size and diameter of the cut bases. This is important, as restitution may be based on this information according to the forfeiture of collateral schedule.
4. Work with the project leader to determine what will be required for restoration of the harvested area.

Building construction: This can be a very sensitive issue that may involve anything from a small outbuilding to a permanent residence. Federal wildlife officers must:

1. Verify the easement boundary.
2. Once it has been determined that a structure has been built or placed on the easement contact the Region 3 office to make them aware of the situation and that they could receive calls in regards to the impending investigation.
3. Once all information has been collected and the violation confirmed, contact the Region 3 office again, and include them in the decision to resolve the violation.
    a. This may involve removing a structure or an exchange of land in regards to the area impacted.
    b. Any change in the easement boundary, such as an exchange, will require a revised easement document involvement from the Region 3 Realty office.

12.3 Easement File Review Preparation

In addition to following the aforementioned guidance, federal wildlife officers must conduct easement file reviews when a repeat violation is committed by the same person who had

specific knowledge of the easement, and a citation is to be issued or court action taken. Federal wildlife officers must:

1. Prepare an easement file review before any violation notice is issued.
2. Conduct a thorough easement file review to identify any problems that may exist within the file that may bar the issuance of the violation notice.
    - The federal wildlife officer must be able to sort through large easement files and determine what information is germane to the current case.
    - The Service will not, under any circumstance hide, destroy, or alter any evidence in the easement file, which is exculpatory in nature, or that may bar the issuance of a violation notice.
3. Be mindful of the "de minimis doctrine" (trivial matters) and the "doctrine of laches" (neglect to asset right or claim) when reviewing the file. These doctrines are defined later in this chapter.
4. Once completing the initial easement file review, contact the RLEZO for assistance or expertise with reviewing the easement file. The federal wildlife officer must be prepared to point out the strengths and weaknesses of the case to the RLEZO when discussing the file review.

Typically, easement file reviews are organized in a chronological format, paying particular attention to prior violations, prosecutions, and the violator's knowledge of the easement. The federal wildlife officer prepares an individual summary by easement number and legal description for each easement violation. This is relatively simple for a single violation, but it can become significantly complex in cases of extensive historical violations and/or multiple violations within the same easement. The following is a minimum of information that the federal wildlife officer must document as well as other actions to take when conducting an easement file review.

1. Obtain and review copies of the specific Service realty easement files, which, depending upon the location of the easement, will be located at the Service's local NWR/WMD office and the servicing Region 3 Realty office (Fergus Falls and Litchfield for Minnesota). Additional realty records may be obtained in the Region 3 Realty office. See Chapter 3: Administration of Rights-of-Way on Easement Properties for a discussion of what can be found in the Region 3 Realty office.
2. In the case of pre-1976 wetland easements, measure the easement wetlands in their entirety to assure the Service has not mapped more than the easement acreage summary sheet indicates.
    a. List the easement mapping references that document what resources were used to prepare the map. See Chapter 11: Mapping Procedures for Wetland Easements for additional information.
3. Ground-proof the map(s) if questions arise concerning the map and any protected basins or other areas within the easement.
4. Gather on-the-ground survey information that demonstrates the violation(s). Photographs and survey notes will typically suffice to document the violation(s).
5. Identify the current landowner and possible tenants.

12.4 Responsibilities of the Project Leaders and the RLEZO

When the file review has been completed by the federal wildlife officer, and the officer is convinced a violation has occurred, he or she must begin processing the incident as a violation of the easement contract. Keep in mind that:

- RLEZOs are available to help federal wildlife officers with easement violation decisions if necessary. At an absolute minimum, keep the RLEZO informed through the easement violation tracking system (see chapter 9, 9.3 Easement Tracking).
- Project leaders should ensure the federal wildlife officer is keeping the easement register for tracking violations current and that the officer and project leader are in communication with the RLZEO for all possible easement violations.
- Each violation is reviewed and evaluated on its own merit realizing that not all violations are the same.
- The RLEZO can review the easement file documentation with the federal wildlife officer who prepared the file. Questions or requests for additional information will be handled directly between the RLEZO and the federal wildlife officer who prepared the file review.
- A file review may be completed at any time when an easement violation has occurred.

As previously stated, violation notices *will not* be issued until the federal wildlife officer has conducted an easement file review, has collaborated with the RLEZO for consistency, and considered if there is a need to coordinate with the U.S. Attorney's Office. (The U.S. Attorney's Office, District of Minnesota has requested that they be notified in advance if violation notices planned to be issued for easement violations.) **It is the responsibility of the RLEZO to communicate with the U.S. Attorney's Office to ensure support if the defendant chooses to contest the violation notice**.

In each instance where a violation notice is issued, the facts must be documented, prepared, and readied for potential U.S. Attorney's Office review. **Violation notices will only be issued after satisfactory restoration of the easement has been accomplished, the federal wildlife officer has verified the restoration, and the RLEZO has been consulted**.

The National Wildlife Refuge System Administration Act of 1966 (16 U.S.C. 668dd) contains only criminal penalties within the wording of the statute. The National Wildlife Refuge System Improvement Act as of October 28, 1998 established two penalties based upon the culpability of the violator. They are:

- Class A misdemeanor, the most stringent penalty, which states in part, "Any person who **knowingly** violates or fails to comply with any of the provisions of this Act [16 U.S.C. 668aa et seq.] or any regulation issued thereunder shall be fined under title 18, United States Code, or imprisoned for not more than 1 year, or both." [See 16 U.S.C. 668dd(f)(1).]
- Class B misdemeanor, the least stringent penalty, which states in part, "Any person who otherwise violates or fails to comply with any of the provisions of this Act (including a regulation issued under this Act) shall be fined under title 18, United States Code, or imprisoned not more than 180 days, or both." [See 16 U.S.C. 668dd(f)(2).]

Make the following entries in the violation notice for each misdemeanor:

Class A misdemeanors

Violations that *occurred before October 28, 1998* are still considered Class A misdemeanors.

Field in Violation Notice	Use This Text
Offense Charged	16 U.S.C. 668dd(c) and 16 U.S.C. 668dd(f)(1)
Offense Description	Subject did knowingly disturb or injure, real or personal property of the United States, to wit; drain or cause to be drained a wetland protected by <*name of easement*>, without being permitted to do so.

Class B misdemeanors

Field in Violation Notice	Use This Text
Offense Charged	16 U.S.C. 668dd(c) and 16 U.S.C. 668dd(f)(2) **(See note below this table for related information about this citation.)*
Offense Description	Subject did disturb or injure real or personal property of the United States, to wit; plow or cause to be plowed land protected by <*name of easement*>, without being permitted to do so.

*NOTE (for Class B, "Offense Charged"): The last citation is imperative in order that the violation be charged under a Class B Misdemeanor. The last citation may only be used for a violation that occurred *on or after October 28, 1998*.

The two major differences between the two misdemeanor charges are:

- the level of awareness by the violator ("knowingly" for a Class A, "strict liability" for a Class B)
- the trial itself (option of a jury trial for Class A, only a bench trial for Class B)

It is ultimately up to the U.S. Attorney's Office to decide on whether to charge a Class A misdemeanor or a Class B misdemeanor. To date, most easement violations that have resulted in violation notices have been charged as Class B misdemeanors.

Once issued, violation notices are tracked by the respective RLEZO for that NWR or WMD through the Central Violations Bureau (a national center charged with processing violation notices issued and payments received on federal property).

In the event that a violation notice is contested, the RLEZO will contact the federal wildlife officer. The RLEZO, with the assistance of the federal wildlife officer, is responsible for presenting the case to the U.S. Attorney's Office and preparation for trial in federal court. Federal wildlife officers are also responsible for completing the easement violation tracking system requirements found in chapter 9, 9.3 Easement Tracking.

Undoubtedly, there will be occasional incidents that are either uncommon, sensitive, or outside the "normal" run of easement issues. When these situations are encountered, the project leader should feel free to collaborate with other refuge and law enforcement employees before taking

any action. The RLEZO will also be available to assist with these special-case situations. How to handle easement issues outside the norm require a judgment to be made, and the field station project leader will decide whether to consult or handle the easement issue alone.

12.5 General Case Brief Preparation

Having already conducted an easement file review, preparing the general case brief should be easier, with a minimum of questions arising at this time. The primary purpose of a general case brief, like that of an easement file review, is to thoroughly address all the issues that may present hurdles for potential prosecution and identify problems that may prevent prosecution. The chief difference between a general case brief and an easement file review is that a general case brief is the first formal process that is undertaken in the process of preparing for litigation. When the federal wildlife officer and appropriate RLEZO believe a violation can and should be prosecuted and the violation has been thoroughly researched and documented through the preparation of a general case brief by the federal wildlife officer, a formal Report of Investigation (ROI) incorporating the general case brief and its attachments are prepared by the RLEZO.

The general case brief should be treated as attorney-client privilege information and labeled as such. The brief, prepared by the federal wildlife officer, must chronologically document the current violation and include all information germane to the investigation excluding exculpatory information. The federal wildlife officer should remember briefs are just that, BRIEF, and should not include extraneous information, personal bias, or anything that is not necessary to understand the events surrounding the current violation and the history of the easement and landowner. The case brief can be prepared in several different ways and may include all or several of the following headings:

- Synopsis
- Narrative
- Predication
- Details of Investigation
- Description of Subjects
- Prior Violations
- Witnesses with Testimony Summaries
- Laws Violated
- Evidence
  - list of all photographs and documents germane to the case
- Attachments
  - may include ROIs, select photographs, chain of title, and easement map(s) marked with locations of violations
- Damage report
  - completed by Biologist or other expert
- Restoration Plan

- a short detailed plan that explains exactly what the Service expects to restore the drained wetland basins
- the restoration plan is very beneficial to the Assistant United States Attorney when dealing with a defense attorney during any plea agreement processes
- specific information to include:
  - the amount of fill (inches) to be removed from the wetland
  - length of the ditch to be filled
  - amount of clay needed in the ditch bottom
  - amount of tile to be removed, etc.

In addition to and included with the aforementioned outline, the Service must ensure the general case brief includes good evidence and documentation. The Service has the burden of establishing sound, credible evidence in a criminal prosecution and/or civil action. The Service must be able to document the damage that has taken place with an easement violation. Documentation can be in the form of, but is not limited to:

- ground and aerial photographs
- ground surveillance documentation
- timely interviews of the potential violator and his or her accomplice(s), his or her neighbor(s), and other state and federal agencies

Remember, the U.S. Attorney's Office, a judge, and a jury do not have the ability to visit the easement site. It is the Service's responsibility to portray in the courtroom, through documentation, the easement violation.

The Service must be ready to gather original, certified, or notarized documents in a timely fashion upon notification from the U.S. Attorney's Office of acceptance of the case for prosecution. Examples of documentation in criminal cases include, but are not limited to certified copies of the easement and deed showing current land ownership. Civil cases require the Service to produce certified copies of the easement and a chain of title from the filing of the easement that documents the current landowner (proposed defendant), along with certified copies of the deeds. In civil cases, the chain of title should include all entries except utility and road ROW easements.

The Service is required to produce witness lists of individuals who may be called upon to testify on behalf of the prosecution. Witnesses are generally organized into two categories:

Fact witnesses, which include all witnesses to be called by the Government except expert and rebuttal witnesses. Fact witnesses could include but are not limited to federal wildlife officers, RLEZOs, Service employees, neighbors, prior landowners, and contractors. When drafting the fact witness list, the federal wildlife officer or RLEZO must include the fact witness's name, work address, phone number, and a brief statement of his or her expected testimony.

Expert witnesses, which include all witnesses who may be called by the Government to provide expert testimony in a given field. The list prepared by the Service must include the expert witness' name, field of expertise (e.g., Wetlands Biologist, Photo-interpreter, Soil

Scientist, Hydrologist, etc.), and the expected testimony of the expert witness (e.g., impact of drainage on a semi-permanent wetland, impact on waterbird production, soil type, wetland classification, etc.). Expert witnesses will be necessary when identifying wetland basins and a host of other topics in which the average Service employee is not trained and has not received the appropriate certification. The Service must be prepared to pay for the expert witnesses' travel and field review time before trial preparation begins. Many times, the U.S. Department of Justice will pay for these costs.

If deemed appropriate and necessary, the project leader may authorize expert witnesses to accompany federal wildlife officers during the investigation phase or to help prepare a case that is likely to be headed for the judicial system. These experts must be escorted by two federal wildlife officers onto the easement property to assist with documentation and data collection such as determining wetland soils, fill amounts, wetland boundaries, etc.

12.6 Wetland Easement Case Briefs

In addition to the previous section dealing with general case briefs, wetland easement case briefs add additional elements that the courts have identified the Service needs to prove. Those additional elements should be covered in the wetland easement case brief and include the following:

Proof That Wetland(s) Have Existed Over Time: As a result of the Johansen decision, the courts now require the Service to prove the wetland(s) that have been negatively impacted through a prohibited activity, existed at the time the Service acquired the wetland easement. The Service must also demonstrate the wetland(s) have existed over the period of time the Service has retained the easement. To aid in this requirement, federal wildlife officers may document the existence of the wetlands through the interpretation of historical aerial photographs, both at or near the time the easement was acquired. One dark spot on an aerial photograph does not fulfill the Service's obligation in this matter, and an expert witness may need to be contracted to interpret aerial photographs. The Service has the obligation and responsibility to review as many aerial photographs as is reasonably necessary to develop an aerial photograph timeline for each wetland that has a violation.

Additional photographs may be accessible through other agencies' resources. Remember, just because a ditch has been documented on the easement doesn't mean an identifiable and defendable wetland exists and that the wetland has been drained. Federal wildlife officers should also obtain documentation of the existence of hydric soils, aquatic plants, and hydrology (evidence of previously standing water) as confirmation that a wetland existed.

Protected Wetland Statement: As a result of the Johansen decision, the courts have established that on pre-1976 wetland easements, the Service is only entitled to the wetland acres purchased and documented on the easement acreage summary sheet. There have been instances where a Service Realty specialist acquired a wetland easement tract that had more wetland acres than the Service had originally paid for and documented on the easement acreage summary sheet. The federal wildlife officer must check to ensure that the Service has not protected more wetland acres than what was initially acquired.

Unless previously mapped, a thorough wetland easement case brief must be completed before the federal wildlife officer determines what wetland(s) the Service meant to identify and protect.

In order to document the wetland easement case brief to the court's satisfaction, the Service must demonstrate that it had only laid claim to the wetland acres the Service purchased, and the Service must provide a protected wetland summary acreage statement in easement cases. This statement should be included in both referrals to the U.S. Attorney's Office and the Region 3 Solicitor's office. The written statement should be completed by the project leader or federal wildlife officer and should include that the wetland is part of the easement acreage summary sheet. Wetlands that receive protection include, but are not limited to:

- Wetlands that the Service has identified to the landowner as being protected. This includes historical wetlands that the Service has protected.
- Any co-owned wetlands that the Service has previously protected referencing other wetland easement owners and/or easement files.
- Any wetlands that have been previously involved in any criminal or civil litigation.
- Service-identified wetlands, as identified by the easement acreage summary sheet, which are not listed above, do not exceed the easement acreage summary sheet, and remain protected.

Proof of damage: As a result of the Johansen case it is the responsibility of the Service to prove that actual damage occurred to the easement, not just that the easement covenants had been violated. The U.S. Attorney's Office will ask for a damage report to be prepared before they file a case. The report can be prepared by having a Service Biologist or subject matter expert onsite documenting specific damages.

Again, federal wildlife officers should be familiar with easement mapping. See Chapter 11: Mapping Procedures for Wetland Easements, which provides more information on mapping requirements.

12.7 U.S. Department of Justice Acceptance of Easement Case

Using the case brief, the appropriate RLEZO and the federal wildlife officer determine whether the case warrants referral for criminal prosecution or a civil action. The RLEZO and the federal wildlife officer present the easement case to the U.S. Attorney's Office. If the case fails to meet the standards for criminal prosecution, the RLEZO sends the case report to the Region 3 Solicitor's office for civil action.

Once a case is accepted by the U.S. Attorney's Office or the Region 3 Solicitor's office, the Service must be prepared to devote 100 percent of its time to the case. The U.S. Attorney's Office may request additional materials be gathered and submitted, and the Service will need to respond with the requested information quickly. The Service, when engaged in trial preparation, must treat all requests from the U.S. Attorney's Office or the Region 3 Solicitor's office as the top priority and will delay other activities in order to honor the requests.

All inquiries about the ongoing case from defense attorneys, the media, or the general public **must be referred without comment** to the U.S. Attorney or Region 3 Solicitor, whichever is appropriate. Copies of all related correspondence concerning easement violations, including congressional inquiries and letters, must immediately be forwarded to the RLEZO.

Once a civil case has been forwarded to the Region 3 Solicitor, further communications concerning that case can be directed by the RLEZO (unless otherwise authorized) to the

Solicitor, RLEZO, and the U.S. Attorney's Office. It is the responsibility of the appropriate RLEZO to track the case through the judicial system, and inquiries concerning the status of the case will be directed to the RLEZO. **Unless otherwise authorized, communications with the U.S. Attorney's Office or Region 3 Solicitor *will be* through the RLEZO**. The appropriate RLEZO keeps the respective project leader and federal wildlife officers involved and abreast of the investigation's development.

When a case is closed, and restoration of the protected habitats has been completed, the project leader sends the violator a notification that the case has been closed (see Exhibit 12-3: Case Closure Letter). All original documentation gathered throughout the investigation remains in the specific easement file stored at the respective NWR/WMD.

12.8 Other Legal Aspects

12.8.1 General Definitions

De minimis doctrine
The law does not care for or take notice of very small or trivial matters, the law does not concern itself about trifles. (Black's Law Dictionary)

Doctrine of laches
Neglect to assert right or claim which, taken together with lapse of time and other circumstances causing prejudice to adverse party, operates as bar in court of equity (civil litigation). A failure to do something that should be done or to claim or enforce a right at a proper time. (Black's Law Dictionary)

Easement
A right, created by an expressed agreement, of one owner of land to make lawful and beneficial use of the land of another without possessing it.

Enforcement
The act of putting something such as a law into effect, the execution of a law, and the carrying out of a mandate or command.

FSA Easement
A signed contract between landowner and the U.S. Department of Agriculture that is now managed and enforced by the Service. The United States retains the right to maintain and enhance wetland and upland habitats as conservation easements by prohibiting the construction of structures, cutting or mowing, cultivation, harvesting of wood products, burning, placing of refuse, wastes, sewage, or other debris, draining, dredging, channeling, filling, discing, pumping, diking, impounding, and related activities, or diverting or affecting the natural flow of surface or underground water into, within, and out of the easement area. There is great variability among FSA conservation easements in terms of what rights are retained.

Habitat Easement
A legal agreement whereby the United States acquires the right to maintain identified upland tracts as wildlife management areas through the control of haying, mowing, and seed harvesting; and through the prohibition of crop production, digging, plowing, disking, or otherwise destroying vegetative cover within the identified tracts.

Includes acquired rights to enhance the wetland and/or upland habitats, to mark or post the property, to prohibit excessive vehicle traffic from the easement area, and the right to prohibit burning of upland vegetation. The habitat easement document is found within Minnesota Wetland Management Districts and includes four different documents, with each document acquiring slightly different rights.

Prosecute
To follow up; to carry on an action or other judicial proceeding. To prosecute an action is not merely to commence it but includes following it to an ultimate conclusion.

Wetland Easement
A legal agreement whereby the United States acquires the right to maintain wetlands on described tracts of property called Waterfowl Production Areas by not draining, burning, filling, or leveling those wetlands.

12.8.2 Easement Authority

Statutes giving authority to the Service to manage and enforce easement interests are presented below.

FSA Easement

The authority for the Secretary of the Agriculture (i.e., Farm Service Agency or FSA), to acquire conservation easements is granted under the Consolidated Farm and Rural Act of 1981 and 1985 (7 U.S.C. 331 and 335), Executive Orders 11990 and 11988, and Section 1314 of the 1985 Food Security Act. The Food Security Act of 1985, Section 1314 and 1318 stipulates the role of the Service to assist the FSA in the enforcement of the conservation easement. This role is further defined in a Memorandum of Understanding between the FSA and the Service, signed in 1987, which addresses interagency coordination. The Service is authorized to enforce conservation easements through the National Wildlife Refuge System Administrative Act of 1966 (16 U.S.C. 668dd et. seq.).

Habitat Easements

The Migratory Bird Hunting and Conservation Stamp Act, March 16, 1934, (16 U.S.C. Sec. 718–718h, 48 Stat. 452) as amended August 1, 1958, (PL 85-585; 72 Stat. 486) for acquisition of “Waterfowl Production Areas;” the Wetlands Loan Act, October 4, 1961, as amended (16 U.S.C. 715k-3–715k-5, Stat. 813), funds appropriated under the Wetlands Loan Act are merged with duck stamp receipts in the fund and appropriated to the Secretary of the Interior for the acquisition of migratory bird refuges under the provisions of the Migratory Bird Conservation Act, February 18, 1929, (16 U.S.C. Sec. 715, 715d–715r, as amended).

Wetland and Habitat Easements

The authority for the Secretary of the Interior (i.e., U.S. Fish and Wildlife Service), to acquire easements for Waterfowl Management Rights is granted under the Migratory Bird Hunting and Conservation Stamp Tax Act, 16 U.S.C. 718d(c), the Fish and Wildlife Act of 1956, (16 U.S.C. 742a–742j), the Emergency Wetlands Resources Act of 1986, (16 U.S.C. 3901), the Land and Water Conservation Fund Act of 1965 [16 U.S.C. 4601-9(a)(1)], and the North American Wetlands Conservation Act of 1989 (16 U.S.C. 4401–4412).

12.8.3 Applicable Easement Enforcement Authorities

The National Wildlife Refuge System Administration Act, specifically, 16 U.S.C. 668dd and the accompanying regulations found in 50 CFR 25, 26, and 27 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-chapI-subchapC.pdf), are not binding to the general operation of the land identified by the easement contract and the landowner's actions. As an example, the right of the landowner to allow or prohibit such activities as trapping, snowmobiling, and hunting is not encumbered so long as these activities do not result in one of the prohibited activities specifically listed within the easement contract attached to the land. A 1986 revision of 50 CFR, Subchapter C, clarified the Service authority on easements. For additional information regarding this change, review 50 CFR 25.11, 25.12, and 25.44 (http://www.gpo.gov/fdsys/pkg/CFR-2010-title50-vol6/pdf/CFR-2010-title50-vol6-part25.pdf).

12.8.4 Burden of Proof (Criminal)

In order to proceed against the violator in a criminal case, the Government must be able to meet a burden of proof—to prove that the person violated the provisions of the easement contract. In all cases, the Government should strive to prove that the violator had knowledge of the easement's existence. "**Knowingly**" means that the person had knowledge of the facts involved. Otherwise stated, the violator knew that the area was protected by an easement and, for wetland easements, this means that the same person had some influence on draining, filling, leveling, or burning the protected wetlands. A recent change in the law [16 U.S.C. 668dd (f2)] now allows individuals to be charged criminally without having to satisfy the "knowingly" part, but federal wildlife officers will still be required to meet this burden before proceeding criminally. If in doubt, consult with your RLEZO.

The Government must prove its case to the court "**beyond a reasonable doubt**." It is important during the investigation and documentation phases of these cases to establish who did the actual draining, filling, leveling, or burning and if the landowner(s) or other violator were aware of the easement provisions. If the Government proves its case, the U.S. Attorney will recommend to the judge that the violator restore the habitats in accordance with Service specifications. In addition, the judge may assess other penalties as he or she deems necessary under the statute.

12.8.5 Burden of Proof (Civil)

In a civil action, the Government does not need to prove that the defendant "knowingly" violated, only that he or she actually caused the damage to the easement. Knowledge of the easement or its provisions is not a necessary element. The Service must be prepared to show the court that measurable damage did occur (draining, filling, leveling, burning, etc.), that restoration is necessary, and that monetary damages for permanent loss of wetlands would not be adequate compensation. The burden of proof required in a civil case is a "**preponderance of the evidence**." This is a lesser standard of proof than required in criminal cases. However, the investigation and documentation of the violation must be done with the same quality and completeness as in criminal cases.

12.8.6 Statute of Limitations (Civil and Criminal)

Statute of limitations is an enactment in a common law legal system that sets forth the maximum time after an event that legal proceedings based on that event may be initiated. There is no statute of limitations barring a civil action where the United States is seeking only equitable

relief, and it is a well-established rule of law that the United States is not subject to any statute of limitations in enforcing its rights unless Congress explicitly provides otherwise. Civil penalties are not specifically provided for in the statute. However, a civil action requiring restoration of the affected wetlands or grasslands, and in some cases a settlement for damages, may be undertaken by the U.S. Department of the Interior's Office of the Solicitor. Civil actions are handled in conjunction with the U.S. Attorney's Office.

With respect to criminal cases, in *United States v. Lhotka,* CR. 4-84-116, slip. op. (D. Minn. August 5, 1985), Judge Cudd found that the criminal prosecution of an easement violation was not barred by the 5-year statute of limitations set forth at 18 U.S.C. 3282, because the violation was continuing in nature. However, the Service is obligated in any judicial process (criminal or civil) to have investigated an easement violation without unnecessary delay. Delay in investigating an easement violation or placing a known violation back into a file could result in a U.S. Attorney's Office declination or a doctrine of laches motion made by the defense.

Chapter 13: Relevant Court Decisions

13.1 General Discussion (Historical)

The easement document itself, the purchasing procedure used to secure the easement, and the enforcement of the easement by the U.S. Fish and Wildlife Service (FWS, Service) have all been sources of arguments in individual court cases decided from 1971 to the present. In addition, the State of North Dakota appealed to the Supreme Court of the United States in 1981 in an effort to overturn a judgment entered by the Eighth Circuit Court of Appeals, dated June 3,1981. That court of appeals decision held that several North Dakota State statutes unconstitutionally interfered with the acquisition of land by the United States for Waterfowl Production Areas and that the North Dakota Governor's consent is not required for such acquisitions.

The supreme court ruling reads as follows:

> *"In the absence of federal legislation to the contrary, the United States unquestionably has the power to acquire wetlands for waterfowl production areas, by purchase or condemnation, without state consent. Paul v. United States, 371 U.S. 245, 264 (1963); Kohl v. United States, 367, 371–372 (1875). Here, however, Congress has conditioned any such acquisitions upon the United States obtaining the consent of the Governor of the State in which the land is located."*

As a result of these court challenges, the easement document and its administration by the Service have become well defined and have become stronger in its use as a tool in protecting wetlands. It is important to remember that easement enforcement is, by nature, controversial and that restoration of protected habitats is the primary goal. However, a strong enforcement posture is mandatory in order to provide a deterrent to those who would be inclined to destroy habitats protected by Service easements. It is imperative that Service personnel conduct their assigned easement duties so as not to weaken the strong posture assigned to the easement by the courts. The following represents some of the easement decisions decided by the courts and that have defined the Service's easement program.

Note that the term "landowner" is referred to in this chapter and elsewhere in this manual but when applicable, it denotes tenant, too.

13.2 Federal Magistrate Decisions

13.2.1 United States v. Earl P. Morehouse [CIV No. 86-1034, U.S.D.C., D. S.D. (1986)]

Morehouse was charged by information with a violation of 16 U.S.C. 668dd(c) by draining and burning off wetland basins, which were subject to protection by Easement for Waterfowl Management Rights. Trial was held before U.S. Magistrate at Aberdeen, South Dakota on December 9, 1986. As a defense, Morehouse contended that the Service Realty specialist misrepresented the easement and that an attached drainage facility map was not a part of the parties' contract, nor was the drainage facility map an accurate reflection of his (Morehouse) understanding of the contract. Morehouse maintained that the wetlands that he had drained were erroneously placed under protection by the easement, and he was not properly notified of their inclusion in the contract by the Service.

The magistrate found that the Service proved beyond a reasonable doubt that proper letters of notification and a valid drainage facility map were sent to Morehouse for his inspection and acceptance. Thus a binding easement was executed on the face of the written agreement, and both parties are bound by its execution. Morehouse was found guilty, fined $500.00 plus court costs, and a stipulation for restoration of the wetlands was filed by the U.S. Attorney. Morehouse appealed to the Eighth District Court of Appeals.

13.2.2 United States v. Myron D. Lhotka [CR No. 4-84-116 U.S.D.C. D. Minn (1985)]

Lhotka was charged in a single count of Criminal Information with knowingly violating the easement document protecting wetlands. Lhotka had executed the easement with the Service in June 1964, and on November 27, 1968, the first of several easement violations was observed by Service personnel. Additional contacts with Lhotka took place between 1968 and 1984. By 1984, a total of 96 wetland basins on one section and 61 wetland basins on another section had been drained or filled by Lhotka.

The court found that all of the non-exempted (by drainage facility map) ditches on defendant's property in Sections 14 and 24 had been created and maintained by the defendant. It was also found that the conveyance of easement is a valid, enforceable contract supported by consideration under which the defendant is prohibited from draining or filling wetland areas. The Service's repeated warnings and contact with the defendant, coupled with the numerous attempts to get him to restore the property, demonstrates without doubt that the defendant knowingly violated the statute. As to the claim by the defendant that the statute of limitations bars prosecution, the court found that, based upon the evidence presented by the Service, the offense charged is considered to be a continuing offense. Lhotka was found guilty of violating 16 U.S.C. 668dd from on or about November 27, 1968, to the date of his conviction, August 5, 1985.

13.2.3 United States v. Alvin Peterson, [Case No. 2:08-mj-16 (2008), U.S. Dist. Court, Dist. Of ND]

Alvin Peterson was charged with draining four wetlands covered by the provisions of Walsh County Easements 124X and 56X-2. Three of these wetlands were restored by a District Court of the United States order {*United States v. Alvin Peterson* [2:04-cr-102 (2005)] [05-4248(8th Circuit)]} in September 2006. A 2-day bench trial was held and Peterson was found guilty a second time.

Magistrate Judge Alice Senechal presided over both of Mr. Peterson's trials. Her post-trial memorandum filed for the 2008 trial found that the Government met its burden of proof beyond a reasonable doubt as to all the elements described in *United States v. Johansen*. These elements are 1) that the United States holds a property interest, established through a properly recorded and accepted easement, 2) that identifiable wetlands existed at the time the easement was taken, 3) that Peterson knew that the wetlands at issue were subject to an easement, 4) that Peterson engaged in prohibited activity by disturbing, injuring, cutting, burning, removing, or destroying the wetlands at issue, 5) that the activity was not permitted or otherwise authorized, and 6) that Peterson's actions caused surface and/or subsurface damage that injured, disturbed, or destroyed the wetlands.

Peterson did not argue that the United States holds a property interest in the wetlands. He did argue that the Government must prove that there was water in the wetlands when the easement was taken. Judge Senechal said that the absence of water does not mean that the areas were

not wetlands in existence when the easement was created. Regarding Element 3, Peterson argued that he did not own the property covered by Easement 124X when he signed a renegotiated map, thus he had no legal authority to sign it. The court stated that his signature on the renegotiated map was not necessary to establish the easement. The map merely established Peterson's knowledge that the wetlands were subject to the easement.

The Government established Element 4 by proving that Peterson directed a contractor to perform the prohibited activity. Peterson argued that the ditching was authorized by North Dakota law in that he was maintaining natural waterways (Element 5). The court disagreed with Peterson's interpretation and stated that there is no credible evidence that he was granted permission for the excavations. As to Element 6, Peterson alleged that the Government did not present evidence comparing the current condition of the wetlands to their condition when the easement was established. Magistrate Senechal stated that the Government was not required to prove the precise water levels as they existed at the time the easement was purchased.

13.2.4 United States v. Kurt A. Skinnemoen [CR No. 03-268 U.S.D.C.: D. Minn (2004)]

Skinnemoen was charged by information with a violation of 16 U.S.C. 668dd(c), 668dd(f)(1) and Title 18 U.S.C, Section 2 by knowingly ditching, draining, filling, removing and otherwise inuring and destroying real property covered by the U.S. Fish and Wildlife Service Wetland Easement Contract G-49x in Grant County, MN. On May 18, 2004 Mr. Skinnemoen pled guilty to the charge (Class A misdemeanor) and agreed to restore the wetlands in accordance with the Service's "Restoration Plan" agreed to by the parties, and that a Service employee will be present during restoration.

This violation involved a wetland that was half on and half off the easement description with the ditch draining the wetland located outside of the easement description. Mr. Skinnemoen owned both the easement and non-easement portions of the wetland as well as the entire drainage ditch and was ordered to restore the wetland. Mr. Skinnemoen restored the drained wetland off the easement and the case was closed September 22, 2004. This was the first successful prosecution of a wetland basin located both on and off the easement where the drainage violation was off the easement description.

13.3 Federal District Court Decisions

13.3.1 United States v. Jerome J. Schoenborn [CIV No. 3-84-1662 U.S.D.C.: D. Minn (1986)]

The primary issue in this action was the validity and enforceability of a wetland easement signed by Schoenborn's parents in 1965 and passed to him as a successor. Schoenborn claimed that the easement was invalid and unenforceable and that he had not violated it. His counterclaims alleged unconstitutional taking, quiet title, negligence, and abuse of due process.

Schoenborn claimed that the Service Realty officer made oral misrepresentations to Edward Schoenborn (Jerome's father) that the easement entitled the Schoenborns and their successors to maintain all ditches then existing, regardless of whether or not the ditches were then functioning, and all basins affected by those ditches. He also claimed that he and his father justifiably relied on these representations and never consented to the scope of the easement as shown on the drainage facility map.

The court held that the written easement and drainage facility map had been available for examination before the Schoenborns were bound by it, and they accepted the document by affixing their signature and receiving payment. The neglect displayed by the Schoenborns in not becoming cognizant with the terms of the written contract was unjustifiable as a defense. The easement is valid and enforceable. The defendant was directed to restore the wetlands and was permanently enjoined from draining or permitting the draining of any wetlands protected by the terms of the easement. Memorandum and Order entered by Judge Edward J. Devitt, District of Minnesota, October 16, 1986.

13.3.2 United States v. Vesterso et al. [CR No. 2-86-1 U.S.D.C.: D. N.D. (1986)]

Warren Anderson, David Leas, and Kent Vesterso, acting as the Towner County Water Board, contracted for two drainage projects. The projects were termed "watercourse maintenance" projects and went through seven sections of land. Located within the projects were several wetlands covered by three separate Service easements.

Investigation showed that the members of the water board knew of the Service easements when the projects were designed and prior to any of the drainage work being done. The investigation also showed that the projects would directly benefit two of the board members by draining wetlands on lands farmed by them. The investigation further showed that the water board was prepared to use this case as a test case on state water rights versus Service easement rights.

The decision was made by the U.S. Attorney's Office to charge the members as individuals with a criminal violation of 16 U.S.C. 668dd(c). The U.S. Attorney's Office felt that it was proper to charge them as individuals in that an individual cannot use his status as a board member to violate state or federal laws. The water board, through the State's attorney, raised the following issues:

- That the State has a reserved right to the watercourses within the State, and the Service cannot prevent the State from cleaning out such watercourses;
- That a landowner could not grant an easement to the Service for wetlands found on a watercourse as the State maintained control of watercourses;
- That easements taken by the Service are subject to easements for existing canals and laterals, which include servitude of drains held by the State;
- That the projects were not drainage projects but were simply cleanouts of old natural watercourses that had filled in during the past 50 years; and
- The wetlands found along the watercourses were not natural wetlands but instead were created as a result of farming practices, which plugged the natural watercourses.

Judge Benson, in an unwritten opinion, ruled that the State Interest argument is not valid stating that interest of the State is an interest in the water, not an interest in the property itself. The easements as purchased by the Service are valid and the United States has a real property interest, which was damaged. Wetlands were present along the watercourse, and those wetlands were adversely affected by the projects. The court further held that the subjects acted as individuals and did not have the authority as board members to do what they did. Ruling entered by Judge Paul Benson, District of North Dakota, April 3, 1986.

13.3.3 United States v. Conrad Rostvet [Civil No. A2-01-007, U.S.D.C.: D.N.D.-NE Div. (2001)]

In 1996, Mr. Rostvet reported to the Service three ditches draining three wetlands on this property. Rostvet was in the process of purchasing the property when he reported the ditches to the Service. An investigation confirmed that these ditches were constructed in the mid-1970s, unbeknown to the Service. The investigation also revealed that the construction of the ditches was partially funded by the U.S. Department of Agriculture.

The Service offered Rostvet the opportunity to fill the ditches. He refused. On January 4, 2001, a civil complaint was filed in District Court of the United States for the District of North Dakota Northeastern Division against Conrad Rostvet for the restoration of three drained wetlands on his property covered by the provisions of Walsh County Easement 109X.

Rostvet again refused to fill the ditches, citing the fact that he had no part in constructing the ditches. The Government agreed to restore the wetlands at no cost to Rostvet. The Service hired a private contractor to close the ditches in October 2001. The complaint was then dismissed.

13.4 Appellate Court Decisions

13.4.1 United States v. Albrecht [496 F.2d 906 (1974)] [CIV No. 4758, D. North Dakota, C.A. 8, No.73-1814]

Appeal by defendants, Mr. and Mrs. Robert Albrecht, from District Court of the United States for the District of North Dakota. Defendants were ordered by district court in a civil case, to restore the area to the conditions that existed prior to ditching. In addition, the court permanently enjoined the defendants from draining or permitting the draining of wetlands under easement. (See 362 P. Supp. 13419 [1973].) In its decision, the Circuit Court for the Eighth Circuit made the following points:

- Robert Albrecht complained during trial and as a legal argument on appeal that the defendants herein had been discriminated against and singled out by the Government concerning the enforcement of the easement. The claimed discrimination does not affect the plaintiff's easement and is not defense to the plaintiff's right to have the easement observed and respected by the dominant fee owner.
- Defendants' major argument is that North Dakota Statutory Law does not specifically allow the type of easement, servitude, or right to property conveyed by the Herbels to the Government . . . (NOTE: Reinhard and Mary Herbel sold the easement to the Service. The Albrechts later purchased the land from the Herbels). . . . We fully recognize that laws of real property are usually governed by the particular states; yet, the reasonable property right conveyed to the United States in this case effectuates an important rational concern, the acquisition of necessary land for Waterfowl Production Areas, and should not be defeated by any possible North Dakota law barring the conveyance of this property right . . . to hold otherwise would be to permit laws to defeat the acquisition of reasonable rights to their citizens' property pursuant to 16 U.S.C. 718d(c) and to destroy a national program of acquiring property to aid in the breeding of migratory birds. We, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in

the United States the rights as stated herein. Section 718d(c) specifically allows the United States to acquire wetland and pothole areas and the Interest therein.

- It was well within the power of the Secretary of the Interior to acquire the reasonable easement conveyed in this case. The Albrechts and their successors are not restricted from farming the land, when such land is dry due to natural causes.

13.4.2 Werner et. al. v. U.S. Department of the Interior, Fish and Wildlife Service, Bureau of Sport Fisheries and Wildlife [581 F.2d 168 (1978)] (No. 77-1958 8th Cir. Ct.)

Edwin Werner and 34 other North Dakota landowners, who entered into wetland easement agreements with the Service, brought an action in District Court of the United States for the District of North Dakota seeking injunctive relief against enforcement of the easements and damages. The appellants claimed that they were induced to sell the easements by the false oral representations of two Service Realty specialists. The Eighth Circuit Court of Appeals upheld the dismissal of the appellants' claim for damages and the finding that the district court had no jurisdiction over the appellants' equitable claims. The Circuit Court for the Eighth Circuit held: ". . . It is undisputed that the oral representations of Fish and Wildlife Service negotiators Brasch and Resman were contrary to the express written terms of the wetlands easements." Further, the district court found that the oral representations of Brasch and Resman were unauthorized. We are satisfied that this finding is clearly erroneous.

It is well established that the United States is not bound by the unauthorized acts or representations of its agents . . . appellants took this risk when they signed written easements containing express terms contrary to their oral understandings. We therefore find that the dismissal of the appellants' claim for damages was proper.

13.4.3 United States v. Seest [631 F2d 107 (1980)] (No. 80-1348 8th Cir. Ct.)

Appeal by defendant Donald Seest from the District Court of the United States for the District of Minnesota. Seest was convicted of violating the National Wildlife Refuge Administration Act, by constructing a subsurface drainage system and making other alterations to an area under easement that he owned. The court sentenced Seest to 6 months imprisonment and ordered him to pay a fine of $500. The sentence of imprisonment was suspended and Seest was placed on probation provided he pay the fine and . . . restore the wetlands to their natural state.

The Circuit Court for the Eighth Circuit affirmed the conviction and remanded the terms of probation for review and clarification. Seest subsequently restored the area. In its decision, the court made the following points:

- We think it is clear that the ditching and trenching and use of drain tile altered the flow of natural waters, both surface and subsurface. Accordingly, we reject the appellant's claim that the Government has not established a violation of law in this case.
- In a petty offense matter, the defendant is not entitled to a jury trial.
- In a criminal trial, the district court judge is vested with discretion to determine where, within the district, a trial will be held.
- Under probation, the offender may be required to make restitution or reparation to aggrieved parties.

13.4.4 United States v. Welte [696 F.2d 999 (1982)] (No. 82-1340 8th Cir. Ct.)

Defendant Peter Welte appealed a decision by the District Court of the United States for the District of North Dakota, which affirmed his conviction before a United States magistrate for draining a pothole that was subject to wetlands easement. The Eighth Circuit Court of Appeals affirmed Welte's conviction and cited the following facts: On March 21, 1966, the U.S. Fish and Wildlife Service purchased an easement from John Lunney covering a quarter section of land that Lunney owned in Grand Forks County, North Dakota. This quarter section was subsequently transferred to Welte by contract for deed, which reflected the easement in perpetuity. Upon the transfer of this land, the Government sent Welte a courtesy letter reminding him that such land was subject to a wetlands easement. In November of 1979, the Government observed a fresh scraper ditch out of one of the potholes covered by the easement. Recognizing that Welte was a new owner, the Government agreed with Welte that if he would restore the area to its former condition, no legal action would be taken against him. The area was later checked and the restoration work was approved by the Government. The Government, acting on an anonymous phone tip, returned to the area and discovered that when the ditch had been filled, drain tiles had been placed in the same location where the ditch had previously been scraped. Thereafter, the Government issued a violation notice. Welte was tried and convicted before a United States magistrate.

On appeal to the district court, his conviction was affirmed. The district court held that Welte's act of draining a pothole, which was subject to a wetlands easement, was clearly a violation of Section 668dd(c). The district court then affirmed the judgment of conviction entered by the United States magistrate.

13.4.5 United States v. Kerry Johansen, 93 F.3d 459 (8th Cir. 1996)

Defendants Kerry and Michael Johansen (Johansens) entered a conditional plea of guilty to the District Court of the United States for the District of North Dakota with appeal to eighth circuit due to the district court’s refusal to hear Johansens’ argument. Johansens’ defense argued that during the wet years, wetland acreage size had increased above the easement summary acreage that was initially acquired by the Service in the 1960's from Johansen’s predecessors. Involved in the argument were three separate easement tracts totaling 105 wetland acres owned by the Johansens. The Johansens contended that even with unauthorized drainage of the excess water, there still remained more acres of wetlands on the three easement tracts than was allowed by the easement acreage summary sheet. The Government’s stance was that all wetlands on the described tract or parcel were protected and that the draining activity negatively impacted individual wetlands covered by the easement conveyance. The district court’s contention was that all wetland acreage on a described easement tract was subject to protection as provided through prior precedence.

The Circuit Court for the Eighth Circuit reversed the district court’s refusal to hear the Johansens’ argument and conditional guilty plea and remanded the district court for action consistent with the eighth circuit opinion. The eighth circuit largely based its opinion on the U.S. Supreme Court decision of *North Dakota v. United States* (U.S., 1983 103 S. CT. 1095) and the district court decision of *United States v. Vesterso*, 828 F.2d 1234 (8th Circuit, 1987). The eighth circuit held that the Service acquired an easement and paid the landowner based upon the easement acreage summary sheet acreage. Further, the defendant must have had knowledge that the parcel was encumbered by a wetland easement, and that the drained wetlands must be part of the easement summary.

The eighth circuit, interpreting the Vesterso decision also noted 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.

13.4.6 United States v. Alvin Peterson [2:04-cr-102 (2005)][05-4248(8th Circuit)]

Defendant Alvin Peterson, Lawton, ND, appealed the decisions of the District Court of the United States for the District of North Dakota, which affirmed his conviction by a United States magistrate judge of draining four wetlands protected by the provisions of a U.S. Fish and Wildlife Service Easement for Waterfowl Management Rights, specifically, Walsh County Easement 124X, 1-3. The Circuit Court for the Eighth Circuit affirmed the judgment of the district court.

In 1966, Peterson's parents granted wetlands easements to the United States. Peterson later inherited the land subject to the easement. Peterson disputed the easement many times. In 1973, to resolve these disputes, Peterson and the Service signed a map that clearly shows, among other things, four wetlands that were not to be drained. Nevertheless, in 1999 and 2003, Peterson hired contractors to dig dozer ditches that drained these four wetlands.

The magistrate judge held a bench trial in which Peterson presented evidence and the testimony of an expert witness. Peterson did not dispute the fact that he hired contractors to dig the ditches. Instead, he argued that the ditches were permissible. In particular, he argued that by digging the ditches, he merely cleaned out areas that were existing watercourses excluded from the easement. He also argued that the Government failed to prove beyond a reasonable doubt that the wetlands he allegedly damaged were in existence prior to, and therefore subject to, the easement. Finally, he argued that evidence he introduced at trial proved that none of his activities actually damaged the wetlands. The Government presented evidence including expert testimony as to the impact that Peterson's actions had on the wetlands. In a thorough and well-reasoned opinion, the magistrate judge rejected Peterson's arguments and found that Peterson's actions were in violation of the easement and in violation of 16 U.S.C. 668dd(c) and (f)(2). The district court affirmed.

The first and second issues that Peterson raised were related to the extent of the easements. The admissions, testimony, maps, and photographic evidence provided more than adequate support for the district court's ruling as to the extent of the easement. The eighth circuit noted in particular that, even if the 1966 easements and older materials left room for doubt, the 1973 map clearly identifies that the areas subject to Peterson's actions fall within the easement. As to the third issue, the district court found the government witness more credible on the issue of damage to the wetlands than Peterson's expert.

The four wetlands were restored by U.S. Magistrate Judge Senechal's order on September 6, 2006. The Service supervised a local contractor as they constructed the four ditch plugs. Mr. Peterson bore the costs of the restorations.

All four of the wetlands involved in the above-described proceedings were drained again in 2007. As a result, the Government charged Peterson with two counts of draining easement wetlands. In addition, a fifth wetland, covered by the provisions of Walsh County Easement 56X, 1 was also drained. A bench trial in district court was held in July 2008, with U.S. Magistrate Judge Senechal presiding. The details of that trial are outlined here in the "Federal Magistrate Decisions" section of this chapter.

13.4.7 United States Appellate Court, v. Alvin Peterson (CR No. 10-1577- 8th Circuit)

Alvin Peterson ("Peterson") was charged with two Class B misdemeanor violations for draining wetlands on property encumbered by a federal wetlands easement, in violation of 16 U.S.C. § 668dd(c), (f)(2). The first violation—number W0900741—alleges Peterson drained wetlands 3, 5, and 8, subject to Walsh County Easement 124X-1-3, on the west 1/2 of Section 15, Township 156N, Range 59W ("Section 15"). The second violation—number W0900742—alleges Peterson drained wetland 2, subject to Walsh County Easement 56X-2, on the north 1/2, southeast ¼ of Section 16, Township 156N, Range 59W ("Section 16"). A magistrate judge found Peterson guilty of both violations, *United States v. Peterson*, 2008 WL 4922413 (D.N.D. Nov. 12, 2008), and sentenced him to 5 years' probation and imposed a $10,000 fine and $1,500 in restitution. Peterson appealed to the District Court of the United States for the District of North Dakota, see Fed. R. Crim. P. 58(g)(2)(D), and the district court affirmed, *United States v. Peterson*, No. 2:08-mj-16, (D.N.D. Mar. 1, 2010). On appeal to this court, Peterson challenged the sufficiency of the evidence solely for his conviction on violation number W0900741, the charge involving wetlands on Section 15. Because substantial evidence supports Peterson's conviction, we affirm.

13.5 U.S. Supreme Court Decisions

13.5.1 North Dakota v. United States [U.S.. 1983 103 S. CT. 1095]

This case arose out of a longstanding dispute between the State of North Dakota and the U.S. Fish and Wildlife Service. In brief summary, the federal Migratory Bird Hunting and Conservation Stamp Act authorizes the Secretary of the Interior to acquire easements over wetland areas suitable for migratory waterfowl breeding and nesting grounds. Section 3 of the Wetlands Loan Act of 1961 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. Between 1961 and 1977, successive Governors of North Dakota consented to the acquisition of easements covering approximately 1.5 million acres of wetlands in that state. By 1977, the United States had obtained easements covering about half of this acreage. In the 1970's however, cooperation between North Dakota and the United States began to break down, and in 1977, North Dakota enacted statutes restricting the United States' ability to acquire easements over wetlands. These statutes set out certain conditions that must be met "prior to final approval" of the acquisition of the easements, permitted a landowner to drain any after-expanded wetland in excess of the legal description in the easement, and limited all easements to a maximum term of 99 years. The United States brought suit in District Court of the United States for the District of North Dakota , seeking a declaratory judgment that, inter alia, the 1977 North Dakota statutes were hostile to federal law and could not be applied and any easement acquired in violation of such statutes would nevertheless be valid. The district court granted summary Judgment for the United States, and the Court of Appeals for the State of North Dakota affirmed.

North Dakota then appealed to the Supreme Court of the United States. The supreme court subsequently upheld the Government's right to secure wetland areas by deciding the following two issues:

- The consent required by Section 3 of the Wetlands Loan Act cannot be revoked at the will of an incumbent governor. To hold otherwise would be inconsistent with the Act's purpose of facilitating the acquisition of wetlands. Here, the acquisition in question

clearly has been approved by North Dakota's Governors as Section 3's language provides. Nothing in the statute authorizes the withdrawal of approval previously given. Nor does Section 3's legislative history suggest that Congress intended to permit Governors to revoke their consent.

- Since Section 3 of the Wetlands Loan Act does not permit North Dakota to revoke its consent outright, the State may not revoke its consent based on noncompliance with the conditions set forth in the 1977 legislation. And to the extent that such legislation authorizes landowners to drain after expanded wetlands contrary to the terms of their easement agreements, it is hostile to federal interest and may not be applied. For the same reason, the statute limiting easements to a maximum term of 99 years may not be applied to wetlands acquired by the United States pursuant to previously given consents.

The Court also stated that: North Dakota [the State] must yield to the overriding national interest in protecting migratory birds.

13.6 Additional Easement Court Cases Involving Other Agencies

13.6.1 United States (NRCS) v. Arthur Polk (Case No. 08-CR-128, District of Wisconsin 2008)

On May 6, 2008, the grand jury returned an indictment against defendant Arthur Polk for a felony pursuant to Title 18 U.S.C. § 641. On May 27, 2009, the Government reduced the charge to a single count misdemeanor pursuant to Title 18 U.S.C. §§ 1853 & 2. Arthur Polk voluntarily agreed to plead guilty to the count and had signed a plea agreement indicating so. The defendant agreed to pay restitution at or before sentencing in the amount of $8,000

Background

The Wetlands Reserve Program (WRP) is administered by the U.S. Department of Agriculture's (USDA) Natural Resources Conservation Service (NRCS). Among other things, the program provides landowners with financial incentives to restore, protect, and enhance wetlands. As part of the program, landowners are paid for easement rights to their land in perpetuity. Landowners participating in the WRP control access to the land in the easement and may sell their property (so long as they disclose the existence of the easement). In addition, they may use (or lease) the land for hunting, fishing, and other recreational activities. However, the easement agreement prohibits certain other activities, such as harvesting wood products, cutting hay, or grazing livestock, unless they are first approved as "compatible" by the NRCS.

Duffy's Marsh

Duffy's Marsh is a 1700-acre freshwater marsh in Marquette County, Wisconsin. Prior to being restored a wetland, it had been drained and used as cropland for four decades. Appreciating the value of wetlands as habitat for wild animals and especially birds, the landowners surrounding the marsh voluntarily joined the WRP and granted permanent conservation easements to the Government in exchange for cash payments. Payments reflected the value of the land, including the loss of its use for agricultural purposes.

Among the landowners who joined the WRP's Duffy’s Marsh project were Arthur Polk and his wife. In 1996, they executed a warranty easement deed giving NRCS permanent easement rights to restore, protect, manage, maintain, and enhance 457 acres of their land in the marsh.

In exchange, they received $231,293.57. The terms of the easement reserve certain rights to the Polks, including record title (and the right to convey the property, subject to the easement), the right to quiet enjoyment, control of access, the right to "undeveloped" recreational uses such as hunting and fishing, and subsurface mining rights. The easement confers upon the Government the right to engage in certain other activities, including the harvesting of wood products, and states that such activities "are prohibited of the landowner on the easement area." However, the easement also provides that the NRCS may authorize, in writing, a landowner's use of the easement area for "compatible" economic uses, including managed timber harvest, if such uses are deemed by NRCS as "consistent with the long-term protection and enhancement of the wetland and other natural values of the easement area."

Polk was an active participant in the Duffy's Marsh project and attended meetings in 1997and again in 2001 where the requirement of obtaining a "compatible use permit" for any vegetation management was reviewed. A letter to Polk in early 2001 also emphasized this requirement as follows:

> *This letter is your notification of the need to request and receive written authorization for any compatible use activities on your WRP easement area. A compatible use can be defined as any activity that impacts vegetation or hydrology (positive or negative). A compatible use authorization is required prior to engaging in any activity not reserved to the landowner under the terms of the WRP Warranty Easement Deed . . . If you desire to engage in any . . . activities on the easement area [other than those reserved to the landowner], you must request authorization from the NRCS*.

The same requirement was also addressed in a WRP newsletter sent to landowners in May of 2002.

On March 1, 2004, while working on nest boxes in Duffy's Marsh, Gregory Kidd, an NRCS biologist, discovered that trees had been cut on the easement area of the Polks' land. He could observe tire tracks and logs stacked in a pile. He went back 2 days later to take photographs and determined that approximately 100 trees had been cut. Kidd's discovery triggered an investigation by NRCS and eventually the USDA's Office of Inspector General.

The WRP employee who worked most closely with Polk was Alison Pena. She met with Polk and other landowners in 1995 to review the terms of the conservation easements and worked with the Polks in reviewing their easement deed before it was recorded. Pena stated that Polk had never requested a compatible use permit or asked to harvest trees on the easement area of his land.

A former WRP participant in the area told investigators that he saw several trees cut and hauled out of Polk's easement area between January and March 2004. He related that Polk had told him he had the trees cut by a local contractor and that "as long as he [was] paying the taxes on the property, he [could] do whatever he wanted to do . . . . "

An employee of the contractor confirmed that between January and March 2004, Polk had asked him to cut some trees for him as a favor (Polk had apparently allowed the contractor to use his property so that the contractor could access a worksite on adjacent land). The employee of the contractor stated that Polk told him he owned the land and pointed out which trees he wanted cut. He recalled taking about half of the felled trees to be burned and leaving the other half onsite. Polk did not pay for removal of the trees.

Polk admits that in approximately December of 2003 he had the contractor cut trees from the easement area of his property. He also admits that he did not seek written permission from NRCS to have the trees cut. According to Polk, the trees felled were cottonwood trees that he wanted removed because they are "dirty seeding trees."

This information is provided for the purpose of setting forth a factual basis for the plea of guilty. It is not a full recitation of the defendant's knowledge of, or participation in, this offense.

13.6.2 United States (Forest Service) v. Edward Higley (Civil No. 92-04448-N-HLR, District Court of Idaho 1994)

Defendant built a road on a scenic easement in violation of the U.S. Forest Service's scenic easement covenants. The defendant was found in violation by the court and ordered to restore the area in question. The court also stipulated if the area was not restored by a set date the Forest Service could restore the area to the sum of $4,088.00, which would be paid by the defendant.

Exhibits

Chapter 3 Exhibits

3-1: March 1, 1994 Solicitor Opinion, “Public Utilities Rights of Way – Minnesota”
3-2: ROW Help Sheet
3-3: Checklist for ROW Permits

Chapter 6 Exhibits

6-1: FSA Easement Boundary Sign
6-2: Conservation Easement Reservations in the United States
6-3: Grant of Easement
6-4: Conveyance of Easement for Waterfowl Management Rights (1)
6-5: Easement Summary
6-6: Conveyance of Easement for Waterfowl Management Rights (2)
6-7: Conveyance of Easement for Waterfowl Management Rights (3)
6-8: Conveyance of Easement for Waterfowl Management Rights (4)
6-9: Exhibit A Map

Chapter 7 Exhibits

7-1: Waterfowl Management Easement Chronological List
7-2: Example of Label
7-3: FWS Forensics Lab Digital Imagery Procedure
7-4: Easement Summary
7-5: Guidance on the Use and Distribution of Digital Easement and Fee Boundary Information

Chapter 8 Exhibits

8-1: Proposed Guidelines for Wetland Easement Enforcement
8-2: Compatibility Determination

Chapter 9 Exhibits

9-1: Easement Compliance Photography Procedure, Minnesota Wetland Management Districts, Fall, 2011
9-2: Easement Data Sheet
9-3: Large Photo Description
9-4: Double Photo Description
9-5: Photo Reference Sheet

Chapter 10 Exhibits

10-1: Seeding Guidelines
10-2: Waterfowl Management Easement Violation Interview Checklist
10-3: Restoration Letter
10-4: Case Closure Letter

Chapter 11 Exhibits

11-1: Difficulty to Drain Map
11-2: Mapping Error Range
11-3: Drainage Facility Map
11-4: Renegotiated Map
11-5: New Easement Map
11-6: Easement Mapping References
11-7: Example of Letter that Transmits Easement Map Requested by a Landowner
11-8: Example of Letter Responding to Landowner Questions Regarding the Mapping Process
11-9: Example of Letter Transmitting Revised Map to Landowner
11-10: Offsite Mapping Tools

Chapter 12 Exhibits

12-1: Solicitor Letter
12-2: Request for Relief Guidance
12-3: Case Closure Letter

Exhibit 3-1: March 1, 1994 Solicitor Opinion, "Public Utilities Rights of Way – Minnesota"

United States Department of the Interior

TAKE PRIDE IN AMERICA

OFFICE OF THE SOLICITOR
Office of the Field Solicitor
Bishop Henry Whipple Federal Building
1 Federal Drive, Room 686
Ft. Snelling, Minnesota 55111-4007

IN REPLY REFER TO:

March 1, 1994

FWS.TC.1737

Post-it® Fax Note 7671	Date	# of pages ▶
To	From	
Co./Dept.	Co.	
Phone #	Phone #	
Fax #	Fax #	

Mr. Joseph S. Marler
Regional Director
Fish and Wildlife Service
Bishop Henry Whipple Federal
1 Federal Drive
Ft. Snelling, Minnesota 55111-4007

Attn: Carol Olson, RE

Re: Public Utilities Rights of Way - Minnesota

Dear Mr. Marler:

This letter is in response to a request from your realty staff for advice regarding the existence of statutory rights of way for public utility lines within existing rights of way for public roads. This office previously advised your realty staff that such statutory rights of way existed in the state of Wisconsin and your staff has now inquired whether such rights of way exist in Minnesota. The answer is yes.

In accordance with MINN. STAT. ANN. § 222.37 (West 1992) public utilities may use public roads for the purpose of constructing, using, operating, and maintaining lines, so long as the lines do not interfere with the ordinary use of the road. The public utility is subject to all reasonable regulations imposed by the governing body of any county, town, or city in which such public road may be. The public utility must notify the governing body of the governmental entity having jurisdiction over the road.

I have included a copy of the applicable Minnesota statute herein. If this office may be of further assistance please feel free to contact me.

Sincerely yours,

Priscilla A. Wilfahrt
For the Field Solicitor

Exhibit 3-2: ROW Help Sheet

[redacted] Region 3 Guidance

US Fish and Wildlife Service Help Sheet
for Road Rights-of -Way Expansion Permit
Applications

This Help Sheet is intended to assist State, County and Township road authorities seeking a permit for road reconstruction or expansion projects that affect US Fish and Wildlife Service (Service) lands within the counties of Otter Tail, Wilkin, Grant, Douglas and Wadena Counties. The MN DOT and County Engineers should have up to date maps and/or GIS layers showing the location of all US Fish and Wildlife Service fee title and easement lands. If not individuals can contact the US Fish and Wildlife Service Office in Fergus Falls for this information.

The Service is required to comply with a number of federal laws before they can grant a permit to expand a road right-of-way (ROW). These regulations cover both fee title and wetland/habitat easement properties. If at all possible road authorities should consider construction that completely stays within the existing ROW. This will negate the need for a permit. ROW requests for totally new roads across Service lands cannot be found compatible with the purposes for these lands and will more than likely be denied. Generally ROW permits cannot be approved by the local Service office but rather are issued by the Regional Office in Fort Snelling, MN.

Situations where a Special Use Permit can be issued bv the Local Office

If the following circumstances apply a Special Use Permit can be issued by the local office. Because Archeological clearance is needed it will take 60-90 days to issue the special use permit.

1. No expanded permanent ROW is needed over Service lands only a temporary construction easement. Signs, fences, parking areas, etc. will be replaced at their original locations and all disturbed sites outside of the existing ROW will be restored.

2. Construction activities outside of the existing ROW will be limited to Upland Areas. (i.e. no fill will be placed in any Service protected wetlands within the temporary easement area)

3. No native prairie will be impacted. (i.e. sod that has never been broken and farmed) Service staff will need to determine if the site contains native prairie.

4. No impacts occur to federally endangered, threatened or candidate species as well as state species of special concern.

5. Clearance in writing must be obtained from the State Historical Preservation Officer (30+ days required).

If the above conditions cannot be met a formal ROW permit is needed.

Exhibit 3-3: Checklist for ROW Permits

[redacted] Region 3 Guidance

Situations where a formal ROW Permit must be issued bv the Regional Office

If expansion of the ROW is unavoidable the road authority needs to submit a formal letter requesting a right-of-way permit that includes the following items:

a. A general description of the road being expanded include number, location, portion being improved and why the improvement/expansion is necessary. Service field staff need to prepare an Environmental Assessment addressing the following questions. Why does this road need to be expanded? Why can't the road be relocated? Why can't Service land interests be avoided?

b. A general description of the project goals and proposed improvement (i.e. realignment, widening, grade changes, flattening inslopes, etc.).

c. How many additional feet of ROW will be needed to complete the project including detailed maps showing existing ROWand proposed expansions. As soon as possible we will need a legal description of this additional ROW as the permit is a legal document that is recorded in the courthouse.

d. A detailed description of the Service protected upland and wetland acres that will be included in the ROW expansion. (i.e. 3 PEMC wetlands totaling 2.46 acres and 4.92 acres of upland) This maybe best done using a table showing the acres of upland as well as number~ acres and type of wetlands.

e. Value of the land needed for the expanded ROW (i.e. appraisal, valuation by recognized expert).

f Mitigation is required for wetland and/or upland acres for which a permanent ROW permit will be granted. Mitigation must be of equal protection, equal wetland type and equal wetland/upland acreage. Mitigation sites must be identified before an EA can be written. Mitigation sites must be restored and transferred to the Service prior to granting the permit. Currently Otter Tail County maintains a US Fish and Wildlife Service mitigation bank that can be used for mitigation in any of the five counties (Otter Tail, Douglas, Grant, Wilkin, Wadena).

g. A copy of the State Historical Preservation Office (SHPO) project approval letter, including the SHPO project number.

Once the above information in obtained we will prepare an EA, Compatibility Determination, etc. for submission to our Regional Office for review, signature and issuance of the permit. It usually takes from 6-9 months from the initial letter to issuance of the permit. It is important that the process is began early enough to allow for issuance of the permit in time to meet your construction needs.

Right-of-Way Processing Procedures

National Wildlife Refuge System Lands

1. Applicant: Submit to project leader who will submit the following to the Division of Realty, US. Fish and Wildlife Service: Attn: Judy West

a. Right-of-Way application - no special form required, but must state purpose, length, width, and approximate acreage with legal description; 50 CFR 29.2I-2(a)(1).

b. Application fee - in accordance with schedule contained in 50 CFR 29.2I-2(a)(2)(ii)*.

c. Map - sufficient to locate the right-of-way on the ground; 50 CFR 29.2I-2(b).

d. Detailed environmental analysis-containing information specified in 50 CFR 29.2I-2(a)(4).

2. Project Leader - Prepare Environmental Action Statement (EAS), Finding of No Significant Impact (FONSI) and Environmental Assessment (EA); 50 CFR 29.2I-2(a)(4). (Submit with applicant package to RE)

Prepare and sign Compatibility Statement if right-of-way is compatible with purposes for which the refuge was established. (Submit with applicant package to RE)

3. US. Fish and Wildlife Service

1. Review and distribute EAS, FONSI and Compatibility Determination. (VSO)

Route FONSI for RD signature, if appropriate.

1. Prepare fair market value appraisal report (lump sum) of right-of-way interest; 50 CFR 29.2I-7(a). (RE or may be prepared by applicant.)

1. Prepare Right-of-Way Permit (2 copies) - include: (RE)

(1) Terms and conditions contained in 50 CFR 29.21-4; 50 CFR 29.21-8 for electric power transmission lines; 50 CFR 29 .2I-9(b)(2) for transportation pipelines;

(2) Required lump sum right-of-way payment and monitoring fee, 50 CFR 29.2I-2(a)(3)(I)*;

(3) And any other terms and conditions necessary to make the right-of-way compatible; send all copies of Right-of-Way Permit to applicant for signature.

1. After applicant signs and pays requested fees, send thru appropriate refuge supervisor to RD for signature. Distribute signed Permit copies (I-applicant (permittee), I-Regional Office). (RE)

2. Project Leader

Monitor construction, operation, and maintenance within the right-of-way.

When construction is completed, notify RE and advise whether completed in accordance with terms of permit.

Applicant - Upon completion of construction, file certification of completion with RE; 50 CFR 29.21-5(b).

* Application fees and monitoring fees are not collected from Federal, State, or local governments or agencies or instrumentalities thereof (except for permits issued under authority of the Mineral Leasing Act of 1920; i.e., pipelines for transportation of oil, natural gas, etc.). (6/2003)

FWS/NWRS-RE -
1/30/04

CHECKLIST FOR RIGHT -OF-WAY PERMITS

Initials

Date
1. Right-of-Way Application

a.Application received and checked

If oil/gas pipeline (see 50 CFR 29.21-9):
- Prepare/send Federal Register notice

- Prepare/send Congressional notification if 24" or more in diameter

TIN/SS# ON CHECK
b. Application fee received - unless Federal, State, or local government agency (then no fee required)

c.Send Collection Transmittal Form to DASC (via Sr. Realty Asst.)

(Be sure to include TIN or SS# on paperwork.)

d. Post permit card, assign number, set up correspondence file

For Upper Miss #'s **check permit status map** & microfiche **to avoid duplication**
2. Environmental Action Statement (EAS)

a.Prepare/send right-of-way transmittal memo to NWRSNSO

Send original EAS, any documents pertaining to permit, and any maps illustrating area. If a document is missing (such as the Capability Determination), RHPO will locate. (If only a Cat. Ex., RD does not sign EAS)

b. 1) Status map: request from cartographer. If you can create the

map using a tract map, do so. If no tract map, request through Regional Supervisory Land Surveyor.

2) Request Project Leader to highlight location of ROW on tract map.

3) Legal description: If any question as to locating the area or the description itself, request a legal description from

the Regional Supervisory Land Surveyor.

c. Received approved EAS

(RHPO retains original signed EAS)

3. Right-of-Way Charge (unless exempt by other provision of Federal law)

a.Appraisal needed? Yes No

If under $2,500, transaction value memo will suffice, to be completed by Realty Specialist - **not Appraiser.** Senior Realty Officer must concur.

If no, reason for exemption:
NOTE: No charge ifFWS owns only an easement interest in the land.

b. Prepare/send appraisal request

Requested from: Applicant -' RO -' WO
All appraisals will need approval by OAS Review Appraiser.

c.Appraisal
Received:

4. Permit Preparation and Processing
Prepare permit

- Include special terms/conditions identified in EAS
  - Ifpowerline, see 50 CFR 29.21-8
  - If oil/gas pipeline, see 50 CFR 29.21-9
  - If electric lines, add #' s 17 & 18
- IfFWS owns only an easement interest in the land, see sample for appropriate terms and conditions

- Prepare/send transmittal letter to permittee
  - Forward two copies of permit for signature
  ,. Request payment of right-of-way fee, if appropriate -
  Request payment of monitoring fee - unless Federal, State, or local government agency (no fee required) (Easements do not require monitoring fees.)

- Received signed pennit copies and check from permittee

  - Be sure check includes right-of-way/monitoring fees
  -Submit right-of-way and monitoring fees to DASC

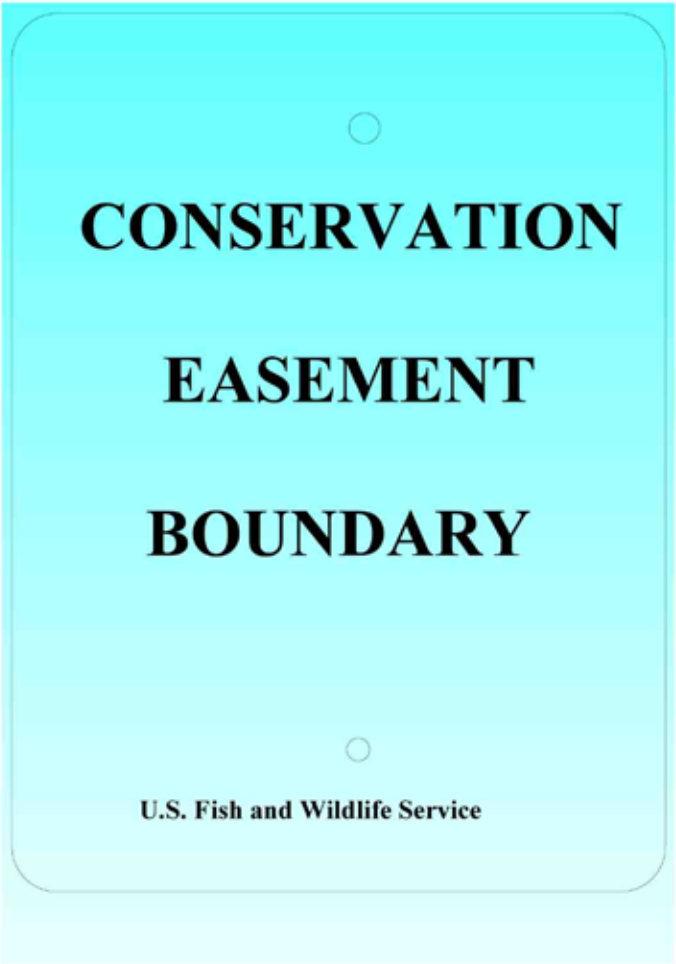
  (see No.1 above for deposit information)

- Send transmittal letter and permit (2 copies) to Regional (INCLUDE CULTURAL Director for signature (through RE Chief & DRD) PARAGRAPH)

- Letter and permit returned, signed by Regional Director

- Send transmittal letter to permittee, forwarding signed permit
- Prepare/send memo to Project Manager, forwarding copy of permit and requesting Certificate of Completion
- Post permit on Realty records:
  - Permit record card
  - Status atlas (map)
- Certificate of Completion received (stamp closed if completion not necessary & file in closed section oflektreiver)
- Quarterly Report material filed
- Enter in FileMaker Pro ROW database

6-1: FSA Easement Boundary Sign



Size:	3" X 4½"
Color:	White with FWS blue letters
Lettering:	Large = ¼" helvetica medium Small = 1/3"
Materials:	Type 1 = aluminum, painted Type 2 = stick-on vinyl

6-2: Conservation Easement Reservations in the United States

Conservation Easement Reservations in the United States

By this instrument there is reserved in the UNITED STATES OF AMERICA, its successors and assigns, a perpetual conservation easement on the property conveyed by this deed. The United States in the conservation easement refers to the United States of America, Farmers Home Administration, United States Department of Agriculture, as defined in the quitclaim deed to which this easement is attached and incorporated herein.

This easement is under the authority and in furtherance of the provisions of Federal law, including sections 331 and 335 of the Consolidated Farm and Rural Development Act (7 U.S.C. 1981, 1985), Executive Order 11990 providing for the protection of wetlands, and Executive Order 11988 providing for the management of floodplains. The restrictions and covenants contained in this easement constitute a perpetual servitude on and run with the property. The Grantee and all successors and assigns ("landowner") of the property described below covenants with the United States to do or refrain from doing, severally and collectively, the various acts mentioned later in this easement. The United States is reserved the rights enumerated in this easement for itself and its successors, agents, and assigns.

1. Description of the Easement Area:

The lands, waters and access rights covered by this easement are located within the following described legal subdivisions in _____ County, State of South Dakota. The easement boundaries are further delineated on the map(s) attached hereto as Exhibit "A." Wetland Areas shall include any enlargements of said wetland areas resulting from normal or abnormal increases in water.

T. N., R. W., 5th P.M.

Section ____:_____and access across the _____.

Easement Areas, as depicted on Exhibit "A," are further described as:

T. N., R. W., 5th P.M.

Section __: _____and access across the _____.

This easement is subject to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electric transmission lines, telegraph and telephone lines, cable lines, and all mineral rights.

2. Covenants by the Landowner:

A. No dwellings, barns, outbuildings, or other structures shall be built within the easement area.

*B.1. For "**Most Restrictive**" Easement Areas of the easement which include permanent grassland vegetation and the wetland area, the vegetation or hydrology of the described easement area will not be altered in any way or by any means or activity on the property conveyed by this deed, or property owned or under the control of the landowner, including: (1) cutting or mowing; (2) cultivation; (3) grazing; (4) harvesting wood products; (5) burning; (6) placing of refuse, wastes, sewage, or other debris; (7) draining, dredging, channeling, filling, discing, pumping, diking, impounding, and related activities; or (8) diverting or affecting the natural flow of surface or underground waters into, within, and out of the easement areas.*

*B.2. For "**Least Restrictive**" Wetland Areas of the easement, either by an activity on the property conveyed by this deed, or on property owned or under the control of the landowner, the vegetation or hydrology will not be altered through: (1) burning; (2) placing of refuse, wastes, sewage, or other debris, (3) draining, dredging, channeling, leveling, filling, pumping, diking, impounding and related activities; or (4) diverting or affecting the natural flow of surface or underground waters into, within, and out of "**Least Restrictive**" Wetland Areas. The landowner shall have the right to carry on farming practices such as grazing, hay cutting, plowing, working and cropping "**Least Restrictive**" Wetland Areas when they are dry of natural causes. "**Least Restrictive**" Wetland Areas shall include any enlargements of said wetland areas resulting from normal or abnormal increases in water.*

*C. Notwithstanding the provisions of B.1. and B.2. above, the landowner shall be responsible for compliance with all Federal, State, and local laws for the control of noxious or other undesirable plants on the easement area. For "**Most Restrictive**" Easement Areas, the responsibility for such plant control may be assumed in writing by and at the option of the easement manager where control or manipulation of such plants is deemed by the manager to affect easement management programs or policies.*

*D. Cattle or other stock shall not be permitted on "**Most Restrictive**" Easement Areas, except that the easement manager shall permit access to and use of waters within the area necessary for stock watering under such terms and conditions as the easement manager deems necessary to protect and further the purposes of this easement, provided:*

> *(1) the easement manager bears the costs of building and maintaining fencing or other facilities reasonably necessary to preclude stock from entering the easement area; and*
>
> *(2) access for stock watering need not be permitted where other waters are reasonably available from other sources outside the easement area.*

3. <u>Rights Reserved in the United States</u>:

*The United States, on behalf of itself, its successors or assigns, reserves and retains the right, at its sole discretion, to manage the easement area, including the following authorities (rights reserved for "**Most Restrictive**" Easement Areas are described in A, B, C, D, E, and F.; rights reserved for "**Least Restrictive**" Wetland Areas are described in A.):*

A. The right of ingress and egress to conduct management, monitoring, and easement enforcement activities. The easement manager may utilize any reasonably convenient route of access to the easement area(s), across Section __, T.___N, R. W, 5th P.M.,_____County, _____. However, the landowner may provide a designated route to and from the easement area so that damage to farm operations can be reasonably avoided.

*B. For "**Most Restrictive**" Easement Areas, the right to install, operate, and maintain structures for the purpose of reestablishing, protecting, and enhancing wetlands functional values including the taking of construction materials to and from said sites.*

*C. For "**Most Restrictive**" Easement Areas, the right to establish or reestablish vegetation through seedings, plantings, or natural succession.*

*D. For "**Most Restrictive**" Easement Areas, the right to manipulate vegetation topography and hydrology on the easement areas through diking, pumping, water management, excavating, island construction, burning, cutting, pesticide application, fertilizing, and other appropriate practices.*

*E. For "**Most Restrictive**" Easement Areas, the right to conduct predator management activities.*

*F. For "**Most Restrictive**" Easement Areas, the right to construct and maintain fences in order to prevent grazing or other types of encroachment on the easement area.*

4. <u>Easement Management and Administration</u>:

A. All right, title, and interests of the United States in this easement are assigned to the Secretary of the Interior for administration by the United States Fish and Wildlife Service as part of the National Wildlife Refuge System pursuant to the National Wildlife Refuge System Administration Act, 16 U.S.C. 668dd et. seq. The U.S. Fish and Wildlife Service may enforce all the terms and conditions of this easement, along with exercising all rights and powers reserved in this easement through such general or specific regulations or orders as have been or may be, from time to time, promulgated under the authority of the Secretary of the Interior. Notwithstanding the above rights in paragraphs II and III retained by the United States, the U.S. Fish and Wildlife Service

may permit the landowner to pursue such activities on said sites as would be consistent with preservation and enhancement of floodplain and wetland functional values.

B. As used in this easement, the term "easement manager" shall refer to the authorized official of the U.S. Fish and Wildlife Service.

5. General Provisions:

A. The agreed upon purposes of this easement are the preservation and maintenance of the wetland and floodplain areas existing as of the date of this conveyance as well as protection and enhancement of plant and animal habitat and populations. Such purposes shall constitute the dominant estate within the easement area. Wetland Areas are defined by reference 7(c) of Executive Order 11990 and a "floodplain" is defined by reference to section 6(c) of Executive Order 11988. Any ambiguities in this easement shall be construed in a manner which best effectuates wetland and plant preservation, and fish and wildlife purposes.

B. Any subsequent amendment to or repeal of any Federal law or order which authorizes this reservation shall not affect the rights reserved by the United States or subsequently held by its successors or assigns.

C. For purposes of this easement, wetland management rights reserved by the United States include, but are not limited to, inspection for compliance with the terms of this easement; research regarding water, wetlands, fish and wildlife and associated ecology; and any other activity consistent with the preservation and enhancement of wetland functional values.

D. The United States, its successors and assigns, including the easement manager, shall have the right to make surveys, take photographs, and prepare such other documentation as may be necessary or desirable to administer the provisions of this easement. Any such map, plat, or other suitable document may be recorded in the land records of the respective county in which the property is located.

*E. The easement reservation does not authorize public entry upon or use of land. Unless the easement manager prohibits public entry to "**Most Restrictive**" Easement Areas, the landowner may permit it at the landowner's discretion.*

F. The landowner and invitees may hunt and fish on the easement area in accordance with all Federal, State, and local game and fishery regulations.

G. This easement shall be binding on the landowner, and the landowner's heirs, successors or assigns. The landowner covenants to warrant and defend unto the United States, its successors or assigns, the quiet and peaceable use and enjoyment of the land and interests in the land constituting this reservation against all claims and demands.

H. The easement manager shall be the agent of the United States or its successors and assigns. The manager shall have discretionary powers of the United States under this easement. In performance of any rights of the United States under this easement, the manager may permit, contract, or otherwise provide for action by employees, agents, or assigns which may include the landowner.

6-3: Grant of Easement

UNITED STATES DEPARTMENT OF INTERIOR
U.S. FISH AND WILDLIFE SERVICE
GRANT OF EASEMENT FOR WILDLIFE HABITAT PROTECTION

THIS INDENTURE, by and between

hereinafter referred to as the Grantors, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative.

WITNESSETH

WHEREAS, the Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. 718d(c); the Fish and Wildlife Act of 1956, 16 U.S.C. 742a-742j; the Emergency Wetland Resources Act of 1986, 16 U.S.C. 3901; the Endangered Species Act of 1973, as amended, 16 U.S.C. 1534 and the Land and Water Conservation Fund Act, 16 U.S.C. 4601-9(a)(1), authorize the Secretary of the Interior to acquire lands or waters or interests therein for the development, advancement, management, conservation and protection of fish and wildlife resources. The purpose of this easement is to provide and protect quality habitat on the lands and wetlands described herein and such lands and wetlands shall be maintained and improved to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species, and

WHEREAS, the lands and wetlands described below contain existing or potential habitat suitable for use for wildlife management purposes.

NOW, THEREFORE, for and in consideration of the sum of _____ _____ Dollars ($), the Grantors hereby grant to the United States, commencing with the acceptance of this Indenture by the Secretary of the Interior or his authorized representative, an easement in perpetuity, which includes a right of use for the maintenance of the lands and wetlands described herein, to wit:

_____ County, State of Minnesota:

Together with the right of ingress and egress to the above described lands and wetlands on, over, across and through the following described lands, to wit:

Subject, however, to all valid existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals , electrical transmission lines, cable lines, and all mineral rights.

The conveyance hereunder shall be effective on the date of the execution of this Indenture by the Secretary of the Interior or his authorized representative; provided, however, that such acceptance must be made within _____ calendar months from the date of the execution of this Indenture by the Grantors, or any subsequent date as may be mutually agreed upon in writing by the parties hereto prior to the expiration of such date; and provided further, however, that in the event that such acceptance is not made by such date, this Indenture shall be null and void.

No rights herein are granted to the general public for access to or entry upon the land subject to this grant of easement for any purpose.

The Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree that they will cooperate in the maintenance and protection of the aforesaid lands and wetlands for the protection and management of fish and wildlife resources and to maintain the quality of these lands and wetlands to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species. To that end and for the purpose of accomplishing the intent on this Indenture, the Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree as follows:

1. Grantors will not perform, cause to be performed or permit haying, mowing or seed harvesting upon the easement area until after July 15 in any calendar year.

2. Grantors will not perform, cause to be performed or permit the following activities upon the easement area: altering of grassland, woodland, wildlife habitat or other natural features by digging, plowing, disking, cutting or otherwise destroying the vegetative cover; dumping refuse, wastes, sewage or other debris; burning; draining, dredging, channeling, filling, leveling, pumping, diking, impounding or related activities; altering or tampering with water control structures or devices; diverting or causing or permitting the diversion of surface or underground water into, within or out of the easement area by any means including ditching or the construction of wells; building or placing buildings or structures on the easement area; and producing agricultural crops, unless prior approval in writing is granted by the U.S. Fish and Wildlife Service; except that grazing the aforesaid lands is permitted at anytime throughout the calendar year.

3. Grantors will pay all taxes and assessments, if any, which may be levied against the land.

4. Grantors will be responsible for noxious weed control and emergency control of pests to protect the public good subject to Federal and State Statutes and Regulations. Methods used to control noxious weeds and pests must be approved in writing by the U.S. Fish and Wildlife Service prior to implementation by the Grantors. However, mowing or haying noxious weeds is prohibited until after July 15 in any calendar year in accordance with the easement terms stated above.

5. The United States and its authorized representatives shall have the right to sign, post, mark or otherwise identify the easement area and to maintain said identification.

6. The United States and its authorized representatives shall have the right to restore and/or maintain grasslands and wetlands on the easement area.

It is understood that this easement and the covenants and agreements contained herein shall run with the land and shall be binding on all persons and entities who shall come into ownership or possession of the lands and wetlands subject to this easement. The Grantor, successors and assigns shall notify the Regional Director, U.S. Fish and Wildlife Service in writing of any sale or transfer within 30 days following the sale or transfer of any portion of the lands and wetlands subject to this easement.

It is further understood that the rights and interests granted to the UNITED STATES OF AMERICA herein shall become part of the National Wildlife Refuge System and shall be administered by the United States Fish and Wildlife Service, pursuant to the National Wildlife Refuge Systems Administration Act, 16 U.S.C. 668dd.

SPECIAL PROVISIONS

1. This Indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this Indenture is acknowledged by the Grantors to be presently binding upon them and to remain so until the expiration of said period of acceptance, as hereinabove described, by virtue of payment to the Grantors, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by Grantors.

2. Notice of acceptance of this Indenture shall be given to the Grantors by certified mail addressed to

and shall be effective upon the date of mailing, and such notice shall be binding upon all Grantors without sending a separate notice to each.

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of incorporation or company.

4. Payment of the consideration shall be made by a United States Treasury check after acceptance of this Indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the Grantors have hereunto set their hands and seals this _____ day of _____, 19_____.

_____(L.S.) _____(L.S.)

_____(L.S.) _____(L.S.)

_____(L.S.) _____(L.S.)

ACKNOWLEDGEMENT

STATE OF _____)
)ss
COUNTY OF _____)

On this _____ day of _____, in the year 19_____, before me personally appeared

known to me to be the person(s) described in and who executed the foregoing instrument and acknowledged to me that they (he/she) executed the same of their (his/her) free act and deed.

_____
Notary Public, State of

(SEAL) My commission expires : _____

This instrument was drafted by Steve Durkee, Realty Specialist, U.S. Fish and Wildlife Service, Wetlands Acquisition Office, 971 East Frontage Road, Litchfield, Minnesota 55355.

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of the United States this _____ day of _____, 19_____.

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

By: _____
Senior Realty Officer, Division of Realty
U.S. Fish and Wildlife Service

UNITED STATES DEPARTMENT OF INTERIOR
U.S. FISH AND WILDLIFE SERVICE
GRANT OF EASEMENT FOR WILDLIFE HABITAT PROTECTION

THIS INDENTURE, by and between

hereinafter referred to as the Grantors, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative.

WITNESSETH

WHEREAS, the Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. 718d(c); the Fish and Wildlife Act of 1956, 16 U.S.C. 742a-742j; the Emergency Wetland Resources Act of 1986, 16 U.S.C. 3901; the Endangered Species Act of 1973, as amended, 16 U.S.C. 1534 and the Land and Water Conservation Fund Act, 16 U.S.C. 4601-9(a)(1), authorize the Secretary of the Interior to acquire lands or waters or interests therein for the development, advancement, management, conservation and protection of fish and wildlife resources. The purpose of this easement is to provide and protect quality habitat on the lands and wetlands described herein and such lands and wetlands shall be maintained and improved to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species, and

WHEREAS, the lands and wetlands described below contain existing or potential habitat suitable for use for wildlife management purposes.

NOW, THEREFORE, for and in consideration of the sum of _____ _____ Dollars ($), the Grantors hereby grant to the United States, commencing with the acceptance of this Indenture by the Secretary of the Interior or his authorized representative, an easement in perpetuity, which includes a right of use for the maintenance of the lands and wetlands described herein, to wit:

_____ County, State of Minnesota

Together with the right of ingress and egress to the above described lands and wetlands on, over, across and through the following described lands, to wit:

Subject, however, to all valid existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals , electrical transmission lines, cable lines, and all mineral rights.

The conveyance hereunder shall be effective on the date of the execution of this Indenture by the Secretary of the Interior
or his authorized representative; provided, however, that such acceptance must be made within _____ calendar months from the date of the execution of this Indenture by the Grantors, or any subsequent date as may be mutually agreed upon in writing by the parties hereto prior to the expiration of such date; and provided further, however, that in the event that such acceptance is not made by such date, this Indenture shall be null and void.

No rights herein are granted to the general public for access to or entry upon the land subject to this grant of easement for any purpose.

The Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree that they will cooperate in the maintenance and protection of the aforesaid lands and wetlands for the protection and management of fish and wildlife resources and to maintain the quality of these lands and wetlands to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species. To that end and for the purpose of accomplishing the intent on this Indenture, the Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree as follows:

1. Grantors will not perform, cause to be performed or permit haying, mowing or seed harvesting upon the easement area until after July 15 in any calendar year.

2. Grantors will not perform, cause to be performed or permit the following activities upon the easement area: altering of grassland, woodland, wildlife habitat or other natural features by digging, plowing, disking, cutting or otherwise destroying the vegetative cover; dumping refuse, wastes, sewage or other debris; burning; grazing; draining, dredging, channeling, filling, leveling, pumping, diking, impounding or related activities; altering or tampering with water control structures or devices; diverting or causing or permitting the diversion of surface or underground water into, within or out of the easement area by any means including ditching or the construction of wells; building or placing buildings or structures on the easement area; and producing agricultural crops, unless prior approval in writing is granted by the U.S. Fish and Wildlife Service.

3. Grantors will not permit the grazing of livestock and will be responsible for excluding livestock from the easement area and will provide, construct and maintain fences as necessary to accomplish this exclusion of livestock.

4. Grantors will pay all taxes and assessments, if any, which may be levied against the land.

5. Grantors will be responsible for noxious weed control and emergency control of pests to protect the public good subject to Federal and State Statutes and Regulations. Methods used to control noxious weeds and pests must be approved in writing by the U.S. Fish and Wildlife Service prior to implementation by the Grantors. However, mowing or haying noxious weeds is prohibited until after July 15 in any calendar year in accordance with the easement terms stated above.

6. The United States and its authorized representatives shall have the right to sign, post, mark or otherwise identify the easement area and to maintain said identification.

7. The United States and its authorized representatives shall have the right to restore and/or maintain grasslands and wetlands on the easement area.

It is understood that this easement and the covenants and agreements contained herein shall run with the land and shall be binding on all persons and entities who shall come into ownership or possession of the lands and wetlands subject to this easement. The Grantor, successors and assigns shall notify the Regional Director, U.S. Fish and Wildlife Service in writing of any sale or transfer within 30 days following the sale or transfer of any portion of the lands and wetlands subject to this easement.

It is further understood that the rights and interests granted to the UNITED STATES OF AMERICA herein shall become part of the National Wildlife Refuge System and shall be administered by the United States Fish and Wildlife Service, pursuant to the National Wildlife Refuge Systems Administration Act, 16 U.S.C. 668dd.

SPECIAL PROVISIONS

1. This Indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this Indenture is acknowledged by the Grantors to be presently binding upon them and to remain so until the expiration of said period of acceptance, as hereinabove described, by virtue of payment to the Grantors, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by Grantors.

2. Notice of acceptance of this Indenture shall be given to the Grantors by certified mail addressed to

and shall be effective upon the date of mailing, and such notice shall be binding upon all Grantors without sending a separate notice to each.

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of incorporation or company.

4. Payment of the consideration shall be made by a United States Treasury check after acceptance of this Indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the Grantors have hereunto set their hands and seals this _____ day of _____, 19_____.

_____(L.S.) _____
(L.S.)

_____(L.S.) _____
(L.S.)

_____(L.S.) _____
(L.S.)

ACKNOWLEDGEMENT

STATE OF _____)
)ss
COUNTY OF _____)

On this _____ day of _____, in the year 19_____, before me personally appeared

known to me to be the person(s) described in and who executed the foregoing instrument and acknowledged to me that they (he/she) executed the same of their (his/her) free act and deed.

_____ _____
Notary Public, State of

(SEAL) My commission expires : _____
_____

This instrument was drafted by Steve Durkee, Realty Specialist, U.S. Fish and Wildlife Service, Wetlands Acquisition Office, 971 East Frontage Road, Litchfield, Minnesota 55355.

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of the United States this _____ day of _____, 19_____.

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

By: _____
___ Senior Realty Officer, Division of Realty
U.S. Fish and Wildlife Service

UNITED STATES DEPARTMENT OF INTERIOR
U.S. FISH AND WILDLIFE SERVICE
GRANT OF EASEMENT FOR WILDLIFE HABITAT PROTECTION

THIS INDENTURE, by and between

hereinafter referred to as the Grantors, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative.

WITNESSETH

WHEREAS, the Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. 718d(c); the Fish and Wildlife Act of 1956, 16 U.S.C. 742a-742j; the Emergency Wetland Resources Act of 1986, 16 U.S.C. 3901; the Endangered Species Act of 1973, as amended, 16 U.S.C. 1534 and the Land and Water Conservation Fund Act, 16 U.S.C. 4601-9(a)(1), authorize the Secretary of the Interior to acquire lands or waters or interests therein for the development, advancement, management, conservation and protection of fish and wildlife resources. The purpose of this easement is to provide and protect quality habitat on the lands and wetlands described herein and such lands and wetlands shall be maintained and improved to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species, and

WHEREAS, the lands and wetlands described below contain existing or potential habitat suitable for use for wildlife management purposes.

NOW, THEREFORE, for and in consideration of the sum of _____ _____ _____ Dollars ($), the Grantors hereby grant to the United States, commencing with the acceptance of this Indenture by the Secretary of the Interior or his authorized representative, an easement in perpetuity, which includes a right of use for the maintenance of the lands and wetlands described herein, to wit:

_____ County, State of Minnesota

Together with the right of ingress and egress to the above described lands and wetlands on, over, across and through the following described lands, to wit:

Subject, however, to all valid existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals , electrical transmission lines, cable lines, and all mineral rights.

The conveyance hereunder shall be effective on the date of the execution of this Indenture by the Secretary of the Interior or his authorized representative; provided, however, that such acceptance must be made within _____ calendar months from the date of the execution of this Indenture by the Grantors, or any subsequent date as may be mutually agreed upon in writing by the parties hereto prior to the expiration of such date; and provided further, however, that in the event that such acceptance is not made by such date, this Indenture shall be null and void.

No rights herein are granted to the general public for access to or entry upon the land subject to this grant of easement for any purpose.

The Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree that they will cooperate in the maintenance and protection of the aforesaid lands and wetlands for the protection and management of fish and wildlife resources and to maintain the quality of these lands and wetlands to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species. To that end and for the purpose of accomplishing the intent on this Indenture, the Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree as follows:

1. Grantors will not perform, cause to be performed or permit the following activities upon the easement area: haying, mowing or seed harvesting for any reason; altering of grassland, woodland, wildlife habitat or other natural features by digging, plowing, disking, cutting or otherwise destroying the vegetative cover; dumping refuse, wastes, sewage or other debris; burning; grazing; draining, dredging, channeling, filling, leveling, pumping, diking, impounding or related activities; altering or tampering with water control structures or devices; diverting or causing or permitting the diversion of surface or underground water into, within or out of the easement area by any means including ditching or the construction of wells; building or placing buildings or structures on the easement area; and producing agricultural crops, unless prior approval in writing is granted by the U.S. Fish and Wildlife Service.

2. Grantors will not permit the grazing of livestock and will be responsible for excluding livestock from the easement area and will provide, construct and maintain fences as necessary to accomplish this exclusion of livestock.

3. Grantors will pay all taxes and assessments, if any, which may be levied against the land.

4. Grantors will be responsible for noxious weed control and emergency control of pests to protect the public good subject to Federal and State Statutes and Regulations. Methods used to control noxious weeds and pests must be approved in writing by the U.S. Fish and Wildlife Service prior to implementation by the Grantors. However, mowing or haying noxious weeds is prohibited until after July 15 in any calendar year in accordance with the easement terms stated above.

5. The United States and its authorized representatives shall have the right to sign, post, mark or otherwise identify the easement area and to maintain said identification.

6. The United States and its authorized representatives shall have the right to restore and/or maintain grasslands and wetlands on the easement area.

It is understood that this easement and the covenants and agreements contained herein shall run with the land and shall be binding on all persons and entities who shall come into ownership or possession of the lands and wetlands subject to this easement. The Grantor, successors and assigns shall notify the Regional Director, U.S. Fish and Wildlife Service in writing of any sale or transfer within 30 days following the sale or transfer of any portion of the lands and wetlands subject to this easement.

It is further understood that the rights and interests granted to the UNITED STATES OF AMERICA herein shall become part of the National Wildlife Refuge System and shall be administered by the United States Fish and Wildlife Service, pursuant to the National Wildlife Refuge Systems Administration Act, 16 U.S.C. 668dd.

SPECIAL PROVISIONS

1. This Indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this Indenture is acknowledged by the Grantors to be presently binding upon them and to remain so until the expiration of said period of acceptance, as hereinabove described, by virtue of payment to the Grantors, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by Grantors.

2. Notice of acceptance of this Indenture shall be given to the Grantors by certified mail addressed to

and shall be effective upon the date of mailing, and such notice shall be binding upon all Grantors without sending a separate notice to each.

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of incorporation or company.

4. Payment of the consideration shall be made by a United States Treasury check after acceptance of this Indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the Grantors have hereunto set their hands and seals this _____ day of _____, 19_____.

_____(L.S.) _____
_(L.S.)

_____(L.S.) _____
_(L.S.)

_____(L.S.) _____
_(L.S.)

ACKNOWLEDGEMENT

STATE OF _____)
)ss
COUNTY OF _____)

On this _____ day of _____, in the year 19_____, before me personally appeared

known to me to be the person(s) described in and who executed the foregoing instrument and acknowledged to me that they (he/she) executed the same of their (his/her) free act and deed.

_____ _____
Notary Public, State of

(SEAL) My commission expires : _____
_____

This instrument was drafted by Steve Durkee, Realty Specialist, U.S. Fish and Wildlife Service, Wetlands Acquisition Office, 971 East Frontage Road, Litchfield, Minnesota 55355.

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of the United States this _____ day of _____, 19_____.

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

By: _____
_____ Senior Realty Officer, Division of Realty
U.S. Fish and Wildlife Service

UNITED STATES DEPARTMENT OF INTERIOR
U.S. FISH AND WILDLIFE SERVICE
GRANT OF EASEMENT FOR WILDLIFE HABITAT PROTECTION

THIS INDENTURE, by and between

hereinafter referred to as the Grantors, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative.

WITNESSETH

WHEREAS, the Migratory Bird Hunting and Conservation Stamp Act, 16 U.S.C. 718d(c); the Fish and Wildlife Act of 1956, 16 U.S.C. 742a-742j; the Emergency Wetland Resources Act of 1986, 16 U.S.C. 3901; the Endangered Species Act of 1973, as amended, 16 U.S.C. 1534 and the Land and Water Conservation Fund Act, 16 U.S.C. 4601-9(a)(1), authorize the Secretary of the Interior to acquire lands or waters or interests therein for the development, advancement, management, conservation and protection of fish and wildlife resources. The purpose of this easement is to provide and protect quality habitat on the lands and wetlands described herein and such lands and wetlands shall be maintained and improved to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species, and

WHEREAS, the lands and wetlands described below contain existing or potential habitat suitable for use for wildlife management purposes.

NOW, THEREFORE, for and in consideration of the sum of _____ _____Dollars ($), the Grantors hereby grant to the United States, commencing with the acceptance of this Indenture by the Secretary of the Interior or his authorized representative, an easement in perpetuity, which includes a right of use for the maintenance of the lands and wetlands described herein, to wit:

_____ County, State of Minnesota

Together with the right of ingress and egress to the above described lands and wetlands on, over, across and through the following described lands, to wit:

Subject, however, to all valid existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals , electrical transmission lines, cable lines, and all mineral rights.

The conveyance hereunder shall be effective on the date of the execution of this Indenture by the Secretary of the Interior or his authorized representative; provided, however, that such acceptance must be made within _____ calendar months from the date of the execution of this Indenture by the Grantors, or any subsequent date as may be mutually agreed upon in writing by the parties hereto prior to the expiration of such date; and provided further, however, that in the event that such acceptance is not made by such date, this Indenture shall be null and void.

No rights herein are granted to the general public for access to or entry upon the land subject to this grant of easement for any purpose.

The Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree that they will cooperate in the maintenance and protection of the aforesaid lands and wetlands for the protection and management of fish and wildlife resources and to maintain the quality of these lands and wetlands to provide cover and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly migratory birds, and threatened and endangered species. To that end and for the purpose of accomplishing the intent on this Indenture, the Grantors, for themselves, and for their heirs, successors, and assigns, lessees, and any other person claiming under them, covenant and agree as follows:

1. Grantors will not perform, cause to be performed or permit the following activities upon the easement area: haying, mowing or seed harvesting for any reason; altering of grassland, woodland, wildlife habitat or other natural features by digging, plowing, disking, cutting or otherwise destroying the vegetative cover; dumping refuse, wastes, sewage or other debris; burning; draining, dredging, channeling, filling, leveling, pumping, diking, impounding or related activities; altering or tampering with water control structures or devices; diverting or causing or permitting the diversion of surface or underground water into, within or out of the easement area by any means including ditching or the construction of wells; building or placing buildings or structures on the easement area; and producing agricultural crops, unless prior approval in writing is granted by the U.S. Fish and Wildlife Service; except that grazing the aforesaid lands is permitted at anytime throughout the calendar year.

2. Grantors will pay all taxes and assessments, if any, which may be levied against the land.

3. Grantors will be responsible for noxious weed control and emergency control of pests to protect the public good subject to Federal and State Statutes and Regulations. Methods used to control noxious weeds and pests must be approved in writing by the U.S. Fish and Wildlife Service prior to implementation by the Grantors. However, mowing or haying noxious weeds is prohibited until after July 15 in any calendar year in accordance with the easement terms stated above.

4. The United States and its authorized representatives shall have the right to sign, post, mark or otherwise identify the easement area and to maintain said identification.

5. The United States and its authorized representatives shall have the right to restore and/or maintain grasslands and wetlands on the easement area.

It is understood that this easement and the covenants and agreements contained herein shall run with the land and shall be binding on all persons and entities who shall come into ownership or possession of the lands and wetlands subject to this easement. The Grantor, successors and assigns shall notify the Regional Director, U.S. Fish and Wildlife Service in writing of any sale or transfer within 30 days following the sale or transfer of any portion of the lands and wetlands subject to this easement.

It is further understood that the rights and interests granted to the UNITED STATES OF AMERICA herein shall become part of the National Wildlife Refuge System and shall be administered by the United States Fish and Wildlife Service, pursuant to the National Wildlife Refuge Systems Administration Act, 16 U.S.C. 668dd.

SPECIAL PROVISIONS

1. This Indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this Indenture is acknowledged by the Grantors to be presently binding upon them and to remain so until the expiration of said period of acceptance, as hereinabove described, by virtue of payment to the Grantors, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by Grantors.

2. Notice of acceptance of this Indenture shall be given to the Grantors by certified mail addressed to

and shall be effective upon the date of mailing, and such notice shall be binding upon all Grantors without sending a separate notice to each.

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of incorporation or company.

4. Payment of the consideration shall be made by a United States Treasury check after acceptance of this Indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the Grantors have hereunto set their hands and seals this _____ day of _____, 19_____.

_____(L.S.) _____
(L.S.)

_____(L.S.) _____
(L.S.)

ACKNOWLEDGEMENT

STATE OF _____)
)ss
COUNTY OF _____)

On this _____ day of _____, in the year 19_____, before me personally appeared

known to me to be the person(s) described in and who executed the foregoing instrument and acknowledged to me that they (he/she) executed the same of their (his/her) free act and deed.

_____

_____
Notary Public, State of

(SEAL) My commission expires : _____
_____

This instrument was drafted by Steve Durkee, Realty Specialist, U.S. Fish and Wildlife Service, Wetlands Acquisition Office, 971 East Frontage Road, Litchfield, Minnesota 55355.

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of the United States this _____ day of _____, 19_____.

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE INTERIOR

By: _____

_____

Senior Realty Officer, Division of Realty
U.S. Fish and Wildlife Service

6-4: Conveyance of Easement for Waterfowl Management Rights (1)

3-1916
July 1960

UNITED STATES DEPARTMENT OF THE INTERIOR

U. S. FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS

THIS INDENTURE, by and between_____, residing at

parties of **the first part, and** the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part.

WITNESSE:

WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec, 718d (c)), authorizes the Secretary of the Interior to acquire small wetland and pothole areas, and interests therein; and

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable in their present condition for use as waterfowl production areas:

NOW THEREFORE, for and in consideration of the sum of dollars ;, the parties of the first part hereby convey to the United States, for a term commencing with the acceptance of this indenture by Secretary of the Interior or his authorized representative which acceptance must be made within____months of the execution of this Indenture

by the parties of the first part a perpetual easement or right of use for the maintenance of the land described below as a waterfowl production area, including the right of access thereto by authorized representatives of the United States:

[redacted]

Subject, however, to all existing rights-of-way for highways, roads, railroads, canals, laterals, electrical transmission lines, telegraph and telephone lines and all outstanding mineral rights.

The parties of the first part, for themselves and for their successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid land as a waterfowl production area by not draining or permitting the draining, through the transfer of appurtenant water rights or otherwise, of any of the wetlands, including lakes, ponds, above-described sloughs, swales, swamps, or potholes, now existing or hereafter occurring on the above-described tract, by ditching or any other means; by not filling in with earth or any other material, any low areas or wetlands, including lakes, ponds, marshes, sloughs, swales, swamps,or potholes, and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors,, **assigns, lessees, licensees, or any other person** or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, and burning provisions mentioned above.

Areas of existing marsh vegetation and depressions which may hold water during certain periods, as well as existing drainage facilities, including drainage ditches, tiles, outlets, and pumps, are shown on a map of the above-described property, a copy of which has been filed with a copy of this document in the files of both of the parties hereto.

SPECIAL PROVISIONS

1. This indenture shall be of no force or effect until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative.

2, In the event the use of the land covered by this indenture is required by a body possessing the power of eminent domain for public purposes other than draining the land, the Secretary. of the Interior or his **authorized representative may release the rights** of the United States under this indenture upon the payment of the pro rata amount of the consideration for the unexpired term of this indenture.

3, Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed to at and such notice shall be binding upon all of the parties of the first part without sending a separate notice to each.

4. The parties of the first part warrant that no person or selling agency has been employed or retained to solicit or secure this contract upon agreement or understanding for a commission , percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the vendors for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

5. It is further mutually agreed that m Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

6. Payment of the consideration will be made by Disbursing Officer's check after acceptance of this indenture by the Secretary of the Interior or his authorized representative, and processing of the usual Government voucher.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this day of , 19 .

(L.S.)

(L.S.)

(L.S.)

(L.S.)

ACKNOWLEDGMENT

STATE OF
COUNTY , } as:

On this day of , in the year ared
, his wife, known to me to
be th persons described in and who e ted the foregoing instrument and acknowledged to me that
they (lie) executed the same as their (hi) free act and deed.

(SEAL)

(Official Title)

My commission expires

ACCEPTANCE

This indenture is accepted on behalf of the United States this day of , 19 , under the authority contained in section 4 of the Migratory Bird Hunting Stamp Act, as amended, and pursuant to authority delegated by 210 DM 1.3, Commissioner of Fish and Wildlife Order No. 4, and 4 AM 4,5D(1).

THE UNITED STATES OF AMERICA

By

(Title)
Bureau of Sport Fisheries and Wildlife

United States Department of the Interior
Fish And Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realty

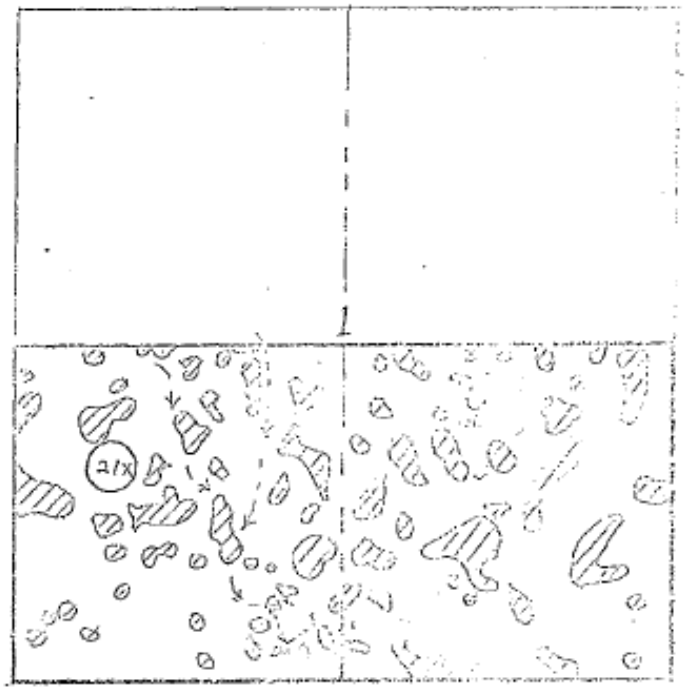
DESCRIPTION

ET AL,

COUNTY South Dakota

WATERFOWL PRODUCTION AREA

EASEMENT AUTHORIZED BY' MIGRATORY BIRD *HUNTING STAMP ACT OF MARCH 16,* 1934, AS AMENDED DESCRIPTION:



Wetlands Areas

Scale - 4" = 1 mile

Tracing Compiled by: Date [redacted] Checked by: Date

United States Department of the
Interior Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realty

DESCRIPTION

TRACT (21X-1 1) ACRES

WATERFOWL PRODUCTION AREA COUNTY,

EASEMENT AUTHORIZED BY MIGRATORY BIRD *HUNTING STAMP* ACT OF MARCH 16, 1934, AS AMENDED

DESCRIPTION:

Wetlands Areas

Scale - 4" = 1 mile

Tracing Compiled ATM *Date:* *Checked by* *Date*

6-5: Easement Summary

Easement Summary

State . [redacted]

Location T. [redacted] N., R. [redacted] W., 5th P.M. Sec. [redacted]

Tract Name . [redacted]

Easement Dated [redacted]

Easement Option Expires: [redacted]

Term of Easement: [redacted]

Easement Consideration: [redacted]

Tract Acreage , [redacted] Cost per acre: [redacted]

Wetland Acreage: [redacted] Wetland cost per acre: [redacted]

Accounting Number [redacted]

Authorization to acquire easements in [redacted] County, [redacted], given by [redacted] in letter dated [redacted].

UNITED STATES DEPARTMENT OF ABERDEEN AAU

THE INTERIOR

U. S. FISH AND WILDLIFE SERVICE

BUREAU OF SPORT FISHERIES AND WILDLIFE

CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS

THIS INDENTURE, by and between , *residing at*

parties of the first part, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part.

WITNESSE

WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec. 718d (c)), authorizes the Secretary of the Interior to acquire small wetland or pothole areas suitable for, use as waterfowl production areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of - - - Dollars ($), the parties of the first part hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within ____ months of the execution of this indenture by the parties of the first part, or any subsequent date as may be mutually agreed upon during the term of this option, an easement or right of use for the maintenance of the land described below as a waterfowl production area in perpetuity, including the right of access thereto by authorized representatives of the United States:

Subject, however, to all existing rights-of-way for highways, roads; railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, and all outstanding mineral rights.

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will 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 surface 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; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Existing drainage facilities are shown on a map in the files of both parties.

SPECIAL

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed to at , and such notice shall be binding upon all the parties of the first part without sending a separate notice to each.

3. The parties of the first part warrant that no person or selling agency has been employed or retained to solicit or secure this contract upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the vendors for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage; or contingent fee.

4. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

5. Payment of the consideration will be made by Disbursing Officers check after acceptance of this indenture by the Secretary of the Interior or his authorized representative, and after the Attorney General or in appropriate cases, the Field Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this 1963.

/s/

(L.S

(L.S.)

Witness

(L.S.

ACKNOWLEDGE

STATE
COUNTY OF s

On this day of , in the year 1963 , before me

ared W- ,) = = IA known to me to

e persons described in an xecuted the foregoing instrument and acknowledged to me that *#(he) ated the same as" (his) free act and deed.

/a/

Notary Public

(SEAL) So"

(Official Title)

My commission expires ,

ACCEPTA

This indenture is accepted on behalf of the United States this day of - , 19 , under the authority contained in section 4 of the Migratory Bird Hunting Stamp Act, as amended, and pursuant to authority delegated by 210 DM 1.3, Commissioner of Fish and [redacted] 4, and 4 AM 4.5D(1).

THE UNITED STATES OF

By /s/

(Title) Regional Director

Bureau of Sport Fisheries and Wildlife24,,,

United States Department of the Interior

Fish and Wildlife Service

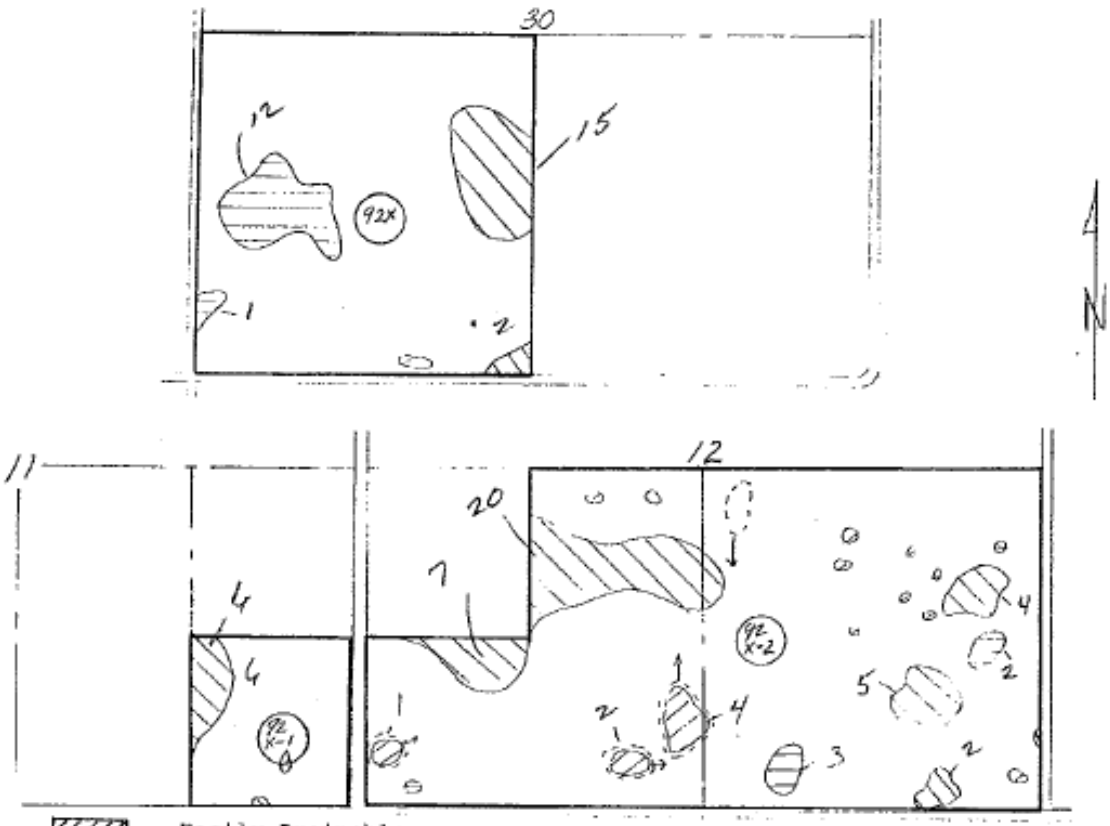
Bureau of Sport Fisheries and Wildlife
Branch of Realty

DESCRIPTION

TRACT ACRES

WATERFOWL PRODUCTION AREA COUNTY

EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED
DESCRIPTION:



Easily Drainable Wetlands Areas

Scale - 4" = 1 mile

Moderately drainable

Difficult to drain

Drained Wetlands

Tracing Compiled by: Date: -63 Checked by:

Date:

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE BUREAU OF
SPORT FISHERIES AND WILDLIFE

Easement

State .

County .
Location:

[redacted]

Tract Name . [redacted]

Tract [redacted]

Easement Dated [redacted]

Easement Option Expires: [redacted]

[redacted]

Term of Easement: [redacted]

[redacted] Co

Easement Consideration: $ Tract Acreage :
st per acre: $ Wetland ~~Acreage:~~ [redacted]
Wetland cost per ~~acre:~~ $

Estimate of Value: $

Accounting Number

Authorization to acquire easements in County,

, given by

DIrector

in letter dated [redacted]

UNITED STATES DEPARTMENT OF THE INTERIOR U. S.
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

THIS INDENTURE, by and between , **residing at** [redacted]

parties of the first part, and the UNITED STATES OF AMERICA, acting_ by and through the Secretary of the Interior or his authorized representative, party of the second part.

WITNESSE

/ WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec. 718d (c)); authorizes the' Secretary of the Interior to acquire small wetland or pothole areas suitable for, use as waterfowl produ ion areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas;

NOW, THEREFORE, for and in consideration of the sum of Dollars the parties of the first part hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within Six months of the execution of this indenture by the parties of the first part, or any subsequent date as may be mutually agreed upon during the term of this option, an easement or right of use for the maintenance of the land described below as a waterfowl production area in perpetuity, including the right of access thereto by authorized representatives of the United States:

[redacted]

Subject, however, to all existing rights-of-way for highways, roads; railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, and all outstanding mineral rights.

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will 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 surface 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; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

SPECIAL

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed to at and such notice shall be binding upon all the p of the first part w thout sen ing a separate notice to h

3. The parties of the first part warrant that no person or selling agency has been employed or retained to solicit or secure this contract upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bone fide employees or bona fide established commercial or selling agencies maintained by the vendors for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

3a. Vendor agrees to pay the administrative fee of the

4: It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise the r upon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

5. Payment of the consideration will be made by Disbursing Officers check after acceptance of this indenture by the Secretary of the Interior or his authorized representative, and after the Attorney General or in appropriate cases, the Field Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals this day of 19

63.

/s/ [redacted] (L.S.

[redacted]

(L.S.

(L.S.

(L.S.)

/a/ (Witness) (L.S.)

(L.S.)

ACKNOWLEDGE

STATE -)
ss COUNTY OF

ba

On this day of , in the year **1963** , before me personally appeared known to me to be the persons described in and who executed the foregoing instrument and acknowledged to me that X*= (he) executed the same as their (his) free act and deed.

[redacted]

(SEAL

(Official Title)

goal Affixed My commission

ACCEPTA

This indenture is accepted on behalf of the United States this day of [redacted] , 19 , under the authority contained in section 4 of the Migratory Bird Hunting Stamp Act, as amended, and pursuant to authority delegated by 210 DM 1.3, Commissioner of Fish and Wildlife Order No. 4 and 4 AM 4.5b(1).

THE UNITED STATES OF

/s/

B

, (Title) Regional Director

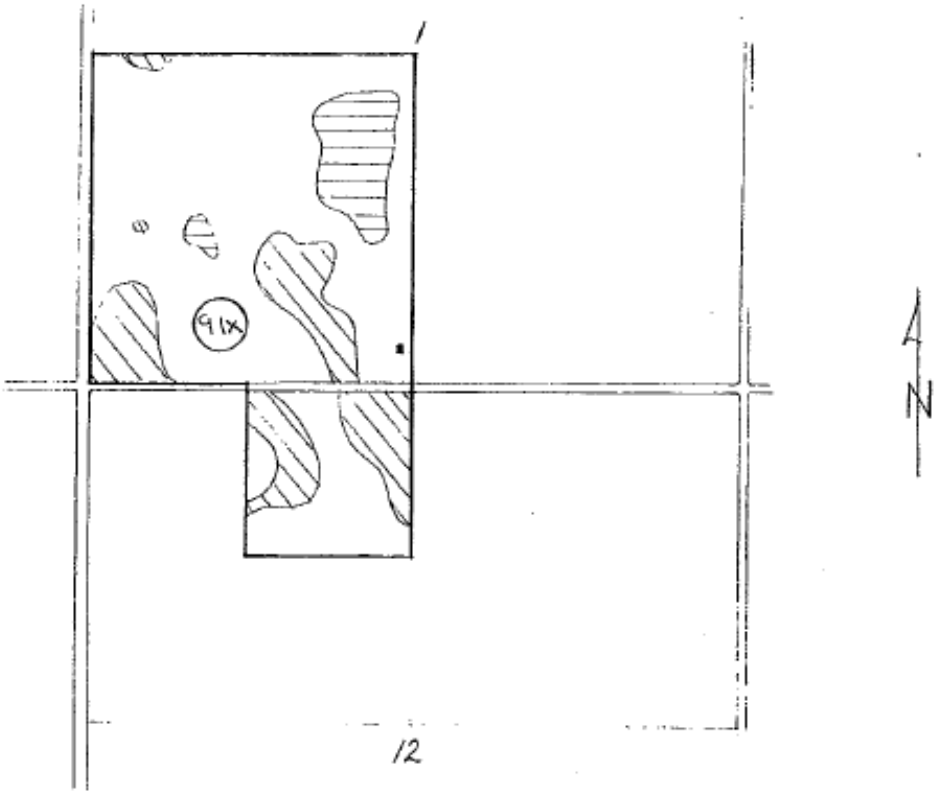
Bureau of Sport Fisheries and Wildlife

United States Department of the
Interior Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realty

DESCRIPTION

[redacted] ACRES

WATERFOWL PRODUCTION AREA COUNTY
EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, As AMENDED DESCRIPTION:
[redacted]



Easily Drainable Wetlands Areas

Moderately drainable

Difficult to Drain

Scale - 4' = 1 mile

Tracing Compiled by: Date: Checked by:

6-6: Conveyance of Easement for Waterfowl Management Rights (2)

UNITED STATES DEPARTMENT OF THE INTERIOR U. S.
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE
CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS

THIS INDENTURE, by and , of

parties of the first part, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part.

WITNESSE

WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by, section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec. 718d (c)), authorizes the Secretary of the Interior to acquire small wetland or pothole areas suitable for, use as waterfowl production areas;

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of Dollars the parties of the first part hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within six months of the execution of this indenture by the parties of the first part, or any subsequent date as may be mutually agreed upon during the term of this option, an easement or right of use for the maintenance of the land described below as a waterfowl production area in perpetuity, including the right of access thereto by authorized representatives of the United States:

[redacted]

Subject, however, to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, and all outstanding mineral rights.

The parties of the first part, for themselves and for their heirs, successors and assigns, covenant and agree that they will 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 surface 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; by not filling in with earth or any other material or leveling, any part or portion of the above-described tract on which surface water or marsh vegetation is now existing or hereafter reoccurs due to natural causes; and by not burning any areas covered with marsh vegetation. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above. Excepted are certain drainage ditches which the parties of the first part may maintain and/or wetlands which are deleted from the provisions of this easement. The above exceptions are shown on a map certified by the Regional Director at the time of acceptance.

SPECIAL

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed to at , and such notice shall be binding upon all the parties of the first part without sending a separate notice to each.

3. The parties of the first part warrant that no person or selling agency has been employed or retained to solicit or secure this contract upon agreement or understanding for a commission, percentage, brokerage, or contingent fee, excepting bona fide employees or bona fide established commercial or selling agencies maintained by the vendors for the purpose of securing business. For breach or violation of this warranty the United States shall have the right to annul this contract without liability or in its discretion to deduct from the contract price or consideration the full amount of such commission, percentage, brokerage, or contingent fee.

4. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

5. Payment of the consideration will be made by Disbursing Officers check after acceptance of this indenture by the Secretary of the Interior or his authorized representative, and after the Attorney General or in appropriate cases, the Field Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals

this day of , 19

/s/ _____ (L.S.)

_____ (L.S.

_____ (L.S.)

_____ (L.S.)

(Witness (L.S.)

(L.S.)

ACKNOWLEDGE

STATE _____

COUNTY OF ___)

On this day of , in the year [redacted] , before me personally appeared known to me to be the person described in and who executed the foregoing instrument and acknowledged to me that (he) executed the same as their (his) free act and deed.

h a/

(SEAL) (Official Title)

SEAL AFFIXED My commission expires _____

ACCEPTA

This indenture is accepted on behalf of the United States this day

[redacted] 19 , under the authority contained in section 4 of the Migratory Bird Hunting Stamp Act, as amended and pursuant to authority delegated by 210 DM 1.3, Commissioner of Fish and Wildlife Order No. O, and 4 AM 4.5D(1)

THE UNITED STATES OF

_____

[redacted]

By _____

[redacted]

(Title) _____

Bureau of Sport Fisheries and Wildlife

United States Department of the
Interior Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realtv

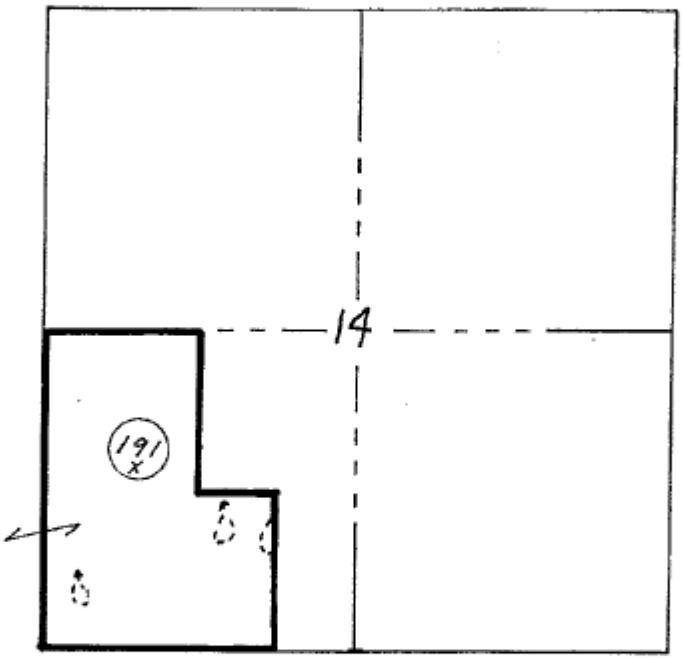
DRAINAGE FACILITY

TRAC [redacted] ¹00.00 ACRES

WATERFOWL PRODUCTION AREA COUNTY AS

EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934

DESCRIPTION: _____



I hereby certify that this map represents the excepted drainage ditches and/or deleted wetlands referred to in the easement [redacted] agreement executed _____ and accepted _____.

/s/ •.

Acting Regional Director

D Wetlands deleted from the Provisions of the Easement

Wetlands Drained

Open ditch

Scale: 4" = 1 mile

Map drawn [redacted] Date: [redacted]

6-7: Conveyance of Easement for Waterfowl Management Rights (3)

Form 3-1014
(Revised Sept. 1979)

UNITED STATES DEPARTMENT OF THE INTERIOR U, S. FISH AND WILDLIFE SERVICE CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS

THIS INDENTURE, by and between

parties of the first part, and the UNITED STATES OF AMERICA, acting by and through the Secretary of the Interior or his authorized representative, party of the second part.

W ITNESSETH:

WHEREAS, section 4 of the Migratory Bird Hunting Stamp Act of March 16, 1934, as amended by section 3 of the Act of August 1, 1958 (72 Stat. 486, 16 U.S.C., sec. 718d (c)), authorizes the Secretary of the Interior to acquire small wetland or pothole areas suitable for use as waterfowl production areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production areas:

NOW, THEREFORE, for and in consideration of the sum of ($ .00)

Dollars, the parties of the first part do hereby convey to the United States, commencing with the acceptance of this indenture by the Secretary of the Interior or his authorized representative which acceptance must be made within 12 months of the execution of this indenture by the parties of the first part, or any subsequent date as may be mutually agreed upon during the term of this option, a permanent easement (in perpetuity) or right of use for the maintenance of the land described below as

The lands covered by this conveyance are those wetland areas, including lakes, ponds, marshes, sloughs, swales, swamps, potholes, and other wholly or partially water-covered areas, now existing or subject to recurrence through natural or man-made causes, delineated on the map(s) attached hereto as Exhibit A and incorporated herein by this reference; provided, always, that the lands covered by this conveyance shall include any enlargements of said wetland areas resulting from normal or abnormal increased water. Said lands are located within, and the aforementioned right of access extends over all lands within the following

described legal subdivision(s) in _ County, State of to wit.

Subject, however, to all existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone lines, cable lines, and all mineral rights.

The parties of the first part, for themselves, their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining, causing or permitting the draining by construction of ditches, or by any means, direct or indirect, whether through the transfer of appurtenant water rights or otherwise, of any surface waters in or appurtenant to these wetland areas delineated on Exhibit A; by not filling in with earth or any other material or levelling any part or portion of said delineated wetland areas; and by not burning any marsh vegetation on any part or portion of said delineated wetland areas. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Copies of the above-referenced map(s), being Exhibit A, are on file in the Office of the Regional Director, U.S. Fish and Wildlife Service.

SPECIAL PROVISIONS

1. This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United States by the Secretary of the Interior or his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as hereinabove described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA, of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

14-16-0006

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed to

at

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commissioner, shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

4. Payment of the consideration will be made by a United States Treasury check after acceptance of this indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

day of , 17

(L.

ACKNOWLEDGMENT

STATE

COUNTY OF ss

On this day of , in the year , before me Personally appeared

, his wife, known to me to

(SEAL)

My commission expires

ACCEPTANCE

In consideration of the [illegible] which is acknowledged, and through his authorized representative, has executed this agreement on the [illegible] day of [illegible] 1 [illegible] the standpoint of the FHA as mortgagee, for the foregoing easement as provided in paragraph thereof, the United States of America acting through FHA hereby subordinates its mortgage

THE UNITED STATES OF AMERICA

BY

U. S. Fish and Wildlife Service

THE UNITED TATES Or AMERICA

Dat

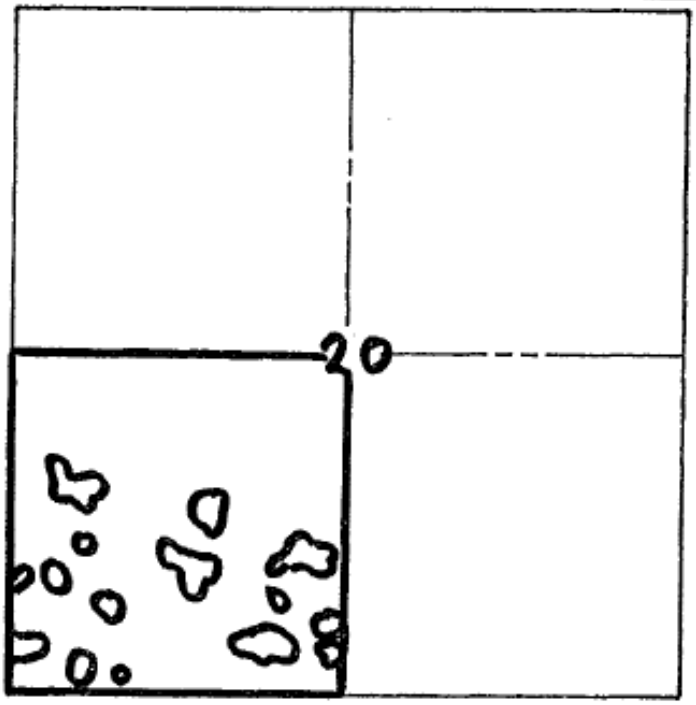
S I

78-752-

UNITED STATES DEPARTMENT OF THE INTERIOR U.S. FISH AND WILDLIFE SERVICE EXHIBIT "A" Map 1 of 1

TRAC _____

WATERFOWL PRODUCTION AREA _____ COUNTY, STATE OF _____
EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED.



This map delineates wetlands referred to in the easement conveyance dated _____ *which* the parties of the first part agree to maintain as a waterfowl prod[redacted] lands covered by this conveyance include any enlargement of the delineated wetland areas resulting from normal or abnormal increased water.

LEGEND

Boundary of Easement

Wetlands covered by provisions of the easement

Nonfunctional drainage facilities which the landowner agrees NOT to repair or clean out

Prepared by: [redacted] Date [redacted]

K&F 10 1153 5-77

6-8: Conveyance of Easement for Waterfowl Management Rights (4)

Form 3-1916

Revised October 1989

UNITED STATES DEPARTMENT OF THE INTERIOR U.S. FISH AND WILDLIFE SERVICE CONVEYANCE OF EASEMENT FOR WATERFOWL MANAGEMENT RIGHTS

THIS INDENTURE, by and between Eugene P. Mack and Carol L. Mack, his wife, of Watertown, South Dakota and Kevin N. Mack, a single person, of Castlewood South Dakota

parties of the first part, and the UNITED STATES OF AMERICA. acting by and through the Secretary of the Interior or his authorized representative party of the second part

WITNESSETH:

WHEREAS, the Migratory Bird Hunting and Conservation Stamp Act,16 U.S.C. 718d(c); the Fish and Wildlife Act of 1956, 16 U.S.C. 742a-742; the Emergency Wetlands Resources Act of 1986, 16 U.S.C. 3901; and the Land and Water Conservation Fund Act, 16 U.S.C. 4061-9(a)(1), authorize the Secretary of the Interior to acquire small wetland or pothole areas suitable for use as waterfowl production areas:

WHEREAS, the lands described below contain or include small wetland or pothole areas suitable for use as waterfowl production

NOW, THEREFORE, for and in consideration of the sum of Seven Thousand Seven Hundred Fifty -

Dollars ($ 7,750.00),the parties of the first part do hereby convey to the United States, commencing with the acceptance of this indenture by

the Secretary of the Interior or his authorized representative which acceptance must be made within 12 months of the execution of this

The lands covered by this conveyance are those wetland areas, including lakes, ponds, marshes, sloughs, swales, swamps, potholes, and other wholly or partially water-covered areas, now existing or subject to recurrence through natural or manmade causes. delineated on the map(s) attached : hereto as Exhibit A and incorporated herein by this reference; provided, always, that the lands covered by this conveyance shall include any enlargements of said wetland areas resulting from normal or abnormal increased water. The lands described on Exhibit A, and the aforementioned right of ingress to and egress extends on, over, across and through any and all lands within the following described legal

subdivision(s) in Deuel County, State of South Dakota , to-wit: T. 116 M,, R, 48 W., 5th P.M.

sec. 36, E except the N 52 rods, E1/2W1/2 except the N 52 rods.

Vendors, successors and assigns relinquish all interest in vested drainage rights recorded in Book 1992 on page 3508, Book 1992 on page 3510, Book 1992 on page 3511 and Book 1992 on Page 3509, which are appurtenant to wetlands on attached Exhibit A's.

Subject, however, to all valid existing rights-of-way for highways, roads, railroads, pipelines, canals, laterals, electrical transmission lines, telegraph and telephone !lnes, cable lines, and all mineral rights.

The parties of the first part, for themselves, their heirs, successors and assigns, covenant and agree that they will cooperate in the maintenance of the aforesaid lands as a waterfowl production area by not draining, causing or permitting the draining by construction of ditches, or by any means, direct or indirect, whether through the transfer of appurtenant water rights or otherwise of any surface waters in or appurtenant to these wetland areas delineated on Exhibit A; by not filling, causing or permitting the filling in with earth or any other material or leveling, causing or permitting the leveling of any par or portion of said delineated wetland areas; and by not burning, causing or permitting the burning of any wetland vegetation on any part or portion of said delineated wetland areas. It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties

of the first part and that neither they nor their successors, assigns, lessees, or any other person or party claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling, and burning provisions mentioned above.

Copies of the above-referenced map(s), being Exhibit A, are on file in the Office of the Regional Director, U.S. Fish and Wildlife Service.

la. The United States and its authorized representatives shall have the right to construct, reconstruct, and maintain all wetland restoration structures shown on Exhibit A.

SPECIAL PROVISIONS

1 This indenture shall not be binding upon the UNITED STATES OF AMERICA until accepted on behalf of the United Sates by the Secretary of the Interior of his authorized representative, although this indenture is acknowledged by the parties of the first part to be presently binding upon the parties of the first part and to remain so until the expiration of said period for acceptance, as herein above described, by virtue of the payment to parties of the first part, by the UNITED STATES OF AMERICA. of the sum of One Dollar, the receipt of which is hereby expressly acknowledged by parties of the first part.

6-9: Exhibit A Map

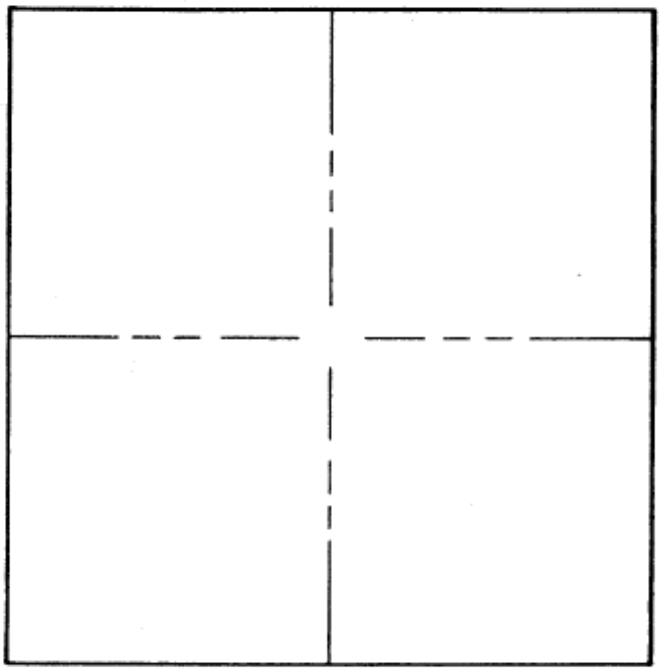
UNITED STATES DEPARTMENT OF THE INTERIOR U. S. FISH AND WILDLIFE SERVICE EXHIBIT "A" Map of

TRACT

WATERFOWL PRODUCTION AREA_____ COUNTY, STATE OF_____

EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED. T. N., R. W., PRINCIPAL MERIDIAN

Structure Elevation
No-____ (MSL)____



The parties of the first part concur with the structure outlet elevations specified above.

_____
Landowner Signature

Date_____

Scale: 4 inches - 1 mile

This map delineates wetlands referred to in the easement conveyance dated_____which the parties of the first part agree to maintain as a waterfowl production area. The lands covered by th is conveyance include any enl argement of the del ineated wetland resulting from normal to abnormal increased water.

LEGEN

Boundary of easement description

Wetlands covered by provisions of the easement

Nonfunctional drainage facilities which the landowner agrees not to repair or clean

Wetland restoration structure

_____
Landowner Signature

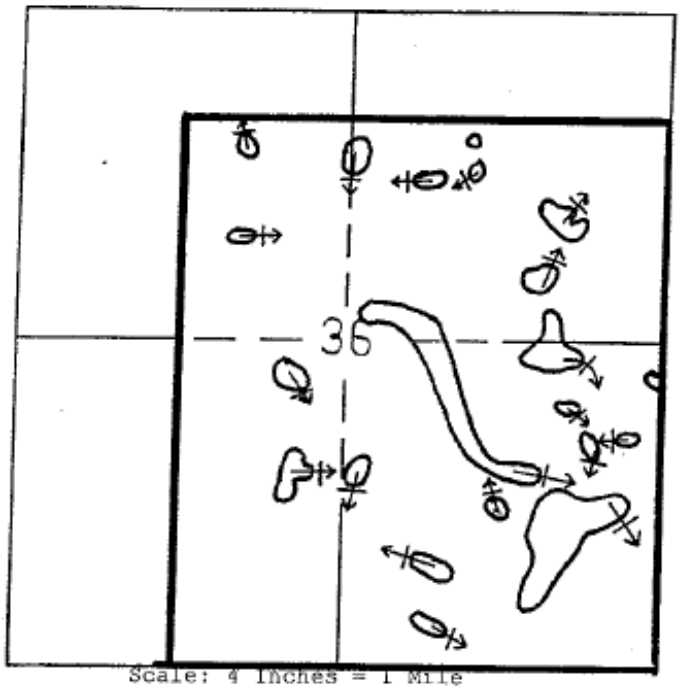
Prepared by:_____ Date:_

UNITED STATES DEPARTMENT OF THE
INTERIOR FISH AND WILDLIFE SERVICE
EXHIBIT "A"

MAP 1 of 1

TRACT ——

WATERFOWL PRODUCTION AREA _____ COUNTY, STATE OF _____
EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED.



Scale: 4 inches = 1 Mile

This map delineates wetlands referred to in the easement conveyance dated

which the parties of the first part agree to maintain as a waterfowl prod[redacted].

The lands covered by this conveyance include any enlargement of the delineated wetland areas resulting from normal or abnormal increased water.

[redacted]

Landowner Signature

Landowner Signature

[redacted]

Landowner Signature

Landowner Signature

[redacted]

Landowner Signature

Landowner Signature

LEGEN

Boundary of Easement Description

Wetland Restoration Structure

Wetlands covered by provisions of the easement

Prepared [redacted] Date: [redacted]

2. Notice of acceptance of this agreement shall be given the parties of the first part by certified mail addressed

and such notice shall be binding upon all the parties of the first part without sending a separate notice to

3. It is further mutually agreed that no Member of or Delegate to Congress, or Resident Commisioner shall be admitted to any share or part of this contract, or to any benefit to arise thereupon. Nothing, however, herein contained shall be construed to extend to any incorporated company, where such contract is made for the general benefit of such incorporation or company.

4. Payment of the consideration will be made by a United States Treasury check after acceptance of this indenture by the Secretary of the Interior or his authorized representative and after the Attorney General, or in appropriate cases, the Solicitor of the Department of the Interior shall have approved the easement interest thus vested in the United States.

IN WITNESS WHEREOF the parties of the first part have hereunto set their hands and seals day [redacted]

[redacted] (L.S.) [redacted] (L.S.)

[redacted] (L.S.) (L.S.)

(L.S.) (L.S.)

(L.S.) (L.S.)

(L.S.) (L.S.)

(L.S.) (L.S.)

ACKNOWLEDGMENT

STATE [redacted])
)ss
COUNTY OF [redacted])

On this [redacted] day of [redacted] before me personally appeared [redacted] , known to me to be the person(s) described in

(SEAL)

WM. J. KURTENBACH
SEAL NOTARY PUBLIC SEAL
SOUTH DAKOTA
My Commission expires 8-30-04

Wm. J. Kurtenbach
Notary Public

My commission 8-30-04

ACCEPTANCE

The Secretary of the Interior, acting by and through his authorized representative, has executed this agreement on behalf of

this [redacted] day [redacted].

[redacted]

THE UNITED STATES OF AMERICA

By: [signature]

Title: CHIEF, DIVISION OF REALTY
U.S. Fish and Wildlife Service

7-1: Waterfowl Management Easement Chronological List

Page 1 of 1

WATERFOWL MANAGEMENT
EASEMENT CHRONOLOGICAL LIST

Easement No. 100X
County Mahnomen

Date Remar	ks-Comments-Event-Etc.	Signature
8/10/6b	Easement granted 5/10/66 by George L. and Mary Griest for $850.00. Easement totals 320 acres with 59 acres of wetlands. Donald J. Bread (RE) negotiated easement.	
9/5/66	On ground inspection by Manager Jones. Contacted the Griest's and discussed easement terms. Took several photos of wetlands and existing drainage facilities.	
11/2/66	Aerial inspection--No suspected violations noted. Type IIIs dry. Type IVs with low water.	
10-26 67	aerial surveillance -No violations noted	
04-30-69	Landowner says no ducks on the pond. LLC	-
6/12/71	On ground inspection by Assistant Manager Smith. Several mallard broods noted on the Type IV SE of farm site.	.
11/1/71	Aerial inspection--No violations. Water conditions extremely high due to high rainfall.	

Form R3-463
(9/80) PP

7-2: Example of Label

Example *of* Label to be Attached to the Back *of*
Photographs Taken to Document Evidence

Roll # *Pic #* *Film Type* *Date*

Time *Easement #* *County* ___

T. *R.* *Sec.* *Camera Height*

Token 8y *Camera Location*

Direction of Photo
Remarks:

(Actual Label Size is 3" x 3 1/2")

7-3: FWS Forensics Lab Digital Imagery Procedure

Procedure for Digital Imagery

Introduction:

The use of technology for forensic examination of images has increased in recent years. Changes in technology have allowed both law enforcement and criminals to move from using traditional photographic methods to utilizing digital technology to capture and process photographic images.

This document describes the standard operating procedures and guidelines by which the examiners of the National Fish and Wildlife Forensics Laboratory, U.S. Fish and Wildlife Service, will handle, capture, process, and preserve evidence related digital images. The types of materials covered by this procedure include, but are not limited to, conventional negatives, positives and prints; digital photographs; and other printed materials.

Evidentiary items will be handled as stipulated in the Quality Assurance Quality Control manual of the Laboratory.

Definitions:

Archival Media - Any media used to store electronic data for long periods of time. In this document, archival media is either writable CD's or writable DVD's.

Analog Image - An image created using conventional photographic methodologies, for example: a photographic negative, photographic positive, or Polaroid print.

Clarified Image - A reproduction of the original image processed via computer software to visually clarify the content of the image and maintain a fair and accurate representation of the scene or object as it was at the time the image was captured.

Color Calibration - The process of adjusting the monitor, input device, and output device to compensate for color conversions.

Digital Image - An image captured by an electronic imaging device, such as a scanner, digital camera, or frame grabber and displayed or stored on electronic media.

Digital image processing - is the science of processing pictorial information with a computer system. The goal of image processing is to clarify the quality of the image.

Duplicate Image - The Laboratory uses the definition of an original consistent with Federal Rules of Evidence Article X, "Content of Writings, recordings, and Photographs", Rule 1001, which states: "**Duplicate**. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic re-recording, or by chemical reproduction, or by other equivalent techniques which accurately reproduces the original."

ICC Profile - A color space description as defined by the International Color Consortium.

Image - A graphical representation of a scene or object.

Lossless Compression - Compression technique that does not result in image data loss when the image is saved and the image can be retrieved with the same data content.

Lossy Compression - Compression technique that results in the lose of image data when the image is saved and the image cannot be retrieved with the same data content that it contained before it was saved.

Original Image - The Laboratory uses the definition of an original consistent with Federal Rules of Evidence Article X, "Content of Writings, recordings, and Photographs", Rule 1001, which states: "**Original.** An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately, is an "original"."

Equipment: The equipment listed below is used in digital imagery clarification procedures. The equipment identified may not be used in every case, but is available to the examiners to use at their discretion. The list is not meant to be all inclusive, but is current as to the time of the signature of this document. The list will be updated yearly when the procedure is reviewed.

Adobe Photoshop
Digital Camera
Flatbed Scanner
IBM compatible computer
Monitor capable of displaying resolution equal to or higher than

the digital resolution.
PCMCIA Card Reader
Positive Slide/Negative Scanner
Photographic Quality Printer
Wide Format Printer
TWAIN Drivers appropriate for device
U-Lead Software any version
Video Card capable of displaying resolution equal to or higher than the digital resolution.
Writeable CD-Rom Drive
Picture Information Extractor

Color Calibration: Computer monitor should be color calibrated according to the manufacturer recommendations. The Fijix Pictrography 3000 will be calibrated whenever the donor or receiver paper is changed. The HP DesignJet 1055CM printer has a manufacturer's color profile which will be used when printing to this printer. A log will be kept of the calibration preformed for each piece of equipment. If an ICC profile is available from the manufacturer, it is to be used.

Maintenance: All maintenance completed on a input or output device shall be recorded in a log.

Procedure:

1. All devices shall be color calibrated in accordance with the procedure documented in the color calibration section above.

2. Photographic images captured with a digital camera, scanner, video capture device, or other digital imagery devices will follow the same evidentiary rules as photographic film.

3. All digital images will include the information regarding their creation either as part of the image file or in the examiner's bench notes. This information is to include the capture device's make, model, settings (if different then the capture device's default settings), and date of capture.

4. The resolution of the adjusted image should be retained at the level standard for the analytical examination being performed. If no analytical examination standard has been established, the original capture resolution should be retained.

5. Some cameras store captured images using a lossy compression. The use of these cameras is acceptable. The digital images are to be preserved

in their captured format.

6. Any clarification of a digital image is to be conducted on a copy of the digital image. The clarification procedures to be used for digital imagery files are to increase visual clarity of the image. Upon completion of the processing, the clarified image is to be saved using a distinct file name using a lossless compression. Acceptable lossless compression file formats are BMP, PSD, or TIF.

7. All digital image(s) are to be preserved on archival media and retained in the designated storage area. All digital images are to be saved, even those with little or no forensic value or poor quality.

Notes and Reports: Each page of an examiner notes should include case number, item number, date, initials, and page number. The make and model of the capture device and the software and version used to clarified images will be documented in examiner's notes. All clarification of the digital image is to be documented in the examiner's notes with sufficient detail to allow the clarification to be repeatable by a qualified examiner. When available in the software being used to clarify the image, a electronically stored or printed log file will be used to document the clarification procedure. All digital images are to be written to a archival media and stored in the designated storage area.

Procedure for Digital Imagery

Approved

Verlin K. Cross
Technical Support Branch Chief

Ed Espinoza
Deputy Laboratory Director

Ken Goddard
Laboratory Director

7-4: Easement Summary

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES AND WILDLIFE

Easement Summary

State : [redacted]

County : [redacted]

Location: T. [redacted] N., R. [redacted] W., 5th P.M.
[redacted]

Tract Name : [redacted]

Tract Number: ([redacted])

Easement Dated : [redacted]/64 Easement Option Expires: [redacted]/64

Easement Accepted: [redacted] 1964 Term of Easement: Perpetual

Easement Consideration: [redacted]

Tract Acreage : 240 Cost per acre: [redacted]

Wetland Acreage: 51 Wetland cost per acre: [redacted]

Estimate of Value: [redacted]

Accounting Number [redacted]

Authorization to acquire easements in [redacted] County,
[redacted], given by [redacted],
[redacted] in letter dated [redacted]/62.

7-5: Guidance on the Use and Distribution of Digital Easement and Fee Boundary Information

Guidance on the Use and Distribution of Digital Easement and Fee Boundary Information Developed, Updated, and Managed by the HAPET Office

Developed by: Ron Reynolds, HAPET, and Chuck Loesch, HAPET 12/04 and Adopted by DWG
Revised by - Ron Reynolds, HAPET, Chuck Loesch, HAPET and Susan Kvas, HAPET 03/07

Background: In 1997 the HAPET Office initiated a project to develop digital representations of the boundaries of USFWS NWRS fee lands and areas described in easement contracts. The need for this information for internal use was widespread and ranged from the development of simple maps using GIS, to complete risk assessments of grassland and wetland resources and the prioritization of their protection. The initial project was completed in 2001 and updates to include new purchases is conducted annually by the HAPET Office. Currently, a copy of the Districts digital fee and easement boundaries reside at the respective Field Station.

Purpose: As more Field Stations use GIS in day to day operations, the value and use of the digital fee and easement data becomes obvious. As a result, it is displayed on numerous maps that are used both internally as well as externally. As more individuals outside of the USFWS become aware that digital fee and easement boundary data exists, requests come from a variety of sources and directions to use the digital data primarily for planning purposes. The sensitive nature of easement information coupled with the ease of misrepresentation and misinterpretation of the data warrants a standardized approach to dealing with data display, requests, and sharing.

Safeguarding Personally Identifiable Information:

We are charged with safeguarding sensitive information including, personally identifiable information, and proprietary information we collect or use in the course of our business. This responsibility is expected of all DOI employees, contractors, volunteers, and others, who collect, access, maintain, use or make decisions using this information. We must keep in mind the importance of our responsibility of maintaining and safeguarding this information.

Two documents which should be reviewed for guidance regarding security policies and rules related to USFWS information technology are; USFWS 270 FWS 7: Information Technology Security (http://irm.fws.gov/manual/270fw7.html) and a memorandum to "all employees" from Secretary Kempthorne, dated June 20, 2006, Subject: Important Notice on Safeguarding Personally Identifiable Information.

Authorities for USFWS policies are:

The Office of Management and Budget Circular A-130

The Privacy Act of 1974, Public Law 930579, December 31, 1974, as amended

The Computer Security Act of 1987, Public Law 100-235, January 8, 1988

The following information comes from the documents above:

Sensitive information is any information which requires protection due to the risk and magnitude of loss or harm that could result from unauthorized disclosure, alteration, or destruction of data. Personally identifiable information identifies an individual or can be used to identify, contact, or locate an individual to whom such information pertains. This can include: personal contact or location information, online contact or location information, government-issued identifier, or information about an individual's finances.

Noncompliance with Government information safeguarding use requirements is a serious offense. The Department can be assessed penalties for mismanagement of information, particularly intentional and willful violations of the Privacy Act that harm an individual. Individual employees may also face criminal penalties for knowingly releasing records to someone not entitled to receive it.

The following recommendations are restricted to the easement digital data set. Distribution of the fee-title information is unrestricted however, it is suggested that any distribution of the fee data be accompanied by information that explains how the data was created.

<u>Recommendations for Easement Data:</u>

1. Digital files of easement data should generally not be provided to non-FWS personnel or organizations.
2. Electronic transfer of information requires encryption by a FWS approved process.
3. Protection: Easement files should be protected using "user ID and password" and only those with a need should have access to these files.
4. Avoid having files copied on portable computers and removed from the office. This is most critical with the files that have landowner attribute data.
5. Easement data shared should be in a map/hardcopy format only and the display should be restricted to the immediate area of need. An example would be a buffered area along a proposed pipeline rather than all of a county that the proposed pipeline transects.
6. Recipients of easement data in any format should be informed that they are not allowed to share (copy or reproduce in any manner) the information with others or use the information for uses other than the intended purpose.

7. The first point of contact for easement information should be the WMD Office that coincides with the geographic location of the data request.
8. The WMD Office should request assistance from the HAPET Office in preparing the map if resources to do so are not currently available at the Field Station.
9. A disclaimer prepared and provided by the HAPET Office should be included in the map layout (Attachment 1).
10. Easement date request that are larger in scale than a WMD should be forwarded to the HAPET Office who will ensure that all WMDs affected are informed.
11. Request from other FWS Divisions should be directed to the HAPET Office.
12. Request from other Federal Agencies should be directed to the HAPET Office.
13. Easement data is a valuable layer for internal use, field maps, tours, etc. Ensure that the disclaimer prepared and include by the HAPET Office is included on any maps.

Recommendations for Fee-Title Data:

1. There is no need at present to restrict the distribution of the fee boundaries.
2. A disclaimer prepared and provide by the HAPET Office should be include and the request must be asked to include the disclaimer on any maps products.
3. The metadata created and provided by the HAPET Office should accompany any distribution of the fee data. (Provided on CD)

Attachment 1

Development of digital U.S. Fish and Wildlife Service (USFWS) National Wildlife Refuge System (NWRS) boundary data is a joint effort between the Habitat and Population Evaluation Team Office (HAPET), Bismarck, ND, and the USFWS Region 6 Division of Realty. Ducks Unlimited Great Plains Regional Office, Bismarck, ND assisted in data collection and processing.

METHODS:
Digital boundaries of the USFWS NWRS fee-title lands were derived from the interpretation of survey information where available. Boundaries for the remaining units were developed from a combination of global positioning system (GPS) positions (<5m acceptable horizontal error) collected during field visits, USFWS National Wetland Inventory digital wetland acres (1:24000), and/or general cartographic data developed by the U.S. Geological Survey (1:100000 and 1:24000).

Detailed methods for producing fee-title boundary data are available in USFWS SOP 97-01 Process for Creating and Managing Service Lands Boundary Digital Data: Standard Operating Procedures for Using Global Positioning System Technology for Collecting Fee-title Boundary Information (Draft).

Digital public land survey section data for North Dakota (1:100000), South Dakota (1:24000), and Montana (1:24000) were used to create boundaries of USFWS NWRS easement areas. Individual sections were subdivided into approximately 40 acre units which were then recombined to match the legal description for the easement area identified within the easement contract. For easement area that deviated from simple legal descriptions, further division of section data was conducted. USFWS National Wetland Inventory digital wetland arcs and general cartographic data developed by the U.S. Geological Survey were used as necessary to complete digital boundaries of easements that did not conform to an aliquot part description.

DISCLAIMER:
The USFWS makes no claim as to the accuracy or completeness of the displayed information. Shaded areas depicting USFWS NWRS fee and easement lands are for illustrative purposes only and do not represent legal boundaries or in the case of easements, the acreage of wetland or grassland resources included in the easement contract. The quality of the data used to develop digital boundaries is variable, consequently, the digital representation of all boundary information is subject to change as higher quality data becomes available. All fee-title and easement arcs are attributed to allow for replacement. For more detailed information on the boundaries of fee-title land or easement areas, please contact one of the USFWS Realty Offices located in Bismarck and Minot, North Dakota, or Aberdeen and Huron, South Dakota.

8-1: Proposed Guidelines for Wetland Easement Enforcement

UNITED STATES
DEPARTMENT OF THE
INTERIOR OFFICE OF THE
SOLICITOR WASHINGTON D.C. 20246

Page 1

Memorandum

To: Associate Director, Wildlife Resources, FWS

From: Assistant Solicitor, Fish and Wildlife

Subject: Proposed Guidelines for Wetland Easement Enforcement

We have reviewed the draft administrative guidelines for wetland easement enforcement jointly submitted by Regions 3 and 6. Although the sole legal question raised by the transmittal memorandum is the authority of the Service to allow certain activities pursuant to a permitting system, we feel that certain implications of the proposal for the easement program in general require a wider discussion.

It must first be understood that through the easement agreement, the government has received, and therefore has a proprietary interest in, only the rights of draining, filling, burning and leveling. 1/

1/ The government has also acquired the right of access to the subject property, but this is not important for purposes of the instant discussion.

' The landowner has retained all other normal incidents of ownership in fee. 2/

This has two important implications: (1) The landowner can undertake all activities other than "filling, draining, burning or leveling" whether or not the activities destroy the wetland or impair its value as a waterfowl production area; 3/ and (2)

2/ This conclusion conflicts with a memorandum dated November 30,-1977 from the Minneapolis Field Solicitor to the Regional Director. The Field Solicitor concluded that the property rights received through the easement agreement were 1) the right to maintain the land as a waterfowl production area, and 2) the concomitant right to expect from the owner of the servient estate certain specific kinds of cooperation in this effort (not to fill, drain, burn or level). However, the estate received by the government is commensurate with that relinquished by the servient estate. See Restatement of' Property, § 452 (1944); Thompson, Real Property, 427 (1961). In this case, the landowner specifically relinquishes only the rights to drain, fill, level and burn. U.S. Gov. Form 3-1916 (1970). This language surely defines the ambiguous "easement . . . or right of use for the maintenance of the land . . . as a waterfowl production area." Restatement of Property supra, §4F83. In this we agree with the U.S. Attorney's appraisal of the Minneapolis Field Solicitor's opinion. Letter from U.S. Attorney,.North Dakota, to Minneapolis Field Solicitor, April 21, 1978.

3/ The landowner could, for example, build a structure adjacent to the easement area which would eliminate the wetland's attractiveness to nesting waterfowl.

the **landowner may allow** third parties to undertake such activities. 4/.

Since the Service holds a proprietary interest only in the rights to drain, fill, level and burn, its authority as an owner of property to regulate the use of its property extends only to those activities. In the instant context, therefore, the Service can regulate only those activities that can fairly be said to have been contemplated within the pertinent terms of the easements, 5/ since this was the extent of rights bargained and paid for. 6%

4/ It is in this context that the opinions discussed in Note 2 supra, were issued. The Field Solicitor concluded that the estate held by the Service vis-a-vis third parties was larger than that held vis-a-vis the landowner. The Service could then regulate acts of third parties, in this case a power line right-of-way applicant, which it could not regulate if undertaken by the landowner. The U.S. Attorney concluded that since the activities could be undertaken by the landowner, third parties could be allowed to undertake the same activities. We subscribe to the opinion of the U.S. Attorney: See Restatement of Property, § 510, comment a, (1944).

5/ This conclusion requires a modification of the present regulations pertaining to the National wildlife Refuge System. 50 CFR Subchapter C. Under the pertinent definitions, Waterfowl Production Area Easements are defined as part of the wildlife Refuge System. 50 CFR § 25.12(a). Management of the Refuge System includes restriction on access, 50 CFR Part 26, land use, 50 *CFR* Part 29, hunting and fishing, 50 CFR Part 30, and other miscellaneous actions, 50 CFR Part 27. Since the Service holds only a limited property right in a Waterfowl Production Area easement, it has no authority to regulate activities such as hunting, fishing, sightseeing, snowmobiling, etc., which are not in conflict with the terms of the acquired estate; the regulation of those types 'of activities remains the prerogative of the fee owner and his or her licensees. Serious consideration should be given, therefore, to delineating those provisions of the general refuge regulations which do not apply to wetland easement areas.

6/ The Chief of the Realty Division in Washington, D.C. has confirmed that our analysis coincides with Realty's understanding of its bargaining position when negotiating wetland easements. This is an important factor in determining the content and scope of the easements.

If it is determined that contemplated activities fall within the scope of the Service's property interest (ie., involve filling, draining, leveling or burning), the Service is still authorized to permit the activities if it is determined that they are "compatible with the purposes for which the area was established." 16 U.S.C. § 668dd(d)(1)(8). Present regulations provide authority to the Service to issue permits allowing burning, 50 CFR § 27.95, filling, 50 CFR § 27.94, and leveling and draining, SO CFR §27.51. 7/

A landowner operating pursuant to, and in compliance with, a permit issued by the Service may undertake the activities without violating the terms of the easement agreement. The permit acts as a license authorizing activities otherwise forbidden by the easement agreement.

The draft administrative guidelines submitted by Regions 3 and 6 contemplate the regulation of six activities: pivot irrigation systems, dugouts, level ditching, construction of nesting islands, burning, and emergency draining. The above analysis has demonstrated that the Service may only purport to regulate these activities if they can be considered draining, filling, burning or leveling. Of these activities, only construction of pivot irrigation systems poses problems of definition. 8/

7/ We advise adoption of the following amendment to 50 CFR Subchapter C to clarify this authority:

Section 29.4 Waterfowl Production Area Easement

> Where the Service owns an easement interest to preserve potholes or other wetland habitat, certain acts such as draining, burning, filling or leveling of a limited nature may be allowed by permit issuedby the Regional Director or the Regional Director's designee, when in that person's judgment, such activities are compatible with the basic purposes of waterfowl production for which such easement interest was acquired.

8/ Dugouts and level ditches serve to reduce the water area of the wetland by concentrating available water and thus can be considered draining. Nesting islands require accumulation of material in the wetland basin and therefore may be considered filling. Burning and emergency draining are contemplated activities by their terms.

The irrigation construction options outlined in the proposed administrative guidelines all require placing some material In the wetland basin (ie., wire mesh, trench-fill material, pilings). It is our opinion that the placing of such material in the wetland basin constitutes "filling" within the terms of the easement agreement. 9/

The Service has previously had occasion to apply such an inclusive definition.. **Letter, Minnesota Field** Solicitor to Mr. John A. Eidsmore, May 17, 1979. The Service has also attempted to define "filling" in terms of gradation. Memorandum from the Acting Regional Director, Region 6, to Wetland Acquisition Offices and Wetland **Management Districts**, February 7, 1975, ("spreading" manure **in wetland basins** is not "filling", but "dumping" manure is; placing a few rocks in a wetland is not "filling", but moving a rock pile to the wetland is).. It is our opinion that this position is untenable because it is **vague** and ambiguous and therefore open to uneven application. It also overlooks the fact that the same volume of material is 'being deposited in the wetland regardless of whether it is dumped or spread; over a sufficient period of time, the impact

9/ We note that other agencies struggling with the proper definition of "filling" have tended toward very inclusive definitions. See, eg. the definition promulgated by the Corps of Engineers pursuant to § 404 of the Federal Water Pollution Control Act, 33 USC § 1344:

> -"fill material" means any material used for the primary purpose of replacing an aquatic area with dry land or of changing the bottom elevation of a waterbody. 33 *CFR* § 323(m)
>
> "discharge of fill material" means the addition of fill material into waters of the United States. The term generally includes, without limitation, the following activities. Placement of fill that is necessary to the construction of any structure in the water of the United States. . . . 33 CFR § 323(n)

Because undertaking the activities outlined in the draft administrative guidelines constitutes draining, filling, leveling or burning, it is within the Service's proprietary authority to regulate these activities and to allow them to occur. In regulating these activities, however, the Service must keep in mind two potentially conflicting considerations: (1) The easement agreement guarantees to the landowner the somewhat limited right to undertake farming practices and to utilize the lands in the "customary manner." 10/ (2) The contemplated activities may only be allowed if '•compatible with the purposes for which the area was established." 16 U.S.C. § 668dd(d)(1)(B).

The compatibility finding must take into account the nature of the interest held by the Service. "Use" provisions in easements, such as that in the instant agreement allowing for limited farming activities in "the customary manner", tend to expand with technological developments. Thompson, 2 Real Property § 385 (1961). The development of standards, as in the drpt administrative guidelines, is a proper technique for factoring the "customary use" rights allowed to the landowner into the compatibility finding. -

10/ "It is understood and agreed that this indenture imposes no other obligations or restrictions upon the parties of the first part and that neither they nor their successors, assigns, lessees, or any person claiming under them shall in any way be restricted from carrying on farming practices such as grazing at any time, hay cutting, plowing, working and cropping wetlands when the same are dry of natural causes, and that they may utilize all of the subject lands in the customary manner except for the draining, filling, leveling and burning provisions mentioned above." U.S. Gov. Form 3-1916 (1970) (emphasis added).

We caution, however, against use of the guidelines as a per se test of compatibility. -A comprehensive administrative record would be necessary to support a compatibility *finding* on a generic basis for all irrigation construction proposals for all wetlands. In fact, a- good argument can be made that the Service should adopt a rebuttable presumption against finding proposed "filling" activities to be compatible with the purposes for which a wetland easement area was established. In acquiring wetland easements, the government has paid considerable sums of money to prevent "draining, filling, burning and leveling" from occurring, since these activities have been deemed to be inimical to the preservation of
-wetlands. For the Service then to turn around and routinely approve the very type of activity that compensation was paid to prevent, without an affirmative showing that in each particular case the impact would be minimal and compatible, would be contrary to the requirements of the Refuge- System Administration Act.

In addition, violation of easement agreements has been prosecuted as an "injury" to government property under 18 U.S.C. § 1361. Determination of compatibility on a case-by-case basis precludes an argument, if a prosecution were to be brought for failure to obtain a permit, that simple failure to obtain a permit cannot be a basis for "injury" of government property.

It is the opinion of this office, therefore, that the Service has acquired, through Waterfowl Production Area easements, a proprietary interest in, and therefore the ability to regulate, only draining, filling, leveling and burning. Since the activities outlined in the draft administrative guidelines all involve either draining, filling, leveling or burning, *they* are within the Service's regulatory authority. A landowner may be allowed to undertake these activities by permit only after an affirmative finding has been made by the Service that the contemplated activities *will* be compatible with the purposes for which the area was established, i.e., maintenance of the particular area for waterfowl production.

We recognize that this is a. very complex area of the law and that it may be difficult to strike a proper balance between the requirement of allowing only compatible irrigation systems to be developed and the rights of "customary" use accorded the landowner in the easement agreement. We are, therefore, quite willing to answer any additional questions that you may have concerning this issue.

Please contact David Fisher (343-2172) for additional information.

for David Fisher
Donald J. Barry

8-2: Compatibility Determination

COMPATIBILITY DETERMINATION

Proposed Use:

The South Dakota Department of Transportation proposes to regrade US Highway 281 from Redfield south to US Highway 14, a distance of 26.8 miles.

Refuge Unit:

Huron Wetland Management District, Beadle County Waterfowl Production Area Wetland Easements 139X; 219X,1; 252X; 371X. A total of five protected wetlands are involved in the proposed project.

Sand Lake NWR Complex, Sand Lake Wetland Management District, Spink County grassland easements 301G and 302G.

Establishing and Acquisition Authorities: Migratory Bird Conservation Act
Migratory Bird Hunting and Conservation Stamp Act

Refuge Purposes:

16 U.S.C. 718c (Migratory Bird Hunting and Conservation Stamp Act): As Waterfowl Production Areas subject to... All of the provisions of such Act [Migratory Bird Conservation Act] --except the inviolate sanctuary provisions ...
16 U.S.C. 715d (Migratory Bird conservation Act}: ._. for any other management purpose, for migratory birds.

Grassland Easement Contracts: ... to provide ... nesting cover, and food for a varied array of aquatic, terrestrial, and avian wildlife, particularly waterfowl and threatened and endangered species.

National Wildlife Refuge System Mission:

The mission of the NWRS is to administer a network of lands and waters for the conservation, management, and where appropriate, restoration of the fish, wildlife, and plant resources and their habitats within the United States for the benefit of present and future generation:. of Americans.

Description of Use:

The South Dakota Department of Transportation proposes to regrade US Highway 281 from Redfield south to the junction of US Highway 14, a distance of 26.8 miles. This road was originally constructed in 1941 with 11.5 foot driving lanes and no shoulders. Currently the road does not meet DOT design standards and requires reconstruction to meet those new standards. An additional 25 feet of permanent right-of-way is required on each side of existing right-ofway to bring the roadway up to meet current safety requirements. The foot pri nt of the reconstructed roadway will be an average of 10-14 feet wider on each side.

Availability of Resources:

There will not be any need for additional resources to administer the proposed use. All resources necessary will be expended during the permitting process.

Anticipated Impacts:

The anticipated impacts related to this use are very minor in nature. The five wetlands protected by easement involved in the proposed use will have small amounts of fill placed into them. The attached project summary list details each specific wetland easement site that will be impacted by the project. (See highlighted lines) Based on totals provided by the DOT summary, there will be a total of 39,200 square feet of new permanent fill placed into the five easement wetlands. This equates to a total of 0.90 wetland acres that will be impacted by the proposed use.

A total of approximately 5.04 acres of grassland protected by grassland easements will be impacted on a temporary basis. After construction activities are complete the DOT will reseed the disturbed area to an approved grass and forb mixture. All provisions of the grassland easement will remain in place and the DOT will post signs on the 5.04 acres of grassland easement to assure that the area is not hayed prior to July 16 each year.

There will be disturbance to wildlife during the construction activity. Other short term impacts include a minor reduction in the amount of grassland nesting habitat on the grassland easements until vegetation is re-established.

Public Review and Comment:

A news paper article regarding the project proposal regarding the grassland easement impacts will be published in the Redfield Press for a period of not less than 14 days.

The notice of this proposed use will be posted at the Huron WMD and Sand Lake NWR Office for a period of no less than 14 days to allow opportunities for public comment.

Determination:

The proposed use is compatible.

Stipulations Necessary to Ensure Compatibility:

Issuance of this permit does not preclude the requirements for obtaining necessary permits and/or approvals from other County, State Federal Agencies and local landowners.

This permit issued subject to the revocation and appeals procedure contained in Title 50, Part 25 of the Code of Federal Regulations.

All easement wetland impacts are minor modifications. By policy, the impacted acreage must be replaced by an equal amount of acreage excavated from around the edge of each easement wetland listed on the attached summary.

All replacement acreage must be in place by 12-31-2004.

or Wetlands

The DOT will place and maintain signs stating the haying and mowing restriction every eighth of a mile for the one and a half mile stretch of U.S. Fish and Wildlife Service Grassland.

South Dakota DOT is responsible for maintaining the compatibility provisions on the grassland easement within the right-of-way.

South Dakota DOT is responsible re-seeding specified grasses on the 5.04 acres of disturbed grassland easement. A seeding plan is attached to the R-O-W permit.

Justification:

Section 2.11 B of the compatibility policy explains how Managers are to determine if the proposed use will "materially interfere with or detract from" the purposes of the NWRS unit in question. The policy also states that compatibility is a threshold issue for managers to evaluate if the ecological integrity of the unit will be maintained based on the proposed use. Considering that the proposed use will be a minor modification to the right-of-way that pre-dates our easement interests, issuing a new right-ofway for an additional 25 feet is compatible.

Signatures:

Huron Wetland District Manager	July 29, 2002 Date
Sand Lake Refuge Manager	7/30/02 Date
Refuge Supervisor	8/8/02 Date
Regional Chief	8/9/02 Date

Re-evaluation Date:

June 12, 2017

US Hwy 231 road project, Sand Lake Wetland District provisions...

Special Conditions:

1. Prohibit haying or mowing for any reason, including mowing for noxious weed control, until after July 15 without prior written approval by the Refuge Project Leader or District Manager.

2. Placement and maintenance of signs, stating first condition, placed every eighth of a mile for the one and a half mile stretch that US Fish & Wildlife Grassland Easement is affected.

3. South Dakota Department of Transportation is responsible for enforcement of US Fish & Wildlife Service's Grassland Easement provisions within the right-of-way.

4. Replanting of specified grasses on easement area ...Standard DOT mix is acceptable for Sec 22 and NW portion of Sec 34(see map). Remainder of Section 34 must be seeded to NRCS recommended native mix(see seeding plan and map).

5. The Fish & Wildlife Service shall not be responsible for any accidents, injury or liability for any portion of the project.

6. Permittee must obtain any other necessary county, state or federal permits necessary to complete the project.

Legal Descriptions for portion of easements affected by project:

-25 foot strip lying adjacent to the parcel deeded for highway purposes in the SWl/4 of Sec. 22, TI 16N, R64 W
-25 foot strip lying east of and adjacent to US HWY 281 in the NW 1/4 of Sec. 34, TI 16N, R64 W
-25 foot strip lying east of and adjacent to Lot H-1 in SW1/4 of Sec. 34. TI 16N, R64W
-25 foot strip lying east of and adjacent to Lot H-1 in SE 1/4 of Sec. 34, T1 16N, R64W
Spink County Grassland Easements: 301G & 302G

Length x Width = approximately 1.5 miles x 25 feet Total acreage impacted = approximately

5.04 acres

MINOR STRUCTURES INSTALLATION
ENVIRONMENTAL EVALUATION

Project HIGHWAY 281 Project

EFFECT

	Short	Long
Dominant Vegetation Altered	Y	N
T & E Species Habitat	N	N
Wetlands Incl. Riparian		
Cultural Resources		
Water Quality		N
Water Quantity (conserve=+ deplete=-)		
Air Quality	Y	
Socio-Economic		N
Compatible?		

Y=Yes; N=No; +=Beneficial; -=Detrimental; O=None

Remarks: The wetland impacts will be mitigated as outlined in the compatibility determination. (see attached.)

Decision

X Start environmental assessment

BY Hans J. Kreutzer 8-19-02
Date

Concur Bob Barnett, Acting Refuge Supervisor 8/26/02
Date

ENVIRONMENTAL EVALUATION
CHECKLIST Refuges and Wildlife
Region

Project Description:

To allow South Dakota Department of Transportation to regrade US Highway 231 from Redfield south to US Highway 14. The project would impact grassland easement tracts 301G and 302G in Spink county located in the Sand Lake Wetland Management District.

Submitted by:

Sand Lake Wetland Management District
(Field Station)

EFFECTS

	Short Term	Long Term	Magnitude
Wetlands	0	0	
Uplands	---	0	
T&E and Candidate Species	0	0	
Other Wildlife	---	0	
Cultural Resources	0	0	
Water Quality	0	0	
Water Quantity (conserve =+. deplete = -)	0	0	
Air Quality	---	0	
Socio-economic	+	+	
Compatible?	Yes	Yes	
Cumulative Impacts	---	0	

Y= Yes; N=No; +=Beneficial; -=Detrimental;

DECISION

. X_____Project is categorically excluded from NEPA documentation
___ Start environmental assessment (EA)

BY: John W Koerner 8/20/02
Project Leader Date

CONCUR:
Refuge Supervisor Date

9-1: Easement Compliance Photography Procedure, Minnesota Wetland Management Districts, Fall, 2011

EASEMENT COMPLIANCE PHOTOGRAPHY PROCEDURE MINNESOTA WETLAND MANAGEMENT DISTRICTS FALL, 2011

Traditionally Minnesota Wetland Management Districts have used aerial reconnaissance flights to visually monitor law enforcement violations. Visually identifying easement compliance violations has always been challenging due to the high number of small parcels scattered across a large landscape.

In 2009, the USFWS Region 3 National Wildlife Refuge System Program purchased a digital aerial photography system which can facilitate a very quick turnaround in photography products. This allows the law enforcement official more time to thoroughly inspect each easement using computer software programs. The photography also provides a record of any violations for future litigation.

Use of the digital photography for fall easement compliance flights over the past two years has met with limited success. Some of the problems encountered were unforeseen such as the early permanent snowfall in 2010. However, other problems were a result of procedural and hardware limitations. The following process addresses known issues and sets forth a plan to mitigate these stumbling blocks.

2011 Flight Schedule

The most effective time to identify easement violations occurs within a very brief temporal window. This window occurs between the time the crops are removed from the fields and the first snowfall. As a result, the window can be as short as two weeks. This time window occurs earlier in the north and progresses later into fall in a southerly direction.

2011 Flight Missions have been scheduled earlier than in past years to avoid termination due to snow events. Order of go has been changed to mitigate the lack of photography in areas that were not flown in 2010 because of early snowfall.

September 27-29	Iowa, Windom, Big Stone and MN Valley WMDs
Sept 30; Oct 1 & 4	Morris WMD
October 6 and 7	Litchfield WMD
October 18-20	Detroit Lakes WMD
October 21, 25, 26	Fergus Falls WMD

The following law enforcement officers will be responsible for data handling and analysis for their field station:

Detroit Lakes WMD	Chuck Melvin
Fergus Falls WMD	Dennis Klimek
Litchfield WMD	Jeffrey Lucas
Morris WMD	Doug Briggs
Big Stone WMD	Doug Briggs
Windom WMD	Brent Taylor
Tamarac WMD	Brent Taylor
Minnesota Valley WMD	Gavin Gensmer

Photo Handling Process Outline

I. Pre-Flight

a. Easement boundaries NOT INCLUDING FMHA will be extracted from the official cadastral layer kept by Region 3 Realty Division. Flight areas will be created based on easement densities (Refer to Figure 1).

b. An ArcGis shapefile of the easements will be sent to the designated law enforcement official for each WMD. They will be asked to look over the easement tracts and determine if all required easements are included in the shapefile. If any easements are missing, they will notify the Processing Lead (Mary Mitchell) by September 10th.

c. Flight plans will be created using the easement density areas to define photography blocks. The true color photography will be collected with the 40 mm lens at 10000 ft. AGL resulting in a pixel resolution of 0.5 meter.

d. An estimate of the flying time needed to complete all easement compliance blocks was calculated in ArcGis and is as follows:

Wetland Management District	**Flight Miles**	**Flight Hours**
Iowa WMD	321	3
Window WMD	367	3
Minnesota Valley WMD	246	2
Big Stone/West Morris WMDs	767	8
Litchfield/East Morris WMDs	1397	17
North Morris/South Fergus Falls WMDs	1111	14
No. Fergus Falls/So. Detroit Lakes WMDs	716	10
North Detroit Lakes/Tamarac WMDs	580	8
Total Easement Compliance Commitment	**5505**	**65**

The numbers calculated above are for hours in the air flying photography transects and does not include travel time to and from photography mission areas or landing to take on law enforcement personnel. Thirteen days have been allocated on the Pilot's calendar for law enforcement compliance photography missions. Since the calculations above total 8-8 hour days and only reflect hours actually flying photography, it is apparent the schedule will be very tight and will not leave much leeway for inclement weather.

II. Photography Acquisition and Processing

One of the most crucial aspects of the easement compliance photography program is the need for a fast turnaround. The turnaround time set by the law enforcement officers is 48 to 72 hours. Essentially, the time allocation would proceed as follows:

Monday	Photo acquisition; plane arrives at Lakeville Airport at 5:00 pm
	Pilot downloads data to hard drive
	Photo processor drives to airport for data pickup
Tuesday	Photo processing time
Wednesday	Photo processing time until 2:00 PM
	Deliver data drive to FedEx location to be mailed
	Priority Overnight by 4:00PM
Thursday	Arrives at Field Station around 1:00 PM

To keep photography flowing evenly through the photo finishing process, the following steps need to occur:

a. At the end of each flight day, the Pilot will download the photography from the DSS to an external hard drive. He will either leave the data in a secured area at the airport for pickup or will set up a time and place for pickup with the Processing Lead.
b. The Processing Lead will pick up the data drive the same day as the flight occurred.
c. Processing of photography will always begin the day immediately following the flight.
d. If a processing backlog begins to occur, the Processing Lead may be required to work hours exceeding an 8 hour day. These hours will be processed as overtime pay.
e. To maximize hours available for processing, the Processing Lead will work from home as long as there is any compliance photography left to be processed. This will be the most efficient use of time since the Lakeville Airport is located closer to the Processing Lead residence and will also facilitate working overtime hours, if necessary.
f. Each Law Enforcement Officer will provide the Processing Lead with 2 USB 2.0 external hard drives. These will be used to ensure there is a continual flow of data to the field stations.
g. Upon receipt of the data drive, the law enforcement officer will download the data and return the external hard drive the same day using priority overnight service.

III. Post Flight Evaluation

With the process outlined above, we will be able to track and further refine the photography reconnaissance and processing elements of the Easement Compliance

Program. However, an effort needs to be initiated to identify the benefits of using aerial photography to identify violations. This has yet to occur and with the substantial allocation of resources to this program, this is a key function that needs to be addressed.

Since this photography is used immediately after it is flown for law enforcement activities, we should be able to evaluate the efficacy of the program by January, 2012. At that time, each law enforcement officer should file a report outlining the details of the violations they were able to identify through aerial photography.

A meeting to present and discuss the findings of the officer reports in January will then follow and be used to justify the significant allocation of resources, refine the methodology and address any issues or enhancements that could improve the efficiency of the program.

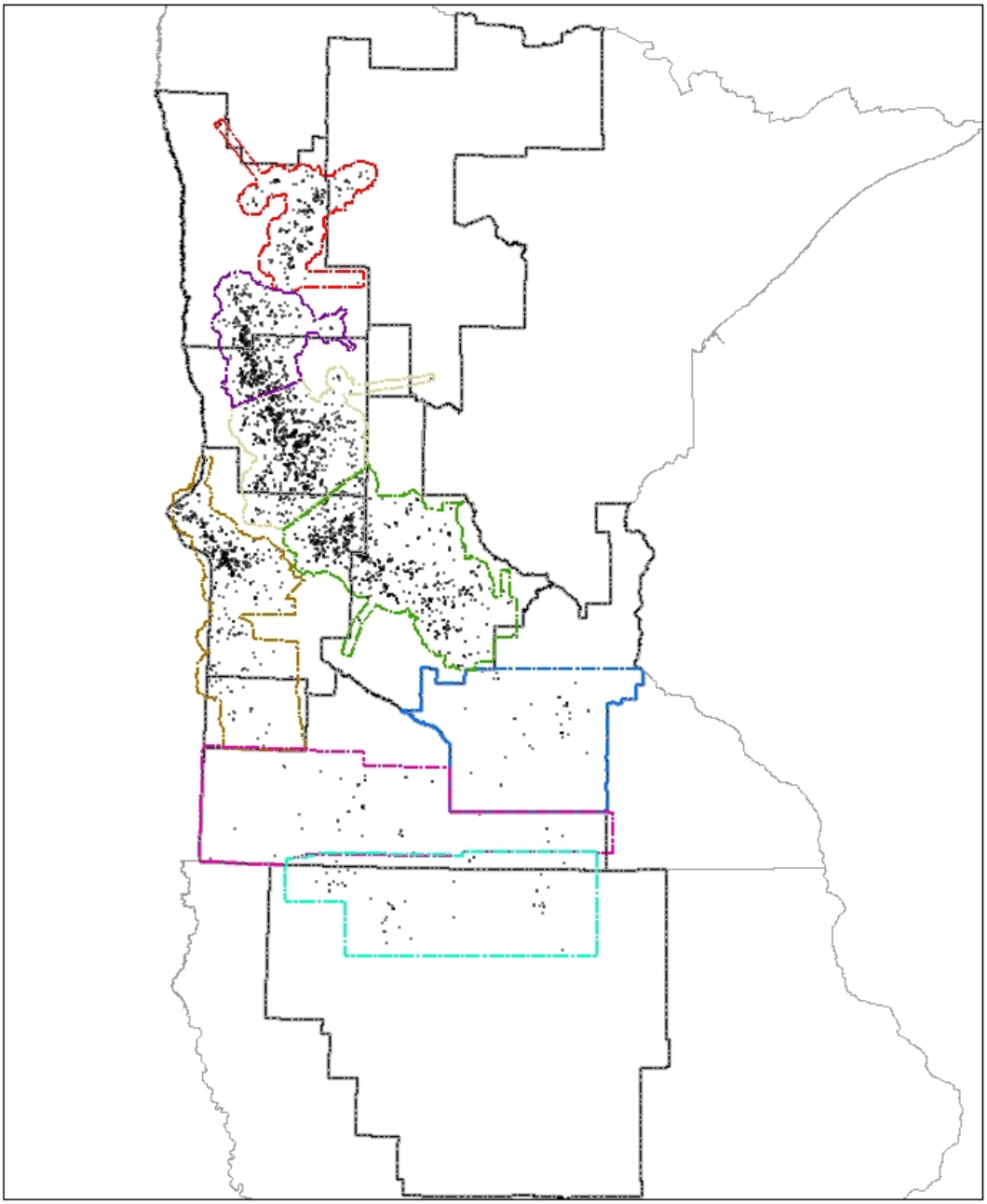


Figure 1. Minnesota- Iowa Easement Compliance Photoraphy Blocks.

- Big Stone-Western Morris WMDs
- Litchfield-East Morris WMDs
- Minnesota Valley WMD
- North Fergus Falls - South Detroit Lakes WMDs
- North Morris-South Fergus Falls WMDs
- Tamarac - North Detroit Lakes WMD
- Union Slough WMD
- Windom WMD

9-2: Easement Data Sheet

Easement Data Sheet

County:

Easement #:

Township Name:

Section TN,RW:

Easement Holder:
Address:

Phone:

Easement Operator:
Address:

Phone:

Date Discovered:

By:

Date Inspected:

By:

Easement History:

Remarks:

Insert Photo Here

Photo Date:

9-3: Large Photo Description

Large Photo Description

Photo#: P1010556	County: Clay	Date: 11/21/05	Easement#/WPA: 74X
Township & Range: T140N, R45W	Section: 15	Photo Taken By: B. Taylor	Direction of Photo: N
Comments: Possible ditching N half of easement			

9-4: Double Photo Description

Photo 1

Photo#:	County:	Date:	Easement#/WPA:
Township & Range:	Section:	Photo Taken By:	Direction of Photo:
Comments:			

Photo 2

Photo#:	County:	Date:	Easement#/WPA:
Township & Range:	Section:	Photo Taken By:	Direction of Photo:
Comments:			

9-5: Photo Reference Sheet

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

Tract: 115X
Section 12, T122N, R45W

Map 1 of 1

PHOTO REFERENCE SHEET

Picture Direction

\# Photo Reference Number

Date of Photos: 11/2/2011

2003 color FSA aerial photo

10-1: Seeding Guidelines

VEGETATION ESTABLISHMENT AGREEMENT

This agreement, dated 2 - 1? , 19 95 by and between

Lynn Meyer and Guynell Meyer, husband and wife , hereinafter referred to as "landowner(s)", and the Fish and Wildlife Service, Department of the Interior, for and on behalf of the United States of America, hereinafter referred to as "Service", is entered into as required by the "Administrative and Enforcement Guidelines and Procedures for Perpetual Grassland Easements Manual" dated April 1, 1992.

Landowner(s) hereby agree(s) to conduct certain vegetation establishment practices on the land owned by (him) (them_ in Ward County, State of North Dakota, described as follows:

T. 155 N., _R. 87_ W., 5th P.M.

Section 27, SE1/4

containing 160 acres, more or less.

Landowner(s) and Service must agree to the conditions to be set forth under "Special Provisions" of this agreement before execution of a grassland easement on the above described property and landowner(s) agree to carry out those terms and conditions as set forth. The agreement may be modified at any time by written mutual consent of the landowner(s) and Service.

SPECIAL PROVISIONS

The following vegetative seed mixtures and seeding rates will be established on the described agricultural land.

	Vegetative Seed Species		Pounds of Live _Seed per Acre
1.	Western Wheatgrass	(ND common)	4.0
2.	Slender Wheatgrass	(Prinar)	0.54
3.	Green Needlegrass	(Lodorm)	1.8
4.	Blue Grama	(SD common)	0.13
S.	Side Oats Grama	(Killdeer)	1.14
6.	Big Bluestem	(MN common)	4.0

The following method and -schedules will be used to establish the required vegetative cover. (Specify ground preparation, planned seeding dates, and shortterm land use.)

SEE ATTACHED

Dat 2 - 17 - 95 Landowner

Date 2/20/95 Michael W. Goos
U.S. Fish and Wildlife Service Department of the

ACKNOWLEDGEMENT

STATE OF NORTH
COUNTY OF TOWNER SS

On this 17th day of uar , 19,95 , before me personally appeared
(he) executed the same.

LAURENCE R. VEIKLEY (Seal) NOTARY PUBLIC STATE OF NORTH DAKOTA

Laurence R. Veikley, Notary Public Ward County, North Dakota My commission expires March 2, 1999

ACKNOWLEDGEMENT

STATE OF NORTH DAKOTA)
COUNTY OF WARD SS

On this 21st day of 19 95 , before me personally appeared

Michael W. Goos . known to me to be the same person(s) described in

LAURENCE R. VEIKLEY (Seal) NOTARY PUBLIC STATE OF NORTH DAKOTA

Laurence R. Veikley, Notary Publi Ward County, Nor h Dakot a

EXHIBIT A

SPECIAL PROVISIONS

PLANNED WORK:

Mr. Meyer agrees to plant 45.30 acres of cropland to Native Grass.This tract is being placed under a grassland easement which will protect the grass planting in perpetuity, and this agreement is contingent on the acceptance of said grassland easement *by* the United States of America. Mr. Meyer agrees to allow FWS personnel access to the area to monitor the success of the project.

Mr. Meyer agrees to prepare the seedbed and plant the grass by May 30, 1995 using a grass drill . Seeding depth shall be at an optimum 4 to ~k"

The seed shall *be* planted in a firmly packed, clean seedbed. A properly compacted seedbed shall be firmed in a manner so that adult footprints are hardly visible.

The seeded site shall not be grazed for 2 full growing seasons, or until the native grasses are adequately established.

Mr. Meyer may hay the native grass planting after July 15th of each year, or when weed control is necessary, and he agrees to leave 10 to 12 " of stubble during the first 2 years if mechanical weed control is necessary.

Mr. Meyer agrees to plant the native grass species, improved varieties and mixtures as shown on the foregoing "Vegetation Establishment Agreement."

EXHIBIT Native Grass Establishment Requirements

Dear Landowner,

You have made a perpetual decision to protect the grasslands on your property. You have requested to seed, reseed, or re- establish prior cropland to grassland. Depending on available funds and grants you may be able to receive cost share assistance for native grass seed. Since this is a perpetual grass stand we recommend that you plant native grass and forb species. There are several conditions that are required for you to receive a permit, such as seed bed preparation, seeding dates, seeding rates, clippings and no grazing the first two years.

If you want to seed existing cropland back to native grass, the best seed bed is to drill directly into soybean stubble the spring after harvest. Round-up ready soybeans would be best if drilled and not cultivated. Do not disturb the field after harvest, ie do not fall or spring till. A combination of chemicals could be used prior to seeding if necessary to control weed growth. If soybeans are not an option for your property, a chemically treated seedbed may be another option. The County Conservation District has a native grass drill that can be used for planting the native grass seed or a list of contractors can be provided.

If you want to re-establish native grass on a field that had been previously planted to tame grass such as smooth bromegrass, we recommend fall breaking and planting the field for two consecutive years to round-up ready soybeans. Then follow the same guidelines as above. Again if soybeans are not an option on your property, a treatment of haying, discing, chemically treating and planting may be another option.

If you want to inter-seed a monotypic stand or a weak stand of native grass, we recommend that you hay the field in September. Try to remove all of the top litter by raking, this will result in exposing areas of soil for the inter-seeding the following spring.
Native grass plantings generally have their greatest success when seeded in the spring from May 1 to July 1. You will be required to plant during this time frame or receive approval to deviate from these dates.

You may choose a variety of native grasses and forbs. When selecting native species to be planted, identify the prairie zone and the soil types of where your land is located. We recommend a minimum mixture of at least 5 species whether you are in the tall grass prairie, mixed grass prairie, or the short grass prairie zones. We also recommend a minimum of 8 pounds of Pure Live Seed be planted per acre.

Example of mixtures:

Tall Grass Seeding

Big bluestem -	2 lbs. PLS (Pure Live Seed)
Switch grass -	2 lbs. PLS
Indian grass -	2 lbs. PLS
Sideoats gramma -	1 lbs. PLS
Western wheatgrass -	1 lbs. PLS

Mixed Grass Seeding

Slender wheatgrass -	1.30 lbs. PLS (Pure Live Seed)
Western wheatgrass -	3.57 lbs.
Sideoats gramma -	1.70 lbs.
Green needlegrass -	1.95 lbs.
Little bluestem -	1.25 lbs.
Blue gramma -	0.23 lbs.

Try to insure that the seed you buy has at least 80% purity and 80% germination. The origin of the seed should be locally within 100 miles of your field. If seed is not available of local origin, purchasing seed originating further than 100 miles east or west longitude or further north is acceptable. Do not purchase any seed over 100 miles south in latitude, as this seed will not be adapted to the shorter growing season. You can purchase the seed from any dealer you want to, or **the FWS** can give you the names of vendors that sell native grass seed.

After you get the native grass seed planted, you will need to monitor the annual weed growth. It is critical that the new native grass seedlings receive sun light and do not have to compete for moisture with annual weeds. You will be authorized in the easement permit to conduct clippings or hayings of the annual weeds the first two growing seasons prior to July 15 to get an established stand of native grass. We recommend no herbicide treatments the first growing season. You may apply a herbicide during the second growing season to control noxious weeds.

During the first two growing seasons, it is critical that the native grass gets a well established root system. This means that you will not be able to graze on the seeded area during the first two growing seasons because cows grazing can actually pull out new plants that haven't established a deep root system.

No matter what type of grassland restoration you are attempting, an easement permit is required. The permit will allow enough time for seedbed preparation, planting the native grass seed, and to conduct weed clippings the first two growing seasons. No other additional easement permits will be issued for the same field, until after the results of the permitted planting are evaluated in accordance with the above requirements.

10-2: Waterfowl Management Easement Violation Interview Checklist

Waterfowl Management Easement
VIOLATION INTERVIEW CHECKLIST

Landowner of Record:
Address:
Person (s) Interviewed:
Address:
Easement Number:

Type of Violation:

Dated violation first observed: By:
Date violation confirmed: By:
Date of interview: Time:

Place of interview:

	Yes	No
A. Explained Easement Contract		
B. Aware of Easement		
C. Committed Violation (See Comments)		
D. Showed Violation Location on Map		
E. Issued Copy of Map (Will be sent with confirmation letter)		
F. Explained Restoration work Required		
G. Set Compliance Deadline (If yes, when: after beans are harvested this fall)		
H. Explained Consequences of Non-Compliance		
I. Wants Copy of Easement Contract		
J. Follow-up Certified Letter Sent		

Attitude of person (s) interviewed and subjects discussed:

This sheet prepared by: Date:
Other FWS personnel present during interview:
Concur:

10-3: Restoration Letter

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Detroit Lakes Wetland Management District
26624 North Tower Road
Detroit Lakes, Minnesota 56501-7959

In reply refer to:

08078 cm
Cert#70070710000045939008

March 20, 2008

Randy ???????
57th Ave North
Hawley, MN 56549

Dear Sir:

I am writing you concerning the land that you own and operate in T140N, R45W, 5th PM, Section 15, W1/2SE1/4; Section 22, NE1/4, E1/4NW1/4, Cromwell Township, Clay County. This land contains wetlands that are protected by a U.S. Fish & Wildlife Service Easement for Waterfowl Management Rights (easement). The easement prohibits the burning, draining, leveling, or filling of the protected wetlands on this property.

On 11/23/07 Officer Taylor and I met you in the field while we were inspection burned, filled, and drained wetlands protected by easement. Officer Taylor informed you that you have been told several times not to Burn, Drain, or Fill protected wetlands. In the fall of 2007 we have found several violations that need to be restored. We discussed the violations that were observed in Area B, C, D, E, and F on map. After our conversation Officer Taylor and I continued to check protected wetlands. We found violation of drainage and fill in Area A, and G on map. These areas are protected by easement. You agreed during our conversation to restore the drainage and fill violation.

The service request that all fill material in area A, C, E, and G on map is removed from protected wetlands. All ditches in areas A,B,D,E,F,and G on map will need to be filled for 100' to the natural level plus 10% fill for settlement.

The Service is requiring that the restoration work be completed by April 30, 2008. A Service employee must be present during the restoration work. Please contact the Service when a date can be set for restoration. If weather or field conditions do not permit work to be completed by April 30, 2008 please contact myself to see what options are available.

If you have any questions or need to set date for restoration please contact me at #218-844-3423

Sincerely,

Charles Melvin III
Refuge Law Enforcement

Encl: Easement Contract, Easement Map, Easement Violation Map

10-4: Case Closure Letter

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Detroit Lakes Wetland Management District
26624 North Tower Road
Detroit Lakes, Minnesota 56501-7959
(218) 847-4431

12005crm
Cert#70100290000218972806

December 8, 2011

Bruce ????
10944 280th St.
Hawley, MN 56549

Dear Bruce and Christopher ????:

On October 31, 2011 you met with me in regards to the restoration of a wetland protected by a US Fish and Wildlife (USFWS) wetland easement in Section 27, lot 5, SW1/4SE1/4, Parke Township. This property consists of wetlands that are protected from any attempt to Burn, Drain, Fill or Level.

I wanted to take the time to thank you for working with me on the filling of drainage ditch and the removal of fill from wetland. Completion of wetland restoration has corrected the violations observed in the fall of 2010. Please note that elevations have been set on ditch and any future erosion that causes the drainage of wetland will be the responsibility of the landowner to correct. At this time I am considering this case closed.

You had questions about the restoring of a large wetland located south east of easement. I spoke with my private lands specialist, and was informed that he would be interested in restoring the basin. I explained to him the importance of the pasture lands. As discussed, after the deer season is completed and as long as snow does not stop field work. I will take some elevations of wetland and ditch so you would have a better understand of how it would look. I will contact you later in the month to discuss options if interested. If you have any questions, please do not hesitate to call me at #218-844-3423. Again, thank you for cooperation with me over this issue.

Sincerely,

Chuck Melvin
Easement Enforcement Officer

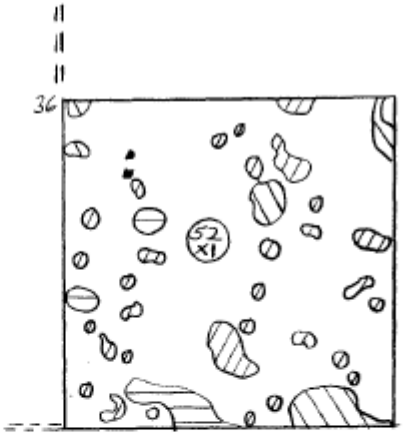
11-1: Difficulty to Drain Map

United States Department of the
Interior Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realty

DESCRIPTION

FAHEY, EDWARD TRACT (S^2X-1) 160,00
ACRES WATERFOWL PRODUCTION AREA RAMSEY COUNTY NORTH
DAKOTA EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934,
AS AMENDED DESCRIPTION: FIFTH PRINCIPAL MERIDIAN

R. 61 W. , T. 153 N., SEC. 36, SE1/4



Wetland Areas Easily

Wetland Areas Moderately Scale - 4" = 1 mile

Wetland Areas Difficult to

Tracing Compiled by: R.S.B. Date: 1014/63 Checked by: W.A.R. Date: 10/4/63

CERTIFICATE OF INSPECTION AND POSSESSION
(Lands other than Federal Building

I, **Harold F. Duebbert**

a **Wetland Manager** of the Department of the Interior, Bureau of Sport Fisheries and Wildlife, hereby certify that on the 16th day of **January**, 19 6 4, I made a personal examination and inspection of that certain tract or parcel of land situated in the County of **Ramsey**, State of **North Dakota**, designated as Tract (32X, 1) and containing •' acres, (proposed to be) acquired by the United States of America for **Waterfowl Management Rights**,

1, That I am fully informed as to the boundaries, lines and corners of said tract; that I found no evidence of any work or labor having been performed or any materials having been furnished in connection with the making if any repairs or improvements on said land; and that I made careful inquiry of the above-named vendor ..) and ascert ai ned that nothing had been done on or about said premises within the past six months that would entitle any person to a lien upon said premises

2. That I also made inquiry of the above-named vendor a XME s to (his) (XXXXX) rights of possession and the rights of possession of any person or persons known to (him) (XXXX) and neither found any evidence nor obtained any information showing or tending to show that any person had any rights of possession or other interest in said premises adverse to the rights of the above-named vendor or the

3. That I was informed by the above-named vendor (

xxxxxxx) that to the best of (his) (xxxxx) knowledge and belief there is no outstanding unrecorded deed, mortgage, lease, contract or other instrument adversely affecting the title to said premises.

' 4. That to the best of my information and belief after actual and diligent inquiry and physical inspection of said premises there is no evidence whatever of any vested or accrued water rights for mining, agricultural, manufacturing or other purposes; nor any ditches or canals constructed by or being used thereon under authority of the United States, nor any exploration or operations whatever for the development of coal, oil, gas, or other minerals on said lands; and that there are no possessory rights now in existence owned or being actively exercised by any third party under any reservation contained in any patent or patents heretofore issued by the United States for said land.

5. That to the best of my knowledge and belief based upon actual and diligent inquiry made there is no outstanding right whatsoever in any person to the possession of said premises nor any outstanding right, title, interest, lien or estate, existing or being asserted in or to said premises except such as are disclosed and evidenced by the public records.

6. That said premises are now wholly unoccupied and vacant except for the occupancy of
as tenant (s) at will, from whom disclaimer (s) of all right, title and interest in and to said premises, executed on the day of ,

Dated this

day o f **January**, **1964**

Harold F. Duebbert

Approved

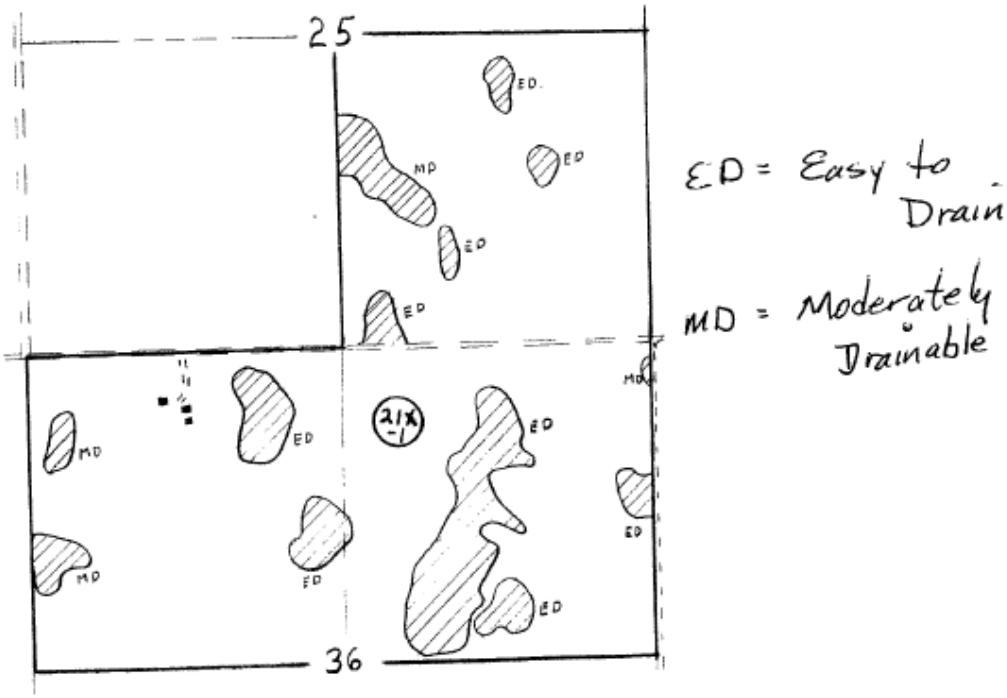
_____

United States Department of the
Interior Fish and Wildlife Service
Bureau of Sport Fisheries and Wildlife
Branch of Realty

DESCRIPTION

RYSAVY, ADOLPH TRACT (21X-1) 480,00
ACRES WATERFOWL PRODUCTION AREA RAMSEY COUNTY
NORTH DAKOTA EASEMENT AUTHORIZED BY MIGRATORY
BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED DESCRIPTION: FIFTH
PRINCIPAL MERIDIAN

R. 60 W. , T. 156 N., SEC. 25, SE1/4



Wetlands Scale - 4" = 1

Tracing Compiled by: W.A.R. Date: 2/26/63 Checked by: R.S.B.

11-2: Mapping Error Range

US Fish and Wildlife, Easement Mapping Error Estimations.

Scott Ralston
Jim Alfonso
Paul Halko

July 2005

Introduction

The USFWS uses two methods for mapping wetlands. Both methods use all available aerial photographs as tools to obtain the best possible representation of wetland basins. In most locations at least one historical image is available for each decade dating back to the 1950's. Wetlands are dynamic systems and will expand or contract based on available precipitation. Using all available tools and images, wetland basin boundaries are drawn by defining landscape signatures through aerial photo interpretation. The conventional mapping method uses Mylar overlaid on 1:15,840 scale photographs to draw wetland boundaries. Wetland boundaries are normally drawn on the best photograph available and the other photographs are used as a reference. Wetland size is either determined by dot counting or by digitizing into a GIS program.

A newer digital method of wetland mapping has also been used. The computerized digital method involves scanning in photographs or using digital media in aerial photography and placing a spatial reference with the image file. This type of digital image is called orthorectified aerial photography which indicates the computer has a reference of where the image belongs on the earth's surface and how big the image is. The photos are overlaid in a Geographic Information System (GIS) program and drafters map basin boundaries based on visual signatures of landscape differences. Within the GIS program, images can be toggled on or off as well as can be turned semi-transparent to compare different years of photographs. Since all images are

orthorectified, the images line up no matter what scale the view is at. Other tools such as topographic elevation can also be overlaid to gain greater knowledge of the landscape.

There is inherent error in remote sensing due to the offsite mapping process. This error can be found in both conventional and digital methods. Conventional methods involve visibility error due to the restriction of viewing the image at a single scale. Conventional mapping also has a line error caused by the width of the line used to draw the boundaries. Dot counting is a crude estimate of wetland area and must be used with some caution because results may vary based on interpretation of a dot's location near a wetland boundary. Digitizing involves error in tracing lines that already have been drawn. With each replication of a line the chance of deviating from the original line increases as well as location of the trace within the thickness of the original line may vary. Digital mapping methods involve less sources of error than conventional mapping. Most error is limited to the quality of the original image that was scanned and the resolution of the scan itself.

With conventional and digital mapping, redundancy is built into the process. A drafter will draw the wetland boundaries to the best of their abilities. Another experienced individual will review, and modify if needed, every draft before it is approved and sent out. Even with known error, remote sensing still has advantages. Funding and staff limitations, prohibit all easement sites from being ground surveyed. Quantification of the error value in the mapping techniques is needed for justification of procedures.

Methods

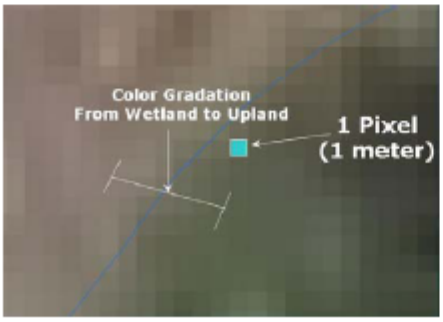
In conventional mapping, many sources of error are not easily quantifiable. One type of error that can be quantified is line width. It is reasonable to assume a drafter may vary above and below the actual wetland basin boundary visible on the photograph due to the thickness of the

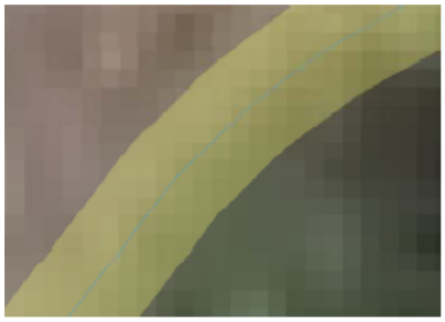
pen or pencil line being drawn. A standard 0.05cm line drawn on a 1:15,840 scale photograph will equal 7.92 meters (about 26 feet) on the ground.

Line error for digital mapping can not be calculated in the same way as conventional mapping. Line width in digital systems is effectively zero. Most aerial photos the USFWS uses that are digitized and orthorectified have an approximate spatial resolution of 1 square meter. This means that each pixel represents an average color of all features within that 1x1 meter block on the earth surface (Figure 1b). Color change from one landcover type to another is often represented by a gradation of pixels instead of a sharp line (Figure 1b). This gradation is determined by the focus of the camera in the original image, the degree of contrast between different landcover types and pixel size resulting from the resolution of the original scan. According to a report by Nelson (1996), error in digital aerial photo mapping is estimated to be at least plus or minus 3 meters (about 10 feet). By taking a sample of wetlands, the USFWS staff found an average of a 6 meter pixel color gradation along wetland basin boundaries. This

Figure 1. Wetland Mapping Example

A. (Top Right) Wetland basin with boundary drawn (blue)
B. (Lower Left) Enlargement of fig. 1b (Yellow box) showing pixilation of image and color gradation
C. Three meter buffer of mapping variation area.





3

information confirmed the findings from the Nelson (1996) study. The gradation zone is similar to the line width error in conventional mapping (Figure 1c).

Data from a study done by Ralston et al. (NDSU 2004) were used to gain wetland characteristics of the region. In that study 128 four square mile sample sites were randomly selected in the Prairie Pothole Region of North Dakota (Stewart and Kantrud 1972). All wetland basins within those sample sites were identified and mapped using a combination of high resolution aerial photography and topographic elevation layers in GIS. Average basin size was calculated from all basins. Wetlands were removed from further analysis if they were located on the edge of the sample site and thus had a smaller wetland size than the true value. Lacustrine wetlands were also removed from further analysis since easement mapping primarily deals with Palustrine systems. With in the GIS program, a 8 meter and a 3 meter buffer were created on each side of the mapped wetland boundaries to simulate the area that an experienced wetland mapper may reasonably be expected to vary in both conventional or digital mapping methods. Area for the buffers were calculated and averaged for all wetland basins.

Results

In all sample sites, 14,724 wetlands were identified. Wetland density was about 31 wetlands per square mile. Mean wetland size was 1.85 acres. Average wetland basin size including the 8 meter buffer above the true wetland basin was 2.47 acres and 1.35 acres when the 8 meter buffer below the true wetland basin boundary was subtracted. Average wetland basin size including the 3 meter buffer above the true wetland basin was 2.07 acres and 1.65 acres when the 3 meter buffer below the true wetland basin boundary was subtracted. Error range is calculated by dividing the buffer area by the wetland size. Average error for digital mapping with an 8 meter buffer is 33.28% above the true size and 27.00% below the true basin size. Average

error for digital mapping with a 3 meter buffer is 11.86% above the true size and 11.06% below the true basin size.

Table 1. Estimated line error for wetland mapping in the PPR of North Dakota.

Buffer Treatment	Average Wetland Size (Acres)	Percent Error from True Size	Average Percent Error from True Size
True Wetland Size	1.85	0.0%	0.0%
Plus 8 Meter Buffer	2.47	33.28%	
Minus 8 Meter Buffer	1.35	27.00%	30.14%
Plus 3 Meter Buffer	2.07	11.86%	
Minus 3 Meter Buffer	1.65	11.06%	11.46%

Discussion

The results from this study suggest that under the assumption that all drafters map basin boundaries based on the same visual signatures the variation on where they draw the basin boundaries may vary by 16 meters in conventional mapping and 6 meters within the pixel gradation when digitally mapping. This variance may result in a difference of up to 33% and 12% respectively above or below the true wetland area in conventional and digital mapping methods.

It is important to recognize that because of mathematical rules, when the diameter of a polygon increases, the area increases greater than if the same distance were subtracted from the diameter of the polygon. Thus, in wetland mapping it is reasonable to assume a mapper may waiver above and below the true wetland boundary, but when the line is above the true boundary it will be adding more acres to the wetland than if the line is drawn below the true boundary for the same distance. This paradox results in a slight overestimation bias of wetland size. The degree of the bias increases with a greater error buffer zone. As seen in the data from this study, when a 3 meter buffer was applied there was only a 0.80% difference between the plus and minus buffers. When an 8 meter error buffer was applied the difference in area of plus and minus buffers increased to 6.28%. Estimates for digital mapping error may be lower in reality than

several of the photographic resources used. However, some of the images used in the digital mapping process, have a resolution as low as 0.6x0.6 meters. A smaller resolution allows for greater photo detail and thus more accuracy in mapping.

Digital mapping error is primarily limited to the size of the pixel gradation and the resolution of the image itself. Conventional mapping methods include the error values calculated in this study but also include other error that is not quantified. The inability to zoom in to features on the photograph limits the ability to see detail and draw as accurately as digital methods. Overlaying photos on top of each other to compare size and shape of features is also more difficult in conventional methods which may create more error. As mentioned earlier other errors are inherent in dot counting or digitizing for area estimates. Both conventional and digital methods have a human error associated with them. This human error is reduced as much as possible by using experienced and trained personal to draft the maps as well as an approval stage where maps are reviewed by a separate individual.

Implications and Management

The USFWS has been given a court mandate to map easements to be consistent with the summary acres described by the realty information (Summary Acres). Since remote sensing mapping is not exact, as described above by the mapping error, maps must come as close as possible to summary acres as the error allows. The USFWS holds their mapping to a higher standard than the calculated error describes. Both conventional and digital mapping are held to an error within 10% of the calculated acreage regardless of the known error of as much as 33% for conventional mapping and 12% in digital mapping. The summary acres are known to have great error from the true wetland acreage on the easement property because they were derived

from crude estimations not involving any exact survey methods. However, due to court adjudication the summary acres must be treated as a single value without error. Mapping error only applies to those maps produced by the USFWS for determining what wetlands on the property that will be protected under the contract. Because there is a known error, the exact acreage value derived during the mapping process must be used only as an approximation of the size of a protected wetland and not as the exact value. Only the range of numbers from plus to minus 10% of the derived value has true meaning. Every value between that range (±10% of mapped acres) has a probability of being the true acreage of the wetlands on the ground. For the purpose of maintaining compliance with court orders the summary acres will be treated as the target to which maps must fit. When mapping, the error range (± 10% of mapped acreage) must encompass the summary acres. As long as the summary acres fall within the mapped error range there is an equal probability of the mapped acreage equaling the summary acres as not equaling the summary acres. Because off-site mapping is not exact, being within the error range is as close as possible to the true value. One exception to this mapping rule is if the mapping error range (entire ±10%) is below the summary acres. In this case the error range does not encompass the summary acres but the court system does not have issues with under acred easements.

Map drafters and approvers should map wetlands on an easement with all available tools to the best of their ability. In order to remove potential mental bias, summary acres should not be known to the drafter until all wetlands have been drawn and finalized. Once all wetlands have been drawn as accurately as possible, total acreage should be determined for the easement. If mapped acres is equal to or less than the summary acres the map may be approved and finalized (Example 1). If the mapped acres are over the summary acres then the map should be re-evaluated for any questionable basins. Questionable basin boundaries may be re-evaluated and

redrawn only if evidence from ground checks and / or consultation with a second approver warrants the modification of basin size or shape. Caution must be taken to not make modifications based on the need to fit into the summary acres or a sampling bias will be formed. Once all questionable features are finalized the mapped acres are again compared to the summary acres. If the mapped acres are at or under summary acres then the map will be approved and finalized. If the mapped acres are still over the summary acres then the error range must be calculated as following (Example 2):

Error Range = From *(Mapped Acres – (Mapped Acres * 10%))* to

*(Mapped Acres + (Mapped Acres * 10%))* to

If the summary acres fall within the error range the map may be approved and finalized. If the entire error range is still over the summary acres then entire wetland basins should be removed based on the wetland elimination criteria in the easement manual (Example 3). Basins will be removed until the error range (as calculated above) encompasses the summary acres or are below the summary acres. Once the summary acreage is satisfactorily within the error range of the basin acres, the map will be approved and finalized.

Map drafters will map to the best of their ability with all available tools at hand. However, it should be recognized that a degree of error is inherent in the remote sensing process. Time and funding intensive processes would be needed to do soil, hydrology and vegetation surveys to determine exact wetland basin boundaries. Off-site mapping will continue to be an important tool in the USFWS easement program but results will be used with the knowledge of present error.

Error Range = From *(Mapped Acres – (Mapped Acres * 10%))* to
*(Mapped Acres + (Mapped Acres * 10%))* to

Example 1: Map was drawn and acres = 45

Summary Acres = 50

Mapped acres are less than summary acres so approve and finalize map

Example 2: Map was drawn and acres = 54

Summary Acres = 50

Mapped acres are over summary acres so questionable basins are re-evaluated.

After evaluation the total acres still = 54

Error range must be calculated.

Error Range = From (54-(54 X 0.10)) to (54+(54 X 0.10))

Error Range = From (54-5.4) to (54+5.4)

Error Range = From 48.6 to 59.4

Summary Acres are between 48.6 and 59.4 so map can be approved and finalized

Example 3: Map was drawn and acres = 60

Summary Acres = 50

Mapped acres are over summary acres so questionable basins are re-evaluated.

After evaluation the total acres still = 60

Error range must be calculated.

Error Range = From (60-(60 X 0.10)) to (60+(60 X 0.10))

Error Range = From (60-6) to (60+6)

Error Range = From 54 to 66

Summary acres are NOT between 54 and 66 so basins must be removed from easement protection.

Based on removal criteria, a 2 acre wetland and a 4 acre are removed.

Total mapped acres now = 54

Mapped acres are still over summary acres so error range must be calculated.

Error Range = From (54-(54 X 0.10)) to(54+(54 X 0.10))

Error Range = From (54-5.4) to (54+5.4)

Error Range = From 48.6 to 59.4

Summary Acres are between 48.6 and 59.4 so map can be approved and finalized

9

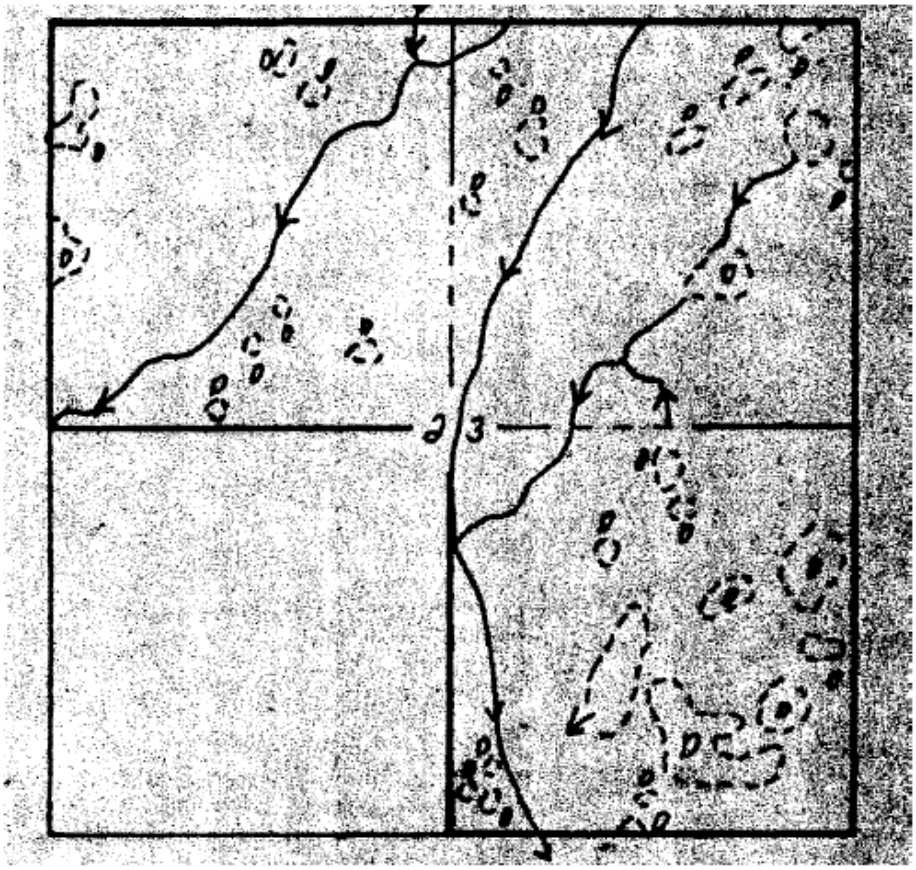
References

Nelson, S. A. 1996. Advances in wetland status and trends monitoring – Cumulative error comparison. Wetlands Program Technical Report 96-6. Gloucester Point, Virgina.

Ralston, S. T., G. M. Linz, and W. J. Bleier. 2005. Characterization of wetlands and cattail (Typha spp.) vegetation in the Prairie Pothole Region of North Dakota. North Dakota State University, Fargo, North Dakota. Unpublished Data.

Stewart, R. E. and H. A. Kantrud. 1972. Population estimates of breeding birds in North Dakota. The Auk 89:766-788.

11-3: Drainage Facility Map



We hereby certify U

bert . ea S e

Wetlands Deleted from the *Provisions* of the Easement

Wetlands Drained

Open Ditch

May 19, 1965 ..

11-4: Renegotiated Map

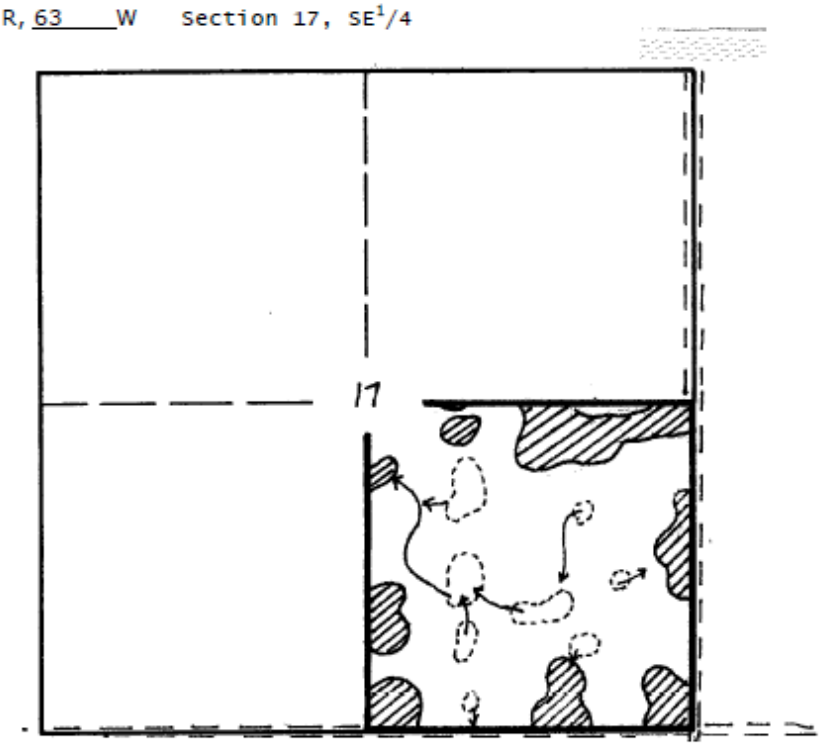
UNITED STATES DEPARTMENT OF THE INTERIOR
FISH and WILDLIFE SERVICE
BUREAU OF SPORT FISHERIES and WILDLIFE
DIVISION OF LAND MANAGEMENT

JAGOW, WALLACE TRACT (69X, 1) 60.00
ACRES

EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934 AS AMENDED

DESCRIPTION: FIFTH PRINCIPAL MERIDIAN

T, 159 N R, 63 W Section 17, SE1/4



HEREBY CERTIFY THAT THIS SKETCH REPRESENTS THE FUNCTIONAL TILE OR OPEN DITCH

DRAINS, INCLUDED IN THE EASEMENT AGREEMENT AMENDED 9/15/75 , IT IS UNDERSTOOD

AND AGREED THAT THESE DRAINS CAN BE DEEPENED OR MAINTAINED AS DRAINAGE

Wallace Jagow, for William E. Stoffel SCALE: 4 inches = I MILE
WALLACE RALPH F. FRIES, WETLAND

WETLANDS INCLUDED IN THE PROVISIONS OF THE EASEMENT.

DRAINAGE FACILITY NOT TO BE MAINTAINED

DRAINAGE FACILITIES THAT CAN BE MAINTAINED

MAP DRAWN BY: Raymond L. Brent DATE: 9/15/75

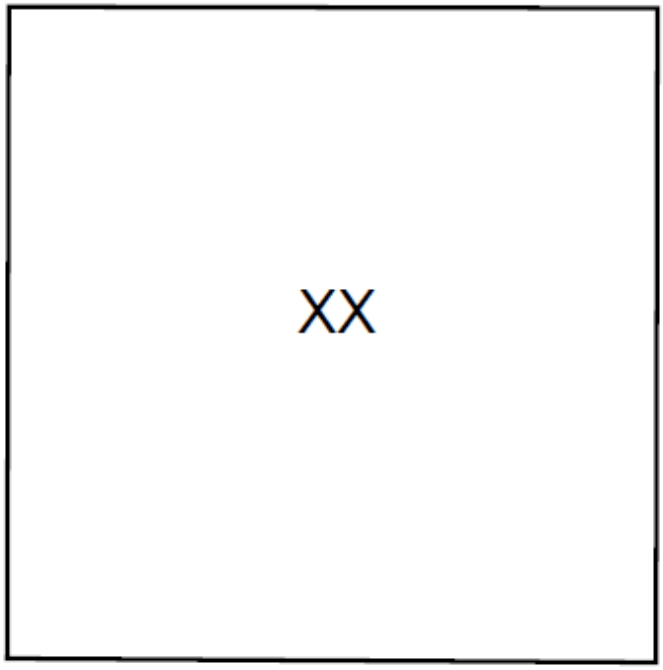
11-5: New Easement Map

UNITED STATES DEPARTMENT OF THE INTERIOR
FISH AND WILDLIFE SERVICE

Tract: XXXX Map 1 of X

WATERFOWL PRODUCTION AREA XXXXXX COUNTY, STATE OF NORTH DAKOTA
EASEMENT AUTHORIZED BY MIGRATORY BIRD HUNTING STAMP ACT OF MARCH 16, 1934, AS AMENDED.
T. XXXN., R. XXW., 5th PRINCIPAL MERIDIAN

SECTION XXXXXXX



1 inch equals 0.25 miles

The U.S. Fish and Wildlife Service (Service) has purchased and owns perpetual rights which restrict or prohibit the right to drain, burn, level, and fill any wetland basins depicted on this map. This map represents the Service's effort to depict the approximate location, size and shape of all protected wetlands based on information and maps available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetland in any given year. The Service reserves the right to revise this map, provided the mapped acreage remains consistent with the Easement's Summary Acres.

Prepared by: _____

Approved by: _____

Date: _____

LEGEND

- Section Boundary
- Boundary of Easement Description
- Wetlands Covered by Provisions of the Easement
- Wetlands Deleted from the Easement
- Approved Drainage Facility

11-6: Easement Mapping References

EASEMENT MAPPING REFERENCES

County
Easement

REFERENCE USED	PHOTO NUMBER(S)	DATE OF PHOTO(S)
ASCS B&W Aerial Photo		
ASCS B&W Aerial Photo		
ASCS B&W Aerial Photo		
NWI Photo Negative		
BOR Basin Photo		
NAPP Photo		
Other:		
Other:		
Other:		
Other:		

EASEMENT MAPPING

County
Easement #

REFERENCE USED	PHOTO NUMBER(S)	DATE OF PHOTO(S)
ASCS B&W Aerial Photo		
ASCS B&W Aerial Photo		
ASCS B&W Aerial Photo		
NWI Photo Negative		
BOR Basin Photo		
NAPP Photo		
Other:		
Other:		
Other:		
Other:		

11-7: Example of Letter that Transmits Easement Map Requested by a Landowner

Example of letter that transmits easement map requested by a landowner.

Certified Mail #

County

Easement #000

John Landowner
Address
Town, ND 00000

Dear Mr. Landowner:

On March 3, 2001, you requested that the U.S. Fish and Wildlife Service (Service) provide you with map of protected wetlands located in the SW1/4 Section 1, T. 148 N., R. 85 W., County, North Dakota. Attached is the map as you requested.

The Service has purchased and owns perpetual rights which restrict or prohibit the right to drain, burn, level or fill any wetland basin depicted on the attached map. This map represents the Service's effort to depict the approximate location, size and shape of all protected wetlands based on information, maps and aerial photographs available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetland in any given year. The Service reserves the right to correct this map provided the mapped acreage remains consistent with the Easement's Summary Acres.

The water levels of these wetlands naturally increase and decrease depending on the natural water cycle. The Service has procedures which allow landowners to remove sheet water or water from wetlands that are affecting roads and buildings. If issues arise concerning individual wetland basins represented on the map, each will be looked at on a case by case basis. It is the landowner's responsibility to contact the Service if there are any questions concerning the burning, draining, filling, and/or leveling of wetlands depicted on the easement wetland map you are being provided.

In summary there are three points to remember about this wetland easement map:

1. The map does not and is not intended to provide the exact size or configuration of the wetlands protected by the provisions of the easement.
2. Any burning, draining, filling or leveling of wetlands depicted on the wetland easement map without a permit issued by the Service is a violation of the provisions of the easement.
3. It is the landowner's responsibility to contact the Service if there are any questions concerning mapped wetlands.

If you have any questions about this map or the easement contract, please contact this office at phone number (701)

Sincerely,

Refuge Officer

Att: map; County Easement OOOOx

11-8: Example of Letter Responding to Landowner Questions Regarding the Mapping Process

Example of letter responding to landowner questions regarding the mapping process.

Certified Mail #

County

John Landowner
Address
Town, ND 00000

Easement #000

Dear Mr. Landowner:

On April 7, 1998, the U.S. Fish and Wildlife Service (Service) completed a map of wetlands located in the SW1/4 Section 1, T. 148 N., R. 85 W., protected by Service wetland easement OOOx County, North Dakota. The Service has purchased and owns perpetual rights which restrict or prohibit the right to drain, burn, level or fill any wetland basin that is shown on the map.

The Service purchased the County OOOx easement in 1967. To arrive at a payment figure for the easement, the Service realtor would have circled those areas he would have identified as wetlands on a black and white aerial photograph. These photos were not maintained as permanent file records and were used for many other purposes. There was no on the ground identification or inventory of the wetlands. The realtor then would have dot counted the circles to arrive at one approximate acreage figure, which is referred to as the "Summary Acreage", for the entire easement. Dot gridding is not a measurement of the exact size of individual wetlands. Each dot on the grid corresponded to a 0.4 acre area. Dots that overlaid wetlands were counted and the resultant number of dots, times 0.4 acres gave an approximation of the wetland acreage on the entire easement tract. The Service does not have acreage figures of individual wetland basins protected by the provisions of the County OOOx easement contract. A per acre monetary value was then applied to the "Summary Acreage" figure to obtain a payment value. Our records indicate that the Service Realtor based payment to the landowner for estimated - acres ("Summary Acreage" figure) for this easement.

The attached map(s) provided to you represents the Service's effort to depict the approximate location, size and shape of all wetland basins protected by the provisions of the easement contract using the "Summary Acreage" figure information, maps and aerial photographs available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetland in any given year. The Service reserves the right to correct this map provided the mapped acreage remains consistent with the Easement's Summary Acres.

The water levels of these wetlands naturally increase and decrease depending on the natural water cycle. The Service has procedures which allow landowners to remove sheet water or water from wetlands that are affecting roads and buildings. If issues arise concerning individual

wetland basins represented on the map, each will be looked at on a case by case basis. It is the landowner's responsibility to contact the Service if there are any questions concerning the burning, draining, filling, and/or leveling of wetlands depicted on the easement wetland map you are being provided.

In summary there are three points to remember about this wetland easement map:

1. The map does not and is not intended to provide the exact size or configuration of the wetlands protected by the provisions of the easement.

2. Any burning, draining, filling or leveling of wetlands depicted on the wetland easement map without a permit issued by the Service is a violation of the provisions of the easement.
3. It is the landowner's responsibility to contact the Service if there are any questions concerning mapped wetlands.

If you have any questions about this map or the easement contract, please contact this office at phone number (701)

Sincerely,

Refuge Officer

Att: map; County Easement OOOOx

Cc: U.S. Fish & Wildlife Service (RE), Bismarck, ND WMD Easement File

11-9: Example of Letter Transmitting Revised Map to Landowner

Example of letter transmitting revised map to landowner.

Certified Mail #

County

John Landowner
Address
Town, ND 00000

Dear Mr. Landowner:

On March 3, 2001, the U.S. Fish and Wildlife Service (Service) provided you with a map of protected wetlands located in the SW1/4 Section 1, T. 148 N., R. 85 W., County, North Dakota. The Service has purchased and owns perpetual rights, which restrict or prohibit the right to drain, burn, level or fill any wetland basin that is shown on the map. [While conducting routine surveys of the wetland easement, on your land, it was noticed that a circle that had been drawn on the map indicating a wetland was, in actuality, a hill. Hills are not protected by the easement contract and the Service is sending you a revised map to reflect this change. - Or - While conducting routine surveys of the wetland easement on your land, it was noticed that a wetland had been missed during the mapping process. This is not unusual as easement maps are drawn with off-site tools such as, information, maps and aerial photographs available at the time the maps are prepared and are rarely ground checked, due to time constraints. The mapped acreage remains consistent with the wetland easement summary acres, with the addition of this wetland.] The attached wetland easement map is a revision of the map sent to you on March 3, 2001, to reflect the above change(s).

The attached map represents the Service's effort to depict the approximate location, size and shape of all protected wetland basins based on information, maps and aerial photographs available at the time this map was prepared. However, wetlands are hydrologically dynamic systems, with expanding and contracting water levels. This map is not meant to depict water levels in the wetlands in any given year. The Service reserves the right to correct this map provided the mapped acreage remains consistent with the Easement's Summary Acres.

The water levels of these wetlands naturally increase and decrease depending on the natural water cycle. The Service has procedures which allow landowners to remove sheet water or water from wetlands that are affecting roads and buildings. If issues arise concerning individual wetland basins represented on the map, each will be looked at on a case by case basis. It is the landowner's responsibility to contact the Service if there are any questions concerning the burning, draining, filling, and/or leveling of wetlands depicted on the easement wetland map you are being provided.

In summary there are three points to remember about this wetland easement map:

1. The map does not and is not intended to provide the exact size or configuration of the

wetlands protected by the provisions of the easement.

2. Any burning, draining, filling or leveling of wetlands depicted on the wetland easement map without a permit issued by the Service is a violation of the provisions of the easement.
3. It is the landowner's responsibility to contact the Service if there are any questions concerning mapped wetlands.

If you have any questions about this map or the easement contract, please contact this office at phone number (701)

Sincerely,

Refuge Officer

Att: map; County Easement OOOOx

Cc: U.S. Fish & Wildlife Service (RE), Bismarck, ND WMD Easement File

11-10: Offsite Mapping Tools

Offsite Mapping Tools - Possible Photographic and Mapping Resources:

USDA Black and White Photography, possible sources include:

- USDA Photography Lab in Utah
- USDA NRCS Field Stations,
- USDI National Wetland Inventory Maps (NWI), Possible Sources: NWI Office, in Florida
- USGS High Altitude Photography, Possible sources include: EROS, Sioux Falls, SD
- USDA Annual High Altitude Photography (Farm Services Agency compliance slides)
- National Archives Photography
- Color infrared aerial photography
- Digital orthoquads (DOQQ) imagery
- USGS topographic maps
- Landsat imagery

Offsite Mapping Signatures:

- Hydrphytic vegetation
- Surface water
- Saturated conditions
- Mud flats
- Flooded or drowned-out crops
- Stressed crops due to wetness
- Differences in vegetation due to different planting dates
- Unharvested crops
- Isolated areas that are not farmed with the rest of the field
- Areas of greener vegetation (especially during dry years)
- Recurring Cropping patterns that avoid wet areas

12-1: Solicitor Letter

UNITED STATES
DEPARTMENT OF THE INTERIOR
OFFICE OF THE SOLICITOR
WASHINGTON, D C 20240

SRA

Exhibit VIII-2

DEC 23 1981

Memorandum

To: Assistant Secretary for Fish and Wildlife and Parks
Assistant Secretary - Land and Water Resources
Assistant Secretary - Energy and Minerals
Assistant Secretary for Territorial & International Affairs
Assistant Secretary for Indian Affairs
Assistant Secretary - Policy, Budget, and Administration

From: Solicitor William H. Coldiron

Subject: Bureau and Office Relationships with United States Attorneys

The Solicitor's Office is responsible for coordinating and handling, as the case may be, litigation regarding the programs and activities of this Department, regardless of whether the litigation is brought against or initiated by the Department. Control over litigation is essential for the proper implementation of the programs and policies of the Secretary of the Interior.

In this context we are concerned over the existing procedures used by the various Bureaus and Offices for direct access by agency personnel to the Justice Department and more specifically to the various United States Attorneys Offices regarding law enforcement activities. The purpose of this memorandum is to request that the various Assistant Secretaries coordinate with their respective Associate Solicitors the "ground rules" by which the Solicitor's Office will coordinate legal matters involving law enforcement and referral of criminal matters to the U.S. Attorneys.

While we recognize that there is no need for the Solicitor's Office to be involved in certain agency activities, such as the Park Service writing a traffic ticket for speeding in Yellowstone, a criminal referral to a United States Attorney

RECEIVED
FEB 03 '82
LAW ENFORCEMENT

could raise in a litigation context significant legal issues which affect the programs and policies of the Secretary. A strategy must be devised by which these types of criminal cases are effectively and timely coordinated with the Solicitor's Office.

We would appreciate your office giving this matter immediate attention in order that the program objectives and coordination can be achieve during the month of January. It is essential, in my judgment, that these issues be resolved in fashion that is cost effective, but nonetheless provides the Solicitor's Office with appropriate control over criminal litigation.

Your immediate attention to this matter would be appreicated.

cc:
All Associate Solicitors
All Regional Solicitors

12-2: Request for Relief Guidance

Exhibit VIII-1 (revised 2008)

Guidelines for Questions about Potentially Enlarged Wetlands on Pre-76 Easements:

Normally, the landowner has an issue with one wetland that seems larger than it has ever been before, although they may ask about several or all wetlands on an easement tract. Each expanded wetland (flooded beyond the wetland boundary) question will be evaluated on a case-by-case basis. The first step will be to map the easement (if it was purchased prior to 1976) according to the Service's mapping policy, and then follow the question process below to determine whether relief is warranted. Consider all relevant information in developing justification for granting or denying relief:

- Look at the wetland in question on the ground.
  Health and Safety:
  - Is the wetland impacting curtilage and/or roads? If it does, then the wetland will be evaluated as a "Health and Safety" situation (See Chapter XII).
- Historical Information:
  - Is the wetland flooded beyond existing tree rings? Keep in mind the size of the trees (15 inches in diameter vs. 2 inches). Size can relate to the length of time they have been growing – which could relate to the historic high water line when looking at large, fully mature trees. This criterion is not an absolute marker of where the wetland edge is located, but it can indicate historic high water levels.

    Yes – Consider Relief; **No** – no relief considered

  - Has flood water inundated two or more wetlands that were mapped separately and now show one large body of water? Keep in mind that just because 2 or 3 wetlands were mapped separately and are now one large wetland doesn't mean the requester is automatically entitled to relief. Some additional questions/tasks include:
    - Is the land in between the wetlands hydric or upland soils?
    - Have someone with soils skills determine if any upland is being flooded.

      Yes – Consider Relief; **No** – no relief considered

  - Has the water line increased beyond that shown in historical aerial photography?
    Yes – Consider Relief; **No** – no relief considered

  Scientific Information:
  - Has the water level increased beyond the [1]hydric soil boundary on a semi-permanent wetland?
    Yes – Consider Relief; **No** – no relief considered

- Has the water level increased beyond the occurrence of hydrophitic vegetation and is upland vegetation being flooded?

  Yes – Consider Relief; **No** – no relief considered

- Reasonableness: The manager will also have to use a reasonable test in making a determination to grant or deny relief. Review the accuracy of the map.
  - Look at the shape of the wetland on the ground; i.e., extra lobes of water that are not showing on the easement map and historic aerial photography. Is there an exaggerated/significant departure in shape on the ground as compared to what is depicted on the easement map and historical aerial photography?

    Yes – Consider Relief; **No** – no relief considered

  - Does the wetland footprint on the ground look substantially larger then the circle on the map and the footprint in historical aerial photography?

    Yes – Consider Relief; **No** – no relief considered

  - The wetland is significantly larger than mapped on the easement map and what is shown in historic aerial photography and has cut off the only access to the landowner's field.

    Yes – Consider Relief; **No** – no relief considered

In summary, use biology. The Service shouldn't be faulted if we use good sound biology.

1 The hydric soil boundary is formed over thousands of years based on the hydrological fluctuations brought on by climatic and geological factors. This is referred to as the "static storage" portion of the wetland. The portion of the wetland above the historic hydric soil boundary is known as the "dynamic storage" or natural overflow portion of the wetland. This is the actual wetland boundary and in extended wet cycles the water may overflow onto adjacent lands. A semi-permanent wetland could potentially function properly at the hydric soil boundary as much of its hydrology is dependent on ground water discharge. When an "expanded or enlarged" wetland question is asked, we are talking about a wetland that has been flooded beyond its scientific boundary (hydric soils for a Semi-permanent and natural overflow for a temporary or seasonal wetland).

Prepared for Easement Manual by: Jim Alfonso, Devils Lake WMD

12-3: Case Closure Letter

United States Department of the Interior

FISH AND WILDLIFE SERVICE
Detroit Lakes Wetland Management District
26624 North Tower Road
Detroit Lakes, Minnesota 56501-7959
(218) 847-4431

12005crm

Cert#70100290000218972806

December 8, 2011

Bruce Bang
10944 280th St.
Hawley, MN 56549

Dear Bruce and Christopher Bang:

On October 31, 2011 you met with me in regards to the restoration of a wetland protected by a US Fish and Wildlife (USFWS) wetland easement in Section 27, lot 5, SW1/4SE1/4, Parke Township. This property consists of wetlands that are protected from any attempt to Burn, Drain, Fill or Level.

I wanted to take the time to thank you for working with me on the filling of drainage ditch and the removal of fill from wetland. Completion of wetland restoration has corrected the violations observed in the fall of 2010. Please note that elevations have been set on ditch and any future erosion that causes the drainage of wetland will be the responsibility of the landowner to correct. At this time I am considering this case closed.

You had questions about the restoring of a large wetland located south east of easement. I spoke with my private lands specialist, and was informed that he would be interested in restoring the basin. I explained to him the importance of the pasture lands. As discussed, after the deer season is completed and as long as snow does not stop field work. I will take some elevations of wetland and ditch so you would have a better understand of how it would look. I will contact you later in the month to discuss options if interested. If you have any questions, please do not hesitate to call me at #218-844-3423. Again, thank you for cooperation with me over this issue.

Sincerely,

Chuck Melvin
Easement Enforcement Officer

U.S. Fish and Wildlife Service
http://www.fws.gov

Region 3, U.S. Fish and Wildlife Service
http://www.fws.gov/midwest