

## FEDERAL DESIGNATIONS - BACKGROUND MEMORANDUM

Section 1 of 2011 Senate Bill No. 2234 (attached as an [appendix](#)) directs the Legislative Management to consider various mechanisms for improving coordination and consultation regarding federal designation over land and water resources in this state. As introduced, the bill would have prohibited the federal government from establishing a federal designation over land or water resources in this state without the approval of the Legislative Assembly by concurrent resolution.

### LEGISLATIVE HISTORY

The bill's proponents included the North Dakota Stockmen's Association, the North Dakota Farm Bureau, the Landowners Association of North Dakota, and certain landowners. The proponents argued that federal designations diminish property rights and are the first step in further regulation. Proponents provided a list of federal designations to which the bill should apply:

- National forests;
- National parks;
- Wilderness areas;
- Roadless areas;
- Wild, scenic, and recreational rivers;
- National monuments;
- National conservation areas;
- National recreation areas;
- National heritage areas;
- Scenic byways;
- National wildlife refuges;
- Wilderness study areas;
- Municipal watersheds;
- Conservation easements;
- Grasslands;
- Wetlands; and
- Prairie potholes.

The proponents listed the Dakota Grassland Conservation Area as the latest example of a federal designation. This is a designation in which the United States Fish and Wildlife Service seeks to conserve 12 million acres in South Dakota, North Dakota, and Montana. This program was proposed by the United States Fish and Wildlife Service for conservation of grasslands through the purchase of conservation easements.

The State Department of Health expressed concern with the bill as introduced. The concern was over which federal designations would require approval. Some designations are made through determinations. For example, there are determinations in which the federal government designates whether the state program is in compliance with federal regulation. The concern was that if state legislative approval were required, the approval may not be able to be given before the

federal government would take over the state program due to the delay resulting from the Legislative Assembly meeting once every two years.

The opponents to the bill as introduced argued that the bill would be preempted by federal law. The supremacy clause of the United States Constitution basically states that federal law preempts state law. If a state adds a requirement that the federal government needs approval to implement federal law in this state, that law is contrary to the supremacy clause and is preempted by federal law. These opponents cited an Attorney General Letter Opinion--2011-L-01--which opined that it is likely that 2011 House Bill No. 1286 would be preempted by federal law. The opinion summarized House Bill No. 1286 as making it a crime for federal or state employees to apply federal law, including federal regulations and rules, when determining a North Dakota resident's right of access to medical services and health insurance coverage, unless the federal government had received approval from the Legislative Assembly. In a footnote of the opinion, the Attorney General identified two other bills that raise similar concerns--one of which was Senate Bill No. 2234.

### NORTHERN PLAINS NATIONAL HERITAGE AREA

One area of contention in recent history regards the Northern Plains National Heritage Area. Congress authorized the program in 2009. The Northern Plains National Heritage Area encompasses approximately 800 square miles of land along both sides of the Missouri River in five counties from Huff to Stanton. The counties include Burleigh, McLean, Mercer, Morton, and Oliver. The purpose of the Northern Plains National Heritage Area is to preserve history in an area of distinct human impact on the landscape. The program provides matching grants.

The Northern Plains Heritage Foundation is the nonprofit organization that functions as the coordinating entity for the Northern Plains National Heritage Area. The Northern Plains Heritage Foundation was charged with writing a management plan for the heritage area. The management plan must identify ways in which the federal funds will be matched, as well as the guidelines the Northern Plains Heritage Foundation will follow when awarding grants, and anything else determined important to the successful management of the heritage area. The management plan has been made and applications for grants have been received by the Northern Plains Heritage Foundation.

The main concern by landowners was that they did not have notice of the potential designation. When notified of the designation, many landowners expressed concern that the program would threaten

private property rights. In response to these concerns, the law authorizing the program provided for an opt-in provision for landowners.

## INVENTORY OF FEDERAL DESIGNATIONS IN THIS STATE

The following is a list by federal agency of designations, especially those designations, listed by proponents of this study. These agencies are the Department of the Interior, the Department of Transportation, and the Environmental Protection Agency. The Department of the Interior is divided into the National Park Service, the Fish and Wildlife Service, the Forest Service, the Bureau of Land Management, and the Bureau of Reclamation.

### Department of the Interior

#### National Park Service

The national park system comprises 394 areas covering more than 84 million acres in every state, except Delaware. These areas include national parks, monuments, battlefields, military parks, historical parks, historic sites, lakeshores, seashores, recreation areas, scenic rivers and trails, and the White House. If one of these areas is in this state, it is listed following a brief description of the area in general.

- **National park** - These are generally large natural places having a wide variety of attributes, at times including significant historic assets. Hunting, mining, and consumptive activities are not authorized.

In this state, there is the Theodore Roosevelt National Park - North and South Units. Part of this park includes the Theodore Roosevelt Wilderness. The wilderness is 29,920 acres managed by the National Park Service. The land is owned in fee title by the United States Department of the Interior.

- **National monument** - The Antiquities Act of 1906 authorized the President to declare by public proclamation landmarks, structures, and other objects of historic or scientific interest situated on lands owned or controlled by the government to be national monuments.
- **National preserve** - National preserves are areas having characteristics associated with national parks, but in which Congress has permitted continued public hunting, trapping, and oil and gas exploration and extraction. Many existing national preserves, without sport hunting, would qualify for national park designation.

In this state there is the Sullys Hill National Game Preserve that consists of 1,674 acres.

- **National historic site** - Usually, a national historic site contains a single historical feature that was directly associated with its subject. Derived from the Historic Sites Act of 1935, a number of historic sites were established by

Secretaries of the Interior, but most have been authorized by Acts of Congress.

- **National historical park** - This designation generally applies to historic parks that extend beyond single properties or buildings.
- **National memorial** - A national memorial is commemorative of a historic person or episode; it need not occupy a site historically connected with its subject.
- **National battlefield** - This general title includes national battlefield, national battlefield park, national battlefield site, and national military park. In 1958 a National Park Service committee recommended national battlefield as the single title for all such parklands.
- **National cemetery** - There are presently 14 national cemeteries in the National Park System, all of which are administered in conjunction with an associated unit and are not accounted for separately.
- **National recreation area** - Twelve national recreation areas in the system are centered on large reservoirs and emphasize water-based recreation. Five other national recreation areas are located near major population centers. Such urban parks combine scarce open spaces with the preservation of significant historic resources and important natural areas in locations that can provide outdoor recreation for large numbers of people.
- **National seashore** - Ten national seashores have been established on the Atlantic, Gulf, and Pacific coasts; some are developed and some relatively primitive. Hunting is allowed at many of these sites.
- **National lakeshore** - National lakeshores, all on the Great Lakes, closely parallel the seashores in character and use.
- **National river** - There are several variations to this category--national river and recreation area, national scenic river, wild river, etc. The first was authorized in 1964, and others were established following passage of the Wild and Scenic Rivers Act of 1968.
- **National parkway** - The title parkway refers to a roadway and the parkland paralleling the roadway. All were intended for scenic motoring along a protected corridor and often connect cultural sites.
- **National trail** - National scenic trails and national historic trails are the titles given to these linear parklands (over 3,600 miles) authorized under the National Trails System Act of 1968.
- **Affiliated areas** - In an Act of August 18, 1970, the national park system was defined in law as "any area of land and water now or hereafter administered by the Secretary of the Interior through the National Park Service for park, monument, historic, parkway, recreational or

other purposes." The affiliated areas comprise a variety of locations in the United States and Canada that preserve significant properties outside the National Park System. Some of these have been recognized by Acts of Congress, and others have been designated national historic sites by the Secretary of the Interior under authority of the Historic Sites Act of 1935. All draw on technical or financial aid from the National Park Service.

There are two historic sites in this state--Fort Union Trading Post National Historic Site and Knife River Indian Villages National Historic Site.

- **Other designations** - Some units of the national park system bear unique titles or combinations of titles, like the White House and Prince William Forest Park.

The National Park Service also administers the National Historic Landmark Program. There are six landmarks in this state--Big Hidatsa Village Site, Fort Union Trading Post, Frederick A. and Sophia Bagg Bonanza Farm, Huff Archeological Site, Menoken Indian Village Site, and Lynch Quarry Site.

In addition, the National Park Service administers the National Register of Historic Places. There are 416 historic places in this state.

#### **United States Fish and Wildlife Service**

- **National Wildlife Refuges**

The Fish and Wildlife Service administers 63 national wildlife refuges in North Dakota. The most popular refuges in North Dakota include Arrowwood, Audubon, Chase Lake, Des Lacs, J. Clark Salyer, Lake Alice, Lake Ilo, Long Lake, Lostwood, Upper Souris, and Tewaukon. The land is owned by the Department of the Interior, United States Fish and Wildlife Service.

- **Wilderness Study Area**

Wilderness study area is a designation by Congress and affects federally owned land as to limit activities. The Fish and Wildlife Service administers two wilderness study areas in this state:

The Lostwood Wilderness is 5,577 acres within the 26,902-acre Lostwood National Wildlife Refuge.

The Chase Lake Wilderness is 4,155 acres.

- **Grassland and Wetland Easements**

The Fish and Wildlife Service purchases grassland and wetland easements. Grassland easements are perpetual easements by the Fish and Wildlife Service to protect native grasslands done on a voluntary basis with landowners. The easement prevents using the land for crop and early haying. Wetland easements are a perpetual easement by the Fish and Wildlife Service to

protect wetlands done on a voluntary basis with landowners.

#### **United States Forest Service**

The Forest Service administers the national grasslands in this state. The grasslands are called the Dakota Prairie Grasslands and consist of 1,259,000 acres in three separate grasslands--the Little Missouri National Grasslands, the Sheyenne National Grasslands, and the Cedar River Grasslands. The land is owned in fee title by the United States Department of Agriculture and is managed by the Forest Service. National forest roadless areas are designations within the national grasslands.

Municipal watersheds are managed by the Forest Service through a program that applies if a national forest watershed supports a municipal water supply.

#### **Bureau of Land Management**

The Bureau of Land Management manages the national conservation system and recreational areas. As part of the national conservation system, the Bureau of Land Management administers the national scenic and historic trails. There is one trail in this state--the Lewis and Clark National Historic Trail. There are not any national conservation areas in this state. This state has one recreational area--the Schnell Recreation Area.

#### **Bureau of Reclamation**

The Bureau of Reclamation manages a number of areas in this state. The largest areas include the Dickinson Dam, the Heart Butte Dam, and the Jamestown Dam and associated reservoirs.

#### **Wild, Scenic, and Recreational Rivers**

Some designations do not fit neatly into one agency. One example is the wild, scenic, and recreational rivers designation. The wild, scenic, and recreational rivers system protects rivers with scenic, recreational, fish and wildlife, and other values. The rivers may be designated by Congress or the states. The program is generally administered by the federal agency with jurisdiction over the property surrounding the river, usually the National Park Service or Fish and Wildlife Service. There are not any wild, scenic, and recreational rivers in this state.

#### **Department of Transportation**

The Federal Highway Administration administers the national scenic byways. This program provides funding to certain highways. The program is a collaborative effort established to help recognize, preserve, and enhance selected roads throughout the United States. There are two highways in this state--Sheyenne River Valley National Scenic Byway and Standing Rock National Native American Scenic Byway.

### **Environmental Protection Agency**

The Environmental Protection Agency is included in the list although the Environmental Protection Agency regulates more than it designates. The Environmental Protection Agency regulates wetlands, including prairie potholes, as to pollution prevention and control under the Clean Water Act and is closely tied to related designations by other agencies.

### **STATE LAW**

The following are instances in which the state has control or cooperation over the acquisition of land by the federal government in the North Dakota Century Code. These instances arise because federal law allows state involvement.

Section 10-06.1-10 provides that a nonprofit organization may not acquire farmland or ranchland unless, among other things, the Governor approves of the proposed acquisition. The nonprofit organization must notify the Agriculture Commissioner who convenes an advisory committee consisting of members from or of:

- The Parks and Recreation Department;
- The Agriculture Commissioner;
- The State Forester;
- The Game and Fish Department;
- The North Dakota Farmers Union;
- The North Dakota Farm Bureau;
- The Stockmen's Association; and
- Affected board of county commissioners.

The advisory committee has a meeting with the board of county commissioners and makes a recommendation to the Governor.

Under Section 20.1-02-17.1, the director of the Game and Fish Department is required to submit proposed wildlife and fish restoration programs or projects involving the acquisition of wetlands, water, or land to the board of county commissioners in affected counties for approval before agreement with and approval by the Secretary of the Interior. The board of county commissioners must inspect the property, hold a public hearing, and give an approval or disapproval. The Game and Fish Department and county agent must provide the board a detailed impact analysis. The Department of Commerce must circulate the analysis within state government for comment and forward the comment to the Game and Fish Department.

Under Section 20.1-02-18, the Governor's approval is required for the acquiring of land by the federal government under the Migratory Bird Conservation Act. Under Section 20.1-02-18.1, the Governor and the director of the Game and Fish Department must submit the proposed acquisition of land waterfowl production areas, wildlife refuges, or other wildlife purposes to the board of county commissioners of the affected counties. The board must give notice and have a public hearing. A detailed impact analysis from the federal agency involved must be given to the board. In addition, the county agent of the affected counties must prepare an impact analysis, and these documents must be given to the Department of Commerce to circulate within state government. The department must forward the analysis and comments to the federal agency and state decisionmakers.

Under Section 54-01-15, the federal government may acquire land for national forests with the consent of the Legislative Assembly. The legislative consent is required in the form of a bill.

Under Section 55-10-10, this state recognizes the National Historic Preservation Act. The State Historical Society is the state entity that carries out the program. The State Historical Society may acquire title or interest in any district, site, building, structure, or object in compliance with federal law.

### **SUGGESTED STUDY APPROACH**

Because of the supremacy clause of the United States Constitution, it is difficult for the state to require any coordination or consultation by the federal government in making any designations. A great majority of designations either involve the state or an Act of Congress as to the particular property. As such, the political process provides the coordination and consultation. If the designation involves the purchase of land, there appears to be at least notice and a hearing.

The committee may desire to focus the study to the actions by certain federal agencies or to certain designations. The result of an approach focused on a particular agency or program, especially if there have been previous issues with the agency and program, may be more effective.

ATTACH:1