N.D.A.G. Letter to Jones (May 26, 1992)

May 26, 1992

Mr. Lloyd A. Jones, Director
N.D. Game and Fish Dept.
100 N. Bismarck Expwy.
Bismarck, ND 58501

Dear Mr. Jones:

Thank you for your February 10, 1992, letter in which you request an opinion on the ability of the North Dakota Wetlands Trust ("Trust") to purchase farmland in North Dakota. In your letter you ask two questions, which are answered separately below.

Question No. 1: Whether the Trust may purchase and acquire title to real property without violating the provisions of N.D.C.C. ch. 10-06?

Answer No. 1: The Trust was incorporated in 1986, pursuant to the Garrison Unit Reformulation Act of 1986 ("Act"), as a nonprofit corporation for the purposes of preservation, enhancement, restoration, and management of wetland and associated wildlife habitat in North Dakota. N.D.C.C. § 10-06-01 prohibits all corporations from owning or leasing farmland unless otherwise authorized by N.D.C.C. ch. 10-06. Under the provisions of this chapter, certain nonprofit organizations may own farmland. N.D.C.C. § 10-06-04.2 defines a nonprofit organization as an organization or trust that has tax-exempt status under at least one of the following Internal Revenue Code sections:

1. An organization that was in existence on December 31, 1984, and that is organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals under section 501(c)(3), or is a domestic fraternal organization under section 501(c)(10).

2. A charitable, religious, educational, or scientific organization classified as either a private foundation or as a public charity having status as an organization described in section 509(a)(1) or (3).

3. A trust described in section 4947 for which a deduction is allowable under section 170.

The Trust was incorporated after 1984, and it is not a section 4947 trust. Therefore, it may only be a nonprofit organization for the purposes of N.D.C.C. ch. 10-06 if it falls within (2). Whether the Trust is an organization described in section 509(a)(1) or (3) is a question of fact upon which I cannot issue an opinion.

Even if the Trust is a section 509(a)(1) or (3) organization, it must also meet the conditions of N.D.C.C. § 10-06-04.1 or § 10-06-04.3 in order to own farmland. Under N.D.C.C. § 10-06-04.1, the following may own farmland:

1. A nonprofit organization or a trust for the benefit of an individual or a class of individuals related within the degrees of kinship specified in subsection 2 of section 10-06-07 may own or lease farmland or ranchland if that land is leased to a person who farms or ranches the land as a sole proprietorship, partnership, or a corporation allowed to engage in farming or ranching under section 10-06-07.

2. To the extent farming or ranching is essential to a nonprofit organization's charitable purposes a nonprofit organization actively engaged in the business of farming or ranching in this state on January 1, 1983, may continue to engage in the business of farming or ranching without interruption after January 1, 1983.

3. A nonprofit organization which owned farmland or ranchland for the preservation of unique historical, archaeological, or environmental land before January 1, 1983, may continue ownership of that land without interruption after January 1, 1983. An organization that is holding land for scenic preservation shall either prohibit all hunting, or if any parcel ofthe land is open to hunting, it must be open to hunting by the general public.

The Trust does not fall within any of these exceptions, so it can own farmland, only if it meets the requirements of N.D.C.C. § 10-06-04.3 which provides, in part:

> A nonprofit organization may acquire farmland or ranchland only in accordance with the following:
>
> 1. Unless it is permitted to own farmland or ranchland under section 10-06-04.1, the nonprofit organization must, before January 1, 1985, have been either incorporated in this state or issued a certificate of authority to do business in this state.

Because the Trust was not incorporated in North Dakota or issued a certificate of authority to do business in this state before January 1, 1985, it cannot purchase farmland under this section.

Even if the Trust is not a nonprofit organization for the purposes of N.D.C.C. ch. 10-06, it may still fall within an exception to the general prohibition against corporate ownership of farmland under N.D.C.C. § 10-06-01.3, which allows corporate ownership of farmland used for industrial or business purposes.

Under N.D.C.C. § 10-06-01.3, a corporation "not engaged in the business of farming or

ranching may own or lease land used for farming or ranching, only when the land is necessary for residential or commercial development, the siting of buildings, plants, facilities, industrial parks, or similar business or industrial purposes of the corporation, or for uses supportive of or ancillary to adjacent nonagricultural land for the benefit of both land parcels."

There is no case law interpreting N.D.C.C. § 10-06-01.3, and the legislative history is silent as to its meaning. The Trust may acquire land under this section if the land is acquired for uses supportive of the nonagricultural land and both parcels are benefitted. Whether these requirements are met is a question of fact upon which I cannot render a legal opinion.

Question No. 2: If the answer to Question No. 1 is no, does the Act preempt state law?

Answer No. 2: Under the supremacy clause, U.S. Const. art. VI, cl. 2, state laws that interfere with or are contrary to the laws of Congress are invalid. Gibbons v. Ogden, 9 Wheat. 1, 211 (1824).

Preemption of state law by federal statute or regulation is not favored. The basic assumption is that Congress did not intend to preempt state law. Federal Bank of St. Paul v. Lillehaugen, 404 N.W.2d 452, 455 (N.D. 1987). There are three ways in which federal law may preempt state law. First, Congress' intent to supplant state authority in a particular field may be expressed in the terms of the statute. Absent explicit preemptive language, Congress' intent to supersede state law may be implicit if a scheme of federal regulation is so pervasive as to make reasonable the inference that Congress intended to supplant state authority in the field. Finally, preemption may occur to the extent that state and federal law actually conflict. Such a conflict arises when compliance with both federal and state regulations is a physical impossibility. Wisconsin Public Intervener v. Mortier, 111 S. Ct. 2476 (1991). See also 1988 N.D. Op. Att'y Gen. 152.

The Act does not expressly preempt state law. The Trust has authority to acquire land and interests in land and water rights. It also has the power to finance wetland preservation, enhancement, restoration and management of wetland habitat programs. (P.L. 99-294). Although N.D.C.C. ch. 10-06 may prohibit the Trust from acquiring land, it does not appear that the application of state law would frustrate the purposes of the Act. Because compliance with both state and federal law is possible, it is my opinion that there is no conflict. Thus, preemption would occur only if Congress intended to supplant state authority in this particular area. After a review of the statutory language and the legislative history, neither of which provides any indication that Congress sought to preempt state law, it is my opinion that the Act does not preempt N.D.C.C. ch. 10-06.

If the Trust wishes to acquire farmland in North Dakota, I suggest introducing legislation for that purpose during the 1993 session.

I hope I have satisfactorily addressed your concerns.

Sincerely,

Nicholas J. Spaeth

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