

In the
Supreme Court of the United States

NORTH DAKOTA, :
 :
 Appellant, :
 :
 v. : No. 81-773
 :
 UNITED STATES :

Washington, D.C.

Tuesday, November 2, 1982

Pages 1 thru 60

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments
next in North Dakota against the United States.

Mr. Attorney General, I think you may proceed
when you are ready.

ORAL ARGUMENT OF ROBERT O. WEFALD, ESQ.,
ON BEHALF OF THE APPELLANT

MR. WEFALD: Mr. Chief Justice, and may it
please the Court, this appeal involves a statutory
construction of the word "consent" in the gubernatorial
consent provision of the Wetlands Loan Act of 1961 and
the constitutionality of certain North Dakota statutes
believed by the United States to unconstitutionally
interfere with the acquisition of wetland easements for
waterfowl production areas in North Dakota's prairie
pothole region covering central and northwest North
Dakota.

Three issues developed at the proceedings
below. Briefly, these are as follows. First, the
United States sought a declaratory judgment action that
these several North Dakota laws are unconstitutional.
Second, the district court held that these laws are
unconstitutional, and that no consent is required.
Third, the United States Court of Appeals for the Eighth
Circuit held not only are these laws unconstitutional

1 and that no consent is required, but that consent is
2 present here and cannot be revoked.

3 As you will see, the dispute between the
4 United States and North Dakota has been narrowed through
5 several concessions made by the United States in its
6 brief. The United States has conceded that consent is
7 required, but that consent can be revoked after a
8 reasonable period of time, and that some of the
9 challenged laws are constitutional, and that others are
10 constitutional only insofar as they cover future
11 acquisitions of wetlands in excess of those wetlands not
12 yet acquired under consents the United States claims to
13 hold.

14 Let me first deal with the question of
15 consent, including whether it is required, whether it
16 has been revoked, and whether it has been exhausted. I
17 then want to deal with the constitutionality of the
18 North Dakota laws in question.

19 Our argument today is staged against the
20 backdrop of our position that the acquisition of these
21 wetlands involves two separate and distinct steps.
22 First, consent must be obtained from our governor.
23 Second, easements must be governed by the real property
24 law of the state of North Dakota.

25 Let me point out that we are talking here

1 about easements, not fee land. Secondly, I want to
2 point out that consent seems to be the main issue as
3 opposed to the unconstitutionality of our laws, because
4 the United States has essentially taken the position
5 that our laws basically constitute a condition of prior
6 gubernatorial consent, and to that extent it cannot fall
7 through on the revocation that we cannot do it. In
8 other words, the governor says -- the United States
9 says, you cannot revoke, you cannot condition your
10 laws.

11 Let's first of all talk about the consent and
12 the first concession on Pages 12 and 16, particularly
13 Footnote 11 of the United States' brief on Page 16. I
14 think that concession, our brief adequately sets forth
15 the laws we are talking about and the particular error
16 made by both the Eighth Circuit Court of Appeals and the
17 District Court, where they held that the gubernatorial
18 consent provision simply doesn't apply, and I think that
19 is adequately taken care of, and I will not be
20 addressing that particular point.

21 Let's talk now about the consent and the
22 revocation of the consent. The revocation we are
23 talking about here is prospective only. North Dakota
24 does not assert that the consent of our governor to the
25 acquisition of these wetland easements is retroactive.

1 We are only talking about prospective.

2 This bill, the Wetlands Loan Act of 1961 --

3 QUESTION: Mr. Attorney General --

4 MR. WEFALD: Yes, sir.

5 QUESTION: -- prospective in what sense? As I

6 -- Maybe I am confused, but it seemed to me there were

7 700,000 acres in which easements had been formally

8 acquired.

9 MR. WEFALD: 765,000, Your Honor.

10 QUESTION: And approximately the same amount

11 in which they were described as unused or

12 unconsummated. Would your prospective argument not

13 apply to the latter group?

14 MR. WEFALD: What we are suggesting is that

15 there is -- that the governor of our state has the right

16 to say, I hereby no longer consent to the acquisition of

17 any easements. What the United States is suggesting is

18 that somehow in the early sixties, 1961 through '64, and

19 again in the early seventies with Governor Link, that

20 certain consents were signed, and that those consents

21 are irrevocable.

22 Now, an example of that consent is found on

23 the Joint Appendix, Page 3. A couple of things to

24 notice about that consent form, first of all. That was

25 prepared by the Fish and Wildlife Service. That

1 document is on official Wildlife Service letterhead.
2 The United States says, well, it says unequivocally in
3 there that the governor consents, and it doesn't say
4 that he says, I am reserving the right to revoke.

5 Query: If the United States, the Fish and
6 Wildlife Service, as the drafter of that instrument had
7 wanted to be clear that the governor could not revoke,
8 couldn't they have put into their instrument, this
9 should be irrevocable? And query: Do you think our
10 governor would have signed it under that circumstance?
11 I doubt it. And that's the issue here.

12 QUESTION: Well, Governor Guy was an able
13 person.

14 MR. WEFALD: He certainly was, a good
15 governor.

16 QUESTION: So?

17 MR. WEFALD: So he signed a document prepared
18 by the Fish and Wildlife Service that said, we are now
19 going to be consenting to the acquisition of easements
20 in North Dakota. He has also signed an affidavit which
21 is in the Joint Appendix that says, I am -- I never
22 intended to relinquish my right to approve from time to
23 time.

24 QUESTION: General Wefald --

25 MR. WEFALD: Yes, sir.

1 QUESTION: -- I found the record, or the
2 opinions, at least, a little skimpy as to exactly what
3 each of these two stages consist of. The first, I
4 gather, is getting consent from the governor.

5 MR. WEFALD: That's correct.

6 QUESTION: Which is given on a county by
7 county basis?

8 MR. WEFALD: Yes.

9 QUESTION: And does the government, the
10 federal government, or the Fish and Wildlife Service
11 simply come in with the sort of consent form that
12 appears on Page 3 of the Joint Appendix? Does it come
13 in with that along with a map showing, you know, how
14 much in Kidder County is being taken, or does the
15 governor simply sign these without having any map before
16 him?

17 MR. WEFALD: You raise an excellent question,
18 Justice Rehnquist. When these signings took place, we
19 don't know exactly what the governor had before him. We
20 know that there was no specific indication as to what
21 particular potholes, what particular wetlands were going
22 to be acquired.

23 QUESTION: Well, that was the governor's
24 problem, I suppose. I mean, if he hadn't wanted to sign
25 the consent, he could have said, show me some maps.

1 MR. WEFALD: Well, I think if the governor's
2 problem at all was that he believed that the United
3 States would treat him fairly in this regard, and that
4 he put his faith in the fact that this acquisition was
5 going to take place over a period of time.

6 Now, one other thing to point out, which is
7 sort of an interesting observation. We first discovered
8 these consents for these 41 counties in 1979, when the
9 interrogatories were answered by the United States
10 government.

11 QUESTION: When you say you first discovered
12 them --

13 MR. WEFALD: That is, we don't have copies of
14 those. You see, they are on official Wildlife
15 stationery. They were taken back by them. We didn't
16 know they existed.

17 QUESTION: But you are running a state
18 government. I mean, you could have asked for a copy if
19 you wanted one.

20 MR. WEFALD: Certainly we could have.

21 QUESTION: You don't say we should appoint a
22 guardian for the state of North Dakota.

23 (General laughter.)

24 MR. WEFALD: Absolutely not. And we do say
25 that we ought to be able to rely on the federal

1 government. These acquisitions were going to take place
2 over a period of time. What would the United States --

3 QUESTION: What was the purpose of the
4 governor ever signing these authorizations if it was a
5 parcel by parcel thing? He authorized the acquisition
6 of certain acreages in each county, certain acreages --

7 MR. WEFALD: Not specific acreages.

8 QUESTION: -- and your claim is that -- Well,
9 do you mean not specific parcels -- up to any amount he
10 agreed to.

11 MR. WEFALD: That's it.

12 QUESTION: And now you are saying it has to be
13 a parcel to parcel thing. Well, there was no possible
14 reason for ever getting the authorization then.

15 MR. WEFALD: Well, first of all --

16 QUESTION: He should have just said, wait a
17 minute, George, when you get ready to acquire a parcel,
18 just come back and ask me.

19 MR. WEFALD: Sure.

20 QUESTION: But he didn't. He says, go ahead
21 and acquire 50,000 acres.

22 MR. WEFALD: Ah ha. He didn't go to the Fish
23 and Wildlife Service and say, I want to give you a
24 consent for 41,000 acres.

25 QUESTION: No, no.

1 MR. WEFALD: They came to him and said, we
2 want you to sign off on 41,000 acres of land.

3 QUESTION: And neither did they ask him to
4 give them anything. They just wanted --

5 MR. WEFALD: And that's the -- The reason the
6 United States came to our governor is because the
7 Congress said that it wanted to continue the partnership
8 established in 1959. I agree with the position of the
9 United States which is that if Congress had not
10 authorized us to consent by law or our governor to
11 consent, that we would have no right to interfere or to
12 be involved in the acquisition process whatsoever, but
13 this federal-state partnership was created by the
14 Congress.

15 QUESTION: General, you talk about the
16 governor's giving the government, giving the federal
17 government, as if the government were kind of conveying
18 state lands, but I take it after the governor consents,
19 that just opens up the acquisition, or if the law
20 provides for a condemnation process. The government
21 still has to go to individual owners in the state of
22 North Dakota and then pay, doesn't it?

23 MR. WEFALD: Absolutely correct. Absolutely
24 correct. And that is what they did over a period of
25 time.

1 QUESTION: And what you are saying is that
2 what the government has already acquired from individual
3 owners under these consents should be inviolate, but as
4 to land for which consent is still outstanding, but
5 where the interest in the land hasn't been acquired from
6 the individual owner, as to that, the consent should be
7 revocable.

8 MR. WEFALD: That's correct.

9 QUESTION: Well, why shouldn't the past
10 acquisitions where individual parcels hadn't been
11 submitted to the governor, why wouldn't they be
12 vulnerable?

13 MR. WEFALD: Your Honor, it is not a question
14 of whether or not the governor had consented to specific
15 parcels. It's a question of whether the United States
16 is still ongoing in its acquisition process, which it
17 was until they abruptly stopped on July 1 of '77. They
18 have under those consents, if they were to proceed
19 ahead, they claim the right to acquire more easements.
20 We say you don't, because that consent is revocable and
21 our governor --

22 QUESTION: And it has been revoked, you say?

23 MR. WEFALD: Well, all we can tell you today
24 affirmatively is that they hold no consent from Governor
25 Olsen to go about this business, and until they hold a

1 consent from Governor Olsen, they are not authorized by
2 this waterfowl -- Wetlands Loan Act of 1961 to come into
3 our state and acquire easements with the fund, with the
4 Stamp Act fund.

5 QUESTION: Well, they do have the unused
6 consent forms from previous governors, right?

7 MR. WEFALD: They have -- they claim that they
8 have acreages yet to acquire. They claim that they have
9 about 700,000 or 600,000 yet to acquire, yet they only
10 want to acquire 20,000.

11 QUESTION: All right, and you are taking the
12 position now that maybe those have been completely used,
13 and furthermore, you are taking the position that maybe
14 the original consent was not sufficiently specific,
15 right?

16 MR. WEFALD: As to the specificity --

17 QUESTION: Did you make those arguments
18 below?

19 MR. WEFALD: The argument --

20 QUESTION: Or are we hearing those for the
21 first time here?

22 MR. WEFALD: The argument with respect to the
23 acreage was made at the Eighth Circuit Court of
24 Appeals.

25 QUESTION: How about the specificity?

1 MR. WEFALD: I believe it was.

2 QUESTION: You don't know?

3 MR. WEFALD: I do not know.

4 QUESTION: Did you make the argument, Attorney
5 General?

6 MR. WEFALD: No. Now, with respect to this
7 consent, it goes back to this federal-state
8 relationship. What we perceive is the Congress
9 intending to create a partnership. We think that we are
10 not the equal partner in this relationship. In fact, we
11 are not even a junior partner. Our status at best is
12 one of a minority stockholder in a closely held
13 corporation. We simply aren't -- It's as if we put our
14 capital in at one point and all of a sudden it's lost
15 forever. If Congress --

16 QUESTION: May I ask you one other question --

17 MR. WEFALD: Yes, sir.

18 QUESTION: -- about the specificity of the
19 consent? Have you abandoned the argument that I thought
20 you were making in your brief that they had to be parcel
21 by parcel?

22 MR. WEFALD: That's what is suggested in the
23 Swan Lake case. What we are suggesting --

24 QUESTION: But what is your position?

25 MR. WEFALD: We are not suggesting that

1 applies retroactively.

2 QUESTION: You suggest -- but are you
3 suggesting the statute requires parcel by parcel
4 consent?

5 MR. WEFALD: No.

6 QUESTION: But you say that until the consent
7 is revoked, or something equivalent to it, a --

8 MR. WEFALD: They can go ahead.

9 QUESTION: -- they can go ahead --

10 MR. WEFALD: Right.

11 QUESTION: -- even though it isn't parcel by
12 parcel consent?

13 MR. WEFALD: That's correct. Yes, sir. And
14 that's what they have done in fact, and that is how they
15 get the 765,000 acres that they are claiming that show
16 within the boundaries of 4.8, but we will talk about
17 that in just a moment.

18 QUESTION: May I just ask you one other --

19 MR. WEFALD: Yes, sir.

20 QUESTION: What is the relevance of your
21 parcel by parcel consent argument in your brief then?

22 MR. WEFALD: Oh, I think it is interesting
23 with respect to the question of specificity. I guess I
24 wouldn't rest my entire case on the specificity point.

25 QUESTION: Well, you mean, we can just forget

1 about that part of it?

2 MR. WEFALD: Well, I want you to think about
3 it, please.

4 Let's take a look at that consent again.

5 QUESTION: South Dakota area. North Dakota
6 area.

7 MR. WEFALD: Yes. Well, whatever.

8 I think it is fair to ask some questions about
9 Congressional intent. I think it is fair to believe
10 that Congress in its refusal to repeal the gubernatorial
11 consent provisions over the years has indeed intended
12 that we have an active voice in this partnership, and in
13 fact we would be able to consent.

14 It is not that the -- the government doesn't
15 contend that that consent is irrevocable. It simply
16 says it is irrevocable only after a reasonable period of
17 time. It is then revocable. We could have placed
18 conditions, as has been suggested. Would that have made
19 the government's position any better had we placed
20 conditions on it?

21 QUESTION: Well, wouldn't it have been good to
22 have gotten a copy of the thing that the governor
23 signed?

24 MR. WEFALD: That probably would have been an
25 excellent idea, but when you trust the Fish and Wildlife

1 Service, you just have to deal with them as is. And we
2 did. We dealt in good faith with the Fish and Wildlife
3 Service. We certainly didn't suggest at the outset that
4 we had to be doubtful about the federal government. My
5 goodness.

6 QUESTION: Has your government signed any
7 other papers without keeping a copy of it?

8 (General laughter.)

9 MR. WEFALD: When we are dealing with the
10 federal government, we believe that we have a right to
11 believe in the good faith, and in this particular case
12 we did put our good faith into it, and over time that
13 may not have been warranted.

14 QUESTION: May I ask one other question?

15 MR. WEFALD: Yes, sir.

16 QUESTION: You said the government concedes
17 that these consents are revocable. I didn't read the
18 government's brief that way. They say in words, "The
19 consent, once given, cannot be revoked," on Page 22.

20 MR. WEFALD: Well, let me see. They do
21 explain on several pages in their brief, specifically
22 14, 25, 26, and 27, that they consent can be subject to
23 revocation after a reasonable period of time. That is
24 the qualifier they put on it. They don't say that it
25 simply can never be revoked. They put a qualifier upon

1 it. And I indeed agree that in fact it is revocable and
2 was intended so by the United States Congress, and that
3 in fact the federal government is not suffering any
4 detriment whatsoever by virtue of the prospective
5 revocation. All they simply have to do is work with us.

6 QUESTION: Have any of Governor Guy's or
7 Governor Link's successors in office attempted to revoke
8 the consent?

9 MR. WEFALD: The point is simply this. The
10 United States today does not hold a consent from
11 Governor Olsen.

12 QUESTION: I know, but isn't that a yes or no
13 answer to that?

14 MR. WEFALD: The answer is, no, they haven't.
15 There is no specific document signed by Governor Link,
16 Governor Guy, or Governor Olsen that says, I hereby
17 revoke, period.

18 QUESTION: Well, have there been things other
19 than specific document signings that might indicate an
20 intent to revoke?

21 QUESTION: There has been a statute, hasn't
22 there?

23 MR. WEFALD: Well, there has been --

24 QUESTION: A state statute, which --

25 MR. WEFALD: Those -- but those, interestingly

1 enough -- the question was with respect to the
2 governor's revocation, and the governor has not. The
3 Fish and Wildlife Service has treated the enactments of
4 1977 as a revocation because they said, these constitute
5 conditions with which we cannot live. You cannot do
6 that, because you cannot revoke. Therefore, on the
7 advice from the Attorney General of the United States,
8 we are only going to try to acquire this one piece of
9 land, and we are going to stop right here and bring a
10 lawsuit, and not acquire any more land until such time
11 as we resolve this at this Court.

12 Now, so for all practical purposes, the United
13 States has treated it as a revocation, although they do
14 not argue as such.

15 QUESTION: A legislative -- a legislative
16 revocation.

17 MR. WEFALD: And in fact, the revocation that
18 the legislature specifically imposed was a revocation of
19 our 1931 legislative consent to the acquisition of
20 refuges -- lands.

21 QUESTION: If the governor -- if the state law
22 purported to revoke a governor's consent, and the
23 governor turned right around and gave it again, I
24 suppose as far as the federal law is concerned the
25 condition would be satisfied. There would be consent.

1 MR. WEFALD: It is simply the governor has not
2 consented. They hold no consent from Governor Olsen.

3 QUESTION: May I ask an impertinent question?

4 MR. WEFALD: Sure.

5 QUESTION: Are there any political overtones
6 in this litigation? I don't -- I am not close enough to
7 North Dakota politics. Are the three governors whose
8 names have been mentioned, Guy, Link, and Olsen, are
9 they all of the same party?

10 MR. WEFALD: No, they are not.

11 QUESTION: Which is who?

12 MR. WEFALD: Guy and Link are Democrat, Olsen
13 is Republican. And there are no -- this -- over the
14 years starting with the Kennedy Administration this
15 hasn't been a partisan political issue. We have been
16 unilaterally sort of not had a good relationship with
17 all the Secretaries of Interior until this year, and we
18 are very pleased with the present relationship that we
19 do have. I wanted to note that for the record.

20 (General laughter.)

21 MR. WEFALD: Let's talk about the other
22 point.

23 QUESTION: But you are interested in keeping
24 the ducks breeding and flying. That is kind of a major
25 industry is the Dakotas.

1 MR. WEFALD: Well, it sure is. We are the
2 duck factory of America, and it is indeed a big industry
3 in North Dakota. A lot of hunters come in. And we have
4 done our part since statehood, since the first
5 cultivated land was broken in North Dakota.

6 QUESTION: It is impossible to find a lawyer
7 practicing during the duck season, isn't it?

8 (General laughter.)

9 MR. WEFALD: Well, we have some goose hunters
10 and duck hunters, although I myself don't do that.

11 Let's talk about this 4.8 million acres for a
12 moment. I want to lodge with the Court as a part of
13 this argument this really nice map. It has marked on it
14 in purple all of the legal subdivisions constituting
15 this 4.8 million acres of easement, and you take a look,
16 you've got to remember that the total legal subdivision
17 -- holding fee in an easement is about 5.3 million.
18 That is 8,300 square miles, bigger than the entire state
19 of Massachusetts, New Jersey, et cetera.

20 I must point out in fairness that when we show
21 the legal subdivisions of 4.8 million acres, it is the
22 position of my Sister Etkind and the United States that
23 the lands claimed directly by the United States are
24 about 765,000 wetland acres to which they hold
25 easements.

1 Our position is --

2 QUESTION: What is this map? Is it part of
3 the record, or just --

4 MR. WEFALD: No, it is basically information.
5 It has not been ever put in as an exhibit.

6 QUESTION: Your opponents have seen it, though?

7 MR. WEFALD: They have. And that is why I
8 explained that we have a difference of opinion as to
9 what it shows, and what is in there.

10 I think that as a backup position with respect
11 to the question of consent and the acquisitions, that
12 even if it is not necessary to address the question of
13 revocability, I think we can successfully find that the
14 government has exceeded all of its acreage
15 acquisitions. They have legal subdivisions describing
16 easements in North Dakota totaling about 4.8 million
17 acres. That is well in excess of about the 1.3 million
18 acres that they were authorized to acquire as shown in
19 the table in the Joint Appendix at Pages 4 and 5.

20 Incidentally, we use the figure of 1.5, but I
21 think it is closer to 1.3, because there were some --
22 you are only supposed to take the last figure as shown
23 on the particular appendix page.

24 QUESTION: Are those larger acreages paid for
25 out of the fund?

1 MR. WEFALD: No. They are not paid for.
2 Unfortunately, they take a legal description to it, and
3 they claim to impose no restrictions on it except that
4 the farmer can use it only insofar as it does not
5 interfere with or violate the restrictions on wetlands.

6 QUESTION: Does the legislation in your view
7 require the consent of the governor or the state agency
8 only for acquisition out of the fund?

9 MR. WEFALD: Yes, and that is what the law
10 specifically provides. It is just that the Congress put
11 the money into it, and has continually put money into
12 that fund for the purpose of making these particular
13 acquisitions, but the United States in this particular
14 case has acquired 4.8 million acres, and there are
15 several cases below that in fact pose -- that in fact
16 bring all the total legal subdivision into the National
17 Wildlife Refuge System and not just the waterfowl
18 production areas, and in fact in the untried case of
19 *Towner v. Key*, on Footnote 14 of Page 19 in the United
20 States' brief, the United States in fact claims the
21 entire tract is part of the National Wildlife Refuge
22 System, but it says that it is only for access.

23 Let's take a look at the laws for just a few
24 moments here that are alleged to be unconstitutional.
25 The laws basically are in two groups. One is entitled

1 47, and that's the one that deals strictly with
2 easements. That's the one that says all easements in
3 North Dakota, regardless of by whom held, will not be in
4 excess of 99 years. No direction from the United States
5 Congress as to how long these easements are to be held.
6 That is simply an administrative determination by the
7 Secretary. At the time the legislation was enacted,
8 they were taking easements of 20, 30, up to 99 years.

9 The Secretary desires perpetual easements, but
10 that is not required, and in fact that is governed by
11 the law of the state of North Dakota. We deem it not to
12 be an impediment, and we believe that it should be
13 upheld as to constitutionality.

14 As to Section S of the provisions in Title
15 20.1, they are in 0218, 18.1, 18.2, 18.3, somewhat run
16 together, 18 is our 1931 legislative consent, and we
17 simply amended that to say that if you don't agree with
18 us, that is, if you don't go along with the other
19 sections, we are going to revoke the consent. 18.1
20 simply provides for public participation in the wetlands
21 acquisition process, public comment.

22 I think there is an objection to the
23 environmental impact statement type requirement, but as
24 we argue this case here in the capital of this great
25 nation from which NEPA came and the environmental impact

1 statements, surely it is clear that there is a right and
2 a good reason for public participation and a need for
3 doing so, whether it is at the federal level or the
4 state level, and we simply imposed a reasonable and a
5 rational requirement in fulfillment of our sovereignty.

6 The 18.2 law advises the landowners of their
7 right to negotiate. There is nothing wrong with that.
8 There can't be anything unconstitutional about that.
9 And indeed, the United States concedes that that is
10 constitutional, notwithstanding the pronouncements of
11 the courts below. They simply indicate that the
12 constitutionality is dubious insofar as that section
13 talks about after expanded wetlands and the right of the
14 farmer to drain those after expanded wetlands back down
15 to the original wetland parameters.

16 Insofar as that happens, we believe that
17 unless the government negotiates specifically with the
18 individual, unless the farmer knows of his right to
19 negotiate about the after expanded wetlands, that the
20 government has not made a valid acquisition. In other
21 words, if they want the after expanded wetlands, then
22 they should negotiate with the farmer, and the farmer
23 should be free to negotiate, and I can't imagine that
24 there is anything unconstitutional with that.

25 Yes, sir.

1 QUESTION: Is it your position that the state
2 statutes should be interpreted as simply putting
3 conditions on the pre-existing governor's consent?

4 MR. WEFALD: Yes. That is as to --

5 QUESTION: So that Governor Guy's consent has
6 never been revoked.

7 MR. WEFALD: That's correct.

8 QUESTION: And so if the United States must
9 have a governor's consent -- suppose the United States
10 went ahead and satisfied the statutory conditions, the
11 state statutory conditions.

12 MR. WEFALD: Yes.

13 QUESTION: It would still have to satisfy the
14 federal statutory conditions.

15 MR. WEFALD: That's correct.

16 QUESTION: Namely in having a governor's
17 consent.

18 MR. WEFALD: That's correct.

19 QUESTION: And that is Governor Guy's
20 consent.

21 MR. WEFALD: Until such time as it is revoked
22 by Governor Olsen.

23 QUESTION: So the governor's consent has never
24 been revoked.

25 MR. WEFALD: That's correct.

1 QUESTION: And so the question is whether the
2 legislature may put conditions on a governor's consent
3 that the federal act requires that the federal act does
4 not authorize.

5 MR. WEFALD: As to the question of the
6 relationship between our governor and our legislature, I
7 believe that is properly a matter for state law and our
8 state courts, and is not properly before this Court.

9 QUESTION: I know, but it is still a question
10 of whether there is a governor's consent under the
11 federal law.

12 MR. WEFALD: Yes.

13 QUESTION: And the federal law doesn't require
14 any legislative consent.

15 MR. WEFALD: That's correct.

16 QUESTION: And you do not claim now that
17 Governor Guy's consent has ever been revoked.

18 MR. WEFALD: It has never been specifically
19 revoked by Governor Guy, Governor Fink, or Governor
20 Olsen.

21 QUESTION: Or by anybody else.

22 MR. WEFALD: That's correct.

23 QUESTION: And if the United States satisfied
24 the legislative conditions imposed by the state
25 legislature, it could go ahead based on Guy's consent.

1 MR. WEFALD: It could until Governor Olsen
2 revokes it, which he will do.

3 QUESTION: Well, he has never revoked it.

4 MR. WEFALD: Yes, but he simply hasn't had to
5 act --

6 QUESTION: You are not authorized to say that
7 he has revoked it.

8 MR. WEFALD: No, he hasn't.

9 QUESTION: You don't even claim that he has
10 revoked it.

11 MR. WEFALD: I do not claim he has revoked
12 it. I have a reasonable expectation as to what he will
13 do when I talk to him about it, but he has not done so
14 to this point.

15 I will reserve the balance of my time for
16 rebuttal.

17 CHIEF JUSTICE BURGER: Ms. Etkind.

18 ORAL ARGUMENT OF BARBARA E. ETKIND, ESQ.,

19 ON BEHALF OF THE APPELLEE

20 MS. ETKIND: Thank you, Mr. Chief Justice, and
21 may it please the Court, I would like to begin, if I
22 may, with a few concerns that were raised during General
23 Wefald's argument.

24 With respect to your question, Justice
25 Blackmun, about prospective, retrospective revocation, I

1 just want to make clear we believe that it is a
2 prospective revocation here. He is retrospectively
3 revoking those consents that have been given, even
4 though they have not yet been exercised by --

5 QUESTION: Who is?

6 MS. ETKIND: Well, I would say -- we would
7 be --

8 QUESTION: I take it that the Attorney General
9 doesn't claim Governor Guy's consent has ever been
10 revoked.

11 MS. ETKIND: We would be very pleased if the
12 consent had ever been revoked, but I feel constrained to
13 show you that in a stipulation filed in the District
14 Court, North Dakota took the position that the consents
15 could be cancelled and in fact had been cancelled.

16 QUESTION: Well, by whom?

17 MS. ETKIND: They were not specific, but I
18 think --

19 QUESTION: Well, the Attorney General now says
20 the governor's consent has never been revoked.

21 MS. ETKIND: Okay.

22 QUESTION: And if you were going to satisfy
23 the legislative conditions imposed by the state
24 legislature, you would have to still have a governor's
25 consent, and whose would it be?

1 MS. ETKIND: Well, we would say that we have
2 the consent of Governor Guy, Governor Link, and -- of
3 Governor Guy and Governor Link, and that they remain
4 outstanding. But as General Wefald explained, Governor
5 Olsen is ready to revoke those consents, and in fact I
6 think that it is a fair reading of the state's position
7 all along that they have been, that they have been
8 revoked.

9 QUESTION: Where is that stipulation?

10 QUESTION: Is that the stipulation on Page 71?

11 MS. ETKIND: Yes.

12 QUESTION: Of the Joint Appendix?

13 MS. ETKIND: Yes. Page 71 and 72, the top of
14 Page 72, right before the paragraph numbered 4.

15 I would also like to take -- to point out in
16 contrast to the implication that the United States was
17 overreaching the state of North Dakota when we first
18 went to get these consents, as was pointed out, Governor
19 Guy had an opportunity to sign any sort of consent he
20 wanted to sign. In fact, with respect to our fee
21 acquisitions, he explicitly kept the right to consent on
22 an acquisition by acquisition basis, and if he had
23 wanted to do so with respect to fee -- with respect to
24 easements, he could have done that as well.

25 QUESTION: Ms. Etkind --

1 MS. ETKIND: Yes.

2 QUESTION: -- supposing that the 1977 statute,
3 instead of reading the way it did, said that the
4 legislature of North Dakota hereby cancels the consent
5 previously given by Governors Guy and Link and forbids
6 any future governor of North Carolina from ever entering
7 into such consents.

8 MS. ETKIND: I believe that the legislature of
9 North Dakota could do that on a prospective basis.

10 QUESTION: If the governor can speak for the
11 state, presumably the legislature can restrict his
12 authority to -- under federal law.

13 MS. ETKIND: I believe that the governor
14 needed authority under state law to consent, and if he
15 did not have that authority, then he could not make the
16 consent.

17 QUESTION: Well, the stipulation just recites
18 what the state's position is.

19 MS. ETKIND: That's right.

20 QUESTION: And it recites your contrary
21 position.

22 MS. ETKIND: That's right.

23 QUESTION: And --

24 MS. ETKIND: But it recites their position --

25 QUESTION: But it doesn't -- but it doesn't

1 explain how the state claims cancellation has been
2 effected.

3 MS. ETKIND: That's right, but in 19 --

4 QUESTION: Have they ever taken a position in
5 this litigation how it has been effected? The Attorney
6 General now says it has never been effected.

7 MS. ETKIND: I understand that. In the papers
8 in the District Court, the -- North Dakota took the
9 position that our declaratory action judgment action was
10 not right on the ground that the gubernatorial consents
11 had been revoked, and since we --

12 QUESTION: By whom? By whom?

13 MS. ETKIND: The state -- at that point, the
14 state was relying on a 1979 statement by Governor Link.
15 Now, he said in that statement, I will not consent to
16 any further wetland acquisitions. We explained in our
17 brief that we think that is ambiguous, but I think the
18 fair understanding of what he was saying is that he
19 viewed the consents that already were in effect not to
20 be in effect, and he wasn't going to revitalize them.

21 QUESTION: That is somewhat ambiguous at the
22 top of Page 72, is it not?

23 MR. ETKIND: Well, I think they are more like
24 alternative arguments than ambiguous.

25 QUESTION: They say it can legally be

1 cancelled unilaterally by the state, that they have been
2 cancelled, and that even if they have not been
3 cancelled, and so on.

4 MS. ETKIND: That's right, but I think they
5 were trying to make alternative arguments. North Dakota
6 has come to rely more and more on its argument that even
7 if its governor's consent cannot be revoked, the United
8 States already has acquired more acreage than the
9 governors already -- ever approved, but the state did
10 not present this issue in its jurisdictional statement,
11 and it therefore cannot rely on it before this Court,
12 nor is that issue fairly comprised within the issues
13 that were presented.

14 And in any event, the contention is specious.
15 It is because of the peculiar nature of waterfowl
16 production area country, that is, lands that have been
17 -- that are characterized by numerous small, scattered,
18 and irregularly shaped wetland. The Secretary early on
19 adopted the practice of acquiring easements covering all
20 of the wetlands occurring on a given described legal
21 subdivision, but while the easement instrument describes
22 a legal subdivision, the easement restrictions which are
23 only on draining, filling, leveling, and burning,
24 expressly apply only to the wetlands occurring on that
25 subdivision.

1 The landowner thus remains completely free to
2 utilize and dispose of the entire balance of his land,
3 that is, the upland, in any way he sees fit. The only
4 conceivable restriction on the landowner's use of the
5 uplands, in addition to not impeding the Secretary's
6 right of access across them to get to the wetlands, is
7 that he cannot take any action on the uplands that would
8 have the expressly prohibited purpose of draining the
9 wetlands.

10 Indeed, Interior's standard easement document
11 permits the landowner to farm even the wetlands when
12 they are dry of natural causes.

13 As General Wefald pointed out, the question
14 before this Court is a straightforward one of statutory
15 construction. The Duck Stamp Act authorizes the United
16 States to use money from the Migratory Bird Conservation
17 Fund to purchase small wetland and pothole areas,
18 interests in them, and rights of way to provide access
19 to them.

20 When Congress became aware in the late 1950's
21 of the ongoing destruction of much of the nation's
22 wetlands, it authorized the United States to buy up
23 portions of these wetlands in order to preserve the
24 desired waterfowl populations and distribution, and in
25 1961, in the Wetlands Loan Act, it authorized a \$105

1 million interest-free loan to the Migratory Bird
2 Conservation Fund in order to make possible a crash
3 program of wetlands acquisition.

4 At the same time, it provided that no land
5 shall be acquired with money from the Migratory Bird
6 Conservation Fund unless the acquisition thereof has
7 been approved by the governor of the state or the
8 appropriate state agency.

9 The question in this case is whether Congress
10 intended that governors would be permitted to revoke
11 those consents once validly given.

12 QUESTION: Are you taking the position that
13 the consent can be revoked within a reasonable time?
14 And if so, why?

15 MS. ETKIND: We have conceded that after a
16 reasonable amount of time for the federal government to
17 act on the consents, they -- they perhaps could be
18 revoked, but we say that that is not the case here.

19 QUESTION: Well, on what do you base that
20 theory? The reasonable time?

21 QUESTION: And has it always been your
22 position?

23 MS. ETKIND: No, it was not the position in
24 the courts below, but then we have come a long way from
25 the position in the -- The courts below held that we

1 didn't need to get any consent whatsoever, but we
2 believe that that flies in the face of the statutory
3 language, as well as in the face of our consistent
4 administrative practice. Ever since 1961, the Fish and
5 Wildlife Service has gone to the states and has acquired
6 consents for easements for waterfowl production areas.

7 QUESTION: But your practice has always been
8 to do it in the manner you did it here, namely, county
9 by county, rather than parcel by parcel?

10 MS. ETKIND: That's not in the --

11 QUESTION: Or do you know?

12 MS. ETKIND: I don't know.

13 QUESTION: Or you have done it both ways?

14 MS. ETKIND: I believe that we have always
15 done it county by county, but that is not in the record,
16 and I can't say for certain.

17 QUESTION: I interrupted Justice O'Connor. Do
18 you want to answer her question?

19 MS. ETKIND: Right. We believe that that
20 question is not presented here, because clearly here the
21 federal government has acted reasonably in not acting on
22 this consent.

23 QUESTION: In waiting 17 years?

24 MS. ETKIND: I'm sorry?

25 QUESTION: In waiting 17 years to --

1 MS. ETKIND: Well, in fact, we have not been
2 waiting 17 years. Not all of these consents were given
3 at the outset of the program in 1961. In fact, as late
4 as 1973, Governor Link authorized the acquisition of
5 more easement lands, and in 1977 he authorized some
6 adjustments in the acreage. So it hasn't been a full 17
7 -- nearly a full 17-year period. Moreover --

8 QUESTION: Are there some consents executed by
9 Governor Guy, who was the one that executed them in the
10 early sixties, I take it, that still have not been
11 acquired by the government?

12 MS. ETKIND: That's probably true, because
13 they weren't done on a parcel by parcel area. It's not
14 -- I couldn't say for sure, but I would think that there
15 probably are some areas in some counties that have not --

16 QUESTION: So then Justice O'Connor's
17 suggestion of a period of 19 years would apply to those
18 particular ones.

19 MS. ETKIND: To some -- to some acreage. To
20 some acreage, that's true. But the moneys for our
21 acquisitions were not appropriated until -- the moneys
22 under the Wetlands Loan Act were not appropriated until
23 the very first instance was in 1963, and since that time
24 we've been operating within -- we've been constrained by
25 the appropriations from Congress under the Wetlands Loan

1 Act and under the revenues that we get from the sale of
2 duck stamps.

3 QUESTION: Well, just as the state, I suppose,
4 has to bear the responsibility for the failure of
5 Governor Guy to ask for a copy, if he didn't, I suppose
6 the federal government has to bear the responsibility
7 for the failure of Congress to appropriate money. I
8 mean, that can't inevitably be a defense to conduct that
9 would otherwise lead to a forfeiture or a divestiture of
10 a claim.

11 MS. ETKIND: Well, but even within those
12 constraints, regardless of who is responsible for them,
13 we have gotten consents from the governors up to 1.5
14 million acres, and until 1977 we exercised a full half
15 of those. We have more than 750,000 acres.

16 QUESTION: Well, but -- what have you done,
17 stockpiled the other half?

18 MS. ETKIND: No. No. For one thing, as
19 Congress foresaw, the negotiation process does take some
20 time. In these programs, we only buy from willing
21 sellers. We don't --

22 QUESTION: You don't have the authority to
23 condemn?

24 MS. ETKIND: We have the authority, but we
25 have never exercised it.

1 QUESTION: You have never used it.

2 MS. ETKIND: Yes. That, of course, takes some
3 time. As Congress recognized when it conceived of this
4 program, it was a huge program. It contemplated the
5 federal government acquiring an additional two and a
6 half million acres of land, and it realized this was
7 going to take some time to do. It realized the type of
8 intricate planning that was going to be involved.

9 Contrary to stockpiling our consents, we have
10 had to plan out where we are going to buy these, what
11 would be the lands that would be best used by the
12 expenditure of limited federal funds.

13 The statutory language, of course, contains no
14 mention of revocability. It provides simply that no
15 lands shall be acquired until the acquisition has been
16 approved by the governor or appropriate state agency.
17 It thus makes no provision for the revoking, qualifying,
18 or conditioning of any consent once it is validly
19 given. By its express terms, all the legislation
20 required is that the governor or state agency at some
21 point have consented to the acquisition.

22 There is no reason why this plain language
23 should not prevail. Particularly since in the absence
24 of explicit legislation, the United States does not need
25 a state's consent to purchase land within its boundaries

1 at all, it would seem that any legislatively imposed
2 consent requirement should be narrowly construed.

3 QUESTION: Why do you say that?

4 QUESTION: Yes.

5 QUESTION: Why shouldn't the full intent of
6 Congress be given expression to?

7 MS. ETKIND: Well, we believe the full intent
8 of Congress should be, but we believe that the full
9 intent of Congress was that the states had a right to
10 withhold their consent at the outset if that's what they
11 chose to do, or to condition it prospectively, but not
12 to revoke it once it had been given.

13 QUESTION: Well, I was curious about where you
14 derived the principle of narrow construction.

15 MS. ETKIND: From the fact that in the normal
16 case, we would be able to just go into a state and buy
17 the land.

18 QUESTION: Well, but Congress has said this
19 isn't going to be the normal case.

20 MS. ETKIND: That's right, but this is a
21 proviso, a limiting proviso at the end of a general
22 enabling provision, and the statutory rule of
23 construction is that such provisions are narrowly
24 construed.

25 The legislative history bolsters the plain

1 meaning of the statute. Like the statute itself, the
2 history contains no mention anywhere of a right to
3 revoke gubernatorial consent. To be sure, Congress
4 intended that the legitimate concerns of the states
5 wouldn't be ignored, and therefore it required the
6 United States to obtain prior gubernatorial consent, but
7 the main thrust of the legislative history is Congress's
8 concern with the urgency of the need for the federal
9 acquisition of wetlands.

10 As I mentioned in response to Justice
11 O'Connor's question, the Congress knew that it would be
12 impossible for the federal government to bring about a
13 program of this magnitude without meticulous long-range
14 planning, and it would have been wholly inconsistent
15 with that recognition for Congress to have intended the
16 governors would be free to revoke their consents once
17 validly given, at least until the United States had had
18 a reasonable time to act on them.

19 The Secretary must be able to rely on the
20 continued effectiveness of gubernatorial consent, at
21 least for a reasonable time, in order to obtain the
22 optimal amount and the type of wetlands in the
23 configurations and in the areas that will most further
24 Congress's goal of protecting and preserving waterfowl
25 populations and distribution.

1 QUESTION: I think there is some tension in
2 your argument that the statute has to be narrowly
3 construed, and yet we should interpret it as giving the
4 state a reasonable time within which to revoke, but 19
5 years is not a reasonable time.

6 MS. ETKIND: Well, I don't think -- well, for
7 one thing, our argument doesn't -- this case doesn't
8 require finding that the states can revoke after a
9 reasonable period of time, since -- if you agree with me
10 that we have not been unreasonable here.

11 QUESTION: Well, that's a question that
12 perhaps this Court isn't equipped to decide.

13 MS. ETKIND: The question of the
14 reasonableness?

15 QUESTION: Right.

16 MS. ETKIND: I think the Court can look to the
17 state of the record just in the sense of how many
18 acquisitions we have made, with how much money, over the
19 period of time. I think it's a question, not
20 necessarily one of a certain number of years. In some
21 contexts perhaps 20 years would have been unreasonable,
22 if we had had these consents and there were no barriers
23 to our purchasing the easements, but --

24 QUESTION: Wouldn't you ordinarily have a
25 hearing before some fact-finder on a question such as

1 reasonableness, though, with the focus being on the sort
2 of issues you say, rather than just kind of gleaning
3 from a record that was devoted to focusing on other
4 issues what you can about reasonableness?

5 MS. ETKIND: In the ordinary course, perhaps
6 that would be -- that would be the thing that would be
7 done. We submit that isn't necessary to do here, and we
8 further submit that any further delay in this case would
9 be unfortunate. As Congress recognized, and is
10 continuing to recognize, these wetlands are disappearing
11 very quickly.

12 QUESTION: Nineteen years is fine, but 20
13 would be fatal.

14 MS. ETKIND: If the Secretary could not rely
15 on the continued effectiveness of gubernatorial
16 consents, he would be forced to purchase immediately any
17 land that he could as soon as the governor had consented
18 to its acquisition, lest that consent be withdrawn,
19 without being able to weigh the relative merits of
20 potential acquisitions that would have to be purchased
21 out of very limited federal funds.

22 In addition, if the Secretary could not count
23 on the continued effectiveness of the consents he
24 received, federal resources would be wasted in the
25 negotiation of acquisitions that ultimately could be

1 frustrated by gubernatorial revocation.

2 Moreover, permitting governors to revoke their
3 consents would seriously delay and therefore ultimately
4 frustrate the purpose of the program as a whole, the
5 acquisition of wetlands. In each case of revocation,
6 the planning and negotiation processes would have to
7 begin again. In turn, in view of this rapid shrinkage
8 and destruction of the nation's wetlands, and the
9 continued escalation of the cost of acquiring them, any
10 delay in acquisition would necessarily result in the
11 ultimate acquisition of fewer acres of wetlands.

1 QUESTION: Why didn't he just -- why was the
2 -- why was the position of North Dakota such a hindrance
3 to the Federal Government?

4 MS. ETKIND: Because we needed their consent,
5 and once they said --

6 QUESTION: Well, why didn't you just get it?

7 MS. ETKIND: After 1977?

8 QUESTION: Yes.

9 MS. ETKIND: They refused to give it after
10 1977.

11 QUESTION: No, they didn't. They just had
12 conditions.

13 MS. ETKIND: There was no question that they
14 were refusing to give it.

15 QUESTION: Well, did you -- did North Dakota
16 take the position that there's no way that we'll ever
17 give consent to acquisition of any more wetlands? I
18 thought there were just conditions on it.

19 MS. ETKIND: Well, as I said before, I believe
20 it's been North Dakota's position that it has revoked.

21 QUESTION: Well, it has revoked. It may be,
22 they may have revoked. But they've never -- has the
23 United States ever tried to satisfy those conditions and
24 get consent?

25 MS. ETKIND: Governor Link said in 1979 that

1 he would not consent to any further wetlands
2 acquisition.

3 QUESTION: Even with the consent -- even
4 satisfying the conditions?

5 MS. ETKIND: Well, he was tying it to the
6 Garrison diversion project, which -- it's a completely
7 different, completely separate matter. There have been
8 numerous disputes between the Federal Government and
9 North Dakota, and in a sense the wetlands acquisition
10 program has sort of been held hostage to the resolution
11 of those other disputes.

12 There was no question that we were not going
13 to be able to get any more land and that they weren't
14 going to consent to that.

15 QUESTION: Well, Ms. Etkind, why is this one
16 thing, this one question of whether the present Governor
17 or perhaps his predecessor will or will not consent,
18 will or will not revoke, so obscure in this record? I
19 get the impression both from you and your opponent that
20 both of you perhaps, or your clients perhaps, pretty
21 much tiptoed around actually going to Governor Link or
22 Governor Olson and saying, you know, will you revoke or
23 will you consent. Am I wrong?

24 MS. ETKIND: I don't think that's the case. I
25 think it was just so clear, there was such hostility,

1 the state was not going to consent to any more.

2 QUESTION: Well, has he ever proposed -- have
3 you ever gone to the Governor, Olson or to Link, and
4 said, here's a tract, a specific tract of land we want
5 to acquire, give us your consent?

6 MS. ETKIND: Well, that was done with respect
7 to fees, yes. Since 1977 no fees have been authorized
8 and they have been returned to the state to ask for
9 action on them, and they were refused.

10 QUESTION: By the Governor? By whom, by the
11 Governor?

12 MS. ETKIND: Well, they've been refused since
13 -- they were returned in '79, so they've been -- I'm not
14 sure when Olson took over.

15 QUESTION: Well, it's the Governor's consent
16 that you needed.

17 MS. ETKIND: That's right.

18 QUESTION: Were they turned down, the specific
19 tracts turned down, by the Governor?

20 MS. ETKIND: Yes. They have not been -- they
21 have not been given. Whether in fact he signed
22 something that said "Declined," I don't know. But he
23 certainly didn't approve them, and we gave them for his
24 approval. They have never been approved.

25 QUESTION: On the question of revocable and

1 irrevocable, that's what we have to decide.

2 MS. ETKIND: Exactly.

3 QUESTION: You found it necessary to get the
4 Governor's consent.

5 MS. ETKIND: That's right.

6 QUESTION: You couldn't operate without it?

7 MS. ETKIND: That's right.

8 QUESTION: Was it your duty to get it
9 irrevocable?

10 MS. ETKIND: We believe that we did.

11 QUESTION: Well, I don't see the word
12 "irrevocable" there.

13 MS. ETKIND: He consented to any wetlands.

14 QUESTION: But I mean, the word "irrevocable"
15 is not there.

16 MS. ETKIND: No, the word is not there.

17 QUESTION: Well, isn't that your duty? You're
18 the one who was doing the negotiating and you're using
19 your paper to write on.

20 MS. ETKIND: Perhaps they could have been more
21 artfully drawn.

22 QUESTION: So you don't think the state
23 unreasonable in saying the failure of you to do it
24 leaves you outside?

25 MS. ETKIND: Oh, I do think that is

1 unreasonable.

2 QUESTION: But you said it was a reasonable
3 time, and you will decide what is a reasonable time.

4 MS. ETKIND: Well, the Court can decide what
5 is a reasonable time. But I think that as long as the
6 Federal Government has been actively pursuing this
7 program of acquiring the wetlands, which it certainly
8 has -- the only reason we haven't been getting anything
9 from '77 'til now is because of the state's refusal to
10 allow us to -- I think that qualifies as reasonable.

11 QUESTION: Well, suppose the present Governor
12 revokes it. What happens?

13 MS. ETKIND: If the present Governor revokes?

14 QUESTION: Yes.

15 MS. ETKIND: I think we can't purchase, if he
16 could, if he had the power to revoke and he revoked.

17 QUESTION: He issues an executive order and
18 says, by this order I revoke any alleged signed paper
19 you have on your stationery that a former Governor
20 signed.

21 MS. ETKIND: I believe that's exactly the
22 question before this Court.

23 QUESTION: Well, could he do it?

24 MS. ETKIND: No, he cannot do it.

25 QUESTION: You'd take him to court if he did

1 it now, I take it? The Governor, you'd take him to
2 court.

3 MS. ETKIND: We believe we've taken him to
4 court.

5 QUESTION: Well, if it's a subsequent
6 development on this posture, if it's done subsequent to
7 this day.

8 MS. ETKIND: That's right.

9 QUESTION: That's a new event.

10 MS. ETKIND: That's right.

11 QUESTION: And you'd take him to court then.

12 MS. ETKIND: That's right.

13 QUESTION: You'd try to hold him in contempt,
14 wouldn't you, for violating an outstanding injunction?

15 MS. ETKIND: I'm sorry?

16 QUESTION: Wouldn't you try to hold him in
17 contempt if he did it now? Isn't there an injunction
18 outstanding, a declaratory judgment order at least, that
19 he can't do it?

20 MS. ETKIND: I'm not sure that there's an
21 injunction outstanding.

22 QUESTION: Well, at least there's a judgment
23 that says that he has already consented.

24 MS. ETKIND: That's right.

25 QUESTION: And he has no right to revoke.

1 Isn't that in the district court order?

2 MS. ETKIND: That's right.

3 QUESTION: I would think he'd think twice
4 before he did it now.

5 MS. ETKIND: I would hope so.

6 QUESTION: But it sure would standing states'
7 rights up on its edge if you say that the Federal
8 Government can tell a Governor, you can't sign a paper.

9 MS. ETKIND: You can't revoke. You can't
10 revoke something something you've already given.

11 QUESTION: I understand. I wasn't trying.

12 QUESTION: The Court of Appeals' opinion seems
13 to have a little confusion about it. At page 26A, they
14 recite, "North Dakota contends," and so forth, "and that
15 any previous consent has been revoked by Governor
16 Link." Perhaps the Attorney General will be able to
17 clear that up for us later on.

18 MS. ETKIND: I think that's an accurate
19 reflection of the stipulation, and I think it's an
20 accurate reflection of the way this case has been
21 litigated all the way through. I firmly believe that
22 there's no question in this case that there has been a
23 purported revocation by the Governor, as well as by the
24 legislature.

25 Once it's established that Section 715(k)(5)

1 does not permit revocation of consent, at least for a
2 reasonable period of time after the consent has been
3 given, it follows that the North Dakota statutes at
4 issue here as applied to previously given but not yet
5 exercised gubernatorial consents also are invalid under
6 the supremacy clause as partial revocations of the
7 previously given consent.

8 QUESTION: Ms. Etkind, suppose you submitted a
9 particular tract to the Governor now and he consented,
10 but that the legislative conditions were not complied
11 with. Do you think you could go ahead?

12 MS. ETKIND: That I could go ahead and
13 purchase it?

14 QUESTION: Yes.

15 MS. ETKIND: The federal --

16 QUESTION: What's the United States' position
17 with respect to the relationship between the legislation
18 and the power of the Governor to consent?

19 MS. ETKIND: The legislation itself works at
20 least a partial revocation of the prior consent.

21 QUESTION: So you think the Governor's
22 consent, future consents, must be consistent with and
23 comply with the state legislation, the '77 legislation?

24 MS. ETKIND: Well, it's our position that they
25 don't have to comply with it, that the '77 legislation

1 is void.

2 QUESTION: I understand. I understand. But
3 even if -- suppose we disagreed with you, that the
4 Governor, that the state may revoke, and so you have to
5 go get the Governor's consent.

6 MS. ETKIND: Right.

7 QUESTION: But when you go get the Governor's
8 consent, do you have to get a consent on conditions that
9 are consistent with the state legislature? Or just, can
10 you ignore the state legislation and just get the
11 Governor's consent?

12 MS. ETKIND: If you agree with us that the
13 Governor -- I mean, if you disagree with us and you say
14 that the Governor can revoke, then I believe that we
15 would have to comply with the state statute.

16 QUESTION: I thought you took the position
17 that at least compliance prospectively was required.

18 MS. ETKIND: Oh, clearly, yes.

19 QUESTION: Well, but you're not saying that as
20 to land where you claim you already have a consent.
21 Some large blocks of land, you claim you've got consent,
22 but you're objecting to the fact you have to comply with
23 the conditions of an impact statement and all that sort
24 of thing.

25 MS. ETKIND: If that consent is valid, which

1 we believe --

2 QUESTION: Then you say the legislative
3 conditions that require you to reimburse them for an
4 environmental impact statement and all that sort of
5 thing, that's invalid?

6 MS. ETKIND: Exactly.

7 QUESTION: What about the 99-year restriction
8 on the easement; is that equally invalid?

9 MS. ETKIND: That is equally invalid.

10 QUESTION: Is that geared to this particular
11 program, the way these other things are?

12 EYou mean, was it --

13 QUESTION: Isn't it a general state law that
14 99 years is the maximum length of any property
15 easement?

16 MS. ETKIND: That's right. It was submitted
17 together with the other language. I mean, it was
18 submitted in response to this same federal-state
19 problem.

20 QUESTION: But isn't there a justification for
21 that rule that may not apply to some of these other
22 conditions that place specific burdens on this program?

23 MS. ETKIND: Well, I think there's two
24 problems with it. One is that if you agree with us that
25 the consents we already have are valid, then that would

1 be a partial revocation of that consent because the
2 consents we have allow us to --

3 QUESTION: Well, but they would argue, I
4 suppose, that what you've got a consent to is to acquire
5 in accordance with the otherwise valid laws of the state
6 of North Dakota that do not specifically burden wildlife
7 land any differently than it burdens anything else.

8 MS. ETKIND: Well, we would say that those
9 statutes that were in effect at the time the consent was
10 given, but not after-enacted statutes.

11 QUESTION: Well, supposing they passed a new
12 recording statute that said every transfer of real
13 property has to be recorded with the secretary of state
14 instead of the county recorder of deeds or something
15 like that. Would you have to comply with that?

16 MS. ETKIND: Well, I think that would be on a
17 different footing, because this particular statute has a
18 particularly adverse impact on the acquisition program.
19 In a related context, when Congress amended the
20 Migratory Bird Conservation Act in 1976 to permit the
21 Secretary to purchase easements as well as fees for
22 wildlife refuge purchases, it made clear that he should
23 make every effort to obtain permanent easements rather
24 than lesser interests, because such an approach was in
25 the best interest of the habitat and the migratory water

1 fowl involved. That's in the legislative history, the
2 House --

3 QUESTION: But they counter by saying, well,
4 that may be better, but you have for a long time
5 acquired a lot of easements for lesser periods, such as
6 20 years and 30 years.

7 MS. ETKIND: That's not true.

8 QUESTION: Oh, isn't it?

9 MS. ETKIND: The vast majority of our
10 easements are perpetual easements. I was told by
11 Interior 99 percent, but that is not in the record.

12 QUESTION: What is in the record on that
13 point?

14 MS. ETKIND: What is in the record is
15 reflected in our brief.

16 (Pause.)

17 QUESTION: If it's in your brief I'll find
18 it. Thank you.

19 MS. ETKIND: In particular, North Dakota
20 Centennial Code Section 20.10218.3 purports to suspend
21 gubernatorial consent to federal acquisition of any land
22 or interest in land with money from the Migratory Bird
23 Conservation Fund. Now, since this provision amounts to
24 a straightforward revocation of consent, it is void as
25 inconsistent with federal law for the reasons I've

1 already discussed.

2 I see that my time is up. Thank you.

3 CHIEF JUSTICE BURGER: Do you have anything
4 further, Mr. Attorney General?

5 REBUTTAL ARGUMENT OF ROBERT O. WEFALD, ESQ.

6 ON BEHALF OF APPELLANT

7 MR. WEFALD: Yes, sir, I do, Mr. Chief
8 Justice.

9 Let me just focus real quickly on this
10 question of the constitutionality of our laws with
11 respect to the argument made again in oral argument by
12 the United States. They are suggesting that our laws
13 are constitutional to any consents that may go on beyond
14 this 1.3 or 1.5 million acres. In other words, our laws
15 are constitutional.

16 The only thing that makes our laws
17 unconstitutional with respect to the United States is
18 that insofar as they purport to condition the
19 acquisition by the Federal Government of another 600 or
20 700,000 acres, that that constitutes a revocation or a
21 conditioning, in that they cannot do that, and that
22 revocation or conditioning is indeed an impediment to
23 us.

24 The last section that my sister just
25 mentioned, 18.103, does not revoke. It simply suspends

1 until the Federal Government of the United States gets
2 together on December 31st, 1983.

3 QUESTION: Mr. Attorney General.

4 MR. WEFALD: Yes, sir.

5 QUESTION: Is the present Governor Olson the
6 former Attorney General of your state?

7 MR. WEFALD: Yes, sir.

8 QUESTION: Well, did Governor revoke or not?

9 MR. WEFALD: Governor Link -- we cannot find a
10 single document where Governor Link said, I revoke these
11 consents signed by myself and Governor Guy.

12 QUESTION: But if he said, I will never -- I
13 will not agree to any further acquisitions, if some
14 piece of land the United States claimed was covered by a
15 prior consent and Governor Link says, I will not agree
16 to that, has he in effect revoked or not?

17 MR. WEFALD: The only fair reading of that
18 statement made by Governor Link is that it relates to
19 the fee lands and not to the easements. Let me explain
20 why this consent --

21 QUESTION: You still say, then, that the prior
22 consents have never been revoked by a Governor?

23 MR. WEFALD: There is no written document to
24 that effect, that's correct.

25 QUESTION: Or no conduct by them.

1 MR. WEFALD: There's plenty of conduct to the
2 effect, but there is no written document.

3 QUESTION: That they revoked?

4 MR. WEFALD: Yes. The United States has
5 treated them as revoked. We treat them as revoked.

6 QUESTION: Well, the Eighth Circuit said they
7 were revoked, too.

8 MR. WEFALD: Yes. Indeed, and so did the
9 district court.

10 Let me explain how this came up --

11 QUESTION: In your argument on direct you said
12 they weren't revoked, I thought.

13 MR. WEFALD: Well, they are not revoked
14 through an action of our Governor where he signs a paper
15 saying, I hereby revoke these particular previous
16 consents.

17 QUESTION: But you've taken the position that
18 the legal effect is they've been revoked.

19 MR. WEFALD: Correct.

20 QUESTION: That's the position you've taken
21 throughout this litigation until this afternoon, right?

22 MR. WEFALD: In terms of the Governor's
23 signature, that's correct.

24 QUESTION: We should judge the case on the
25 ground that North Dakota's legal position is that the

1 consents have purported to have been revoked.

2 MR. WEFALD: Well, that's correct.

3 Let me tell you what came up at the district
4 court level, just to clear this up. The United States
5 sued us. Their complaint sought to declare
6 unconstitutional our laws. That's all. At the end of
7 the oral argument the judge suggested, well, I don't
8 think consent's necessary. Thereafter followed the
9 stipulation, in a very curious order of events, and it
10 has subsequently snowballed to this particular point.

11 Thank you.

12 CHIEF JUSTICE BURGER: Thank you, counsel.

13 The case is submitted.

14 (Whereupon, at 11:55 a.m., the case in the
15 above-entitled matter was submitted.)

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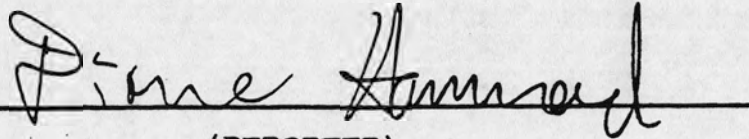
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NORTH DAKOTA, Appellant v. UNITED STATES

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