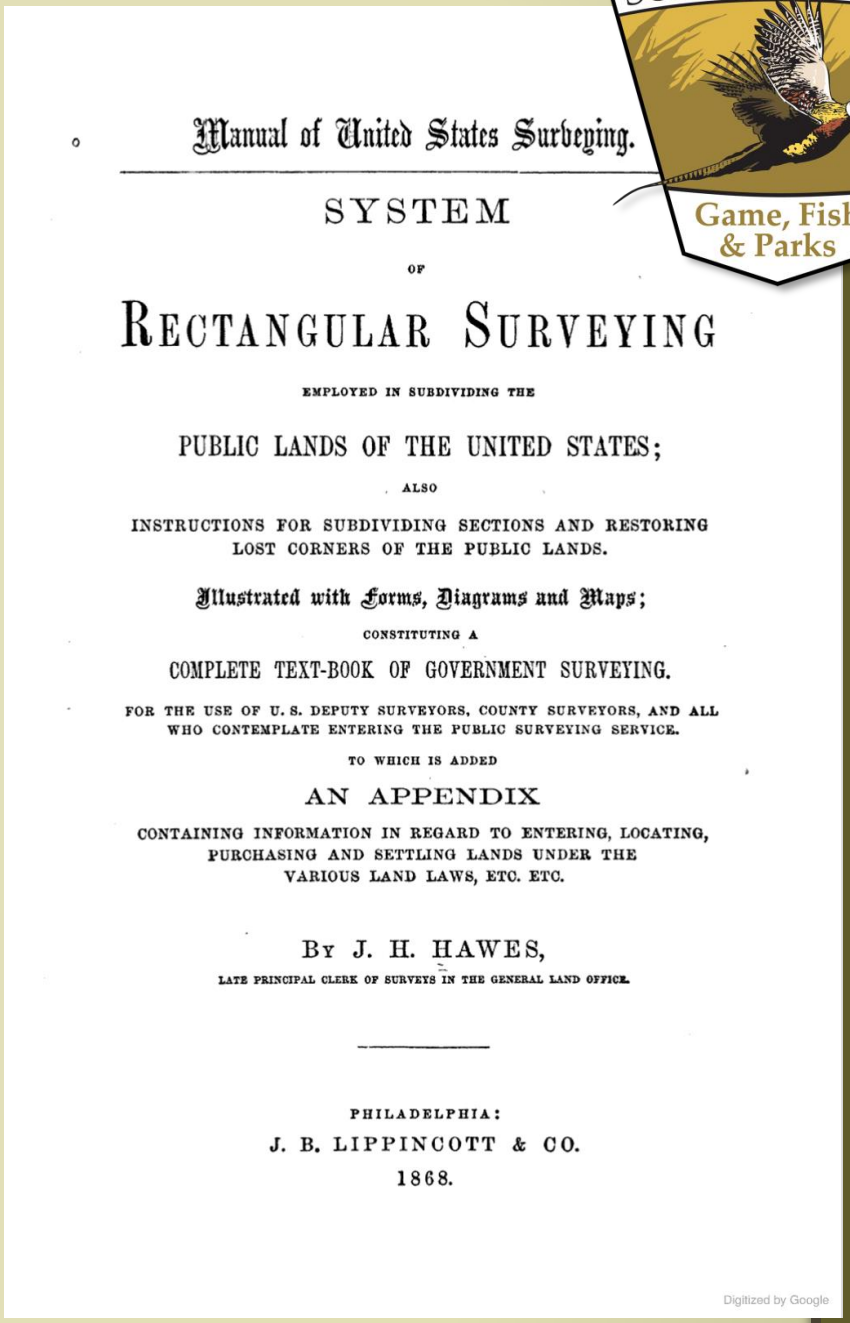
Recreational Use of Water over Private Land

Lakebed Ownership

5. Lakes, Ponds, etc. – Lakes embracing an area of less than *forty acres* will not be meandered.

Shallow lakes or bayous, likely in time to dry up or be greatly reduced by evaporation, drainage, or other cause, will not be meandered however extensive they may be, but such lakes should be described, and the facilities for drainage or prospect of becoming dry from natural causes stated.

(United States Surveying Manual, page 48)



Manual of United States Surveying.

SYSTEM

OF

RECTANGULAR SURVEYING

EMPLOYED IN SUBDIVIDING THE

PUBLIC LANDS OF THE UNITED STATES;

ALSO

INSTRUCTIONS FOR SUBDIVIDING SECTIONS AND RESTORING LOST CORNERS OF THE PUBLIC LANDS.

Illustrated with Forms, Diagrams and Maps;

CONSTITUTING A

COMPLETE TEXT-BOOK OF GOVERNMENT SURVEYING.

FOR THE USE OF U. S. DEPUTY SURVEYORS, COUNTY SURVEYORS, AND ALL WHO CONTEMPLATE ENTERING THE PUBLIC SURVEYING SERVICE.

TO WHICH IS ADDED

AN APPENDIX

CONTAINING INFORMATION IN REGARD TO ENTERING, LOCATING, PURCHASING AND SETTLING LANDS UNDER THE VARIOUS LAND LAWS, ETC. ETC.

By J. H. HAWES,

LATE PRINCIPAL CLERK OF SURVEYS IN THE GENERAL LAND OFFICE.

PHILADELPHIA:

J. B. LIPPINCOTT & CO.

1868.

Digitized by Google

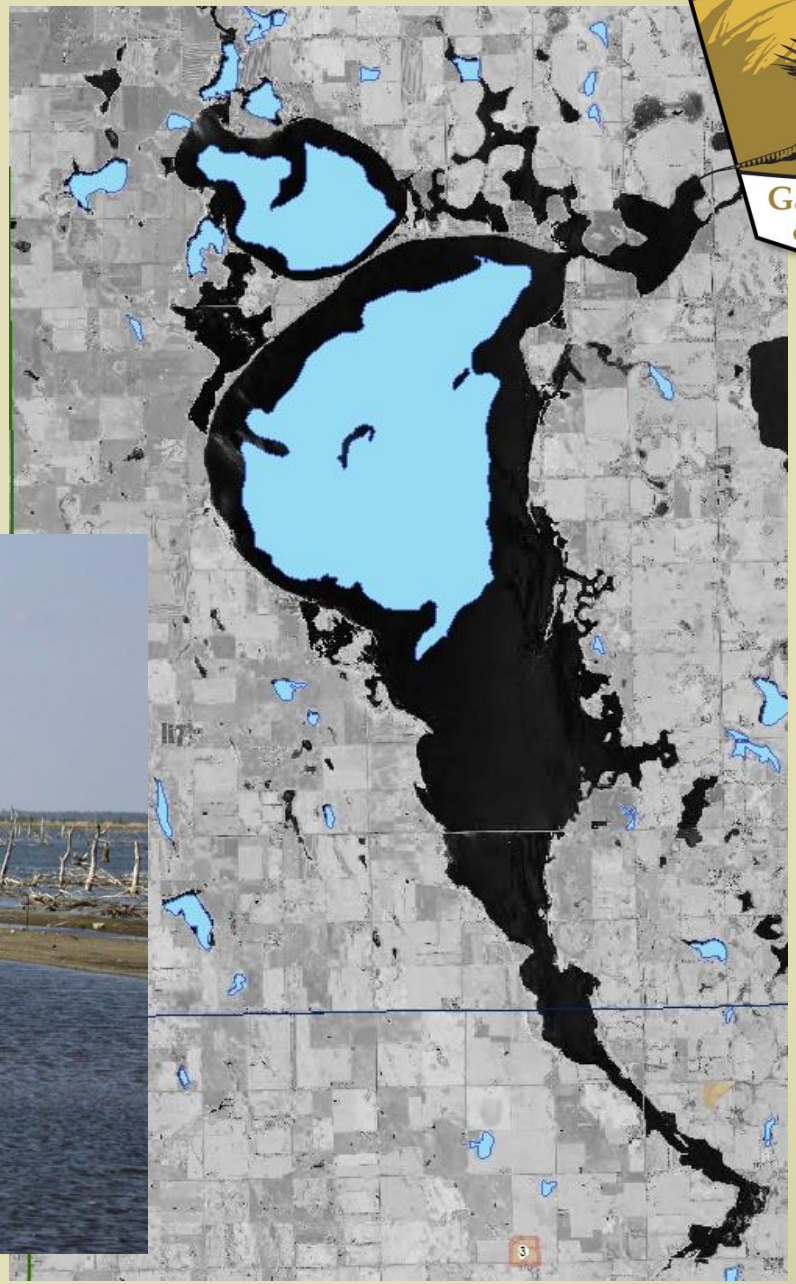
South Dakota – 1889

Upon statehood, the title to the beds of all meandered lakes were vested with the state

Lake Thompson
Kingsbury County

1930's: completely dry
1987: 6,680 ac
2012: 18,175 ac

- Same as in 1856

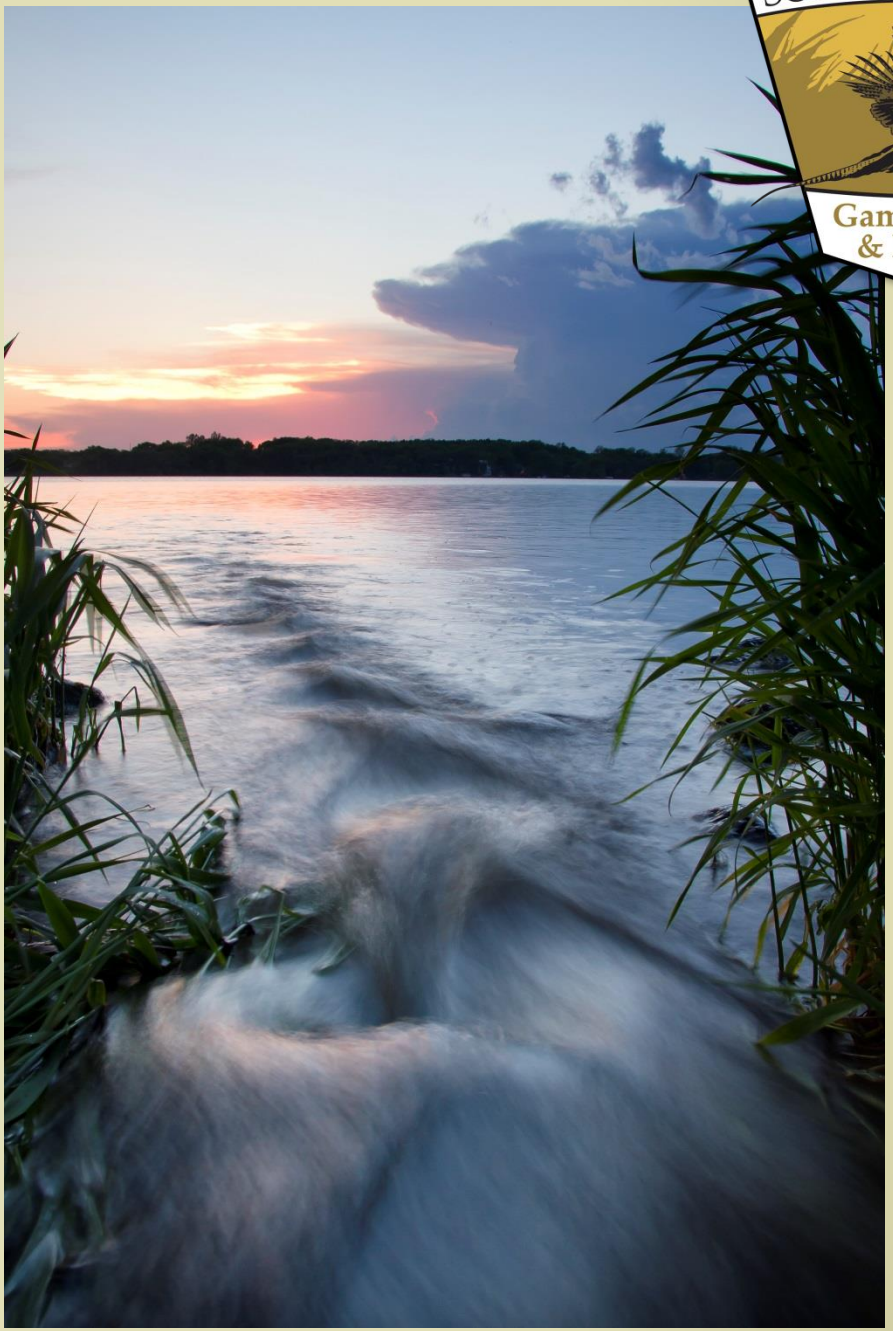


Wet Cycle of the mid to late 1990s in NE South Dakota

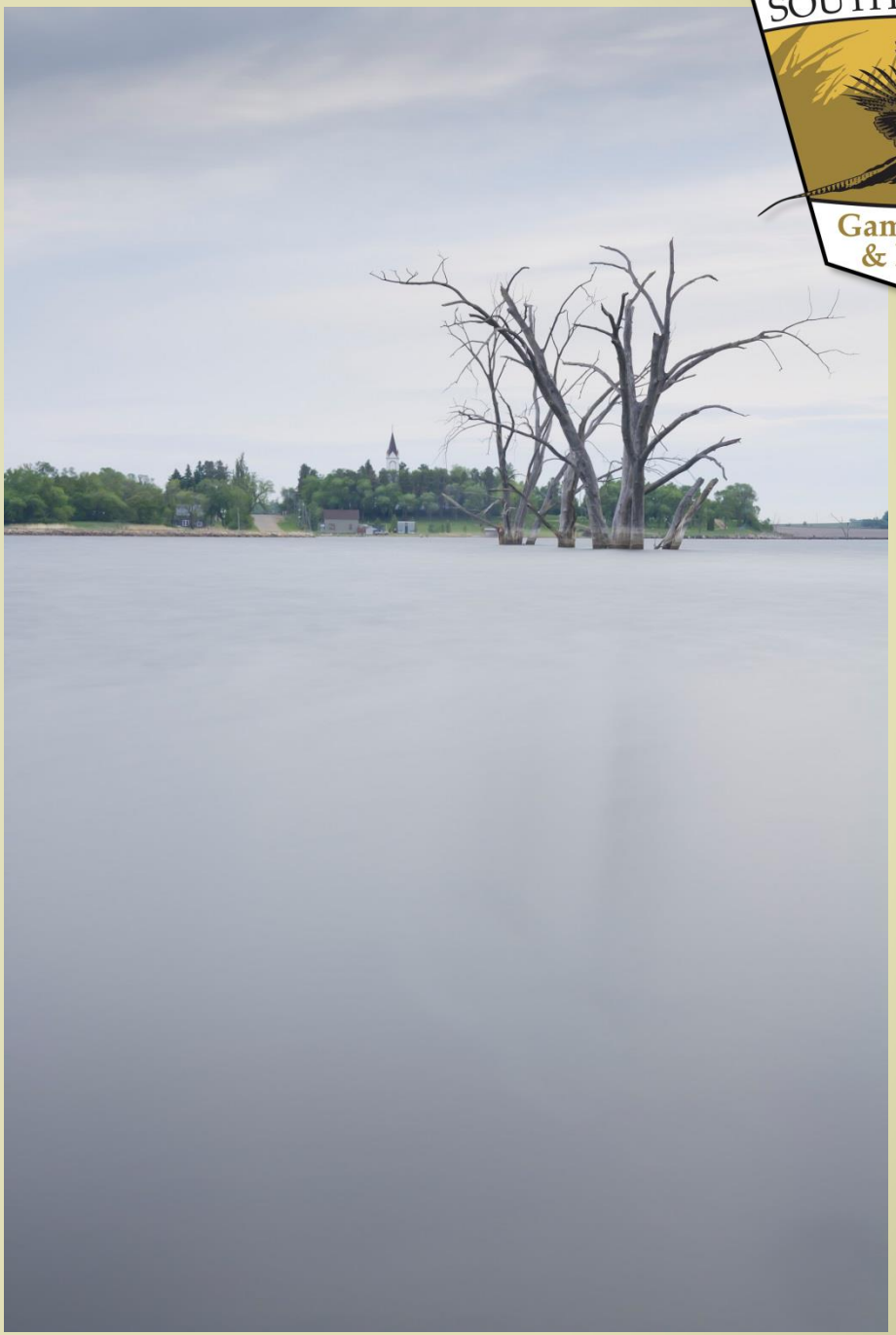
- Lakes grew larger
- Marshes became lakes
- New ponds and wetlands formed in dry basins

Cycle continued and water levels peaked in 2008-12

Moderate reductions in water levels in past 5 years



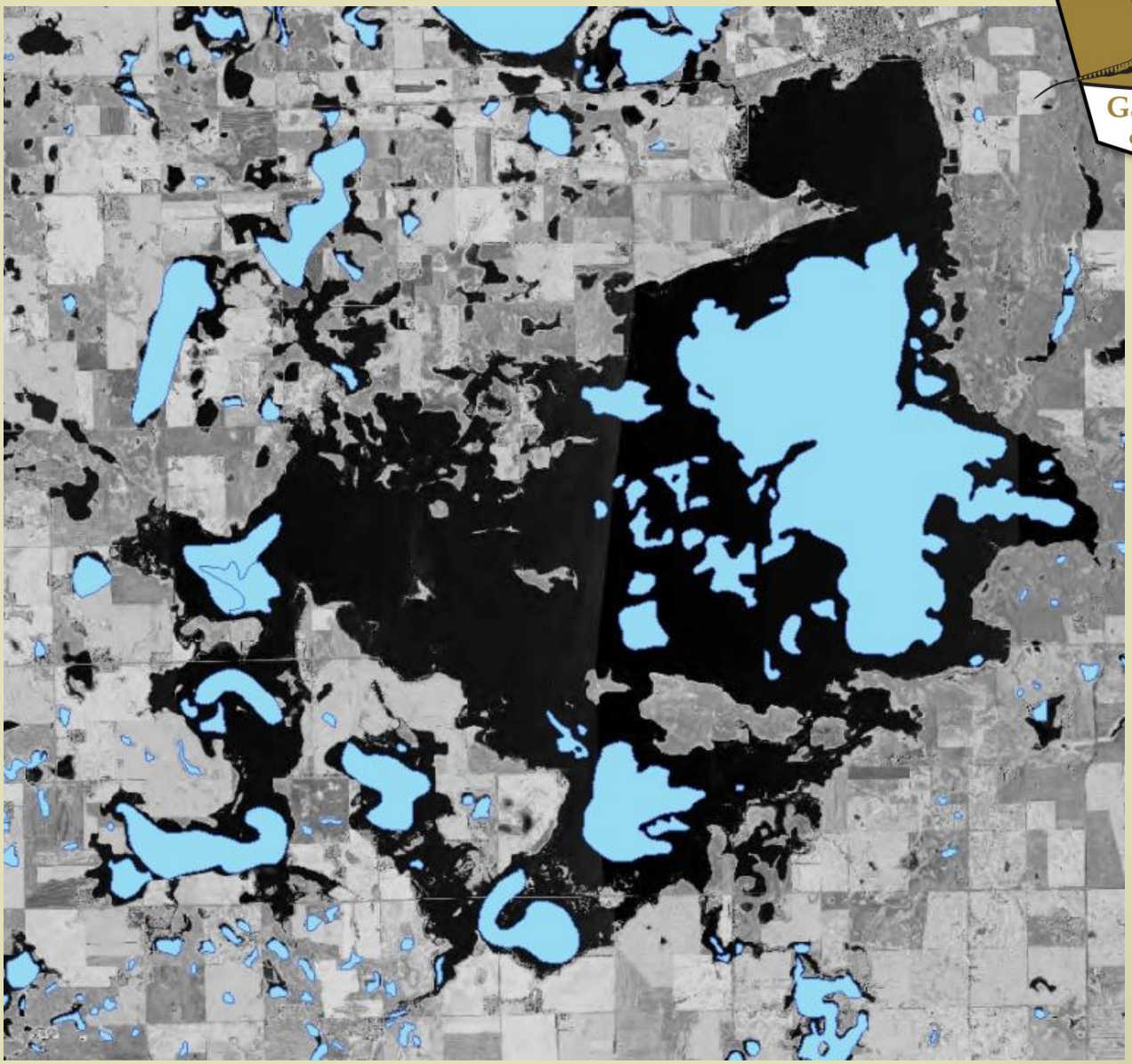
And the result of the rising water was…

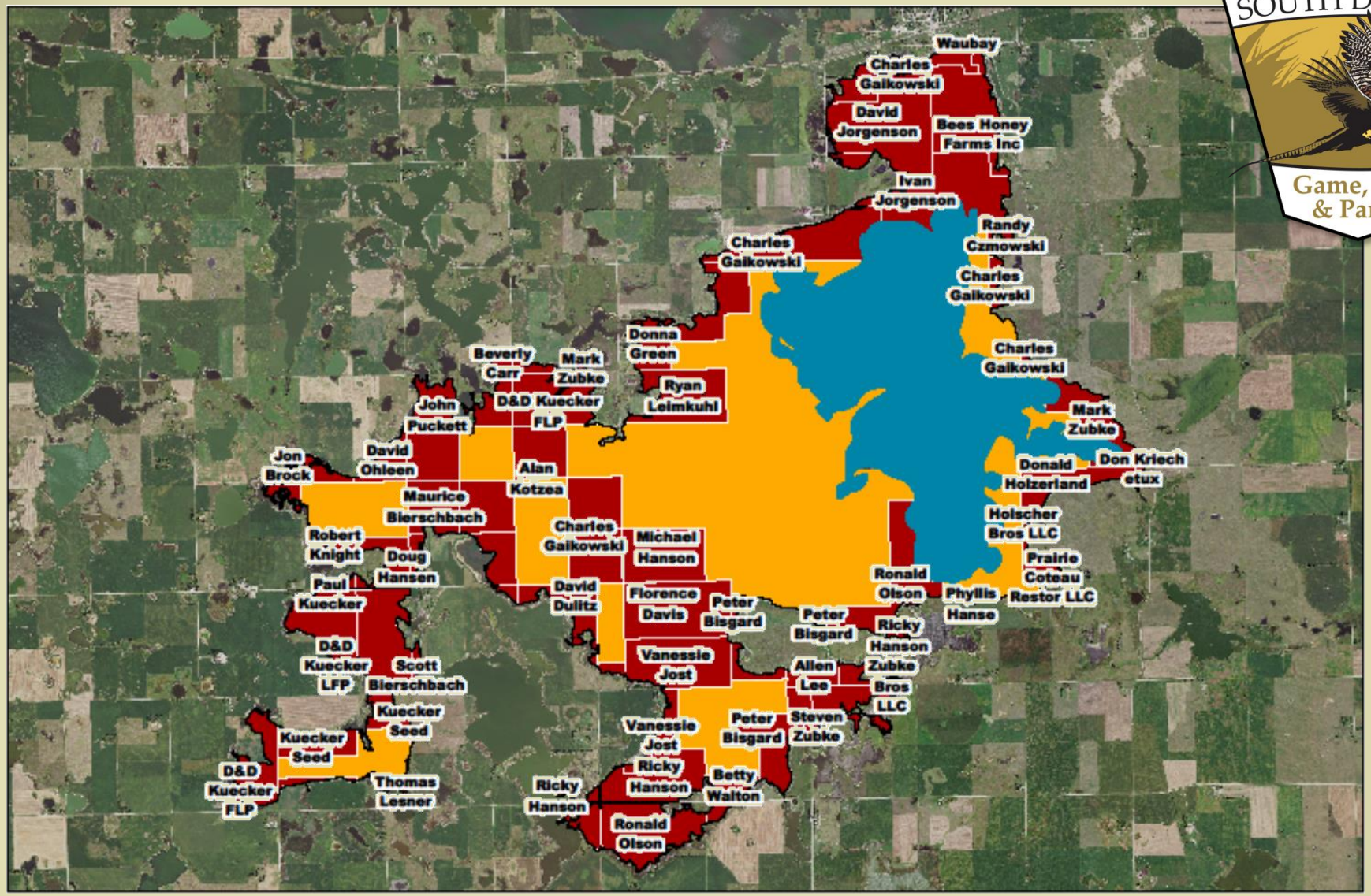


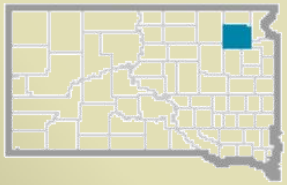
Bitter Lake

1991
3,500 ac

2012
18,000+ ac







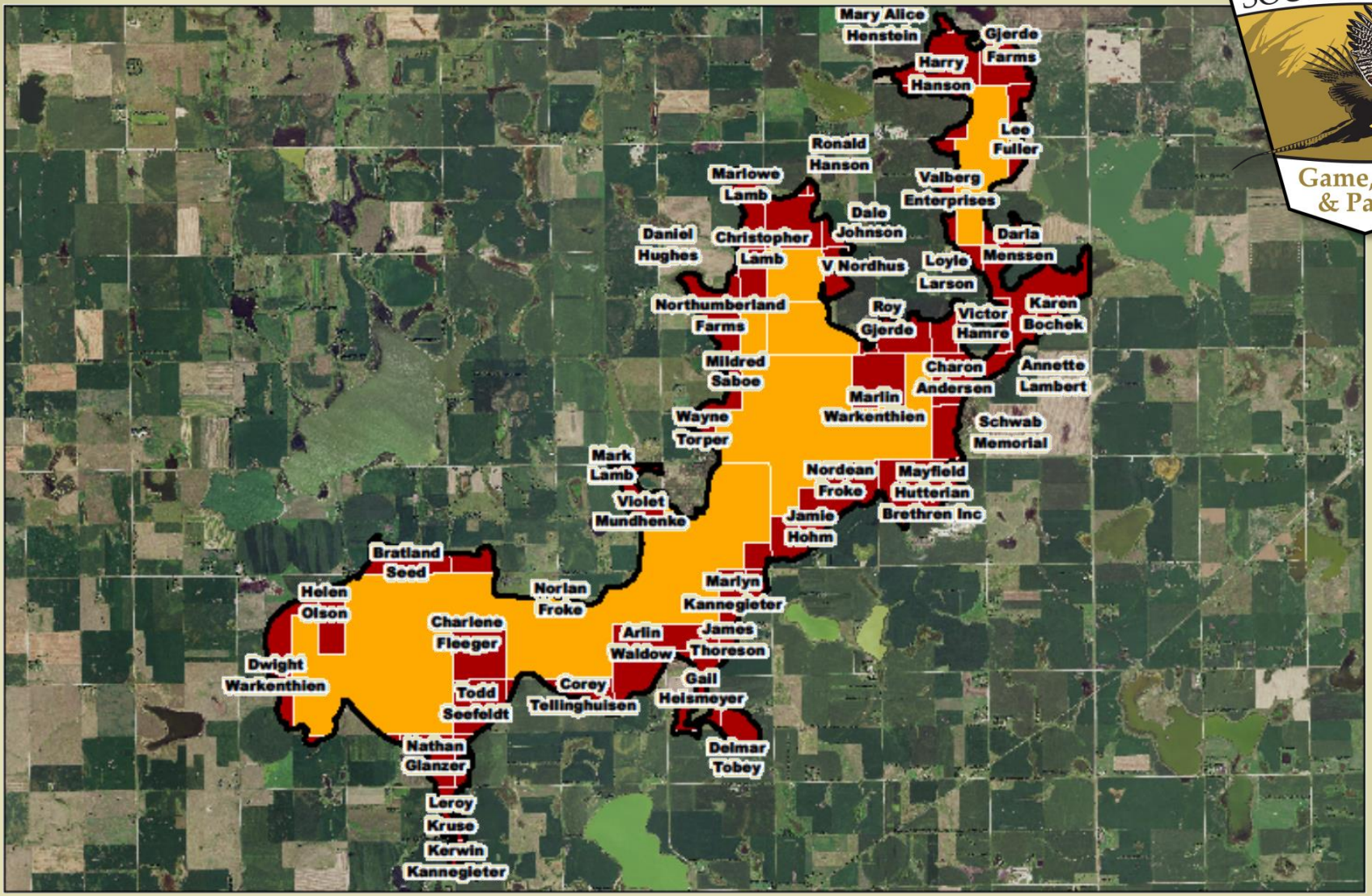
Bitter Lake - Day County

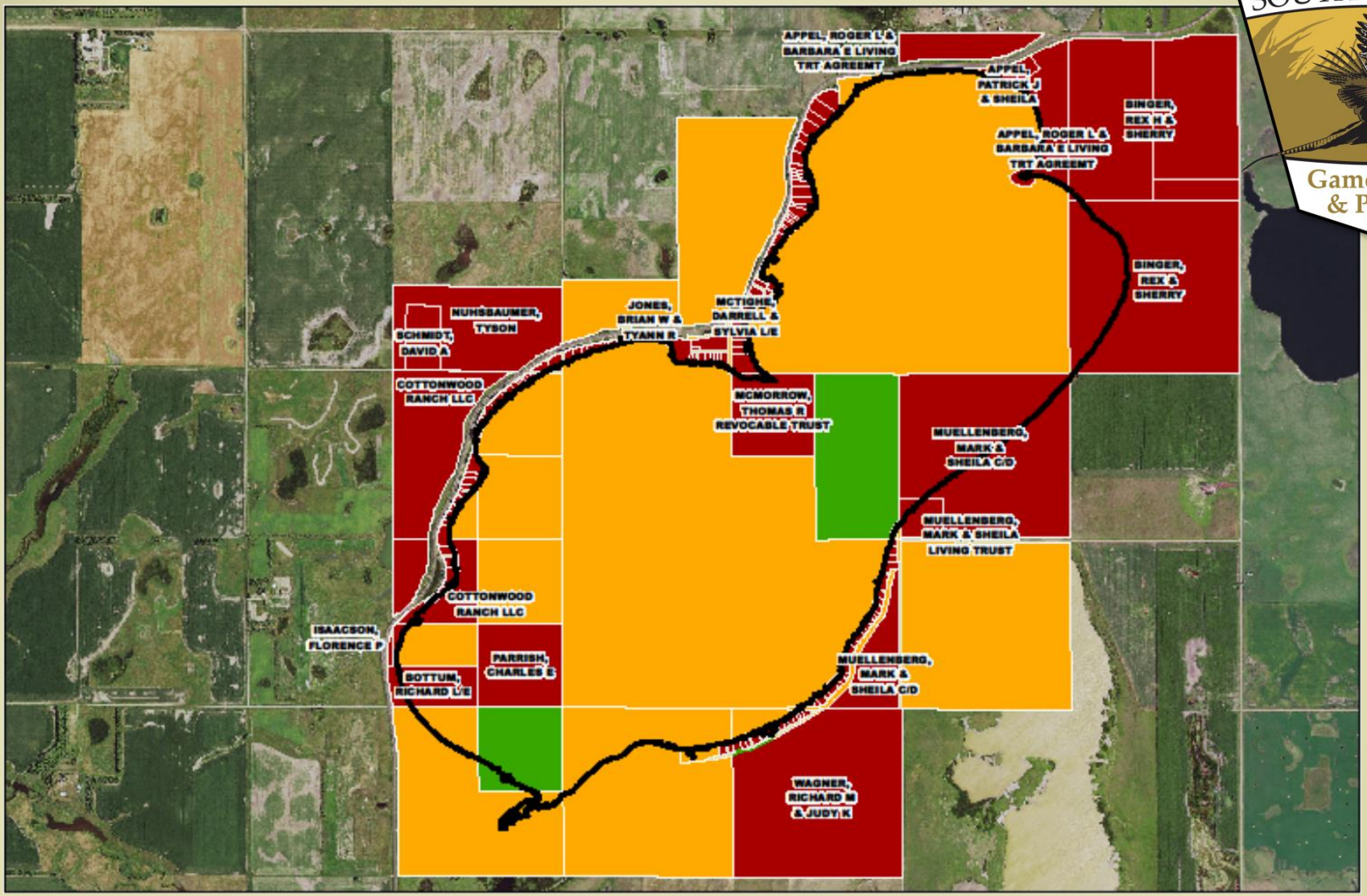
N

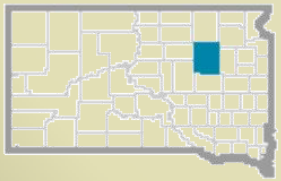
Miles

0 1 2 3 4

- 2016 Lake Boundary
- Meandered Lake Boundary
- Private Parcels - 46 Owners
- Public Land


Mary Alice Henstein
Gjerde Farms
Harry Hanson
Lee Fuller
Ronald Hanson
Marlowe Lamb
Valberg Enterprises
Dale Johnson
Daniel Hughes
Christopher Lamb
Darla Menssen
V Nordhus
Loyle Larson
Northumberland Farms
Roy Gjerde
Victor Hamre
Karen Bochek
Mildred Saboe
Charon Andersen
Annette Lambert
Marlin Warkenthien
Wayne Torper
Schwab Memorial
Mark Lamb
Nordean Froke
Mayfield Hutterian Brethren Inc
Violet Mundhenke
Jamie Hohm
Bratland Seed
Helen Olson
Norlan Froke
Marlyn Kannegieter
Charlene Fleeger
Arlin Waldow
James Thoreson
Dwight Warkenthien
Gail Heismeyer
Corey Tellinghuisen
Todd Seefeldt
Nathan Glanzer
Delmar Tobey
Leroy Kruse
Kerwin Kannegieter
N
Dry Lake #2 - Clark County
Miles
0
1
2
3
4
2016 Lake Boundary
Private Parcels - 48 Owners
Public Land

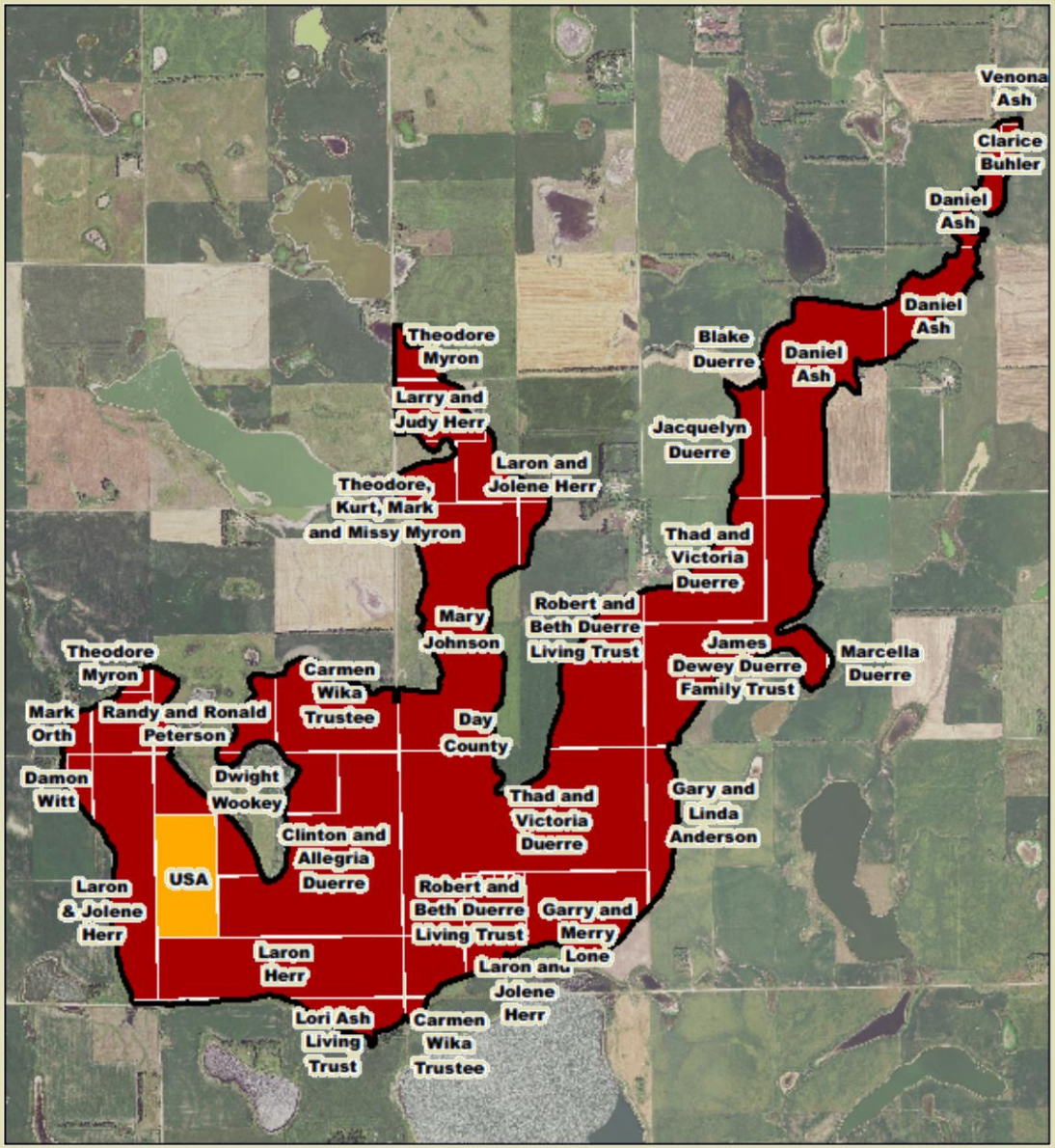


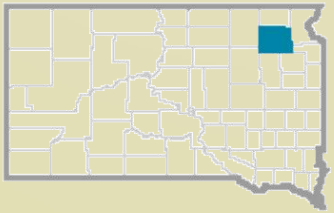


Cottonwood Lake

0 0.25 0.5 0.75 1 Miles

- 2016 Lake Boundary
- Private Parcels - 197 Owners
- Spink County
- State & Federal Government





Jesse Slough & Duerre Lake

2016 Lake Boundary

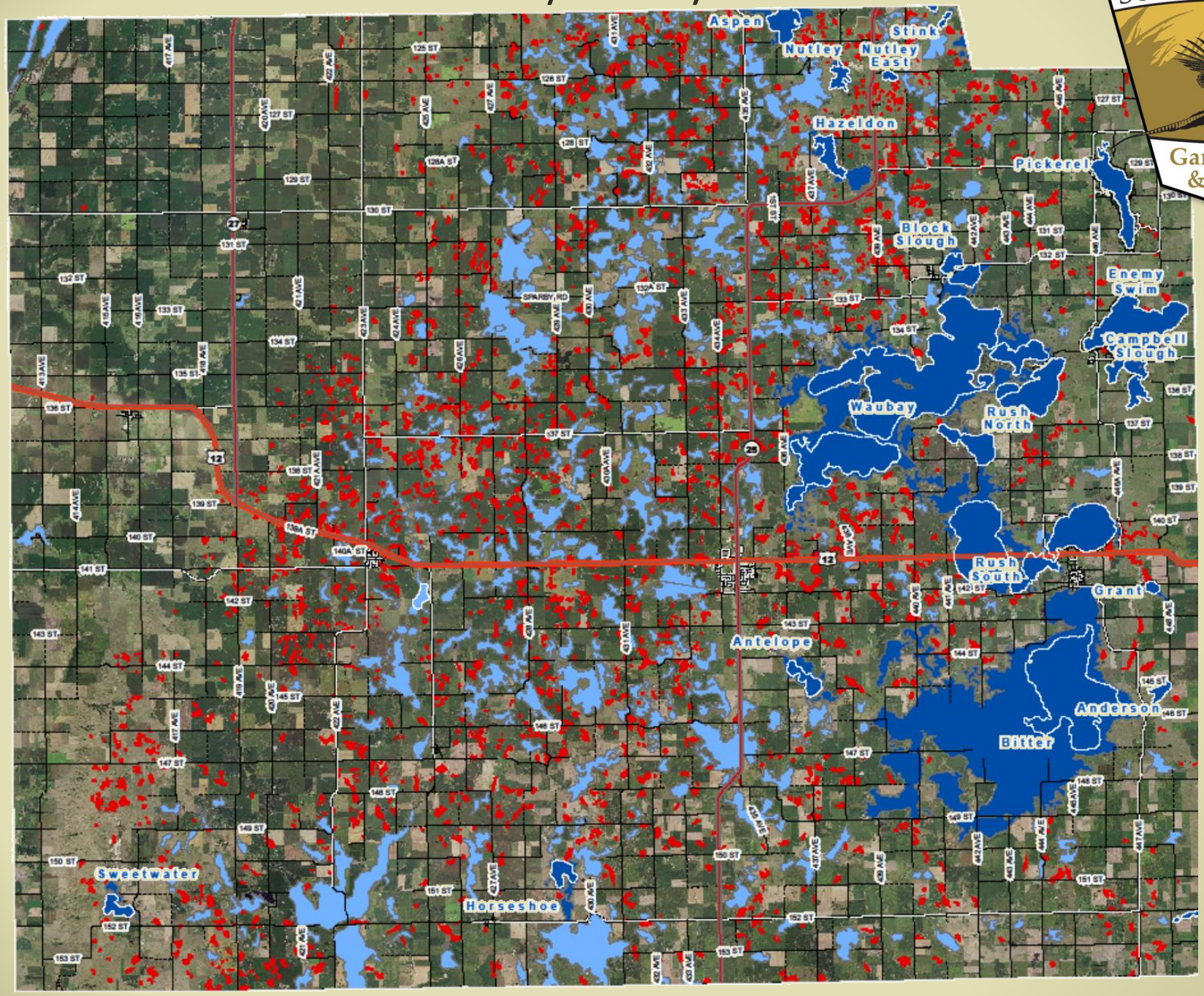
Private Ownership - 28 Landowners

Public Land

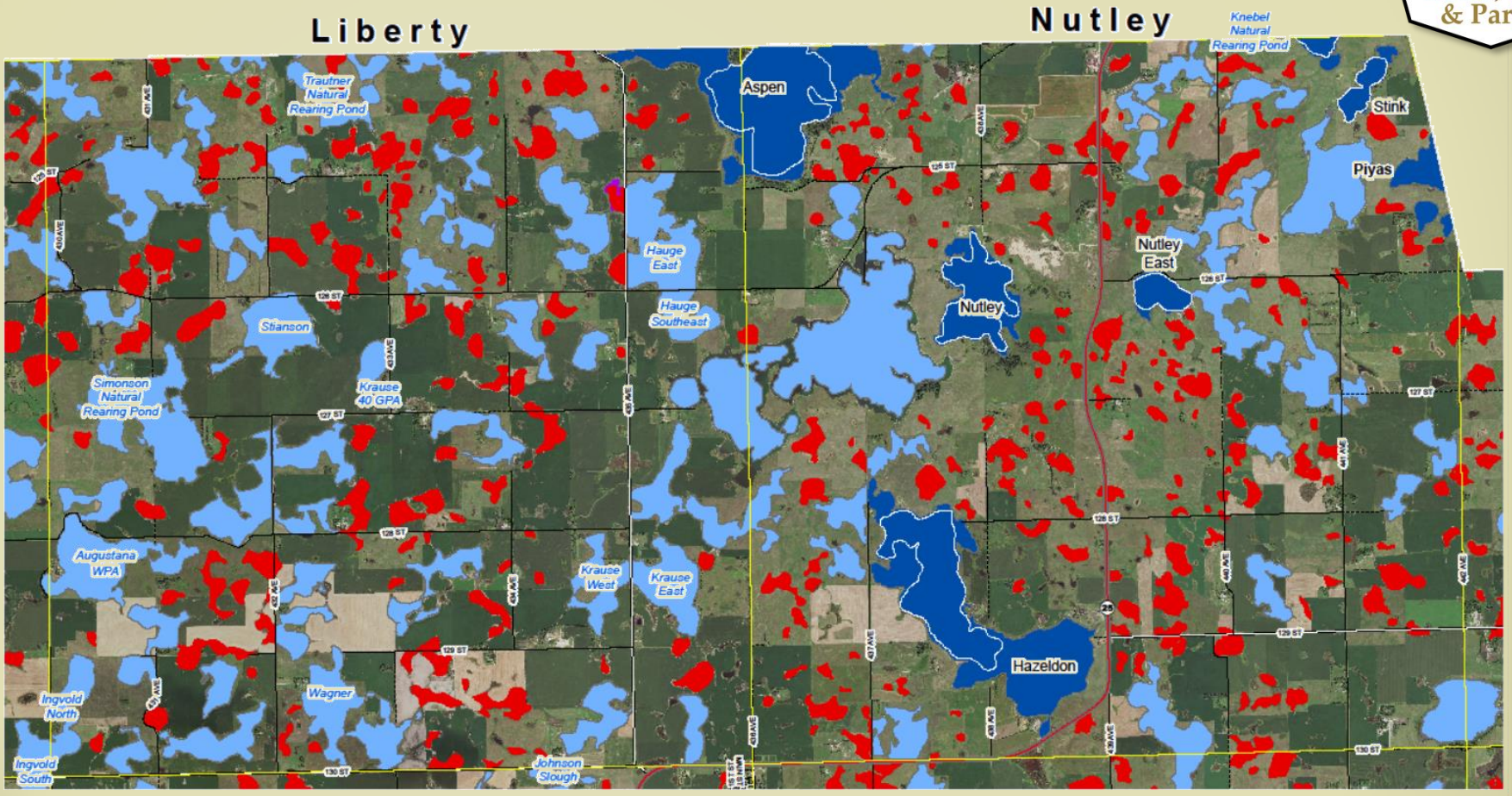
Miles

0 0.4 0.8 1.2 1.6

Day County


Aspen
Nutley
Nutley East
Stink
Hazeldon
Pickerel
Block Slough
Enemy Swim
Campbell Slough
Waubay
Rush North
Rush South
Grant
Antelope
Anderson
Bitter
Sweetwater
Horseshoe

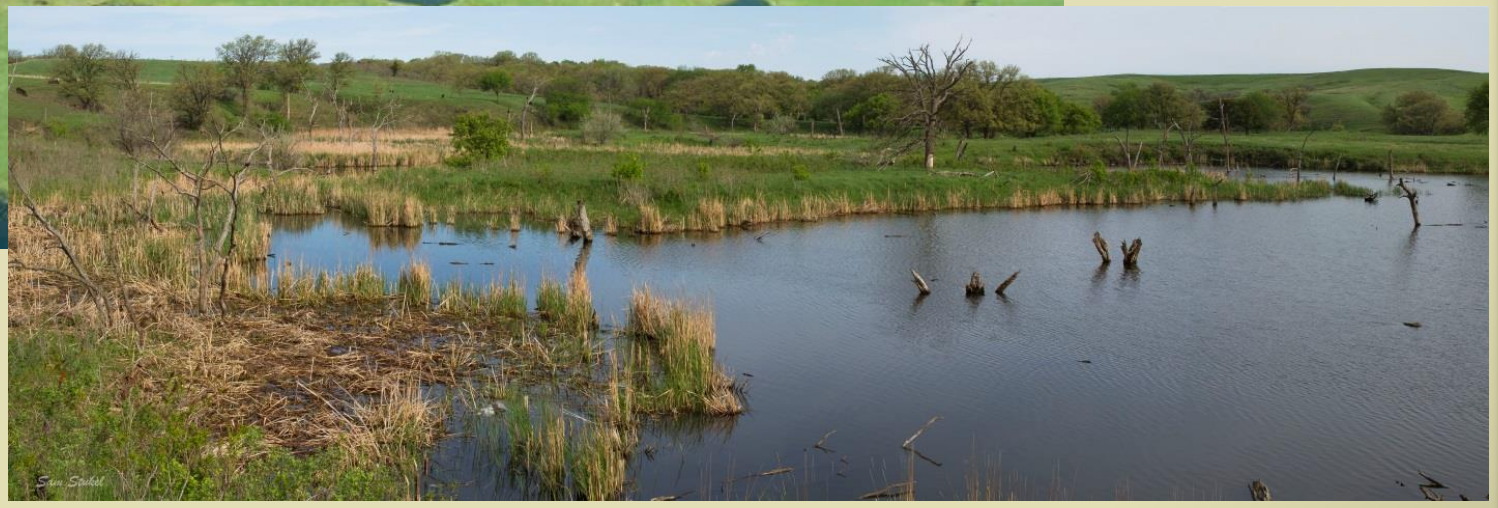
Day County


Liberty
Nutley
Trautner Natural Rearing Pond
Aspen
Knebel Natural Rearing Pond
Stink
Piyas
Hauge East
Hauge Southeast
Nutley East
Nutley
Stianson
Simonson Natural Rearing Pond
Krause 40 GPA
Augustana WPA
Krause West
Krause East
Hazeldon
Ingvold North
Wagner
Ingvold South
Johnson Slough
Meander Line
Township Boundaries
Meandered Lakes
Non-meandered Lakes > 40 acres
Non-meandered Lakes 40 acres or Less

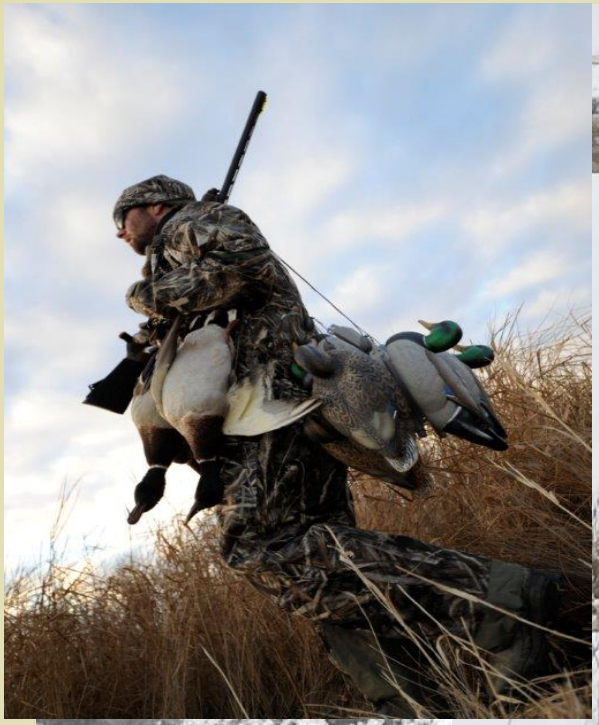
Fisheries developed and the anglers followed…

Public and private lake accesses were developed…

Important to remember:
These are non-meandered waterbodies too…



And, it’s not just fishing…



Parks v. Cooper 2004

Long Lake, Parks Slough and Schiley Slough

Court Holdings

1. Landowners hold titles to lakebeds.
2. All water in SD belongs to the people in accord with the public trust doctrine.
3. Legislature has the obligation to determine the extent of the public's right to use non-meandered bodies of water held in trust for the public.

Legislation after Parks v. Cooper

2005: HB 1059

- Authorized the Water Management Board to establish a list of non-meandered lakes that would be open to public recreation.
- Initial list of non-meandered lakes would be open to public recreation if:
  1. The lake has a history of recreational use by the public; and
  2. The lake has been developed for public use by:
     a) construction of public boat docks, boat ramps, picnic areas, or campgrounds;
     b) active state or federal management of a recreational use; or
     c) state or federal ownership of a portion or all of the lakebed.

Legislation after Parks v. Cooper

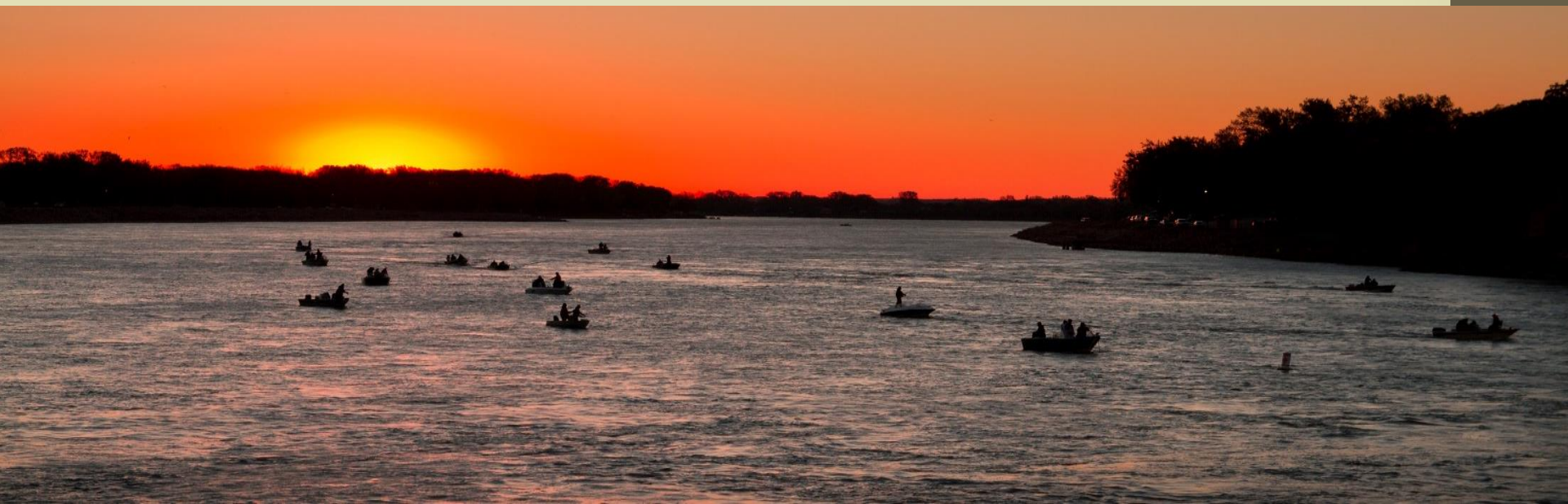
2005: HB 1059 (continued)

- Non-meandered lakes could be added to or deleted from to the list of lakes open to public recreation by petition by a person or agency.
- The Water Management Board may establish recreation as a beneficial use for any natural non-meandered lake if the following criteria are met:
    1. The lake is capable of supporting recreational use;
    2. Establishing recreational use will not impair water rights; and
    3. Establishing recreational use for the non-meandered lake is in the public interest.

Legislation after Parks v. Cooper

2006: HB 1096

- Non-meandered lakes would be open to for pubic recreation if:
  1. The natural non-meandered lake is contiguous with a meandered waterbody.
  2. The natural non-meandered lake has a well-established bed and shoreline that historically have been capable of holding various levels of water; the area of the lake is twenty-five acres or larger; lawful public access to the lake exists via publicly-owned land or a public right-of-way or section line; public recreational use benefits exist such as boating, swimming, trapping, fishing, or hunting.
- Sought to establish a list of non-meandered waters open to public access.



Legislation after Parks v. Cooper

2013: HB 1135

- Water over private land would be open to recreational use by the public except any portion a non-meandered lake is posted as closed to public recreation by the owner of the land under the water.
    - Posted waters could be used by members of the public with permission from the landowner.
- No water could be posted as closed to the public when recreational access by the public has been established and continuous for a period of at least 21 years.

Legislation after Parks v. Cooper
2014: SB 169

- The public is granted restricted recreational access to water over private land if the public could legally access the water and:
  1. the water is contiguous/connected to a meandered waterbody; or
  2. a non-meandered waterbody has a surface area of at least 40 acres; or
  3. a non-meandered waterbody has a surface area of less than 40 acres and was not posted as closed to public access.
- Public access to non-meandered waters does not include an allowance for a person to stand, walk or wade on private land under the water.
- Public access to non-meandered waterbodies for hunting (except waterfowl) and trapping is prohibited.

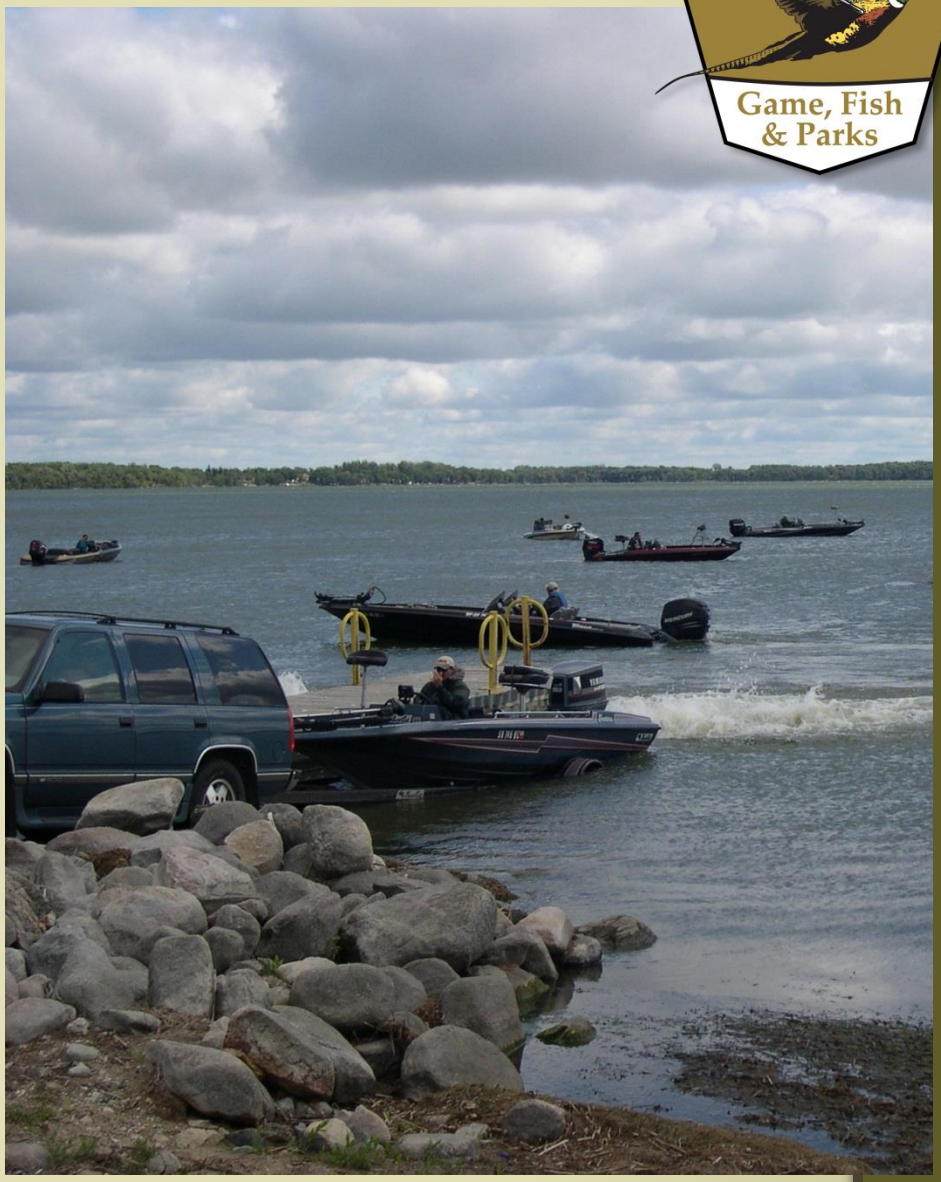
Duerre v. Hepler 2017

Foundation of Decisions:

- The legislature has not yet said that the public has a right to enter or use this State's non-meandered waters for recreational purposes.

Court Holdings

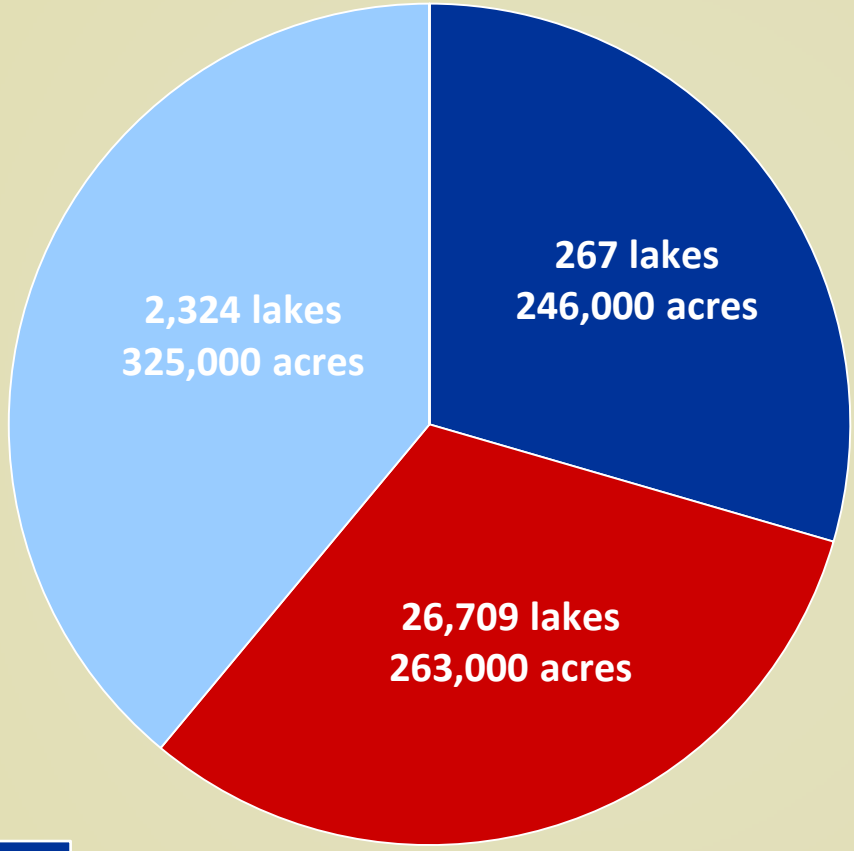
- Neither the public nor the landowners have a superior right to use the water and ice over the landowners private property.
- GFP may not facilitate access to water over landowner's private property.



Natural Lakes in South Dakota

29,300 lakes

834,000 acres



29% Meandered lakes

32% Non-meandered lakes 40 acres or less

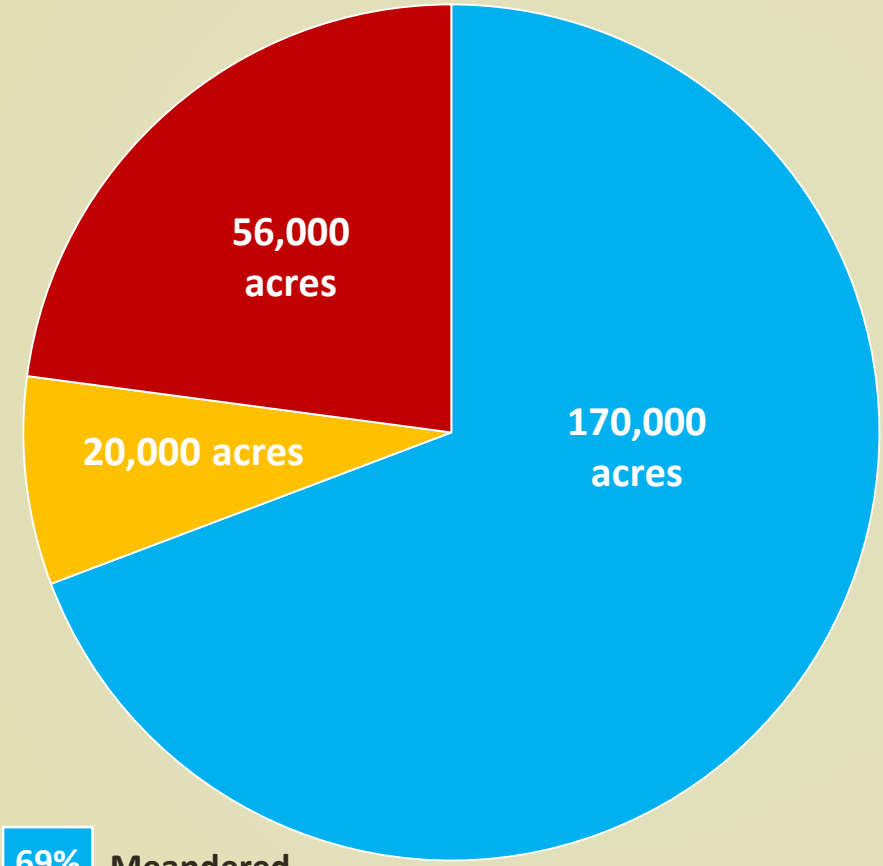
39% Non-meandered lakes larger than 40 acres

Not included:
487,000 acres of water in Missouri River, Orman Dam, Angostora, and Shadehill Reservoirs

Meandered Lakes

267 lakes

246,000 acres



69% Meandered

8% Public deeded

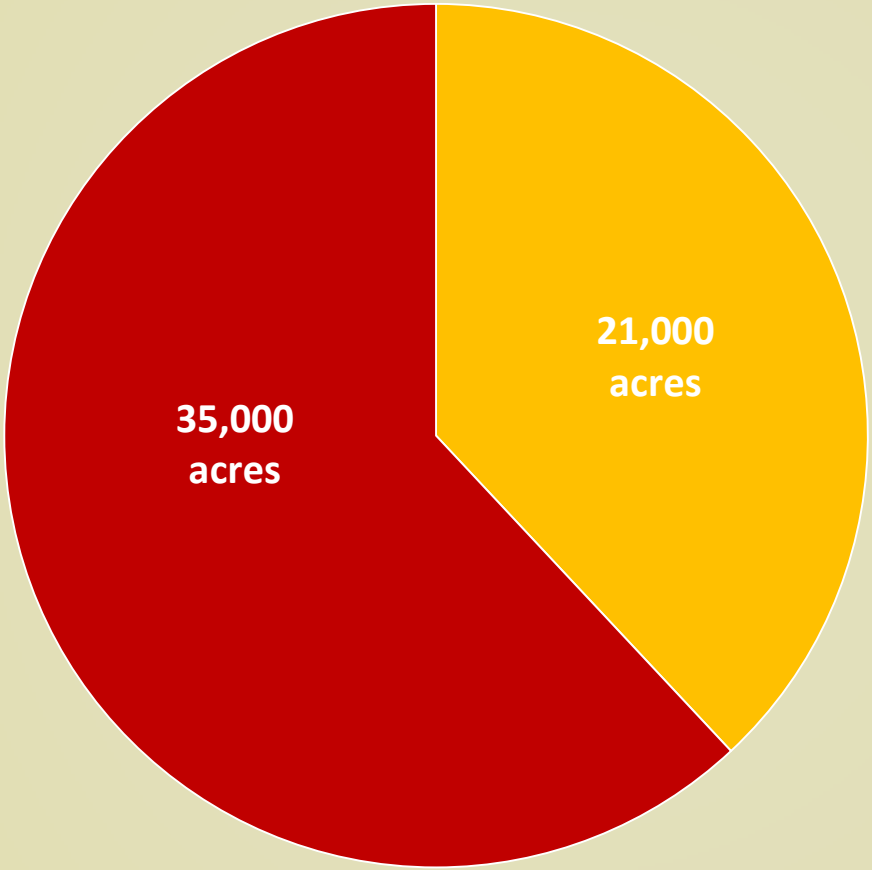
23% Private deeded

<u>Note</u>: currently, 115 of these 267 meandered lakes do not provide any fishing opportunity

Non-meandered Lakes with Fishing

91 lakes

56,000 acres



38% Public deeded

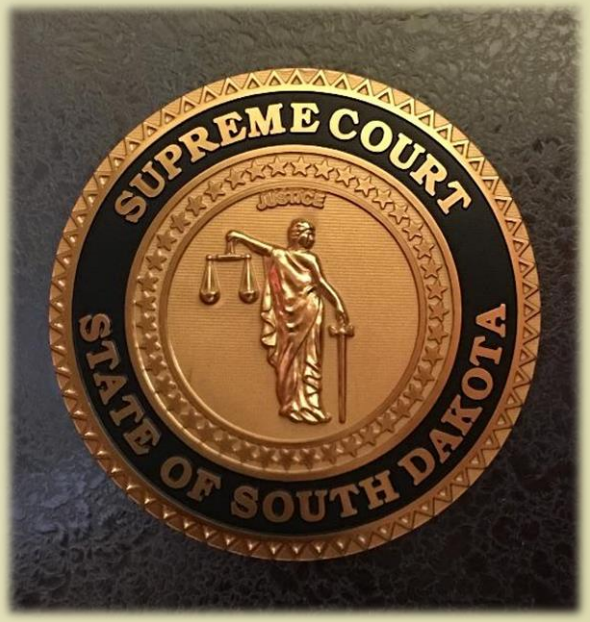
62% Private deeded

Size (ac)	#	acres
6-40	7	150
41-80	5	400
81-160	13	1,400
160+	67	54,000

South Dakota Supreme Court

Parks v. Cooper – 2004

> "However, it is up to the legislature to decide how these waters are to be beneficially used in the public interest."

Duerre v. Hepler – 2017

> "Ultimately, until the legislature acts, neither the Landowners nor the general public have an 'obligation [i.e. a right] existing in [their] favor' that is superior and enforceable by injunction under SDCL 21-8-14."