

**Testimony of Doug Goehring
North Dakota Agriculture Commissioner**

**United States Senate Committee on Environment and Public Works
Subcommittee on Fisheries, Water, and Wildlife
*“A Review of Waters of the U.S. Regulations” Their Impact on States and the American
People”***

June 12, 2019

Good morning Chairman Barrasso, Minority Ranking Member Carper, Subcommittee Chairman Cramer, Minority Ranking Member Duckworth, and members of the committee.

Thank you for the opportunity to present to you today about the Waters of the United States regulations and their impact on the states and those who care for and make a living off the land. My name is Doug Goehring, North Dakota Agriculture Commissioner.

North Dakota farmers and ranchers own, operate, and manage almost 90 percent of the land area in the state, and our more than 26,000 farms and ranches operate on nearly 40 million acres. The average farm or ranch operation in North Dakota is approximately 1,500 acres, and provides food and habitat for more than 90 percent of the wildlife in North Dakota. Agriculture is North Dakota’s largest industry, accounting for 25 percent of the total economy. Although only two percent of the population in the state are farmers and ranchers, agriculture supports 24 percent of the state’s workforce, which is comparatively higher than the national statistic where agriculture supports 19 percent of the workforce.

Under the previous definition of a traditionally navigable water (TNW), there were only 5,100 linear miles of jurisdictional TNWs in North Dakota. The 2015 Rule would have expanded federal authority to 85,604 linear miles in North Dakota.

It is important to recognize that North Dakota is one of five states in the prairie pothole region. By definition, prairie potholes are shallow wetlands that are the result of glacial activity.

Through the egregious overreach of the 2015 Waters of the United States Rule, federal jurisdiction would have been extended through dry land with the inclusion of a 4,000 foot buffer, to encompass the entire prairie pothole region. North Dakota would have witnessed a takings of approximately 80 percent in our state.

The prairie pothole region supports a vast ecosystem of both wildlife and livestock species. There are many acres of highly productive native prairie within this region that are important to ranchers as forage for their livestock. Managed grazing of this region is a critical piece in the success of the health of the entire ecosystem, and would have been greatly restricted under the 2015 Rule. Without proper management, the diversity of the prairie would see a detrimental loss of native plant species, as well as an increase in invasive species that thrive under nonuse conditions.

As Agriculture Commissioner, I am greatly concerned about the potential of the 2015 Waters of the United States Rule that conceivably places virtually every river, creek, stream, and vast amounts of adjacent lands under EPA jurisdiction. I remain troubled with the apparent attempt to infringe and encroach upon the individual sovereignty of the states. The most fundamental management practice in agriculture is effective water management – either to retain, conserve, or convey. An overly rigid one-size-fits-all federal intervention and regulatory oversight is not reasonable, not workable, and not appropriate.

Unlike the 2015 Rule, the 2019 Proposed Waters of the United States Rule was crafted with input from the regulated community. I welcome a final rule because the existing patchwork for states is confusing for state officials working between producers and the federal government. It also creates uncertainty for producers, as jurisdictions continue to shift with each new court decision. In North Dakota, we advocated for a new rule not for partisan reasons, but

because the previous rule had a regulatory expanse that conflicted with state jurisdiction and regulated large tracts of land where no rivers or streams exist. Farmers and ranchers would have been forced to hire a consultant to determine what was jurisdictional. Overall, I am seeking a new rule that will allow farmers and ranchers to visually see what is and is not jurisdictional. We need to craft a rule that adheres to the text and legal precedent of the Clean Water Act (CWA) and gives farmers and ranchers clear lines to determine when a federal permit is required.

The CWA is a strict liability statute that carries hefty civil fines as criminal penalties for persons who violate the Act's prohibitions. Civil penalties can equal up to \$54,833 per day, per violation. To ensure that law abiding farmers and other landowners can understand and comply with the CWA, the Final Rule's definition of Waters of the United States must provide clarity and certainty. As such, I support further changes to the proposed rule that will: clarify navigability, more clearly define tributaries, and improve clarity regarding ditches and wetlands.

The 2015 Rule asserted jurisdiction over a wide array of dryland features, isolated features and vaguely defined "other waters." The rule used an ill-defined application of the "significant nexus" test, and allowed for regulation of waters that have no relation to navigable waters and waters that do not contribute flow to navigable waters. The proposed regulatory text would define traditionally navigable waters (TNWs) as "waters which are currently used, or which were used in the past or may be susceptible to use in interstate or foreign commerce, including the territorial seas and waters which are subject to the ebb and flow of the tide." I would encourage the Administration to re-evaluate this definition of TNWs and ensure that *navigability* is included in the definition. I would also encourage EPA to revise the above text and make it clear that waters that are or were used for transport in interstate or foreign commerce qualify as TNWs. This difference, although small, will ensure that TNWs are waters that are not flowing

due to heavy rainfall or other weather events. Instead, it will narrow jurisdictional focus to waters that support commerce and are indeed navigable.

In the 2019 Proposed Rule, tributaries of TNWs are jurisdictional. The rule defines “perennial” as a “surface water flowing continuously year-round during a typical year,” and “intermittent” is defined as “surface water flowing continuously during certain times of a typical year and more than in direct response to precipitation.” These definitions currently only concern flow regimes. To clarify these terms, I would encourage the Administration to consider the value of physical indicators, as well as continuous surface water flow.

In the 2015 rulemaking, “bed,” “bank,” and “ordinary highwater mark” were misused and did not address the amount of water flowing through these features when determining jurisdiction. Rather than regulating flow regimes and physical barriers as separate entities, I would request the Administration to consider both flow and physical indicators to determine the presence of a jurisdictional tributary. The sequential, two-step process recommends first, determining whether physical indicators exist. Then, determining whether the tributary meets necessary flow metrics. I support this approach as it creates clear, administrable lines for farmers and ranchers when trying to determine whether features on their land are jurisdictional.

I agree with the intent to leave most ditches and artificial channels out of federal jurisdiction. Across the nation, states, counties and municipalities regulate water flows through ditches to conserve, allocate and maintain water quality. The current proposed definition only confuses the existing regulatory scheme and needs to be adjusted. To the extent the agencies intend to assert jurisdiction over ditches that are constructed in tributaries, they should revise the “tributary” definition to clarify that the definition encompasses artificially created tributaries.

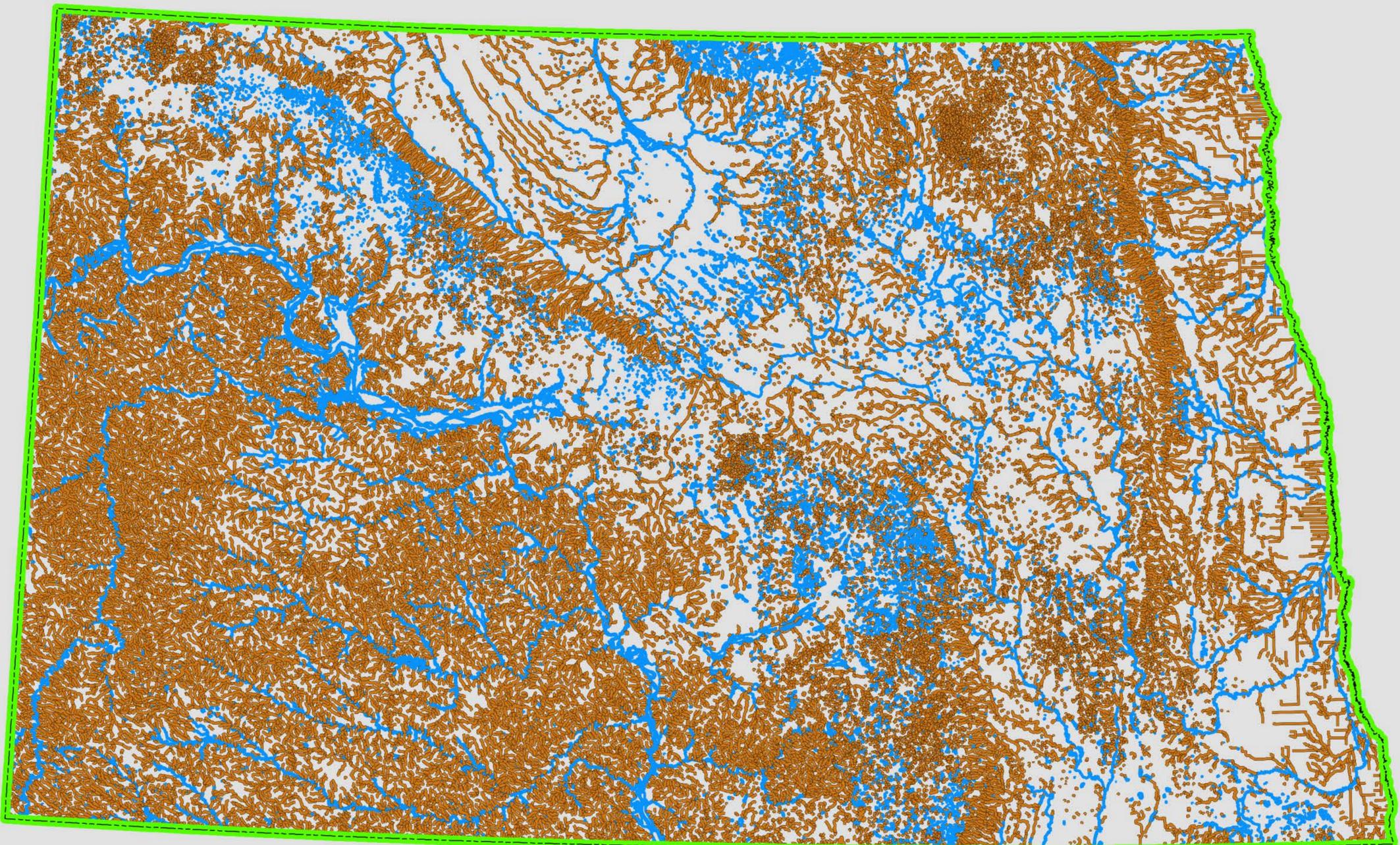
Under the Proposed Rule, “adjacent wetlands” would be jurisdictional, and the rule defines that term to mean “wetlands that abut or have a direct hydrologic surface connection to a jurisdictional water in a typical year.” I applaud the agency for providing a definition of “upland,” which means “any land area that under normal circumstances does not satisfy all three wetland delineation criteria and does not lie below the ordinary highwater mark.” I support that wetlands that are physically separated from a Water of the United States and do not have a direct surface connection are not adjacent wetlands.

North Dakota, as the lead plaintiff for a coalition of states with a preliminary injunction on the 2015 rule, continues to have significant interest in the Waters of the United States rulemaking. The extensive involvement of North Dakota in both the litigation of the 2015 rule and recent rulemakings demonstrates the state is committed to maintaining regulatory control over the waters of the state. North Dakota, through its laws and agencies, already properly, sensibly, and consistently protects the waters of the state, both the surface and subsurface water.

I want to assure you that these rulemakings are not taking place in a vacuum, and the resulting regulatory structure needs to reflect this. States have intimate knowledge of their available resources, the needs of their people and industries, and are much better equipped to understand the specific and unique needs that do not fit a one-size-fits-all federal regulatory scheme.

No one loves our land and resources more than we do! We drink the water, produce the food and raise our families on the land, with the intent to pass it on to the next generation. Thank you Mr. Chairman and I’d be happy to answer any questions.

Intermittent Streams, Ephemeral Streams, Wetlands, Ravines & Ditches



FLOW_TYPE

— Intermittent

— Perennial

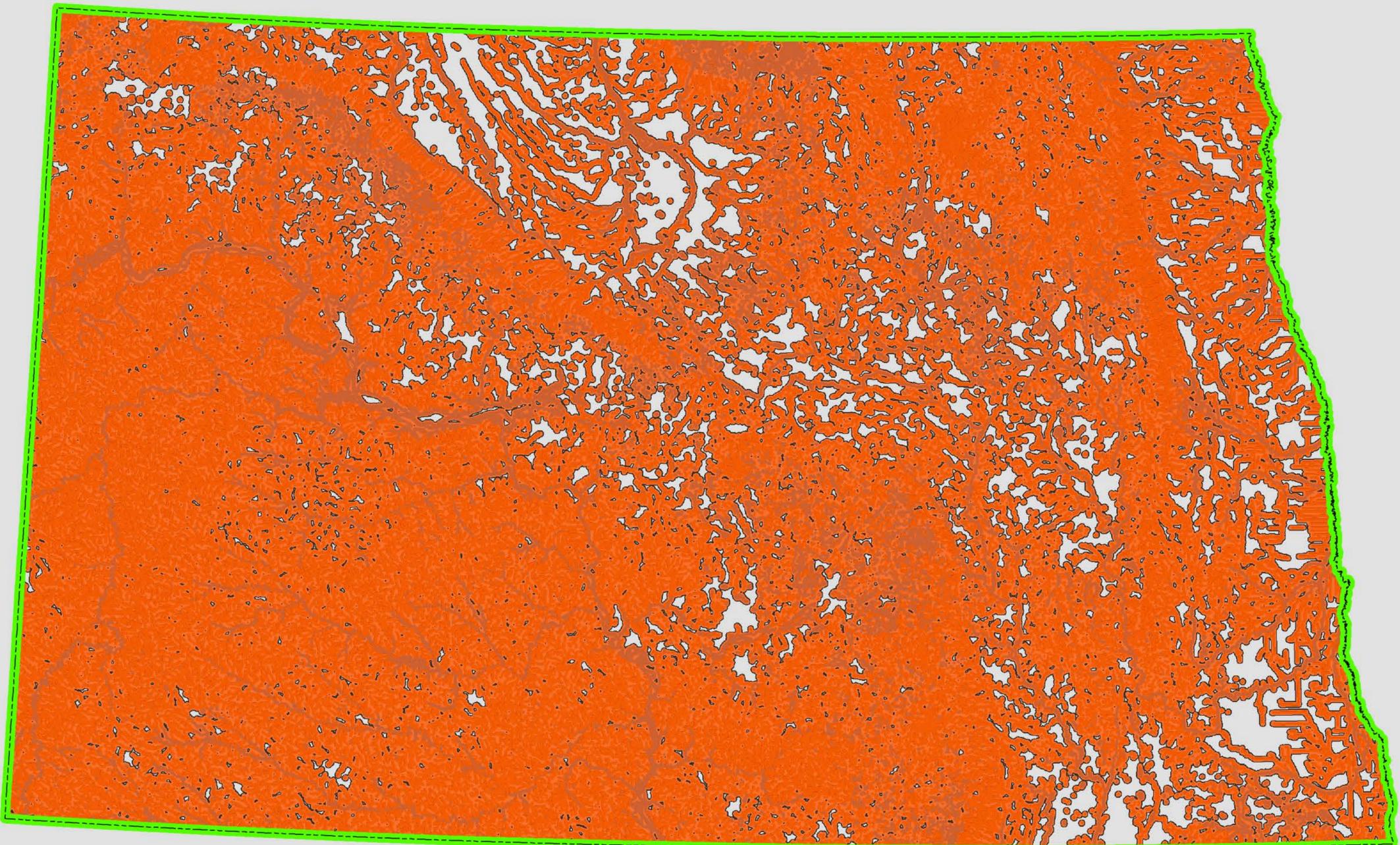
□ State Border





Intermittent Streams, Ephemeral Streams, Wetlands, Ravines & Ditches

4000ft buffer



 Stream Buffer

FLOW_TYPE

 Intermittent

 Perennial

 State Border



0 8 16 24 32
Miles



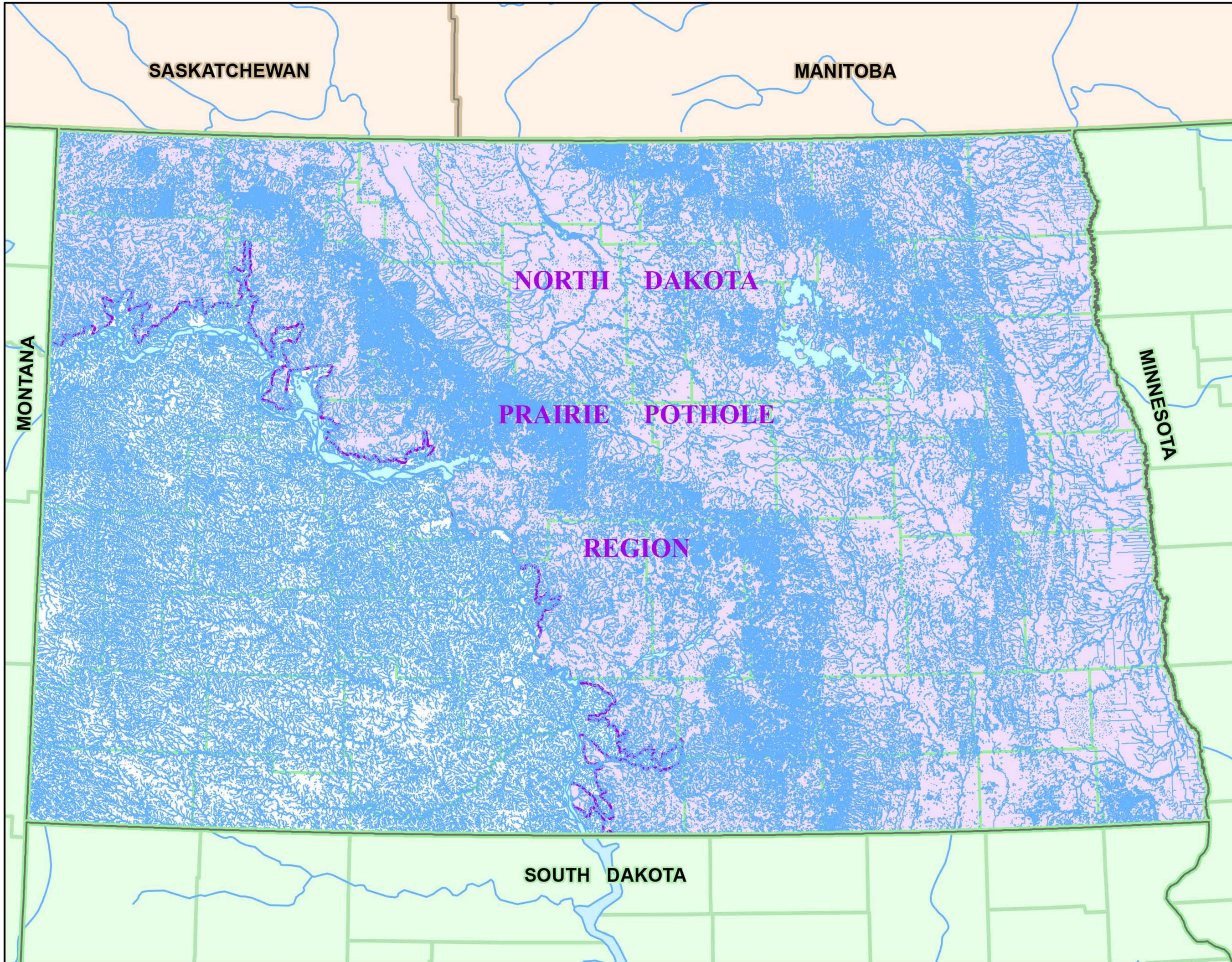


Figure 5.0: Spatial extents of the North Dakota Prairie Pothole Region (purple areas) and 1:24,000 scale water features