

Sixty-sixth  
Legislative Assembly  
of North Dakota

## ENGROSSED SENATE BILL NO. 2211

Introduced by

Senators Bekkedahl, Dwyer, Unruh

Representatives Keiser, Porter

1 A BILL for an Act to create and enact section 61-33-01.1 and a new subsection to section  
2 61-33.1-03 of the North Dakota Century Code, relating to the determination of the ordinary high  
3 water mark; ~~and~~ to amend and reenact sections 61-33-01 and 61-33.1-02, subdivision e of  
4 subsection 3 of section 61-33.1-03, sections 61-33.1-04 ~~and~~, 61-33.1-05, and 61-33.1-07 of the  
5 North Dakota Century Code, relating to sovereign lands, determining the ordinary high water  
6 mark, and the ownership of mineral rights of land ~~inundated~~ subject to inundation by Pick-Sloan  
7 Missouri basin project dams; to provide a contingent appropriation; to provide for application;  
8 and to declare an emergency.

9 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

10 **SECTION 1. AMENDMENT.** Section 61-33-01 of the North Dakota Century Code is  
11 amended and reenacted as follows:

12 **61-33-01. Definitions.**

13 As used in this chapter, unless the context otherwise requires:

- 14 1. "Board" means the sovereign lands advisory board.
- 15 2. "Board of university and school lands" means that entity created by section 15-01-01.
- 16 3. "Ordinary high water mark" means the continuous line along the banks of navigable  
17 ivers and lakes where the presence and action of waters of the navigable river or lake  
18 are so common and usual, and so long continued in all ordinary years, as to mark  
19 upon the bank of a navigable river or lake a character distinct from that of the abutting  
20 upland. The ordinary high water mark line must be continuous in elevation or gently  
21 sloping, following the gradient of the river.
- 22 4. "Sovereign lands" means those areas, including beds and islands, lying within the  
23 ordinary high water mark of navigable lakes and streams. Lands established to be

1 riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be  
2 above the ordinary high water mark and are not sovereign lands.

3 ~~4.5.~~ "State engineer" means the person appointed by the state water commission pursuant  
4 to section 61-03-01.

5 **SECTION 2.** Section 61-33-01.1 of the North Dakota Century Code is created and enacted  
6 as follows:

7 **61-33-01.1. Ordinary high water mark determination - Factors to be considered.**

8 The state engineer shall maintain ordinary high water mark delineation guidelines  
9 consistent with this section.

10 1. When determining the ordinary high water mark for delineating the boundary of  
11 sovereign lands, vegetation and soils analysis must be considered the primary  
12 physical indicators. When considering vegetation, the ordinary high water mark is the  
13 line below which the presence and action of the water is frequent enough to prevent  
14 the growth of terrestrial vegetation or restrict vegetation growth to predominately  
15 aquatic species. Generally, land, including hay land, where the high and continuous  
16 presence of water has destroyed the value of the land for agricultural purposes must  
17 be deemed within the ordinary high water mark.

18 2. When feasible, direct hydrological and hydraulic measurements from stream gauge  
19 data, elevation data, historic records of water flow, high resolution light detection and  
20 ranging systems, prior elevation and survey maps, and statistical hydrological  
21 evidence must be considered when determining the ordinary high water mark. The  
22 state engineer shall establish appropriate guidelines, technical standards, and other  
23 criteria, including use of light detection and ranging systems or other future  
24 technological advancements, as necessary, for conducting hydrologic and hydraulic  
25 modeling required by this section.

26 3. Secondary physical indicators, including litter, debris, or staining, may be considered  
27 to supplement the analysis of the ordinary high water mark investigation but may not  
28 supersede primary physical indicators unless primary physical indicators are deemed  
29 inadequate or inconclusive. Physical indicators directly affected by influent  
30 non-navigable tributaries, adjoining water bodies, or wetlands may not be used to  
31 delineate the sovereign land boundary of a navigable body of water.

**SECTION 3. AMENDMENT.** Section 61-33.1-02 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-02. Mineral ownership of land ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams. (Retroactive application - [See note](#))**

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

**SECTION 4. AMENDMENT.** Subdivision e of subsection 3 of section 61-33.1-03 of the North Dakota Century Code is amended and reenacted as follows:

- e. Subsection ~~34~~ of section 61-33-01 and section 47-06-05, which provide all accretions are presumed to be above the ordinary high water mark and are not sovereign lands. Accreted lands may be determined to be within the ordinary high water mark of the historical Missouri riverbed channel based on clear and convincing evidence. Areas of low-lying and flat lands where the ordinary high water mark may be impracticable to determine due to inconclusive aerial photography or inconclusive vegetation analysis must be presumed to be above the ordinary high water mark and owned by the riparian landowner.

**SECTION 5.** A new subsection to section 61-33.1-03 of the North Dakota Century Code is created and enacted as follows:

Upon adoption of the final review findings by the industrial commission, the board of university and school lands may contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage on a quarter-quarter basis or government lot basis above and below the ordinary high water mark

as delineated by the final review findings of the industrial commission. The acreage determination is final upon approval by the board.

**SECTION 6. AMENDMENT.** Section 61-33.1-04 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-04. Implementation. (Retroactive application - [See note](#))**

1. Within six months after the adoption of the ~~final review findings~~acreage determination by the ~~industrial commission~~board of university and school lands:
  - a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and
  - b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.
2. Upon adoption of the ~~final review findings~~acreage determination by the ~~industrial commission~~board of university and school lands:
  - a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the ~~date of adoption of the final review findings~~approving the acreage determination.
  - b. Operators of oil and gas wells affected by the ~~final review findings~~final acreage determination immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the ~~date of adoption of the review findings~~the board approves the acreage determination. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of

the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding or final acreage determination.

**SECTION 7. AMENDMENT.** Section 61-33.1-05 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-05. Actions challenging review findings or final acreage determinations.**  
(Retroactive application - [See note](#))

1. An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03.
2. An interested party seeking to bring an action challenging the final acreage determination under this chapter shall commence an action in district court within two years of the date the ~~acreage determinations were approved~~ ~~payments were made~~ by the board of university and school lands. The plaintiff bringing an action under this section may challenge only the acreage determination for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the final acreage determination challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a determination of the acreage above or below the historical Missouri riverbed channel which varies from the final acreage determination under this chapter bears the burden of establishing the variance by clear and

convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm contracted by the board of university and school lands under subsection 2 of section 61-33.1-04.

3. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, ~~and~~ determination of the ordinary high water mark, and final acreage determination under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

**SECTION 8. AMENDMENT.** Section 61-33.1-07 of the North Dakota Century Code is amended and reenacted as follows:

**61-33.1-07. State engineer regulatory jurisdiction. (Retroactive application - [See note](#))**

This chapter does not affect the authority of the state engineer to regulate the historical Missouri riverbed channel, minerals other than oil and gas, or the waters of the state, provided the regulation does not affect ownership of oil and gas minerals in and under the riverbed or lands above the ordinary high water mark of the historical Missouri riverbed channel ~~inundated~~subject to inundation by Pick-Sloan Missouri basin project dams.

**SECTION 9. CONTINGENT APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - REIMBURSEMENT OF LEGAL EXPENSES.**

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of \$750,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of reimbursing legal expenses as provided in subsection 2, for the biennium beginning July 1, 2019, and ending June 30, 2021.
2. The commissioner of university and school lands shall use funds appropriated in subsection 1 to reimburse actual legal and expert fees incurred and requested by any private mineral owner, or the owner's successors in interest, who reserved the mineral rights, through deed or condemnation order from the court, when the United States acquired the owner's property as part of the land acquisitions for Garrison Dam and its reservoir, Lake Sakakawea, and who filed a lawsuit against the state of North Dakota after December 31, 2011, but before December 31, 2016, and which lawsuit was pending as of February 1, 2017, claiming title to reserved mineral rights. The legal and

1 expert fees may not be reimbursed until the final adjudication, settlement, or other  
2 resolution of the lawsuit for which they were incurred.

3 **SECTION 10. APPLICATION.** Sections 1 and 2 of this Act do not apply to the ordinary high  
4 water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This  
5 Act does not affect or limit the authority of the state engineer to regulate waters of this state.

6 **SECTION 11. EMERGENCY.** This Act is declared to be an emergency measure.