

Sixty-sixth
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1192

Introduced by

Representatives Keiser, Martinson

Senator Unruh

1 A BILL for an Act to create and enact section 61-33-01.1 of the North Dakota Century Code,
2 relating to defining and delineating the ordinary high water mark of a navigable body of water;
3 ~~and~~ to amend and reenact section 61-33-01 and subdivision e of subsection 3 of section
4 61-33.1-03 of the North Dakota Century Code, relating to the definition and determination of
5 ordinary high water mark; and to provide for an application.

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

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

9 **61-33-01. Definitions.**

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

- 11 1. "Board" means the sovereign lands advisory board.
- 12 2. "Board of university and school lands" means that entity created by section 15-01-01.
- 13 3. "Ordinary high water mark" means the continuous line along the banks of navigable
14 rivers and lakes where the presence and action of waters of the navigable river or lake
15 are so common and usual, and so long continued in all ordinary years, as to mark
16 upon the bank of a navigable river or lake a character distinct from that of the abutting
17 upland. The ordinary high water mark line must be continuous in elevation or gently
18 sloping, following the gradient of the river.
- 19 4. "Sovereign lands" means those areas, including beds and islands, lying within the
20 ordinary high water mark of navigable lakes and streams. Lands established to be
21 riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be
22 above the ordinary high water mark and are not sovereign lands.
- 23 4.5. "State engineer" means the person appointed by the state water commission pursuant
24 to section 61-03-01.

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

3 ~~62-33-01.1~~**61-33-01.1. Ordinary high water mark determination guidelines- Factors to**
4 **be considered.**

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

- 7 1. ~~The ordinary high water mark line is a function of the hydrology and hydraulics of a~~
8 ~~river or lake. A person determining an ordinary high water mark shall use, whenever~~
9 ~~feasible, direct hydrologic and hydraulic measurement from lake and stream gauge~~
10 ~~data, elevation data, flood prediction analysis, historic records of water flow, high-~~
11 ~~resolution remote sensing data and methods, prior elevation and survey maps, and~~
12 ~~statistical hydrological evidence. High-resolution remote sensing data and methods~~
13 ~~include aerial photography and light detection and ranging.~~When determining the
14 ordinary high water mark for delineating the boundary of sovereign lands, vegetation
15 and soils analysis must be considered the primary physical indicators. When
16 considering vegetation, the ordinary high water mark is the line below which the
17 presence and action of the water is frequent enough to prevent the growth of terrestrial
18 vegetation or restrict vegetation growth to predominately aquatic species. Generally,
19 land, including hay land, where the high and continuous presence of water has
20 destroyed the value of the land for agricultural purposes must be deemed within the
21 ordinary high water mark.
- 22 2. ~~The ordinary high water mark lines on the banks of a nonreservoired navigable lake~~
23 ~~always must be the same elevation, and on a river must be the same elevation on~~
24 ~~opposite banks based on points directly across from one another perpendicular to the~~
25 ~~axis of flow of the river. When the elevation of the ordinary high water mark line is~~
26 ~~established on only one bank of a river, the elevation and gradient of that line must be~~
27 ~~transferred to the opposite bank directly across the river perpendicular to the axis of~~
28 ~~flow.~~When feasible, direct hydrological and hydraulic measurements from stream
29 gauge data, elevation data, historic records of water flow, high resolution light
30 detection and ranging systems, prior elevation and survey maps, and statistical
31 hydrological evidence must be considered when determining the ordinary high water

mark. The state engineer shall establish appropriate guidelines, technical standards, and other criteria, including use of light detection and ranging systems or other future technological advancements, as necessary, for conducting hydrologic and hydraulic modeling required by this section.

3. ~~When direct measurement methods are infeasible, indirect indicators of the ordinary high water mark line, such as a break in slope along the banks, a change in sediment texture, and a change in the vegetation characteristics, may be used to determine an ordinary high water mark line. However, the interpretation of indirect indicators must be constrained within elevation restrictions described in this section and otherwise defensible within the known hydrologic and hydraulic characteristics of the nonreservoired portion of the flow of the navigable stream, the extent of which must be based on the reservoir operating at full capacity. Indirect indicators affected by influent non-navigable tributaries, adjoining water bodies, or wetlands may not be used to delineate the sovereign land boundary of a navigable water body.~~ Secondary physical indicators, including litter, debris, or staining, may be considered to supplement the analysis of the ordinary high water mark investigation but may not supersede primary physical indicators unless primary physical indicators are deemed inadequate or inconclusive. Physical indicators directly affected by influent non-navigable tributaries, adjoining water bodies, or wetlands may not be used to delineate the sovereign land boundary of a navigable body of water.

SECTION 3. 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.

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