

Sixty-sixth  
Legislative Assembly  
of North Dakota

## ENGROSSED 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; to~~  
 3 ~~amend and reenact section 61-33-01 and subdivision e of subsection 3 of section 61-33.1-03 of~~  
 4 ~~the North Dakota Century Code, relating to the definition and determination of ordinary high-~~  
 5 ~~water mark; and to provide for an application.~~ for an Act to create and enact a new subsection to  
 6 section 61-33.1-03 of the North Dakota Century Code, relating to the determination of the  
 7 ordinary high water mark; to amend and reenact sections 61-33.1-04 and 61-33.1-05 of the  
 8 North Dakota Century Code, relating to the ownership of mineral rights of land inundated by  
 9 Pick-Sloan Missouri basin project dams; and to declare an emergency.

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

11 ~~— **SECTION 1. AMENDMENT.** Section 61-33-01 of the North Dakota Century Code is~~  
 12 ~~amended and reenacted as follows:~~  
 13 ~~— **61-33-01. Definitions.**~~  
 14 ~~— As used in this chapter, unless the context otherwise requires:~~  
 15 ~~— 1. "Board" means the sovereign lands advisory board.~~  
 16 ~~— 2. "Board of university and school lands" means that entity created by section 15-01-01.~~  
 17 ~~— 3. "Ordinary high water mark" means the continuous line along the banks of navigable~~  
 18 ~~rivers and lakes where the presence and action of waters of the navigable river or lake~~  
 19 ~~are so common and usual, and so long continued in all ordinary years, as to mark~~  
 20 ~~upon the bank of a navigable river or lake a character distinct from that of the abutting~~  
 21 ~~upland. The ordinary high water mark line must be continuous in elevation or gently~~  
 22 ~~sloping, following the gradient of the river.~~  
 23 ~~— 4. "Sovereign lands" means those areas, including beds and islands, lying within the~~  
 24 ~~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.~~

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

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

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

14 **SECTION 1.** A new subsection to section 61-33.1-03 of the North Dakota Century Code is  
15 created and enacted as follows:

16 Upon adoption of the final review findings by the industrial commission, the board of  
17 university and school lands may contract with a qualified engineering and surveying  
18 firm to analyze the final review findings and determine the acreage on a quarter basis  
19 or government lot basis above and below the ordinary high water mark as delineated  
20 by the final review findings of the industrial commission. The acreage determination is  
21 final upon approval by the board.

22 **SECTION 2. AMENDMENT.** Section 61-33.1-04 of the North Dakota Century Code is  
23 amended and reenacted as follows:

24 **61-33.1-04. Implementation. (Retroactive application - [See note](#))**

- 25 1. Within six months after the adoption of the ~~final review findings~~acreage determination  
26 by the ~~industrial commission~~board of university and school lands:
- 27 a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts  
28 lying entirely above the ordinary high water mark of the historical Missouri  
29 riverbed channel on both the corps survey and the state phase two survey must  
30 be released to the owners of the tracts, absent a showing of other defects  
31 affecting mineral title; and

- 1           b. Any royalty proceeds held by the board of university and school lands attributable  
2           to oil and gas mineral tracts lying entirely above the ordinary high water mark of  
3           the historical Missouri riverbed channel on both the corps survey and the state  
4           phase two survey must be released to the relevant operators to distribute to the  
5           owners of the tracts, absent a showing of other defects affecting mineral title.
- 6           2. Upon adoption of the ~~final review findings~~acreage determination by the ~~industrial-~~  
7           ~~commission~~board of university and school lands:
- 8           a. The board of university and school lands shall begin to implement any acreage  
9           adjustments, lease bonus and royalty refunds, and payment demands as may be  
10           necessary relating to state-issued oil and gas leases. The board shall complete  
11           the adjustments, refunds, and payment demands within two years after ~~the date-~~  
12           ~~of adoption of the final review findings~~approving the acreage determination.
- 13           b. Operators of oil and gas wells affected by the ~~final review findings~~acreage  
14           determination immediately shall begin to implement any acreage and revenue  
15           adjustments relating to state-owned and privately owned oil and gas interests.  
16           The operators shall complete the adjustments within two years after the ~~date of~~  
17           ~~adoption of the review findings~~board approves the acreage determination. Any  
18           applicable penalties, liability, or interest for late payment of royalties or revenues  
19           from an affected oil or gas well may not begin to accrue until the end of the  
20           two-year deadline. The filing of an action under section 61-33.1-05 tolls the  
21           deadline for any oil and gas well directly affected by the action challenging the  
22           review finding or acreage determination.

23           **SECTION 3. AMENDMENT.** Section 61-33.1-05 of the North Dakota Century Code is  
24           amended and reenacted as follows:

25           **61-33.1-05. Actions challenging review findings or acreage determination.**  
26           **(Retroactive application - [See note](#))**

- 27           1. An interested party seeking to bring an action challenging the review findings or  
28           recommendations or the industrial commission actions under this chapter shall  
29           commence an action in district court within two years of the date of adoption of the  
30           final review findings by the industrial commission. The plaintiff bringing an action under  
31           this section may challenge only the final review finding for the section or sections of

1 land in which the plaintiff asserts an interest. The state and all owners of record of fee  
2 or leasehold estates or interests affected by the finding, recommendation, or industrial  
3 commission action challenged in the action under this section must be joined as  
4 parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high  
5 water mark of the historical Missouri riverbed channel which varies from the boundary  
6 determined under this chapter bears the burden of establishing the variance by clear  
7 and convincing evidence based on evidence of the type required to be considered by  
8 the engineering and surveying firm under subsection 3 of section 61-33.1-03.

9 2. An interested party seeking to bring an action challenging the final acreage  
10 determination under this chapter shall commence an action in district court within two  
11 years of the date the acreage determinations were approved by the board of university  
12 and school lands. The plaintiff bringing an action under this section may challenge  
13 only the acreage determination for the section or sections of land in which the plaintiff  
14 asserts an interest. The state and all owners of record of fee or leasehold estates or  
15 interests affected by the final acreage determination challenged in the action under  
16 this section must be joined as parties to the action. A plaintiff or defendant claiming a  
17 determination of the acreage above or below the historical Missouri riverbed channel  
18 which varies from the final acreage determination under this chapter bears the burden  
19 of establishing the variance by clear and convincing evidence based on evidence of  
20 the type required to be considered by the engineering and surveying firm contracted  
21 by the board of university and school lands under subsection 2 of section 61-33.1-03.

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

27 **SECTION 4. EMERGENCY.** This Act is declared to be an emergency measure.