

FISCAL NOTE
Requested by Legislative Council
02/02/2015

Amendment to: HB 1268

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures						
Appropriations						

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

The First Engrossment of HB 1268 is a proposed legislative study relating to sovereign land boundaries and the effect on property taxes. The cost of study is unknown.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Under NDCC 61-33, the State Engineer has the responsibility to manage and supervise the sovereign lands lying within the ordinary high watermark of navigable lakes and streams, and the Board of University and School Lands manages the oil and gas mineral interests beneath those lands.

As a proposed study, the bill may require expenditures for technical experts for providing background on the delineation of the ordinary high water mark of navigable waters, however the extent of that cost cannot be determined.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

None.

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The State Engineer and the Commissioner of University and School Lands have coordinated efforts on the delineation of navigable waters and would cooperate in providing background for a legislative study of sovereign lands. Those expenses would be funded by each departments' appropriated special fund operating budgets.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

Expenses cannot be determined.

Name: Lance Gaebe

Agency: Department of Trust Lands

Telephone: 701 328 2800

Date Prepared: 02/03/2015

FISCAL NOTE
Requested by Legislative Council
01/13/2015

Bill/Resolution No.: HB 1268

- 1 A. **State fiscal effect:** *Identify the state fiscal effect and the fiscal effect on agency appropriations compared to funding levels and appropriations anticipated under current law.*

	2013-2015 Biennium		2015-2017 Biennium		2017-2019 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues						
Expenditures				\$33,220,000		\$10,235,000
Appropriations			\$0	\$33,220,000	\$0	\$10,235,000

- 1 B. **County, city, school district and township fiscal effect:** *Identify the fiscal effect on the appropriate political subdivision.*

	2013-2015 Biennium	2015-2017 Biennium	2017-2019 Biennium
Counties			
Cities			
School Districts			
Townships			

- 2 A. **Bill and fiscal impact summary:** *Provide a brief summary of the measure, including description of the provisions having fiscal impact (limited to 300 characters).*

Every fourth year the Land Board would be responsible for providing boundaries of sovereign lands to each county. The Land Board does not currently have this responsibility or information.

- B. **Fiscal impact sections:** *Identify and provide a brief description of the sections of the measure which have fiscal impact. Include any assumptions and comments relevant to the analysis.*

Under NDCC 61-33, the State Engineer manages and supervises the sovereign lands lying within the ordinary high watermark of navigable lakes and streams, and the Board of University and School Lands manages the oil and gas mineral interest beneath those lands.

The bill would require substantial expenditures for the initial surveys and technical delineation of the ordinary high water mark of navigable waters. The information would be used to create maps for county officials. The surveys would be updated every four years.

3. **State fiscal effect detail:** *For information shown under state fiscal effect in 1A, please:*

- A. **Revenues:** *Explain the revenue amounts. Provide detail, when appropriate, for each revenue type and fund affected and any amounts included in the executive budget.*

none

- B. **Expenditures:** *Explain the expenditure amounts. Provide detail, when appropriate, for each agency, line item, and fund affected and the number of FTE positions affected.*

The State Engineer recently surveyed navigable waters at an average cost of \$9,270 per bank mile. While 118 bank miles along the Yellowstone and Missouri Rivers have been surveyed, the remaining 3,567 bank of the Mouse, Red, Sheyenne, James, Heart, Des Lacs, Knife, Cannonball, Pembina, Missouri and Bois de Sioux Rivers would need to be surveyed to determine the boundaries of sovereign lands for an estimated cost of \$33,000,000.

The perimeter of the shoreline of navigable lakes including Devils Lake, Painted Woods Lake, Lake Metigoshe, Upper Des Lacs, Sweetwater Lake and other navigable lakes is unknown, but a similar per mile cost would be involved in the assessment of the ordinary high watermarks of these bodies. This cost may exceed \$10,000,000.

The bank and shoreline estimate could increase if other lakes or streams are determined to be navigable.

An additional FTE to manage the contracts and reviews would also be needed.

The State Engineer's Office, and not the Land Board would be the appropriate entity to implement the act, and it would require appropriation and FTE authority for these functions.

- C. **Appropriations:** *Explain the appropriation amounts. Provide detail, when appropriate, for each agency and fund affected. Explain the relationship between the amounts shown for expenditures and appropriations. Indicate whether the appropriation or a part of the appropriation is included in the executive budget or relates to a continuing appropriation.*

An appropriation of \$33,220,000 for costs and salaries for the State Engineer in the 2015-2017 biennium would be needed. An estimated \$10,235,000 would be required in the 2017-2019 biennium.

Name: Lance Gaebe

Agency: Department of Trust Lands

Telephone: 701 328 2800

Date Prepared: 01/16/2015

2015 HOUSE POLITICAL SUBDIVISIONS

HB 1268

2015 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee

Prairie Room, State Capitol

HB 1268

1/29/2015

22812

☐ Subcommittee

☐ Conference Committee

Chancellor Musch

Explanation or reason for introduction of bill/resolution:

Relating to the board of university and school lands informing counties of the boundaries of sovereign lands within each county for correct determination of the taxable status.

Minutes:

Representative Nelson Testimony #1
John Paczkowski Testimony #2
Michael Brand Testimony #3

Chairman Klemin: Opened the hearing on HB 1268 (Nelson will be returning to testify in support shortly)

Opposition:

John Paczkowski: Testimony #2

Michael Brand: Testimony #3

Chairman Klemin: This doesn't say anything about oil and gas development in here does it?

Mike: No it does not.

Chairman Klemin: So when you say the board of universities and school lands manages only the oil and gas and relay the hydro carbons under the beds of navigable lakes and streams are you saying the boards of universities and schools lines have nothing to do with the boundaries of sovereign lands in each county as described in this bill?

Mike: That is correct

Chairman Klemin: So this would be a new responsibility for the board of university and school lands, should we pass this bill?

Mike: That is right it would be a new responsibility that we believe belongs to the state engineer.

Representative Beadle: If you look to the Nelson's testimony he mentions that there was a drafting error. He meant not for the schools but for the water commission or state engineer. When the bill refers to the board of university and school lands that should be the water commission or the state engineer.

Support:

Representative Nelson: (He returned from another meeting to testify on the bill)
Testimony #1

Representative Koppelman: How does the tax on inundated lands that you mention work?

Representative Nelson: As far as I know you go through an application process and there are some criteria and you get a 90% reduction.

Representative Koppelman: So is most of this land agricultural land and if so isn't that taxed on productivity and if so isn't that taken into consideration if it is underwater?

Representative Nelson: There are adjustment factors and effectively the counties are using them. For instance one thing is even though the people still do have title to those islands is I do know that they are giving even the people on the islands cause there is a lot of costs getting to and from the islands a reduction on their taxes, and I commend them for that. The people that are under the water, I guess it is be better to be charged for someone else's land but I still don't think you get to the end of the basic problem.

Representative Kelsh: Sovereign land is determined by the high water mark and that was at what point in history?

Representative Nelson: Whether or not water is navigable the point in history in that part is the moment of state hood but because rivers tend to move and stuff the exact boundaries of the water today is not limited to the water at the time of state hood.

Representative Kelsh: When that water, for instance Devil's Lake receded, people then there it was determined to be sovereign land, somebody farmed it. Did they pay rent to the state of North Dakota? Did they buy that land? How did it become determined that they should be paying taxes on it?

Representative Nelson: This is where people around Devil's Lake think Devil's Lake is different but is actually where it is the same. The water receded greatly from the time of state hood and they even have some special names for the deeds down in the bottom of the lake and people some of them squatted in stuff but somehow everybody ended up with a deed for which they were paying taxes, and this is where they think it is different, but this is where it is the same. That was not state land because it was not navigable water in the land so therefore that was not state land even though the water would have been over the top of the land at the time of statehood. So on a navigable body as the water recedes the title does to. In its ordinary high water mark, Devil 'slake is a bit unique that it tends to move so much. Private land would go down to that and public land would extend up to that.

Representative Kelsh: When it was at the 93, 92 levels there were farming, building houses, and then would come back up. If they were farming this land and it was sovereign land, did they farm it, pay rent, buy it?

Representative Nelson: It was not sovereign land after it had receded and the question would have been how do you determine title to the land and in general is what happens it is a pie shape from the shore but in Devil's Lake I don't think that was actually followed but basically the school board was involved and somehow they ended up with title. Those people were not squatting on sovereign land, they were on deeded land but it would have been sovereign at the time of state hood with the level but as the water receded and the lake established a new ordinary high-water mark that was private land.

Chairman Klemin: Closed the hearing on HB 1268

Chairman Klemin: Opened the hearing on HB 1268.

Representative Beadle: I understand this bill is far from good due to some of the issues that we have with it due to the price tag associated with it. As it stands now I don't for see a way that it would ever pass appropriations much less the floor, but I'm wandering, we understand there is a significant issue especially I the Devil's Lake area particular and it seems as if our definition in statute utilizing navigable waters to determine whether it is sovereign land versus private property seems it hasn't updated with technology and I'm thinking we should amend this bill to become a study at look at the issues.

Representative Kelsh: I could support that, the testimony of Nelson, the people are expected to pay 10% of the tax and that land is underwater and it is not their land, there is something wrong with the system. I don't believe this fiscal note at all.

Chairman Klemin: Before we can vote on this I think we need to see some language.

Representative Anderson: I am from the area and the paying of taxes causes devastation for families. One of my classmates father, committed suicide over this. His land was underwater and he had to pay taxes. He had no money.

Chairman Klemin: Representative Beadle if you would find language that would be good. Hearing is closed on HB 1268.

2015 HOUSE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Prairie Room, State Capitol

HB 1268
1/30/2015
22901

- ☐ Subcommittee
☐ Conference Committee

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Explanation or reason for introduction of bill/resolution:

Relating to the board of university and school lands informing counties of the boundaries of sovereign lands within each county for correct determination of the taxable status.

Minutes:

Representative Beadle Testimony #1

This hearing is inaudible

Chairman Klemin: Opened the hearing on HB 1268

Representative Beadle: Testimony #1

Representative Koppelman: Moved the motion

Representative Beadle: Second

A Voice Vote Was Taken: All in favor

The amendments were adopted

Representative Kelsh: Moved do pass as amended

Representative Beadle: Second

A Roll Call Vote Was Taken: Yes 13, No 0, Absent 1 (Klein)

Do pass as amended

Representative Beadle will carry the bill

January 30, 2015

Handwritten: 1-30-15

PROPOSED AMENDMENTS TO HOUSE BILL NO. 1268

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study regarding taxation of state sovereign lands.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - TAXATION OF SOVEREIGN LANDS. During the 2015-16 interim, the legislative management shall consider studying the boundary changes of state sovereign lands due to frequent or substantial changes in water levels and the effect these boundary changes have on the taxation of sovereign lands. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-fifth legislative assembly."

Renumber accordingly

**2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1268**

House Political Subdivisions Committee

☐ Subcommittee ☐ Conference Committee

Amendment LC# or Description: 15.0541.01001

Recommendation: ☒ Adopt Amendment
☐ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Koppelman Seconded By Beadle

Representative	Yes	No	Representative	Yes	No
Chairman Lawrence R. Klemin			Rep. Pamela Anderson		
Vice Chair Patrick R. Hatlestad			Rep. Jerry Kelsh		
Rep. Thomas Beadle			Rep. Kylie Oversen		
Rep. Rich S. Becker			Rep. Marie Strinden		
Rep. Matthew M. Klein				Voice	
Rep. Kim Koppelman					
Rep. William E. Kretschmar					
Rep. Andrew G. Maragos					
Rep. Nathan Toman					
Rep. Denton Zubke					
	Voice				

Total (Yes) 14 No 0

Absent 1

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:

**2015 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1268**

House Political Subdivisions Committee

☐ Subcommittee ☐ Conference Committee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☒ Do Pass ☐ Do Not Pass ☐ Without Committee Recommendation
☒ As Amended ☐ Rerefer to Appropriations

Other Actions: ☐ Reconsider ☐ _____

Motion Made By Kelsh Seconded By Beadle

Representative	Yes	No	Representative	Yes	No
Chairman Lawrence R. Klemin	X		Rep. Pamela Anderson	X	
Vice Chair Patrick R. Hatlestad	X		Rep. Jerry Kelsh	X	
Rep. Thomas Beadle	X		Rep. Kylie Oversen	X	
Rep. Rich S. Becker	X		Rep. Marie Strinden	x	
Rep. Matthew M. Klein	---				
Rep. Kim Koppelman	X				
Rep. William E. Kretschmar	X				
Rep. Andrew G. Maragos	X				
Rep. Nathan Toman	X				
Rep. Denton Zubke	X				

Total (Yes) 13 No 0

Absent 1 (Klein)

Floor Assignment Representative Beadle

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1268: Political Subdivisions Committee (Rep. Klemin, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (13 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). HB 1268 was placed on the Sixth order on the calendar.

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to provide for a legislative management study regarding taxation of state sovereign lands.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. LEGISLATIVE MANAGEMENT STUDY - TAXATION OF SOVEREIGN LANDS. During the 2015-16 interim, the legislative management shall consider studying the boundary changes of state sovereign lands due to frequent or substantial changes in water levels and the effect these boundary changes have on the taxation of sovereign lands. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-fifth legislative assembly."

Renumber accordingly

2015 SENATE POLITICAL SUBDIVISIONS

HB 1268

2015 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee

Red River Room, State Capitol

HB 1268

3/12/2015

Job Number 24730

☐ Subcommittee

☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

A Bill for an Act to provide for a legislative management study regarding taxation of state sovereign lands

Minutes:

Written testimony # 1 Rep. Marvin E. Nelson

Chairman Burckhard opened the committee for HB 1168. All senators were present. Chairman Burckhard left to give testimony on another bill so V. Chairman Anderson presided at the hearing.

Rep. Marvin E. Nelson Written testimony # 1. (4:24-7:27) We are talking land under navigable waters. Sponsor and in favor of HB 1268.

V. Chairman Anderson Isn't it true that ranchers or farmers along the edge of Devils Lake who had 2 miles of land previously below the high water mark used that land pretty much for free for all the time that they were grazing cattle or doing whatever down there before the water came up?

Rep. Marvin Nelson Most of that land was put on the tax roll so I don't know if you'd say for free. The way the ownership of the land works is as a navigable water receded traditionally you have basically that pie shape to the mill and I don't think that was really followed in the case of Devils lake. Over a period of time anyway they came up with a way they have their boundaries and their units and I don't know that anybody ever paid for that land but that would be really kind of normal as navigable went down and established a new thing that you don't buy that, that is an ownership interest that the shore owner had.

V. Chairman Anderson It seems to me that if they platted the land then it got put on the tax rolls and then they could sell it and that's where all those houses were built below the high water mark that we eventually bought. Because we thought the water was never going to come back.

Rep. Marvin Nelson Yes, that is basically the way it worked and its interesting when you talk to people from Devils Lake as they talk about that deeding of the land and stuff as though Devils Lake is unique, but really it was Devils Lake operated the same way as other

navigable waters and then most of our waters are probably not navigable. The State Water Commission now has put on their web site if you go there, a navigable and non-navigable water publication and they do list of those waters of the state that they have determined one way or the other. Most waters in our state really have not been determined. Navigability has been a question of fact and it's very possible that the situation exists with other waters as well. The Corp of Engineers has also a list of navigable that is different than the state, so, those on that list the state is not claiming as sovereign but with the sovereign lands its back to again as the water has risen at Devils Lake, it really creates a lot of problems for people because in some cases they have mortgages on it. We had a bill to pay for that and one of the problems with that is part of the requirements is that they give a good and marketable title. How do you give a good title to land you don't own? So, this is the basic problem at this point is that they really don't own that land and yet they still have all these things going on. It is kind of a nasty problem and that is why I would hope that we study it a little bit and try to come up with some policies.

Senator Judy Lee So, if I own land now that was originally under water and then the lake went down, and so it was platted and it was farmed, or whatever, and a recreational home was built on it and now the water has come back up and the house has been moved and its not useful, do those people who had it platted and sold legally give up their ownership of that land since you're saying it is sovereign land now or is it something that there going to put in their will and transfer ownership to the heirs because eventually the lake may go down again and then then can own that land again?

Rep. Marvin Nelson They legally don't have ownership of the land, but if you go back say early in statehood because of those general criteria that it would be to the pie shaped, there was at least one early court case where a person had land at the bottom of the lake, and the water came up and then when it receded because his land was completely inundated; when the shore owner became owner of that land. If you take more recent court decisions, because we have the ability now to know where those property lines are and stuff, the property is restored to those lines if the water recedes once again. So you effectively something and I don't really know what to call it. That title that land would return to the estate that had it when it went under; but you don't own it while it's under. So, it's like you have some rights, but you don't really have a clear ownership or ownership of that land at this point.

Senator Judy Lee So if I lose ownership of it, if I don't want to pay taxes on it then maybe I shouldn't own it anymore, because if I didn't pay taxes on my house after 5 years the county would sell it on the courthouse steps. You kind of want it both ways is what I am hearing.

Rep. Marvin Nelson Senator Lee I guess you could argue, it would be more similar to mineral rights. Where you don't pay taxes on mineral rights yet you don't auction them off on the courthouse steps, but its real property but the ownership of the real property under the navigable waters belongs to the state of North Dakota. You even some parcels that aren't completely under the water where you're paying taxes on the whole parcel because you have part of your land that is above it. But that is the concern is people don't want to have their land foreclosed upon for taxes which I would argue would be illegal to do;

because how do you foreclose for taxes on land that the person didn't pay on property he didn't own.

Senator Judy Lee Maybe someone owns it. I don't want to pay taxes on it but I want to own it, so tell me why. I am not trying to be smart alecky here but how do I not look I am not trying to get it both ways. I want to own it, but not pay taxes on it.

Rep. Marvin Nelson You have a right there. I guess really I would have to say it's more a right of ownership under certain conditions, than actual ownership at this time. Yes you could argue that you're trying to have it both ways. You see if it was a non-navigable water, if the boundaries there and your land goes under the water, you still own that. So you still would pay taxes on that. That is still your land. It gets to be riparian rights like if it's a navigable water you or I as a member of the public could walk along the shoreline because we have riparian rights and other landowners around there can walk on the shoreline. But if it is non-navigable water, if you're walking on somebody's shoreline your trespassing. You don't have riparian rights on non-navigable water. It is just kind of the way it has evolved. I won't say that water laws totally reasonable or rational, or anything else but that is the way it is. It is just back to a problem of having people paying taxes on land that really and literally at this point don't own.

Senator Bekkedahl Sovereign lands are those already delineated in the Devils Lake basin by some type of a map structure that you've seen?

Rep. Marvin Nelson No, it's not delineated and that was when I originally asked for the state to basically tell the counties where the line was. That was where I came up with like a \$32 or 33 million dollar fiscal note, but it wasn't just for Devils Lake. But it was about \$10,000 a mile which is what would cost them as they have been doing along the Missouri River. To survey that accurately and at this point honestly, nobody has a line.

Senator Bekkedahl So sovereign lands which were the lands existing at the moment of statehood that were under water, high water mark is a newer definition that I think I have seen out there that deals with as the water ebbs and flows, increasing or decreasing which to me would see that is different than sovereign land?

Rep. Marvin Nelson The sovereign lands, that was people around Devils Lake thought that where the lake bed was at statehood that was going to be the line that was going to be sovereign land forever. If you read the Attorney Generals' opinion that I have included, that was part of the court case that no it's land under a water that was navigable at the time of statehood but the land itself the sovereign land itself can change if the lake establishes a different ordinary high water mark. So like now when Devils Lake has come up, it has established a new high water mark, so basically everything below the shore is sovereign land. If it went down, and vegetation came back and was growing and such, then that would again establishing a new ordinary high water mark and then all the land that had vegetation, would become privately owned again. It is not what was under water at the time of statehood. (Ex. Cited) Basically Devils Lake is a bit unique in varying so much that it.

Senator Bekkedahl I think sovereign lands to me, would be a definition of where that boundary existed at statehood of navigable waters. I think the high water mark

interpretations have become an accommodation that may serve as some other entities. Maybe it is the state, maybe somebody else. I don't know, but, the courts have obviously ruled on that. The interesting part to me is that when there were mineral interests involved under the Missouri River and the Yellowstone Rivers, it didn't take the state long to spend the money to determine that high water mark. It is interesting they haven't done it for Devils Lake as well.

V. Chairman Howard Anderson closed the hearing on HB 1268.

Committee Discussion

Senator Dotzenrod I wonder if there is somebody here from the State Water Commission that could answer a question I have about the original surveys when this land in the Dakotas was originally surveyed I assume that was before statehood. The section lines were identified and that when the surveys did that they identified lines they called meandering borders. That was part of the original first surveys if I am not mistaken. That has a lot to do with on those surveys the law that we use today to decide who owns what. Is that correct understanding?

Jerry Heizer Sovereign Land Manager for the State Engineer (21:18-) The original GOO was surveyed prior to statehood and at that time they did indeed establish a meander line around Devils Lake where the lake was at that particular time. The meander lines were basically on water bodies was established to really identify which acres could be usable and patented. So everything outside out of the original meander line was indeed patented. Somebody applied for patent on that and took it into their possession. As Devils Lake rises the courts established that yes Devils Lake is navigable water and was at the time of statehood and therefore sovereign to the state of North Dakota. So the state takes title to the beds and banks of the states' navigable waters including Devils Lake. The Corps also established that the line is ambulatory. As with rivers, they move, erode, lands secrete and title moves with that. Accretion acres once they arise above the ordinary high water mark, those acres go to the riparian land owner. If the river erodes on this side title is lost by the riparian land owner and goes to the state. In terms of Devils Lake because the line that delineates where the states interest begins, the dividing line basically between the state's interests and the private land owners' interest, is the ordinary high water mark. That is basically defined as that line where the water is there, is frequent enough to arrest the growth of ordinary agricultural crops. So basically when we delineate the ordinary high water mark and the state engineer did develop guidelines for delineating road and high water mark in 2007, and it's a science based approach that repeatable so that when the study is complete on a particular piece of ground its' defensible and it is something we can stand on. In terms of Devils Lake because it rises and falls rapidly sometimes, the vegetation doesn't get a chance to establish so the vegetation isn't which is normally is our primary indicator of an ordinary high water mark. It isn't a good indicator on Devils Lake and so the Corp basically said that the state takes to the waters' edge. The ordinary water mark on Devils Lake is basically wherever the water is today right now when you ask that question. So to delineate the ordinary water marks for Devils Lake it's a moving target. It all depends on the year. (Ex. Cited) In terms of land ownership on Devils Lake (Two ex. Cited 24:41- 26:45)

V. Chairman Anderson So, what could happen of course is that if my whole quarter is under water and so now the actual land owner who controls this is not me, but the guy who is my neighbor previously. But what you're saying is when that water goes down again, my quarter that emerges I get my title back to that even though I wasn't the riparian land owner for the period of time that the water was over my whole piece of land.

Jerry Heizer Yes, that is my understanding that is correct. I am going to guess that as the lake goes down and someday I think it probably will, my guess is that there will be some interesting law suits where some folks are going to try to implement the riparian land owner viewpoint of that and folks are going to say no, case law says that title comes back to me.

V. Chairman Anderson While you're up here, maybe for the edification of our committee you could explain the situation where the original surveys, high water mark was established and all that below that we considered riparian land. How did those get patented or titled and then sold off previously?

Jerry Heizer Where the meander line was here and the lake went to here? Again, my understanding is based on relicted acres. As a lake shrinks if it does and goes down in elevation and you get exposed shore line, the riparian land owner, gets title to those relicted acres. So, they can survey that and record it. They don't pay for it, it's a riparian land owner right. In terms of Devils Lake, that really is kind of a mute point. The lake has got a drop to near historic low before those lands are ever going to reemerge.

V. Chairman Anderson We used two miles of land down to the water, and there was no taxes or anything on that because it was all riparian land and they just used it for free at that time. I stopped and talked to an attorney who had built a house on what was previously below the high water mark, and I asked him what your rights be if the water came back up and he said I don't know.

Senator Bekkedahl So, Senator Dotzenrod indicated the meander line that established anything lakeside of the meander line original was state property. Is that what you're saying?

Jerry Heizer Yes, Devils Lake was a navigable water at the time of statehood. So the state took title to that land as the lake existed at that time.

Senator Bekkedahl As the lake then recedes from the meander line, the state still owns that line of the meander line even though the lake receded or are you saying that the riparian land owner gets title to that land temporarily from the state until it then gets burdened with water again. Is that what you're saying?

Jerry Heizer That is correct.

Senator Bekkedahl So the meander line exists from statehood is not a permanent basis for land ownership for the state so that's why their getting out?

Jerry Heizer No, sir that is not, that is correct.

Senator Bekkedahl Wow, to me it would have made more sense that that always stayed the case and then as the lake receded the riparian land owner would get a possessory interest to utilize the land and pay tax accordingly.

V. Chairman Anderson I believe there are some state who treat it that way.

Jerry Heizer There could be. The very states took title to navigable waters at the time of statehood under the Equal Footing Doctrine. Within it the states do have some latitude in how they deal with sovereign lands. Some states say ordinary high water mark states where they take title to ordinary water marks, such as North Dakota. There are some states that take title to the ordinary low water mark. Most states do not relinquish their states sovereign lands, some state do. So every state has some latitude to deal with sovereign lands as they see fit within their state.

Senator Dotzenrod One clarification, based on what you told me so far, Jerry that under today's set of laws and the trying to establish who owns what, that original meander line essentially doesn't mean anything if I follow your understanding or explanation?

Jerry Heizer In short, that is correct. It wasn't designed to establish absolute title so much as it was designed to aid in patenting land. For example a lot of meander water bodies in the state of North Dakota and Rep. Nelson is correct in that most of those small lakes in the state if put to the test for navigability, they wouldn't meet that test. We've looked at a lot of lakes up in the Northwest part of the state, primarily from mineral interests where folks are trying to lease acres, there's meander water body on it and who has title. Of course they can't get the leasing complete until the title issues have been cleared. So we've been asked by folks to determine whether or not those water bodies are indeed navigable or not for title. The vast majority of them are not. Then what we do is we work with the State Land Department, and we jointly sign an affidavit of disclaiming title that we file with the respective county recorders' office basically saying at this time, we find no evidence to support navigability and therefore we at this time claim no real property rights in that. Then they of course that means the bed belongs to the repairing land owners and they do whatever appropriate survey, is necessary to establish who owns what.

V. Chairman Anderson Is there someone who was going to share some information with the committee?

Bruce Engelhardt (34:11-35:17) Director of Water Development and Jerry's boss. I also have the survey crew in my position so I just wanted to clarify. I think Jerry did a fairly good job on the meander line but just to point out the meander line was set up when you look at the directions for surveyors when the original surveyors were done to determine what should count against the 160 acres on a homestead. It has nothing to do with the ordinary high water mark and where the sovereign land line is and there was an earlier question about Devils Lake and what elevation. The elevation of the meander line on Devils Lake actually varies at wildly because it was done at different times. There are some that meandered as high as 1435 and if you include Stump Lake some of that meanders below 1400.

V. Chairman Anderson If this study is going to be done, probably your surveyors are going to have to respond to most of the questions, would that be correct?

Bruce Engelhardt No Senator Anderson, actually in this case, where your determining the ordinary high water mark like Jerry indicated typically it is going to be done off of vegetation. It's really botanious and soil scientists and those types of people that are determining where the line is and that we don't have the staff. We don't have those people on staff, we would contract that out. That is what we've done in the past on the Missouri River and so on.

V. Chairman Anderson Any more questions from the committee.

Jerry Heizer The reason we delineated with the land department. The Land Department actually took the lead and delineated the ordinary high water mark in the Upper Missouri and and Yellowstone rivers. We were party to that. The reason that was done was simply because there were so many questions as to title on those lands for mineral interests. So, literally dozens of wells were being held in suspense accounts because title was not clear. So, that was done basically to assist all the mineral development along those two rivers simply because there were dozens of wells literally hundreds of people whose bonus money and mineral payments were being held in suspense account because title was not clear. So, that study was conducted basically to assist not only the state, but also the land owners along those rivers who they weren't seeing their checks. That was the reason that one was done at that time.

V. Chairman Anderson Let's say a taxing authority around Devils Lake or a land owner wanted to determine where this mark was so they could negotiate whether they were paying taxes or not, would they ask you to do that? You would contract for it and then they would pay the bill, is that the way it would work currently?

Jerry Heizer I am not sure. I will let Bruce handle that one.

Bruce Englehardt I guess I am not sure either, but like it was mentioned earlier on Devils Lake because the water moves so quickly but then stays there for most of the rest of the year, there it isn't so much a matter of vegetation, etc, its' really the water level, the peak water level for the year is about as good a representation of the ordinary high water mark as you're going to be able to get. So, I don't think it's a matter of where exactly the ordinary high water mark is; it's what is taxed and what isn't. If someone were to ask the state engineer's office that question, rather than doing a study, I think our response would be well it peaked at this elevation, this summer that is probably a good enough answer.

V. Chairman Anderson Then you could draw a line based on GPS or whatever at that elevation, would that be a reasonable assumption for what the county could go by?

Bruce Engelhardt yes, Senator Nelson indicated the whole Devils Lake Basin has been flown with lydar. So there are good mapping capabilities. Yes you could draw a line on a map using an elevation and it would be relatively accurate.

Senator Judy Lee How can an interim study end up producing results that will benefit the discussion we've just had? What can legislators that don't know anything about what you do from an expert point of view? Figure out what we got to do and you can do it. Collectively we want to do what's right for the state. So if we were a body like us an interim study committee

and this study gets approved what do you see as a potential for any positive result coming out of here that is going to really accomplish anything good?

Bruce Engelhardt We're really the technical experts and that was why I got up here to answer questions. I don't feel that I am qualified to answer that question.

Senator Judy Lee Can I rephrase it then? I am looking at this. This is technical stuff and I think that is important in the same sense that I am not going to tell some engineer how to build a bridge. I would hire a civil engineer to do a good job with that. But, so what we're supposed to be doing it seems to me is to figure out to allow this people to own the land and not pay any taxes on it. That is kind of the way I am getting this thing. I am not quite sure because of the technical nature of what would be done, recognizing the expertise that is needed and the cost and all of that stuff. What kind of outcome there could be from this that could be helpful to you in your work; or that you would find anticipate being beneficial if you see this coming into the front of you?

Bruce Engelhardt Well, I guess I don't see this assisting us in our technical work. We have a very detailed way of determining the ordinary high water mark where its' critical to do it for specific reasons. The determination of the ordinary high water mark on Devils Lake the actual water surface elevation is as good a representation as I think you're able to get for Devils Lake. The State Engineers Office in managing the sovereign lands considers centrally everything below the waters of Devils Lake as sovereign lands, and manages it accordingly. We don't really have anything to do with the taxation issue nor does the State Engineer.

V. Chairman Anderson It might just speculation but it might be what we need here is a reconsideration of how we tax the land when it is under water, but that isn't a part of this study for the bill here.

V. Chairman Anderson closed the hearing on HB 1268.

2015 SENATE STANDING COMMITTEE MINUTES

Political Subdivisions Committee Red River Room, State Capitol

HB 1268
3/13/2015
Job Number 24836

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature



Explanation or reason for introduction of bill/resolution:

"Click here to type reason for introduction of bill/resolution"

Minutes:

"Click to enter attachment information."

Chairman Burckhard opened the committee for discussion on HB 1268. Senator Dotzenrod was absent. Other committee members were present.

Senator Judy Lee I am sympathetic certainly to what Rep. Nelson was talking about and the challenges there are for people who are building on the edge of the water. Because we don't always know how that works and where it is going to go. But after reading the Attorney's Generals report, the opinion, you know the federal law is pretty much in charge here for a whole lot of it and I don't know that we can make any changes to the way things happen because of all of that federal oversight and determination way back since it was statehood in 1889. So if we studied the boundary lines and what are we going to do with them and who the heck is going to pay for it because that is really pricey. So I sympathize with the situation but I am not quite sure that this is going to fix it.

Senator Anderson As we looked at the other day too, to say that you have to have a big project delineate these and then two months later they change again. It doesn't make much sense. It does seem that the technology is in place so that the county should they want too, could say you've got 137 acres now that is under water and we're not going to tax that or whatever. It seems like if there is changes to be made there in a different place that would be where we tax it at 10% of the previous assessed value. I think that was a nominal amount that was set to preserve things and it doesn't seem like it should be a great burden but we could always reduce that to 1% but that is what this is about.

Chairman Burckhard so do we have a motion?

Senator Judy Lee I move a do not pass on HB 1268.

2nd Senator Anderson

Discussion:

Senator Bekkedahl The biggest thing that I came out of this with was the testimony that was provided that essentially whatever the high water mark for the year is for Devils Lake is, the high water number mark, it may be different in September than in May, but whatever it is for the year the highest mark evaluation is what it is. I think that is what these counties just have to go off of when they make their determinations. I don't know if they have engineers that do that or if they use lidar that is available but I think the information is there to make the determination.

Senator Grabinger I just don't know if that information is readily available to all counties. I don't know if they have it up there or not.

Senator Bekkedahl I was under the assumption that the counties would go to the appropriate state agency that had that information and that is why it seems available. I don't know if they are getting it down to them, but there is a resource that they could go to.

Chairman Burckhard Further discussion on a Do Not Pass motion

Roll call vote 5-0-1

We'll hold it open for Senator Dotzenrod.

Carrier: Senator Judy Lee

Minutes:

Roll call vote

5-0-1

Senator Dotzenrod later votes "yea" on a "do not pass" motion, changing the roll call vote to 6-0-0

March 16, 2015 Job number 24926

Date: 3.13.15
Roll Call Vote: 1

2015 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 1268

Senate Political Subdivisions Committee

☐ Subcommittee

Amendment LC# or Description: _____

Recommendation: ☐ Adopt Amendment
☐ Do Pass ☒ Do Not Pass ☐ Without Committee Recommendation
☐ As Amended ☐ Rerefer to Appropriations
☐ Place on Consent Calendar
Other Actions: ☐ Reconsider ☐ _____

Motion Made By Senator Judy Lee Seconded By Senator Howard Anderson

Senators	Yes	No	Senators	Yes	No
Chairman Burckhard	X				
Senator Anderson	X		Senator Dotzenrod	X	
Senator Bekkedahl	X		Senator Grabinger	X	
Senator Judy Lee	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Senator Judy Lee

If the vote is on an amendment, briefly indicate intent:

REPORT OF STANDING COMMITTEE

HB 1268, as engrossed: Political Subdivisions Committee (Sen. Burckhard, Chairman)
recommends **DO NOT PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING).
Engrossed HB 1268 was placed on the Fourteenth order on the calendar.

2015 TESTIMONY

HB 1268

HB 1269

Good morning Chairman Klemin and members of the House Political Subdivisions committee. HB1269 is an attempt to fix a wrong. What is happening is people are being charged and paying taxes on land owned by the state of North Dakota. While this is most obvious in the case of Devils Lake, it is possible, even likely, that the situation is not exclusively one on Devils Lake.

Some background. When North Dakota became a state it entered the Union on the basis of an equal footing with the other states. One thing that that means is that North Dakota became the owner of the sovereign lands of the state. That is, those lands which exist below the ordinary high water mark of waters which were navigable at the time of statehood.

I refer you to the State of North Dakota's Sovereign Land Management Plan for a good background on the history and laws leading up to today. It is available online at, and I include a copy in my testimony.

(<http://www.swc.nd.gov/4dlink9/4dcgi/GetSubCategoryRecord/Reports%20and%20Publications/Sovereign%20Land%20Management%20Plan>)

It gives a good definition of sovereign lands and the basic problem. "One of the more challenging aspects of applying the Public Trust Doctrine is to clearly identify what land is sovereign and subject to state control. Again, North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams." Page 4

It also makes what seems to me to be a rather amazing statement after 125 years of statehood. "Since river, stream, and lake navigability determinations are dependent on several circumstances, and since there are thousands of miles of rivers and streams and hundreds of lakes throughout the state that have not been subjected to navigability determinations, an inventory of existing navigable water bodies is all but impossible to develop during the course of this planning process. Therefore, the state will proceed with the development of navigability determination standards, followed by the implementation of those standards for jurisdictional determinations on a caseby-case basis in the future." Page 7

Now if we turn to the bill, there is one error. I made the mistake of assuming the Board of University and School Lands managed the land but they do not manage sovereign lands. Where the bill refers to the Board of University and School Lands, that should be the State Water Commission or the State Engineer. Then we come to the issue of whom should be responsible for determining at least an approximate boundary of the sovereign lands? County tax directors are not experts in water law nor sovereign lands. Who is would be the State Engineer and the State Water Commission. They have tools available to them which can determine quickly and fairly accurately the shoreline under current elevations of Devils Lake.

A shoreline which for purposes of taxes is currently off by many miles. If you look at the included picture of Devils Lake with the different colors representing different lake levels, it is my understanding that the counties are basically using the smallest, darkest blue area as the area not taxable. Also note all the named lakes that are at present really all Devils Lake.

Basically the argument made by the fiscal note is one of if they are going to determine the shoreline they must do it with great accuracy much like a land surveyor would do and that would be very costly. I would propose that a determination made with something like LIDAR data which is available would be much more accurate than what is currently being used and they could do it quickly and without significant cost and they could thereby provide information to the affected counties which would allow the taxation to be much more correct than it is today. As time goes by and the State Water Commission more accurately determines high water marks, then that could be used, but until then, counties need something.

I would point out that an Attorney General's Opinion already has looked at the issue of ownership of the bed in an opinion given to Mr. Michael Conner, then manager of the Devils Lake Joint Water Resource Board. I am also including a copy of that letter with my testimony. It leaves some question as far as lakes not connected to Devils Lake which have become inundated but says connected lakes would become the property of the state of North Dakota. As far as I know, the position of the State Engineer

would be that all the currently connected waters are indeed Devils Lake in fact if not all in local names and that the state owns the bed underneath the waters.

As such, people should not be paying taxes on land owned by the state of North Dakota.

**LETTER OPINION
2004-L-33**

May 11, 2004

Mr. Michael Connor
Manager
Devils Lake Basin Joint Water Resource Board
524 4th Avenue #27
Devils Lake, ND 58301

Dear Mr. Connor:

Thank you for your letter asking questions related to Devils Lake.¹ For the reasons discussed below, it is my opinion that as Devils Lake rises or recedes, the adjacent landowner will take title down to the ordinary high water mark, the State will take title to lands up to the ordinary low water mark, and the adjacent landowner and the State will have correlative rights to the area in between the two marks known as the shorezone; any financial assistance received by landowners related to land inundated by Devils Lake will likely not adversely affect the State's property interest in the bed of Devils Lake; debris removal on land exposed by the receding lake will be governed by N.D.C.C. §61-03-23.1 if applicable, and, if not applicable, will be the responsibility of the landowner for land above the ordinary high water mark; the courts have historically, without much explanation, applied laws determining the boundaries of navigable bodies of water to both rivers and lakes; and if Devils Lake continues to rise, State ownership may follow rising waters to inundated lands.

ANALYSIS

As you know, Devils Lake is a large freshwater lake in northeast North Dakota whose elevation has fluctuated widely. During Devils Lake's most recent rise beginning in the 1940's, the lake has risen and inundated many acres of developed land surrounding Devils Lake.

¹ You also ask questions relating to the operation of the Devils Lake outlet. This office will not issue an opinion on matters in which it is currently engaged in litigation. The State has, in fact, been sued over the outlet. Two groups have appealed the North Dakota Pollutant Discharge Elimination System Permit issued for the outlet by the North Dakota Department of Health to the State Water Commission. Consequently, this office respectfully declines to answer questions relating to the outlet.

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Today, Devils Lake's elevation is over 1,447 feet mean sea level (msl). You ask if Devils Lake rises to 1,450' msl, whether the additional acreage inundated becomes State property. The essence of your question is whether the State's title to the bed of Devils Lake can expand. Conversely, you ask how ownership will be determined if the lake recedes. The answers to your questions require an analysis of why the State has absolute title to beds of navigable waters and principles of water and property law.

Upon achieving independence from Great Britain, each American colony became sovereign. As such, they held "the absolute right to all their navigable waters and the soils under them . . . subject only to the rights since surrendered by the constitution to the general government." Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842). Since the beds of navigable waters were not surrendered by the U.S. Constitution to the federal government, they were retained by the states. Mumford v. Wardwell, 73 U.S. 423, 436 (1867). New states admitted to the Union were entitled to the same rights as those held by the original states. Id.; Pollard v. Hagan, 44 U.S. 212, 224, 228-29 (1845). This concept is the equal footing doctrine. See Utah Division of State Lands v. United States, 482 U.S. 193, 195-196 (1987). Indeed, North Dakota's Enabling Act states that North Dakota shall be "admitted . . . into the union . . . on an equal footing with the original States" 25 Stat. 676, 679 (1889) reprinted in 13 N.D.C.C. p. 63 (1981).

Under the equal footing doctrine, upon North Dakota's admission to the Union it took title to the sovereign lands within the state. State v. Brace, 36 N.W.2d 330, 332 (N.D. 1949). "The starting legal principle is that a state acquires, as an incident of statehood, title to the beds of all navigable bodies of water within its boundaries" 101 Ranch v. United States, 714 F. Supp. 1005, 1013 (D.N.D. 1988), aff'd, 905 F.2d 180 (8th Cir. 1990). See also J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co., 423 N.W.2d 130, 132 (N.D. 1988) (same). This title is "absolute," Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 372, 374 (1977), and has been confirmed by the Submerged Lands Act. 43 U.S.C. § 1311(a). Thus, the State has absolute title to the beds of navigable waterways.²

Devils Lake is navigable. See In re Matter of the Ownership of the Bed of Devils Lake, 423 N.W.2d 141 (N.D. 1988); Rutten v. State, 93 N.W.2d 796 (N.D. 1958); Devils Lake Sioux Tribe v. State of North Dakota, 917 F.2d 1049 (8th Cir. 1990); 101 Ranch, 714 F.

² Although North Dakota took title to the bed of Devils Lake at statehood, in 1971, as part of the Garrison Diversion water project, the State conveyed to the United States by quitclaim deed all land "lying below the meander line in the Devils Lake-Stump Lake chain of lakes." 101 Ranch v. United States, 905 F.2d 180, 184 (8th Cir. 1990). "The 1971 deed expressly conveyed the lakebed by reference to pools in the lake." Id. at 184 n.9. The fact that the State conveyed certain lands to the United States should not affect the principles of law governing boundary determinations.

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Supp. 1005; 101 Ranch, 905 F.2d 180; National Wildlife Federation v. Alexander, 613 F.2d 1054 (D.C. Cir. 1979). The next logical question is to what extent does the State's and adjacent landowners' ownership of a navigable body of water change as the lake rises and falls?

The boundary of a tract of land abutting a navigable body of water is ordinarily formed by a water line. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143.³ The boundary is generally discussed by reference to the ordinary low water mark, the ordinary high water mark, and the area between those two marks which is referred to as the "shorezone." The State owns absolute title to the bed of navigable bodies of water up to the low watermark. State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 540 (N.D. 1994) (citing Hogue v. Bourgois, 71 N.W.2d 47, 52 (1955)). The adjacent or upland owner owns title to the ordinary high water mark. Both the State and the upland owner have correlative rights between the ordinary high water mark and the ordinary low water mark known as the shorezone. State ex rel. Sprynczynatyk, 523 N.W.2d at 544-45.

Section 61-15-01, N.D.C.C., defines the ordinary high water mark as "that line reached by water when lake or stream is ordinarily full and the water ordinarily high." In a case involving the ordinary high water mark of Devils Lake, the Court explained:

"'High Water Mark' means what its language imports -- a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . . In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks.

In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian⁴ owner and the public. It is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."

In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 144-5 (quoting Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958)). The doctrines of reliction and submergence

³ Because the water level of the lake may rise or fall before the ordinary high water mark is established, at any given time, the water level could be below or above the ordinary high water mark.

⁴ Riparian means 'belonging or relating to the bank of a river or stream; of or on the bank.' North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 298 at n.1 (N.D. 1995).

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define the boundary between public and private interests. 101 Ranch, 905 F.2d at 183. Relict land is that which was covered with water, but which was uncovered by the imperceptible recession of the water. 101 Ranch, 714 F. Supp. at 1014 (citing Bear v. United States, 611 F. Supp. 589, 593 n.2 (D. Neb. 1985), aff'd, 810 F.2d 153 (8th Cir. 1987)). When relict lands are created, the upland owner takes title to those lands; the doctrine of reliction causes the title to riparian land to be ambulatory. 101 Ranch, 714 F. Supp. at 1014 (citing Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. at 386, and California ex rel. State Lands Com'n v. United States, 805 F.2d 857, 864 (9th Cir. 1986)).

"Submergence is the converse of reliction and involves the imperceptible rise in water level so that land formerly free of water becomes submerged." 101 Ranch, 714 F. Supp. at 1014 (citing Municipal Liquidators, Inc. v. Tench, 153 So.2d 728 (Fla. 1963)). When this happens, title to submerged lands reverts to the State and the loss is uncompensated. 101 Ranch, 714 F. Supp. at 1014. Thus, the ordinary high water mark is not a fixed line, but is instead ambulatory. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 144-5 (quoting Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958)). The extent of the State's and the adjacent landowner's title fluctuates with the water line as it exists from time to time. State ex rel. Sprynczynatyk v. Mills, 592 N.W.2d at 592 (citing In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143-144).

Typically, ordinary high water mark determinations only arise due to court actions. There have been at least two North Dakota Supreme Court cases and one federal district court case discussing ordinary high water mark determinations for Devils Lake. In Rutten v. State, the plaintiff argued and the district court agreed that the ordinary high water mark was 1,419 feet msl. Rutten, 93 N.W.2d at 798. The North Dakota Supreme Court, however, analyzed the historical rises and falls of the lake and concluded that the evidence was insufficient to sustain the plaintiff's contention that the waters of Devils Lake had permanently receded and that the ordinary high water line of the lake was 1,419 feet msl. Id. at 798-99. The Court explained that "the evidence before the court fails to warrant the conclusion that there has been a permanent reliction to the present level of the lake, or that the waters in the lake will never again reach some higher level." Id. at 799. In 1988, the North Dakota Supreme Court determined that the ordinary high water mark was 1,426 feet msl. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143. The same year, however, the North Dakota federal district court determined the ordinary high water mark to be 1,427 feet msl. 101 Ranch, 714 F. Supp. at 1008 (D.N.D. 1988). I am unaware of any additional court determinations relative to Devils Lake's ordinary high water mark. These cases illustrate the ambulatory nature of title to land adjacent to Devils Lake.

In some cases, land that was not riparian to the lake may now be inundated by Devils Lake. In a conversation you had with a member of my staff, you asked whether the nonriparian owner would become the owner of the riparian land if Devils Lake recedes below that riparian land. The North Dakota Supreme Court in Perry v. Erling, 132

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N.W.2d 889 (N.D. 1965), has indirectly examined a variation of the issue you present. In Perry, land which was originally surveyed as riparian was submerged by the encroaching Missouri River; the encroachment caused land, originally surveyed as nonriparian, to become riparian. Id. at 897. The Perry Court concluded that when the river shifted back, causing the land originally surveyed as riparian to reemerge, title to the reemerging land rested with the owner of the original riparian land and not with the owner of the original nonriparian land. Id.

Although the North Dakota Supreme Court has not directly addressed this issue relative to Devils Lake, it is possible that the Court would expand upon the precedent set in Perry and 101 Ranch, and allow title to formerly inundated riparian land to revert to the person who owned it prior to inundation.

You ask if the State's ownership will be affected if landowners receive financial assistance for inundated land without State involvement. Generally, the State's title to land is unaffected by an exchange of money between landowners and a third party. See 101 Ranch, 714 F. Supp. 1005. It is difficult to imagine a situation in which an arrangement or transaction between a landowner and another person will adversely affect the State's property interest.

You ask who is responsible for debris removal from land currently inundated as the water recedes. For instance, debris such as dead tree groves (fallen and standing), abandoned machinery, and other objects that might be considered garbage may be left behind by receding waters on the newly exposed land.

In 1997, the North Dakota Legislature passed N.D.C.C. § 61-03-21.3, giving the State Engineer the authority to order the removal, modification, or destruction of dangers in, on the bed of, or adjacent to a navigable lake. The law provides in part:

If the state engineer finds that buildings, structures, boat docks, debris, or other manmade objects, except a fence or corral, situated in, on the bed of, or adjacent to a lake that has been determined to be navigable by a court are, or are imminently likely to be, a menace to life or property or public health or safety, the state engineer shall issue an order to the person responsible for the object. The order must specify the nature and extent of the conditions, the action necessary to alleviate, avert, or minimize the danger, and a date by which that action must be taken The person responsible is the person who owns or has control of the property on which the object is located, or if the property is inundated with water, the person who owned or had control of the property immediately before it became inundated by water.

Id.

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In cases where N.D.C.C. § 61-03-21.3 does not apply, for instance, if the debris did not constitute a menace to life, property, or public health or safety, other principles would govern. As noted earlier, the water line, no matter how it shifts, remains the property boundary around Devils Lake. 101 Ranch, 802 F.2d at 184-185 (citing Oberly v. Carpenter, 274 N.W. 509, 513 (1937); Jefferis v. East Omaha Land Co., 134 U.S. 178, 196 (1890)). Thus, if the water level drops, the owner of previously inundated land would regain absolute ownership to land above the ordinary high water mark and be responsible for debris removal assuming, of course, that either state or local law required the removal. Between the ordinary high water mark and the low water mark there is a zone along the shoreline wherein the State and the landowner have correlative rights. In State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d at 544, the North Dakota Supreme Court declined to specify the rights of riparian landowners and the State: "The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise. Any precise delineation of parties' rights in this situation would be advisory." The Court did, however, cite to a Minnesota Supreme Court decision wherein that court explained:

"While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose. The state may use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation. Restricted only by that paramount public right the riparian owner enjoys proprietary privileges, among which is the right to use the land for private purposes."

Id. at 543-44 (quoting State v. Korrer, 148 N.W. 617 (Minn. 1914)). Thus, neither the State nor the riparian landowner have absolute title to the shorezone, although the riparian landowner can use his or her land as long as the landowner does not interfere with the public's use of the zone. Based upon the lack of direction from the North Dakota Supreme Court relative to the extent of correlative interests and the potential for numerous factual scenarios, I am unable to issue an opinion whether it is the State or private landowner who would be responsible for debris removal in the shorezone when N.D.C.C. § 61-03-21.3 is not applicable.

You ask how laws designed to resolve "river" disputes can be applied to lakes. Historically, when analyzing the boundaries of navigable bodies of water, North Dakota courts have not distinguished between rivers and lakes. In Roberts v. Taylor, 181 N.W. 622, 625 (N.D. 1921), the North Dakota Supreme Court explained that "in this state a lake is differentiated from a water course only in that it is simply an enlarged water course wherein the water may flow or a basin wherein the waters are quiescent." In In re Matter of Ownership of Bed of Devils Lake, 423 N.W.2d at 144, the Court explained

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May 11, 2004

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that the doctrines of accretion and reliction have often been applied by this court to lakes and rivers in this state. Id. (citing Hogue v. Bourgois, 71 N.W.2d at 52; Roberts v. Taylor, 181 N.W. at 622; Brignall v. Hannah, 157 N.W. 1042, 1045 (N.D. 1916)). In sum, the Court, without much explanation, has readily applied the principles of reliction, submergence, etc., to lakes just as those principles have been applied to rivers.

Finally, you ask whether lakes and coulees connected to Devils Lake that become inundated by the rising waters of Devils Lake become part of Devils Lake and subject to State ownership. As explained above, the extent of the State's ownership in the bed of Devils Lake fluctuates with the rise and fall of the lake. If geographic features connected to Devils Lake become covered by the rising lake, I see no reason why the principles discussed above would not apply and, therefore, the bed of the "connected" lakes and coulees could become owned by the State.

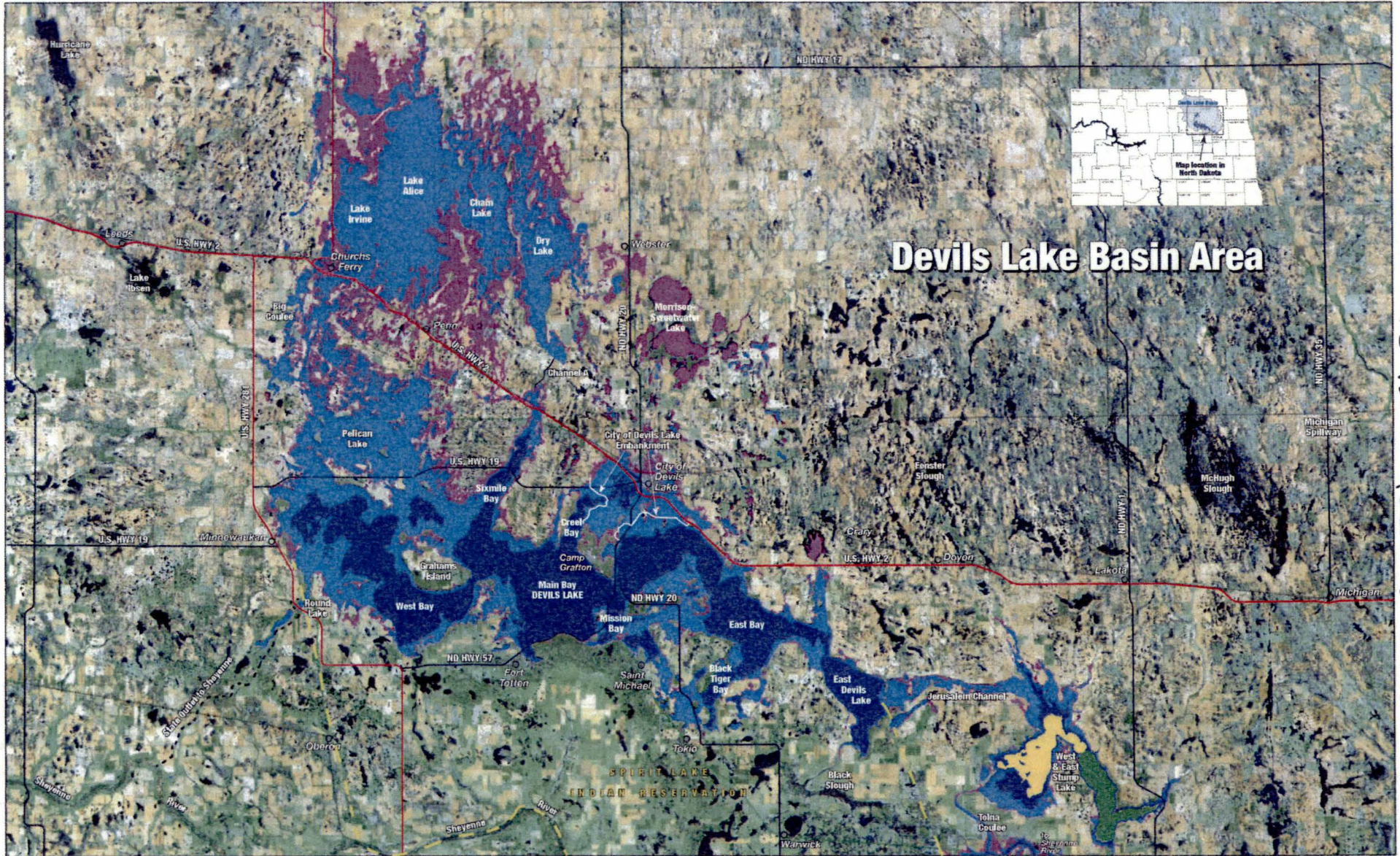
You also ask whether coulees and land under lakes "not previously connected to Devils Lake" that become inundated by the expansion of Devils Lake become part of Devils Lake and subject to State ownership. Your question implies that the lakes were not navigable at statehood and, therefore, their beds are not owned by the State. Again, the principles discussed above and the ambulatory nature of the State's ownership would seem equally applicable to this situation. But the situation is unique and we have not found a court decision that directly addresses this issue. Further, there is uncertainty in the meaning of "not previously connected to Devils Lake." Does it mean not connected in the past 10, 100, or 1,000 years? Consequently, although State title may follow rising Devils Lake waters to lands "not previously connected to Devils Lake," we are unprepared at this time to issue an opinion on the subject.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).



Map produced by the North Dakota State Water Commission
 LandSat Images: May 16, 2010, Bands 7-5-3

U.S. Geological Survey 30 Meter Digital Elevation Model, Land Surface Elevation (NGVD 29)

1,398 ft. msl 5 square miles	1,405 ft. msl 11 square miles	1,429 ft. msl 109 square miles	1,452 ft. msl 316 square miles	1,458 ft. msl 435 square miles
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Map Scale (Miles)



HB 1268 1/29/2015 1.11



North Dakota Sovereign Land Management Plan



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Introduction

North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams.¹ The State of North Dakota plays an important role in the management of sovereign land through the State Engineer, who is responsible for administering the state's non-mineral interests in North Dakota's sovereign land.²

The goal of the State Engineer in managing this vital resource is: to manage, operate, and supervise North Dakota's sovereign land, for multiple uses, that are consistent with the Public Trust Doctrine, and are in the best interest of present and future generations.

Background and Purpose of the Sovereign Land Management Plan

On January 3, 2005, the North Dakota Attorney General issued an opinion, North Dakota Attorney General (N.D.A.G.) 2005-L-01, regarding the ability of land developers to construct wildlife habitat on sovereign land to satisfy federal mitigation requirements.³ In that opinion, the Office of the State Engineer was advised to, among other things, issue sovereign land permits only when they are consistent with a comprehensive sovereign land management plan.

The State Engineer's authority to manage sovereign land is derived from North Dakota Century Code (N.D.C.C.) § 61-33-05, which states that the State Engineer shall "manage, operate, and supervise" sovereign land. The State Engineer has adopted administrative rules to create a framework to follow legislative directives.⁴ But, the Attorney General has indicated management of sovereign land requires that the State Engineer incorporate the Public Trust Doctrine into any management scheme. Specifically, that the State Engineer create a plan pursuant to the Doctrine to manage sovereign land.

In response, the Office of the State Engineer has developed a North Dakota Sovereign Land Management Plan to:

1. Continue to fulfill the State Engineer's duty to manage sovereign land pursuant to the Public Trust Doctrine;
2. Satisfy requirements outlined in N.D.A.G. 2005-L-01;
3. Provide improved consistency in the management of sovereign land and administration of regulations;

¹ N.D.C.C. § 61-33-01(3).

² The state's mineral interests in sovereign lands are managed by the State Land Department under the authority of the Board of University and School Lands. N.D.C.C. § 61-33-03.

³ N.D.A.G. 2005-L-01.

⁴ N.D.A.C. ch. 89-10-01.

4. Serve as a complement to North Dakota's Administrative Code (N.D.A.C.) ch. 89-10-01 concerning sovereign land management; and
5. Generally improve management of the state's sovereign land for present and future generations.

The Planning Process

In developing North Dakota's Sovereign Land Management Plan, the Office of the State Engineer recognized the need for diverse technical expertise, and therefore sought assistance from the North Dakota Sovereign Land Advisory Board provided for in the North Dakota Century Code.⁵ In response, a technical working group, including, but not limited to, representatives from all of the advisory board member agencies, was formed to bring a broad spectrum of interests and expertise into the planning process. Member agencies on the sovereign land technical working group included (in alphabetical order) the:

- Attorney General's Office
- Department of Agriculture
- Game and Fish Department
- Garrison Diversion Conservancy District
- Health Department
- Historical Society
- Land Department
- Parks and Recreation Department
- Office of the State Engineer
- State Water Commission

This plan is the product of a cooperative planning effort between the above agencies, coordinated by the Office of the State Engineer and State Water Commission staff. In addition, comments from other government entities and the general public were sought and considered in the final version of the plan.

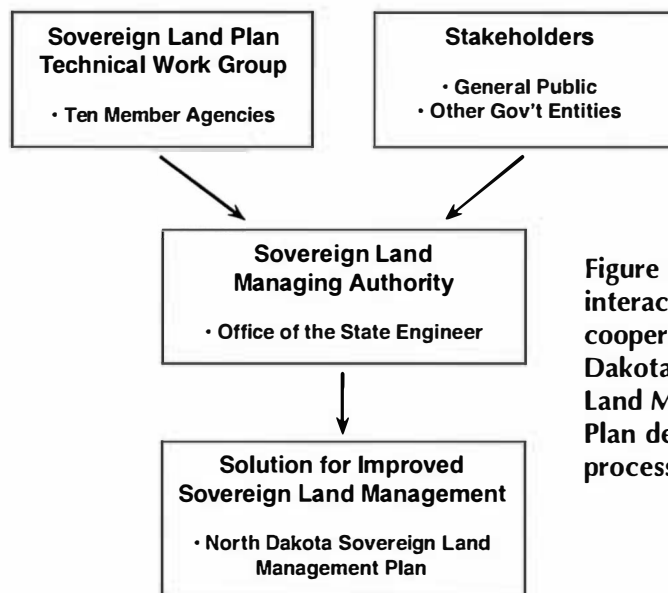
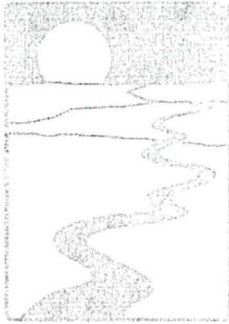


Figure 1: The interactive and cooperative North Dakota Sovereign Land Management Plan development process.

⁵ N.D.C.C. §§ 61-33-08 and 61-33-09.



Applicable Laws and Rules

The source of the state's authority to manage sovereign land emanates most centrally from the Equal Footing Doctrine. N.D.A.G. 2005-L-01 provides a comprehensive discussion of the Doctrine and the basis of the state's authority to manage sovereign land. But the Public Trust Doctrine provides the framework for the state to manage sovereign land.

Black's Law Dictionary defines the Public Trust Doctrine as "the principle that navigable waters are preserved for the public use, and that the state is responsible for protecting the public's right to the use."⁶ Thus, in the simplest of terms, the Public Trust Doctrine provides for the legal right of the public to use certain lands and waters. Further, the North Dakota Supreme Court, in United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d, 457, 463, stated that the Doctrine permits alienation and allocation of such precious state resources, only after an analysis of present supply and future demand.

The Public Trust Doctrine, as interpreted by the North Dakota Supreme Court, imposes on the state the duty to manage sovereign land to foster not only the "public's right of navigation" but also "other important aspects of the state's public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies."⁷ The Doctrine further requires the protection and preservation of other interests including "natural, scenic, historic, and aesthetic values."⁸

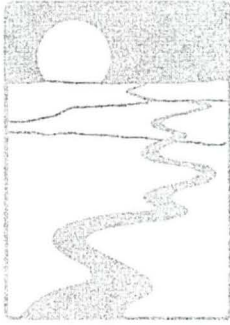
The North Dakota Supreme Court has also stated that the Public Trust Doctrine includes an element of planning, and that the Doctrine requires, at a minimum, evidence of planning in the allocation of public water resources.⁹ This in fact became the original source of the planning requirement that prompted the development of a sovereign land management plan for the state.

⁶ Black's Law Dictionary 1246 (7th ed. 1999).

⁷ J.P. Furlong Enterprises, Inc. v. Sun Explor. & Prod. Co., 423 N.W.2d 130, 140 (N.D. 1988).

⁸ United Plainsmen Ass'n v. State Water Conservation Comm'n, 247 N.W.2d 457, 462 (N.D. 1976) (citing Payne v. Kassab, 312 A.2d 86, 93 (Penn. 1973)).

⁹ United Plainsmen, at 463.

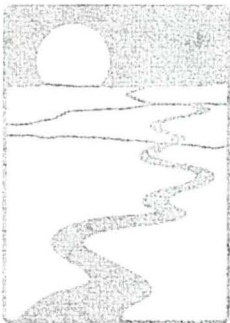


Application of the Public Trust Doctrine



The Public Trust Doctrine provides the general framework for North Dakota's Sovereign Land Management Plan by placing significant limitations and affirmative duties on the state. As such, the best interests of the public require the conservation and preservation of the state's sovereign land. The Doctrine, however, has exceptions for activities with equal benefit to the public including, but not limited to bridges, boat ramps, and water supply intakes. Private use of sovereign land may also be permissible under the Doctrine so long as the public's interests are not materially compromised.¹⁰

¹⁰ E.g., Caminiti v. Boyle, 732 P.2d 989, 995-96 (Wash. 1987) (private docks not necessarily inconsistent with the trust); Kootenai Envtl. Alliance v. Panhandle Yacht Club, Inc., 671 p.2d 1085, 1094 (Idaho 1983) (private marina permitted); State v. Bleck, 338 N.W.2d 492, 498 (Wis. 1983) (ski jump acceptable if it does not "materially obstruct navigation" and "is not detrimental to the public interest"); Morse v. Oregon Div. of State Lands, 590 P.2d 709, 712 (Or. 1979) (private grants acceptable if they do not substantially impair the public's interests); State v. Pub. Serv. Comm'n, 81 N.W.2d 71, 74-75 (Wis. 1957) (small part of a lake could be filled to expand a park); Boone v. Kingsbury, 273 P. 797, 817 (Cal. 1923) (drilling derricks would not significantly impede the public trust, particularly since the state retained authority to have the derricks moved if they did interfere with the trust).



Sovereign Lands: Where Are They?



One of the more challenging aspects of applying the Public Trust Doctrine is to clearly identify what land is sovereign and subject to state control. Again, North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams. In North Dakota, two interrelated federal standards may be considered for determining whether a given water body is navigable. The first is the federal standard for establishing state title to sovereign land under the Equal Footing Doctrine. The second is also a federal standard, where water bodies are defined as navigable waters of the United States under the Commerce Clause of the United States Constitution.

The Federal Standard Under the Equal Footing Doctrine

When applying the federal standard under the Equal Footing Doctrine, waterways are navigable if they were navigable in fact at statehood:

And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.¹¹

Thus, if historical investigations determine that a water body was used as a highway for commerce, then it would likely be considered navigable. However, in a sparsely populated state like North Dakota, where historical records around the time of statehood are limited or are non-existent, the standard of being susceptible to use for commerce becomes very important.

The susceptibility test requires that a water body need only be capable of supporting commerce in its natural state, and that it need not ever have supported navigation for commerce, as long as its characteristics and location could lend itself to those types of activities. Additional discussions of susceptibility, as it pertains to North Dakota, will be presented in greater detail later in the plan.

The Federal Standard Under the United States Constitution Commerce Clause

The Commerce Clause of the United States Constitution states: "The Congress shall have power . . . to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes . . ."¹² As such, federal jurisdiction over navigable waterways has been asserted through various statutes, such as Section 10 of the Rivers and Harbors Act of 1899¹³ and the Federal Power Act.¹⁴

The most influential case that defined standards for navigability determinations under the Commerce Clause test was United States v. Appalachian Elec. Power Co. in 1940.¹⁵ In that case, the Supreme Court determined that navigability may be established by: (1) present use or suitability for use; (2) suitability for future use with reasonable improvements; or (3) past use or suitability for past use.¹⁶

There are several similarities between the Commerce Clause test of navigability and the standard under the Equal Footing Doctrine, but there are also important differences. One difference is that reasonable improvements to the waterway to facilitate travel may be considered.¹⁷ Closely related is the issue that navigability for Commerce Clause purposes can develop after statehood with waterway improvements.¹⁸ And lastly, the Commerce Clause test requires that a waterway must serve as a link in interstate or foreign commerce, whereas the Equal Footing Doctrine test does not.¹⁹

North Dakota's Navigable Waters

In the past, North Dakota has affirmatively asserted jurisdiction over a relatively small number of the state's waters based on both federal tests of navigability.

¹¹ The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1871).

¹² U.S. Const. art. I sec. 8, cl. 3.

¹³ 33 U.S.C. 401-406.

¹⁴ 16 U.S.C. 791 *et seq.*

¹⁵ 311 U.S. 377 (1940).

¹⁶ Gollatte v. Harrell, 731 F.Supp. 453, 458 (S.D. Ala. 1989); United States v. Appalachian Elec. Power Co., 311 U.S. 377, 405-08 (1940).

¹⁷ The Montello, 87 U.S. (20 Wall) 430 (1874).

¹⁸ Appalachian Elec. Power, at 408.

¹⁹ Oregon v. Riverfront Protection Ass'n, 672 F.2d 792, 794 n.1 (9th Cir.1982); Utah v. United States, 403 U.S. 9, 10 (1971).

Meaning that some of North Dakota's waters were identified as navigable because of the federal standard under the Equal Footing Doctrine. Others were determined to be navigable because they were listed as Section 10 (of the Rivers and Harbors Act of 1899) "waters of the United States" under the Constitution's Commerce Clause test.²⁰

Before development of this plan, the courts had determined the Missouri and James Rivers, and Devils, Painted Woods, and Sweetwater Lakes to be navigable because of the federal standard under the Equal Footing Doctrine. In addition, the Missouri River, the James River from the North Dakota/South Dakota border to the railroad bridge in Jamestown, the Yellowstone River, the Red River from the confluence of the Bois De Sioux and Ottertail Rivers in Wahpeton to the Canadian border, the Bois De Sioux River from the North Dakota/South Dakota border to its confluence with the Ottertail River in Wahpeton, and the Upper Des Lacs Lake were determined to be Section 10 waterways, and thus navigable.

However, failure to be identified as a navigable waterway by the courts or the U.S. Army Corps of Engineers does not prevent the State Engineer from asserting jurisdiction over additional lands. In fact, the State Engineer has a responsibility under the Public Trust Doctrine to use prudent judgment in identifying all of the rivers and lakes throughout the state that should be included on the state's list of navigable waters, based on their location, physical characteristics, and/or historic and present use.

In order to address North Dakota's waters that have no prior federal navigability determinations, it will be necessary for the state to identify other water bodies that are likely navigable, and therefore involve sovereign land under the jurisdiction of the State Engineer. To make those determinations, the state will rely on the federal standard for navigability under the Equal Footing Doctrine – in particular, whether a water body was "susceptible" to navigation at statehood, or if historical documentation warrants a navigability determination.

Since the navigability test requires only that a water body be susceptible or capable of being used as a highway for commerce, susceptibility as a commercial highway may be shown several ways, including through an examination of a river's physical characteristics.²¹ If a water body is "capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a navigable river or highway."²²

In consideration of modes of transportation, the types of watercraft used around the time of statehood can be used to measure navigability. Thus, canoes; small, flat-bottomed boats; and any other shallow-draft boats can suffice. Further, if a river's present characteristics make it useful for commerce, and if hydrological evidence or other technical proof indicate that present characteristics are similar to those at statehood, then that may be considered proof of navigability.²³

²⁰ The listing of waters as Section 10 navigable waterways is a function of the U.S. Army Corps of Engineers.

²¹ Appalachian Elec. Power, at 410-13; United States v. Utah, 283 U.S. 64, 83 (1931); The Montello, at 441-42; Alaska v. United States, 662 F. Supp. 455, 463 (D. Alaska 1987).

²² The Montello, at 441-42.

²³ Charles M. Carvell, *ND Waterways: The Public's Right of Recreation and Questions of Title*, 65 N.D.L. Rev 7, at 17 (1988), citing United States v. Utah, at 83; Loving v. Alexander, 548 F. Supp. 1079, 1089 (W.D. Va. 1982).



With regard to lakes and other water basins, technical standards and physical characteristics alone may be inadequate to determine susceptibility of use. This issue, as it relates to North Dakota, was addressed comprehensively in a recent Attorney General memorandum on the ownership of White Lake in Mountrail County.²⁴ Generally speaking, it has been determined with respect to lakes that geography, not hydrological characteristics, is a more important overriding factor, in the absence of historic evidence of use for commerce. Even if any type of boat could traverse a given lake, it is more important that the lake is "so situated that it becomes or is likely to become a valuable factor in commerce."²⁵ Thus, isolated bodies of water, or dead-end lakes, that are not situated to be used as a means of transportation or a highway of commerce may not be navigable.²⁶

Since river, stream, and lake navigability determinations are dependent on several circumstances, and since there are thousands of miles of rivers and streams and hundreds of lakes throughout the state that have not been subjected to navigability determinations, an inventory of existing navigable water bodies is all but impossible to develop during the course of this planning process. Therefore, the state will proceed with the development of navigability determination standards, followed by the implementation of those standards for jurisdictional determinations on a case-by-case basis in the future.

In the interim, anyone pursuing a project occurring in or around any river or stream, or meandered water body, shall be required to submit an application to the Office of the State Engineer for a sovereign land permit. The State Engineer's authority to regulate activities on those water bodies will be reviewed, based on the best available evidence at that time.

²⁴ Memorandum from Assistant Attorney General Charles Carvell to Deputy Land Commissioner Rick Larson (June 17, 2005).

²⁵ *Id.* (citing State V. Aucoin, 20 So.2d 136, 154 (La. 1944)).

²⁶ Lefevre v. Washington Monument & Cut Stone Co., 81 P.2d 819, 822 (Wash. 1938); United States v. Utah, at 83, 86.



The Ordinary High Water Mark

The delineation of the ordinary high water mark is a critical component of sovereign land management, because it identifies the specific areas in and around the state's navigable waters that are under the jurisdiction of the State Engineer. Another way of looking at it is that the ordinary high water mark delineates the boundary between uplands owned by riparian landowners and state-owned sovereign land.

As defined in North Dakota's Administrative Code, ordinary high water mark means:

[T]hat line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety.²⁷

The North Dakota Supreme Court has further defined high water mark as:

[W]hat its language imports - a water mark. It is co-ordinate with the limit of the bed of water; and that only is to be considered the bed that the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . .

In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks. In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian owner and the public. It is the point up to which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop.²⁸

General Guidelines for Ordinary High Water Mark Delineations

The above definitions do provide some guidance for ordinary high water mark delineations in North Dakota, wherein the courts determined that hydrology and impacts upon the soil are the primary indicators, followed by vegetative impacts. But, beyond those definitions, the State of North Dakota does not have a specific set of standards or guidelines established for ordinary high water mark delineations.

²⁷ N.D.A.C. § 89-10-01-03.

²⁸ *State ex rel. Sprynczynatyk v. Mills*, 1999 ND 75, ¶ 13, 592 N.W.2d 591 (citing *In re Ownership of the Bed of Devils Lake*, 423 N.W.2d at 144-5 (quoting *Rutten v. State*, 93 N.W.2d 796, 799 N.D. 1958)).

The Office of the State Engineer recognizes the need for such standards, and as a result, members of the sovereign land workgroup initiated the process of developing specific guidelines. However, that level of effort exceeded the original scope of the sovereign land management planning process, but proceeded independently as a related project.

To develop a specific set of standards or guidelines, other states were consulted (particularly Minnesota, Wisconsin, and Washington). All have or are in the process of developing technical guidelines for ordinary high water mark delineations. Though all of the above states have descriptions of what to look for in ordinary high water mark delineations, they do not all agree on the importance of specific indicators.

In Minnesota, the primary physical features looked for in order of significance are trees, water-formed evidence, and vegetative evidence.²⁹ In Washington, the hierarchical order of significance is hydrology, soils, and then vegetation.³⁰ In Wisconsin, the state provides an inventory of what to look for, though no order of significance is provided for each of the indicators.³¹

A commonality for all ordinary high water mark delineation techniques, no matter where they are being conducted, is that they must be multidisciplinary in nature. Ordinary high water mark delineations should consider hydrology, soils, vegetation, and other physical indicators (i.e. ice scars, erosion, mud/sediment/water stains, wrack, sediment deposition, etc). Thus, it is probably less important to focus on the order of importance of all the potential water mark indicators than it is to recognize that several indicators are important.

Correlative Rights Between the State and Riparian Landowners

The Office of the State Engineer is required to manage sovereign lands, which include those areas from high water mark to high water mark on navigable waters. However, there is also the issue of correlative rights between the state and riparian landowners between the ordinary high water mark and the ordinary low water mark, where that area is often referred to as the shore-zone. The ordinary low water mark is defined as a mark that is "the low level reached by waters of a lake under ordinary conditions, unaffected by periods of extreme and continuous drought."³² It has also been defined as "the line or level at which the waters of a lake usually stand when free from disturbing causes."³³

This issue of correlative rights was addressed in N.D.A.G. 2004-L-33, where it was explained that between the ordinary high water mark and the low water mark there is a zone along the shoreline wherein the state and the landowner have correlative rights.³⁴ In State ex rel. Sprynczynatyk v. Mills, the North Dakota Supreme Court

²⁹ John Scherek and Glen Yakel, *Guidelines for Ordinary High Water Level (OHWL) Determinations*, Minnesota Department of Natural Resources Technical Paper 11, 1993.

³⁰ Erik Stockdale and Alan Wald, *Methods for Delineating an Ordinary High Water Line or Ordinary High Water Mark on Streams and Rivers in Washington State (Draft Version 1.1)*, Washington Department of Fish and Wildlife, Washington Department of Ecology, 2005.

³¹ Wisconsin Department of Natural Resources, *Waterway and Wetland Handbook (Chapter 40, Ordinary High Water Mark)*, 2004

³² South Dakota Wildlife Fed'n v. Water Mgmt. Bd., 382 N.W.2d 26, 27 (S.D. 1986).

³³ Slauson v. Goodrich Transp. Co., 69 N.W. 990, 992 (Wis. 1897).

³⁴ N.D.A.G. 2004-L-33.



declined to specify the rights of riparian landowners and the state:

The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise. Any precise delineation of parties' rights in this situation would be advisory.³⁵

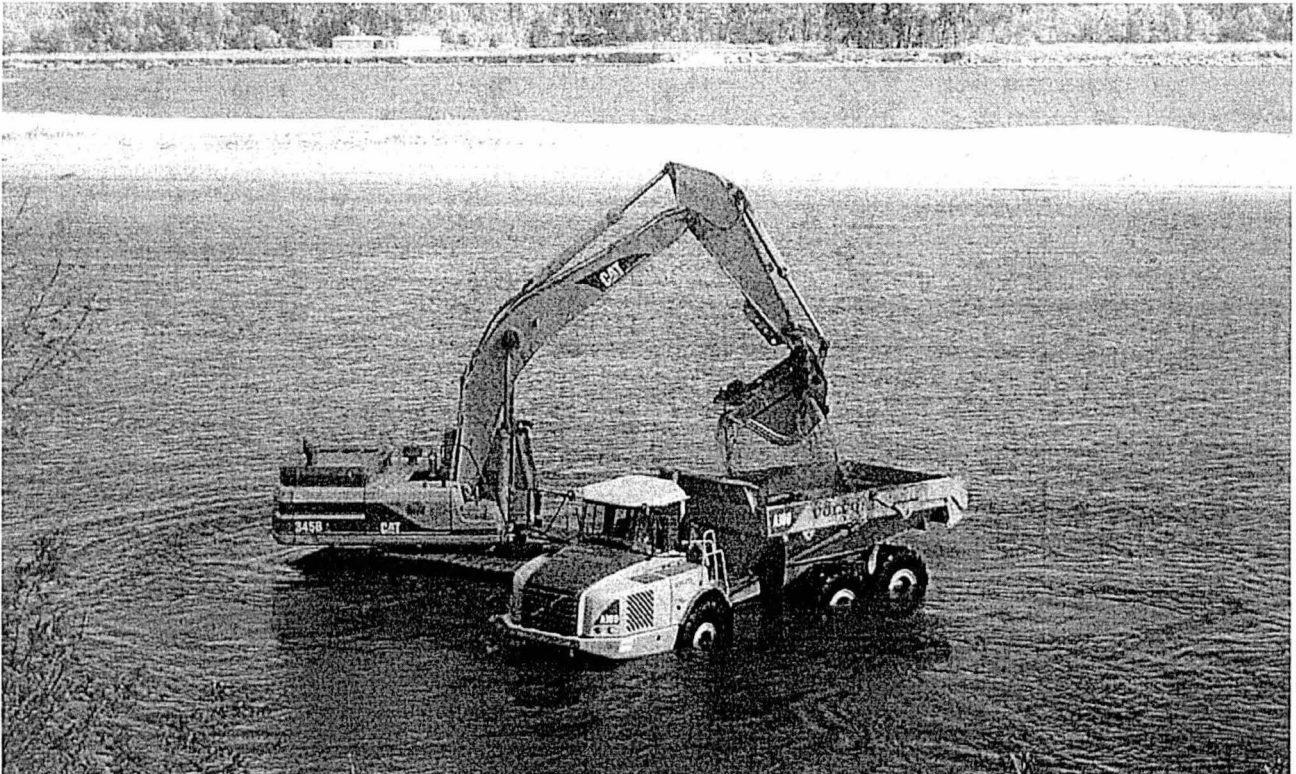
The Court did, however, cite a Minnesota Supreme Court decision wherein that Court explained:

While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the right of the public to use the same for the purpose of navigation or other public purpose. The state may use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation. Restricted only by that paramount public right the riparian owner enjoys proprietary privileges, among which is the right to use the land for private purposes.³⁶

Thus, neither the state nor the riparian landowner has absolute title to the shore-zone, although the riparian landowner can use this land for private purposes as long as the use does not interfere with or adversely affect the public's use or interest in the zone.

³⁵ *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 544 (1994).

³⁶ *Id.* at 543-44 (quoting *State v. Korner*, 148 N.W. 617 (Minn. 1914)).





Plan Strategies and Recommendations

In managing, operating, and supervising North Dakota's sovereign land, the Office of the State Engineer is guided primarily by N.D.A.C. ch. 89-10-01. However, in order to achieve the state's sovereign land management goal contained in this plan and to address more contemporary issues that have evolved in recent years, several recommendations and action strategies were developed.

The Sovereign Land Management Plan recommendations and corresponding action strategies listed below were developed in consideration of comments from all of the state agencies involved in the sovereign land technical workgroup. Considerations were also made after receiving input from other local and regional entities, as well as the general public.

It should be noted that the following recommendations and action strategies are just that—recommendations. Actual changes or additions to state Century Code or Administrative Rules, as a result of this planning process, may differ from what is recommended. Any additions or modifications to state statutes and rules will be conducted through established legal protocol.

Sovereign Land Management Plan Recommendations and Action Strategies

Recommendation 1: The definition of "navigable streams or waters" in N.D.A.C. § 89-10-01-03 contains inconsistencies and should be updated to consider federal standards.

- Action Strategy 1.1: It is proposed that the definition of "navigable streams or waters" in N.D.A.C. § 89-10-01-03 be amended to consider federal standards and to read as follows:

"Navigable streams or waters" means any waters which were in fact navigable at time of statehood, including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake that is, were used or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.

Recommendation 2: Any authorization by the Office of the State Engineer for activities impacting sovereign land should be conditional and revocable if the action is in the best interest of the public trust.

- Action Strategy 2.1: N.D.A.C. § 89-10-01-14 should be amended to include language specifying that all authorizations are conditional and revocable if new information or circumstances deem that the action is in the best interest of the public trust. The actions should not be restricted to incidence of grantee non-compliance with the original conditions of the authorization.

Recommendation 3: The Office of the State Engineer should consider the impacts of actions on sovereign land to cultural and historic resources before granting or modifying permits.

- Action Strategy 3.1: Though the State Historical Society is included in the list of agencies consulted for sovereign land permit application reviews under N.D.A.C § 89-10-01-06, cultural and historical resources are not included in the list of "general permit standards" in N.D.A.C. § 89-10-01-08. Therefore, N.D.A.C § 89-10-01-08 should be amended to include cultural and historic resources.

Recommendation 4: The state's annually updated Section 303(d) list of water quality-limited waters should be an important consideration in the review of any sovereign land permit application. Section 303(d) of the federal Clean Water Act and its accompanying regulations (CFR Part 130 Section 7) require each state to list water bodies (i.e., lakes, reservoirs, rivers, streams, and wetlands) that are considered water quality-limited and require load allocations, waste load allocations, and Total Maximum Daily Loads (TMDLs). This list has become known as the "TMDL list" or "Section 303(d) list."

- Action Strategy 4.1: Since the State Department of Health is included in the list of agencies consulted for sovereign land permit application reviews under N.D.A.C § 89-10-01-06, it is expected that the Office of the State Engineer would be made aware of the significance of any action on the state's Section 303(d) listed waters. However, the Office of the State Engineer should keep a copy of the most recent Section 303(d) list for reference.

Recommendation 5: It is recommended that a subcommittee of the sovereign land workgroup continue to work on the development of more specific standards or guidelines for water mark delineations in North Dakota.

- Action Strategy 5.1: The Office of the State Engineer will retain an environmental services consulting firm, with expertise in hydrology, soils, and wetland vegetation to assist with the development of ordinary high water mark delineation guidelines for North Dakota. Technical input from the sovereign land planning workgroup agencies will also be sought to improve the effectiveness of the guidelines.

Recommendation 6: The Office of the State Engineer should play a more active role in regulating and supervising the use of motor vehicles on the state's sovereign land. Under N.D.A.C. § 89-10-01-12, the public has the right to recreate on sovereign land so long as those activities are "nondestructive." In addition, general permit standards under N.D.A.C § 89-10-01-08 require the Office of the State Engineer to consider impacts of actions on riparian landowners' rights, recreation,

aesthetics, environment, erosion, fish and wildlife, water quality, and alternative uses.

- Action Strategy 6.1: N.D.A.C. § 89-10-01-13 should be amended as follows:

The use of motorized vehicles ~~other than boats on land~~ below the ordinary high watermark is authorized in conjunction with the use of navigable waters for transportation or recreation, or as reasonably necessary for activities allowed pursuant to these rules water bodies is prohibited, except:

1. When on government-established trails;
2. When on sovereign land areas adjacent to the Kimball Bottoms off-road riding area;
3. When on state-designated off-road use areas, provided the area is managed and supervised by a government entity, the government entity has developed a management plan for the off-road area that must be submitted to the State Engineer, and the managing government entity has obtained a sovereign land permit for off-road use in the designated area;
4. To cross a stream by use of a ford, bridge, culvert, or similar structure provided the crossing is in the most direct manner possible;
5. To launch or load a boat, canoe, or other watercraft in the most direct manner possible;
6. To access and operate on the frozen surfaces of any navigable water, provided the crossing of sovereign land is in the most direct manner possible;
7. To access private land that has no other reasonable access point, provided that access across sovereign land is in the most direct manner possible;
8. By disabled persons who possess a totally or permanently disabled person's fishing license or shoot from vehicle permit;
9. When operation is necessary as part of a permitted activity or project; and
10. By the riparian owner or the riparian owner's lessee in the shore zone adjacent to the riparian owner's property.

This section does not authorize use of property above the ordinary high watermark ~~but does authorize the use of trails established by a government agency, such as those established for snowmobiles, which are located below the ordinary high watermark~~. This section does not authorize use of property above the ordinary high water mark. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 7: For the Office of the State Engineer to fulfill its duty to manage, operate, and supervise activities on the state's sovereign land, a more visible presence – particularly regarding enforcement and general compliance checks will be required in the future.

- Action Strategy 7.1: The Office of the State Engineer will work to develop interim cooperative agreements with the Game and Fish Department and other law enforcement to address sovereign land-related disputes, violations, and enforcement.

- Action Strategy 7.2: The Office of the State Engineer will request from the Governor and Legislative Assembly additional funding and FTEs to deal with the increasing workload associated with sovereign land delineations, navigability determinations, management, and enforcement.

Recommendation 8: The Office of the State Engineer should begin to make sovereign land delineations in areas that are under high development or use pressure, and that are currently in question as to their ownership.

- Action Strategy 8.1: The Office of the State Engineer, in cooperation with other state agencies and professional consultants, will begin to make ordinary high water mark and sovereign land delineations on an as needed basis (particularly in the Bismarck-Mandan area along the Missouri River and near the confluence of the Yellowstone and Missouri Rivers) to prevent private encroachment on sovereign land.
- Action Strategy 8.2: If large-scale delineations are made, the Office of the State Engineer may produce general maps of those areas to be used as educational tools for landowners, local governments, and developers.
- Action Strategy 8.3: Where practical, and particularly in high-use or conflict areas, the Office of the State Engineer may mark and maintain sovereign land boundaries.

Recommendation 9: An educational program should be developed and administered to inform the general public, government agencies and entities, and developers about new and existing sovereign land regulations, the consequences associated with violations, and the location of areas containing sovereign land.

- Action Strategy 9.1: The Office of the State Engineer will develop public announcements, magazine articles, informational brochures, maps, and other publications as sovereign land management-related educational tools. Regional seminars may also be conducted to improve awareness.

Recommendation 10: No established penalties currently exist to discourage illegal projects or use, or the placing of unpermitted objects on sovereign land. N.D.C.C. § 61-03-21.3 deals with the removal, modification, or destruction of dangers in, on the bed of, or adjacent to navigable lakes. Since the current language only applies to lakes, the State Engineer should pursue an amendment that would make N.D.C.C. § 61-03-21.3 applicable to all navigable waters.

- Action Strategy 10.1: A bill will be developed for the 60th Legislative Assembly to amend N.D.C.C. § 61-03-21.3 so it applies to all navigable waters, and any illegal projects or objects that occur on the state's sovereign land.

Recommendation 11: The Office of the State Engineer should play a more active role in the prevention and control of noxious weeds on sovereign land.

- Action Strategy 11.1: The Office of the State Engineer will work with the State Department of Agriculture, county weed boards, and other federal, state, and local entities to monitor, inventory, and control the spread of noxious weeds and invasive species on the state's sovereign land.

- Action Strategy 11.2: The Office of the State Engineer will work to secure additional funding to monitor and control noxious weeds and invasive species infestations on sovereign land.

Recommendation 12: The number of people using sovereign land for summer recreation has increased dramatically in recent years. Along with increased use has come increased incidence of littering. In particular, broken glass containers that get mixed into the soil are becoming a serious health risk for recreators. Thus, in the interest of public health and safety, it is necessary for the Office of the State Engineer to put controls in place that specifically prohibit littering, the abandonment of property, and the possession of glass containers on sovereign land.

- Action Strategy 12.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits littering, the abandonment of property, and the possession of glass containers on sovereign land. Possession of glass containers inside of boats will not be subject to this rule. Proposed language might read:

The disposal of refuse, rubbish, bottles, cans, or other waste materials is prohibited except in garbage containers where provided. Abandonment of vehicles or other personal property is prohibited. Holding tanks of campers or boats may not be dumped on sovereign land. Glass containers are prohibited on sovereign land. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 13: Hunting, boating, fishing and trapping are all activities that have minimal long-term impacts and commonly occur on sovereign land throughout the state. However, language is required in the North Dakota Administrative Code to allow for the management and supervision of these activities on sovereign land, since none currently exists.

- Action Strategy 13.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses public access and use. Proposed language might read:

All sovereign land areas are open for public hunting, fishing, and trapping, except as provided in other rules and regulations or laws, or as posted at public entry points. Posting sovereign land with signage by anyone other than the State Engineer is prohibited without a sovereign land permit. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

- Action Strategy 13.2: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses watercraft. Proposed language might read:

Watercraft may not be left unattended on or moored to sovereign land for more than twenty-four hours except:

- 1. When moored to privately owned docks;*
- 2. When moored to private property above the ordinary high water mark with a rope, chain, or other type of restraint that does not cause unreasonable interference with navigation or the public's use of the shore zone; or*

3. *By riparian landowners in the shore zone.*

A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 14: Specific rules and regulations regarding the removal and destruction of natural resources occurring on the state's sovereign land are required to protect the integrity of these public areas for generations to come.

- Action Strategy 14.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits unpermitted activities that remove or destroy natural resources occurring on the state's sovereign land. Specific language might read:

Trees, shrubs, vines, plants, soil, gravel, fill, rocks, fossils, sod, water, firewood, posts, poles, or other public property may not be removed from sovereign land without a permit issued by the state engineer, except that firewood may be removed under certain stated conditions from designated firewood cutting plots, and the riparian landowner or their lessee may hay or graze land in the shore zone. Commercial cutting of firewood is prohibited on all sovereign land. Gathering of downed wood for campfires is permitted. Removal of property from sovereign land by permit shall only be in a manner, limit, and condition specified by the permit. Berries and fruit may be picked for non-commercial use, unless prohibited by posted notice. Property may not be destroyed or defaced. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

Recommendation 15: Specific rules and regulations regarding the removal and destruction of cultural resources occurring on the state's sovereign land are required to protect the integrity of these resources for generations to come.

- Action Strategy 15.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits the unpermitted removal or destruction of cultural resources occurring on the state's sovereign land. Specific language might read:

Artifacts, or any other cultural or historic resources occurring on sovereign land may not be destroyed or removed without formal written approval from the state historical society. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

Recommendation 16: Language is required in the North Dakota Administrative Code to allow for the management and supervision of camping on sovereign land, since none currently exists.

- Action Strategy 16.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses camping on the state's sovereign land. Specific language might read:

Camping for longer than ten consecutive days in the same vicinity or leaving a tent or camper unattended for more than twenty-four hours is prohibited

on any state sovereign land area. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

Recommendation 17: In the interest of public health and safety, the management and supervision of organized group activities on the state's sovereign land should be more closely managed in the future.

- Action Strategy 17.1: Language will be added to N.D.A.C. ch. 89-10-01 that specifically addresses organized group activities. Specific language might read:

Organized group activities that are publicly advertised or are attended by more than twenty-five persons are prohibited without a permit issued by the Office of the State Engineer. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)

Recommendation 18: Since there are thousands of river and stream miles and hundreds of lakes throughout the state that have no prior navigability determinations, the Office of the State Engineer should consider means of determining navigability where appropriate in the interest of the public trust.

- Action Strategy 18.1: The Office of the State Engineer will develop standards for making navigability determinations, using the federal standard under the Equal Footing Doctrine as a foundation.

(Also see Action Strategy 7.2)

Recommendation 19: The State Engineer will take a more active role in managing the presence of pets at large on higher-use sovereign land areas, particularly in the Bismarck-Mandan corridor of the Missouri River. In the future, additional sovereign land areas may be considered for restrictions on an as needed basis.

- Action Strategy 19.1: Language will be added to N.D.A.C. ch. 89-10-01 that prohibits pets at large in a six-mile corridor of the Missouri River near the Bismarck-Mandan area. Specific language might read:

Pets may not be permitted to run unattended on sovereign land in and around the Missouri River between the railroad bridge near the south border of Fort Lincoln state park (approximately river mile marker 1,310) and the Interstate 94 bridge (approximately river mile marker 1,315.4). Pets in this corridor of the Missouri River must be leashed by a restraint of no more than ten feet. A pet's solid waste must be disposed of properly. A person who violates this section is guilty of a class B misdemeanor unless a lesser penalty is indicated.

(Also see Action Strategy 7.1)



Plan Evaluation



An important outcome of this first-ever North Dakota Sovereign Land Management Plan was to develop a product that could serve as a foundation for future planning efforts. As such, this plan is not the final result of a planning process - rather, it is more appropriately viewed as the first step. After two years, the Office of the State Engineer, along with the sovereign land planning workgroup, will review the performance of the overall plan, the recommendations, and action strategies, and begin the process of incorporating modifications as necessary to improve the document for future users.



Addendum

Since the completion of the Final Draft North Dakota Sovereign Land Management Plan in January 2007, several advancements have occurred as a result of various recommendations included in the Plan. Some of the advancements that will be reported in this addendum required the passage of Senate Bill 2096 (SB 2096) during the 60th Legislative Assembly. On April 26, 2007, SB 2096 was signed by Governor, John Hoeven, and a day later, it was signed by Secretary of State, Al Jaeger. It will become effective August 1, 2007.

SB 2096 had four purposes: 1) to provide the Game and Fish Department with the authority to enforce sovereign land-related rules and regulations on the state's sovereign lands; 2) to allow the State Engineer to enter into agreements with the North Dakota Game and Fish Department or other law enforcement entities to enforce sovereign land-related rules and regulations; 3) to provide the State Engineer with the authority to manage the removal, modification, or destruction of dangers in the state's navigable waters that have been determined to be navigable by a court of law; and 4) to provide a penalty for violations of sovereign land-related rules and regulations.

As of May 2007, the following progress had been made on Plan recommendations:

- Recommendation 5 and Action Strategy 5.1 were completed in January 2007. The Office of the State Engineer contracted with an environmental services consulting firm to develop Ordinary High Water Mark Delineation Guidelines for North Dakota. The guidelines are available on the State Engineer and Water Commission's website at www.swc.nd.gov under "Reports and Publications."
- Progress toward the completion of Recommendation 7 and Action Strategy 7.1 occurred with the passage of SB 2096. When SB 2096 becomes effective August 1, 2007, cooperative agreements will be signed with the Game and Fish Department to provide law enforcement on the state's sovereign lands.
- Implementation of Recommendation 8 and Action Strategies 8.1, 8.2, and 8.3 are well underway. In April 2007, the Office of the State Engineer requested proposals for the completion of ordinary high water mark delineations near the confluence of the Missouri and Yellowstone Rivers, and along the Missouri River north of Bismarck.
- Recommendation 10 and Action Strategy 10.1 were completed with the passage of SB 2096. On August 1, 2007, the State Engineer will have the authority to manage the removal, modification, or destruction of dangers in all of the state's navigable waters.

As the Plan continues to be implemented in the future, progress will be tracked, and updated information will be provided on the State Engineer and Water Commission's website at www.swc.nd.gov, under "Special Projects."

TESTIMONY ON HOUSE BILL NO. 1268

House Political Subdivisions Committee

**John Paczkowski, Chief – Regulatory Section
Office of the State Engineer**

January 29, 2015

Mr. Chairman and members of the Political Subdivisions Committee, my name is John Paczkowski. I am the Chief of the Regulatory Section for the Office of the State Engineer. On behalf of the State Engineer, Todd Sando, I am here in opposition of House Bill No. 1268, which would create and enact a new section to chapter 57-02 requiring the board of university and school lands to inform counties of the boundaries of sovereign land for the purpose of determining the taxable status of property.

First of all, what is the definition of sovereign lands? Sovereign lands are defined as "those areas, including the beds and islands, lying within the ordinary high water mark of navigable lakes and streams." The ordinary high water mark is the "line below which the action of the water is frequent enough to either prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable waters are considered to be below the ordinary high water mark in their entirety." And finally, navigable waters "means any waters that were in fact navigable at the time of statehood, that is, were used or were susceptible of being used in their ordinary condition as highways of commerce over which trade and travel were or may have been conducted in the customary modes of trade on water."

This bill tasks the board of university and school lands with identifying and mapping the boundaries of sovereign lands throughout the state. Though N.D.C.C. chapter 61-33 gives the board of university and school lands the authority to manage the state's oil, gas, and related hydrocarbons interests beneath the state's sovereign lands, it is the state engineer who manages the surface issues on these same lands. Therefore, it should be the state engineer who determines the sovereign lands boundaries, not the board of university and school lands.

To date the boundary of the state's sovereign lands have only been delineated in areas where concerns or conflicts with adjacent landowners has required such action due to the effort and expense required to properly delineate the ordinary high water mark. Additionally the ordinary high water mark can move over time, which may lead to a scenario whereby the delineation may no longer be valid if a concern is not raised in a given area for an extended period of time. Further, there are several pending lawsuits involving delineation issues, most with significant legal implications.

As can be seen in the fiscal note attached to this bill, delineating the boundaries of all of the state's sovereign land would be a costly undertaking. In addition to being

very expensive, this effort would likely take multiple years to complete even if multiple teams of experienced experts could be secured for this effort.

In conclusion, the large expenditure of funds required to complete this task when there are no known disputes or concerns along the vast majority of the sovereign lands boundaries seems to be unwarranted and unnecessary.

Thank you for the opportunity to comment on this matter. I will be happy to answer any questions you might have.

**TESTIMONY OF MICHAEL BRAND
Director, Surface Management Division
North Dakota Department of Trust Lands**

IN OPPOSITION TO HOUSE BILL NO. 1268

**House Political Subdivisions Committee
January 29, 2015**

Mr. Chairman and members of the Committee, I am Michael Brand, Director of the Surface Management Division for the ND Department of Trust Lands (Department). I am here today to testify in opposition to House Bill 1268.

The reason for opposition to HB 1268 is twofold; 1) The Board of University and School Lands manages only the "oil, gas, and related hydrocarbons" under the beds of navigable lakes and streams in North Dakota, 2) The State Engineer is responsible for the management of the other minerals and the beds of navigable lakes and streams under N.D.C.C. 61-33-03.

The Land Board worked cooperatively with the State Engineer in 2009 and 2010 to survey portions of the Missouri and Yellowstone Rivers west of Williston. However, because there is no active hydrocarbon mineral interest on other navigable waterways, the Land Board does not have a statutory interest or directive to manage those lands or determine their boundaries.

The State Engineer has the clear statutory responsibility for managing the beds of navigable lakes and streams wherever they may be located in North Dakota. Therefore, any surveys that would be need to be done to delineate those boundaries should logically be under the direction of the State Engineer. The State Engineer would also be the logical entity to estimate the costs of completing surveys.

We respectfully request a "do not pass" recommendation for House Bill 1268.

Proposed Amendment to HB 1268

A BILL for an Act to provide for a legislative management study.

SECTION 1. LEGISLATIVE MANAGEMENT STUDY. During the 2015-16 interim, the legislative management shall consider studying the boundary changes of state sovereign lands due to frequent or substantial changes in water levels of the Devils Lake Basin regarding the taxation of sovereign land. The legislative management shall report its findings and recommendations, together with any legislation required to implement the recommendations, to the sixty-fifth legislative assembly.

H.B. 1268
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HB1268

Chairman Burckhard and members of the Political Subdivisions Committee, I am Representative Marvin E. Nelson of District 9.

HB1268 is asking for a study of the taxation of sovereign lands. Sovereign lands being those land which exist under waters of the state that were navigable at the moment of statehood.

The most obvious, though not necessarily only problem exists at Devils Lake. The Lake has greatly changed in size since statehood. As the water recedes ownership of what was the state land becomes private. As the water again rises, the land once again becomes owned by the state of North Dakota. I am including an Attorney General's opinion which goes into much of the background of this.

The problem that has developed is that people are being charged taxes on land that they don't currently own. If you take the color map of Devils Lake, the counties basically are taxing any land above the deep blue color. The land is taxed at a reduced rate but it is still being taxed. The bill originally told the state engineer to tell the counties where the boundary was. This came with an estimated \$32 million dollar price tag with almost every mile of shoreline costing approximately \$10,000 to survey.

As it currently stands, the shore is off by about 30 miles. It seems to me we could be a lot closer with technology available like LIDAR than we currently are but the legislature really needs to develop policy on how to do this. So that is why we need to study this issue.

LETTER OPINION
2004-L-33

May 11, 2004

Mr. Michael Connor
Manager
Devils Lake Basin Joint Water Resource Board
524 4th Avenue #27
Devils Lake, ND 58301

Dear Mr. Connor:

Thank you for your letter asking questions related to Devils Lake.¹ For the reasons discussed below, it is my opinion that as Devils Lake rises or recedes, the adjacent landowner will take title down to the ordinary high water mark, the State will take title to lands up to the ordinary low water mark, and the adjacent landowner and the State will have correlative rights to the area in between the two marks known as the shorezone; any financial assistance received by landowners related to land inundated by Devils Lake will likely not adversely affect the State's property interest in the bed of Devils Lake; debris removal on land exposed by the receding lake will be governed by N.D.C.C. § 61-03-23.1 if applicable, and, if not applicable, will be the responsibility of the landowner for land above the ordinary high water mark; the courts have historically, without much explanation, applied laws determining the boundaries of navigable bodies of water to both rivers and lakes; and if Devils Lake continues to rise, State ownership may follow rising waters to inundated lands.

ANALYSIS

As you know, Devils Lake is a large freshwater lake in northeast North Dakota whose elevation has fluctuated widely. During Devils Lake's most recent rise beginning in the 1940's, the lake has risen and inundated many acres of developed land surrounding Devils Lake.

¹ You also ask questions relating to the operation of the Devils Lake outlet. This office will not issue an opinion on matters in which it is currently engaged in litigation. The State has, in fact, been sued over the outlet. Two groups have appealed the North Dakota Pollutant Discharge Elimination System Permit issued for the outlet by the North Dakota Department of Health to the State Water Commission. Consequently, this office respectfully declines to answer questions relating to the outlet.

LETTER OPINION 2004-L-33

May 11, 2004

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Today, Devils Lake's elevation is over 1,447 feet mean sea level (msl). You ask if Devils Lake rises to 1,450' msl, whether the additional acreage inundated becomes State property. The essence of your question is whether the State's title to the bed of Devils Lake can expand. Conversely, you ask how ownership will be determined if the lake recedes. The answers to your questions require an analysis of why the State has absolute title to beds of navigable waters and principles of water and property law.

Upon achieving independence from Great Britain, each American colony became sovereign. As such, they held "the absolute right to all their navigable waters and the soils under them . . . subject only to the rights since surrendered by the constitution to the general government." Martin v. Waddell's Lessee, 41 U.S. 367, 410 (1842). Since the beds of navigable waters were not surrendered by the U.S. Constitution to the federal government, they were retained by the states. Mumford v. Wardwell, 73 U.S. 423, 436 (1867). New states admitted to the Union were entitled to the same rights as those held by the original states. Id.; Pollard v. Hagan, 44 U.S. 212, 224, 228-29 (1845). This concept is the equal footing doctrine. See Utah Division of State Lands v. United States, 482 U.S. 193, 195-196 (1987). Indeed, North Dakota's Enabling Act states that North Dakota shall be "admitted . . . into the union . . . on an equal footing with the original States" 25 Stat. 676, 679 (1889) reprinted in 13 N.D.C.C. p. 63 (1981).

Under the equal footing doctrine, upon North Dakota's admission to the Union it took title to the sovereign lands within the state. State v. Brace, 36 N.W.2d 330, 332 (N.D. 1949). "The starting legal principle is that a state acquires, as an incident of statehood, title to the beds of all navigable bodies of water within its boundaries" 101 Ranch v. United States, 714 F. Supp. 1005, 1013 (D.N.D. 1988), aff'd, 905 F.2d 180 (8th Cir. 1990). See also J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co., 423 N.W.2d 130, 132 (N.D. 1988) (same). This title is "absolute," Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 372, 374 (1977), and has been confirmed by the Submerged Lands Act. 43 U.S.C. § 1311(a). Thus, the State has absolute title to the beds of navigable waterways.²

Devils Lake is navigable. See In re Matter of the Ownership of the Bed of Devils Lake, 423 N.W.2d 141 (N.D. 1988); Rutten v. State, 93 N.W.2d 796 (N.D. 1958); Devils Lake Sioux Tribe v. State of North Dakota, 917 F.2d 1049 (8th Cir. 1990); 101 Ranch, 714 F.

² Although North Dakota took title to the bed of Devils Lake at statehood, in 1971, as part of the Garrison Diversion water project, the State conveyed to the United States by quitclaim deed all land "lying below the meander line in the Devils Lake-Stump Lake chain of lakes." 101 Ranch v. United States, 905 F.2d 180, 184 (8th Cir. 1990). "The 1971 deed expressly conveyed the lakebed by reference to pools in the lake." Id. at 184 n.9. The fact that the State conveyed certain lands to the United States should not affect the principles of law governing boundary determinations.

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May 11, 2004

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Supp. 1005; 101 Ranch, 905 F.2d 180; National Wildlife Federation v. Alexander, 613 F.2d 1054 (D.C. Cir. 1979). The next logical question is to what extent does the State's and adjacent landowners' ownership of a navigable body of water change as the lake rises and falls?

The boundary of a tract of land abutting a navigable body of water is ordinarily formed by a water line. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143.³ The boundary is generally discussed by reference to the ordinary low water mark, the ordinary high water mark, and the area between those two marks which is referred to as the "shorezone." The State owns absolute title to the bed of navigable bodies of water up to the low watermark. State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 540 (N.D. 1994) (citing Hogue v. Bourgois, 71 N.W.2d 47, 52 (1955)). The adjacent or upland owner owns title to the ordinary high water mark. Both the State and the upland owner have correlative rights between the ordinary high water mark and the ordinary low water mark known as the shorezone. State ex rel. Sprynczynatyk, 523 N.W.2d at 544-45.

Section 61-15-01, N.D.C.C., defines the ordinary high water mark as "that line reached by water when lake or stream is ordinarily full and the water ordinarily high." In a case involving the ordinary high water mark of Devils Lake, the Court explained:

"'High Water Mark' means what its language imports -- a water mark. It is co-ordinate with the limit of the bed of the water; and that only is to be considered the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes. . . . In some places, however, where the banks are low and flat, the water does not impress on the soil any well-defined line of demarcation between the bed and the banks.

In such cases the effect of the water upon vegetation must be the principal test in determining the location of high-water mark as a line between the riparian⁴ owner and the public. It is the point up to which the presence and action of the water is so continuous as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."

In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 144-5 (quoting Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958)). The doctrines of reliction and submergence

³ Because the water level of the lake may rise or fall before the ordinary high water mark is established, at any given time, the water level could be below or above the ordinary high water mark.

⁴ Riparian means 'belonging or relating to the bank of a river or stream; of or on the bank.' North Shore, Inc. v. Wakefield, 530 N.W.2d 297, 298 at n.1 (N.D. 1995).

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define the boundary between public and private interests. 101 Ranch, 905 F.2d at 183. Relicted land is that which was covered with water, but which was uncovered by the imperceptible recession of the water. 101 Ranch, 714 F. Supp. at 1014 (citing Bear v. United States, 611 F. Supp. 589, 593 n.2 (D. Neb. 1985), aff'd, 810 F.2d 153 (8th Cir. 1987)). When relict lands are created, the upland owner takes title to those lands; the doctrine of reliction causes the title to riparian land to be ambulatory. 101 Ranch, 714 F. Supp. at 1014 (citing Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co., 429 U.S. at 386, and California ex rel. State Lands Com'n v. United States, 805 F.2d 857, 864 (9th Cir. 1986)).

"Submergence is the converse of reliction and involves the imperceptible rise in water level so that land formerly free of water becomes submerged." 101 Ranch, 714 F. Supp. at 1014 (citing Municipal Liquidators, Inc. v. Tench, 153 So.2d 728 (Fla. 1963)). When this happens, title to submerged lands reverts to the State and the loss is uncompensated. 101 Ranch, 714 F. Supp. at 1014. Thus, the ordinary high water mark is not a fixed line, but is instead ambulatory. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 144-5 (quoting Rutten v. State, 93 N.W.2d 796, 799 (N.D. 1958)). The extent of the State's and the adjacent landowner's title fluctuates with the water line as it exists from time to time. State ex rel. Sprynczynatyk v. Mills, 592 N.W.2d at 592 (citing In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143-144).

Typically, ordinary high water mark determinations only arise due to court actions. There have been at least two North Dakota Supreme Court cases and one federal district court case discussing ordinary high water mark determinations for Devils Lake. In Rutten v. State, the plaintiff argued and the district court agreed that the ordinary high water mark was 1,419 feet msl. Rutten, 93 N.W.2d at 798. The North Dakota Supreme Court, however, analyzed the historical rises and falls of the lake and concluded that the evidence was insufficient to sustain the plaintiff's contention that the waters of Devils Lake had permanently receded and that the ordinary high water line of the lake was 1,419 feet msl. Id. at 798-99. The Court explained that "the evidence before the court fails to warrant the conclusion that there has been a permanent reliction to the present level of the lake, or that the waters in the lake will never again reach some higher level." Id. at 799. In 1988, the North Dakota Supreme Court determined that the ordinary high water mark was 1,426 feet msl. In re Ownership of the Bed of Devils Lake, 423 N.W.2d at 143. The same year, however, the North Dakota federal district court determined the ordinary high water mark to be 1,427 feet msl. 101 Ranch, 714 F. Supp. at 1008 (D.N.D. 1988). I am unaware of any additional court determinations relative to Devils Lake's ordinary high water mark. These cases illustrate the ambulatory nature of title to land adjacent to Devils Lake.

In some cases, land that was not riparian to the lake may now be inundated by Devils Lake. In a conversation you had with a member of my staff, you asked whether the nonriparian owner would become the owner of the riparian land if Devils Lake recedes below that riparian land. The North Dakota Supreme Court in Perry v. Erling, 132

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N.W.2d 889 (N.D. 1965), has indirectly examined a variation of the issue you present. In Perry, land which was originally surveyed as riparian was submerged by the encroaching Missouri River; the encroachment caused land, originally surveyed as nonriparian, to become riparian. Id. at 897. The Perry Court concluded that when the river shifted back, causing the land originally surveyed as riparian to reemerge, title to the reemerging land rested with the owner of the original riparian land and not with the owner of the original nonriparian land. Id.

Although the North Dakota Supreme Court has not directly addressed this issue relative to Devils Lake, it is possible that the Court would expand upon the precedent set in Perry and 101 Ranch, and allow title to formerly inundated riparian land to revert to the person who owned it prior to inundation.

You ask if the State's ownership will be affected if landowners receive financial assistance for inundated land without State involvement. Generally, the State's title to land is unaffected by an exchange of money between landowners and a third party. See 101 Ranch, 714 F. Supp. 1005. It is difficult to imagine a situation in which an arrangement or transaction between a landowner and another person will adversely affect the State's property interest.

You ask who is responsible for debris removal from land currently inundated as the water recedes. For instance, debris such as dead tree groves (fallen and standing), abandoned machinery, and other objects that might be considered garbage may be left behind by receding waters on the newly exposed land.

In 1997, the North Dakota Legislature passed N.D.C.C. § 61-03-21.3, giving the State Engineer the authority to order the removal, modification, or destruction of dangers in, on the bed of, or adjacent to a navigable lake. The law provides in part:

If the state engineer finds that buildings, structures, boat docks, debris, or other manmade objects, except a fence or corral, situated in, on the bed of, or adjacent to a lake that has been determined to be navigable by a court are, or are imminently likely to be, a menace to life or property or public health or safety, the state engineer shall issue an order to the person responsible for the object. The order must specify the nature and extent of the conditions, the action necessary to alleviate, avert, or minimize the danger, and a date by which that action must be taken The person responsible is the person who owns or has control of the property on which the object is located, or if the property is inundated with water, the person who owned or had control of the property immediately before it became inundated by water.

Id.

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In cases where N.D.C.C. § 61-03-21.3 does not apply, for instance, if the debris did not constitute a menace to life, property, or public health or safety, other principles would govern. As noted earlier, the water line, no matter how it shifts, remains the property boundary around Devils Lake. 101 Ranch, 802 F.2d at 184-185 (citing Oberly v. Carpenter, 274 N.W. 509, 513 (1937); Jefferis v. East Omaha Land Co., 134 U.S. 178, 196 (1890)). Thus, if the water level drops, the owner of previously inundated land would regain absolute ownership to land above the ordinary high water mark and be responsible for debris removal assuming, of course, that either state or local law required the removal. Between the ordinary high water mark and the low water mark there is a zone along the shoreline wherein the State and the landowner have correlative rights. In State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d at 544, the North Dakota Supreme Court declined to specify the rights of riparian landowners and the State: "The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise. Any precise delineation of parties' rights in this situation would be advisory." The Court did, however, cite to a Minnesota Supreme Court decision wherein that court explained:

"While the title of a riparian owner in navigable or public waters extends to ordinary low-water mark, his title is not absolute except to ordinary high-water mark. As to the intervening space his title is limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose. The state may use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation. Restricted only by that paramount public right the riparian owner enjoys proprietary privileges, among which is the right to use the land for private purposes."

Id. at 543-44 (quoting State v. Korrer, 148 N.W. 617 (Minn. 1914)). Thus, neither the State nor the riparian landowner have absolute title to the shorezone, although the riparian landowner can use his or her land as long as the landowner does not interfere with the public's use of the zone. Based upon the lack of direction from the North Dakota Supreme Court relative to the extent of correlative interests and the potential for numerous factual scenarios, I am unable to issue an opinion whether it is the State or private landowner who would be responsible for debris removal in the shorezone when N.D.C.C. § 61-03-21.3 is not applicable.

You ask how laws designed to resolve "river" disputes can be applied to lakes. Historically, when analyzing the boundaries of navigable bodies of water, North Dakota courts have not distinguished between rivers and lakes. In Roberts v. Taylor, 181 N.W. 622, 625 (N.D. 1921), the North Dakota Supreme Court explained that "in this state a lake is differentiated from a water course only in that it is simply an enlarged water course wherein the water may flow or a basin wherein the waters are quiescent." In In re Matter of Ownership of Bed of Devils Lake, 423 N.W.2d at 144, the Court explained

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that the doctrines of accretion and reliction have often been applied by this court to lakes and rivers in this state. Id. (citing Hogue v. Bourgois, 71 N.W.2d at 52; Roberts v. Taylor, 181 N.W. at 622; Brignall v. Hannah, 157 N.W. 1042, 1045 (N.D. 1916)). In sum, the Court, without much explanation, has readily applied the principles of reliction, submergence, etc., to lakes just as those principles have been applied to rivers.

Finally, you ask whether lakes and coulees connected to Devils Lake that become inundated by the rising waters of Devils Lake become part of Devils Lake and subject to State ownership. As explained above, the extent of the State's ownership in the bed of Devils Lake fluctuates with the rise and fall of the lake. If geographic features connected to Devils Lake become covered by the rising lake, I see no reason why the principles discussed above would not apply and, therefore, the bed of the "connected" lakes and coulees could become owned by the State.

You also ask whether coulees and land under lakes "not previously connected to Devils Lake" that become inundated by the expansion of Devils Lake become part of Devils Lake and subject to State ownership. Your question implies that the lakes were not navigable at statehood and, therefore, their beds are not owned by the State. Again, the principles discussed above and the ambulatory nature of the State's ownership would seem equally applicable to this situation. But the situation is unique and we have not found a court decision that directly addresses this issue. Further, there is uncertainty in the meaning of "not previously connected to Devils Lake." Does it mean not connected in the past 10, 100, or 1,000 years? Consequently, although State title may follow rising Devils Lake waters to lands "not previously connected to Devils Lake," we are unprepared at this time to issue an opinion on the subject.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts. See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).

