17.0159.10000

FISCAL NOTE

Requested by Legislative Council
04/18/2017

Amendment to: SB 2134

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.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				$(48,063,708)		$(29,406,007)
Expenditures				$157,779,374		
Appropriations				$187,185,381		

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

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 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 bill adopts a definition of sovereign minerals within Missouri River reservoirs as within the historical riverbed channel and implements a study to determine this location. The bill directs the adjustment of State leased mineral acres and authorizes refunds of mineral proceeds.

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.*

N.D.C.C. ch. 61-33 defines sovereign land to include beds and islands lying within the ordinary high watermark of navigable lakes and streams and assigns management of the oil, gas and related hydrocarbons to the Board of University and School Lands. The State Engineer manages the islands and the bed of navigable waters and all other minerals therein. The State has leased sovereign oil and gas minerals within the estimated historic ordinary high watermark of the Missouri River as it existed prior to inundation by Lake Sakakawea. The revenue is deposited into the Strategic Investment and Improvements Fund (SIIF).

For portions of the Missouri River under reservoirs, the bill would define public ownership of the riverbed minerals as the historic Missouri riverbed channel. The bill initiates a study of U.S. Army Corps of Engineers' pre-inundation surveys and historic records to determine the acreage and stipulates the adjustment of mineral acreage and associated refunds.

The method the Board has used to determine the historic channel and which served as the basis to lease the State's oil and gas rights differs from the area depicted by the federal surveys, thus the bill would initiate the surrender of mineral acres from previous State claims of the historic and actual river channel.

The State would return revenue collected on an estimated 25,000 acres and relinquish future royalty revenue. The impact includes return of the bonus and rent already collected to lessees of record and the return to operators of royalties collected; reduced claim to escrowed royalties; and lost future royalties estimated upon 2015-2017 Biennium (to date) production and prices.

The bill also defers to the U.S. Bureau of Land Management's determination of public domain tracts as depicting acres owned by the federal government. Where these nonpatented lands are within the historic ordinary high watermark of the Missouri River, the State has claimed ownership and leased these acres, which are included in the

estimated fiscal impact. Revenue that the State has collected from the acres that the United States has also claimed would be returned to the lessees and operators from which it was received.

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.*

   The bill would have a negative impact on the SIIF, which collects the proceeds of all sovereign mineral leasing.

   There is an acreage difference between the federal river survey and estimated historic ordinary high watermark as identified by the Board of University and School Lands in 2010. Additionally, the bill would apply a determination of the historic river high watermark west of the Highway 85 Bridge in an area where the Board leased minerals based on the 2009 and 2010 survey of the ordinary high watermark.

   The combined impacts are that the State would repay from the SIIF, revenue it has collected on an estimated 25,000 acres and would also not receive future royalty revenue.

   The bill will require forfeiture of claim to $18,657,701 of presently escrowed royalty. Additionally, based upon 2015-2017 Biennium (to date) average level prices and production, the estimated impact on future royalty revenue would be a reduction of $29,406,007 in each of the next two biennia.

   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.*

   Based upon the possible reduction of 25,000 mineral acres, an estimated $87,663,214 of bonus and rent, and $69,316,160 of royalties collected and anticipated through FY 2017 will be returned to lessees and operators.

   The Bill appropriates $800,000 to the Department of Mineral Resources for the costs of a contractor to determine the acreage and tracts within the "historical Missouri riverbed channel" as determined by the Army Corps of Engineers' surveys conducted in connection with its determination of the amount of land acquired for the impoundment of Lake Sakakawea and Lake Oahe; in combination with other historical records.

   Technical and legal expenditures and the need for additional Department of Trust Land staff to implement acreage adjustments and resulting refunds cannot be determined. An additional mineral title specialist FTE to assist in the correction of leases related to over 400 leases has been requested for inclusion in the budget for the Commissioner of University and School Lands. The requested Mineral Title Specialist would cost an estimated $206,976 per biennium with benefits and overhead, has not been included in appropriation authorization.

   The Bill appropriates $100,000,000 from the SIIF for the purpose of repayments of mineral revenues, and authorizes the Commissioner to borrow up to $87,000,000 from the Bank of North Dakota and appropriates the amount needed for mineral revenue repayments.

   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.*

   Section 2 of the bill appropriates $800,000 from the SIIF to the Department of Mineral Resources to hire a contractor to study the historic ordinary high water mark.

   Section 3 of the bill contains appropriation authority to the Commissioner of University and School Lands of $187,000,000 related to refunds of an estimated:
   $87,663,214 of bonus and rent;
   $69,316,160 of royalties collected and anticipated through FY 2017; and
   $29,406,007 that could be collected during the time-frame of the study.

   The total appropriation is $187,185,381.

Name: Lance Gaebe
Agency: Department of Trust Lands
Telephone: 701 328-2800
Date Prepared: 04/19/2017

Projected Revenues Based Upon 25,000 Impacted Acres [1]		
	FY 2017-2019 [+]	FY 2019-2021
Oil and Gas Lease Bonus & Rents [2]	$ (87,663,214)	
Royalties Collected [3]	(69,316,160)	
Royalties Collected - Projected [4]	(29,406,007)	(29,406,007)
Royalties Escrowed [5]	(18,657,701)	
Change in Revenue	$ (205,043,082)	$ (29,406,007)

[+] Estimated funds to be disbursed in 2017 - 2019 biennium, but some may be disbursed in 2019 - 2021 biennium.

[1] Difference between the Corp's survey and the Board of University and schools Lands' estimated historic ordinary high water mark.

[2] Bonuses collected and held in SIIF, to be returned to lessees.

[3] Includes projected royalties collected through the end of FY 2017. Already collected royalties would be returned to operators.

[4] Based upon 2015-2017 biennium (to date) average level prices and production.

[5] Funds held in escrow accounts at the Bank of North Dakota due to title disputes.

Potential Bonus Repayments

	Total Bonuses & Rents Collected	% Impact Bill 2134	Total
Phase I*	$ 26,083,522	77.53%	$ 20,223,613
Phase II**	119,993,395	56.20%	67,439,601
	$ 146,076,917		$ 87,663,214

Projected Revenues

Projected Future Periods

	Received	Escrowed	Total Estimated Revenue	% Impact Bill 2134	Total
Phase I*	$ 1,999,529	$ 1,067,123	$ 3,066,652	77.53%	$ 2,377,700
Phase II**	40,094,698	7,996,013	48,090,711	56.20%	27,028,308
	$ 42,094,227	$ 9,063,136	$ 51,157,363		$ 29,406,007

Royalties Collected

	Received	Anticipated FY 2017 Collections	Revenues	% Impact Bill 2134	Total
Phase I*	$ 8,790,483	$ 499,882	$ 9,290,365	77.53%	$ 7,203,197
Phase II**	100,492,181	10,023,675	110,515,856	56.20%	62,112,963
	$ 109,282,664	$ 10,523,557	$ 119,806,221		$ 69,316,160

Royalties Escrowed

	Escrow Received	Anticipated FY 2017 Escrow Collections	Revenues	% Impact Bill 2134	Total
Phase I*	$ 7,608,180	$ 311,244	$ 7,919,424	77.53%	$ 6,140,251
Phase II**	19,939,778	2,332,171	22,271,949	56.20%	12,517,450
	$ 27,547,958	$ 2,643,415	$ 30,191,373		$ 18,657,701

* Phase I leased (between township 153-102 and Hwy 85)

** Phase II leased (between Hwy 85 and Hwy 23)

17.0159.09000

FISCAL NOTE

Requested by Legislative Council
04/05/2017

Amendment to: SB 2134

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.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				$(48,063,708)		$(29,406,007)
Expenditures				$158,529,374		
Appropriations				$187,935,381		

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

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 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 bill adopts a definition of sovereign minerals within Missouri River reservoirs as within the historical riverbed channel and implements a study to determine this location. The bill directs the adjustment of State leased mineral acres and authorizes refunds and legal cost refunds.

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.*

N.D.C.C. ch. 61-33 defines sovereign land to include beds and islands lying within the ordinary high watermark of navigable lakes and streams and assigns management of the oil, gas and related hydrocarbons to the Board of University and School Lands. The State Engineer manages the islands and the bed of navigable waters and all other minerals therein. The State has leased sovereign oil and gas minerals within the estimated historic ordinary high watermark of the Missouri River as it existed prior to inundation by Lake Sakakawea. The revenue is deposited into the Strategic Investment and Improvements Fund (SIIF).

For portions of the Missouri River under reservoirs, the bill would define public ownership of the riverbed minerals as the historic Missouri riverbed channel. The bill initiates a study of U.S. Army Corps of Engineers' pre-inundation surveys and historic records to determine the acreage and stipulates the adjustment of mineral acreage and associated refunds.

The method the Board has used to determine the historic channel and which served as the basis to lease the State's oil and gas rights differs from the area depicted by the federal surveys, thus the bill would initiate the surrender of mineral acres from previous State claims of the historic and actual river channel.

The State would return revenue collected on an estimated 25,000 acres and relinquish future royalty revenue. The impact includes return of the bonus and rent already collected to lessees of record and the return to operators of royalties collected; reduced claim to escrowed royalties; and lost future royalties estimated upon 2015-2017 Biennium (to date) production and prices.

The bill also defers to the U.S. Bureau of Land Management's determination of public domain tracts as depicting acres owned by the federal government. Where these nonpatented lands are within the historic ordinary high watermark of the Missouri River, the State has claimed ownership and leased these acres, which are included in the

estimated fiscal impact. Revenue that the State has collected from the acres that the United States has also claimed would be returned to the lessees and operators from which it was received.

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.*

   The bill would have a negative impact on the SIIF, which collects the proceeds of all sovereign mineral leasing.

   There is an acreage difference between the federal river survey and estimated historic ordinary high watermark as identified by the Board of University and School Lands in 2010. Additionally, the bill would apply a determination of the historic river high watermark west of the Highway 85 Bridge in an area where the Board leased minerals based on the 2009 and 2010 survey of the ordinary high watermark.

   The combined impacts are that the State would repay from the SIIF, revenue it has collected on an estimated 25,000 acres and would also not receive future royalty revenue.

   The bill will require forfeiture of claim to $18,657,701 of presently escrowed royalty. Additionally, based upon 2015-2017 Biennium (to date) average level prices and production, the estimated impact on future royalty revenue would be a reduction of $29,406,007 in each of the next two biennia.

   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.*

   Based upon the possible reduction of 25,000 mineral acres, an estimated $87,663,214 of bonus and rent, and $69,316,160 of royalties collected and anticipated through FY 2017 will be returned to lessees and operators.

   The Bill appropriates $800,000 to the Department of Mineral Resources for the costs of a contractor to determine the acreage and tracts within the "historical Missouri riverbed channel" as determined by the Army Corps of Engineers' surveys conducted in connection with its determination of the amount of land acquired for the impoundment of Lake Sakakawea and Lake Oahe; in combination with other historical records.

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   The Bill appropriates $100,000,000 from the SIIF for the purpose of repayments of mineral revenues, and authorizes the Commissioner to borrow up to $87,000,000 from the Bank of North Dakota and appropriates the amount needed for mineral revenue repayments.

   The Bill appropriates up to $750,000 from the SIIF to reimburse legal expenses of private mineral owners who sued the State regarding ownership of submerged minerals

   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.*

   Section 2 of the bill appropriates $800,000 from the SIIF to the Department of Mineral Resources to hire a contractor to study the historic ordinary high water mark.

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The total appropriation is $187,935,381.

Name: Lance Gaebe

Agency: Department of Trust Lands

Telephone: 701 328-2800

Date Prepared: 04/06/2017

Projected Revenues Based Upon 25,000 Impacted Acres [1]		
	FY 2017-2019 [+]	FY 2019-2021
Oil and Gas Lease Bonus & Rents [2]	$ (87,663,214)	
Royalties Collected [3]	(69,316,160)	
Royalties Collected - Projected [4]	(29,406,007)	(29,406,007)
Royalties Escrowed [5]	(18,657,701)	
Change in Revenue	$ (205,043,082)	$ (29,406,007)

[+] Estimated funds to be disbursed in 2017 - 2019 biennium, but some may be disbursed in 2019 - 2021 biennium.

[1] Difference between the Corp's survey and the Board of University and schools Lands' estimated historic ordinary high water mark.

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[3] Includes projected royalties collected through the end of FY 2017. Already collected royalties would be returned to operators.

[4] Based upon 2015-2017 biennium (to date) average level prices and production.

[5] Funds held in escrow accounts at the Bank of North Dakota due to title disputes.

Potential Bonus Repayments

	Total Bonuses & Rents Collected	% Impact Bill 2134	Total
Phase I*	$ 26,083,522	77.53%	$ 20,223,613
Phase II**	119,993,395	56.20%	67,439,601
	$ 146,076,917		$ 87,663,214

Projected Revenues

Projected Future Periods

	Received	Escrowed	Total Estimated Revenue	% Impact Bill 2134	Total
Phase I*	$ 1,999,529	$ 1,067,123	$ 3,066,652	77.53%	$ 2,377,700
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	Escrow Received	Anticipated FY 2017 Escrow Collections	Revenues	% Impact Bill 2134	Total
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	$ 27,547,958	$ 2,643,415	$ 30,191,373		$ 18,657,701

* Phase I leased (between township 153-102 and Hwy 85)

** Phase II leased (between Hwy 85 and Hwy 23)

17.0159.08000

FISCAL NOTE

Requested by Legislative Council
03/24/2017

Amendment to: SB 2134

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.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				$(48,063,708)		$(29,406,007)
Expenditures				$157,779,374		
Appropriations				$187,185,381		

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

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 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).*

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For portions of the Missouri River under reservoirs, the bill would define public ownership of the riverbed minerals as the historic Missouri riverbed channel. The bill initiates a study of U.S. Army Corps of Engineers' pre-inundation surveys and historic records to determine the acreage and stipulates the adjustment of mineral acreage and associated refunds.

The method the Board has used to determine the historic channel and which served as the basis to lease the State's oil and gas rights differs from the area depicted by the federal surveys, thus the bill would dictate the surrender of mineral acres from previous State claims of the historic and actual river channel.

The State would return revenue collected on an estimated 25,000 acres and relinquish future royalty revenue. The impact includes return to the lessees and operators of bonus, rent, and royalty already collected; reduced claim to escrowed royalties; and lost future royalties estimated upon 2015-2017 Biennium (to date) production and prices.

The bill also defers to the U.S. Bureau of Land Management determination of public domain tracts as owned by the federal government. Where these nonpatented lands are within the historic ordinary high watermark of the Missouri River, the State has claimed ownership and leased these acres, which are included in the estimated fiscal impact.

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.*

      The bill would have a negative impact on the SIIF, which collects the proceeds of all sovereign mineral leasing.

      There is an acreage difference between the federal river survey and estimated historic ordinary high watermark as identified by the Board of University and School Lands in 2010. Additionally, the bill would apply a determination of the historic river high watermark west of the Hwy. 85 Bridge where the Board leased based on the 2009 and 2010 survey of the ordinary high watermark.

      The combined impacts are that the State would repay from the SIIF, revenue it has collected on an estimated 25,000 acres and would also not receive future royalty revenue.

      The bill will require forfeiture of claim to $18,657,701 of presently escrowed royalty. Additionally, based upon 2015-2017 Biennium (to date) average level prices and production, the estimated impact on future royalty revenue would be a reduction of $29,406,007 in each of the next two biennia.

   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.*

      An estimated $87,663,214 of bonus and rent, and $69,316,160 of royalties collected and anticipated through FY 2017 will be returned to lessees and operators.

      The Bill appropriates $800,000 to the Department of Mineral Resources for the costs of a contractor to determine the acreage and tracts within the "historical Missouri riverbed channel" as determined by the Army Corps of Engineers' surveys conducted in connection with its determination of the amount of land acquired for the impoundment of Lake Sakakawea and Lake Oahe; in combination with other historical records.

      Technical and legal expenditures and the need for additional Department of Trust Land staff to implement acreage adjustments and resulting refunds cannot be determined.

   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.*

      Appropriation authority will need to be provided to the Commissioner of University and School Lands for the expenditures related to refunds of an estimated:

      $87,663,214 of bonus and rent;
      $69,316,160 of royalties collected and anticipated through FY 2017; and
      $29,406,007 that could be collected during the time-frame of the study.

      Including the $800,000 appropriated in Section 2 of the bill, the total appropriation is $187,185,381.

Name: Lance Gaebe

Agency: Department of Trust Lands

Telephone: 701 328-2800

Date Prepared: 02/07/2017

Projected Revenues Based Upon 25,000 Impacted Acres [1]		
	FY 2017-2019 [+]	FY 2019-2021
Oil and Gas Lease Bonus & Rents [2]	$ (87,663,214)	
Royalties Collected [3]	(69,316,160)	
Royalties Collected - Projected [4]	(29,406,007)	(29,406,007)
Royalties Escrowed [5]	(18,657,701)	
Change in Revenue	$ (205,043,082)	$ (29,406,007)

[+] Estimated funds to be disbursed in 2017 - 2019 biennium, but some may be disbursed in 2019 - 2021 biennium.

[1] Difference between the Corp's survey and the Board of University and schools Lands' estimated historic ordinary high water mark.

[2] Bonuses collected and held in SIIF, to be returned to lessees.

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[4] Based upon 2015-2017 biennium (to date) average level prices and production.

[5] Funds held in escrow accounts at the Bank of North Dakota due to title disputes.

Potential Bonus Repayments

	Total Bonuses & Rents Collected	% Impact Bill 2134	Total
Phase I*	$ 26,083,522	77.53%	$ 20,223,613
Phase II**	119,993,395	56.20%	67,439,601
	$ 146,076,917		$ 87,663,214

Projected Revenues

Projected Future Periods

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Royalties Escrowed

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	$ 27,547,958	$ 2,643,415	$ 30,191,373		$ 18,657,701

* Phase I leased (between township 153-102 and Hwy 85)

** Phase II leased (between Hwy 85 and Hwy 23)

17.0159.06000

FISCAL NOTE

Requested by Legislative Council
02/06/2017

Revised
Amendment to: SB 2134

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.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				$(286,287,872)		$(35,603,513)
Expenditures				$350,000		
Appropriations						

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

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 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 bill changes the definition of sovereign minerals within Missouri River reservoirs.

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.*

For portions of the Missouri River, the bill would sever the public's ownership of the riverbed from its ownership of the minerals beneath the bed. N.D.C.C. ch. 61-33 defines sovereign land to include beds and islands lying within the ordinary high watermark of navigable lakes and streams and assigns management of the oil, gas and related hydrocarbons to the Board of University and School Lands. The State Engineer manages the islands and the bed of navigable waters and all other minerals therein. On behalf of the State, the Board has leased these oil and gas minerals to the estimated historic ordinary high watermark of the Missouri River as defined by state law as it existed prior to inundation. The revenue is deposited into the Strategic Investment and Improvements Fund.

The bill would make the U.S. Army Corps of Engineers' river surveys prior to inundation by Lakes Sakakawea and Oahe determinant of the State's sovereign mineral boundary. Because the method the Board has used to lease the State's oil and gas rights differs markedly from the area of the historic river depicted by the federal surveys, substantial mineral acres would be surrendered to the federal government and to private title claims.

The US Department of Interior's recent position is that the Missouri River is owned by the tribes within the boundary of the Fort Berthold Reservation. The State disputes this position and claims ownership. If passed, North Dakota would forego its assertion to all riverbed minerals within the Fort Berthold and Standing Rock Reservations.

The State would return revenue on an estimated 910 mineral tracts involving 64,000 acres and relinquish future royalty revenue. The impact includes the return of bonus, rent, and royalty already collected; escrowed royalties that are anticipated to be collected; and estimated lost future royalties based upon 2015-2017 Biennium (to date) production and prices.

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.*

      The bill would have a negative revenue impact on the Strategic Investment and Improvements Fund, which collects the proceeds of all sovereign mineral leasing.

      There is an acreage difference between the federal river survey and estimated historic ordinary high watermark as identified by the Board of University and School Lands' contractor in a 2010 investigation.

      Presently under Lake Sakakawea the Board, on behalf of the State, leases oil and gas minerals within the estimated historic high watermark both within and outside of the reservation. With passage of this bill, North Dakota would abandon its claim to riverbed minerals located within the Fort Berthold and Standing Rock reservations.

      The combined impacts are that the State would repay from the SIIF, revenue it has collected on 910 mineral tracts involving an estimated 64,000 acres and would also abdicate future royalty revenue.

      The impacts includes the return to lessees of $129,489,819 of bonus and rent; the repayment to operators of $71,974,869 in royalties collected and anticipated through FY 2017; and the forfeiture of claim to $49,219,671 of presently escrowed royalty.

      Additionally, based upon 2015-2017 Biennium (to date) average level prices and production, the estimated impact on future royalty revenue would be a reduction of $35,603,513 in each of the next two biennia.

   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.*

      Technical and legal expenditures and the need for additional staff for implementing the bill cannot be determined.

      The costs of hiring a qualified contractor to determine the acreage and tracts within the "historical Missouri riverbed channel" as determined by the Army Corps of Engineers' last known survey conducted in connection with its determination of the amount of land acquired for the impoundment of Lake Sakakawea and Lake Oahe is estimated at $350,000.

   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.*

      No anticipated impact on present biennium appropriations.

      Continuing appropriation authority (N.D.C.C. §§ 15-05-19, 15-07-22) is used for spending authority to manage, preserve, and
      enhance the value of the SIIF; it is unknown if this same authority can be used for expenditures related to reducing the State's previously claimed asset.

Name: Lance Gaebe

Agency: Department of Trust Lands

Telephone: 701 328-2800

Date Prepared: 02/07/2017

Projected Revenues Based on Acreage Changes in Engrossed SB 2134 [1]

	FY 2015-2017	FY 2017-2019	FY 2019-2021
Oil and Gas Lease Bonus & Rent [2]	$ -	$ (129,489,819)	$ -
Royalties Collected [3]	-	(71,974,869)	
Projected Royalties [4]		(35,603,513)	(35,603,513)
Escrowed Royalties [5]	-	(49,219,671)	-
Change in Revenue	$ -	$ (286,287,872)	$ (35,603,513)

Appx. Acres [1]	Affected Tracts [1]
64,000	910

[1] Difference between the Corps' survey and the Board of University and School Lands' estimated historic ordinary high watermark. The bill eliminates the State's claim to all minerals underlying the Missouri River within the boundary of the Fort Berthold Reservation.

[2] Bonuses collected and held in the SIIF, to be returned to lessees.

[3] Includes projected royalties through the end of FY 2017.
Already collected royalties would be returned to operators.

[4] Based upon 2015-2017 bienium (to date) average level prices and production

[5] Funds held in escrow accounts at the Bank of North Dakota due to title disputes.

17.0159.06000

FISCAL NOTE

Requested by Legislative Council
02/06/2017

Amendment to: SB 2134

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.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				$(286,287,872)		$(35,603,513)
Expenditures				$350,000		
Appropriations						

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

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 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 bill changes the definition of sovereign minerals within Missouri River reservoirs.

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.*

For portions of the Missouri River, the bill would sever the public's ownership of the riverbed from its ownership of the minerals beneath the bed. N.D.C.C. ch. 61-33 defines sovereign land to include beds and islands lying within the ordinary high watermark of navigable lakes and streams and assigns management of the oil, gas and related hydrocarbons to the Board of University and School Lands. The State Engineer manages the islands and the bed of navigable waters and all other minerals therein. On behalf of the State, the Board has leased these oil and gas minerals to the estimated historic ordinary high watermark of the Missouri River as defined by state law as it existed prior to inundation. The revenue is deposited into the Strategic Investment and Improvements Fund.

The bill would make the U.S. Army Corps of Engineers' river surveys prior to inundation by Lakes Sakakawea and Oahe determinant of the State's sovereign mineral boundary. Because the method the Board has used to lease the State's oil and gas rights differs markedly from the area of the historic river depicted by the federal surveys, substantial mineral acres would be surrendered to the federal government and to private title claims.

The US Department of Interior's recent position is that the Missouri River is owned by the tribes within the boundary of the Fort Berthold Reservation. The State disputes this position and claims ownership. If passed, North Dakota would forego its assertion to all riverbed minerals within the Fort Berthold and Standing Rock Reservations.

The State would return revenue on an estimated 910 mineral tracts involving 64,000 acres and relinquish future royalty revenue. The impact includes the return of bonus, rent, and royalty already collected; escrowed royalties that are anticipated to be collected; and estimated lost future royalties based upon 2015-2017 Biennium (to date) production and prices.

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.*

      The bill would have a negative revenue impact on the Strategic Investment and Improvements Fund, which collects the proceeds of all sovereign mineral leasing.

      There is an acreage difference between the federal river survey and estimated historic ordinary high watermark as identified by the Board of University and School Lands' contractor in a 2010 investigation.

      Presently under Lake Sakakawea the Board, on behalf of the State, leases oil and gas minerals within the estimated historic high watermark both within and outside of the reservation. With passage of this bill, North Dakota would abandon its claim to riverbed minerals located within the Fort Berthold and Standing Rock reservations.

      The combined impacts are that the State would repay from the SIIF, revenue it has collected on 910 mineral tracts involving an estimated 64,000 acres and would also abdicate future royalty revenue.

      The impacts includes the return to lessees of $129,489,819 of bonus and rent; the repayment to operators of $71,974,869 in royalties collected and anticipated through FY 2017; and the forfeiture of claim to $49,219,671 of presently escrowed royalty.

      Additionally, based upon 2015-2017 Biennium (to date) average level prices and production, the estimated impact on future royalty revenue would be a reduction of $35,603,513 in each of the next two biennia.

   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.*

      Technical and legal expenditures and the need for additional staff for implementing the bill cannot be determined.

      The costs of hiring a qualified contractor to determine the acreage and tracts within the "historical Missouri riverbed channel" as determined by the Army Corps of Engineers' last known survey conducted in connection with its determination of the amount of land acquired for the impoundment of Lake Sakakawea and Lake Oahe is estimated at $350,000.

   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.*

      No anticipated impact on present biennium appropriations.

      Continuing appropriation authority (N.D.C.C. §§ 15-05-19, 15-07-22) is used for spending authority to manage, preserve, and
      enhance the value of the SIIF; it is unknown if this same authority can be used for expenditures related to reducing the State's previously claimed asset.

Name: Lance Gaebe

Agency: Department of Trust Lands

Telephone: 701 328-2800

Date Prepared: 02/07/2017

Projected Revenues Based on Acreage Changes in Engrossed SB 2134 [1]

	FY 2015-2017	FY 2017-2019	FY 2019-2021
Oil and Gas Lease Bonus & Rent [2]	$ -	$ (110,245,126)	$ -
Royalties Collected [3]	-	(70,751,579)	
Projected Royalties [4]		(32,752,001)	(32,752,001)
Escrowed Royalties [5]	-	(35,157,910)	-
Change in Revenue	$ -	$ (248,906,616)	$ (32,752,001)

Appx. Acres [1]	Affected Tracts [1]
64,000	910

[1] Difference between the Corps' survey and the Board of University and School Lands' estimated historic ordinary high watermark. The bill eliminates the State's claim to all minerals underlying the Missouri River within the boundary of the Fort Berthold Reservation.

[2] Bonuses collected and held in the SIIF, to be returned to lessees.

[3] Includes projected royalties through the end of FY 2017.
Already collected royalties would be returned to operators.

[4] Based upon 2015-2017 bienium (to date) average level prices and production

[5] Funds held in escrow accounts at the Bank of North Dakota due to title disputes.

17.0159.05000

FISCAL NOTE

Requested by Legislative Council
01/05/2017

Bill/Resolution No.: SB 2134

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.*

	2015-2017 Biennium		2017-2019 Biennium		2019-2021 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues				$(212,961,857)		$(30,374,301)
Expenditures						
Appropriations						

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

	2015-2017 Biennium	2017-2019 Biennium	2019-2021 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 bill defines sovereign minerals within Missouri River reservoirs as the former river channel depicted in federal surveys. The State has already leased minerals within the estimated high water mark of the pre-lake river, so the bill would cause the return of revenues and loss of future royalties.

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.*

The bill would sever the public's ownership of the bed of the Missouri River from its ownership of the minerals beneath it. N.D.C.C. ch. 61-33 defines sovereign land to include beds and islands lying within the ordinary high watermark of navigable lakes and streams and assigns management of the oil, gas and related hydrocarbons to the Board of University and School Lands. The bill would change the method the Board has used lease sovereign oil and gas acres, which revenue is deposited into the Strategic Investment and Improvements Fund. The Board historically leased these types of minerals to the estimated ordinary high water mark of the Missouri River as it existed prior to inundation.

The bill would apply U.S. Army Corps of Engineers' river surveys prior to inundation by Lakes Sakakawea and Oahe as depicting the state's sovereign mineral boundary. Because the method the Board has used to lease the State's oil and gas rights differs markedly from the area of the historic river depicted by the federal surveys, substantial mineral acres would be surrendered to the federal government and to private title claims. The State would return revenue on an estimated 710 mineral leases involving 40,000 acres and relinquish future royalty revenue. The impact includes the return of bonus, rent, and royalty already collected; escrowed royalties that are anticipated to be collected; and estimated lost future royalties based upon 2015-2016 production and prices.

The State Engineer manages the islands and the bed of navigable waters and all other minerals therein.

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.*

      The bill would have a negative revenue impact on the Strategic Investment and Improvements Fund, which collects the proceeds of all sovereign mineral leasing.

      There is an acreage difference between the federal river survey and estimated historic ordinary high watermark as identified by the Board of University and School Lands' contractor in a 2010 investigation.

      From the SIIF, the State would repay revenue it has collected on 710 mineral leases involving an estimated 40,000 acres along 164 river miles, and also relinquish future royalty revenue.

      The impact includes the return of $90,021,514 of bonus and rent; the repayment of $63,548,383 royalties collected and anticipated through FY 2017; and the forfeiture of claim to $29,017,659 of presently escrowed royalty.

      Additionally, based upon FY 2015 and 2016 average level prices and production, the estimated impacts on future royalty revenue would be a reduction of $30,374,301 in each of the next two biennia.

   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.*

      Expenditures related to additional legal or FTE expenses were not estimated.

   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.*

      No anticipated impact on present biennium appropriations.

Name: Lance Gaebe

Agency: Department of Trust Lands

Telephone: 701 328-2800

Date Prepared: 01/10/2017

Revenues					
Projected Future Periods					
	Received	**Escrowed**	**Total Estimated Revenue**	**% Impact by Bill 2134**	**lost revenue**
Phase II**	40,094,698	7,996,013	48,090,711	56.20%	27,028,308
Phase IV***	813,373	5,384,133	6,197,506	53.99%	3,345,993
	40,908,071	13,380,146	54,288,217		30,374,301

Royalties Collected					
	Received	**Anticipated FY 2017 Collections**	**Revenues**	**% Impact by Bill 2134**	**returned revenue**
Phase II	100,492,181	10,023,675	110,515,856	56.20%	62,112,963
Phase IV	2,455,366	203,343	2,658,709	53.99%	1,435,420
	102,947,547	10,227,018	113,174,565		63,548,383

Royalties Escrowed					
	Escrow Received	**Anticipated FY 2017 Escrow Collections**	**Revenues**	**% Impact by Bill 2134**	**lost anticipated revenue**
Phase II	19,939,778	2,332,171	22,271,949	56.20%	12,517,450
Phase IV	28,991,598	1,570,372	30,561,970	53.99%	16,500,209
	48,931,376	3,902,543	52,833,919		29,017,659

* % Impact from Bonus WKS

** Phase II (between Hwy 85 and Hwy23)

*** Phase IV (between Hwy 23 and Garison Dam)

Potential Bonus Repayments

	Affected Tracts	Total Bonuses & Rents Collected	% impact by SB 2134	potential bonus repayment
Phase II	392	$ 119,993,395	56.20%	$ 67,439,601
Phase IV	318	41,826,605	53.99%	22,581,912
Total	**710**	**$ 161,820,000**	**55.63%**	**$ 90,021,514**

Phase II (between Hwy 85 and Hwy 23	
Assigned Fund Value - Phase II	78,600,382.00
Acres between State and Corps Historic River	22,144.37
Value Per Acre	3,549.45
Change in Acres if bill 21	(19,000)
Value Per Acre	3,549.45
Estimated At Risk Amour	(67,439,601)

Phase IV (between Hwy 23 and dam)	
Estimated OHWM Surve	38996.45
As Adjusted Bill 2134	17942.52
Change	21053.93
% Change	53.99%

2017 SENATE ENERGY AND NATURAL RESOURCES

SB 2134

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

2134
1/12/2017
Job # 26848

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution: A bill relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin dams.

Relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin dams.

Minutes: Attch#1=SenArmstrong,Attch#2=RonNess,Attch#3+3A=RonNess,Attch#4=CraigSmith,Attch#4-A=DennisEdwardJohnson,Attch#5&Attch#6=PeterMasset,Attch#7=Fred/JoyceEvans,Attch#8 &Attch#8-A=JonPatch,Attch#9=JoshuaSwanson,Attch#10=EdwardLynch,Attch#11=SuzanneVehs,Attch#12=John Paczkowski, Attch#13=Lance Gaebe,Attch#14=Phyllis Young.

Chairwoman Unruh: Clerks will call the roll. All committee members present. We have a lots of information to cover and people to hear from thus we are in the Bry Haugland room. We will be here until 11:00 and close the hearing. I would like to get through as much material as we can this morning. If we do not get through all testimony, we will reopen this hearing in Ft Lincoln room this afternoon right after floor session in Senate.

Chairwoman Unruh: Open hearing on SB 2134.

Sen. Armstrong: (1.50) I am from Dist 36. I am in support of SB 2134. (see attch#1) I have been involved with this for well over a year.

Sen. Cook (6.23): I see in the bill that there is reference to a western border. Can you point on the map what part of the lake we are talking about?

Sen. Armstrong (7.05): By Williston to Garrison Dam. This includes Lake Oahe, just not any mineral development under Lake Oahe.

Sen. Cook: OK. Does it affect any land on Ft Berthold Reservation?

Sen. Armstrong: The people I have dealt with, do not think so. If that is a concern, we would remove the Ft Berthold Reservation by bordering it in and out of this bill. This is not a reservation bill. The issues between the state and reservation are a separate from this bill. This bill is about state and private citizens' owners on stuff that the state owns. If Berthold becomes an issue, I would recommend that we amend it out of the bill.

Sen. Cook (7.55) : Can someone explain the fiscal note. You mentioned $180 million that is sitting in a trust fund. Can we find out the exact amount and does that get subtracted from the $212 Million?

Sen. Armstrong: Someone other than me will answer that question. It is a line item set aside in the SIFT fund. The BLM survey is smaller than the state survey. If you use the BLM survey, the state mineral rights would get smaller than the state survey.

Senator Bekkadahl, Dist 1, Williston, ND: I support SB 2134. The issues that we are seeing in this area, that this bill attempts to remedy, came out of the Williston are when Bakkan first started. Some lawsuits that originated in there, have seen several courts since then. We have representation in my district that directly related to this. I have been in contact with these people and they really want to see the definitions place into law that are in this bill that gives them some certainty of what they do or do not have. Any questions?

Ron Ness, ND Petroleum Council : (9.51) Here in support of SB 2134. (see attch#2) I am here to introduce Craig Schmidt. He has spent the majority of time on this issue. We agree with Sen Armstrong. From western border of Ft Berthold to highway 85 bridge. There are unique circumstances that are dealt with to the west of 85 bridge. The intention of this bill is those private lands. The 350 Bakkan wells that have been drilled; the light blue is the original river bed which would be defined in this bill, and dark blue is area in which the Corps of Engineers study claims. That is the lake. You can imagine that if you are a mineral owner that has owner and leased these lands for generations, and now your land was paid to you be the Corps but the Corps did not reserve the minerals and let the landowners reserve the minerals. The issue from the oil and gas side is that currently you have to lease both sides in order to have a have a valid lease. You have to pay both sides or put money in suspense. That is the $180 Million. You are in a situation where you are uncertain of who to pay. Mr. Smith will explain that. There are minutes from March 9, 2010 Rules committee. (Attch#3 & 3-A)

Craig C. Smith, ND Petroleum Council (13.00-33.12): Support of SB 2134(see attch#4) I would like to introduce Dennis Johnson.

Dennis Johnson, Watford, ND, a lawyer:(34.49-41.25) (see attch#4-A) Just remember that rivers move. I came here on my own because this bill is right. What is happening is wrong.

Peter Massett, Jr. (41.53-45.46): Bismarck resident, Army vet (Operation Iraqi Freedom 111(2004-05); I work in the energy industry. (see attch#5 & attch#6). Here in support of SB 2134.

(Attch#7): Handed in to committee. Received by e-mail.

Preston Page: I am private mineral owner who would be greatly affected by the taking of the minerals under Lake Sakakawea. You have heard a lot of parties testify on the legal issues. We want to ratify and adopts that testimony al well. But we want to touch on the amount of people affect by this. We did an in-depth study on the number of mineral owners by the taking of the minerals under Lake Sakakawea. We out together a list of 3669 names from ND. This started as an issue underneath the lake bed. Then our study went through all those that had signed oil and gas leases for generations as Mr. Ness stated earlier. As Mr. Smith stated that there are thousands of mineral owners. We want to bring it back to you because of legality but also morality of taking private minerals from these owners who had these for generations. That is what we want to testify on.

Sen. Armstrong: (47.43) Why and when did you do this survey?

Preston: I did it a few months ago. We were asked by someone at the Petroleum Council to see how many people would be affected by this. We identified 3669 names and addresses.

The point is it is not a cooperation. Not big oil out of Houston. This is private mineral owners whose crop lands were taken 50-60 years ago.

Chairwoman Unruh: Any more in support of SB 2134? You need to check in support or against. We only allow neutral with agency testimony. Any against?

Jon Patch (52.36-59.30), Bismarck, ND: I am against this bill. I am here representing my grandparents, JT and Evelyn Wilkinson of Williams County, ND. (see attch#8 & attch#8-A)

Chairwoman Unruh: Would you continue to oppose this bill if there was another bill to address those concerns on the other side of the bridge?

Jon Patch; I have asked Representative Keiser to introduce in the House which states using the historical channel in Lake Sakakawea below the 1854 ft contour which is the level of the lake. My hope would be that there be compromise between both bills. I think the easiest thing would be to amend this bill to take out the bridge. It is arbitrary. Totally capricious in terms of that is has not scientific or legal for having it in there. Take that language out this would be a great bill.

Joshue Swanson, Lawyer with Vogel Law Firm,: I agree with much that has been said this morning. My client is Mr. Patch. (see attch#9) (1.01.16-1.08.17) Please amend the bill.

Mark Fox, Chairman MHA Nation: I am here against SB 2134. (1.09.19) Based on information at testimony here and on side bar, I understand from one of the bill sponsors and other that what we are requesting new language. Right now we oppose the bill as is. It is overbroad and unlawful as it is written. We have lived here long before ND became a state. US acknowledged the MHA territory in 1851 Treaty of Ft Laramie. Our boundaries have always included the Missouri River bed and underlining minerals. The currents reservation boundaries were redrawn by executive order in 1870 before ND reached statehood. When ND became a state in 1989, it disclaimed all right and title lands held by the MHA Nation as it was required to do by the Federal Enabling Act. The US reaffirmed the Missouri riverbed was owned in trust by MHA Nation and by a 1936 title opinion. It was also reaffirmed in 1979 by the Interior Board of Land Applies in a federal proceeding in which ND actively participated. The latest reaffirmation that the riverbed minerals at held in trust for MHA Nation came in a letter from the Dept of Interior dated November 13, 2016. When Congress took reservation land for the Garrison Dam, Congress recognized MHA Nation's title to the riverbed and underlined minerals and included them in a takings legislation. In 1984, the riverbed minerals were returned to MHA Nation by the Ft Berthold Minerals Restoration Act. In this act, Congress declared that the minerals within the reservation that were acquired by US for the Garrison Dam, are hereby declared to be held in trust by US for the benefit and use of the three affiliated tribes of the Ft Berthold Reservation. SB 2134 fails to acknowledge the MHA ownership of the riverbed minerals within the Ft Berthold Reservation. Reject or amend to exclude riverbed minerals within the reservation.

Chairwoman Unruh: I will accept written testimony until day's end. After hearing is closed, we can accept no more testimony.

Mark Fox: Any questions? (1.12)

Edward Lynch: (1.13.02-1.22.58): I am here representing myself and my family, The Vohs and Lynch families of Williston. (see attch#10) (He also submitted attch#11) This is an unconstitutional taking of land. Against this bill. If amended, I may support.

Chairwoman Unruh: Any more testimony against? Seeing none. Any agency testimony?

John Paczkowski, State Engineer Office; State Water Commission: (1.23.44-1.27.28) Just here to give information. I will take questions. (see attch#12)

Sen. Armstrong: Is the bill and survey defensible?

John: I cannot answer.

Sen. Cook: As Devils Lake expands, I understand where the state owns the water, and they would gain more surface water, but who pays the taxes on the land under the water?

John: That varies. There are some landowners that are paying taxes for land that is under water. Others do not pay.

Sen. Cook: I would disagree with that. We need to clarify. The landowner continues to pay the taxes unless they elect not to and they have lost the rights of the land because of delinquent taxes. I argue then, that if they pay taxes on the land, do they not retain ownership of the minerals?

John: I do not have a legal answer for you.

Chairwoman Unruh: Further agency testimony?

Lance Gaebe, Commissioner of University and School Lands: (1.29.07) (see attch#13) I want to clear up some confusion. Our primary responsibility is outlined in the enabling act in the ND Constitution. The topics here are not related to that. We oversee the common school trust fund and a number of other permanent trusts. My office provided the fiscal note. It was said that there was a sudden and dramatic change. IT has been a long standing practice of the land board to lease the minerals west of the Williston area to the channel as it exists and as depicted as the water flows. East of the Hwy 85 bridge, as using the historic river channel as it was identified in air photos. The studies that have been referenced were done to put a more technical aspect and review of those guidelines. They have not changed but we hired the Bartlett and West firm to put more specific by river mile by river mile. West of Williston it was done on the ground and on the water looking at hydrology, botany, and so forth. The state standards were used by the contractor that was jointly hired with the state engineer identify the ordinary water high marks starting in 2010 of the river as it exists. This is the basis for the states ownership. There is changing always because it is free flowing river. The fiscal note is a result of the difference of the historic review and the Corps survey. The Land Board has adopted a motion that it does not plan on changing its leasing practices but want this assembly to take a look at the definition of ordinary high water mark. Board has not reviewed this bill. We will meet later this month.

Chairwoman Unruh: (1.3) Prior to the 2009 survey, was it the Corp survey that the state was using to lease minerals?

Lance: That predates me. I believe the methodology has not changed. Before the 2009 survey, was in house aerial maps. West of Hwy 85 bridge, was the river as at flowed and east of 85 bridge was the historical done by staff looking at aerial photos.

Chairwoman Unruh: So it could have included the Corps survey, but maybe not. So on your time line you state that in 2007 as the State Engineers Office testified earlier, we developed new ordinary high water mark delineations guideline. Then we used these guidelines to create a new map to determine state ownership. That is clear. Thank you.

Sen. Armstrong: There has been lots of conversation west of the bridge. The states positions are as the river moves, so does the minerals moves as well? Not just the surface, west of the bridge?

Lance: The state's ownership changes with the movement of the river. Because of the complexity of oil and gas, we have and are willing to lock in acreage if a well is produced on certain acres, we do not try and change the ownership of that specific well as time goes on. We look at when it was drilled and the best information of acreage at the time. If a well gets drill in same area 10 years later, and better information about the river, we consider that at the time of the new well was drilled.

Sen. Armstrong: As a practical effect, even though the river is constantly moving, slowly, correct.

Lance: Imperceptible movement, yes.

Sen. Armstrong: So you lock in the terms of the lease but not necessarily terms of spacing unit or held by production.

Lance: I would not say lock in terms of lease but we do on well by well basis. A lease could be as long initial production to 30-50 years, so maybe as additional wells are drilled, we would be willing to lock in acreage on those specific wells. We would have better acreage information at the time.

Sen. Armstrong: Wouldn't it be simpler to lock in the river channel?

Lance: I wish a lot of this were simpler.

Chairwoman Unruh: Any other questions before we go on to the fiscal note? I am curious if there is any documentation at your office of the leases that were made prior to the 2009 survey. And the areas that those leases encompassed? Is that possible.

Lance: There has been leasing well before the 2009 survey east and west of the Williston area. I am not sure but I can try and get examples types of leases and wells.

Chairwoman Unruh: It would be valuable to the committee to see which areas were specially affected in those previously leased areas by the changes of the 2009 survey as far as the state's ownership and mineral boundaries.

Lance: If there were changes in 2009 it was because there were specific information. When the leasing was done prior to that, it was largely in response to interest. Not a comprehensive survey of the entire stretch of the river. If there was interest in leasing a certain piece of ground, or tract, an in-house review was done trying to depict the river course and figured out for that tract. I would not be able to produce for you a comparison of pre 2009 the whole length of the river. Most of the testimony today has been tract by tract specific basis.

Chairwoman Unruh: Move on to fiscal note.

Lance: (1.46) The largest conflict is with the Federal government over who owns – state or federal. So to cover their risk, we found that many operators who operate in this area tend to lease from both plus private parties, as has been suggested. There were layers of duplication claims of ownership, and now someday is here to resolve. Within the fiscal note, we have several different classes of funds that reach that level. There is a assigned fund balance. The Land Board set that amount aside at the time pre high water decision. It was called the shore zone. The difference between the water's edge and the ordinary high water mark. So within the SIF, are funds that are still in the funds and are bonuses that were collected from that shore zone. We continue to have an assigned fund balance, within the SIF, even though the Reed decision affirmed that the state owns the ordinary high water mark. We calculate it based on the potential outcome of lawsuits. We calculate about 90 Million dollars of the bonus and rent that have been collected that are in the fund, would not be the states because of the passage the bill and using the Corps survey instead of the historic depiction of the high water mark. We have also collected and anticipated collecting until June 30, $63.5 Million of royalties. Also a number of funds that are in escrow. There are

some that mentioned royalties held in suspense. That means it operators who are not able to determine title have the ability under state law to hold until they can figure out who the owners are. Usually it is in escrow at Bank of ND. We estimated a $30 Million loss of future revenues in each of next two biennia's. Any questions?

Sen. Cook: (1.50.11) We have a tough decision as we go forward. We need to eliminate all the uncertainty out there. We need to determine what the courts have failed to determine. It is going to cost money. How much money should that influence what is right and what is wrong. We hear testimony from those west of the river and there is a talk of another bill. Can you tell us somehow what the fiscal cost of west of the river might be on top of this?

Lance: I am trying to think how. We used GIS layers from the federal government in our own GIS data and put overlays and then subtracted. I think we can if we can locate the Corps surveys, if they exist. Could be done.

Sen. Cook: If there was an amendment, we would have a fiscal note before we pass the bill out. Start getting ready.

Chairwoman Unruh: Further questions? Any more Agency testimony? Seeing none. Close the hearing on SB 2134. (1.52)

(Attch#14-Phyllis Young) She put this on Chairwoman Unruh desk after the hearing. Chairwoman Unruh said to include in testimony.

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
1/13/2017
26873

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature: Pam Dever

Explanation or reason for introduction of bill/resolution: Relating to the ownership pf minerals inundated by Pick-Sloan Missouri Basin dams.

Minutes: Committee Work

All committee members present . **Chairwoman Unruh** : Let's open the discussion on SB 2134. I don't see us moving on this today. If anyone has questions or comments, please ask.
Sen. Roers (.19): Can we hear from the AG office as to how the state's position was formulated? Would that we appropriate to hear from the other side?
Chairwoman Unruh : We can certainly ask them to come down toe committee. That would be valuable information.
Sen. Roers : We heard a very convincing presentation yesterday, but somehow there must be a second side to this story. Or the money would not be sitting there.
Chairwoman Unruh : Inviting them down would be appropriate for yesterday when the hearing was, but now it would be to give us a legal time line of what their office has engaged in. They cannot comment on bill. They could have during the hearing.
Sen. Roers ; I just like to hear from the other side. If there is nothing, that is fine.
Chairwoman Unruh : You are welcome to have those conversations with the AG Office if you want. They were in the room yesterday. The lawyers who were working on these cases and involved in these minerals. They had every opportunity to comment yesterday.
Sen. Cook : I would add that everything that the AG has done, as far as court hearings, has left a paper trail. Sen. Roers , you can find that paper trail if you want. May be nice for the record.
Chairwoman Unruh : I would like to request a paper trail from the AG Office of the cases that they have engaged in on state's behalf.
Sen. Armstrong : (2.48) I am trying to work on the best language would be if we take out the 85 bridge and what would be the appropriate language. It may just be as easy as contacting the BLM and finding out if it is was the whole Pick-Sloan Act as it went through. We are trying to find that language. Sen. Cook asked for another fiscal note so that will be interesting to see as well.
Chairwoman Unruh : Yes, if we address that boundary at all, we will be looking at a different fiscal note. Hopefully we will have those numbers and give the committee time to digest and work on this as we move forward by the end of January to get it to Appropriations.

Sen. Oban : (3.60) Somebody in their testimony provided a different description of where that would go extending past that Hwy 85 mark. I cannot remember where it is. Someone did provide something like that yesterday.
Sen. Armstrong : Most want you to exclude that hwy 85. Take the west boundary out. I am trying to figure out if that is the most accurate, how it occurred at that point in time. What we do with it is what we do with it. If they went to the border, I will find out. Then it will be simple to removing 85. If there was a boundary around Pick-Sloan project, then that is worth considering as the correct boundary.
Chairwoman Unruh : I would agree. West of the bridge complicates things because of the different leasing practices of the state and the different case law that is already in place for some of the court cases that have already been settled. I have done a lot of reading in last week and we have other members who have been working on this a long. I want to take our time and get it right.
Sen. Oban : I do have a followup. When someone brought up Devils Lake yesterday, I could not wonder why we are only talking about this body of water. Why not other body of waters? Why not every other body of water that the state goes in and out of leasing (controlling)? Is it not treating these people special versus everyone else then?
Sen. Armstrong : No, I just dealt with the two artificial dams that are located in ND regarding the Missouri river. Originally, the issue was because of language in the Wilkenson case where historically the state has claimed the high water mark under the river, There is an argument made in a pleading in that case that because of the artificial dam at Lake Sakakawea, they now have a claim to the high water mark at the artificially dammed lake. The uniqueness of the Missouri River and Lake Sakakawea and Lake Oahe is not anything other than they are the two Corp of Engineer controlled dams. Devils Lake is not. That is how the legislation bore out.
Chairwoman Unruh: (7.11) This is not necessarily a problem everywhere. The equal footing doctrine addressed a lot of this as the time of statehood. Unless the body of water is constantly fluctuating like Devils Lake, you do not run into these issue.
Sen. Oban: There are actually five listed under the Equal Footing Doctrine. I know it is not just this. I know it is because there is oil. Obviously why people are arguing this. Those mineral are of value now. Who is to say what minerals will be of value down the line, just because it is not oil? Just general question.
Sen. Cook : How did you come up with five? Did we get some testimony?
Sen. Oban : No, Sen. Cook , I just looked on the Office of the State Engineer.
Sen. Cook : What are the five?
Sen. Oban : 1-Missouri River , 2-James River, 3-Devils Lake, 4-Painted Woods Lake, 5-Sweet Water Lake. There are additional ones sovereign to ND, list of eleven.
Sen. Cook : (8.08) I would like to know how much land did the state of ND gain title to underneath Devils Lake because of the Equal Footing Doctrine and how much land under Devils Lake has someone gained title to because of back taxes. My understanding of Devils Lake I the only way you will loose title to the land is if you do not pay the taxes. They lower the taxes. People pay just to keep ownership of the land. When the water backs off, you can farm it again. The story in the hearing yesterday told by the first family, Wilkenson, where they believed they had title of the mineral rights, And when they started drilling, they wondered why they did not payment. They found out that an oil company had those same mineral rights. How did the oil company gain the mineral rights. I assume they bought or leased them from the state. Somewhere there has got to something that happened that we were not told about. The family said they did not get a notice that he was loosing his mineral

rights. It would be nice if we could find a paper trail of how did the state acquire the mineral rights. It appears like a taking from yesterday's testimony and flagrante. If that is true, we need to find out.

Sen. Armstrong : I think it is important to recognize that this bill deals with severed minerals. I am not smart enough to figure out all of the land issues that are involved in Devils Lake and all the other bodies of water. Whole different set of president that applies. We were cautious but did include Oahe, bec it was by Lake Sakakawea. We may want t look at doing it everywhere and get ahead of it instead of dealing with it after there have been 350 wells drilled. To address Sen. Cook, I do not know how the actual condemnation occurred, but I know the difference is what the state deems the high water mark versus what the feds historical deemed as high water mark. The state's high water mark of the river is significantly larger than what the federal one was. That is whether it was east or west of the bridge. I do not know the actual process of the condemnation. I am sure someone does and we can find it.

Sen. Cook : We heard testimony from the Water Commission that they believe that the line that separates ownership this high water mark, can change from day to day, from year to year. This means that at one time you own mineral rights, and couple of years later you find out you do not own them. Accretion. There must be some communication that informs the landowner that they do not own mineral right any longer. I want to know the degree they do communicate, and to what degree in the past.

Vice Chair Kreun : In testimony, it said that the state claimed our mineral acres as their own and auctioned them to the highest bidder at the time is how the oil company obtained the mineral right in that point and time. You are asking how the state got the mineral right to auction off, right? As the river and the lake move to some degree, do the right follow the river and change so someone else can have a mineral right and then loose later when moves again.

Sen. Armstrong : This is one of the reasons we chose the 85 bridge. That is how the land department treats it differently. They treat it differently on the east side of the bridge and west side. On west side, yes. The land department does it on case by case basis. I found that odd. I would assumed they did it on spacing unit basis instead of well by well basis. That does not make sense. If you are treating accretion and erosion as changing the mineral ownership, it is changing constantly. On east side of the river, the question becomes what is the ordinary high water mark and whether the claim in under the river or under the lake. They do not treat it to move under Lake Sakakawea west of the river.

Vice Chair Kreun : The minerals did not move, only the river did. Yes.

Chairwoman Unruh : Any further discussion. We have a few requests: Fiscal note, notification process of erosion and accretion for mineral owners that is currently in place now, and legal time line from AG Office. Close the discussion. Meeting adjourned .

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
1/26/2017
Job #27489

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution: Relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin dams.

Minutes: Committee discussion

Chairwoman Unruh: Let's look at SB 2134. We had a 2 hour hearing two weeks ago. Not much committee discussion on this, but we have all had more questions after the hearing, I know. We have all done some investigating. Some of the main concerns that we heard, and that can be addressed to improve the bill, is we have to remove the tribes from the bill. That we can look at. How do we do that, and by what definition do we use there. We heard opposing testimony because of the west boundary that the bill provides with the bridge on the west side of the bridge. I am looking at an amendment to remove the bridge from the bill and fully use the Corps survey that is referenced in the bill all the way to the end of the Corps survey. There is another option which is to take that amendment out and take that language and apply it all the way to the Montana border. Couple of areas just west of where the Corps survey ended has already been litigated by the courts. Most seem satisfied in that area. There a couple of impacts with those amendments on the private mineral owners, but also on the state's fiscal note. I am digging in to what funds are set aside to straighten this out if necessary, if this passes. We need to look at the fiscal note for adding the area west of the bridge and for removing the tribal lands. Lots of moving pieces. We have to move this out of committee next week. I will come with those amendments. Do we need to direct the land department, if we pass this bill, is a question. How to work through all of the issues arise from passing this bill. Any questions?

Sen. Schaible: Is there information being gathered about how the river moves, and do minerals move with the land? Is this a continuing issue arising each time someone notices a movement?

Chairwoman Unruh: The problems that arise with accretion and erosion, like we learned in the committee hearing, apply to other rivers in ND. Accretion and erosion don't apply to this bill, necessarily. If we decide to use the Corp survey as stated in the bill, we do not need to worry about accretion and erosion. We will stop things in time when the surface was purchased at time of inundation of Lake Sakakwea, so the river did not change, and the

accretion and erosion was not taken into consideration with the purchase of the surface. We would state that at that point in time, the surface and minerals we severed and ownership stayed from that point in time. I believe there is a gap in the way the ND handles accretion and erosion and mineral ownership under river beds. I think it should be looked at in the interim or addressed in the next session. There should be some type of guidance out there. I have asked many, many times and found no guidance document out there that the land department uses to address accretion and erosion. But it does not effect this bill as currently written.

Sen. Cook (6.38): We need to take the bridge out, and we need to take the reservation out. We need to do what's right. I am not too concerned how much money is hiding somewhere. I think that is an Appropriations worry. We need to decide what is right and wrong and not be influenced by the cost. Sometimes you need to do what is right. If we remove the tribes, how are those minerals rights on the tribe divided?

Chairwoman Unruh: Good question.

Sen. Armstrong :(7.49) In dealing with Legislative Council and other governor's attorneys working their way through this, the language to remove the tribes is clarifying language. The tribes were never in this bill. The tribes claimed the minerals in federal court. This is state action. So any dispute between the state and tribes relating to minerals is an act, and they were paid $10.2M. This language is for clarity only. I wrote it. It was never my intent to have the tribes included in this bill. No, tribal mineral issues are not settled. There is fee land there is tribe land; there is BLM land and state land They have all kinds of different issues on the reservation. They are separate from this issue. I own minerals in 15293 section 18-19. This is directly under the lake. The wells are dead center of the reservation. My company is not in any pending litigation under the lake. We had a settlement west of the bridge couple of years ago.

Chairwoman Unruh: (9.50) I have had conversations with writers of the bill and others who had input on the bill, and all assumed the tribes were not included; just clarifying language.

Vice Chair Kreun : Which high water mark will we choose to make this decision. When the dam fills up, it took 10 years to fill, and at that point in time there was some movement of that river while that dam was filling. Are we following in the footsteps of the Corps decision or are we following of footsteps of the river when it was dammed up, had not moved, and then on the tail end, it has moved.? Do we go to the original Corps high water mark? Did the dam effect that water? It changed the channel of the water.

Chairwoman Unruh: (11.53) I studied a lot in college about the accretion and erosion process. The 10 years before the dam filled, after the dam was put in place, the impacts that reducing flow had on the river miles and miles upstream are hard to figure out. But it did have an impact even across the state border. When you stop the flow of a river like that, it impacts far up stream.

Sen. Armstrong: That is one of the reasons we used the Pick-Sloan Act. The survey was done in preparation of flooding the lake. We were trying to sever out the mineral acreage. How the land was effect and how the land was effected and who got to use what over that

course of time is whatever. The reason it is important to use the Pick-Sloan Act as a point in time, is that is when they started buying out landowners. That is the data they used to buy out land owners during the Pike-Sloan Act. They used this survey to let them retain the minerals. They thought the minerals would be under the lake and not assessable, so why would they pay for them. That is why you are using the ordinary high water mark in relation to Pike-Sloan Act.

Chairwoman Unruh: I have struggled with the same concept. Having the state come in and do the newer surveys later and utilize those surveys; whether or not there was a good reason, why we needed to investigate and take another look at the ordinary high water mark. The more and more I dig into it, I think it comes down to that moment in time of the Pike-Sloan Act when the surface was purchase and the minerals were severed and kept by the private landowners. I think it was always the intent for them to own the minerals. Anything we do beyond that to change that ownership, just is not the right thing. I do have questions about high water marks and different surveys that were used. It boils down to that is the right survey to use. (14.55)

Vice Chair Kreun : Why I ask this is that Craig Smith defined the ordinary high water mark. Is the state using his definition to create the high water mark? Because the vegetation was there long enough to create that?

Chairwoman Unruh: I agree. We have an obligation to investigate. Last week the state filed for a stay on the Wilkinson case pending the outcome of legislation here and another bill in the House. We do have an obligation to get to the bottom of issues and outstanding issues. Craig has become an expert in the ordinary high water mark and use of this over time. If committee wanted I bet he would come in and talk to us about it. 8:00 some morning.

Sen. Armstrong: One of the most compelling pieces when it was shown to me was the difference in the 2009 survey versus the Pike-Sloan survey. It is just a little map we had in the hearing. When you do it from the 1952 high water mark, it is marked as cropland and corn land. It is outside the high water mark. When you do it from the 2009 survey with photos, it is inside the high water mark. If you can grow corn, you are outside the ordinary high water mark. The 2009 map had corn inside the ordinary high water mark. Technology really changed a lot in 2009, but being on the ground with the survey equipment is a bit better than photos in my opinion. I found that little map very compelling.

Chairwoman Unruh: Sen. Armstrong is referring to exhibit 4 in Craig Smith's testimony. Sen. Armstrong makes a good point. In my professional career, I preform or hire people to do these surveys. I have to go back and look at maps from 1960's and try to figure out if something is used as cropland or hay land or as pasture. If it had been broken before or if had been feed back into grass. I know firsthand that if you can find documentation at the area on the ground at the time, it is much more reliable than anything I can uncover by looking at maps from FSA Office. (19.59) (recording dead from here-why?)

Sen. Armstrong: Will we see a new fiscal note?

Chairwoman Unruh: Still working on amendments. Maybe in the morning. Meeting adjourned.

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
2/2/2017
Job #27777

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution: Relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin dams.

Minutes: 8:00 a.m. information committee meeting

Chairwoman Unruh: Call to order. Take attendance. All committee members present. We are going to look at SB 2134. We all had questions on ordinary high water mark and the survey that is talked about in the bill. We have Craig Smith here to answer some questions and give information.

Craig Smith: Crowly, Fleck Law Firm representing ND Petroleum Council: (1.46) The survey was partly conducted by BLM survey office. They surveyed all the public domain lands. That survey was conducted to the ordinary high water mark as federal law demanded at that time. The BLM also participated in reviewing 82 other tracts that were tracts on accretions. The rest of the survey, as to private lands, was conducted by the Corps. It was based on the ordinary high water mark. Why do we have two surveys of ordinary high water mark in some areas that are very different? A difference in interruption and how they define what ordinary high water mark was. The Corps looked at land value lots and did land appraisals. The ground appraisals were a part of that process. The Supreme has held for many years, that a test is whether or not the water has been high enough and continuous enough to destroy the value of that land for agricultural purposes. That is what the Corps followed and they on the accretions and looked at those; if the land was being used for hay or cultivated agricultural crops, they would allocate that accreted tract the owner. On the state survey, the state took a more liberal view on that. They claim for of the accreted lands including the tracts with crops and hay. That's how we get to the difference the two surveys. Does that help?

Chairwoman Unruh: I think it does. Any questions?

Sen. Roers: Is there a difference in the definition of high water mark from what the Corps uses and what the state uses, that could explain some of the acreage disparity?

Craig: Yes, the state in their phase 2 survey, they applied the 2007 guidelines that were adopted by the state engineer. The Corps and BLM guidelines are pretty much the same. The biggest difference lies as to the interruption of agricultural crops and value. (5.13)

Sen. Armstrong: Can the state redefine the high water marks 55 years after it was flooded?

Craig: Not sure. The guidelines are not statute or administrative rules. Based on case law. Biggest difference lies with the agricultural value.

Vice Chair Kreun: How was the high water mark's process determined? There is no legislative directive, not a BLM directive, not land management directive. How was that process determined? You are saying that there are two geological surveys for two different reasons, but would they have the same basis on how they got there? We do not have a written directive to follow and do that. Someone decided at some point in time that this is the way will do it. How did that decision come about?

Craig: (7.24) BLM has a manual survey that goes back to 1800's. It has been updated through the years. That is what governs all federal property. All the surveys that were done by the federal government from the time or original government survey to any federal property today, is done by that guideline. On state side, we have case law on judicial interruption of the high water mark. In 2007, the state engineer adopted guidelines to assist state surveyors.

Vice Chair Kreun : So that can make up that acreage difference just by using the different high water mark. Like 40,000 acres' difference; so is this how this comes forward?

Craig: Of that acreage, I think the largest percent would relate to those accretions and the difference of interruptions on agricultural value. There are other areas where the surveys are a bit different, you may have one section of land where they are different by 8 – 15 acres. Just a matter of interruption. If you sell out two different engineering frames, you may come back with something slightly different.

Chairwoman Unruh: I agree with Craig. I have seen different interruptions of different high water marks in my job. The one thing that is consistent between the survey in 2009 and Corp survey, is that the amount included within the ordinary high water mark acreage was so drastically larger in the second survey that was done. Two different methodologies. One is more encompassing than the other.

Sen. Oban: We brought Craig here to discuss the difference between the surveys. Wouldn't the ones that did the surveys be more expert?

Chairwoman Unruh: Yes, but not this committee job to determine whether or not the state approach was better than his other survey. Not sure that is relevant to what this committee is to decide. (11.28) I had a question, not on high water mark, if you are willing. Can we talk about the western boundary? We have a bridge identified as a boundary. We have folks tell us that it is an arbitrary point to choose. I can't disagree with that argument. I would like discuss on that. Do you have any information about levels or flows in that area?

Craig: (12.28) As was testified in prior hearing, the highway 85 bridge was just selected as a landmark or policy, and historically, that state and operators have done is west of that bridge. We have lease and developed there based on river conditions. The state, as Mr. Gaebe testified, were done on case by case basis. We look at aerial photos and work out where the high water mark was and where the state would lease. Another reason is that the 85 bridge is the head water area of the lake. Depending on the elevation of the lake as well as flow from the river, you have the river slowing down tremendously. You get sediment built up and this alters the course of the channel. It is within that area of a couple miles, where all that comes together. So that is historically that is why the state and industry have gone that path. That is a bit of history on it.

Sen. Roers: Can you expand on west of the river was done on case by case basis and now east of the river this plan. Why not do everything east on case by case basis also?

Craig: It was case by case because we did not have extensive oils and gas development there. In 1980's there were a few wells drill west of Williston, and a few east of Williston. Nothing like the Bakkan play were it is continuous. Outside of the Corps survey, there was not need to do it.

Vice Chair Kreun: In the second survey that was done, why did we do that in 2009 or 2007 whenever it started? What was reasoning behind that?

Craig: Outside of the Corps survey, there was never a complete survey of the whole water system. As Bakkan was being developed, that entire river system and the lake was going to be developed and drilled.

Vice Chair Kreun: Would that follow the process the state has used over and over in year's past. The same method to do that. There are certain water laws that are required, but the state has a policy that they go through. Have they used this in other bodies of water to determine the same mineral or ownership of surface land?

Craig: I am getting in areas where what the state did. I am not in on those conversations. I can say that prior the state 2009 survey, it was done on case by case basis. It was not done on the ground, just looked at aerial photographs and best educated guesses. After the 2007 guidelines, the state used as their basis for going forward for future surveys.

Chairwoman Unruh: When we get into state territory, we have other information we can go back on. We need to wait for Sen. Cook to come back before we discuss any amendments.

Sen. Oban: Do you think that passing this bill in any form, will reduce the number of law suits or will it create new ones on the other side with different players?

Craig; That is a good question. I think we will reduce law suits. A complicated matter whether this is passed or not. Will be future litigation of some sort. It will provide more certainty.

Sen. Oban: Things are working through the court system, now with what they are working with now. You do not see a situation where it will flip a switch in a different direction?

Craig: This bill does is resolves the state verses federal issue. The United States refuses to wave the sovereign immunity going forward like they did in the past. If the state does not seek to litigate that issue, it will be unresolved for 20-30 years or never. We will be faced with paying the state and the United States. The federal land will not have any further development. This bill is critical to that. If it is not passed, we will see continued litigation and new law suits on accreted lands. (20.40)

Chairwoman Unruh: Take 5 minutes. (29.17) back to order. 17.0159.05002 is first amendment to look at. This removes the reservations from the bill.

Sen. Cook: I move this amendment. **Sen. Armstrong**: I second.
Chairwoman Unruh: Call the roll: YES 7 NO 0 -0- Absent
This **passes.**

Chairwoman Unruh: The next set of amendments is 17.0159.05003. This is to extent the boundary. (Craig explains (32.50-33.40) Any discussion? We cannot have a new fiscal note until we pass the amendments. The fiscal will grow.

Sen. Armstrong: I move this amendment. **Sen. Oban**: I second.
Roll taken on Sen. Armstrong motion. YES 7 No 0 -0- Absent. **Passes**

Chairwoman Unruh: We have one more set of amendments. Not necessary language.

Sen. Armstrong: I do not like language like this. It puts us in after our next legislative session. I get concerned when you put a deadline in. It is a long time-2 ½ years.

Chairwoman Unruh: We have before us SB 2134 as twice amended.

Sen. Armstrong: Do we refer to Appropriations?

Chairwoman Unruh: Even with the amendments and changing the fiscal note, it will be a deficient revenue for the state but not an appropriation. So this does not need to be sent down. Will go straight to the floor.

Sen. Cook: (38.57) I still have this last amendment before me. Not a good one. I think this bill needs more work done. Will we have a chance to look at it after the fiscal?

Chairwoman Unruh: Not quite sure? I think by passing these amendments, we should be able to request a fiscal note today. I need a motion to pass it out of committee. We can discuss it this afternoon or tomorrow.

Stand at ease for the next bill. (40.40)

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
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☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution: Relating to the ownership of minerals inundated by Pick-Sloan Basin dams.

Minutes: 2:15 discussion

Chairwoman Unruh: Let's take up SB 2134 again. We passed two amendments this morning. There is a memo dated Jan 18, 2017 before each of you. Trust land puts together some info on fiscal impact on the two amendments we passed this morning. L.C. will not give us the fiscal note until we pass SB 2134 out of committee. (.32 – 2.09)

Sen. Armstrong: The potential decrease in litigation costs will not show up in a fiscal note. Once there is more title ownership certainty, the chance of infield drilling and more well goes up significantly. Those things do occur and will not occur in a fiscal.

Chairwoman Unruh: In Finance and Tax Committee, we have been talking about getting software to help project what all of the impacts would be when we make a decision like this. That would show a lot of the things Sen. Armstrong has been talking about. Other funds sitting out there that would help the burden of the state because they have been set aside. That is not our committee's responsibility, though. We need sound policy, that is our job.

Sen. Armstrong: I move a MOVE A DO PASS om SB 2134 as amended.

Sen. Schaible: I second.

Vice Chair Kreun: What are the bonuses?

Chairwoman Unruh: They are relating to signing leases. Not double leasing. Single lease contracts.

Roll called: YES 6 NO 1 -0-Absent. **PASSED as amended.**
Chairwoman Unruh will carry the bill.

1st amend

17.0159.05002
Title.

Prepared by the Legislative Council staff for
Senator Unruh
February 1, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2134

Page 1, line 10, replace "sections" with "segments"

Page 1, line 12, replace "sections" with "segments"

Page 1, line 12, after "project" insert "dams"

Page 1, line 13, remove "and extends"

Page 1, line 14, replace "Garrison dam" with "northern boundary of the Fort Berthold reservation"

Page 1, line 16, replace "South Dakota border" with "northern boundary of the Standing Rock Indian reservation"

Page 1, line 17, replace "two hundred ninety-nine" with "three hundred three. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation are excluded from this section and must be determined under federal law"

Renumber accordingly

2nd Amend

17.0159.05003
Title.

Prepared by the Legislative Council staff for
Senator Unruh
February 1, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2134

Page 1, line 14, replace "thirty-one and thirty-two" with "thirty-three and thirty-four"

Page 1, line 15, replace "fifty-four" with "fifty-three"

Page 1, line 15, replace the second "one" with "two"

Page 1, line 16, replace "fifty-two and four tenths" with "sixty-five"

Renumber accordingly

ET

2-2-17
p. 1 of 1

17.0159.05006
Title.06000

Prepared by the Legislative Council staff for
Senate Energy and Natural Resources
Committee

February 2, 2017

PROPOSED AMENDMENTS TO SENATE BILL NO. 2134

Page 1, line 10, replace "sections" with "segments"

Page 1, line 12, replace "sections" with "segments"

Page 1, line 12, after "project" insert "dams"

Page 1, line 13, remove "and extends"

Page 1, line 14, replace "Garrison dam" with "northern boundary of the Fort Berthold reservation"

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Renumber accordingly

Date: 2/2/17
Roll Call Vote #: 1

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2134

Senate Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 17.0159.05002

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 Sen. Cook Seconded By Sen Armstrong

Senators	Yes	No	Senators	Yes	No
Chair Jessica Unruh	✓		Sen. Erin Oban	✓	
Vice Chair Curt Kreun	✓				
Sen. Kelly Armstrong	✓				
Sen. Dwight Cook	✓				
Sen. Jim Roers	✓				
Sen. Don Schaible	✓				

Total (Yes) 7 No 0

Absent -0-

Floor Assignment _____

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

2/2/17
Date:
Roll Call Vote #: 2

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2134

Senate Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 17.0159.05003

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 Sen Armstrong Seconded By Sen. Oban

Senators	Yes	No	Senators	Yes	No
Chair Jessica Unruh	X		Sen. Erin Oban	X	
Vice Chair Curt Kreun	X				
Sen. Kelly Armstrong	X				
Sen. Dwight Cook	X				
Sen. Jim Roers	X				
Sen. Don Schaible	X				

Total (Yes) 7 No -0-

Absent -0-

Floor Assignment _____

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

amendment passed

Date: 2-2-17
Roll Call Vote #: 3

2017 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2134

Senate Energy and Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 17.0159.05006

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 Sen. Armstrong Seconded By Sen Schaible

Senators	Yes	No	Senators	Yes	No
Chair Jessica Unruh	X		Sen. Erin Oban		X
Vice Chair Curt Kreun	X				
Sen. Kelly Armstrong	X				
Sen. Dwight Cook	X				
Sen. Jim Roers	X				
Sen. Don Schaible	X				

Total (Yes) 6 No 1

Absent -0-

Floor Assignment Sen Unruh

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

REPORT OF STANDING COMMITTEE

SB 2134: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 1 NAYS, 0 ABSENT AND NOT VOTING). SB 2134 was placed on the Sixth order on the calendar.

Page 1, line 10, replace "sections" with "segments"

Page 1, line 12, replace "sections" with "segments"

Page 1, line 12, after "project" insert "dams"

Page 1, line 13, remove "and extends"

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Renumber accordingly

2017 HOUSE ENERGY AND NATURAL RESOURCES

SB 2134

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

SB 2134
3/10/2017
29045

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Donna Whetham

Explanation or reason for introduction of bill/resolution:

Relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin project dams.

Minutes: **Attachment 1,2,2a,3-8,8a.**

Chairman Porter: opened the hearing on SB 2134.

Sen. Kelly Armstrong, District 36: Presented written testimony. (See Attachment #1). In support of SB 2134. (1:57-7:38) I started getting into this over 2 years ago. He represents over 50 landowners and is directly involved in how it affects the landowners. These are the men and women in the middle of this and when you're in the middle of the state and federal there's no winning. This bill is necessary, but it is an imperfect solution to a complex problem but what we are hoping to do is since there will be litigation no matter what we do. What we hope to do is to at least allow for when you litigate you can get from start to a finish.

Rep. Ruby: If we give the mineral rights back to the people, does it go to new owners, or the owners at the time of flooding?

Sen. Armstrong: When they came in to compensate people for the flooding of the Missouri River the Federal government severed the minerals. They didn't want to pay for something that was worthless at the time because they were under water. Through horizontal drilling we found that those minerals are not worthless any more. There are 350 wells drilled under the lake. It essentially will go to the heirs or whoever owned the of the title and land and retained the minerals at the time of flooding.

Sen. Unruh: Presented (Attachment #2 and 2a) in support of SB 2134 and referred to proposed amendment 17.0159.06005. (8:58-16:38)

Rep. Keiser: Do you know if a new fiscal note has to be developed for this amendment or is the current Senate fiscal note qualify?

Sen. Unruh: I believe the current fiscal note would reflect the amendment properly. There would be an increased cost because of the appropriation to complete the survey but as the general rule is as the bill is written I think it will be relatively similar.

Rep. Lefor: In your amendment you refer to the historical Missouri River bed channel as being the border, however you're saying the Legislative Managements Interim committee would continue to study this issue to see if there are any other changes that needs to be made?

Sen. Unruh: If you look on Page 1 Subsection 2 the definition of historical Missouri River bed channel as defined in the bill is everything south of Garrison Dam. What the study would be looking at would be anything where Lake Sakakawea has inundated. This is where we need clarification because the Corp Survey has passed that the surface needed to be purchased to repay state and private owners for inundating Lake Sakakawea. So that survey has been done. As people have looked at photos from the 1950's, we have noticed inconsistencies with what they show and what the Corp actually determined as the ordinary high water mark. If we pass the bill without the amendments, we would see further lawsuits and litigation. This study would allow for those areas to be studied more intensely. We would start with the Corp survey and exclude or include any additional acres that maybe weren't identified quite properly with the survey. This study tries to prevent some of those lawsuits if we just flat did the Corp survey.

Rep. Lefor: Page 2 of your proposed amendment you are talking about an interested party challenging the final study. During the interim you intend to finalize the boundary and they must commence an action in district court within two years of adoption. I assume you are setting the time limit to say this is your one opportunity and if you don't challenge what we are doing now you are forever time barred from doing so?

Sen. Unruh: That's correct, we'd like to make sure this issue is taken care of and we would like to put it to rest. There are a lot of folks involved in litigation on this issue.

Rep. Keiser: I want to make sure what we are doing meets your intent. As you read the study language, the interim committee is going to select the individual, they usually don't meet until May and that takes a period of time. Once they're selected, they'd have 6 months but we have language that would grant them an extension if it is needed. Theoretically this could extend action for up to 3 years. I think the real intent was so if there was a challenge we could recognize it and address it. What about all those properties that don't have a challenge and get caught up in the 3 year wait. Should we have a time limit where people have to register a concern and if they don't then we can go ahead with all those other properties. Right now as I read this everybody is trapped in the long term even if there's no contention or no disagreement about the mineral rights. It seems we would like to have some way for those people who have no problem to move forward and not have to wait for the ones that do have a problem.

Sen. Unruh: I don't think this would hold up those tracts that don't have issues.

24:07

Ron Ness, President of North Dakota Petroleum Council: In support of SB 2134 and the amendments. Presented written testimony (See Attachment #3). (24:14-27:12)

Craig Smith, member of North Dakota Petroleum Council: In support of SB 2134 presented written testimony and explained the power point slides. (See Attachment #4). (28:12- 31:00)

Rep. Keiser: Would you explain avulsion?

Craig Smith: Avulsion is a sudden change in the river channel, typically where the oxbow is cut off and abandoned and a new channel formed. States take contrary positions on ownership rights affected by avulsion. Continued with slide presentation. (31:29-39:15)
The agricultural test becomes important to high water mark because it is the mark where water occupies long enough to destroy the land value for agriculture, and I want you to remember that because it is relevant later on. The Corp is under a budget and landowners want more money for their land. Later in 1951 they adopted a policy that it would no longer take oil and gas.

Chairman Porter: What was that date?

Craig Smith: November 1951, I don't know the exact date. They were just getting close to the Williston Basin Bakken boundaries are. If this would have happened 5-6-7 years later we wouldn't be here today. Because the United States owned all the mineral rights under lake Sakakawea. We wouldn't be receiving tax revenue and royalty because of the oil and gas development under the lake. Continued to explain power point. This example shows the conflict between the state and Corp surveys and impacts of the river movement. The blue shaded area is what the Corp determined to be the river channel before Garrison Dam, the yellow is the river location at the time of the original government survey, you have the river move southerly and erode into these cracks and then accretions built up. The Corp allocated these accretions to these landowners. The state survey takes all the accretions that is within the high water mark. So we have a conflict between the state leases and the fee leases. From the operator standpoint they would have to lease both sides to protect their interests and the royalties are either suspended or escrowed with the state. Showed map of the Federal and State leases overlap. HB 1199 clarifies state oil and gas ownership under Lake Sakakawea/Garrison project and does not adopt a particular survey or resolve other pending issues. Key element to this is to give the public notice and opportunity to comment on this. It sets for a two year statute of limitations after the survey is adopted so everyone has time to make a decision to challenge. The amendments also recognize that Federal law is going to prevail on the public domain tracts. Federal leases are going to win. For operators that ends that conflict and we can go forward and draw our wells. Some operators will lose acreage but they are alright with that because they want this problem solved. The bill does recognize that the state engineer who had authority over the surface of the bed of the river and also over minerals except oil and gas and authority over the waters of the state. We want to clarify this bill only deals with oil and gas and does not affect the State Engineers authority. This concept does provide a road map for resolution of multiple problems that otherwise are not going to be resolved and provides a fundamental principle of fairness and an opportunity for everyone to participate in the process. (40:19-57:40)

Rep. Bosch: By way of a percentage how accurate do you think a Corp study is?

Craig Smith: I wish I could say. What I reviewed the Corp survey is pretty sound. The state will end up owning more acres under the new study than they will under the Corp study. 58:00

Rep. Roers Jones: The river channel once identified by the survey, under the lake, isn't going to change but once the survey if done on the historical bed channel south of the dam, what will happen in the future if the river position changes. Will the minerals ebb and flow with the river changes or will this be established that the owners of those minerals are the owners based on the reconciled survey and this won't be an issue going forward?

Craig Smith: The historical Missouri River channel is only going to apply to Garrison Dam to that boundary, so from Garrison Dam to Bismarck that is still current condition. So how the river moves the title will move with the river. For Garrison Dam project or Oahe, at the time the Corp did this the Federal Power Act, we had a congressional action and at that time what we are saying is everybody's rights are essentially frozen.

Rep. Roers Jones: From the dam to Bismarck where the river is still changing this will continue to be a problem even though the minerals were severed. Or there wasn't a severing process that took care of those minerals at that time?

Craig Smith: We don't have oil development south of the dam so the mineral issue has never been present and it is a natural river and we don't have Corp acquisition of the property and no Federal access. In that area State law will govern.

Rep. Keiser: Great presentation, thanks. Back to the study provision, I'm just making a comment. We're not doing a study her. We're taking action here. Do you think in that section we should make a little stronger reference to the fact if adjustments if they occur are based on the original high water mark as defined by the Corp. When I read this language it just says adjustments. What we are saying up front is we're going to take the Corp. We're going to put in place a process for anyone who wants to challenge the Corps position to make it a potentially alternative decision which would be an adjustment to the Corp Survey. Wouldn't it be better to just say what we really mean?

Craig Smith: We're willing to look at other language, but we want to keep the intent.

Jon Patch: **representing Wilkinson family:** Testimony in support of SB 2134. (See Attachment #5). (1:03:00-1:07:35)

Rep. Heinert: With your comment on the one big oil company do you have proof that it occurred?

Jon Patch: I have documentation in the office.

Rep. Heinert: Have you presented that to the Attorney General's office?

Jon Patch: we are suing the Attorney General's office essentially.

Rep. Keiser: I assume you know a lot of the people impacted up there. Are we doing the right thing with this bill, are we leaving anyone out on this legislation?

Jon Patch: My simple answer is no.

1:08:48

Josh Swanson, **represents Patch, Wilkinsons, Vohs family and First National Bank**: Testified in support of SB 2134. (See Attachment #6) My testimony does not address the amendments presented but the ends are the same. I do think the Corp survey should be the study point, but if you look at the language in the amendments is the state's definition of the ordinary high water mark, that is the issue in my client's lawsuit against the state of North Dakota. This language gives my client has zero certainty whether they would retain their minerals because we don't know the results of the study, it puts us in a quandary because we have to make a decision whether or not we would abide by legislation or pursue our legal rights in our appeal without knowing an outcome of what the legislation would be because the study leaves that open to interpretation. I previously testified on Feb. 2nd that the United State reports specifically rejecting the facts, the law and then methodology behind the survey the state was using. Any attempt to pull in different pieces of the states methodologies and the states survey not only leaves open questions for my clients but also it opens a very likely legal challenge from the United States and other mineral owners. That would be a concern of mine. (1:08:54-1:15:09)

Rep. Keiser: If we more clearly state that the process begins with the court and that you can only alter that with clear and convincing evidence of a rational, doesn't that take care of you on the 1st issue?

Josh Swanson: It is difficult for me to answer that, certainly we would take a hard look at that and if it were worded differently and it addressed our concerns. The other end of that is the state of North Dakota hasn't answered the question if they would abide by that or challenge that. Part of our calculation would also include that and obviously if the state and the Attorney General's office would challenge that it would be problematic for my client. If it were written in such a way that my clients had that certainty to know they would retain their mineral rights, that determine how we'd handle that.

Rep. Keiser: All we can do is pass laws. We can't control the courts. We do the best job we can but you can't hold us accountable to the courts.

Josh Swanson: Certainly. What gives me some solace is our supreme court has said time and time again that in matters of policy and legislation such as we are dealing with here, the Supreme Court tends in general to defer to the legislature. That would be part of our calculation. If the language was changed and it addressed our concerns, I think we would be alright. Continued on written presentation. (1:18:11-1:20:16).

Rep. Lefor: You expressed a concern about this study and what it might do. What might it do to your lawsuit? Do you understand why the legislature wants to study this more based on what you just said?

Josh Swanson: I can certainly understand it. It's a complex issue and it is an issue of first impression in the United States. There haven't been any cases quite like this being raised in the United States. With a study as far as our lawsuit, with the state ordinary high water mark language in there, one of the primary concerns addressed in our lawsuit is using the states guidelines the state claims my client's property. I understand the legislation has a presumption in it that the Corps maps will apply, but presumptions can always be overcome. With the states ordinary high water mark study component in there it leaves uncertainty we have to make a decision on a truncated timeline because our appeal case is pending before the Supreme Court.

Pete Hanebutt, North Dakota Farm Bureau: 1:22:39-1:23:04 In support of SB 2134. It is a very complex issue and the overall perspective of making people whole who have been harmed in the past is what we are supportive of.

Chairman Porter: Any further testimony in support? Seeing none we will start the opposition after a 10 minute recess.
1:29:33

Chairman Porter: called the meeting back to order on SB 2134. Any opposition to SB 2134?

Lance Gaebe, Commissioner of University and School Lands: presented (See Attachment #7) in opposition of SB 2134. I cannot speak to the amendment but Legislative Council asked for an updated fiscal impact and we will work on that and get it to you before Thursday. (1:29:41-1:59:49)

Chairman Porter: You made a comment that the state is working inside of the high watermark and that the state isn't attempting to take lakebed minerals. Senator Armstrong handed out a testimony from a Mr. Johnson (See Attachment # 8 and 8a) where there is a claim that heirs of Bruno Herman Weyrauch say the state is outside of even close to the ordinary high water mark. Is that fight inside of your department or who's fighting the Weyrauch's on their ownership?

Lance Gaebe: This is the case where the state sold land to a party and the party didn't record the titles. They asked the state to convey that title to them decades later and it is in fact under lake Sakakawea and we have not yet provided that title because of issues of litigations. I would defer to the Attorney General's counsel to explain that.

Rep. Lefor: Page 4 of testimony, to modify loss contrary to those already established and implemented on bodies of water across the state would be unprecedented, this is a matter for the courts to decide and changes of this magnitude contemplated in this bill would upend any progress that has been made in rectifying these issues, what progress has been made?

Lance Gaebe: Up until 2013 there was a dispute by many if North Dakota was a low or high water mark state. There were conflicting statutes on how we should lease that and the land board has leased by the ordinary high water mark and that was litigated and it was resolved in 2013. We have been in regular communications with the Chairman of the 3 Affiliated Tribes and BIA officials to work on an agreement with ownership within the confines of the

Ft. Berthold Reservation. We also filed appeals on the cases of overlaps and disputes with the Bureau of Land Management to resolve conflicts with the federal government.

Rep. Lefor: On Page 3 your stated the Land board adopted a motion in 2016 that until such time the legislature has had the opportunity to consider definition of the ordinary high water mark as it is used in establishing the state sovereignty ownership of oil and gas minerals, so in one case you are asking legislature to come into this and on the other hand you are saying stay out. Which is it?

Lance Gaebe: 2:04 I appreciate you weighing in on this, the use of the Historical Ordinary Water Mark (HOWM) has been the practice and it has not been the law. If the legislature can adopt the HOWM that would codify the practice that the board has done. The challenge I have is the HOWM that the land board has used and the HOWM that is promoted by this bill is very different. This piece of legislation does this remarkably different than the land board has done.

Rep. Ruby: In regards to the equal footing doctrine at the time we became a state, which is basically the state takes possession of all the land within the set boundaries unless the United States has already given it to a 3rd party which is in reference to tribal reservations, at the time ND became a state we did take that mineral rights. At some point wasn't there a bill of sale? Wouldn't that mean the state forfeited rights to the mineral rights and the land?

Lance Gaebe: I agree up until the point of the bill of sale, there is potentially people who homesteaded or acquired land but it would not have included the river or navigable waters. The rivers and lakes belong to the state and if there was title by people next to that they would have created that title themselves, the state didn't do a bill of sale or abstract of any nature that would have defined where the edge of that river is. t

Rep. Ruby: At the time of homesteading I would assume there would have been a filing with the United States government which would also give the right of the 3rd party in that sense.

Lance Gaebe: Probably so, but as has been described by the witness the challenge of a river is that it moves and when it moves by erosion, unfortunately it gives and it takes land. It changes. That would still likely be the case in the river between Bismarck and Riverdale for example. There may be a change in title with the movement of the river.

Rep. Ruby: I have an understanding that would just take the surface not the mineral rights. That is my understanding under the equal footing.

Lance Gaebe: I believe the equal footing doctrine to be in effect for the public ownership of the navigable waterway for the commerce related to that river. Presumably that was first conceived precolonial days, it was related to title masons and ocean shores but even now if you go to California you are able to go on that beach even if there is a fancy hotel or private owner right there. It's not just the water and bed it is also the states, they have the rights to the oil and gas beneath it because of the public similarly the commerce related to rivers. There wasn't the distinction of where the bed of the river and the soils and minerals beneath. They are generally considered to be those of the citizens.

Chairman Porter: You made a comment that the dam was closed in 1953-54 and that the river even though the dam was closed and it was filling that the river continued to act like a river even though the current had slowed down and the whole mode of the river being a river stopped once that dam was closed. How are you making it the basis that the Corp survey is not the proper one to start with and that there was something magical that happened that kept that river acting like a river even though we stopped the flow of the river?

Lance Gaebe: I am not trying to make a basis that there were great deals of changes, even highlighted by the purpose of the purposed amendment that there are areas of discrepancy within the Corp survey is plausibly because the river did keep acting as a river. We are talking about a 150 mile long reservoir.

Rep. Keiser: I realize the river upstream can change when the dam fills up but I would suspect that as it fills it changes the pressure and has implications upstream. I am suggesting it may not be natural. Is it the case that with our definition is by just administrative rule?

Lance Gaebe: The reference in 63.31 to the ordinary water mark, the measure of rule describes how that high water mark is determined.

Rep. Keiser: But the level we got to, I don't remember in the legislature that we have ever addressed this issue before. Except the second survey, how did we get to accepting that? Did we put that in statute?

Lance Gaebe: No.

Rep. Keiser: So that had to be administrative rule.

Lance Gaebe: That was not administrative rule either, the board is given the responsibility to manage this and the board put in place those surveys we have talked a great deal about and as the surveys were being completed the mineral tracts were presumed to be approximated and those were released because there was a huge back log of interest in leasing those tracts.

Rep. Keiser: 2:13:00 In your hand out you referred to administrative 89-10-01-03 which seems to me that administrative rule defines it and it was done through the administrative process I guess.

Lance Gaebe: That reference is how the ordinary high water mark is determined and is one of the key ways to determine sovereign lands.

Rep. Keiser: We're getting to the same point. It's through some administrative rule process that we got to this point.

Lance Gaebe: That is correct but the utilization of the existing law is what the contractor used in applying those standards and make those determinations, we did not do administrative code with reference to publishing the results of that survey.

Chairman Porter: As you adopted them the Land Board made a motion and adopted the results. Was that part of a public hearing process or just a motion and adoption of results?

Lance Gaebe: It was a combination of what you just said. The Board on the outset approved the requests for proposals from qualified firms and were accepted. Then as the contractor finished his work he presented a summarization and then that was accepted as the language said by the board.

Chairman Porter: At the time of the accepting when that work was done, was there a meeting of the Land Board like this where people were in the crowd and had an opportunity to speak? Or just a meeting of the Land board and the contractor and then the approval of the document?

Lance Gaebe: I don't recall if there were people in the crowd but every meeting of the Land Board is published and the agenda is published in advance. Sometime we have big crowds and other times we don't. This was done in Phases. We have certainly taken comments and testimony but not quite as formal as this.

Chairman Porter: Can you get us copies of the minutes where this was discussed?

Lance Gaebe: Certainly.

Rep. Keiser: Was there ever any discussion by the Governor or any one on the Board that this is a significant policy issue, maybe we should ask the legislature, since they set policy? Was that ever discussed?

Lance Gaebe: This was initiated before my tenure. I think it is almost a progression of how it has been done. It has been done this way for a long, long time. Certainly it has gotten more comment because of the activity. The leasing of the historical river under Lake Sakakawea has always been done that way. The reason it got bigger is because in 2008 and 2009 there were dozens of people nominating those tracts and they hadn't been identified, so the land board did have the conversation that we need to get this done.

Rep. Keiser: It was stated earlier $142 million in the SIIF (Strategic Investment and Improvements Fund) and $60 million in the Bank of North Dakota that come out to be approximately $202 million. Where did those dollars come from, just the sources? Does that $202 million represent 100% collected on all these affected lands, or have we spent a lot of it?

Lance Gaebe: The best place I can point to you is page 5 of my testimony (Attachment #7). $142 million set aside as part of SIIF, we're estimating that $130 million would be for the bonuses that have already been collected. Basically we took the acres using these GIS maps to subtract one from the other and multiplied that percentage times the bonuses that have been collected. It is not perfect we didn't go tract by tract. The $72 million is from royalties that have been collected. There is close to $65 million in escrow accounts. The board lease requires the escrowing.

Rep. Keiser: I'm talking just about the land that would be impacted if this bill were to be passed. Was 100% of any source of revenues from those properties put into escrow or did we put some into escrow and spend some?

Lance Gaebe: If the operating oil company doesn't believe there is a dispute that the technique that the board has leased is not in litigation or haven't double leased it, like a lot of these cases then they would have paid the royalty. If there is an actual or perceived dispute or in some cases the operator has leased from more than one party the same tract of land. Then the state law authorizes operators to hold that in suspense. In 2010 the Board changed its lease so that instead it paid the escrow. There may still be title disputes in those cases. The escrow accounts were to keep it in a safe place until we can decide these issues.

Rep. Keiser: I'm sure we understand we do need a new fiscal note. Could you coordinate with Lynn Helms to add an addendum because a couple times the question is raised what will the impact be if this transfer happens? Will there be more production coming out of those areas? We've seen maps that most companies are coming in and fixing the lease but they are not expanding until we can resolve this one way or the other? It would be nice to see the positive side if it can be seen.

Lance Gaebe: That would be a difficult estimate to make because of how we did the fiscal note thus far we did not presume any change in production, drilling or price. I'm not sure I can agree with the fact that there has been a slowdown in production there are some massive multiwell pads in close proximity to the river that have been built or are contemplated. The positive side of the fiscal note is we could see more drilling if this was resolved. That also goes to the short term nature of the fiscal note. What we prepared of the $30 million dollars only $50 million of it was forgone revenue, there was millions and billions more of forgone revenue over the long term for the royalty. That aspect might help with the tax collections but this is the royalty for the owned aspects.

Chairman Porter: Further opposition? Seeing none. Hearing closed for SB 2134.

Rep. Keiser: Motion to adopt the amendment 17.0159.06005 as presented.

Rep. Anderson: seconded.

Chairman Porter: Any further discussion on the adoption of the amendment? Seeing none. Voice Vote taken. All ayes. Motion carries to adopt the amendment to SB 2134.
Appointed the Subcommittee: Rep. Keiser, Rep. Anderson, Rep. Heinert, Rep. Bosch and Rep. Mock to work on SB 2134.

Rep. Keiser: Anyone on the committee who wishes to attend the Subcommittee hearing please notify our clerk and she will inform you so you are aware of whenever we are working.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy & Natural Resources Committee
Peace Garden Room, State Capitol

SB 2134
3/16/2017
29293

☒ Subcommittee
☐ Conference Committee

Donna Whetham

Explanation or reason for introduction of bill/resolution:
Relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.

Minutes: Attachment 1-2.

Chairman Keiser: Opens the hearing of SB 2134. In attendance Chairman Keiser, Rep. Anderson, Rep. Bosch, Rep. Heinert and Rep. Mock. This is an organizational meeting. If you have any amendments you are going to propose, please give them ahead of time. We want to make sure we get this right. There is a significant amount of money and we should see the fiscal note.

Lance Gaebe, North Dakota Department of Trust Lands: I do have a copy of the fiscal note I sent to Legislative Council so I can give you a copy.

Chairman Keiser: Yes, we would like that knowing it could change but it would be a starting point. We need to look at the cost side but we also need to look at the benefit side, of the potential of clearing up this issue. We asked Lynn Helms to come up with an addendum to the fiscal note.

Lance Gaebe: Explained the fiscal impact of amendment 17.0159.06005. (See Attachment #1). 3:55-11:42

Chairman Keiser: In the second full paragraph on page 2 of your handout the state will repay revenue the SIIF fund has collected on the 795 mineral tract, the total there is $249 million and we would add the next paragraph and the future loss of revenue of almost $33 million. Those two combined without approval from Legislative Council, is that the total fiscal note basically?

Lance Gaebe: You break it down by biennium. What I wanted to emphasis is that the $110 million of bonus and rent has already been collected & we would have to return that amount. When you look into loss of future royalty like that so the last bullet there is money that has not yet been realized but it is the estimate of what we wouldn't collect if these acres were no longer leased.

Rep Heinert: Can you tell me on the Bartlett & West contract that you have with them can you tell me when that was and was it a just a desktop survey?

Lance Gaebe: It was done in 2009 in the first Phase, that was west of the Williston area and it was on the ground. The middle segment was desktop in 2010. Phase 4 was in 2013 in the reservation and they were all in office using maps and aero photos a so forth. Phase 1 was completed in 2010, Phase 2 completed in 2011 and the Phase 4 was done in 2013 or 2014.

Lynn Helms ~ Director of Department of Mineral Resources: There are some things that we do know and we can have some dialog from you about some of the uncertainties. North Dakota receives half of all Federal royalties that are collected so we would have to net that into this equation too. If the minerals end up going to the Federal government instead of the state, there will be a loss of royalties to the state but there will be a net gain on the other side. Because half of what the Feds collect comes back here, plus half of what comes back here goes to the county. There is a formula for that. Explained written handout. (See Attachment #2). My final question is how long might the litigation continue and how much will this bill shorten that process. 15:00-21:48

Chairman Keiser: The reality is this loss could be recovered once this gets resolved. The uncertainty has limited the activity in that area. At the point of resolution likely the activity would pick up.

Lynn Helms: I would agree. This has postponed activity and once the issue is resolved the activity will pick up. The way the oil industry looks at things if a barrel is not produced today it is not recovered tomorrow it is recovered at the end of the well life. The oil hasn't gone anywhere and the wells will be drilled and the tax will be paid at some point in time. It is just the value to industry and to the royalty owners diminishes with time.

Rep Anderson: What is the potential of wells being drilled there?

Lynn Helms: The potential as we see it is 950 additional wells. Roughly 1/6 has not been realized.

Chairman Keiser: Are there any issues as a committee to focus on? I am still not clear on what the tribal relationship is in this bill. We need to decide if we keep them in or take them out. If they are not impacted by the study why are they in there? We need to do the right thing on that one. My second concern, I understand what we have in this hog house bill, we have made a determination what the boundary is and then we go on to say however if there is a reasonable disagreement on that boundary we put into a play a process to be followed. If I am on the side of the state I would say I would challenge everything, given the boundary marks there is some property that really should be potentially challenged. Can we set up an expedited process? It seems to me with the timetable in the bill it could be 3 years before we get resolution. The properties that are not in the boundaries should be expedited and clear them. We built the dam in 1953, in 1953 the water to some degree backed up but why do we use 1958 data to determine what happened in 1953, makes no sense to me. Should we put a provision that when this committee is making a determination that we use data from 1953 or before. I have been told that there is reasonable data that exists. Should we

address that in this? My last issue is the interim committee being the group being responsible for this, that doesn't work. They can't legislate, so we need find a government agency to delegate the authority to. One suggestion is the North Dakota Industrial Commission. We cannot give the Interim Committee that authority.

Rep Anderson: I think the date should be the date should be set when the dam was closed because then the water started spreading out. The date the dam being closed is the key to this I think.

Rep Heinert: I keep going back to the new Bartlett & West but if we select the date of the dam being closed that takes it out of the equation. I'm curious why we are not looking at the Bartlett & West Survey. We need to take a better and stronger look at the Bartlett & West survey and say whether it is acceptable. I would rather do that than use money on a bill to do another total new survey.

Rep Bosch: We need to focus on the dates. The farther back we can go the better.

Chairman Keiser: We need to understand well how we got to the ordinary high water mark that we are using versus the ordinary low water mark. Who made that decision and how did that process occur? I don't remember it being done legislatively, we need a quick history on how that came about. The other concern, in the section where we talk about the appropriation of $800,000 to hire a consultant, we need to exclude any firm which was involved with the previous survey. It's a conflict of interest.

Rep Bosch: When we put that RFP out we have to define their scope clearly. So we can get the results we are looking for.

Chairman Keiser: Closes the hearing.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy & Natural Resources Committee
Peace Garden Room, State Capitol

SB 2134
3/16/2017
29348

☒ Subcommittee
☐ Conference Committee

Donna Whetham

Explanation or reason for introduction of bill/resolution:
Relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.

Minutes: Attachment 1, 2

Chairman Keiser: Reconvene the subcommittee of SB 2134. Present is Chairman Keiser, Rep. Anderson, Rep. Bosch, Rep. Heinert and absent is Rep. Mock. Lance, has there been any changes on the fiscal note since this morning?

Lance Gaebe, North Dakota Department of Land Trusts: No.

Chairman Keiser: What were the dollars into SIIF fund and into a second account? What was the amount in those?

Lance Gaebe: There isn't really a 2nd account; it is within the SIIF (Strategic Infrastructure Investment Fund.) The land board has set aside what is called an assigned fund balance. Initially that was set up because of the debate between the low and high water mark, so it was calculated on the shore zone. The difference of the bonus took a percentage $142 million dollars. (See Attachment # 1).

Chairman Keiser: All the monies that have come in that are in question, 100% has been deposited into the assigned fund balance. The amount is approximately $142 million. If I read your Fiscal Note, and I take the $249 million, it looked like we were returning $110 million, repayment of $71 million and forfeiture of claims of presently escrow royalty. The only thing we haven't done is the fourth one, loss of future royalty but we have only $142 million in the fund.

Lance Gaebe: There is more in the SIIF; this is the portion that the Land Board set aside as a reserve in case litigation went against the state. The scale of this bill was not anticipated when that assigned fund balance was set aside.

Chairman Keiser: We have collected $216 million dollars. I don't care what fund we put It into. What you are telling us now is we have spent $74,000,000 of this money somehow. If we owe $216 million if this bill were to pass and we were to pay them off. I thought you said

we had collected $216 million and of that $142 million went into the SIIF fund and the rest had to go someplace else. It was essentially spent out of the SIIF fund.

Lance Gaebe: It is all in the SIIF Fund. Yes, the SIIF funded the SURGE package which funded transportation projects in western North Dakota communities. The SIIF also funded the diagnostic laboratory in 2015 at NDSU, expansion of the geological library at UND had a good portion funded by the SIIF. It has been appropriated and spent but the balance is larger that the $142 million. The escrowed portion is not yet within the SIIF, it is at the Bank of North Dakota. When we get these issues resolved there will be a fund set up that could be released and likely returned to the operators and they would distribute it to whoever is supposed to get it. Of the amounts in this fiscal note the $110million has been collected and is in SIIF and the $70.5 million royalties is in SIIF, the rest is not yet in there.

Rep Anderson: How much is in this SIIF fund now?

Lance Gaebe: I don't know.

Rep Mock: It is estimated in the biennium that the SIIF will have $577 million available for appropriations. Including the appropriations with HB 1199 and SB2134 and all other current expenditures that are in the legislature through cross over, we would have $338,774,483 unobligated ending fund balance in the SIIF.

Chairman Keiser: Given all the monies we have put in and set aside in every category we could access to manage this payment if it occurred, what is the balance would we need to reach the payment?

Lance Gaebe: Off the top of my head it would be $190 million.

Chairman Keiser: But we have $142 million in that one account.

Lance Gaebe: That is all part of the balance that Rep. Mock just read. I don't see that as different fund.

Jon Patch, North Dakota Director of Water Appropriations at North Dakota State Water Commission: Shows a PowerPoint presentation of the Phase 2 survey of several miles west of Williston to the 4 Bears Bridge. A study of discrepancy area would be a good study. I hope a solution can be figured out and be exempted out of the study so we don't have to have a delay to having this resolved. No copy submitted. (12:06-21:45)

Chairman Keiser: There are properties that are between the Corp and the later survey. They may have question, if you are outside and you are now just covered by the lake in some parts, here are 2 different categories if this bill is to go forward and we should be able to separate the categories to move forward.

Jon Patch: I think that is an area where there are differences of opinion, if it is exposed you should be looking at it on the current day ordinary high water mark, but at the peak of flooding in 2011 I can show you some maps of that.

Rep Bosch: What survey is John's land included under, or how is it included?

Jon Patch: Based on a line that I hope goes away because it is really bogus, that is the phase 1 survey. They didn't not account for the hydrology in phase 1 and reservoir, tributaries, wetlands on the property and high ground water are all hydrology and they didn't account for that as they should have in this area. They may have done that upstream.

Chairman Keiser: Who did phase 1?

Jon Patch: Bartlett & West in 2009-2010. and the contractor as well and done as the boots on the ground survey. That survey is really not applicable in this area.

Rep Bosch: The dates from this morning is Phase 1 is 2010 and 2011 was Phase 2 date are important when this happened.

Jon Patch: The surveys were adopted by the land board in 2009-2010, the actual was done a year or two ahead of it. date is when they were accepted but survey was done earlier.

Rep Heinert: I would like to ask Lance. Why is the line so different from Bartlett and West Phase 1 and Phase 2? Are the lines in Jon's photos and accurate description of Bartlett and West lines according to your agency?

Lance Gaebe: I think so, they would be very similar, I would like to defer the question to the Office of the State Engineer. Phase 1 was literally hip wader and boats to find out where the ordinary high water mark exists. Phase 2, it was an internal, on the desk survey.

Jerry Heiser,Sovereign Lands Manager for Office of State Engineer/State Water Commission: The lines do appear to be correct.

Rep Heinert: There is a significant difference between Phase 1 and Phase 2 of Bartlett and West Report, is that also accurate?

Jerry Heiser: Yes it is, the reason for the difference is the Phase 2 line is based on aerial photography taken in 1958. As you go further downstream the used some 1956 photography and perhaps some other year. The difference from 1958 to now is that the river moves from avulsion, accretion & erosion they are not static. The river is not where it used to be. As far a Phase 1 that was done by Bartlett and West, the Department of trust lands took the lead in putting together the RFP and the contract for that. State Engineer also participated in that and the cost associated and the review of the RFP and the contractors that submitted the proposals. Bartlett and West was awarded that and did the work. Colleagues from the land board and myself were in the field were out there on 2 or 3 occasions looking at soils and hydrology. Hydrology was included in this study. The primary indicator was vegetation.

Chairman Keiser: Do you have the RFP and could we get a copy?

Jerry Heiser: Yes, we can get you a copy.

Rep Bosch: The Phase 2 resurvey was that was basically the same area the Phase 1 survey, did they do that 1 year later because there was a belief that Phase 1 was incorrect?

Jerry Heiser: No, the State Engineer did not participate in the Phase 2 study. It was not because of uncertainties in the Phase 1 survey area. They the contract in place and they had the support staff to do that so they included everything that was acquired by the Corp just because they had it available and they could do it, not of any doubt.

Rep Bosch: Would it be your professional opinion that Phase 1 was incorrect because it's so different?

Jerry Heiser: No. We are confident that Phase 1 results were accepted by the State Engineer and the Commissioner.

Chairman Keiser: I understand the general principle of general natural navigable waters. I support both Federal and State law on those. When we build a dam we no longer have natural we have man made, it is not natural anymore. How do you make the argument that the river changed after the dam started filling up when there is a clear distinction between the original river and the lake that we created?

Jerry Heiser: The construction of the dam and the inundation changed the character of the Missouri River above or below it.

Chairman Keiser: That's my point, it is different than it would have been had the dam not been built. Would you agree with that?

Jerry Heiser: Certainly I agree, it has changed the character of the river, but the distinction on the upper end is at what point is the Ordinary High Water Mark indicated by the actions of the river and at what point is it dictated by the actions of the reservoir in my professional opinion where we conducted the Phase 1 study, ordinary high water mark is dictated primarily by the river not the reservoir. Therefore, the employment of the State Engineers the delineation guidelines to determine the ordinary high water mark is appropriate.

Chairman Keiser: That is part of the disagreement, should we create definitions for this section if the legislature goes that direction for natural and man-made navigable waters?

Jerry Heiser: It depends on what natural means? Both below and above the Garrison Dam has affected how the river functions along with the creation of hardened bank lines, rock jetty's and levy's. So what is natural?

Chairman Keiser: Does the dam influence the Yellowstone River as it comes out of Livingston?

Jerry Heiser: I believe it does not.

Chairman Keiser: So that is still a navigable not influenced by a man made reservoir? At some point between Williston and Livingston at some point the dam will stop having an

influence on the river, but below that point now we have the influence of a man-made reservoir.

Jerry Heiser: At some point you get to that place where the Ordinary High Water Mark is primarily a factor of the reservoir and not the flow of the river.

Chairman Keiser: The issue here is the State is saying if it's an influence but not an important influence we still do take it.

Chairman Keiser: Does anyone have amendments? I'm going to hand out amendments. (See Attachment # 2). Explained the amendment. This is to address the issue if this bill would pass the lands that aren't going to be contested and the lands that would be contested. This is an attempt. I would like to address an easy and more rapid transition. (41:29-44:55). Do we want the tribe in the amendment, because as I understand we don't have them included in the study? Is that correct?

Craig Smith ~ Crowley Fleck in Bismarck, on behalf of the North Dakota Petroleum Council: As to the reservation all the bill does is say the State doesn't own above the historical river channel. The study is limited from the Northern boundary of the reservation to a little west of Williston. There is a dispute between the tribe and the state who owns the riverbed itself, not just where the ordinary High Water mark is. If it is determined the State owned title to the riverbed the legislature under this bill and could authorize another study of that channel.

Chairman Keiser: I will give the audience's opinion of the study.

Rep Mock: Is there any language in this bill that is abdicating the States claim of ownership of the Missouri River within the tribal boundaries?

Craig Smith: It doesn't expressly address the issue. That's going to be a Federal Court issue or an agreement between the two sovereign governments.

Chairman Keiser: If this is going to create a problem for the state should this pass and be signed by the Governor, we need to know and we need the correct language in there. We are not in a position to know that. We want you experts to let us know. We want to know if that should be included, excluded or modified. Other issues, there does exist aerial photographs in 1953 and prior that do clearly show where the river was in at that time. With the current language we have we are saying we are going with the data available in 1953. Is that correct?

Craig Smith: That's correct. Yes, the current language is based on immediately prior to the closure of the dam and for Garrison Dam that is April 7, 1953.

Chairman Keiser: That will be the established Ordinary High Water Mark?

Craig Smith: Yes.

Chairman Keiser: How did South Dakota get Ordinary Low Water Mark and we got Ordinary High Water Mark?

Craig Smith: South Dakota, Montana, North Dakota and California all have statutes at statehood that said the Riparian owner, the upland owner takes to the Low Water Mark. Montana, South Dakota and California supreme courts interpreted that statute as being just that. So they are low water mark states. In North Dakota we had the same statute but the state argued that it violated the anti-gift clause in the constitution. When North Dakota entered the state acquired to the High Water Mark, the supreme court said the legislature could not gift the shoreline acreage to the upland owners by that statute. That is why we are at the High Water Mark.

Chairman Keiser: It doesn't matter what we do legislatively the court is position on that issue. We are ok with the delineation you have in this bill? We are in compliance with the states definition of Ordinary High Water Mark?

Craig Smith: I would agree. I think the language of the bill is ok.

Lance Gaebe: There isn't an existing definition of the Ordinary High Water Mark with respect to reservoirs or historic. The practice has been to use the Historic high water mark in places of reservoirs but the existing state law define an Ordinary High water mark as has been described. This bill will adopt a new definition for Historic Ordinary High water mark. It would be essentially codifying it.

Chairman Keiser: Can I you give us the statue or rule?

Lance Gaebe: In my testimony from last Friday there is a list on page 6. We can get copies of that as well.

Chairman Keiser: I would like the Engineering department responses to one of my concerns that we incorporate in the study section that no entity previously may be hired to do this survey. I feel it would be a conflict of interests. Would you any reaction to language that would address that?

John Paczkowski, Office of State Engineer/State Water Commission: That may be limiting. There have been essentially three firms have been working on it. In the cases we have been talking about today I think all three have been involved in Phase 1 or 2 or one of the lawsuits.

Chairman Keiser: Could you check the degree of their involvement?

John Paczkowski: I know their involvement. Bartlett and West was the primary for Phases 1 and 2. They used Carlson McKain Inc. as one of their subcontractors. Mr. Patch's family used Houston Engineering as an expert witness in their case. State Engineers office used Houston Engineers in the past, the Land Department used Bartlett and West. To get someone not involved we will need to get someone out of state.

Chairman Keiser: Would you be concerned if we picked Houston Engineering because they are involved in a lawsuit on the other side?

John Paczkowski: It would give me cause for concern.

Chairman Keiser: We want to be objective.

Josh Swanson ~ Representing Wilkinson, Vohs families and First National Bank: We do have the lawsuit pending against the state. We would also have the same issues of concern with using Bartlett and West since they did Phase 1 and 2 studies. The United States response to the States request to use their surveys was that they had some serious concerns and issues with both methodology, the facts and the laws as interpreted by the state with the Phase 1 and 2 study.

Rep Mock: The repayment to the operators, the $70 million or whatever the balance is that we would not have accounted for coming from the SSIIF, making sure whatever we would have would reflect the balance from the SIIF for this biennium.

Rep Anderson: It looks like it will be paid out in the next 4 years. I think you might need an idea what you would need in the first and second 2 years.

Chairman Keiser: Is it possible, it would be speculation. My amendment would dramatically change the payout in the first year or two. That principle whether the language is correct or not is critical. The easiest position I could take as the state is to say we object and then it goes back into the pool and we don't do anything until the committee is formed and the study is done.

Craig Smith: I have reviewed the proposed amendment concerning lands outside of what the survey study would be. I think our concern here is west of the bridge where we had the Phase 1 survey, you might have tracks of land that are above the Corp survey and the Phase 2 survey, however you still have the Phase 1 survey. Even if the act becomes effective and it would take out that, we have the Wilkinson pending before the supreme court. We don't know what their reaction will be. We don't know at this time what the State would do after the legislation is passed. We haven't seen a final version of it yet. I think to put some mandatory 6 month provision on that are is problematic. If you go east of the bridge where you don't have the Phase 1 survey it is less of an issue if you say you have a tract of land that is above the Corp and Phase 2 survey. It is highly unlikely they will be impacted by a new study. Unless we find a way to deal with the Wilkinson case, from the operators perspective we will object to that amendment.

Chairman Keiser: The principle remains somehow we need to get this going. Adjourned the hearing.

Minutes of the

(HOUSE) (SENATE) BILL NO. 2134 SUBCOMMITTEE OF THE

Energy + Natural Resources **STANDING COMMITTEE** #29382

Meeting location: Fort Totten Room

Date of meeting: 3-17-17

Time meeting called to order: 9:30

Members present: Chairman Kaiser Rep Anderson
Rep Bosch Rep Heinert Rep Mock AB

Others present (may attach attendance sheet):
Lynn Helms, Craig Smith ND Pet Council; Claire from LC, Jerry Heiser

Topics discussed:
• hog house amendment - attachment 1 • Csmith, Attachment 3 + 3A maps, etc • Jerry Heiser, attachment 2 - 2A-2B • definition of ordinary high water mark, • sovereign lands • time line - 6 mths not enough - 18-24 mths, title attorney's dream • should the land dept be in chg of this since they are involved in lawsuits

Motion and vote:

Time of adjournment: 10:00 AM

Note: If a motion is made, a description of the motion must be provided along with the member seconding the motion. A recorded roll call vote must be taken and reported for any nonprocedural motion.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Peace Garden Room, State Capitol

SB 2134
3/23/2017
29572

☒ Subcommittee 8 AM-8:30 AM
☐ Conference Committee

Kathleen Davis

Explanation or reason for introduction of bill/resolution:
Relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.

Members present: Chairman Keiser, Rep. Anderson, Rep. Bosch, Rep. Heinert, Rep. Mock

Others Attending: Lance Gaebe, John Paczkowski, Roger Kelley, Blair Thoreson, Robert Harms, Ron Ness, Craig Smith, Bill Kalanek, Karlene Fine, Allisen Berment, Drew Combs, G. Pullman, Rep. Roers Jones Patch

Minutes: Attachment 1-4

Chairman Keiser: Opens the hearing of SB 2134.

Chairman Keiser: Attachment 1 and 2 - 06011. The differences between 10 and 11 are on Page 4, Subsection D a little clarification language.

~Corps survey is the primary basis for determining mineral ownership.

~Will be take into consideration Phase 2 and address property outside of Phase 2

~Changed the title and added an emergency to it.

~Created a new Section 1 beginning on Page 2

~Last known survey conducted by the Army Corp of Engineers in connection with the project as supplemented by the supplemental plats created by the branch Cadastral Survey of the US Bureau of Land Management.

~Defines Corp's survey, "historical Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri Basin Project" and the boundaries along which it extends for this legislation, Segment, individual segment maps contained within the Corp survey, final project maps for the Pick-Sloan Project Dams, "State phase two survey" means ordinary high water mark survey on page 2.

~Page 3
~addressing mineral ownership of land inundated by Pick-Sloan Project

~Excluded tribal lands

~Page 4. Historical records and applicable state laws must be considered in the review subsection 3; complete the review within 6 months of entering a contract, subsection 4

~Page 5. Using the clear, open & transparent process. Shall consider all public comments, Implementation-have put in a lot of time tables, lands outside of phase 2

~Page 6. Complete the adjustment within 2 years, end of 2-year deadline, actions challenging review finds,

~Page 7. State engineer regulatory jurisdiction, retroactive application

13:59

Rep Bosch: Page 4, subsection 4, the extension, there is no length.

Chairman Keiser: That is something the committee should consider, but I think the intent is clear and there will be no delay.

Chairman Keiser: Are there any other amendments. I'm offering an amendment Attachment 3. It's simply an appropriation. It sets a ceiling up to $750k would be made available for folks' legal expenses initiated after 12/31/2011 but before 12/31/2016. From my personal perspective, it's something that should be considered. Any question or comments?

Lance Gaebe ~ Commissioner of University & School Lands: Attachment 4. The fiscal note.

Chairman Keiser: Any questions on the fiscal note? Closed the subcommittee hearing.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

SB 2134
3/24/2017
29664

☒ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davis

Explanation or reason for introduction of bill/resolution:

To provide for a legislative management study of a long-term energy plan for the state

Minutes: **Attachments 1-5**

Chairman Keiser: called the subcommittee to order. All committee members were present.

Allen Knutson, LC – Attachment 1

Chairman Keiser: what you're saying is the good news is there's a lot of money there and the bad news is there isn't enough. There is a potential requirement of $51.1 million. Is there any way this payoff can be set up over 2 interim cycles?

Knutson: There's been some discussion of that and I'm sure there's some language that could be included to do that. I can work with Claire, paying those refunds over a certain period of time rather than all right at the start.

Chairman Keiser: we won't put it on this bill at this point, we'll do it in appropriations and I will work with Chairman Dalzer with that. Claire will come up now and explain the differences between amendment 6011 and 6012 because everyone was working on 6011 and now we have 6012.

7:48

Claire Ness, LC – Attachment 2-2a – Christmas tree amendment 06012

Chairman Keiser: What was the rational for going straight to the court versus administrative law judge, mediation and those other forms?

Claire Ness: I think one to give someone who's making a challenge kind of an expedited review and also to expedite the refund and make sure the process gets under way quickly. Questions?

9:49

Josh Swanson, attorney, representing the Wilkinson and Vos families and beneficiaries of the trust property managed by First National Bank Thanked the committee for their diligent work on this. The only issue we have with the language is there is a little bit of uncertainty. I've discussed with Mr. Smith this morning with regard to Section 61-33.1-03, Page 2 Subpart D under #3 that talks about the state case law regarding the identification of the point where the presence of water rests the vegetation to destroy its value for ag purposes. If you look at all the other criteria in Section 3 in A and throughout the bill, it talks about the historical data. If we take a look at D that's not clear. It doesn't mention the review the point at which the water destroys the value for agricultural purposes being limited at the point the dam was closed, it leaves a question in my mind whether that would be limited to when the dam was closed or if you could argue whether you have to look at 2017 conditions. As the chairman and committee knows, looking at 2017 conditions is impossible because the historic river is under the lake. If I may distribute copies of a map, presented Attachment 3. If you take a look there you can see, there's a segment of property marked off which is the Wilkinson property. It's a field. You can see that area photographed from 1958. The property was farmed so there's no question that the presence of water could destroy the value of that property for agricultural purposes. As you know the US acquired the property for the Garrison Project because that's exactly what happened. Inundation by Garrison Dam and Lake Sakakawea has destroyed the value of the property for ag purposes. So long as that subpart is clarified, we have no issue with the bill, and again we appreciate the committee's efforts.

Chairman Keiser: I'm not finding that section.

Josh Swanson: It's Page 3 of the marked up version of the bill. It's under 61-33.1-03 Subpart 3 Sub D.

Chairman Keiser: This is getting direction relative to what can be used in the review of the ordinary high water mark in 1953.

Josh Swanson: correct. So long as it's clear that subpart D, that particular criteria should be viewed from the 1953 conditions rather than present day. We just want to make sure that was clear and that it's on the record that's what the committee's intent is if there was ever a question before the court what point and time Subpart D, that review is limited to.

Rep. Heinert: I'm trying to clarify the date you're talking about. You said 58 and 53.

Josh Swanson: To be clear the photo I provided was from 1958 which shows the year the US acquired the property from the Wilkinsons and that it was still being farmed at that point. You are correct. The year would be 1953, the year the dam closed so it's consistent with the rest of the bill. As far as reviewing the conditions on the ground there for subpart D would be 1953.

Chairman Keiser: I thought somewhere in here Josh we delineated that the data to be used was prior to 1953 for the review.

Josh Swanson: That's how I would read the language and if it ever came up in court that's what I would argue but I think there's some room were to challenge it where it says in other parts of the bill, for example, subpart A, number 3, that aerial photography of the historical Missouri River bed channels existing before the closure date of the Pick-Sloan Project Dams, and I think you're correct. If you read the bill the legislative intent is clear, but my lawyer being a bit paranoid, remove any doubt there.

Chairman Keiser: I will speak on behalf of the subcommittee and full committee; the intent is clear on our record that we do mean that time table for the review.

John Swanson: Certainly, we appreciate that.

16:23

Lance Gaebe, ND Trust Lands – presented Attachment 4. My comments are directed towards 06011 but I don't think any of the changes

Chairman Keiser: no that's good. Do we have copies for the people in the audience, it will help?

Chairman Keiser: You ask some good questions. Is this an all-inclusive list, can we use other things, etc. Should they be prioritized, do they have to look at all of these on each review, for each section, and the answer is yes. They do have to look. No firm is going to have this list and not look at all of this on every issue because they would be challenged. I don't have a problem with that one. Whether we prioritize them or not, you have to look at them and give them proper weight based on the information that's available would be my argument. If you see it differently.

Gaebe: It also says to use applicable state laws. So the things like the state engineer's guidelines and the administrative code reference ordinary high water mark presumably would be inclusive unless somebody decides this is all that can be looked at, is my only reason for bringing it up. He continued on presenting his Attachment #4.

Chairman Keiser: which line are you on there?

Gaebe: Line 23 of page 5, so it says, "any suspended or escrowed". I think you might want to just add any. Just drop suspended or escrowed and maybe leave it as royalty or revenue or collected. Pretty all-encompassing if you have royalty.

Chairman Keiser: what you're suggesting is on Page 5, Line 23, "any suspended or collected royalty?"

Gaebe: collected, escrowed or collected.

Chairman Keiser: so suspended, escrow, or collected?

Gaebe: the other option to drop all three and just say royalty.

Chairman Keiser: Because if we put yours in, we're covering every royalty.

Gaebe: continued presenting his attachment.

27:31 Gaebe: lastly on the fiscal note, we would sure like to seek an appropriation for the authority to extend those amounts because of the, certainly the land board has the ability to do some modest corrections or to use continuing appropriation authority for maintenance of the funds, or enhancement of the funds, but this would be a pretty substantial refund. In that regard, I don't think the numbers that Legislative Council presented were markedly different that mine, except they actually incorporated the collections of this biennium which I excluded from yesterday's comments. Because of your request I wanted to just present just what we needed to present from the SIF. I think the reason for Legislative Council's reason for doing so is this biennium's collections were in the top number forecasts. That the ending fund balance was in there. So that appropriate that they did that analysis as well. That's my quick analysis of yesterday's version of 6011.

28:51

Lynn Helms, Director of Dept. of Mineral Resources, clarified Page 5 lines 9 through 21; it discusses how the Department of Mineral Resources would get public input on the review of the ordinary high water mark. Currently identifies it as a public meeting. Typically, what we do, are public hearings. There is a difference. It sounds like a minor difference but public hearings have a much stricter notice requirement. For example, for our hearings we have to publish those in the Bismarck Tribune and the County newspaper of the effected lands. No so for a public meeting. Also for a public hearing, we have a hearing officer, there are rules that apply in terms of swearing people who want to testify or introduce items into the record. We take a lot of care with creating the record. Sometimes we reopen the record and allow new items to come in but then anyone else affected by that has an opportunity to respond to those new items. So there's a significant different between public meeting and public hearing. I want to be crystal clear on what you want.

Chairman Keiser: Lynn, let me ask you, what do you want?

Helms: I would be more comfortable with a public hearing.

Chairman Keiser: granted (30:33)

Helms: for something like that has the potential to go right to court and there's a lot of effort that's going in to create that legal record. We might ask Mr. Smith, because he's likely to end up litigating a lot of these. He's nodding his head. Using the Industrials public hearing process and notice process, very well known by the oil and gas industry, and everyone involved. It would be clearer. If we could substitute hearing for meeting.

Chairman Keiser: Consider it done. I appreciate that, I had concerns about that. I wanted to have a lot of transparency on this issue.

Rep. Mock: as I'm looking at Line 9 on Page 5. Am I to understand there would be two hearings or just one?

Helms: that's the way I understand it too.

Chairman Keiser: that's one of the amendments in here Craig (Smith).

Helms: One of the things we changed was to make sure that there was just one meeting. But there will be a publication of the review findings, 60 days provided for people to look those over, and then the hearing will take place. Then there will be one singular public hearing following the publication, and the 60 days for people to review.

Chairman Keiser: questions? Anyone who wishes to address the committee?

Craig Smith, Petroleum Council, Attachment #5-5a-5b-5c. We feel this bill has made a lot of progress in the last couple weeks. Mr. Gaebe pointed out on the release of proceeds that operators would have that title information, and we would agree with that. We would not object to the land department would refund to the operators and they'd make that distribution. Page 5, Sub 1 Line 23. The concept would be the department would release escrow or collected proceeds to the operators for distribution to the proper owners.

Rep. Heinert: clarify at the same time Mr. Gaebe's request on any suspended or escrow and go to any royalty?

Chairman Keiser: would it be simpler to just say any royalty proceeds? Does that work?

Smith: yes.
Next in section 61-33.1-03 Subsection 3, the review requirements the firm would have to follow. Just a little background. Mr. Gaebe indicated earlier, there were a couple other criteria. One was review the BLM Manual Surveying and the other State Engineering guidelines. Both have been removed. The BLM manual is a very comprehensive manual, yet there are certain provisions in there that would conflict with state law and would probably create some confusion for the firm what they're supposed to do. The state engineering guidelines, they're comprehensive as well. However, there's one parameter of it that we don't believe comports with state law. That deals with their vegetation test in determining the ordinary high water mark. For that test what they did was adopt the Corps of Engineers' wetlands delineation manual, which is for the Waters of the U.S. in determining wetlands. It's a species test. We don't, that's a regulatory test. It is not an ownership boundary test. So we don't believe that test should be used. We think the language in subsection D referring to the agricultural crops, that case law suggests you have a different approach than you would with the Corps of Engineers delineation manual. The state guidelines also refer to the state of Washington Department of Ecology guidelines. Again, that's a regulatory agency and they're regulating the waters of the state of WA, and they expressly state these methods and ordinary high water mark definitions are not meant to supersede the standards and methods used by licensed surveyors in determining property boundaries and ownership. So we have two standards that the state engineers adopted that are for regulatory purposes and they conflict

with title determination. We have no issue with the rest of the guidelines and we have no issue with those guidelines in terms of regulatory purposes but for title purposes we do.

Chairman Keiser: that was a demonstration of getting something on record that is a critical argument in the future. Seeing noone, we'll close the continuation hearing on SB 2134. Claire please come up and address the 2 simple changes.

Claire Ness: The changes I have are to change the language of public meeting to public hearing and change that throughout so the Dept. of Mineral Resources will hold one public hearing. We will change the reference to any suspended or escrowed royalty proceeds to any royalty proceeds in 61-33.1-04; and we have a provision that will split out that first section of the implementation provision to denote the Board of University and School Lands will release the proceeds to the operators and the operators will then distribute those proceeds to the owners. So that first subsection 1 of the implementation section will get split out in that way.

Rep. Heinert: on the last comment providing the monies back to the oil companies. Are we covering the state side of that with that statement enough to be sure that the oil companies can't come back at us and say you didn't give us enough, or the landowner or somebody who gets those mineral rights down the road can't come back at the state when we've turned those proceeds over to the oil company to return to the people?

Claire: You're saying if the state releases the proceeds and the proceeds then get distributed to the owner, and the owner comes back and says, wait, this was not an accurate distribution. The owner will be able to challenge the survey findings if what you're saying is that their discrepancy is a result of the review of the Corp survey, and they would have a discrepancy with the findings from the industrial commission on the survey. If I'm understanding correctly, they'll still be able to challenge those findings.

Chairman Keiser: I think I get it. So the state with this amendment, the state will send the money to the oil companies to the proper owners. As soon as we send that money is there any remaining money, is there any remaining liability back to the state if downstream the owner says you didn't pay me correctly. Does that come out of the oil company or the state.

Claire: if we gave the oil company the correct amount and it didn't get to the owners, we would be covered. We would have documentation of that.

Chairman Keiser: but if we made an error and gave too few dollars, and they come back and say you owe us more and the oil companies come to the state, we've got a case, you should have paid more. We're not off the hook.

Claire: right.

Rep. Mock: I believe in Mr. Gaebe's comments he alluded to appropriation language given the quantities we're asking the land department to distribute. Do we need to add any additional language regarding appropriations?

Chairman Keiser: we certainly can at this point. I'm not qualified to review if that number is right or not. But the appropriations committee is. I don't disagree with the argument but they will have to appear before the appropriations committee and ask for an adjustment. Questions?
Rep. Heinert: My last question was on Mr. Gaebe's letter in reference to tribal lands, whether we need to adjust that section he talked about. That's more for Claire. Under #1, he talks about the reservation boundaries. Do you feel we're ok with the way it's written now?

Claire: I feel its ok. I feel we exempted within the reservation boundaries because those are subject to different laws and different legal disputes.

44:50

Ron Ness, Page 5, Line 23. The 1-year time frame from the Emergency Clause added to this bill changes. I would suggest throughout this discussion that when this review is final, so you know the determination is of that committee, and there are some abilities in there for delay, within either 18 months or within 6 months after the review of findings are adopted. The one-year time frame from the emergency clause, now added to this bill, changes, it's very complicated.

Chairman Keiser: it does speed it up 6 months. What would you like it to be?

Ness: Within 6 months after the review findings are adopted.

Chairman Keiser: because of the emergency clause, it does start some other issues for other places. Committee members, we have before us we have the combined simple amendments, including this last piece if that's acceptable, could we have a motion for placing those on 0012?

Rep. Mock: moved

Rep. Anderson: second

Chairman Keiser: Discussion? Adopting the simple amendments indicate by saying aye. Opposed. Voice vote, motion carried.
Those amendments have now been placed on .06012. Committee members, your wishes?

Rep. Heinert: I would move adoption of 60013

Chairman Keiser: 60013 is what you are moving the adoption of technically of.

Rep. Heinert: as a subcommittee and then move it to the main committee for approval

Rep. Bosch: second

Chairman Keiser: this is basically a hoghouse bill. So we're recommending a Do Pass on this bill as amended. Further discussion. Roll call vote. 5 yes 0 no 0 absent. Motion carries.

2017 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Coteau –A Room, State Capitol

SB 2134
3/24/2017
29686

☐ Subcommittee
☐ Conference Committee

Committee Clerk Signature	Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin project dams.

Minutes: **Attachments 1-1A-1B**

Chairman Porter: Called the committee to order.

Rep. Keiser: Attachment 1 and1A. Amendment 06012, all the changes are on Page 5 of your markup bill.

Chairman Porter: Line 12 Page 5 also?

Rep. Keiser: yes LC must have missed that. We will change that to public hearing. Continued reviewing attachments. I've never seen a bill where words matter more.
3rd party that comes in

Chairman Porter: One of the questions that came to me was in regards to the assurance that we are getting a neutral firm. What about former state employees that would have been a part of this original survey, that may have retired or moved on to a different job and working inside of a company?

Rep. Keiser: We did not limit that. The limits we have are limited to the firm, has the first been involved in an activity. Personally I don't have a problem with that. You've never going to find, unless we go outside of the state and have someone who has no knowledge whatsoever of this issue. We need to be reasonable. We have said if there's a conflict of interest within the firm. That would apply in a partnership I would suspect as well. It would depend on the structure of the firm. Rep. Keiser continued on presenting amendment changes.

Rep. Keiser: Question came up during subcommittee this morning, what if there's something above and beyond these parameters or do they have to actually assess each of these parameters for each segment or tract. The answer is yes they have to consider them all. If there's something there when doing their research, yes they have to consider it. Should they

prioritize one over the other? That's a professional judgement. What we are saying, if these exist, you are to use them in your review. Rep. Keiser continued reviewing the amendment changes.

Rep. Keiser: Reviewed Attachment 1B, fiscal note. This is the fiscal note the ND University and Public School Lands gave us, it's reasonably close, it's very different. The key elements, on the very bottom line, the $51.1 million, that's what we're short. That's not our issue, that's appropriations issue. There's a potential to split part of these payments out into the next biennium. So there is enough, depending on how it's managed and the transfer of funds occurs, there is enough money to do it within the SIF fund, there's enough money to guarantee it with the SIF fund and transfer it though, but as I explained to the subcommittee, I'm not qualified to make that decision. That's an appropriations decision. I will share with the committee that Lance Gaebe came in this morning with some proposed amendments or areas to consider for amendment. One included a fiscal note of $185,000 for his department to do all this extra work. The committee did not consider that. They said he could make his case with appropriates on that. We also had one other amendment that I proposed and that was to reimburse families and mineral owners up to $750k for their court related expenses because they never should have had them in my opinion. That motion was never moved or seconded by the committee and as a result is not on the bill at this time. However, it is in the record.

Chairman Porter: questions? Comments from other subcommittee members.

Rep. Anderson: I'd like to thank Rep. Keiser and Claire Ness, LC, for their hard work. I think we got the proper language in place to establish that ordinary high water mark. To me that's the key for the whole thing. Once you get that established everything else will fall into place.

Chairman Porter: questions? Comments

Rep. Keiser: Move to adopt amendment 06013.

Rep. Heinert: second

Chairman Porter: We have a motion to adopt amendments to SB 2134 by Rep. Keiser and a second from Rep. Heinert. Discussion? Voice vote, motion carries.

Rep. Keiser: I move a Do Pass as Amended on SB 2134 and Rerefer to Appropriations

Rep. Ruby: second

Chairman Porter: We have a motion from Rep. Keiser for a Do Pass as Amended and Rerefer to Appropriations, and a second from Rep. Ruby. Further discussion?
Roll call vote yes 14, no 0, absent 0. Motion carried. Rep. Keiser is carrier.

17.0159.06005
Title.

Prepared by the Legislative Council staff for
Senator Armstrong
March 8, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide for a legislative management study of the ordinary high water mark of an extent of the historical Missouri riverbed channel; to provide an appropriation; and to provide for retroactive application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed before the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance.

61-33.1-03. Determination of the ordinary high water mark of the historical Missouri riverbed channel.

The corps survey must be considered the presumptive determination of the ordinary high water mark of the historical Missouri riverbed channel, subject only to the

final study adopted by the legislative management's energy development and transmission committee during the 2017-18 interim and judicial review as provided in this chapter.

61-33.1-04. Implementation.

Upon adoption of a final study conducted during the 2017-18 interim by the legislative management's energy development and transmission committee:

1. The board of university and school lands immediately shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final study.

2. Operators of oil and gas wells affected by the study immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the final study. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for the segment of the final study challenged by the action.

61-33.1-05. Actions challenging final study.

An interested party seeking to bring an action challenging the final study conducted during the 2017-18 interim by the legislative management's energy development and transmission committee must commence an action in district court within two years of the date of adoption of the final study. The plaintiff bringing an action under this section may challenge only the segment of the final study which affects the plaintiff's interests. The state and all owners of record of fee or leasehold estates or interests affected by the segment of the final study challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the final study bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by law during the 2017-18 interim by the legislative management's energy development and transmission committee.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.2-07. State engineer regulatory jurisdiction.

This chapter does not affect the authority of the state engineer to regulate the historical Missouri riverbed channel, minerals other than oil and gas, or the waters of the state, provided the regulation does not affect ownership of oil and gas minerals in

and under the riverbed or lands above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.

SECTION 2. LEGISLATIVE MANAGEMENT STUDY - STUDY OF CORPS SURVEY OF EXTENT OF HISTORICAL MISSOURI RIVERBED CHANNEL.

1. During the 2017-18 interim, the energy development and transmission committee shall procure a qualified professional engineering and surveying firm to conduct a study of the corps survey, as defined in section 61-33.1-01, to verify the proper delineation of the ordinary high water mark of the historical Missouri riverbed channel. The study must be limited to the extent from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Upon the effective date of this Act, the legislative management shall commence procurement to select a qualified engineering and surveying firm for the study. Within ninety days of the first date of publication of the invitation, the legislative management shall select and approve an engineering and surveying firm for the study. The firm selected must complete the study within six months of entering a contract with the legislative management. The legislative management may extend the time required to complete the study if the energy development and transmission committee deems an extension necessary.

2. In conducting the study under this section, the delineation of the ordinary high water mark of the corps survey may be adjusted, modified, or corrected only for a segment of the river if clear and convincing evidence establishes the portion of the corps survey for that segment does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, guidelines, and applicable state laws must be considered in the study:

   a. All available historic aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. United States geological survey elevation and Missouri River flow data;

   d. "Ordinary High Water Mark Delineation Guidelines" issued by the state engineer;

   e. "Manual of Surveying Instructions (2009)" issued by the United States bureau of land management;

   f. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high water mark. Lands having agricultural value capable of growing crops or hay, but not merely

intermittent grazing or location of cattle, generally must be considered above the ordinary high water mark; and

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

3. Upon completion of the study, the energy development and transmission committee shall publish notice of the study and make the study available for public inspection and comment. The public must have sixty days after publication of the notice to submit technical comments to the committee and engineering and surveying firm for consideration. The committee shall adopt a final study within sixty days after close of public comments, or such time as the committee may deem necessary. Upon adoption of the study, the study is determinative of the boundary of the ordinary high water mark of the historical Missouri riverbed channel, binding upon the state and all interested parties, subject only to judicial review.

SECTION 3. APPROPRIATION. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the legislative management for the purpose of procuring professional engineering and surveying services in connection with the study required by section 2 of this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 4. RETROACTIVE APPLICATION. This Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high water mark determination by the final study adopted under section 2 of this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership."

Renumber accordingly

Amendments adopted by the subcommittee to 17.0159.06012:

1. Page 5 of the markup:
   Change "public meeting" to "public hearing" in subsections 6 and 7 of section 61-33.1-03.

2. Page 5 of the markup:
   Change the deadline for implementation in subsection 1 of section 61-33.1-04 to be "within six months after the final review findings are adopted" instead of "within one year of the effective date of this Act".

3. Page 5 of the markup:
   Change subsection 1 of section 61-33.1-04 so the Board of University and School Lands will release the proceeds to operators, who will in turn distribute the proceeds to the owners.

4. Page 5 of the markup:
   In subsection 1 of section 61-33.1-04, change "any suspended or escrowed royalty proceeds" to "any proceeds".

3/24/17 DP
1 of 5

17.0159.06013
Title.08000

Prepared by the Legislative Council staff for
House Energy and Natural Resources
Committee

March 24, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the

riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

   b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the

ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

   b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

Date: 3-10-17

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2134

House Energy & Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 17.0159.06005

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 Rep. Keiser Seconded By Rep. Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson	Voice Vote		Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Seibel		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Mock		

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

Motion Carries.

Date: 3-24-17

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2134

House Energy & Natural Resources 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
- ☒ adopt simple word changes

Motion Made By Rep Mock Seconded By Rep Anderson

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Seibel		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Mock		

Voice vote motion carries

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

If the vote is on an amendment, briefly indicate intent:
- pg 5 chg public meeting to public hearing
- pg 5 chg deadline for implementation to be within 6 mths after final review findings are adopted.
- pg 5 release proceeds to operators, who will in turn distribute to owners
- pg 5 chg any suspended or escrow royalty proceeds to any proceeds

Date: 3-24-17

Roll Call Vote #: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2134

House Energy & Natural Resources 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 ☒ recommend a Do Pass to full committee of 06013

Motion Made By Rep Heinert Seconded By Rep Bosch

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson	✓		Rep. Roers Jones		
Rep. Bosch	✓		Rep. Ruby		
Rep. Devlin			Rep. Seibel		
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog		
			Rep. Mock	✓	

Total (Yes) 5 No 0

Absent 0

Floor Assignment

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

recommend to full committee a Do Pass on forthcoming 06013 Amendment

Date: 3-24-17

Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2134

House Energy & Natural Resources Committee

☐ Subcommittee

Amendment LC# or Description: 17.0159.06013

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 Rep. Keiser Seconded By Rep Heinert

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter			Rep. Lefor		
Vice Chairman Damschen			Rep. Marschall		
Rep. Anderson			Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Seibel		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Mock		

Voice vote motion carries

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

26013

Date: 3-24-17

Roll Call Vote #: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2134

House Energy & Natural Resources 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 Rep. Keiser Seconded By Rep Ruby

Representatives	Yes	No	Representatives	Yes	No
Chairman Porter	✓		Rep. Lefor	✓	
Vice Chairman Damschen	✓		Rep. Marschall	✓	
Rep. Anderson	✓		Rep. Roers Jones	✓	
Rep. Bosch	✓		Rep. Ruby	✓	
Rep. Devlin	✓		Rep. Seibel	✓	
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog	✓	
			Rep. Mock	✓	

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep. Keiser

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

REPORT OF STANDING COMMITTEE

SB 2134, as engrossed: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** and **BE REREFERRED** to the **Appropriations Committee** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2134 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 create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

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

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

to be above the ordinary high-water mark and owned by the riparian landowner.

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

   b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds,

and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

2017 HOUSE APPROPRIATIONS

SB 2134

2017 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

SB 2134
March 29 2017
29804

☐ Subcommittee
☐ Conference Committee

Explanation or reason for introduction of bill/resolution:

Relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams

Minutes: attachment1-5

Chairman Delzer: Opened the meeting on SB 2134

Rep. Porter: District 34 in Mandan, The House Energy Committee SB 2134 and it is a rewrite in which we redid most of the bill that came over to us from the senate. We need to go in and redo the whole survey and that is where the money on the fiscal note comes from. We need to pass this bill. Discussed SB 22134 SB 2008

Chairman Delzer: Are you working off of SB 2008.

Rep. Porter: Yes, I felt very strongly that we needed to see the information that was presented to us by Mr. Smith from Crowley Fleck who started working on this a long time ago. We need to give back those mineral acres to those private citizens of North Dakota that were taken from them by the state of North Dakota. I was going to have Rep. Keiser walk through the bill, the timing and the payments. (4:47)

Chairman Delzer: Rep. Keiser Do you have the information form the council?

Craig Smith: (1 attachment) With Crowley Fleck PLLP Bismarck; explains the attachment. (5:25) I am going to run through some principles and history about Garrison Dam and how that all plays with this bill, Under the equal footing doctrine as western states joined the union they claimed title to the beds of all navigable water "upon equal footing, in all respects whatever up to the Ordinary High Water Mark. (17:57)

Chairman Delzer: You said they don't recognize the state survey and you said the state supreme court recognizes the high water mark?

Mr. Smith: They recognize only the high water mark principal. The United states and the state agree on that.

Vice Chairman. Kempenich: Is the accessibility under that to?

Mr. Smith: We are looking back in time to 1950, whether or not it had agriculture value or not is a possibility. It is submerged now. What this bill does is lock in the river channel as of that time.

Vice Chairman. Kempenich: That is all the way to the Dam?

Mr. Smith: Correct.

Chairman Delzer: Does this go to the face of the dam or does it stop at the reservation?

Mr. Smith: It exceeds the reservation in terms of on the reservation itself.

Chairman Delzer The part south of the reservation would be included in this but there aren't any mineral rights on it.

Mr. Smith: The reservation is not included in the bill. It was at one time but it is not in there.

Chairman Delzer: What I am asking about is the eastern part of the lake that is not part of the reservation?

Mr. Smith: That would include everything except the reservation. (continues)

Rep. Keiser: District 47 Bismarck; (see attachment 2) This is a hog house amendment, we did engage the senate sponsors in the discussions during the process and they are absolutely on board.

Chairman Delzer: If it is a hog house why isn't doesn't it say "after were bill replace"?

Rep. Keiser: I have proposed amendments 6012 and it does strike that language.

Chairman Delzer: (attachment 3) Proposed amendments title 08 is not the final version?

Rep. Keiser: Title 08 is not the final version.

Chairman Delzer: We will get the final copy of proposed amendments 06013. (attachment 4)

Rep. Porter: The only opposition was the land boards

Rep. Keiser: There are 2 other serveries' done Phase 1 and Phase 2. This is not a new survey. If you could do this perfectly we would have a 35-month window in which to complete the actions defined in HB 2134. If this passes, Department of Mineral Resources has 90 days to select a firm to do the review one of the review one of the qualifiers in this documents is that no firm can be considered for selected if they have a conflict of interest. The review has to be completed in 6 months, then there is results once they receive reports they have 60-day notice for public input, At the end of that 60 days the Department of Mineral Resources will conduct a public hearing, they will make recommendations and changes if any and will present the final recommendation to the North Dakota Industrial Commission. There is no time period expected that the Industrial Commission will work reasonably to address the issue. They can make changes and at that point there's a 6-month window that opens in which the Bureau of University and School Lands can begin to distribute money to owners, and that is outside of phase 2. (32:41)

Chairman Delzer: What is that for your time frame?

Rep. Keiser: That money could be distributed in sept. 2019 then there is an 18-month period in which the Bureau of University and School Lands can distribute the remaining dollars to those properties that are within the review process and decisions have to be made. It doesn't account for decisions and presentations for the public hearings which will add some time. (34:07)

Rep. Martinson: I am interested in the same people as you are interested in, are those contested or uncontested?

Rep. Keiser: They are uncontested.

Rep. Martinson: How long should these people wait to get their land back?

Rep. Keiser: They had to be fair to all parties, it could be as soon as 11 months. This is shorter than the original bill. We did feel as we went through this legislation the process had to be fair. It is fair to think that they could start to distribute dollars if the Bureau of University of School Lands doesn't disagree.

Chairman Delzer: Is this going to resolve this or is it going to cause more litigation?

Rep. Keiser: According to the fiscal note it has a addressed the states liability regardless of the litigation that is ongoing.

Chairman Delzer: the fiscal note that you are talking about assumes everything goes exactly as they say and it is all needed to be paid out?

Rep. Streyle: Couldn't we just put an amendment on this bill and tell the state to get out of here?

Rep. Keiser: That is a separate issue, they can take whatever action they wish to take.

Chairman Delzer: Would the Bureau University School land board have the opportunity to sue the legislature for doing this?

Rep. Keiser: The attorney has to deal with it including defending the actions of the legislature.

Chairman Delzer: I don't know that there is enough money set aside to repay all of this within the timeframe that you are talking about.

Rep. Keiser: From the committee perspective, from the subcommittee perspective, and based on comments of other members of the legislature we are all on the same page. This is the greatest taking that has been identified by any state within the United States, its wrong, it should be corrected, and whatever it takes to correct this wrong is essential to the state of North Dakota. (41:37)

Chairman Delzer: Did we set enough money aside to manage this?

Rep. Martinson: The people spent about 300 thousand dollars and have no more money and there's only one other group that has filed a law suit, would you think we should repay the legal fees?

Rep. Keiser: I think it would be appropriate.

Chairman Delzer: Could we pay some off first and the others paid off later?

Rep. Keiser: That has not been part of our conversation.

Chairman Delzer: Would we have any legal standing to do such a thing?

Rep. Keiser: That was not.

Allen Knudson, Legislative Council: (4327) This does match up to the fiscal note. (see attachment 3) We did work with the federal trust fund lands in putting this together. If it isn't paid out this way, it would kind of be a wash.

Chairman Delzer: The biennium date would be 7/1/ 2019? Since this leaves the reservation out, would this affect the lawsuits that we have discussed or any of those disputes?

Rep. Keier: we left it out because that would be a federal issue. The reservation of those law suits is beyond our capacity in the state of North Dakota.

Rep. Porter: Mr. Smith would have that answer to that question.

Mr. Smith: There are no pending law suits on the reservation. The tribe has claimed the Missouri River bed.

Chairman Delzer: What would this do if this was settled?

Mr. Smith: Tribe is claiming the whole river bed itself. They claim this on the Fort Laramie Tree. The state of North Dakota is claiming the river bed on the reservation based on equal footing doctrine.

Rep. Brandenburg: (49:40) If they were to claim anything on the rights it would go the opposite way of what they claim the land is?

Vice Chairman Kempenich: In 1851 Fort Laramie Tree wasn't put into the record until 1911. In 1868 Fort Laramie Tree did the second one and did uphold some. In 1874 Congress did away with treaties so it gets to be a gray area on this treaty stuff.

Mr. Knutson: If we used the entire amount is set aside.

Chairman Delzer: What about the money that is set aside?

Mr. Knutson: I don't believe it is available, we don't have access to the 18.7 million.

Chairman Delzer: Would we be able to use that the same way you are talking about the same way you are talking about using the other one and pay it back?

Mr. Knutson: I don't believe so because it is in escrow.

Chairman Delzer: Allen have you looked at this?

Allen Knudson: We need to take a look at the timing of the bill.

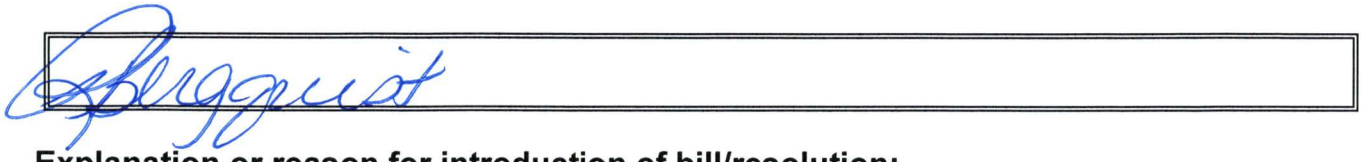
Chairman Delzer: We need to take a look at the estimate of time and the language if we can expect that to happen. We will close the meeting. (attachment 5 submitted no testimony given)

2017 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

SB 2134
4/4/2017
29925

☐ Subcommittee
☐ Conference Committee



Explanation or reason for introduction of bill/resolution:

Relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams

Minutes:

Chairman Delzer: Reviewing amendment 17.0159.06019. It has everything in it from the original bill and then we had to have some kind of appropriation if the study goes forward and the bill is passed as such and the lawsuits are settled up and have to be paid for. Page 5 of the amendment section 2 appropriates 800 thousand out of SIIF for an actual study to be done. Section 3 is to pay some of these off. The time frame would be about 18 months but this appropriated 100 million dollars of the stuff that is set aside in escrow for this. That should get us through the biennium. If it moves so fast that the next legislative assemble can't handle it getting the additional amount needed. And there could be a last resort line of credit of 87 million from the Bank of ND. Leaves the amount for the reservation alone, give an opportunity to go forward. Seems like there's a lot of support for the bill and it does put funding in place. The amendment would also pay the lawyer's fee up to 750 thousand.

3:55 Representative Martinson: Yes, and it's very specific, the lawsuit has to be filed against the state after December 31st of 2011 and before December 31st of 2016 and the lawsuits have to be pending as of February 1st of 2017. It talks about the legal fees and they can only be paid after it's been settled. There are only two parties that have filed suit.

I would make a motion to move the amendment

Representative Meier: Second

Representative Streyle: This will probably work, there has been other legal fees from varies companies that have double leased so there are other expenses that maybe should be looked at. I would rather fund more out of SIIF but this should get us to the next session.

Chairman Delzer: I think that's the whole point, it gets us to the next session and then we will have some idea of extra money we have is SIIF and how we would actually get it. I think there is also some escrow money in the bank and that doesn't have to be appropriated because that is in escrow. I think that's about 60 million.

Representative Nathe: So we are paying legal fees for two lawsuits. In the future we will also be paying legal fees?

Chairman Delzer: It would be up to the legislative assembly, because we are saying yes for this one but next it would be up to the assembly or the courts. Further discussion?

Voice vote, All in Favor, Motion Carries,

Representative Kempenich: There is federal lands involved in this too, I would like the amendment to have the state to withhold all federal land monies the until after the Dakota Access Pipeline law enforcement issue is settled. We are going to end up going to court and if we get half we'll be lucky and I think we should at least make an attempt to recover some of that. If we owe this to the federal we should hold it.

Representative Brandenburg: Second

Chairman Delzer: Allen can we do that? Do we have the leger right to do that if we are saying this should be settled and paid and then say we're not going to pay the feds until they pay for something else?

Allen Knudson, Legislative Council: We would have to check with our legal staff as far as what our options might be.

Representative Streyle: We haven't even sued them yet; I think we should reject this amendment.

Chairman Delzer: I think you could and there is a motion on the table but it hasn't really been stated as to what it is.

Representative Kempenich: We might as well set aside 42 million then and start trying to figure out how we are going to repay the Bank of ND.

Chairman Delzer: I don't have a problem doing it I just don't know that we can.

Representative Streyle: These are totally separate issues we should not muddy up this bill.

Chairman Delzer: All those in favor of amending to try to say that we would withhold federal money until they have paid for the DAPL costs.

Voice vote, All in favor, Motion fails

Representative Martinson: Do Pass as Amended on SB 2134

Representative Streyle: Second

Chairman Delzer: Further discussion?

A Roll Call vote was taken. Yea: 20 Nay: 0 Absent: 1

Motion carried Representative Keiser will carry the bill

9/4/17 DIA
1087

17.0159.06019
Title.09000

Prepared by the Legislative Council staff for
Representative Martinson
April 4, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

In lieu of the amendments adopted by the House as printed on page 1108-1112 of the House Journal, Engrossed Senate Bill No. 2134 is amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to any minerals above the ordinary high-water mark of the historical Missouri riverbed

channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands

having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the

state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public

domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.

2. The funding provided in this section is available for the following:

   a. Repayment of any bonus, lease, and rent collections that are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   b. Repayment of any royalties collected before July 1, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   c. Repayment of any royalties collected after June 30, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   d. Repayment of any bonus, lease, and rent collections that are attributable to the remaining oil and gas mineral tracts requiring repayments.

   e. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. If the commissioner of university and school lands determines additional funding is necessary for any remaining mineral revenue repayments after the calculation under subsection 3:

   a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue repayments.

   b. If additional funding is needed before funds being made available by the sixty-sixth legislative assembly under subdivision a, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands may access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue repayments for the biennium beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - REIMBURSEMENT OF LEGAL EXPENSES.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $750,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of reimbursing legal expenses as provided in subsection 2, for the biennium beginning July 1, 2017, and ending June 30, 2019.

2. The commissioner of university and school lands shall use funds appropriated in subsection 1 to reimburse actual legal and expert fees incurred and requested by any private mineral owner, or the owner's successors in interest, who reserved the mineral rights, through deed or condemnation order from the court, when the United States acquired the owner's property as part of the land acquisitions for Garrison Dam and its reservoir, Lake Sakakawea, and who filed a lawsuit against the state of North Dakota after December 31, 2011, but before December 31, 2016, and which lawsuit was pending as of February 1, 2017, claiming title to reserved mineral rights. The legal and expert fees may not be reimbursed until the final adjudication, settlement, or other resolution of the lawsuit for which they were incurred.

SECTION 5. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

4/9/17 DF
7 of 7

Renumber accordingly

Date: 4/4/2017
Roll Call Vote #: 1

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2134

House Appropriations Committee

☐ Subcommittee

Amendment LC# or Description: **17.0159.06019**

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 **Representative Martinson** Seconded By **Representative Meier**

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer					
Representative Kempenich			Representative Streyle		
Representative: Boehning			Representative Vigesaa		
Representative: Brabandt					
Representative Brandenburg					
Representative Kading			Representative Boe		
Representative Kreidt			Representative Delmore		
Representative Martinson			Representative Holman		
Representative Meier					
Representative Monson					
Representative Nathe					
Representative J. Nelson					
Representative Pollert					
Representative Sanford					
Representative Schatz					
Representative Schmidt					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

MOTION CARRIES

Date: 4/4/2017
Roll Call Vote #: 2

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2134

House Appropriations Committee

☐ Subcommittee

Amendment LC# or Description: **State withhold federal land money until after the DAPL law enforcement issues are settled.**

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 **Representative Kempenich** Seconded By **Representative Brandenburg**

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer					
Representative Kempenich			Representative Streyle		
Representative: Boehning			Representative Vigesaa		
Representative: Brabandt					
Representative Brandenburg					
Representative Kading			Representative Boe		
Representative Kreidt			Representative Delmore		
Representative Martinson			Representative Holman		
Representative Meier					
Representative Monson					
Representative Nathe					
Representative J. Nelson					
Representative Pollert					
Representative Sanford					
Representative Schatz					
Representative Schmidt					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

MOTION FAILS

Date: 4/4/2017
Roll Call Vote #: 3

2017 HOUSE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. SB 2134

House Appropriations 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 **Representative Martinson** Seconded By **Representative Streyle**

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer	X				
Representative Kempenich	X		Representative Streyle	X	
Representative: Boehning	X		Representative Vigesaa	X	
Representative: Brabandt	X				
Representative Brandenburg	X				
Representative Kading	X		Representative Boe	A	
Representative Kreidt	X		Representative Delmore	X	
Representative Martinson	X		Representative Holman	X	
Representative Meier	X				
Representative Monson	X				
Representative Nathe	X				
Representative J. Nelson	X				
Representative Pollert	X				
Representative Sanford	X				
Representative Schatz	X				
Representative Schmidt	X				

Total (Yes) 20 No 0

Absent 1

Floor Assignment **Representative Keiser**

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

MOTION FAILS

REPORT OF STANDING COMMITTEE

SB 2134, as engrossed and amended: Appropriations Committee (Rep. Delzer, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (20 YEAS, 0 NAYS, 1 ABSENT AND NOT VOTING). Engrossed SB 2134, as amended, was placed on the Sixth order on the calendar.

In lieu of the amendments adopted by the House as printed on page 1108-1112 of the House Journal, Engrossed Senate Bill No. 2134 is amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

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

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

to be above the ordinary high-water mark and owned by the riparian landowner.

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

   b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds,

and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.

2. The funding provided in this section is available for the following:

   a. Repayment of any bonus, lease, and rent collections that are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   b. Repayment of any royalties collected before July 1, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   c. Repayment of any royalties collected after June 30, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   d. Repayment of any bonus, lease, and rent collections that are attributable to the remaining oil and gas mineral tracts requiring repayments.

   e. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. If the commissioner of university and school lands determines additional funding is necessary for any remaining mineral revenue repayments after the calculation under subsection 3:

   a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue repayments.

   b. If additional funding is needed before funds being made available by the sixty-sixth legislative assembly under subdivision a, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands may access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue repayments for the biennium beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - REIMBURSEMENT OF LEGAL EXPENSES.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $750,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of reimbursing legal expenses as provided in subsection 2, for the biennium beginning July 1, 2017, and ending June 30, 2019.

2. The commissioner of university and school lands shall use funds appropriated in subsection 1 to reimburse actual legal and expert fees incurred and requested by any private mineral owner, or the owner's successors in interest, who reserved the mineral rights, through deed or condemnation order from the court, when the United States acquired the owner's property as part of the land acquisitions for Garrison Dam and its reservoir, Lake Sakakawea, and who filed a lawsuit against the state of North Dakota after December 31, 2011, but before December 31, 2016, and which lawsuit was pending as of February 1, 2017, claiming title to reserved mineral rights. The legal and expert fees may not be reimbursed until the final adjudication, settlement, or other resolution of the lawsuit for which they were incurred.

SECTION 5. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

2017 CONFERENCE COMMITTEE

SB 2134

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
4/12/2017
Job #30093

☐ Subcommittee
☒ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution: Relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin dams.

Minutes: Conf #1, Attch#1 and #2=Rep. Keiser

Present: Chairwoman Unruh (chair), Sen. Cook, Sen. Oban
Rep. Keiser (chair), Rep. Martinson, Rep. Mock
Chairwoman Unruh: This is basically a hog house. Can the House explain?

Rep. Keiser: I have a graphic for you. (see Attch #1). On page 2, we created a best definition for clarity. We were told the more specific we could be in all of our statements in the document, the better it is for demonstrating our intent. We defined Corps survey, historical river bed channel, Phase II survey, etc. The next section deals with mineral ownership of the land. We were attempting to say that the Corps survey is presumptive. Phase II may or may not be one or more segments that there may be a question on. We set up the process by which we would have not a study but a review. We would require the Dept. of Mineral Resources to set up an RFP after the bill is passed. We gave them 90 days to do that. This graph is not ideal, but gives you a quick overview of the process that we developed in the legislation. It becomes law and then the Dept. of Mineral Resources has 90 days in which to do an RFP, but they can do it in less time. At the conclusion of setting up the RFP and selecting a firm to do the review, we did not want any conflict of interest in the review team. So you cannot have participated in Phases I, Phase II, or the Corps survey in any manner even as consultant or advisor on those. You could not have participated in any of the legal disputes that have been or maybe in the court. They will select that firm for review. The review has a time period of 6 months to be completed. The Dep. Of Mineral Resources may extend that period, if needed, and that is in the new legislation. At the conclusion of the review process, the firm will present the results to the Dept. of Mineral Resources. Then there will be a 60-day window created that the Dept. of Mineral Resources will receive and request public input relative to the findings and results of review. At the end of the 60 days, and with proper notification, the Dept. of Mineral Resources, will conduct a public hearing to get addition input. After that, the Dept. of Mineral Resources will make recommendations to the ND Industrial Commission relative to the findings. The Industrial Commission can accept, nullify, or make recommendations to the review process. There is a 6-month period, after completion of the Industrial Commissions' accepting the final product, the Bureau of School Lands will have a window of 6 months to start to distribute dollars to owner outside of Phase

II. Those properties should not be considered in the review process. There is an additional 18-month period in which the University and School Lands can distribute millions dollars in the process. We have put in specifications as to what can be considered in the review process. It includes all of the data and information available prior to 1953. There are adequate photos and other documents available for the review process to occur. The final elements of the bill are the appropriations. We did make some adjustments. All of these dollars are coming from SIIF Fund. There is an appropriation for $800,000 for the review. $100,000M set or escrow in the University and School Lands to start the process. In addition to that, $87M in line of credit to Band of ND. There is also an appropriation for $750,000 to repay the legal fees of those owners that have attempted to get remedy through the courts. We are trying to shut the policy of the ordinary high water mark. Our committee did review at length the court proceedings and court cases that the Supreme Court used in defining the ordinary high water mark. I think they missed the mark in their review. It was convenient the parts that they took out and made reference to, while ignoring other parts that addressed the ordinary high water mark. They used standards that aren't based on defining land ownership, but more standards based on agriculture elements. This bill does exclude all tribal lands from the review process and from the payment process. There is a liability there, but it is out of the control of ND. It is a federal issue and developed in the federal courts. We set in three places in the bill, that the standard that is to be use in the review and the development and modification is clear and convincing evidence standard for them to make a decision. We are utilizing the information available prior to the back fill of the lake. We did put in a sole remedy for those people those people to have a two-year window to go to district court for remedy. Only district court. As we worked through this, we have done everything possible to address this in an appropriate way. We think we are right. Words do matter. Every word in this documents does mean something. Any questions?

Sen. Cook: I read through the bill. Good work. Where was section 2, 3, and 4. Were they added in IBL?

Rep. Keiser: The original appropriations had the $800,000 in it. We had not identified in the original bill. We defined the liability and it comes around $187M. This is based on the best data that we had available to the committee. That is where the $100M and $87M came from. We feel it is very close to what the potential liability is. We don't have to use it all. We will only draw on the bank line of credit as needed. As you can see at the time table, it is reasonable to think it will take a minimum of 36 months to do this. It is not unreasonable to say that some entities may do it sooner. I have confidence in the state agencies. (12.05) We may be back in session and could have handled it, but there is a chance this may be resolved before next session. We got the monies from SIIF Fund because it was there. It is my belief that we escrowed most of these dollars that were being paid in royalties. But we also did spend some, so we did not have $187M available in the escrow section of SIIF Fund. (13.10)

Chairwoman Unruh: You have great detail in this new bill. Great job with the policy piece. Outlines a great structure to move forward in this process. Sooner than later is important. I have a question on section 3 appropriation of $100M. On page 8, sub-section A – E.; the dates are triggered in there, why? (14.03)

Rep. Keiser: I wish I could tell you. This is language that provided by the industry folks relative to the time table. They said this is appropriate for the claims and the transactions that have occurred. One question we had on House side, was how does the money get transferred? We had a provision in here that the money, once established that it is owed, will be sent to the oil companies, and they are best to know who the loyalties owners are, etc., and they would distribute dollars to appropriate parties.

Chairwoman Unruh: Thank you. I will follow-up with some others with some other question on that section. Any more questions? That brings us to section 4 on page 9. That is the legal fee reimbursement piece. My concerns with the bill, this area is the concern area. I think this is poor precedent for us to set. I did research and the legislature has never done this before for any other pending court cases. It says we will reimburse the legal fees for a particular individual. It is a hard line for where the Senate is at right now. If that was taken out, the rest of bill is great, but this section we can't concur with. (16.05)

Rep. Martinson: We feel pretty strongly that the state stole these people's minerals. How would you feel if someone stole your property and you had to go to court to get it back and you paid as much money in court fees as you got returned? Precedent, heck, we use that to whatever advantage we want. Wither we like it or be don't. For people of the land, they have spent their last dollars that they could afford, on attorney's fees. $300,000, then their attorney said, I will do the work for you and hope we can win. We are the court here. We make the final determination. I know the end game for the Senate. You have HB1199 out there and you have not acted on it. If you don't like what we are doing here you will take this back and kill the bill, and amend everything into HB1199, and that's where we will be. Keep in mind when you do that, that the House has options too, in the House. There are things we can do also, that effect these types of bills. Be careful if that is the end game you are going to play. We are just as solid on the attorney's fees as you are against it. We will sit here as long as you want until you decide that you will do what your intent is and put in on another bill and send it to the House. If that is not the intent, pass out 1199.

Rep. Keiser: I do not think as hard as he is in this. I did not know that the state has never done this before. I was hoping Sen. Armstrong would be here as an attorney to help. I know that courts all the time, award one side or the other side their legal fees. It is based on the egregiousness of the action. The House feel this was so egregious and so wrong that there is no question that you should never had to go to court. Given that we did that, if the willing parties wanted attorney's fees, they would get them in court. We are declaring what the line is and there will be winners and losers. Based on that, shouldn't the state own this issue because we created it. If it was really wrong, we should pay the people for that. That is hard to swallow, but some people are always going to go out and take the risk and try and get satisfaction through the courts. I wish we could have done this four years ago and prevented those court cases from happening. That is the rational. The courts would award these fees.

Chairwoman Unruh: I don't think we are that far apart. I do think that if the courts see this as such an egregious action, that that action can be taken there. I sympathize with what these folks have had to go through, in regards to this issue, but I feel it is not our place to step in on this particular one. (20.24)

Sen. Cook: Representatives, do you believe that the passage of this bill will eliminate all future court cases on this issue?

Rep. Keiser: Absolutely not. The old adage in legislature is follow the money. This is real money. If this is the state's position, and everyone follows it, it makes the court case more clear on either side. (21.11) Will the two pending court cases be dropped because the legislature has spoken? They would not be in the courts had we taken our responsibility four or six years ago.

Chairwoman Unruh: That was an avenue that was not taken as strongly as it should have been. I agree with that. I think the Senate may be agreeable to designating where the fees, if awarded, would come from. Encouraging the courts to consider that when and also the state, and if the cases get settled. Just a direct appropriation in this manner is inappropriate. We are not very far apart here. (22.12)

Rep. Martinson: The big beneficiaries are not the couple of families that filed the law suit. It is big oil. It is a couple of the biggest oil companies in the country. That is where the money is going to go. The individual owners will get their royalties, but 1/6 or 1/5 of a barrel is not much compared to what the oil companies yet. We put aside $187M, and we can't give these folks up to $750,000. That is less than a percent. That is what you are saying.
Chairwoman Unruh: What I am saying is that the policy piece of this bill is a landowner bill, not a big oil bill. This is not a state of North Dakota bill. This is a bill for landowners and this gets them back what was theirs to begin with.
Rep. Martinson: I disagree with that. We had a bill, 1199, that took care of the landowners, and it was changed because of big oil. This is a big oil bill.
Chairwoman Unruh: I think we will keep our comments to the bill in front of us., which is SB 2134. Any more discussion?
Rep. Keiser: I just sent my messenger to get my amendment. I did have amendment to consider. (see Attch#2). I really support this but I want us to come to a solution. We have a problem here. Let's do it fair and right. Those folks who took the initiative to challenge the state. It is hard to challenge the state. So many hurdles to challenge the state. The state has so many resources and attorneys that the private sector does not have. I applaud any citizen who has the guts to stand up to us once in a while. This is such an egregious action. Maybe we should build a bigger dam. Flood more. If this is the right concept, then we can take the mineral rights. That is not the right concept. What we did was wrong. This amendment is on the last section. I offer it for consideration. I am not supporting it, just trying to look at and move forward.
Chairwoman Unruh: We are out of time and we have 4:00 conferences, so we will adjourn for today. (26.52)

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
4/13/2017
Job #30129

☐ Subcommittee
☒ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution:

Minutes: Conf #2

Present: Chairwoman Unruh (chair), Sen. Cook, Sen. Oban
Rep. Keiser (chair), Rep. Martinson, Rep. Mock

Chairwoman Unruh: We are in round 2. I studied this amendment and could not see anything really different. They don't allow for a direct appropriation. When language says "court shall", I am not comfortable.

Rep. Martinson: Do you support in some form the basic concept that these people should have some legal fees paid?

Chairwoman Unruh: I believe that is a decision of the court system will have to make as we go through the process.

Rep. Martinson: So the only way you will support legal fees and expert fees is if the courts allow it?

Chairwoman Unruh: I think that is the appropriate avenue for awarding legal fees. Yes.

Rep. Martinson: There is no room for negotiation? We cannot have risk management do it, or a third party arbitrator do it. The only way that you will accept legal fees is through the court system. I s that correct?

Chairwoman Unruh: I think the words 'no room for negotiation' are a bit strong right now. There are ways we can support the returning of those legal fees. Suggest what funds they might come out of to show that the legislature supports that it happens. Yes, I don't believe it is our responsibility as a legislature but it is the judicial branch to award fees.

Rep. Martinson: I am asking to save time. If there is nothing to negotiate then we should leave.

Chairwoman Unruh: I think I will call on Sen. Cook.

Sen. Cook: I move that the House recede from their amendment and further amend everything except Section 4.

Chairwoman Unruh: We have a motion to remove section 4, which is the legal fees.

Sen. Oban: I second.

Chairwoman Unruh: Any discussion? Call the roll on the motion.

YES 3 NO 3 -0- absent **MOTION FAILED**

Chairwoman Unruh: Our positions are very clear here. I will go take a crack at my version of the language.
Rep. Martinson: Is there some way to craft language that would encourage or say that this is not the intent of legislature to deny fees? It is up to a court.
Chairwoman Unruh: I can take a stab and we can agree and like. Any other discussion? We are adjourned.

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
4/17/2017
Job # 30154

☐ Subcommittee
☒ Conference Committee

Committee Clerk Signature Emmery Keatley for Pam Dever

Explanation or reason for introduction of bill/resolution:

Relating to the ownership of minerals inundated by Pick-Sloan Missouri Basin dams.

Minutes: Attachments: #1-2 = Rep. Keiser

Present: Chairwoman Unruh (chair) Sen. Cook, Sen. Oban
Rep. Keiser (chair), Rep. Martinson, Rep. Mock

Chairman Unruh: Opened the conference committee hearing on SB 2134. Representative Keiser had a couple of technical amendments he would like the committee to consider. I told the committee I would take a look at some more permissive but directive language to address the legal fees issue that we have been discussing. I tried and I did come up with something but it is not something I am comfortable with and I don't think I can come with anything I am comfortable with so I do not have an amendment to share with everyone today.

Representative Keiser: The appropriations committee put the amendments for the appropriations on the bill (See Page 8, Attachment #1). This is a technical amendment (See Attachment #2); it was always the intent of both the natural resources committee and appropriations to make the funding for the pay-off to be available if the process were expedited. What the current wording is that the appropriations put on the bill in Subsection B was confusing on whether or not it was in this biennium or the next one whether they had to take out a letter of credit when the bill became law with the emergency clause or was it the intent to take out the letter of credit at the point which it may or may not be needed in the interim.
The new language in Subsection B clearly states that they have the authority to do it but they are to use the first money first and when necessary to open a letter of credit. This is a technical amendment and puts in statue what our intention was which is that if necessary, the $187M will be available. If it's not necessary, they don't need to open that letter of credit until such point as it is needed.

Representative Keiser: Moved to Adopt Amendment.

Representative Martinson: Seconded the motion.

Senator Cook: We are just amending Section 3 of the bill?

Representative Keiser: Correct.

Committee Discussion: The committee discussed waiting until they had finished with the amendments before taking final action on the bill

Representative Keiser: Withdrew his motion.

Chairman Unruh: I do not have any language and I am not planning to come with any language to try and the legal expenses. I cannot come up with anything that is appropriate to be in here. It is not our role; it is our role to set policy which I think we are doing and I think we are doing a good job of doing but it is not our job to tell the court system who gets legal fees or not. I have received multiple emails from other people who have incurred legal costs, albeit not nearly as extensive as some of the folks who have pushed this issue through the court system but I don't understand why we wouldn't direct the courts to give legal fees back to everyone. When we get that far into this slippery slope, I am uncomfortable with the concept.

Representative Keiser: I support what you are suggesting but the Senate needs to deal with HB 1199 and not hold it as leverage to bring it in at the very end. It doesn't make any sense to work on this bill of HB 1199 is still alive

Representative Martinson: I hope you understand that we are not interested in meeting anymore until HB 1199 is resolved.

Chairman Unruh: Closed the conference committee meeting on SB 2134.

2017 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee
Fort Lincoln Room, State Capitol

SB 2134
4/18/2017
Job #30188

☐ Subcommittee
☒ Conference Committee

Committee Clerk Signature Pam Dever

Explanation or reason for introduction of bill/resolution:

Minutes: Conf #4, Attch#1=Chairwoman Unruh

Present: Chairwoman Unruh (chair), Sen. Cook, Sen. Oban
Rep. Keiser (chair), Rep.D Anderson, Rep Mock

Chairwoman Unruh: Open SB 2134. Welcome Rep. Anderson. I passed out the amendments I worked on. (see Attch#1) Page 5, section 3 are where the changes start. Went through the amendment to committee. Sub 2 had an A, B, C, D, E subsections to it. LC thought that may cause problems if we missed a piece of royalty collections. We consolidated the language in there to make it all encompassing and kept in though section C which is the catch all for that section. These were clarification changes. We changed the line of credit language as per Rep. Keiser request. All was changed to what the House wanted except I removed section 4 on the attorney fees. Any questions? (2.05)

Sen. Cook: I move amendment 17.0159.06025.

Sen. Oban: I second.

Chairwoman Unruh: Any committee discussion? Please call the roll on the amendment.

YES 5 NO 1 -0- absent. **That passes.**

The House receded and amendment passed.

Chairwoman Unruh: Our work is done. (2.51)

Prepared by the Legislative Council staff for
Senator Unruh
April 17, 2017

CK 4/18/17
1 of 6

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

That the House recede from its amendments as printed on pages 1268-1273 of the Senate Journal and pages 1462-1467 of the House Journal and that Engrossed Senate Bill No. 2134 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections 33 and 34, Township 153 North, range 102 West, which is the approximate location of river mile marker 1,565, and from the South Dakota border to river mile marker 1,303.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed

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channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections 33 and 34, Township 153 North, range 102 West. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not

merely intermittent grazing or location of cattle, generally must be considered above the ordinary high water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

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b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

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61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.

2. The funding provided in this section is available for the following:

   a. Repayment of any lease, bonus, rents, and royalty collections attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey, as required in subsection 1 of section 61-33.1-04.

   b. Repayment of any lease, bonus, rents, and royalty collections attributable to the remaining oil and gas mineral tracts, as required in subsection 2 of section 61-33.1-04.

   c. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments under this Act.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. As soon as a repayment amount for a known recipient is calculated but after the expenditure of the $100,000,000 in subsection 1:

   a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue or other repayments.

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b. If the $100,000,000 is expended before the repayment of all amounts calculated for known recipients and before additional funds are made available by the sixty-sixth legislative assembly, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands shall access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue and other repayments under this Act for the biennium beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

SECTION 5. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

Date: 4/12 4/13
Roll Call Vote #: 1

2017 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. SB 2134 as (re) engrossed

Senate Energy Natural Resources Committee

Action Taken
- ☐ **SENATE accede to House Amendments**
- ☐ **SENATE accede to House Amendments and further amend**
- ☐ **HOUSE recede from House amendments**
- ☒ **HOUSE recede from House amendments and amend as follows**
  (Take out section 4 as amendment)
- ☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Sen. Cook Seconded by: Sen. Oban

Senators	4-12	4-13		Yes	No	Representatives	4-12	4-13		Yes	No
Chairwoman Unruh (chair)	X	X		X		Rep. Keiser (chair)	X	X			X
Sen. Cook	X	X		X		Rep. Martinson	X	X			X
Sen. Oban	X	X		X		Rep. Mock	X	X			X
Total Senate Vote						Total Rep. Vote					

Vote Count Yes: 3 No 3 Absent: -0-

Senate Carrier _____ House Carrier _____

LC Number _____ . _____ of amendment

LC Number _____ . _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

FAILED

Date: 4/18
Roll Call Vote #: 1

2017 SENATE CONFERENCE COMMITTEE
ROLL CALL VOTES

BILL/RESOLUTION NO. as (re) engrossed

Senate Energy Natural Resources Committee

Action Taken
- ☐ **SENATE accede to House Amendments**
- ☐ **SENATE accede to House Amendments and further amend**
- ☐ **HOUSE recede from House amendments**
- ☒ **HOUSE recede from House amendments and amend as follows**
- ☐ **Unable to agree**, recommends that the committee be discharged and a new committee be appointed

Motion Made by: Sen. Cook Seconded by: Sen. Oban

Senators	4/18			Yes	No	Representatives	4/18			Yes	No
Chairwoman Unruh (chair)	✓			✓		Rep. Keiser (chair)	✓				✓
Sen. Cook	✓			✓		Rep. Anderson	✓			✓	
Sen. Oban	✓			✓		Rep. Mock	✓			✓	
Total Senate Vote						Total Rep. Vote					

Vote Count Yes: 5 No: 1 Absent: -0-

Senate Carrier Sen. Unruh House Carrier Rep. Keiser

LC Number 17.0159 . 06025 of amendment

LC Number _____ . _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Insert LC: 17.0159.06025
Senate Carrier: Unruh
House Carrier: Keiser

REPORT OF CONFERENCE COMMITTEE

SB 2134, as engrossed: Your conference committee (Sens. Unruh, Cook, Oban and Reps. Keiser, D. Anderson, Mock) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 1268-1273, adopt amendments as follows, and place SB 2134 on the Seventh order:

That the House recede from its amendments as printed on pages 1268-1273 of the Senate Journal and pages 1462-1467 of the House Journal and that Engrossed Senate Bill No. 2134 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections 33 and 34, Township 153 North, range 102 West, which is the approximate location of river mile marker 1,565, and from the South Dakota border to river mile marker 1,303.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

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

Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections 33 and 34, Township 153 North, range 102 West. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high water mark; and

   e. Subsection 3 of section 61-33-01 and section 47-06-05, which provide all accretions are presumed to be above the ordinary high water mark and are not sovereign lands. Accreted lands may be determined to be within the ordinary high water mark of the historical Missouri riverbed channel based on clear and convincing evidence.

Areas of low-lying and flat lands where the ordinary high water mark may be impracticable to determine due to inconclusive aerial photography or inconclusive vegetation analysis must be presumed to be above the ordinary high water mark and owned by the riparian landowner.

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

   b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated,

the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.

2. The funding provided in this section is available for the following:

   a. Repayment of any lease, bonus, rents, and royalty collections attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey, as required in subsection 1 of section 61-33.1-04.

   b. Repayment of any lease, bonus, rents, and royalty collections attributable to the remaining oil and gas mineral tracts, as required in subsection 2 of section 61-33.1-04.

   c. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments under this Act.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. As soon as a repayment amount for a known recipient is calculated but after the expenditure of the $100,000,000 in subsection 1:

   a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue or other repayments.

   b. If the $100,000,000 is expended before the repayment of all amounts calculated for known recipients and before additional funds are made available by the sixty-sixth legislative assembly, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands shall access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue and other repayments under this Act for the biennium beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

SECTION 5. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

Engrossed SB 2134 was placed on the Seventh order of business on the calendar.

2017 TESTIMONY

SB 2134

SB 2134
1-12-17
Attch #1

SB 2134 TESTIMONY - SENATE NATURAL RESOURCES - 1/12/17

Chairman Unruh and members of the Senate Natural Resources Committee, my name is Kelly Armstrong, Senator, District 36. I am here today in support of Senate Bill 2134. This bill seeks to define the high water mark of the little Missouri river under lakes Sakajawea and Lake Oahe as it relates to mineral ownership. Senate Bill 2134 defines the high water mark of the Missouri River and makes it clear that the State only has claim to those minerals under the river channel and not under the lake. There are over 350 wells currently drilled under the lake. Mineral owners are frustrated. Oil Companies are frustrated. Policy makers are frustrated. There are millions of dollars being held in suspense over this issue. There is over $100 million dollars set aside in state funds because of this issue. Mineral owners and companies have spent hundreds of thousands of dollars on legal fees arguing these issues. This issue has been in dispute and/or litigation for at least the last 10 years. And the truth is no one is any closer to a resolution than we were a decade ago. In fact, last fall the ND Land Board voted that action was needed by the legislature to help resolve this issue.

SB 2134 uses the BLM survey which was done on the ground in preparation for flooding lake Sakajawea to define the high water mark of the Missouri river. Essentially, the bill freezes the river channel in time upon the flooding of the lake. The state will own the minerals inside of that high water mark and private mineral owners will own the minerals outside of that high water mark. In 2009 the state conducted a survey of the original high water mark of the Missouri river using photographs and other techniques. The state and the Federal governments surveys are not the same, resulting in constant dispute placing mineral owners and operators in the middle of a government dispute. The BLM survey is the appropriate survey to use to determine the historical high water make of the Missouri river as it was the survey conducted as part of the Pick Slone Act in preparation for flooding the lake.

Over the last decade the State Land Department has been aggressively claiming minerals under the river in and around lake Sakajawea. Further, in recent Court filings the State has claimed that they may have a claim to all the minerals under the high water mark of Lake Sakajawea which would result in a multi-billion dollar taking. To say that these events have concerned mineral owners, oil operators, legislators, and anyone who cares about private property rights would be a massive understatement. Legislation is needed to clearly define what North Dakota's Policy is regarding mineral ownership and legislation is needed to define the ordinary high water mark of the Missouri river under the lake. These issues can longer be left to the courts, there simply is no satisfactory resolution to be found there.

Thank you,

Kelly Armstrong
Senator, District 36

SB 2134
1-12-17
Ron Ness
Attch #2
pg 1

NORTH DAKOTA PETROLEUM COUNCIL
West Broadway, Ste. 200 | P.O. Box 1395 | Bismarck, ND 58501-1395
701.223.6380 | ndpc@ndoil.org | www.NDOil.org

Senate Bill 2134

Testimony of Ron Ness

Senate Energy and Natural Resources Committee

January 12, 2017

Chairman Unruh and members of the Senate Natural Resources Committee, my name is Ron Ness, president of the North Dakota Petroleum Council. Last year the North Dakota Petroleum Council represented more than 500 companies in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I appear before you today in support of Senate Bill 2134.

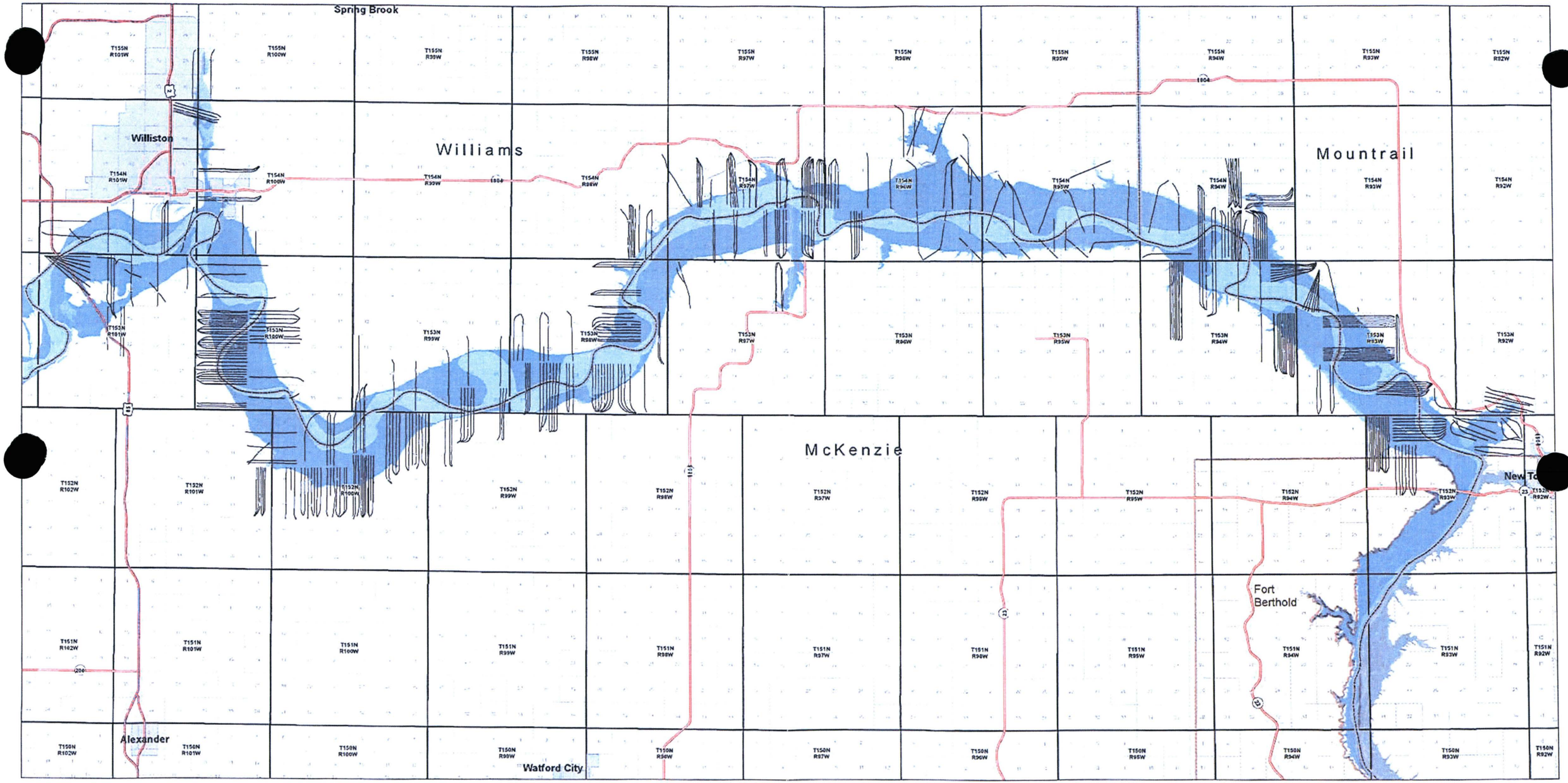
Senate Bill 2134 is a necessary clarification of mineral ownership under Lake Sakakawea and the high-water mark of the Missouri River essentially from the highway 85 bridge to the Garrison Dam. The area comprising the Fort Berthold Indian Reservation is a continuing dispute between the State of North Dakota and the Three Affiliated Tribes over the ownership of the Missouri riverbed, that issue will likely need to be resolved in separate agreement or federal court. This bill as drafted does not address the mineral ownership west of highway 85 to the Montana border, that area has other unique issues that should be addressed separately from this bill. Over the past year, there have been numerous court filings and pleadings where the state indicated they were seeking claim to the lakebed not just the river and stated, "the lake and the river are indistinguishable." However, the State Land Board in their November meeting voted unanimously to clarify they were not seeking to change their policy through court pleadings and the Governor suggested legislative policy was the best option to clarify mineral ownership. There have been tens of thousands of acres leased for millions and millions of dollars, 350 Bakken wells drilled many additional wells to be drilled in this area which will pay billions in royalties. Oil operators under this bill are seeking to clarify who they must pay for the royalty interests, many companies have leased both parties to

ensure they have the proper party leased, some have been paid royalties while millions of dollars are held in suspense due to these title issues. The private mineral owners have owned these lands for decades, the operators have leased in good faith and recent court filings by the State of North Dakota have put all the parties in uncertain position.

Senate Bill 2134 is an important piece of legislation. Please see the attached minutes from the March 9, 2010 Administrative Rules Committee. The minutes indicate, Charles Carvel, a former Assistant Attorney General who was the attorney for the Water Commission for more than 30 years stated that the State does not own the lake, rather the federal government does. "Mr. Carvel said, with regard to the lands of Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control." Senate Bill 2134 confirms this long-standing principle of ownership which leasing decisions were based upon for decades.

Craig Smith, NDPC Executive Committee Member and Past Chairman will provide the specific details on the bill on behalf of industry.

We urge a Do Pass on SB 2134. I would be happy to answer any questions.



Pg #1 1-12-17 SB 2134 Attch #3

1-12-17 SB 2134 From Ron Ness Atta #3 Pg 2

Fri Ron Ness

SB 2134
1-12-17
attch #3A

pg 1

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, March 9, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 10:00 a.m.

Members present: Senators Jerry Klein, John M. Andrist, Tom Fischer, Joan Heckaman, Tracy Potter; Representatives Randy Boehning, Chuck Damschen, Duane DeKrey, Jim Kasper, Kim Koppelman, George J. Keiser, Joe Kroeber, Jon Nelson, Blair Thoreson, Francis J. Wald, Lonny Winrich, Dwight Wrangham

Members absent: Senator Layton W. Freborg; Representatives Wesley R. Belter, Stacey Dahl, Mary Ekstrom

Others present: See Appendix A

It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

STATE WATER COMMISSION

Chairman Klein called on Mr. Dale Frink, State Engineer, State Water Commission, for comments on State Water Commission rules carried over from the previous committee meeting. Mr. Frink said the rules submitted for Administrative Rules Committee consideration relate to management of sovereign lands but do not make changes in law or rules determining what is included in sovereign lands. He said in 1989 the Legislative Assembly transferred sovereign lands management from the Land Department to the State Engineer. He said a 2005 Attorney General opinion required development of a comprehensive plan for management of sovereign lands. He said the required comprehensive plan has been completed. He said the existence of the comprehensive plan has been beneficial because issues and uses relating to sovereign lands have grown in recent years. He said some rules changes were needed to conform preexisting rules to the comprehensive plan. He said that is the reason the rules were adopted.

Mr. Frink said the rules adopted cover issues relating to uses of sovereign lands, but he understands the concern of the committee is with obtaining information on what is included in sovereign lands and how the phrase "navigable waters" is defined. He said Mr. Charles Carvell, Director, Natural Resources and Indian Affairs Division, Attorney General's office, is the state's most experienced legal adviser on these issues, and he asked Mr. Carvell to provide information to the committee on these issues.

Representative Keiser asked why these changes were made through rules instead of legislation. Mr. Frink said the comprehensive plan as developed and implemented required adjustment of existing rules of the State Water Commission. Representative Keiser asked why sovereign lands are defined in rules instead of legislation. Mr. Frink said the definition of sovereign lands in the rules is identical to a definition in statute. He said the rules do not make any change in what is included within the coverage of the term sovereign lands.

Mr. Carvell provided testimony (Appendix B) based on a written outline distributed to the committee. He traced the history of the sovereign lands doctrine.

In response to a question from Representative Keiser, Mr. Carvell said constitutionally it is probably not possible for the state to change the status of sovereign lands because the waters that were navigable at statehood are the basis of the state's sovereign lands.

Senator Klein asked whether the federal government under Section 404 of the Clean Water Act is looking for ways to expand its jurisdiction by expanding what are considered navigable waters for Clean Water Act purposes. Mr. Carvell said that appears to be true.

In response to a question from Representative Kasper, Mr. Carvell said with regard to water and lands at Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control.

Representative Koppelman said as he understands the policy, navigable waters at statehood are certain defined waters but water level changes can change what land is included in sovereign lands of the state. Mr. Carvell said that is correct.

Senator Heckaman said at Devils Lake agricultural lands have been inundated and former owners are continuing to pay minimal property taxes on the property. Mr. Carvell said he does not see any reason why those owners should pay property taxes. He said the state owns the land under sovereign lands coverage, and those owners will be restored to ownership when the water recedes.

Mr. Frink said it is a local decision on property taxes on inundated lands. He said owners of those

Craig Smith SB 2134 1-12-17

Attc #4 pg1

SENATE BILL NO. 2134—Lakebed Minerals

Senate Natural Resources Committee

Testimony of Craig C. Smith

January 12, 2017

Chairman Unruh and members of the Senate Natural Resources Committee, my name is Craig Smith. I am an attorney with the Crowley Fleck law firm in Bismarck practicing oil and gas law for the past 28 years. I'm appearing today on behalf of the North Dakota Petroleum Council.

This Bill involves incredibly important and very complex issues affecting thousands of mineral owners, the State of North Dakota, oil and gas companies and others. Given the magnitude we believe it might be helpful if we first presented a quick overview of the general historical and legal principles relating to the complex ownership issues created by navigable rivers relevant to this Bill.

BACKGROUND.

Under the Equal Footing Doctrine, when western states entered the Union, they acquired title to the bed of navigable rivers and lakes up to the Ordinary High Water Mark ("OHWM") including minerals. Thus, when North Dakota entered the Union, it acquired title to the bed of the Missouri River as it existed upon the date of Statehood. (The State's riverbed minerals are considered "Sovereign Lands" administered by the State Land Board and are subject to different requirements than the Common School Trust Lands). After Statehood, a State could elect to take title to either the low or high water mark. You may recall a few years ago there was litigation as to whether the State of North Dakota had elected to own to the low water mark or the high water mark. This issue was resolved by the North Dakota Supreme Court in *Reep v. State*, when our Supreme Court held the State's title extends to the OHWM.

Briefly, what is the Ordinary High Water Mark? Judicial case law, including North Dakota cases, often define the OHWM as "**The upper limit of the bed of the water; which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes**". While other factors and guidelines may used in the determination, this is the basic definition of OHWM.

Hand out--Exhibit 1 is an example of an original government survey prepared in 1896 for Township 153, Range 98, which identifies the Missouri River channel as of that year, and, of course, the State's riverbed ownership at that time. However, this original government survey does not reflect or establish the ownership boundaries of current river conditions.

Large western rivers such as the Missouri often meandered significant distances from their original boundaries. This river movement is typically caused by the hydraulic effects of erosion and accretion. The Doctrine of Erosion is the loss of soil along a river bank caused by current eroding the bank. The Doctrine of Accretion is the opposite, it is the deposit of soil along the bank of a

river as the river shifts away from a bank. When a navigable river shifts from its original banks, the general rule of law is (1) the State's ownership title to the surface and minerals of the riverbed moves with the river. (2) Landowners whose land was eroded away by the new channel lose title to the surface and minerals, and (3) riparian landowners who gain land through accretion as the river moved away from their bank gain title to the accreted surface and minerals.

Exhibits 1 and 2:

To demonstrate these principles, refer to Exhibits 1 and 2. On Exhibit 1 the blue rectangle shows Sections 23 and 26. This is the river location in 1896. Now refer to Exhibit 2, which is based on the Corps of Engineers survey 60 years later for the same lands. Note the historic river channel located in Section 26 no longer exists. Through erosion the river channel shifted nearly a mile north into Section 23. And looking at Section 24, note that on the 1896 survey the river did not even enter Section 24, but in 1952 it flowed directly through the NW4. In other words, in 1896 the State did not own any sovereign minerals in Section 24, but in 1952, the State owned sovereign minerals in most of the NW/4 where the new channel shifted. This is just one example of many Missouri River channel changes, but I hope this provides a glimpse into the complex ownership challenges river movement can create.

SENATE BILL 2134 PROVISIONS. Turning to Senate Bill 2134, it basically covers two separate issues. First, with respect to bed of Lake Sakakawea, since the construction of Garrison Dam, and consistent with federal law, the State until recent comments in a litigation case has only claimed title to the historical Missouri River channel as the Missouri River existed at the time of construction of the Dam in the 1950s, which consists of approximately 30,000 riverbed acres. The remaining 463,000 acres of land needed for the Garrison Project was acquired by the federal government by purchase or eminent domain pursuant to the Flood Control Act of 1944 and Takings Act of 1949. From the Yellowstone-Missouri River confluence to the northern boundary of the Fort Berthold Indian Reservation, the Corps generally (though not always) acquired only the surface estate; the oil and gas rights were reserved by the landowners who sacrificed their land for the project. Nor did the Corps acquire minerals that were severed prior to it acquiring the surface.

On the Fort Berthold Indian Reservation, the United States acquired 156,000 acres from tribal and allottee owners under the Takings Act of 1949. The Takings Act took both the surface and minerals from Tribal members. However, in 1984, Congress restored the oil and gas taken from Tribal members back to the Three Affiliated Tribes. *See* Pub. L. 81-437, 63 Stat. 1026 (1949) and Pub. L. 98-602, 98 Stat. 3152 (1984)

As to the bed of Lake Sakakawea, and for both on and off the Fort Berthold Indian Reservation, this Bill confirms into law the State's long standing policy that the State did not acquire any minerals above the OHWM of the historical Missouri River channel. However, a caveat here, insofar as it relates to the minerals underlying the historical riverbed channel within the Fort

Berthold Indian Reservation. The Committee should be aware ownership of the riverbed itself on the Reservation is currently in question. Both the Tribe and the State have leased the riverbed channel lying within the Reservation, and although there is no litigation pending, I believe both parties have notified the other in writing of their competing claims. The State's title, if proven, would be based on the Equal Footing Doctrine and this Bill recognizes if the State's claim under the Equal Footing Doctrine prevailed, it would own the riverbed. However, if the Tribe's claim under the Fort Laramie Treaty prevailed, then the State's claim under Equal Footing Doctrine would be preempted or void. In sum, this Bill does not resolve the State/Tribal disagreement. Ultimately this is a federal question that can only be resolved by a political agreement between the two sovereign governments or a final federal judicial decision.

Defining the OHWM boundary. The second matter the Bill addresses is to define the boundaries and location of the Ordinary High Water Mark of the "historical riverbed channel". To do so the Bill adopts the survey conducted by the US Army Corps of Engineers in connection with the amount of land acquired by the Corps for Lake Sakakawea

What is the Corps survey?

Because the Missouri River boundaries had changed (due to river movement caused by erosion/accretion) since the time of the original government survey, a new survey was necessary to determine the exact riparian landowner acreages for land compensation purposes. The Corps survey was a combination of on the ground survey work, review of aerial photography, and on the ground land appraisal investigations.

When the Bakken play was first developing, the Bureau of Land Management ("BLM") initially leased its minerals based on the original government survey. However, the BLM Cadastral Survey office realized the original government survey did not depict the actual river boundaries that existed at the time of Garrison Dam. Moving quickly by federal government standards, a few years' later BLM and BLM Cadastral Survey offices elected to adopt the Corps survey as the best evidence available to establish the historical Missouri River channel for oil and gas leasing purposes.

Exhibit 3- Example of Corps Segment Map. Describe map.

State Survey. The State also did its own investigation of the historical Missouri River channel under Lake Sakakawea. The State's Phase 2 delineation of the historical river channel was based primarily on a review of a series of aerial photography. Obviously, since the historical river channel is now submerged, the State contractors did not have the benefit or opportunity of conducting any on the ground actual surveys or investigation as did the Corps.

With the BLM adopting the Corps survey, conflicts have since arisen between federal lease ownership and state leases issued pursuant to the Phase 2 delineation, resulting in overlapping leases and with both the State and the USA demanding royalty payments for leases covering the same lands. Neither the State nor the USA have sought to litigate the matter in federal court and with the government entities asserting sovereign immunity, there are few judicial options available

to private parties to resolve the conflicting leases (i.e. cases attempting to "interplead" both the State and United States have been dismissed on sovereign immunity grounds). After over eight years, the inability to obtain a judicial remedy to resolve the dispute between the State and Federal surveys is of great long-term concern to NDPC, and with no judicial resolution on the horizon we have turned to this body for other possible solutions.

Differences in State and Federal Surveys: Exhibits 4 and 5.

In areas where the Missouri River channel did not move significantly from date of original government survey and the Corps survey, the State and Corps surveys are substantially the same. However, where there exists significant river movement, there can be fairly large differences between the two surveys with the Corps survey typically allocating accretions to riparian private owners and the State survey allocating accretions to the State claiming they lie within the OHWM.

Exhibit 4—example of appraisal notes with overlay on Corps and State survey.

Exhibit 5: This is an example of overlapping state and federal survey issue based on a recent BLM Supplemental Plat. The Blue area is the historical river channel based on the 1950s Corps survey. The orange/yellow is where the river was located at the time of original government survey. The river subsequently moved north and east, eroding lands to the north and depositing accretions to the south. In this example, the United States owns oil and gas minerals in Lot 4 of Section 26—with Lot 4 never being patented out. Based on the Corps survey, the United States claims accretions to Lot 4 identified in green. However, the State in its Phase 2 delineation (shown in black hash marks) claims all of the old river channel plus the new channel (and all lands in between) as within the OHWM of the new channel while completely overlapping the federal survey/lease. Since both the State and BLM require payment of royalties on overlapping lease acreages, spacing units such as this are more difficult to develop economically until such time as the ownership issues are resolved. The same can be said for areas where the State survey significantly overlaps privately owned leased lands.

In closing, NDPC urges the Legislature to consider adopting the Corps survey of the historical Missouri River bed channel for the following reasons:

1. The survey included on the ground survey work, not only review of aerial photography;
2. The instructions for the survey was to establish the ordinary high water mark as the river then existed, thus, the Corps survey to the high water mark and not the low water mark is consistent with North Dakota judicial precedent;
3. The Corps conducted surface inspections for land use and appraisal purposes in determining compensation for lands taken or purchased.
4. The Corps had no incentive to claim lands below the ordinary high water mark, as doing so would have cost the federal government additional land acquisition expense,
5. As to State lands acquired by the Corps, the State did not dispute the Corps surveys at that time, and

6. Adopting the Corps survey would eliminate the conflict between the USA and the State as to overlapping leases, an issue that to date appears to not have any judicial remedy available to resolve the dispute.

We urge a Do Pass on SB 2134. I would be happy to answer any questions

1-12-17 SB 2134 #4 p4

SENATE BILL NO. 2134—Lakebed Minerals

Senate Natural Resources

Exhibits to Testimony of Craig C. Smith

January 12, 2017

EXHIBIT 1 – Original Government Survey Township 153 North, Range 98 West

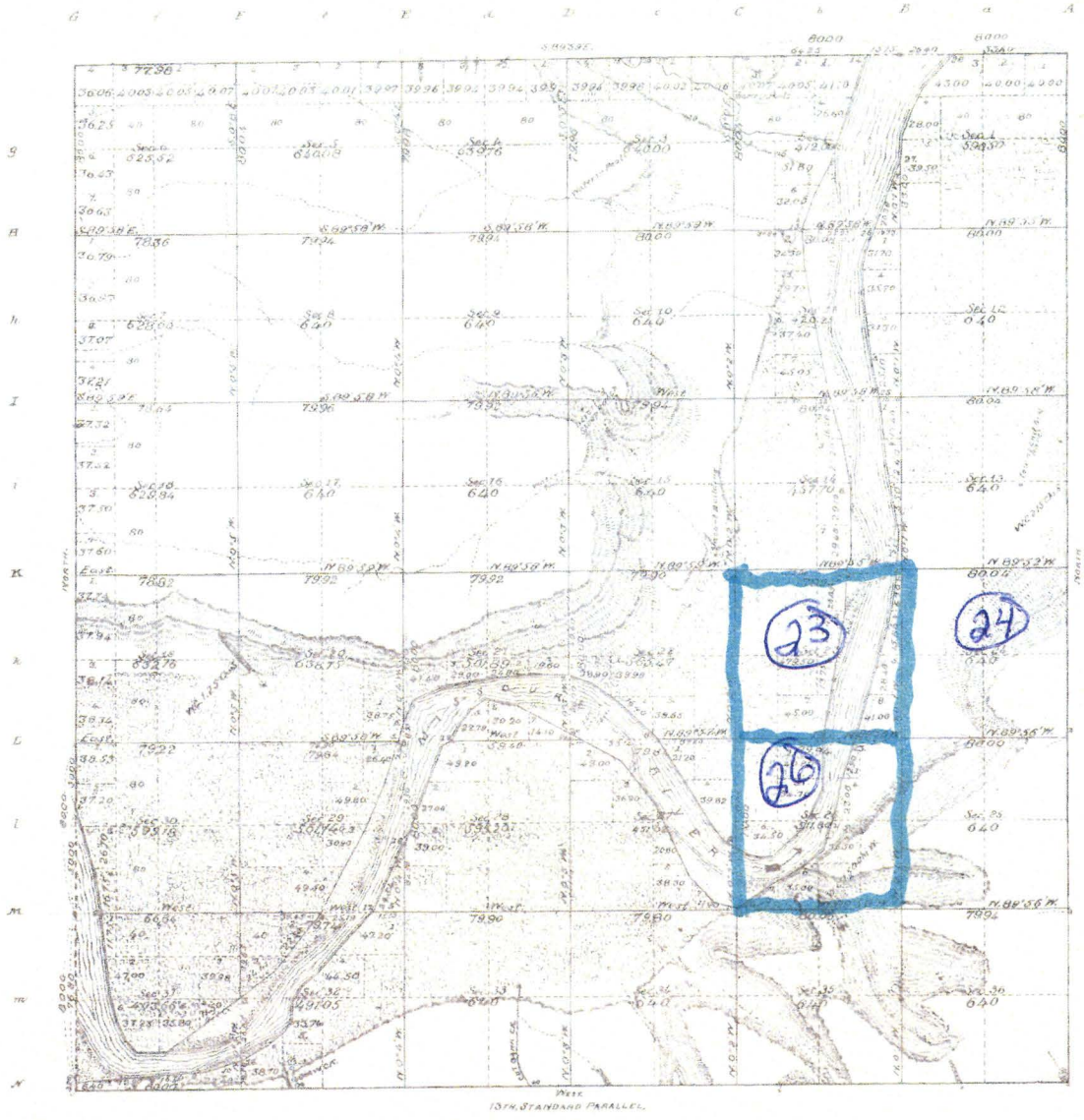
EXHIBIT 2- BLM Supplemental Plat Township 153 North, Range 98 West

EXHIBIT 3- U.S. ARMY CORPS OF ENGINEERS SEGMENT MAP "W"

EXHIBIT 4- BLM/Corps of Engineers Appraisal Overlay Map

EXHIBIBT 5- BLM Supplemental Plat-Overlapping State and Federal Surveys

Township No 153 North, Range No 98 West of the 5th Principal Meridian, North Dakota.



Latitude 48°01'N.
Longitude 103°11'W.
Mean mag dec. 11°12'E.

Area in acres: Public Land 21014.67 Water Surface 1974.69 Total Area 22988.96 Acres.

Surveys Designated	By Whom Surveyed	Contract No.	Contract Date	Amount of Surveys No.	Ch.	Lks.	When Surveyed
Subdivisions	George K. Hare	42	March 24th 1896	58	72	94	Aug 26th Sept 8th 1896
Meanders				22	73	55	
R.R. & Wagon Roads				17	77	86	June
		A	June 8th 1891	6	60	00	October

Scale: 80 Chains to an Inch.

The above Plat of Township No 153 North, of Range No 98 West of the Fifth Principal Meridian, North Dakota, is strictly conformable to the field notes of the survey thereof on file in this Office, which have been examined and approved.

U.S. Surveyor Generals Office

Andrew Blewett

EXHIBIT

tabbies

ND #4 pg7

SB 2134

1-12-17

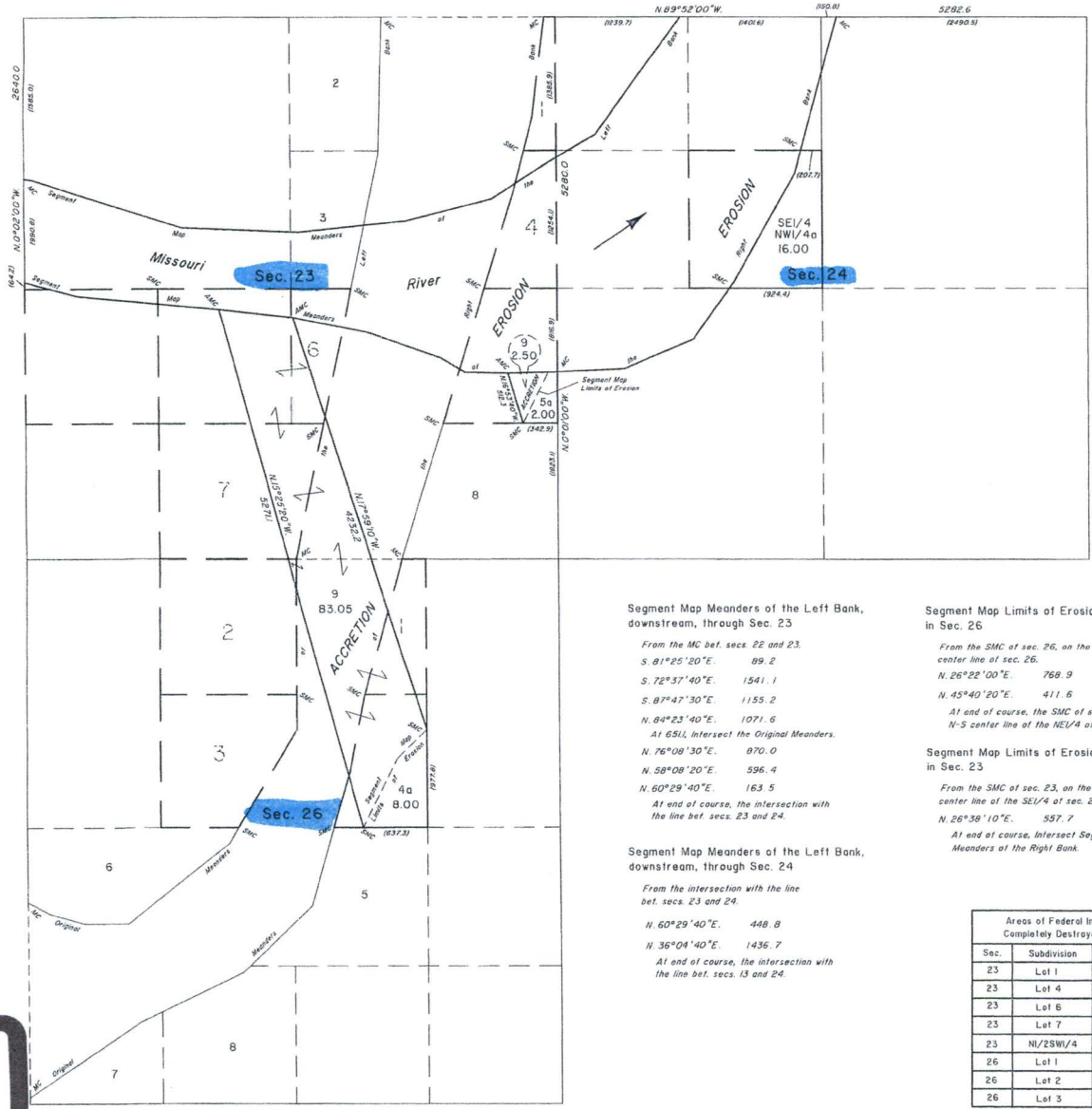
http://survey.swc.nd.gov/glos/153098/nd... g[1/10/2017 9:52:31 AM]

ORIGINAL

TOWNSHIP 153 NORTH, RANGE 98 WEST, OF THE FIFTH PRINCIPAL MERIDIAN, NORTH DAKOTA

SUPPLEMENTAL PLAT

Sheet 2 of 4



True Meridian

Segment Map Meanders of the Left Bank, downstream, through Sec. 23

From the MC bet. secs. 22 and 23.

S. 81°25'20"E. 89.2

S. 72°37'40"E. 1541.1

S. 87°47'30"E. 1155.2

N. 84°23'40"E. 1071.6

At 651.1, intersect the Original Meanders.

N. 76°08'30"E. 870.0

N. 58°08'20"E. 596.4

N. 60°29'40"E. 163.5

At end of course, the intersection with the line bet. secs. 23 and 24.

Segment Map Meanders of the Left Bank, downstream, through Sec. 24

From the intersection with the line bet. secs. 23 and 24.

N. 60°29'40"E. 448.8

N. 36°04'40"E. 1436.7

At end of course, the intersection with the line bet. secs. 13 and 24.

Segment Map Limits of Erosion, in Sec. 26

From the SMC of sec. 26, on the E-W center line of sec. 26.

N. 26°22'00"E. 768.9

N. 45°40'20"E. 411.6

At end of course, the SMC of sec. 26, on the N-S center line of the NE1/4 of sec. 26.

Segment Map Limits of Erosion, in Sec. 23

From the SMC of sec. 23, on the E-W center line of the SE1/4 of sec. 23.

N. 26°38'10"E. 557.7

At end of course, Intersect Segment Map Meanders of the Right Bank.

Segment Map Meanders of the Right Bank, downstream, through Sec. 23

From the intersection with the line bet. secs. 22 and 23.

S. 75°11'50"E. 536.2

S. 84°36'00"E. 1410.3

At end of course, the AMC of sec. 26, on a line dividing the accretion in front of lots 4 and 5 of sec. 26.

Segment Map Meanders of the Right Bank, downstream, through Sec. 26

From the AMC of sec. 26, on a line dividing the accretion in front of lots 4 and 5 of sec. 26.

S. 83°47'50"E. 734.9

At end of course, the AMC of sec. 26, on a line dividing the accretion in front of lot 4 and the SE1/4NE1/4 of sec. 26.

Segment Map Meanders of the Right Bank, downstream, through Sec. 23

From the AMC of sec. 26, on a line dividing the accretion in front of lot 4 and the SE1/4NE1/4 of sec. 26.

S. 78°58'10"E. 767.5

S. 70°26'00"E. 752.7

S. 59°38'30"E. 285.1

S. 88°40'00"E. 421.4

At end of course, the AMC of sec. 23, on a line dividing the accretion in front of lots 5 and 8 of sec. 23.

N. 88°48'00"E. 491.4

At 399.0, intersect Segment Map Limits of Erosion.

At end of course, the MC of secs. 23 and 24.

Segment Map Meanders of the Right Bank, downstream, through Sec. 24

From the MC of secs. 23 and 24.

N. 87°19'30"E. 673.8

N. 66°57'10"E. 738.3

N. 36°02'50"E. 703.2

At 609.9, the SMC of sec. 24, on the E-W center line of sec. 24.

N. 30°23'40"E. 1192.5

N. 15°10'40"E. 1589.3

At 2216, the SMC of sec. 24, on the E-W center line of the NW1/4 of sec. 24.

At end of course, the MC of secs. 13 and 24.

Areas of Federal Interest Lands Completely Destroyed By Erosion

Sec.	Subdivision	Original Acreage
23	Lot 1	6.30
23	Lot 4	15.80
23	Lot 6	13.75
23	Lot 7	45.00
23	N1/2SW1/4	80.00
26	Lot 1	12.90
26	Lot 2	40.80
26	Lot 3	34.70

Acreage Table for Original Subdivisions

Sec.	Subdivision	Original Acreage	Remaining Land "a"	Eroded Land "b"
23	Lot 5	28.40	2.00	26.40
24	SE1/4NW1/4	40.00	16.00	24.00
26	Lot 4	23.00	8.00	15.00

800 400 0 800 1600 2400

Scale in Feet

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Billings, Montana December 18, 2013

This plat, showing amended lottings, is based upon the official records and, having been correctly prepared in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Joshua F. Alexander

Chief Cadastral Surveyor for North Dakota
Acting

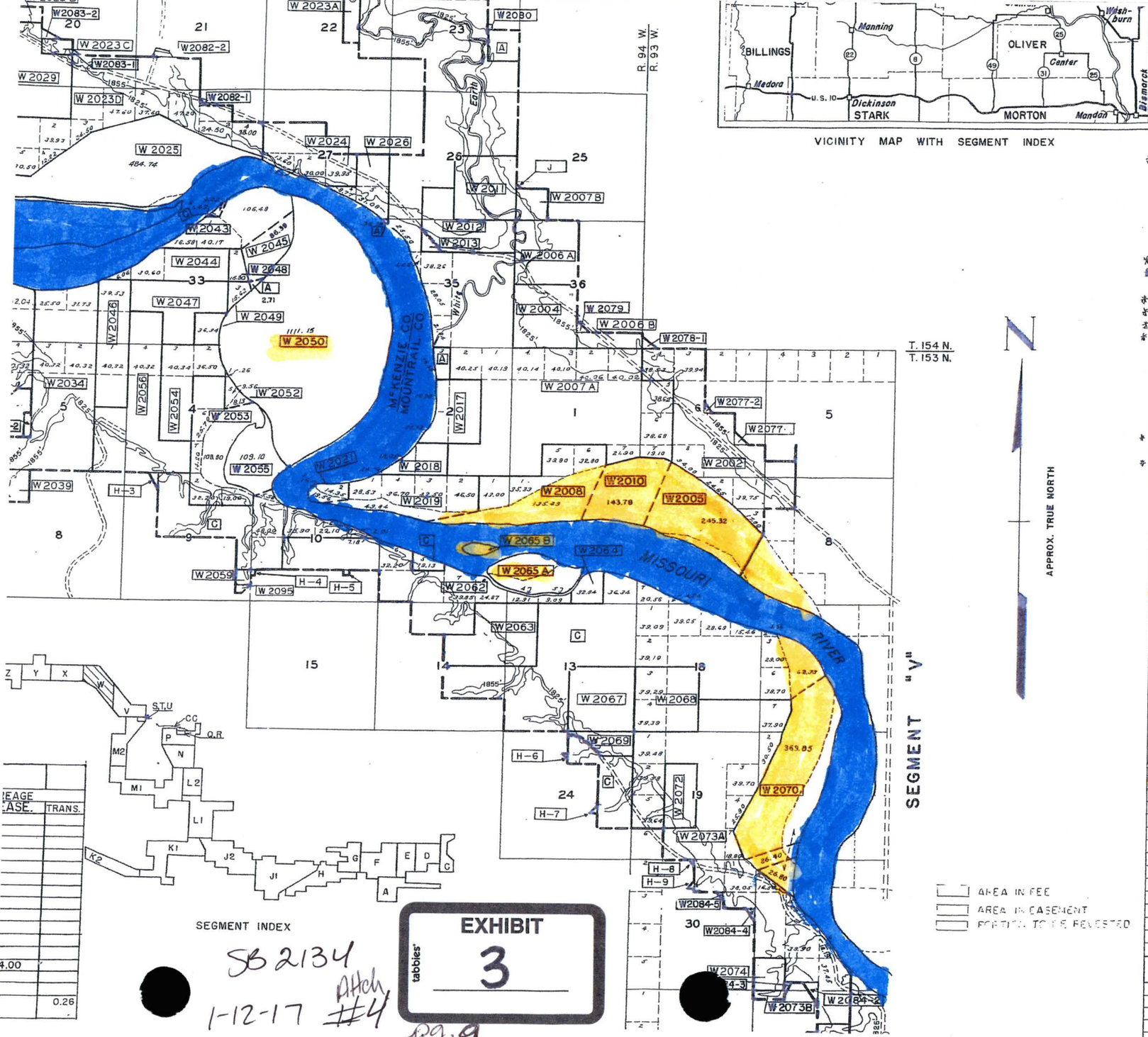
EXHIBIT 2

tabbies

BJL

OFFICIALLY FILED IN STATE OFFICE: JANUARY 29, 2014

T. 153 N., R. 98 W., 5th P.M., ND GP. 92 SUP. BJL



VICINITY MAP WITH SEGMENT INDEX

	MARIE CRANMER		
A	U.S.A. DEP'T. OF INTERIOR	see remarks	
W 2010	CHARLES E. STEWART	143.78	
W 2011	JOHN LARMER	160.00	
W 2012	KENNETH AUVERSON	149.85	
W 2013	ALFRED COLTON	10.15	
W 2077	NEAL BARTLESON	3.44	
W 2077-2	NEAL BARTLESON	0.46	
W 2078-1	V.P. & R. GRAZING ASSOCIATION	2.30	
W 2017	SINA B. ROGERS	122.73	
W 2018	ANDREW GUNDERSON	58.89	
W 2019	ARTHUR AUVERSON	198.07	
W 2078-2	DELETED		
W 2021	ANDREW GUNDERSON	34.07	
W 2022	DELETED		
W 2023	E. H. O'CAIN ET UX		
	PARCEL 'A' 62.80 'B' 20.00 'C' 20.00 'D' 562.05	664.85	
W 2024	ALFRED THOMPSON	165.14	
W 2025	E.H. O'CAIN ET UX	484.74	
W 2026	ANNE M. THOMPSON	79.85	
W 2078-3	DELETED		
W 2079	STATE OF NORTH DAKOTA, et al	1.84	
W 2029	FRANK LA BAR ET UX	200.00	
W 2080	ARVINE E. OLSON AND MARION E. OLSON	0.52	
W 2081	DELETED		
W 2082-1	LEONA VACHAL WHEELOCK, ET AL	0.46	
W 2082-2	LEONA VACHAL WHEELOCK, ET AL	4.82	
	McKENZIE CO.		
W 2033	DELETED		
W 2034	SARAH B. PHELPS ET AL	527.87	
W 2035	SARAH B. PHELPS ET AL	186.86	
W 2036	DELETED		
W 2037	DELETED		
W 2083-1	ORVILLE T. THRONSON, ET AL	0.69	
W 2039	AL N. NELSON	40.00	
W 2083-2	ORVILLE T. THRONSON, ET AL	2.41	
W 2041	DELETED		
W 2042	DELETED		
W 2043	MRS. MARY ORTLOFF ET AL	163.23	
W 2044	RUBY L. QUALE	116.66	
W 2045	RALPH O. VANGEN ET UX	86.39	
W 2046	ROBERT AMOS BOWYER JR. ET AL	159.85	
W 2047	JOHN A. ANDERSON	160.00	
W 2048	RALPH O. VANGEN ET UX	16.80	
W 2049	CLARENCE VANGEN ET UX	51.96	
W 2050	STATE OF NORTH DAKOTA	1111.15	
W 2051	DELETED		
W 2052	FLORENCE POOLE HITLAND ET AL	17.95	
W 2053	MILDRED BANCROFT ET AL	239.90	
W 2054	HELGE SHERVEN	156.84	
W 2055	MILDRED BANCROFT ET AL	109.10	
W 2056	EDWIN HENDRICKSON	320.32	
W 2057	DELETED		
W 2058	DELETED		
W 2059	RUBY L. QUALE	10.00	
W 2061	DELETED		
W 2062	BERTHA C. BENN	398.92	
W 2063	SIDNEY BENN	200.00	
W 2064	AGNES G. SKARET	32.84	
W 2065	STATE OF N.D. PARCEL 'A' 107.30 'B' 14.00	121.30	
W 2066	DELETED		
W 2067	MYRON N. RULAND	160.00	
W 2068	DELLA M. RULAND	158.68	
W 2069	MARION S. RULAND ET AL	43.00	
W 2070	BLAINE OSBURN ET UX	396.65	
W 2071	DELETED		
W 2072	HENRY AASTERUD ET AL	80.00	
W 2073	BLAINE OSBURN ET AL PARCEL 'A' 1036.59 'B' 10.51	1047.10	
W 2074	OLE BREVIG ET UX	40.00	
W 2076	DELETED		
A	U.S.A. DEP'T. OF INTERIOR	SEE REMARKS	
C	U.S.A. (DEP'T. OF AGR.) (see remarks)		3204.59

TRACT	REMARKS
A	[redacted] 25 Feb. 1955, Public Land Order No. 1078, [redacted] included in register of segment A.
C	[redacted] 10 March 1954, Executive Order No. 10520 [redacted] includes the parcels in Segments W, X, Y and Z. and pertain only to Segments

15 MILES

TOTAL ACRES

ACRES FEE

ACRES EASEMEN

ACRES TRANSFE

ACRES PERMITS

TOTAL ACRES DI

ACRES TRANSFE

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BOUNDARY MARKER (BRASS

TAKING LINE FOR RESEI

PERTINENT CONTOUR LI

CEMETERY

STATE OR PROVINCE LI

COUNTY LINE

TOWNSHIP LINE

SECTION LINE

PROPERTY LINE

STREAMS

RAILROADS

POWER LINES

TELEPHONE LINES

IMPROVED ROADS

UNIMPROVED ROADS

5280' 26

DI

OFFIC

N

GARRISON DAM

EXHIBIT 3

tabbies

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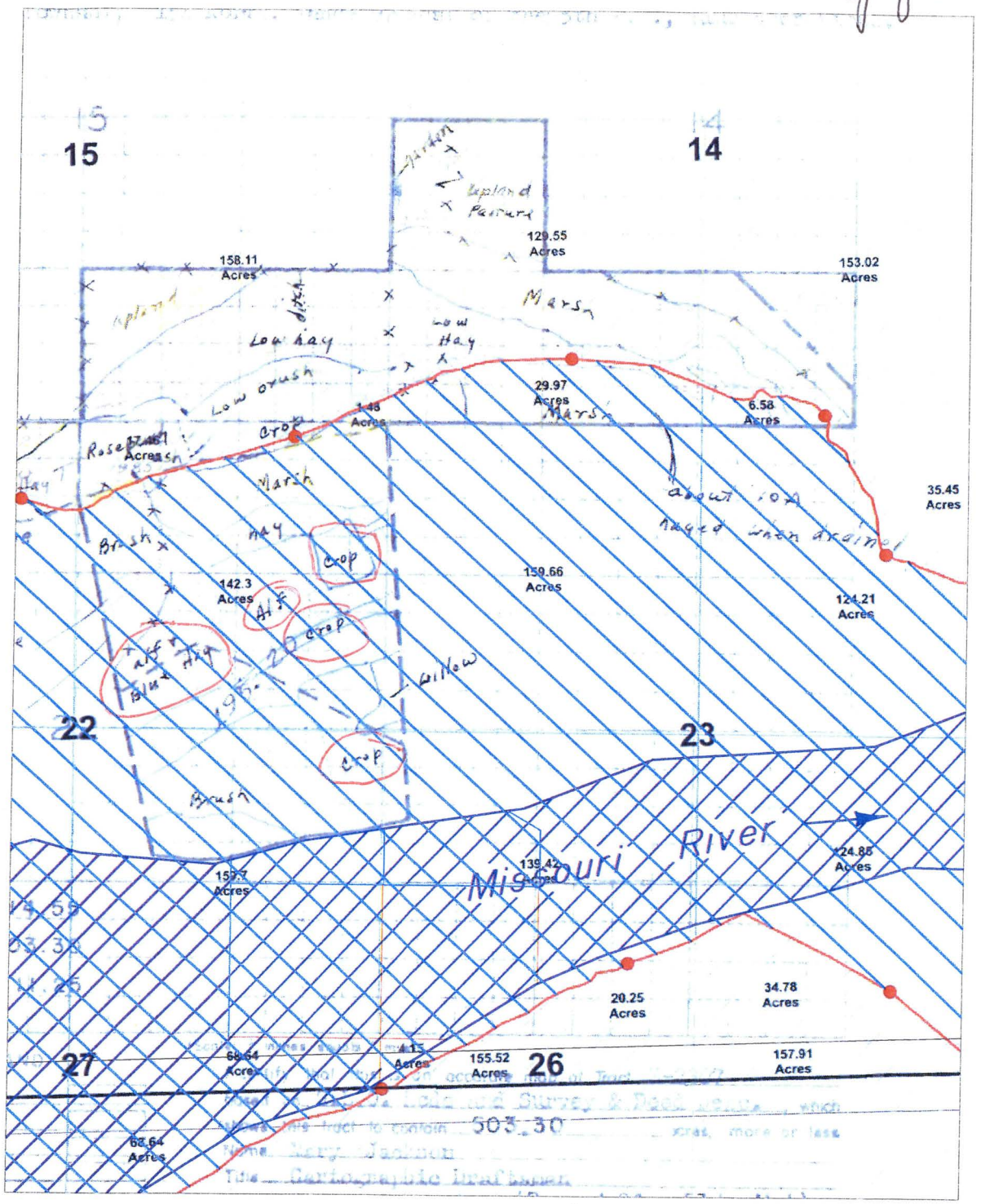

Diagram included with a COE Appraisal.

LEGEND

Missouri Riverbed between OHWM's as determined in ND Task Order #2.

Land above the OHWM as determined in ND Task Order #2.

Missouri Riverbed between OHWM's as determined on the BLM Supplemental Plats from the COE Segment Maps

Note: The vast majority of the Missouri Riverbed determined on the BLM Supplemental Plats is contained within the determination from ND Task Order #2 resulting in overlapped hatching.

EXHIBIT 4

Enclosure 12

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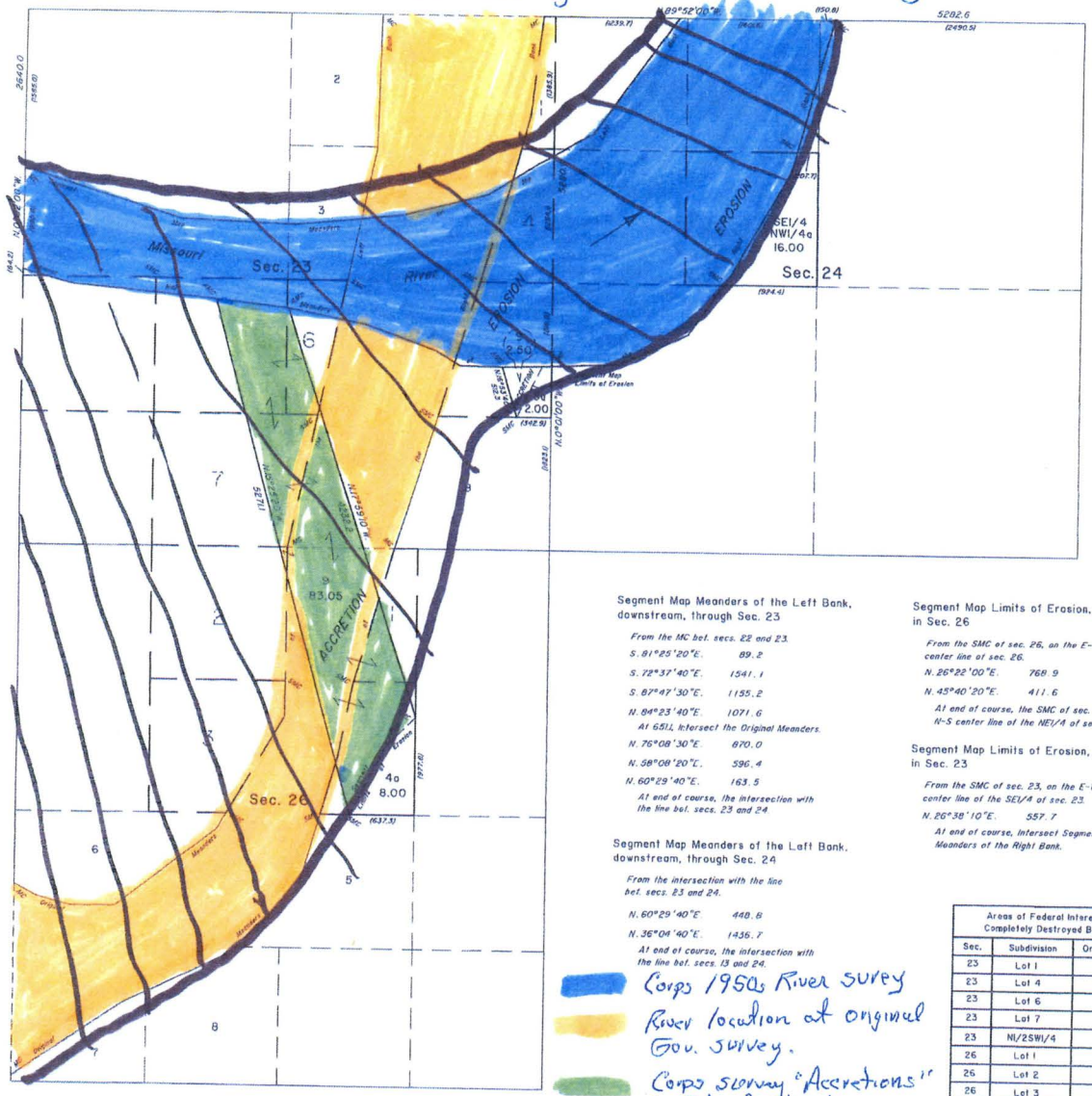
SUPPLEMENTAL PLAT

Overlapping State/Federal Survey



Segment Map Meanders of the Left Bank, downstream, through Sec. 23

From the MC bet. secs. 22 and 23.

S. 81°25'20"E. 89.2

S. 72°37'40"E. 1541.1

S. 87°47'30"E. 1155.2

N. 84°23'40"E. 1071.6

At 651.1, intersect the Original Meanders.

N. 76°08'30"E. 670.0

N. 58°08'20"E. 596.4

N. 60°29'40"E. 163.5

At end of course, the intersection with the line bet. secs. 23 and 24.

Segment Map Meanders of the Left Bank, downstream, through Sec. 24

From the intersection with the line bet. secs. 23 and 24.

N. 60°29'40"E. 448.8

N. 36°04'40"E. 1436.7

At end of course, the intersection with the line bet. secs. 13 and 24.

Segment Map Limits of Erosion, in Sec. 26

From the SMC of sec. 26, on the E-W center line of sec. 26.

N. 26°22'00"E. 768.9

N. 45°40'20"E. 411.6

At end of course, the SMC of sec. 26, on the N-S center line of the NE1/4 of sec. 26.

Segment Map Limits of Erosion, in Sec. 23

From the SMC of sec. 23, on the E-W center line of the SE1/4 of sec. 23.

N. 26°38'10"E. 557.7

At end of course, intersect Segment Map Meanders of the Right Bank.

Segment Map Meanders of the Right Bank, downstream, through Sec. 23

From the intersection with the line bet. secs. 22 and 23.

S. 75°11'50"E. 536.2

S. 84°36'00"E. 1410.3

At end of course, the AMC of sec. 26, on a line dividing the accretion in front of lots 4 and 5 of sec. 26.

Segment Map Meanders of the Right Bank, downstream, through Sec. 26

From the AMC of sec. 26, on a line dividing the accretion in front of lots 4 and 5 of sec. 26.

S. 83°47'50"E. 734.9

At end of course, the AMC of sec. 26, on a line dividing the accretion in front of lot 4 and the SE1/4NE1/4 of sec. 26.

Segment Map Meanders of the Right Bank, downstream, through Sec. 23

From the AMC of sec. 26, on a line dividing the accretion in front of lot 4 and the SE1/4NE1/4 of sec. 26.

S. 78°58'10"E. 767.5

S. 70°26'00"E. 752.7

S. 59°38'30"E. 785.1

S. 88°40'00"E. 421.4

At end of course, the AMC of sec. 23, on a line dividing the accretion in front of lots 5 and 8 of sec. 23.

N. 88°48'00"E. 491.4

At 399.0, intersect Segment Map Limits of Erosion.

At end of course, the MC of secs. 23 and 24.

Segment Map Meanders of the Right Bank, downstream, through Sec. 24

From the MC of secs. 23 and 24.

N. 87°19'30"E. 673.8

N. 66°57'10"E. 739.3

N. 36°02'50"E. 703.2

At 609.9, the SMC of sec. 24, on the E-W center line of sec. 24.

N. 30°23'40"E. 1192.5

N. 15°10'40"E. 1588.3

At 2216, the SMC of sec. 24, on the E-W center line of the NW1/4 of sec. 24.

At end of course, the MC of secs. 13 and 24.

Corps 1950s River survey

River location at original Gov. survey.

Corps survey "Accretions" to federal lands

1661 - STATE SURVEY

GO

Areas of Federal Interest Lands Completely Destroyed By Erosion		
Sec.	Subdivision	Original Acreage
23	Lot 1	6.30
23	Lot 4	15.80
23	Lot 6	13.75
23	Lot 7	45.00
23	NI/2SWI/4	80.00
26	Lot 1	12.90
26	Lot 2	40.80
26	Lot 3	34.70

Acreage Table for Original Subdivisions				
Sec.	Subdivision	Original Acreage	Remaining Land "a"	Eroded Land "b"
23	Lot 5	28.40	2.00	26.40

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Billings, Montana December 18, 2013

This plat, showing amended lottings, is based upon the official records and, having been correctly prepared in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

153.48

Joshua F. Alexander

EXHIBIT 5

tabbies

Dennis Johnson Support pg1

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WRITTEN TESTIMONY OF DENNIS EDWARD JOHNSON IN SUPPORT OF SENATE BILL 2134
SENATE ENERGY AND NATURAL RESOURCES COMMITTEE JANUARY 12, 2017

I am Dennis Edward Johnson from Watford City, ND. I was born and raised on a ranching / farming operation in McKenzie County ND. I am an attorney in Watford City, ND having in the past served as McKenzie County State's Attorney for 31 years. I am also a partner and founding member of the private law firm of Johnson & Sundeen which has been in business since 1980.

In my practice we have several specialties including oil & gas law, primarily representing private mineral owners and surface owners. We sue oil companies. This Senate Bill is one of those rare occurrences when private mineral owners and oil companies are in agreement. I am offering testimony today in support of Senate Bill 2134.

I also adopt the testimony as given today by Craig Smith.
The reason this Bill is before the legislature is because of the uncertainty the actions or inactions of the state of North Dakota has caused in regard to ownership of the minerals lying beneath the backwaters of the Garrison Reservoir.
There are a great many oil wells that have been drilled under Lake Sakakawea and many more yet to be drilled.

When the Garrison Reservoir was approved to be built one of the very first acts the Federal Government had to accomplish was to acquire the land that would be flooded by the dam. Ownership of the lands to be flooded was determined and the United States began to acquire the land owned by private individuals and by the State of North Dakota. This was done primarily through condemnation in many cases. The United States took the surface of the land and paid for it, but the minerals were not taken and continued to be owned by the private citizens.
The dam was built and the lands flooded – in many cases destroying the livelihood of farmers and ranchers by taking the very best land they owned – river bottom land.

For a number of years now the state of North Dakota has insinuated that it owns the minerals that were left to private individuals when the flood waters from the dam built by the United States covered the land that was purchased and taken by the Federal government. This has caused a great uncertainty and halted the payment of money from oil and gas production to the mineral owners and oil companies. It also has undoubtedly halted further development of the oil and gas interests lying under Lake Sakakawea.

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I have approximately 50 clients who are impacted by the state's action or inaction. They are not being paid for the oil and gas production from the minerals they own. Not one of my clients knows I am here today testifying and not one of them is paying me to come and testify.

This entire scenario reminds me of a third world country. Imagine being a property owner or a business owner and getting word from your government that it plans to take your property without compensation? Welcome to Bolivia – Have a nice day! This is exactly the uncertainty the state has caused.
It is settled law that the state of North Dakota owns from ordinary high water mark to ordinary high water mark on the opposite bank of a navigable river. That is the law.

When the back waters of the dam flooded the Missouri River the river channel stopped moving and is frozen and fixed. The survey done by the United States established the ordinary high water mark of the Missouri River before the dam flooded the river valley.

The law proposed by Senate Bill 2134 creates certainty. Certainty allows business to be conducted without fear of taking by the state without compensation. This proposed legislation will stop any contemplated land grab by the state. The state does not lose the minerals it is entitled to but will be prevented from claiming that the lands under the lands flooded by the Garrison Reservoir built by the United State also belongs to them.

By removing the uncertainty minerals owners will get paid. Oil companies will invest in drilling more wells. This creates jobs. This boosts the North Dakota economy and will benefit the state in tax revenue.
Passing this law will also restore North Dakota citizen's faith in their government that North Dakota does not take away private property rights.
If this Bill does not become law we are looking at another 10, 20, maybe even 30 years of litigation. Litigation is not the best resolution for the mineral owners, the oil companies or the state.

I appear before you today of my own volition. I am here to ask for your recommendation of "do pass" for Senate Bill 2134. I am here because passing this Bill and making it law is the RIGHT THING TO DO for North Dakota.
I thank you for your time and attention.

Dennis Edward Johnson

Dennis Edward Johnson
P O Box 1260
Watford City, ND 58854

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Testimony of Peter Masset Jr. January 12th, 2017

Madam Chair Unruh, Senator Armstrong, thank you for allowing testimony on Senate Bill 2134. My name is Peter Masset, Jr. and I am a Bismarck resident, United States Army Veteran (Operation Iraqi Freedom III (2004-2005) – 1-188th ADA - F Battery) and I work in the energy industry of North Dakota.

I am here today to promote certainty. By certainty here is what I mean. I feel it is in the best interest of the state and its' legislators to promote legal certainty as to the ownership of the lakebed minerals.

Any action that could transfer private property to state owned property, would hurt mineral owners and create uncertainty in the Bakken Oil Field. Legal certainty would be good for the individual tax paying citizens that own this property. It would also benefit all citizens of North Dakota who currently benefit from a ten percent oil and gas extraction and production tax. This certainty would also be good for the state economy by cultivating a stable business environment in the state of North Dakota.

My work in the energy industry has allowed me to examine the records to the lakebed minerals under Lake Sakakawea. Looking at one of the "Lis Pendens" filed as document number 139810 in McKenzie County and dated the 13th day of June, 1952. This document notified a group of surface owners of the 8,151 acres of land that an action has been commenced by the United States of America. The stated object of this action was stated as "the condemnation and taking of the lands described in the complaint by the United States of America for public use."

On the 15th of August 1953, "Judgment on Declaration of Taking"(document #144185) was granted vesting title to the 8,151 acres of land to the United States of America. The judgment also stated that "the public use for which said lands are taken is in connection with the construction and establishment of a project known as the Garrison Dam and Reservoir Project, the purpose of which is to adequately provide flood control in the basin of the Missouri River for the use and benefit of the public generally and for such other uses as may be authorized by Congress or Executive Order." Furthermore, after the court vested title in the United States of America, it went on by "reserving, however, to the owner of the land or the owner of any interest therein," "all oil and gas rights therein, on or under said described lands".

After reviewing these two taking documents the intent is clear, the United States of America needed land for a public use. But here is what is special, and what the USA did not do was also take the mineral interests underlying the property. That would have been and overreach. It appears that in 1953 the United States of America had the foresight to protect the liberty and private property of these United States citizens.

As for today, I strongly urge the state of North Dakota to protect the private property rights of these individuals and their successors. A bill that defends this private property from an overreach will establish the certainty many of us desire.

Thank you. I would be happy to answer any questions.

Peter Masset, Jr.

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pgl

Peter Masset

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Document No. 49810

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

UNITED STATES OF AMERICA,

Civil No. 2549

Plaintiff,

-vs-

8,151.83 Acres of Land, More or Less, in Mountrail, McKenzie and Williams Counties, North Dakota; ArthurAuverson et al., and Unknown Owners,

LIS PENDENS

Defendants.

NOTICE IS HEREBY GIVEN that an action has been commenced in the above-entitled Court by the United States of America, the above-named Plaintiff, against the persons known to the Plaintiff to have or claim an interest in the property to be acquired, which is described in Exhibit "A" hereto attached and made a part hereof, which persons are those listed in Exhibit "B" which is hereto attached and made a part hereof; the North Dakota State Tax Commissioner, Bismarck, North Dakota; McKenzie County, a municipal corporation, Watford City, North Dakota; Williams County, a municipal corporation, Williston, North Dakota, Mountrail County, a municipal corporation, Stanley, North Dakota, and all unknown persons claiming any interest in or lien or encumbrance upon the lands described in the Complaint; and all persons in possession of said premises or any part thereof; that said action is now pending; that the object of said action is the condemnation and taking of the lands described in the Complaint by the United States of America for public use.

The premises and lands affected by said action are situated in the County of McKenzie, State of North Dakota, as described in said Exhibit "A".

Dated this 17th day of June, 1952.

J. Harvey Lackkart
Assistant United States Attorney

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TRACT NO. V-1963 - Lot 1 in Section 34, in Township 153 North, Range 93 West of the 5th P.M., plus accretions, situate in McKenzie County, North Dakota, containing 151.41 acres, more or less.

TRACT NO. V-1968 - Lot 2, Southwest quarter of the Northeast quarter (SW¼NE¼) West half of the Southeast quarter (W½SE¼) of Section 6 in Township 152 North, Range 93 West of the 5th P.M., except a tract described as follows: Beginning at a point 446 feet East of the South 1/4 corner of aforesaid Section 6, thence East 874 feet to the East 1/16 line, thence North along said line 656 feet, thence West and South to the point of beginning, said exception contains 7.22 acres, more or less. Said tract exclusive of exception contains 170.12 acres, more or less, and is situate in McKenzie County, North Dakota.

TRACT NO. V-1976 - Lots 2, 3 and 4 of Section 5 in Township 152 North, Range 93 West of the 5th P.M., situate in McKenzie County, North Dakota, containing 172.06 acres, more or less.

TRACT NO. V-1988 - Lots 5, 6 and 7 of Section 10, Township 152 North, Range 93 West of the 5th P.M., except 4.79 acres more or less in said Lot 5 described as follows: Beginning at a point which is 426 feet North of the Southwest corner of Lot 5, thence East 370 feet, thence North to the Missouri River, thence Northwesterly along said river to the Northwest corner of Lot 5, thence South to the point of beginning. Said tract exclusive of exception contains 67.16 acres, more or less, and is situate in McKenzie County, North Dakota.

TRACT NO. W-2039 - Northwest quarter of the Northwest quarter (NW¼NW¼) of Section 8 in Township 153 North, Range 94 West of the 5th P.M., situate in McKenzie County, North Dakota, containing 40.00 acres, more or less.

TRACT NO. W-2044 - Southwest quarter of the Northeast quarter (SW¼NE¼), Southeast quarter of the Northwest quarter (SE¼NW¼), of Section 33 and also those portions of the Southwest quarter of the Northwest quarter (SW¼NW¼) of Section 33 and Southeast quarter of the Northeast quarter (SE¼NE¼) of Section 32 lying South and East of the Missouri River all in Township 154 North, Range 94 West of the 5th P.M., situate in McKenzie County, North Dakota, containing 116.66 acres, more or less.

TRACT NO. W-2048 - Lot 2 of Section 33 in Township 154 North, Range 94 West of the 5th P.M., plus accretions, situate in McKenzie County, North Dakota, containing 103.19 acres, more or less.

TRACT NO. W-2056 - Southwest quarter of the Southwest quarter (SW¼SW¼) of Section 33 in Township 154 North, Range 94 West of the 5th P.M., Lot 4, Southwest quarter of the Northwest quarter (SW¼NW¼), West half of the Southwest quarter (W½SW¼) Southeast quarter of the Southwest quarter (SE¼SW¼) of Section 4, East half of the Southeast quarter (E½SE¼) of Section 5 in Township 153 North, Range 94 west of the 5th P.M., situate in McKenzie County, North Dakota, containing 320.32 acres, more or less.

TRACT NO. W-2059 - Northeast quarter of the Southeast quarter of the Southeast quarter (NE¼SE¼SE¼) of Section 9, in Township 153 North, Range 94 West of the 5th P.M., situate in McKenzie County, North Dakota, containing 10.00 acres, more or less.

EXHIBIT "A"

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TRACT NO. X-2164 - Lot 6, West half of the Southeast quarter (W½SE¼) of Section 32, and those portions of the Southeast quarter of the Northeast quarter (SE¼NE¼) of Section 32, and the Southwest quarter of the Northwest quarter (SW¼NW¼) of Section 33, lying South of the Missouri River, all in Township 154 North, Range 95 West of the 5th P.M., plus accretions, situate in McKenzie County, North Dakota, containing 179.15 acres, more or less.

TRACT NO. X-2169 - Lots 5, 6 and 7 of Section 26; Lots 5 and 6 of Section 27, all in Township 154 North, Range 95 West of the 5th P.M., plus accretions, situate in McKenzie County, North Dakota, containing 277.91 acres, more or less.

TRACT NO. Y-2276 - Lots 5, 6, 7 and 8, of Section 28, Lots 7 and 8, of Section 29, North half of the North half of the Northeast quarter (N½N½NE¼), of Section 32, North half (N½), Southwest quarter (SW¼), Northwest quarter of the Southeast quarter (NW¼SE¼), of Section 33 in Township 154 North, Range 96 West of the 5th P.M., plus accretions. Lot 4, West half (W½) of Lot 3, North half of the Southwest quarter of the Northwest quarter (N½SW¼NW¼), Northwest quarter of the Southeast quarter of the Northwest quarter (NW¼SE¼NW¼), of Section 4, in Township 153 North, Range 96 West of the 5th P.M., situate in McKenzie County, North Dakota, containing 911.60 acres, more or less.

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TRACT NUMBERS	PURPORTED OWNERS	ADDRESSES
V-1931	Arthur Auverson	Sanish, N.D.
W-2019	Arthur Auverson	Sanish, N.D.
V-1963	Errett A. Johnson, single	517 Marcer St. Princeton, W.Va.
V-1968	Helen Laymon, widow	3443 NE 33 St. Portland, Oregon
V-1976	Helen Laymon, widow	"
V-1988	William C. Golly and W.E.Blatherwick	Sanish, N.D.
W-2002	Andrew Gunderson	Box 617 Columbia Falls, Montana
	Mountrail County	Stanley, N.D.
	Fred Truax	Unknown
W-2018	Andrew Gunderson and/or	Box 617 Columbia Falls, Montana
	Mountrail County, N.D.	Stanley, N.D.
W-2021	Andrew Gunderson	see above
W-2004	State of North Dakota and / or John N. Gunderson	Bismarck, N.D. 107 D. Victory Heights Spokane, Washington
W-2029	Lucy LaBar, Frank LaBar, Kathryn LaBar	White Earth, N.D.
W-2039	Al N. Nelson	Keene, N.D.
W-2044	Ruby L. Quale	Watford City, N.D.
W-2059	Ruby L. Quale	" " "
W-2048	Ralph Vangen	5037 41 Street SW Seattle 6, Wash.
X-2106	Orville W. Griffin and Pauline Griffin, husband and wife	Weiser, Idaho
X-2126	George A. Hove	Stanley, N.D.
X-2147	George A. Hove	Stanley, N.D.
X-2151	George A. Hove	Stanley, N.D.
X-2127	Clifford H. Hove	White Earth, N.D.
X-2157	Clifford Hove a/k/a Clifford H. Hove	" "
X-2131	Clifford Marmon a/k/a Clifford G. Marmon	" "
X-2132	George M. Marmon and/or Melton Danielson, single	" " " "
X-2138	Melton Danielson, single	" "
X-2158	Edwin Hendrickson	Sanish, N.D.
	Elmer Hendrickson	" "
	Johanna Gamsey	Whitefish, Montana
	Myrtle Willie	Omaha, Nebraska
	Inez Kohl	Unknown
	Audrey Zemliska	Unknown
W-2056	Edwin Hendrickson	Sanish, N.D.
X-2164	Bert Boots	Watford City, N.D.

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TRACT NUMBERS	PURPORTED OWNERS		ADDRESSES
X-2169	Lawrence Grimestad a/k/a Lawrence Grimstad		Charlson, N. D.
Y-2229	Walter Ferguson a/k/a Walter S. Ferguson		White Earth, N.D.
Y-2241	B. H. a/k/a Bruno H. and as Brunnel H. Weyranch and Dorothy F. a/k/a Dorothy Weyranch , husband and wife		Ray, N. D.
Y-2269	B. H. a/k/a Bruno H. and as Brunnel H. Weyranch and Dorothy F. Weyranch		Ray,N.D.
Y-2259	A. R. Healey		Minot, N.D.
Y-2261	J. G. Hove and Irma Hove State of North Dakota		Ray,N.D. Bismarck,N.D.
Y-2276	R. J. Coughlin		322 8 Ave. S.E. Minot, N.D.
Y-2262	Mrs. Dorothy Wheeler		Ray,N.D.
Z-2306	George W. Judd and Hulda S. Judd and heirs of T. Anderson, deceased		Ray, N.D.
	Elisabeth Anderson		Milan, Minn.
	Lydia M. Olson		Milan, Minn.
	Alma J. Lind		Badger, Minn.
	Clara Wilson		Montevideo,Minn.
	Sylvia Amundson	304 S.Grove St.	Owatonna, Minn.
	Hortense Sandbe		Watson, Minn.
	Julian Anderson	64 Orlin Ave.	Minneapolis, Minn.
	Meredith A. Anderson		Madison, Wisconsin
	E. T. Anderson	R. F. D. #1	Oconomowoc,Wis.
	Stanley R. Anderson		Milan, Minn.
	Lloyd W. Anderson		"
	Hilda Anderson		"
	Winifred Anderson		"
	Ethel Anderson	4929 N. Calif Ave.	Chicago, Ill.
	Marylin Anderson		Minneapolis, Minn.
	Phyllis Anderson		Milan, Minn.
	Gwendolyn Anderson		"
	Lloyd Anderson, Jr.		"
	Rodney Anderson		"
	Donovan Anderson		"
	Gertrude Anderson		Appleton, Minn.
	Elizabeth Anderson		"
	Jane Anderson		Milan, Minn.
	Mary Anderson		"
	Virginia Anderson		"
	PURPORTED CLAIMANTS		
V-1931	Anne Auverson, wife of Arthur Auverson		Sanish, N. D.
	Fredrick W. Hannah		Unknown
	State Bank of Ross		Ross, N. D.
	Paul L. Snyder		Unknown
	Farmers State Bank of Sanish, dissolved John A. Graham, State Examiner		Bismarck, N. D.
	Paula C. Willie		Unknown
	Lawrence A. Willie, her husband		Unknown
	Bovey-Shute and Jackson, Inc.		Sanish, N. D.
	Floyd L. Squire		Unknown
	Elmer Lee Shipley		"
W-2019	Anne Auverson, wife of Arthur Auverson		Sanish, N. D.
V-1968	Joe Gubranson, tenant		Unknown
V-1988	Lucy M. Golly, wife of William C. Golly		Sanish, N. D.
	Bond Lumber Co.		Unknown
W-2002	Ruth Gunderson, wife of Andrew Gunderson		Columbia Falls, Mont.
	James Valentine		Unknown
	Jess Dunn		Unknown
	C. F. Truax		Unknown
	Fred W. Hannah		Unknown

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TRACT NUMBERS	PURPORTED CLAIMANTS	ADDRESSES
W-2018	Ruth Gunderson, wife of Andrew Gunderson	Box 617 Columbia Falls, Montana
	O. T. Shoberg	Unknown
	L. P. Munroe	"
	George S. Rogers	"
W-2021	Ruth Gunderson, wife of Andrew Gunderson	Box 617 Columbia Falls, Mon
	E. F. Moore	Unknown
	Mrs. Myrtle Fitzpatrick	Sanish, N.D.
	George S. Rogers	Unknown
W-2004	Betty Gunderson, wife of John N. Gunderson	107 D. Victory Heights, Spokane, Washington
	Andrew Gunderson	Box 617 Columbia Falls, Mon'
W-2029	Williams Hardware Company, a corp.	Minneapolis, Minn.
	Mary Williams	Unknown
	Fred Williams	"
	Charles E. Stewart, tenant	Stanley, N.D.
W-2039	Ingrid Nelson, wife of Al N. Nelson	Keene, N. D.
	The Federal Land Bank of Saint Paul, a corporation	St. Paul, Minn.
W-2044	Harold Quale, husband of Ruby L. Quale	Watford City, N.D.
	Jacob Leuthold, Jr.	Kasson, Minn.
	Warren Oil Corporation	Houston, Texas
	Harry G. Letts	Grand Forks, N.D.
	Herbert C. Reed	" "
	Allen M. James	203 2nd St. E. Minot, N.D.
	William T. Howard	209 Main Street Minot, N.D.
W-2059	Harold Quale, husband of Ruby L. Quale	Watford City, N.D.
W-2048	Hazen Vangen, wife of Ralph Vangen	5037 41 Street SW Seattle 6, Wash.
X-2106	Joe Viall, tenant	Unknown
X-2126	Big Viking Oil Company	Ray, N.D.
	Ira Knox	"
	Jennie Knox	"
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
	Clifford H. Hove, tenant	White Earth, N.D.
X-2147	John G. Hove	Ray, N.D.
	Irma M. Hove	"
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
	Clifford H. Hove, tenant	White Earth, N.D.
X-2151	Hagen Investment Company, a corporation	Ray, N.D.
	Ira Knox	"
	Jennie Knox	"
	Clifford H. Hove, tenant	White Earth, N.D.
X-2127	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
X-2157	Archie Montpelier	Unknown
	John G. Hove a/k/a J. G. Hove	Ray, N. D.
	Irma Hove	"
	Citizens State Bank of Ray	"
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
X-2131	Alice M. Marmon, wife of Clifford M. Marmon	White Earth, N.D.
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
	A. M. Fruh	Bismarck, N.D.
	Thomas W. Leach	"

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X-2158	Ruth N. Hendrickson, wife of Edwin	Sanish, N. D.
	Middlewest Investment Company	Minot, N.D.
	H. T. Skovholt	Williston,N.D.
	Marian Sorben	"
	C. O. Sletten	"
	Mabel C. Sletten	"
	Ray V. Hennen	Morgantown,Va.
	M. G. Jacobson	243,Auburn Avenue Tacoma, Washington
	Cora Clark	Minot, N.D.
	Lillian M. Sherman	"
	Hagen Investment Company	Ray,N.D.
	James D. Lowe	Minot, N.D.
	Philip M. Lowe	"
	H. H. Hester	"
	Lawrence M. Carlsen a/k/a L. M. Carlson	Wildrose,N.D.
	Clarence J. Yackal	Barrett, Minn.
	Thomas W. Leach	Bismarck,N.D.
	A. M. Fruh	"
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
W-2056	Ruth N. Hendrickson, wife of Edwin Hendrickson	Sanish, N. D.
	Magnolia Petroleum Company	Dallas, Texas
	Frank Montgomery	Snyder, Texas
	Aaron Pasternak	Houston, Texas
	Garden Villas Grocery	" "
X-2164	Cora Boots, wife of Bert Boots	Watford City, N. D.
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
	Missouri River Railway Company, % Northern Pacific Railway Company	St. Paul, Minn.
	Federal Farm Mortgage Corporation, a corporation	St. Paul, Minn.
	Bill K. Neill	Lindsay, Oklahoma
	Tioga State Bank	Tioga, N.D.
	Selmer Danielson, tenant	Charlson, N. D.
	Middlewest Investment Company	Minot, N. D.
	Heirs of O. B. Herigstad, deceased:	
	Fern E. Herigstad, widow of O. B. Herigstad, deceased	Box 809, Minot, N.D.
	Jean L. Pringle	" "
	Roger O. Herigstad	" "
	Elaine Purdy	Carpio,N.D.
	Lucile Broyles	Box 809, Minot, N. D.
	Peter Johnson	Minot, N. D.
	Sophus Henriksen	" "
	Nell P. Rose	" "
	Jane O'Rourke	" "
	Ward S. Johnson	" "
	Osman Gunvaldson	Fargo,N.D.
	P. M. Shefveland	Van Hook, N. D.
	Ray Richmond	Minot, N.D.
	George Benno	" "
	Emil and Nettie Peterson	Charlson,N.D.
	Hazel Byorum	Minot, N. D.
	Edward Murray	Kenmare,N.D.
	H. L. Jensen	" "
	A. O. Peterson	" "
	Harry Kinzley	Mohall, N. D.
	Harry Pullos	" "
	Joe Novak	Minot, N. D.
	Lauritz Johnsen	Mohall, N. D.
	Anthony H. Trutna	" "
	Ernest D. Peterson	Charlson, N. D.
	Jess Willard	Minot, N. D.
	Tom Coons	" "

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	Anna B. Schade	Ray, N.D.
	Mabel E. Kinzley	Mohall, N. D.
	Carl Nelson	Bismarck, N.D.
	A. C. Harke	"
	Phil W. Starkle	"
	Bill K. Neill	Lindsay, Oklahoma
	John L. Howard	Minneapolis, Minn.
	Gladys E. Willard	Minot, N. D.
	H. R. Tisdale	Drayton, N. D.
	Arthur Fleckten	" "
X-2169	Eileen Grimestad, wife of Lawrence Grimestad	Charlson, N. D.
	George A. McGee	Minot, N. D.
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
Y-2229	Agnes Ferguson, wife of Walter Ferguson	White Earth, N.D.
	The Federal Land Bank of Saint Paul, a corporation	St. Paul, Minn.
	Northern States Leasing Company	Unknown
	Edgar L. Martinson	Kennedy, Minn.
	Herbert Mortensen	" "
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
Y-2241	Arthur V. Rhinehart, a/k/a A. V. Rhinehart	Unknown
	Minnie J. Westergaard	"
	State Treasurer as Trustee for the State of North Dakota	Bismarck, N. D.
	Louise Merryman Parker	Unknown
	William M. Parker, her husband	"
	Sidney T. Merryman	"
	Susan G. Morryman, his wife	"
	John J. Tighe	Unknown
	Martha P. Tatem, widow	"
	Ker D. Dunlop	Ramsey County, Minn.
	State of North Dakota	Bismarck, N. D.
	G. A. Ulbaasen	Sanish, N. D.
	A. A. Breslin	"
	L. V. Baxter	"
	Fred Falstad	Williston, N. D.
	H. K. Peyton	"
	William G. Owens	"
	Carlos S. Jones	"
	Eivind Tandberg	Noonan, N. D.
	Minnie Keup	"
	A. E. Kelsey	Poplar, Montana
	F. P. Bergman, Jr.	Williston, N. D.
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
	California Company	225 Bush Street San Francisco, Calif.
	Sam Skadron	Unknown
	Ed F. Neuman	Williston, N. D.
	Ben Bartz	"
	R. L. Bork	"
	Joe Mendro	"
	O. O. Huseby	"
	Miles T. Wirtz	Ray, N.D.
	M. S. Ordal	Ross, N. D.
	Hildur Berg	Unknown
	W. H. Keup	Columbus, N. D.
	Adeline Tancre	Unknown
	B. M. Jacobson	243 Auburn Avenue Tacoma, Washington
	A. M. Fruh	Bismarck, N.D.
	Thomas W. Leach	"

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TRACT NUMBERS	PURPORTED CLAIMANTS	ADDRESSES
Y-2241 (continued)	Wm. A. Brunsvold	Ray, N. D.
	H. T. Skovholt	Williston, N. D.
	Edna A. Hester	Claremont, N. D.
	S. M. Hydle	Williston, N. D.
	The Federal Land Bank of Saint Paul, a corporation	St. Paul, Minn.
Y-2276	Homer Sorenson, tenant	Unknown
	Spouse, if any, of R. J. Coughlin	322- 8 Avenue S. E. Minot, N.D.
Y-2269	Wm. G. Owens	Williston, N. D.
Y-2259	Spouse, if any, of A. R. Healey	209 9 St. SE Minot, N. D.
	Philip M. Lowe	Ray, N. D.
	Martin G. Jacobson	243 Auburn Avenue Tacoma, Washington
	Erling Manger	Williston, N. D.
	Hagen Investment Company, a corp.	Ray, N. D.
	Helga Tandberg	Pasadena, California
	Eivind Tandberg	Noonan, N. D.
	William A. Brunsvold	Ray, N. D.
	Dr. W. F. Nordman	Mora, Minn.
	C. E. Burdick	Corinth, N. D.
	Marjorie E. McGee	Ray, N. D.
	Alyce J. Gotham	"
	W. A. Morin	"
	T. L. Pierce	"
	Mrs. Ann Holter	Stanley, N. D.
	Ernestine Grosse	Wheelock, N. D.
	Rhoda Frank	Powers Lake, N. D,
	Alph Anderson	" "
	Landowners Royalty Company	Mandan, N. D.
	Lawrence M. Tavis, trustee	"
	J. E. Kilshaw	Ray,N.D.
	H. C. Helle	Fargo,N.D.
	Olaf Haraldson	Minot, N. D.
Y-2261	M. V. Linwell	Unknown . . .
	Charles Goudy	Ray, N. D.
	Etha Goudy, wife of Charles Goudy	Ray, N. D.
	Arthur Hartsock (or Hartsoch)	Ray, N. D.
	B. M. Jacobson	243 Auburn Avenue Tacoma, Washington
	Monrad Ek	Unknown
	Ed F. Neuman	Williston, N. D.
	M. A. McClung	Watford City, N. D.
	Helga Tandberg	Pasadena, California
	Eivind Tandberg	Noonan, N. D.
	J. Allen Smith	"
	A. H. Anderson	"
	Ole W. Tandberg	Oslo, Norway
	Dr. W. F. Nordman	Mora, Minn.
	A. S. Holte and son	Noonan, N. D.
	R. E. Grinnell	"
	R. M. Cross	Williston, N. D.
	W. A. Wright	"
	W. R. Olson	Terre Haute, Indiana
	W. J. Hansen and son	Ray, N. D.
	C. O. McGee	"
	Joe Carter	White Earth, N. D.
	C. C. Charlson	Ray, N. D.
	O. H. Rask	Zahl, N. D.
	Edmund S. Severson	Tioga, N. D.
	Carl Severson	"
	Nellie Lazier	"
	M. G. Jacobson	243 Auburn Avenue Tacoma, Washington
	L. L. Munson	Noonan, N. D.
	Mrs. Sallie J. Munson	"
	Landowners Royalty Co.	Mandan,N.D.

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TRACT NUMBERS	PURPORTED CLAIMANTS	ADDRESSES
Y-2261 (continued)	Ole Brevig	Rugby, N. D.
	John M. Gillette	Grand Forks, N. D.
	Otto B. Jahnke	Casselton, N. D.
	Tom Hurley, trustee	Edgeley, N. D.
	A. F. Fir	Nome, N. D.
	Lloyd Johnson	"
	R. H. Beechie	"
	Nels J. Magnuson	Bismarck, N. D.
	Frank S. Carr	"
	Theodore Larson	"
	Dr. C. Kierland, trustee	"
	V. L. Gilbreath, trustee	"
	Lawrence M. Tavis, trustee	Mandan, N.D.
	Charles S. Atchison	Houston, Texas
	Amerada Petroleum Corporation	Tulsa 2, Oklahoma
	Ernam W. Hansen	Ray, N. D.
Y-2262	Hubert Wheeler, husband of Dorothy Wheeler	Ray, N. D.
	North American Oil Company	Unknown
	Arthur Hartsock	Ray, N. D.
	W. R. Olson	Terre Haute, Indiana
Z-2306	Milton K. Higgins	Bismarck, N. D.
	Iris Irene Higgins, wife of Milton K. Higgins	" "
	Hunt Oil Company, a corp.	700 Mercantile Bank Bldg Dallas, Texas

Exhibit "B" Page seven

139810

Office of Register of Deeds ... June ... A.D. 1951 ... Register of Deeds ... Deputy

U.S. Attorney Box 272, Fargo, N.D.

Document No. 14118

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

FILED
AUG 17 1953
BEATRICE A. McMICHAEL, Clerk

UNITED STATES OF AMERICA,

Plaintiff,

-vs-

8,151.83 Acres of Land, More or Less, Situate in Mountrail, McKenzie and Williams Counties, State of North Dakota, and Arthur Auverson, et al., and Unknown Owners,

Defendants.

CIVIL NO. 2549

JUDGMENT ON DECLARATION OF TAKING

This day comes the Plaintiff, in the above-entitled cause, the United States of America, by Harry Lashkowitz, Assistant United States Attorney for the District of North Dakota, and moves the Court to enter Judgment vesting title in the United States of America in fee simple, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines, and the reservations of minerals to the land owners specifically set forth in paragraph three of the Declaration of Taking herein, in and to the property hereinafter described and described in the Declaration of Taking, as well as the Complaint herein.

Thereupon the Court proceeded to hear and pass upon said Motion, Complaint, and Declaration of Taking, and finds as follows:

First- That each and all of the allegations in the Complaint and the Declaration of Taking are true; and that the United States of America is entitled to acquire property by eminent domain for the purposes set out and prayed in said Complaint.

Second- That a Complaint in condemnation was filed in the above-entitled action at the request of the Secretary of the Army, the authority empowered by law to acquire the lands described in the Complaint, under instructions from the Attorney General of the United States, the person authorized by law to direct the institution of such condemnation proceedings.

Third- That in said Complaint and Declaration of Taking a statement of the authority under which the public use for which said lands are taken is set out, and that the Secretary of the Army is the person authorized and empowered by law to acquire lands such as are described in the Complaint, which is in pursuance of and under the authority of the provisions of the Act of Congress approved February 26, 1931 (46 Stat. 1421,40 U. S. C. Sec. 258a) and Acts supplementary to and amendatory thereof; the Acts of Congress approved April 24, 1888 (25 Stat. 94, 33 U.S.C.591); March 1, 1917 (39 Stat.948,33 U.S.C. 701); December 22, 1944 (Public Law 534, 78th Congress, Second Session); also under the Civil Functions Appropriation Act, 1952, approved October 24, 1951 (Public Law 203,82nd Congress); and that the public use for which said lands are taken is in connection with the construction and establish-

ment of a project known as the Garrison Dam and Reservoir Project, the purpose of which is to adequately provide flood control in the basin of the Missouri River for the use and benefit of the public generally and for such other uses as may be authorized by Congress or by Executive Order.

Fourth- That a proper description of the lands sought to be taken sufficient for the identification thereof is set out in said Declaration of Taking.

Fifth- A statement of the estate or interest in said lands taken for said public use is set out in the Declaration of Taking.

Sixth-A plat showing the lands taken is set out.

Seventh- A statement is contained in said Declaration of Taking to the effect that the estimated amount of compensation for the taking of the property desdribed therein, in the opinion of the Secretary of the Army, will probably be within any limits prescribed by Congress on the price to be paid therefor.

Eighth- A statement is contained in said Declaration of Taking of the sum of money estimated by the acquiring authority to be just compensation for all of the lands to be taken thereunder, together with all buildings and improvements thereon and appurtenances thereto, which is a total of $ 263,225.00 , and said sum has been deposited in the Registry of this Court.

And the Court having considered the Complaint in condemnation herein as it relates to the hereinafter described lands, Declaration of Taking, and the statutes in such case made and provided, and it appearing to the Court that the United States of America was and is entitled to take said described property and have title thereto vested in it pursuant to law, it is, therefore, considered by the Court, and it is the

ORDER AND JUDGMENT of the Court that title to the hereinafter described lands vested in the United States of America upon the filing of the Declaration of Taking herein and the deposit in the Registry of the Court of the sum of $ 263,225.00 and the estate taken is the fee simple title, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines and reserving, however, to the owner of the land or the owner of any interest therein, including third party lessees, their heirs, successors and assigns, all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved are subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the

construction, operation and maintenance of the Garrison Dam and Reservoir, and that any exploration or development of such rights shall be subject to federal or state laws with respect to pollution of waters of the reservoir; provided further that the District Engineer, Corps of Engineers, Garrison District, or his duly authorized representative shall approve in furtherance of the exploration and/or development of such reserved interests, the type of any structure and/or appurtenances thereto now existing or to be erected in connection with such exploration and/or development, said structures and/or appurtenances thereto not to be of a material determined to create floatable debris.

IT IS FURTHER ORDERED that leave be and is hereby granted the United States of America to take immediate possession of all of the tracts of land in this action, to the extent of the interest to be acquired by the United States of America and proceed with such public works thereon as have been authorized by Congress.

The lands taken herein are situate in the Counties of Kountrail, McKenzie and Williams, State of North Dakota, and are described in Exhibit "A", attached hereto and made a part hereof.

This case is held open for such other and further orders, judgments and decrees as may be held necessary in the premises.

Dated this 15th day of August 1953.

CHARLES J. VOGEL
Judge, United States District Court.

The following described lands situate in McKenzie County, North Dakota, and more particularly described as follows:

TRACT NO. V-1963 - Lot 1 in Section 34, in Township 153 North, Range 93 west of the 5th P.M., containing 27.00 acres, more or less.

TRACT NO. V-1968 - Lot 2, Southwest quarter of the Northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$), West half of the Southeast quarter ($W\frac{1}{2}SE\frac{1}{4}$) of Section 6 in Township 152 North, Range 93 west of the 5th P.M., except a tract described as follows: Beginning at a point 446 feet East of the South 1/4 corner of aforesaid Section 6, thence East 874 feet to the East 1/16 line, thence North along said line 656 feet, thence west and South to the point of beginning, said exception contains 7.22 acres, more or less. Said tract exclusive of exception contains 170.12 acres, more or less.

TRACT NO. V-1976 - Lots 2, 3 and 4 of Section 5 in Township 152 North, Range 93 West of the 5th P.M., containing 172.06 acres, more or less.

TRACT NO. V-1988 - Lots 5, 6 and 7 of Section 10, Township 152 North, Range 93 west of the 5th P.M., except 4.79 acres more or less in said Lot 5 described as follows: Beginning at a point which is 426 feet North of the Southwest corner of Lot 5, thence East 370 feet, thence North to the Missouri River, thence Northwesterly along said river to the Northwest corner of Lot 5, thence South to the point of beginning. Said tract exclusive of exception contains 67.16 acres, more or less.

TRACT NO. W-2039 - Northwest quarter of the Northwest quarter ($NW\frac{1}{4}NW\frac{1}{4}$) of Section 8 in Township 153 North, Range 94 west of the 5th P.M., containing 40.00 acres, more or less.

TRACT NO. W-2044 - Southwest quarter of the Northeast quarter ($SW\frac{1}{4}NE\frac{1}{4}$), Southeast quarter of the Northwest quarter ($SE\frac{1}{4}NW\frac{1}{4}$) of Section 33 and also those portions of the Southwest quarter of the Northwest quarter ($SW\frac{1}{4}NW\frac{1}{4}$) of Section 33 and Southeast quarter of the Northeast quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section 32 lying South and East of the Missouri River all in Township 154 North, Range 94 West of the 5th P.M., containing 116.66 acres, more or less.

TRACT NO. W-2059 - Northeast quarter of the Southeast quarter of the Southeast quarter ($NE\frac{1}{4}SE\frac{1}{4}SE\frac{1}{4}$) of Section 9 in Township 153 North, Range 94 West of the 5th P.M., containing 10.00 acres, more or less.

TRACT NO. W-2048 - Lot 2 of Section 33 in Township 154 North, Range 94 West of the 5th P.M., containing 16.80 acres, more or less.

TRACT NO. W-2056 - Southwest quarter of the Southwest quarter ($SW\frac{1}{4}SW\frac{1}{4}$) of Section 33 in Township 154 North, Range 94 West of the 5th P.M., Lot 4, Southwest quarter of the Northwest quarter ($SW\frac{1}{4}NW\frac{1}{4}$), West half of the Southwest quarter ($W\frac{1}{2}SW\frac{1}{4}$), Southeast quarter of the Southwest quarter ($SE\frac{1}{4}SW\frac{1}{4}$) of Section 4, East half of the Southeast quarter ($E\frac{1}{2}SE\frac{1}{4}$) of Section 5 in Township 153 North, Range 94 west of the 5th P.M., containing 320.32 acres, more or less.

TRACT NO. X-2164 - Lot 6, West half of the Southeast quarter ($W\frac{1}{2}SE\frac{1}{4}$) of Section 32, and those portions of the Southeast quarter of the Northeast quarter ($SE\frac{1}{4}NE\frac{1}{4}$) of Section 32, and the Southwest quarter of the Northwest quarter ($SW\frac{1}{4}NW\frac{1}{4}$) of Section 33, lying South of the Missouri River, all in Township 154 North, Range 95 West of the 5th P.M., plus accretions, containing 179.15 acres, more or less.

TRACT NO. X-2169 - Lots 5, 6 and 7 of Section 26, Lots 5 and 6 of Section 27, all in Township 154 North, Range 95 west of the 5th P.M., containing 117.10 acres, more or less.

TRACT NO. Y-2276 - Lots 5, 6, 7 and 8, of Section 28, Lots 7 and 8 of Section 29, North half of the North half of the Northeast quarter ($N\frac{1}{2}N\frac{1}{2}NE\frac{1}{4}$) of Section 32, North half ($N\frac{1}{2}$), Southwest quarter ($SW\frac{1}{4}$), Northwest quarter of the Southeast quarter ($NW\frac{1}{4}SE\frac{1}{4}$) of Section 33 in Township 154 North, Range 96 west of the 5th P.M., plus accretions. Lot 4, West half ($W\frac{1}{2}$) of Lot 3, North half of the Southwest quarter of the Northwest quarter ($N\frac{1}{2}SW\frac{1}{4}NW\frac{1}{4}$), Northwest quarter of the Southeast quarter of the Northwest quarter ($NW\frac{1}{4}SE\frac{1}{4}NW\frac{1}{4}$), of Section 4, in Township 153 North, Range 96 West of the 5th P.M., containing 911.60 acres, more or less.

EXHIBIT "A"

District Court of the United States

BOOK 39 PAGE 313

District of North Dakota

UNITED STATES OF AMERICA
DISTRICT of NORTH DAKOTA } ss:

I, Beatrice A. McMichael, Clerk of the District Court of the United States for the District of North Dakota, do hereby certify that I have carefully compared the foregoing copy with the original thereof which is in my possession as such Clerk and that such copy is a correct transcript from such original. **JUDGMENT ON DECLARATION OF TAKING insofar as it covers the lands located in** McKenzie **County in the matter of United States of America vs. 8,151.83 Acres of Land, More or Less, Situate in Mountrail, McKenzie and Williams Counties, State of North Dakota, and Arthur Auverson, et al., and Unknown Owners - Civil No. 754;**

IN TESTIMONY WHEREOF I have hereunto set my hand and affixed the seal of said Court, at Fargo, in said District, this 17th day of August, A. D. 1953

Beatrice A. McMichael, *Clerk*

By Eula L. Baldwin, *Deputy*

Delinquent Taxes and Special Assessments, or Installments of Special Assessments, paid and transfer entered this 19th day of August 1953

COUNTY AUDITOR

By [illegible] Asst. Deputy

Document [illegible]

REGISTER OF DEEDS OFFICE MCKENZIE COUNTY NORTH DAKOTA

STATE OF NORTH DAKOTA, } ss. OFFICE OF
COUNTY OF McKENZIE. } REGISTER OF DEEDS

I hereby certify that the within instrument was filed in this office for record on the 20 day of Aug A. D. 1953 at 2:45 o'clock P. M., and was duly recorded in Book 39 of Misc. on Page 312.

REGISTER OF DEEDS

By _____ Deputy

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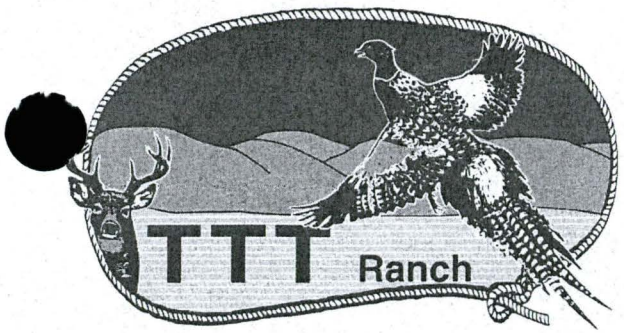

For

January 11, 2017

ND Senate Natural Resources Committee, Chairman Jessica Unruh, and other members:

We, Fred & Joyce Evans, Stanley, ND are writing this concerning the importance of passing Senate Bill 2134. Our ranch is in central Mountrail County, and the main minerals we own are in this area. Following are our thoughts and comments on the reason why SB 2134 should be passed.

The "old" Missouri River-bed is simple, a navigable water-way, with accretion and riparian rights, something which has been well defined just before the government started "buying" land which was to be flooded. There is not the slightest doubt where the River-Bed was at that time. A lot of the land on either side of the Missouri river had been HOMESTEADED, Land which was owned in fee simple, land which was willingly, and some, not so willingly deeded to the US Government for the sole purpose of a reservoir to hold water after the Garrison Dam was built. The surface of that land was sold, with a good number of sellers reserving "their Mineral Rights". Senate Bill 2134, will clarify the point that the minerals which were retained at the time of the sale of the their land, are still theirs, and are not to be taken.

My Grandfather homesteaded North of New Town. Let's say his homestead North of New Town was where Lake Sakakawea is, he had his 160-acre homestead and also acquired another four (4) quarters of land, ending up with 800 acres in the mid 1940s, right where Lake Sakakawea was going to be! He would have had to sell the land to the US Government, however let us say he reserved "**his** Minerals" under this land. His Minerals would have been passed down to his children, one would have been my mother, then passed on down to her five (5) children. Those Minerals would have been leased a number of times over the years and now there are quite a few Oil-Wells on those 800 acres.

The people who own mineral rights which were reserved when they sold their land, T**heir Minerals** under Lake Sakakawea need to be protected. We appreciate your time in reading this and thank you for your consideration, along with a swift passage of Senate Bill 2134, protecting the private ownership of minerals under land that was "taken", under Lake Sakakawea. Please, let this come out of committee with 100%, "DO PASS".

Yours Truly,

Fred W. Evans

Fred W. Evans & Joyce Evans

Joyce Evans

4949 Triple T Road
Stanley, North Dakota 58784
Phone 701-628-2418 • www.tttranch.com

Things Take Time

Jon Patch

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Testimony of Jon Patch

Concerning SB 2134

Senate Energy and Natural Resources Committee

January 12, 2017, 9:00 AM

Madam Chair, my name is Jon Patch. I'm a lifelong resident of North Dakota. I am here representing the family of my Grandparents, JT and Evelyn Wilkinson who homesteaded and farmed in the Trenton Valley of Williams County (figures 1 and 2). My mother, who is 92 years old, and is a resident of the MSLCC, often recalls the time growing up there and working in my grandfather's wheat fields. Deep under those wheat fields is the Bakken formation, which my grandfather knew absolutely nothing about, but had the providential wisdom to write "reserving the minerals" when he signed the title over to the U.S. government in the 1950s under the threat of condemnation (see Warranty Deed and letter from the US Attorney General). Why did he sign title of that land he owned in fee to the government? Because he was told that it was needed for the newly created Garrison Dam and man-made reservoir (Lake Sakakawea, figures 3, 4, & 5) that will occasionally flood that property. Well, that forced Grandpa out of the farming business but at least he still had some attachment to the property by leasing the mineral rights. He and his children who inherited those mineral rights have been actively leasing those minerals since the 1950s. The land we are talking about is 286 acres in the Trenton valley **west** of the highway 85 bridge.

I lay that groundwork because back in February 2010, the family was delighted to find out that our mineral acres were included in a 1280 acre spacing unit. In May, 2010 there was a special hearing held by the Oil and Gas division on a drilling permit request. Brigham oil spudded the well on 6/20/2010 and completed drilling on 7/13/2010. The well was fracked in November, 2010 and has been producing ever since. But, that is where our delight ends and our disheartenment begins. After many months of wondering why the royalty payments weren't forthcoming, I discovered by happenstance that our mineral acres had been nominated into the State Land Department mineral database after department employees shared draft information of an OHWM study that the Land Board commissioned at the behest of the oil companies. The State claimed our mineral acres as their own and auctioned them to the highest bidder at the August, 2010 state mineral auction. By the way, the OHWM study was not finalized, accepted, and made public by the land board until November, 2010, six months after the draft results were slipped into the hands of the oil company operatives. No notice was given, nor any opportunity to object to what the state did in their taking scheme. Many meetings with Department staff and attorneys and presentations to the Land Board met with deaf ears. Land Commissioner Gaebe told me at one point "nothing is going to change with their policies and practices unless told to do so by the legislature or a guy in a black robe." The family explored both options and decided for the sake of time we would take the court route. We hired an attorney and in January of 2012 we sued the state to get our minerals back. Now, some $300,000 in attorney and expert fees later, our case is in the hands of the Supreme Court. The sad fact is, we never got to have our day in court. Days before our scheduled trial last May, the judge signed verbatim a summary judgement order that was nothing more than the proposed order written by the state attorneys. The order states that "the Missouri River is not distinguishable from Lake Sakakawea." And that artificial changes such as dams and dam operations can influence the OHWM boundaries and the course of rivers and lakes. Therefore, the state argument is essentially saying the Lake does not

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exist, its merely a widening of the Missouri River, thereby laying claim to hundreds of thousands of riverbed and mineral acres purchased by the corps for reservoir operations.

Land surface elevation of our mineral land, that the state has laid claim to, is in the 1850-1851 foot range above mean sea level. The Garrison Dam spillway is at 1854'. The corps acquired property upstream of the Dam based on that top of spillway elevation, which represents the maximum operating pool. All of the USGS National Hydrography Dataset maps use the 1854' contour as the limit of Lake Sakakawea (figure 3). The ND Industrial Commission use the 1854' contour in their "Special Places" rule for the extent and limit of Lake Sakakawea.

I would like to note that my mother and her siblings with first-hand knowledge have said under oath that the land in question never flooded prior to the dam being built. (See attached affidavits, Appendix 1)

But, since the dams were built, the land has flooded regularly, most recently in 2011 when the reservoir was operated at maximum capacity (figure 5).

Now, having said all that, where does our family stand with regards to this bill? That depends. The bill would need to be amended to remove unnecessary language that essentially limits the upstream extent of Lake Sakakawea as the Highway 85 bridge.

Keeping that language would validate the current practice of the Department of Trustlands of using one sovereign land determination east of the Highway 85 bridge and a different one west of the bridge. That determination was described in our expert's report as an arbitrary and capricious line/boundary for the western edge of Lake Sakakawea (report prepared by Houston Engineering Inc, available for download at:
https://www.dropbox.com/s/u996e0yiubikliq/houston%20report-final%28all%29.pdf?dl=0 .)

Statements by state officials and experts taken during our lawsuit depositions prove that there is no sound scientific or valid legal reasoning for it to be used as a boundary for sovereign land determination (see attached quotes). The Highway 85 bridge was used simply as a recognizable landmark when doing their OHWM studies. Hardcoding it in statute as legal boundary for sovereign land determination, as this bill would currently do, would be a big mistake.

We wholeheartedly and in the strongest way oppose the bill if this language remains.

By the same token, if the bill would be amended to include the entire reach of Lake Sakakawea up to the 1854' contour, we would wholeheartedly support it. This could easily be accomplished by striking the language that specifies the extent of the reservoir as ending at mile marker 1552.4. There is broad support from state officials and experts on the use of the "historic channel" within Lake Sakakawea as the state limit to it's sovereign ownership (see attached quotes).

I respectfully ask for your fair and just treatment of Mineral Owners west of the Highway 85 bridge, essentially, to do the right thing!

Sincerely,

Jon Patch, P.E.

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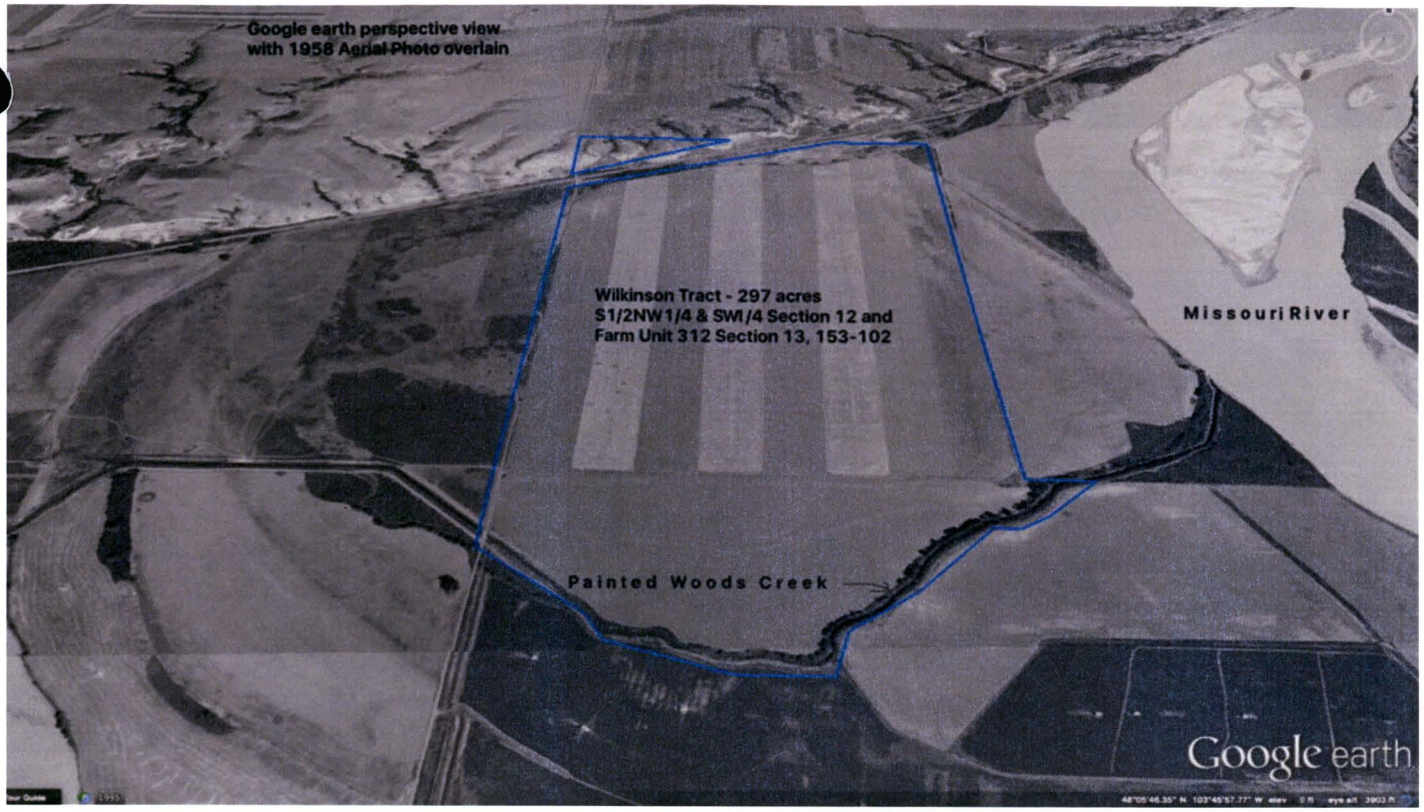

Figure 1 - Aerial Photography Taken in 1958

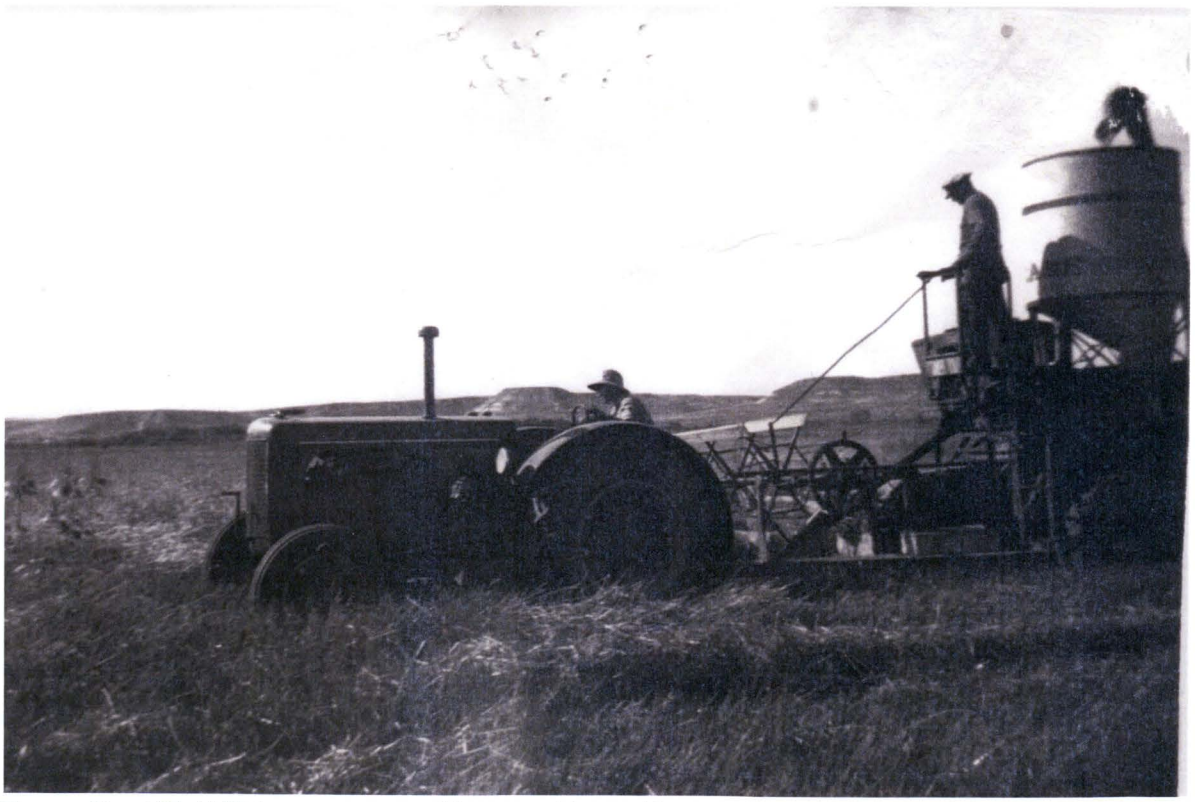

Figure 2 - J.T. Wilkinson on combine working with son Tom on tractor. (in about 1940)

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J. T. Wilkinson and Evelyn M. Wilkinson, his wife, Trenton, North Dakota

to

WARRANTY DEED DOC. # 288165
Book 131 Deeds page 411
Filed June 10, 1958, 4:50 P.M.
Dated June 9, 1958

United States of America
Address: Washington, D. C.

In consideration of $ 43,327.00, Grant, Bargain, Sell and Convey unto second party and its assigns, all that tract or parcel of land lying and being in the County of Williams and State of North Dakota, and described as follows, to-wit:
Farm Unit No. 312 in Buford-Trenton Project, according to the plat thereof recorded in Deed Book 101, Page 413, being a part of Sec. 13, Twp. 153, Rge. 102 and containing 57.09 acres, more or less, also the SW¼ and S½NW¼ of Sec. 12, Twp. and Rge. aforesaid, excepting that portion of said S½NW¼ which constitutes right-of-way of the Great Northern Railway Company, containing, exclusive of said exception 228.95 acres, more or less, subject to existing easments for public roads and highways, public utilities, railroads and pipe lines.

Reserving, however, to the owner of the land or the owner of any interest therein, including third party lessees, their heirs, successors and assigns, all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved are subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation and maintenance of the Garrison Dam and Reservoir, and that any exploration or development of such rights shall be subject to federal or state laws with respect to pollution of waters of the reservoir; provided further that the District Engineer, Corps of Engineers, Garrison District, or his duly authorized representative shall approve, in furtherance of the exploration and/or development of such reserved interests, the type of any structure and/or appurtenances thereto now existing or to be erected or constructed in connection with such exploration and/or development, said structures and/or appurtenances thereto not to be of a material determined to create floatable debris.
Free from all encumbrances.

$47.85 R. S. Cancelled

On this 9th day of June A. D. 19 58, before me personally appeared J. T. Wilkinson and Evelyn M. Wilkinson, his wife known to me to be the same persons described in and who executed the within and foregoing instrument, and severally acknowledged to me that they executed the same.

(N. P. Seal)

Telmar E. Rolfstad /s/
Notary Public, Williams County, State of North Dakota

My commission expires Nov. 19, 1958

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EXHIBIT "3"

ABSTRACTER'S CERTIFICATE

Project Garrison Dam & Reservoir, N.D. Tract No. NH-3190

Williams County, State of North Dakota

containing 228.05 acres, more or less.

I hereby certify that for the use and benefit of the United States of America and its assigns I have made a complete examination of all public records pertaining to the title to the captioned land since Sept. 20, 1957, 5 P.M. the date of the previous certificate and that nothing affecting or relating to the title in any manner whatsoever has been filed or recorded in such records since the date of the previous certificate except as shown at page(s) Entries 10a to 12, inclusive, of the abstract.

I further certify that no taxes or special assessments now appear upon the records as unpaid and no tax sales now appear upon the records as unredeemed except as follows:

none

Made this 24th day of July A. D., 19 58 at 5 P.M.

Williston (City), North Dakota (State)

58058
NO-0110

Nellie J. Hydle
Abstracter

(This form of certificate is to be attached to CONTINUATIONS OF ABSTRACTS)

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Office of the Attorney General
Washington, D. C.

May 12, 1959

GARRISON DAM AND RESERVOIR

HH-3190

N. D.

Honorable Wilber M. Brucker
Secretary of the Army
Washington, D. C.

My dear Mr. Secretary:

A re-examination has been made of the title data relating to 286.04 acres of land, more or less, Tract No. HH-3190, Garrison Dam and Reservoir Project in Williams County, North Dakota. This land was conveyed to the United States of America under the provisions of existing legislation by J. T. Wilkinson and Evelyn M. Wilkinson, his wife, under deed dated June 9, 1958, filed for record on June 10, 1958, and recorded among the land records of the county in Book 131 of Deeds at page 411. Your reference is No. MRGRO 601.1 and the file number of this Department is 33-35-242-1238.

The land is described in the aforesaid deed, which recites a consideration of $43,327.00.

The abstract, consisting of volume No. 33315, containing 17 items, volume No. 33008, containing 34 items, volume No. 33009, containing 32 items and continuation abstract No. 56628, containing 12 items, was last satisfactorily certified on July 24, 1958, by the Williams County Abstract Company. All references to abstract numbers made herein refer to numbers appearing on the back cover of the abstract volume.

The abstract, recorded deed, and accompanying data disclose valid title to be vested in the United States of America subject to:

1. Easements for roads, highways, public utilities, railroads and pipe lines, if any, not shown of record.

2. Reservations contained in the patents from the United States shown at item 1 of abstract No. 33315, item 27 of abstract No. 56628.

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3. Reservation by grantors and owners of any interest therein including third party lessees, their heirs, successors and assigns of all oil and gas rights therein, under the terms contained in the deed to the United States.

Your Department has advised that objections 1, 2 and 3 will not interfere with the contemplated use of the land.

Abstract volume No. 33315, continuation abstract volume No. 56628, deed and related papers are enclosed. Abstract volumes 33008 and 33009 are enclosed with the final opinion for Tract No. HH-3187, this Department's file No. 33-35-242-1232.

Sincerely yours,

William P. Rogers

Attorney General

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Project Garrison Dam and Reservoir, N. Dak.
Tract HH-3190
County Williams
State North Dakota

PAYMENT AND CLOSING SHEET

Vendors J. T. Wilkinson and Evelyn M. Wilkinson, his wife
New Address Trenton, North Dakota
Acreage 286.04 Consideration $ 43,327.00 Date 10 June 1957

	Action Taken (✓)	Cash Payments by Vendor	Amount Paid From Treas. Check
Curative Material Obtained			
Approved by Spec. Atty. (abst.) or Title Co. (C. of T.)			
Notary Fees (Vendor's Expense)			
Recording Fees (Vendor's Expense)			
Physical Inspection of Property	X		
Disclaimers (CR Form 20)			
Statement of Consent of Commanding Officer			
Report on Vacation of Property (CR Form 106)			
Certificate of Crop Inspection (CR Form 77)			
Refund for Crops Harvested by Vendor			
Fee for Issuing Cashier's Check or Money Order			
Certificate of Inspection and Possession (CR Form 39)	X		
Deed to United States	X		
Notary Fee (Vendor's Expense)			
Federal Revenue Stamps - 55¢ for $500 (Vendor's Expense)	X	$47.85	
State Revenue Stamps (Vendor's Expense)			
Recording Fee by Vendor or United States (see option)			
Search of Records Since Last Continuation	X		
Mortgages, Judgments, F.S.A. Loans and Other Liens			
1. Payment to _____; Principal			
Interest from _____ to _____			
2. Payment to _____; Principal			
Interest from _____ to _____			
Release Fees (Vendor's Expense)			
Certificates Re: Blocked Nations (CR Form 98 or 99)			
Taxes: Delinquent (19__ to 19__)			
Current (19__)			
Withheld for Taxes Which are a Lien but not Payable			
Fee for Issuing Cashier's Check or Money Order			
Total Cash Payments by Vendor			
Total Amount Paid From Treasurer's Check			- - -
Option Price			$43,327.00
Total Amount Paid From Treasurer's Check (Are all requirements of Attorney General's opinion satisfied?)			
Balance Due Vendor			
Receipt for U. S. Treasurer's Check (CR Form 19)	X		
Certificates Re: Blocked Nationals (CR Form 98 or 99)			

The above is a complete, true and correct account of funds received and disbursed by me and a report of the action taken in conducting payment and closing of the instant transaction.

Closing Attorney

I/We have examined the above statement and find it correct. This acknowledges that $ 43,327.00 has been disbursed as above with my/our approval and for my/our account and benefit, which said sum is the sale price set forth in my/our Option Agreement with the United States of America, and I/We acknowledge receipt of the balance due me/us as shown above.

J. T. Wilkinson

Evelyn M. Wilkinson

Evelyn M. Wilkinson, his wife

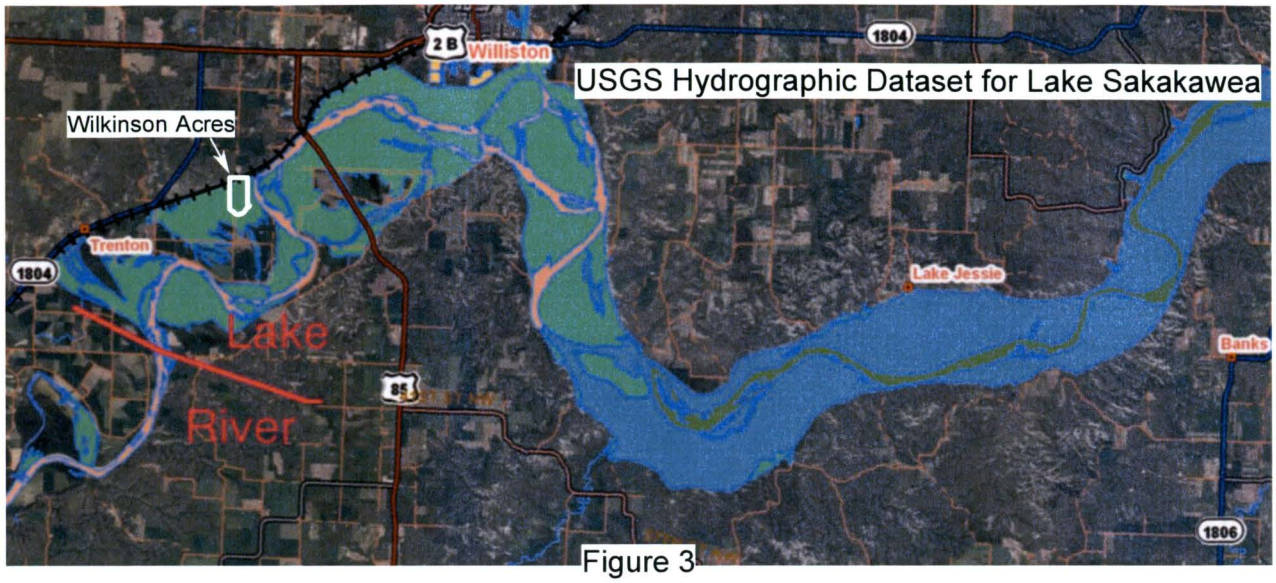

Figure 3

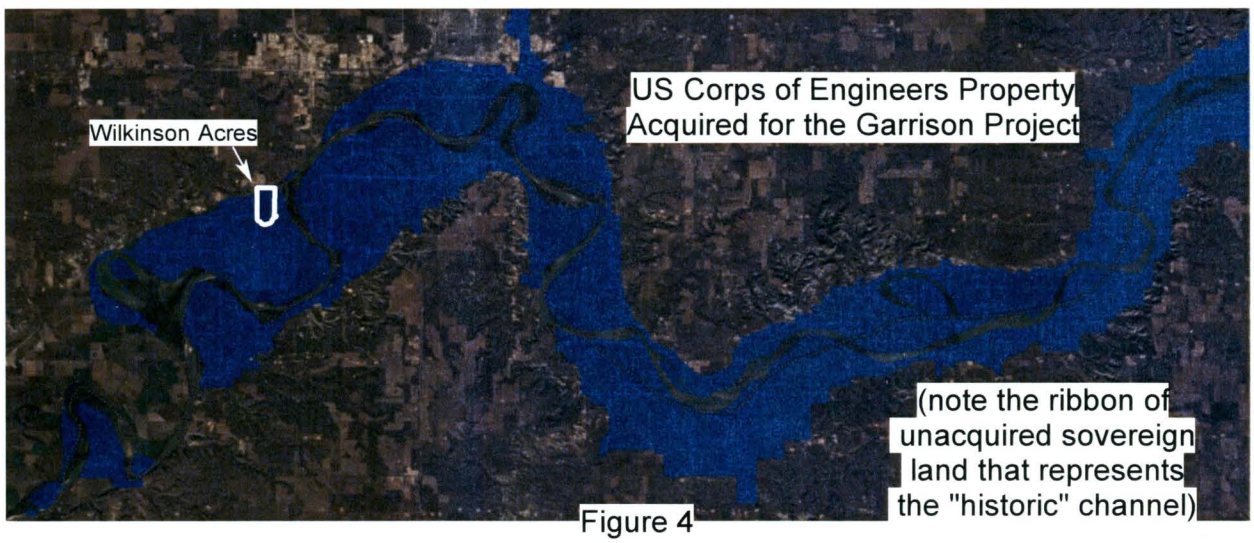

Figure 4

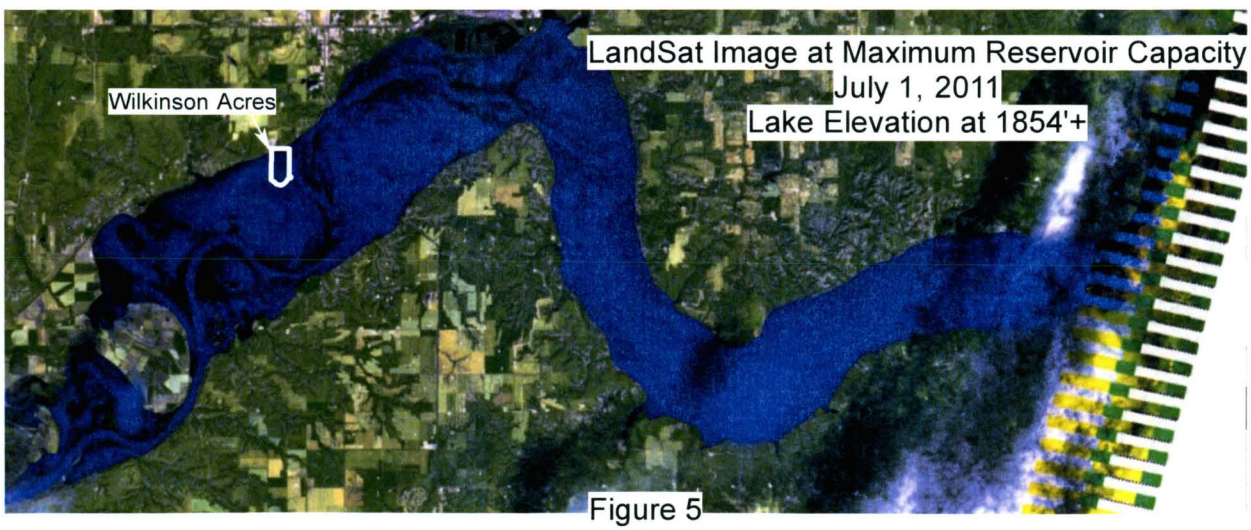

Figure 5

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Quotes from state officials concerning the use of the Highway 85 Bridge as a dividing line.

From Depositions taken for the Wilkinson vs. State of ND et.al. Lawsuit

James Landenberger – Bartlett and West

Q. Do you know why the Highway 85 bridge is used as the dividing line between the Phase I and Phase II studies?

A. No.

Q. From an engineering and technical standpoint, is there any reason why the Highway 85 bridge should have been used as the dividing line between the Phase I and Phase II studies?

A. Engineeringwise why the bridge was chosen, I have no idea.

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

Q. Are you aware of any scientific basis for using the Highway 85 bridge as a transition for use of the Phase I Study over the Phase II Study?

A. No. Other than Phase II was an estimation -- or was an estimation based on historical photography versus natural delineation.

Q. Right. But I'm talking about specifically the Highway 85 bridge. Are you aware of any scientific basis for using the Highway 85 bridge as a transition --

A. No.

Todd Sando, ND State Engineer

Q. The State of North Dakota used the Highway 85 bridge as the cutoff point for separating the Phase I Study and the Phase II Study. Do you have any knowledge why they used the Highway 85 bridge?

A. No.

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Q. Do you know if there's any scientific or technical reason the State would have used the Highway 85 bridge as the point for separating the Phase I Study and Phase II Study?

A. No.

Q. Did you have any discussions with anyone from the Land Board about using the Highway 85 bridge as the transition point between the Phase I and Phase II Study?

A. Don't recall any.

Gerald Heiser, Sovereign Lands Manager, Office of the State Engineer

Q. Are you aware of any scientific reason for the Land Department to use the Highway 85 bridge as a cutoff for leasing Phase I acreage west of that bridge?

A. I am not, no.

Q. And I understand you didn't have any input in using Highway 85 bridge as a cutoff for the mineral leasing acreage.

A. That's correct.

Q. Has there been any work done by the State Water Commission with respect to a definitive line where the Lake Sakakawea is on one side and the river is on the other side of that line?

A. No, I don't believe anything definitive.

Q. Has there been some preliminary work done in that regard?

A. No, I don't believe so.

Q. Do you agree that the western boundary of Lake Sakakawea is the land upstream of the Garrison Dam to the 1854 contour level?

MS. VERLEGER: Objection to the extent it calls for a legal conclusion.

THE WITNESS: I believe that was the elevation the Corps used to purchase lands for the reservoir, but --

Q. (MR. STOCK CONTINUING) And all those lands up to the 1854 level certainly would be subject to inundation by the dam?

A. I assume. Otherwise, I believe they wouldn't have purchased it.

Lance Gaebe, ND Land Commissioner

Q. And what is the basis of using the Highway 85 bridge to lease minerals up to the ordinary high water mark to the river as it existed that day instead of the historic Missouri River in that area?

A. It was a decision that was reached before my time. I don't know the basis of that. Before my time at the department.

Q. Okay. So to summarize here, the State used Phase I in the Wilkinson property because it was west of the Highway 85 bridge?

A. The State used Phase I because it identified the river condition as the river exists in its present state.

Q. And you used the condition as the river exists in its present state for the ordinary high water mark -- the cutoff for that decision is the Highway 85 bridge; yes?

A. Approximated, yes. I think in nearly all cases, that's correct.

Q. Is there any scientific reason to use Highway 85 bridge to determine ordinary high water mark as the river exists that day instead of using the historic Missouri River west of Highway 85 bridge?

A. I don't know.

Q. Are you aware of any scientific reason to use Highway 85 bridge for that distinction?

A. I am not.

Mike Brand, former Director of Surface Management, Department of Trustlands

Q. Is there any basis -- are you aware of any scientific basis for using the Highway 85 bridge as that distinction for leasing purposes?

A. That would be speculation on my part. I'm not involved in that decision or in studying that decision.

Q. Well, based on your expertise and your training and your experience as the director of the Surface Management Division, can you tell me any scientific reason why Highway 85 bridge should be used as the dividing point for using Phase I compared to Phase II?

A. That would be a question to ask the State Water Commission.

Q. You've been designated as an expert witness in this case, Dr. Brand. Do you have any opinion on the use of Highway 85 bridge as the dividing point between Phase I and Phase II with respect to the State's leasing practices?

A. I haven't -- I haven't studied that delineation point -- I mean, that division. All I can say is that we did stop essentially at Highway 85 because beyond there it was almost impossible to delineate the ordinary high water mark on the south side of the river.

Q. Did you -- did Bartlett & West delineate the ordinary high water mark on both sides of the river or just the south side?

A. Both sides.

Q. Why do you say it was impossible to delineate the ordinary high water mark on the south side of the river west of Highway 85?

A. Impossible is probably incorrect because nothing is impossible in this life, of course, but it would have been more difficult and beyond the scope of the project because of the wetlands that were there and the meandering that occurred there.

Bruce Zelmer, Surveyor, Bartlett and West

Q. Do you know why the State chose the Highway 85 bridge as the transition point between the Phase I and Phase II surveys?

A. I can't tell you exactly why. Our original contract and scope and RFP was to go to river mile 1549, I believe. We attempted to do that. As we came into the Williston area from upstream, we were very confident in what we did. And as we got to the bridge and then the left bank and there was some

major concerns that the delineators had on that right bank and how that swirled back around, and there was discussions on where to stop that, so, again, between the -- I think it was the Water Commission people that were involved in that, the Land Department, and ourselves, of course, but we did not make that decision.

Q. When you say how it -- was it how the water swirled around by there?

A. Yeah. Some is water, some is the high water mark, there's agricultural plots in there if you look on the imagery too.

Q. My understanding is that James Landenberger dealt with the State as far as comments they may have had with regards to the Phase I and Phase II Studies; is that correct?

A. Correct. James was our point of contact with all those projects.

Q. Are you aware of any scientific basis to support using the Highway 85 bridge as the point where the Phase II survey stops and the Phase I Study begins?

A. No.

Q. ... With regards to the Highway 85 bridge, do you know if there was any scientific basis to use the Highway 85 bridge as a separation between the Phase I and Phase II Studies?

A. ..... Again, it's my opinion, but maybe because it's a physical feature.

Gary Preszler, former ND Land Commissioner

Q. I'll just tell you, I believe Mr. Gaebe stated that the State's use of the Highway 85 bridge for transition leasing purposes of using Phase II compared to Phase I came from you and conversations with others that came before him in the office. Is that not true?

A. Well, I'll tell you what the bridge represents. It does not represent any type of a man-made structure that we felt had an influence whatsoever. It just represented a recognizable landmark that we all knew and we used that as a basis, so when we talked about Phase I, Phase II, we would talk about miles east or west of the bridge. Tom certainly had the maps and he was more familiar with the actual river miles that were there. But as far as that we used Phase I up until the bridge, no. Well, we used the information that I had on Phase I up until my retirement. I did not have anything with Phase II, so I can't answer that as far as what the department did after my retirement.

Q. You'd agree that there's no scientific reason to use the Highway 85 bridge as the transition between Phase I and Phase II as far as leasing purposes?

A. No. It represented no scientific analysis or basis whatsoever. But I think if you look at the report that was given, on the north shore Bartlett & West delineated all the way east of Williston a number of miles. On the south shore they ended about where the bridge was. So that's, if anything, where it looked at the differences to what we were leasing, and stuff like that, that would have impacted it, because we didn't have complete data then east of the bridge on Phase I, if I'm correct in my understanding. You have the data.

Tom Feeney, Director of Mineral Management, Department of Trustlands

Q. Well, was the decision to use the Highway 85 bridge as the transition point between using Phase I and Phase II acreages?

A. Not to my knowledge. That Highway 85 bridge, I don't know where that term even came from or who initiated it or where -- what it represents. To me that was just a landmark, an easy point of reference. When somebody asks you, How far did you get on this project? Well, Highway 85 bridge approximately, you know. The bridge has nothing to do with what phase is used to determine what acreage is made available for nomination.

Q. Right. So you'd agree there's no scientific basis to use Highway 85 bridge as a transition point between Phase I and Phase II acreages; correct?

A. This is the wash area that we knew needed more study, and so we commissioned a phase 3 also. And Phase III -- I don't know if we called it Phase III. I think it was Task Order 3. But, anyway, the purpose of 3 was to take a closer examination of these problem areas, controversial areas, areas difficult to determine if it's river or lake, and there were maybe half a dozen of them that were studied in Phase -- or Task Order 3.

Quotes from state officials concerning the use of the "historic channel" as the limit to the state's claim to sovereign land ownership.

Gary Preszler – State Land Commissioner from 1995-2010 – from Deposition in Wilkinson vs. State Lawsuit

Q. (MR. STOCK CONTINUING) And, therefore, the State -- in your opinion, the State cannot claim as sovereign lands land underlying Lake Sakakawea; is that a fair statement?

THE WITNESS: No, I don't -- I don't agree with that. And the State has always maintained rights to the original riverbed under Lake Sakakawea.

Q. (MR. STOCK CONTINUING) That's a good point. So even though inundated by Lake Sakakawea, the State would claim, and has the right to claim, ownership of the original historic Missouri riverbed?

THE WITNESS: That's been the basis of our management at the Land Department. Yes, we maintain that the State did not convey the riverbed to the federal government nor did they condemn the riverbed itself.

Q. (MR. STOCK CONTINUING) In fact, the State is not -- well, has a policy of not claiming mineral interests up to the shores of Lake Sakakawea other than underneath the historic Missouri riverbed; correct?

THE WITNESS: I can only respond as to my tenure during -- as commissioner, we never claimed anything outside the riverbed.

Q. The historic Missouri riverbed?

A. The historic riverbed, that's correct.

Todd Sando – State Engineer 2010-2016 – from Deposition in Wilkinson vs. State Lawsuit

Q. But you don't know what sovereign land the State of North Dakota is claiming as part of the Garrison project that was owned by the United States?

A. Yes, I do. We're claiming where it's been delineated below the ordinary high water mark and we're managing the water that was -- I mean, the land that was transferred at the time of statehood, so the historic river channel through Lake Sakakawea.

Q. (MR. SWANSON CONTINUING) Lake Sakakawea did not exist at statehood; correct?

A. Correct.

Q. So Lake Sakakawea could not be navigable at statehood; correct?

A. Correct.

Q. And you do not know whether your office, the State Engineer and the State Water Commission, has determined that the State owns as sovereign lands 30,000 acres which represents the riverbed of the Missouri River lying underneath Lake Sakakawea?

A. You're saying I don't know. I do know, yes.

Q. Well, what do you know?

A. Like I said, the original channel at the time of statehood was transferred to the State of North Dakota, so whatever number of acres that is, the historic channel.

Gerald Heiser – Sovereign Lands Manager, office of the ND State Engineer 2008-present - from Deposition in Wilkinson vs. State Lawsuit

Q. Now, and that -- would that claim to sovereign lands up to the ordinary high water mark also include claim to lands inundated by Lake Sakakawea?

THE WITNESS: The State claims title to the historic bed of the Missouri River under Lake Sakakawea.

Q. (MR. STOCK CONTINUING) Correct. So you can claim -- the State of North Dakota claims title to the historic Missouri River but not necessarily the Garrison Reservoir created by the Garrison Dam?

THE WITNESS: At this time, no, we don't.

Q. (MR. STOCK CONTINUING) As the manager of sovereign lands, do you currently manage any sovereign lands around Lake Sakakawea, bordering Lake Sakakawea?

A. Well, we manage the Missouri River, so, I guess, yeah.

Q. Do you currently -- specifically does your office manage any sovereign lands bordering Lake Sakakawea, is what I'm asking, not bordering the river.

A. We administer sovereign lands on the historic Missouri River channel but not bordering -- I mean, nothing on the external boundaries of the reservoir.

Charles Carvell – Former Director, Natural Resources and Indian Affairs Division, Attorney General's office, - from Minutes of the Administrative Rules Committee Tuesday, March 9, 2010 (attached)

In response to a question from Representative Kasper, Mr. Carvell said with regard to water and lands at Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control.

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AHd #8

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, March 9, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 10:00 a.m.

Members present: Senators Jerry Klein, John M. Andrist, Tom Fischer, Joan Heckaman, Tracy Potter; Representatives Randy Boehning, Chuck Damschen, Duane DeKrey, Jim Kasper, Kim Koppelman, George J. Keiser, Joe Kroeber, Jon Nelson, Blair Thoreson, Francis J. Wald, Lonny Winrich, Dwight Wrangham

Members absent: Senator Layton W. Freborg; Representatives Wesley R. Belter, Stacey Dahl, Mary Ekstrom

Others present: See Appendix A

It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

STATE WATER COMMISSION

Chairman Klein called on Mr. Dale Frink, State Engineer, State Water Commission, for comments on State Water Commission rules carried over from the previous committee meeting. Mr. Frink said the rules submitted for Administrative Rules Committee consideration relate to management of sovereign lands but do not make changes in law or rules determining what is included in sovereign lands. He said in 1989 the Legislative Assembly transferred sovereign lands management from the Land Department to the State Engineer. He said a 2005 Attorney General opinion required development of a comprehensive plan for management of sovereign lands. He said the required comprehensive plan has been completed. He said the existence of the comprehensive plan has been beneficial because issues and uses relating to sovereign lands have grown in recent years. He said some rules changes were needed to conform preexisting rules to the comprehensive plan. He said that is the reason the rules were adopted.

Mr. Frink said the rules adopted cover issues relating to uses of sovereign lands, but he understands the concern of the committee is with obtaining information on what is included in sovereign lands and how the phrase "navigable waters" is defined. He said Mr. Charles Carvell, Director, Natural Resources and Indian Affairs Division, Attorney General's office, is the state's most experienced legal adviser on these issues, and he asked Mr. Carvell to provide information to the committee on these issues.

Representative Keiser asked why these changes were made through rules instead of legislation. Mr. Frink said the comprehensive plan as developed and implemented required adjustment of existing rules of the State Water Commission. Representative Keiser asked why sovereign lands are defined in rules instead of legislation. Mr. Frink said the definition of sovereign lands in the rules is identical to a definition in statute. He said the rules do not make any change in what is included within the coverage of the term sovereign lands.

Mr. Carvell provided testimony (Appendix B) based on a written outline distributed to the committee. He traced the history of the sovereign lands doctrine.

In response to a question from Representative Keiser, Mr. Carvell said constitutionally it is probably not possible for the state to change the status of sovereign lands because the waters that were navigable at statehood are the basis of the state's sovereign lands.

Senator Klein asked whether the federal government under Section 404 of the Clean Water Act is looking for ways to expand its jurisdiction by expanding what are considered navigable waters for Clean Water Act purposes. Mr. Carvell said that appears to be true.

In response to a question from Representative Kasper, Mr. Carvell said with regard to water and lands at Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control.

Representative Koppelman said as he understands the policy, navigable waters at statehood are certain defined waters but water level changes can change what land is included in sovereign lands of the state. Mr. Carvell said that is correct.

Senator Heckaman said at Devils Lake agricultural lands have been inundated and former owners are continuing to pay minimal property taxes on the property. Mr. Carvell said he does not see any reason why those owners should pay property taxes. He said the state owns the land under sovereign lands coverage, and those owners will be restored to ownership when the water recedes.

Mr. Frink said it is a local decision on property taxes on inundated lands. He said owners of those

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State of North Dakota

Office of the State Engineer

900 EAST BOULEVARD AVE.
BISMARCK, ND 58505-0850
701-328-2750 • FAX 701-328-3696 • http://swc.nd.gov

DEPARTMENT OF
NDTRUST LANDS
INVESTING FOR EDUCATION

Lance D. Gaebe, Commissioner

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328 – 2800
Fax: (701) 328 – 3650
www.land.nd.gov

December 8, 2014

Ms. Jamie E. Connell, State Director
Bureau of Land Management
Montana State Office
5001 Southgate Drive
Billings, MT 59101-4669
Via e-mail: jconnell@blm.gov

RE: 9661 (MT926)

Dear Ms. Connell:

In July 2014, the Bureau of Land Management (BLM) published notice in the Federal Register regarding resurveys of four townships in North Dakota. On behalf of the State of North Dakota, the Office of the State Engineer (OSE) submitted a letter on August 7, 2014, and the Department of Trust Lands (DTL) submitted a letter on August 6, 2014, protesting these resurveys.

In 2009, North Dakota initiated an Ordinary High Water Mark (OHWM) survey of the river channel of the Missouri River. Under present day, Lake Sakakawea, the historic channel, was determined based upon high resolution aerial photography from 1958, just prior to these lands being flooded from the construction of Garrison Dam. The survey was conducted using the OSE's January 2007 "Ordinary High Water Mark Delineation Guidelines," a document developed to provide a scientific repeatable process for delineating the OHWM of the state's waterbodies.

BLM appears to be using Corp of Engineers' segment maps to determine the OHWM of public domain tracts within the four townships. These maps are not an accurate reflection of the OHWM. The State of North Dakota owns several parcels now being claimed by BLM and insists the Cadastral Supplemental Plats not be filed as an official plat.

Todd Sando
State Engineer

Lance D. Gaebe
State Land Commissioner

TODD SANDO, P.E.
STATE ENGINEER

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State of North Dakota
ss.
County of Burleigh

Affidavit of Lois Jean Patch

I, Lois Jean Patch, of Bismarck, North Dakota, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. That I was born in Trenton, North Dakota on February 20, 1924 in my parents home. I lived with my parents in Trenton, North Dakota until I was a late teenager when I went away to college in Fargo, ND. I returned to Williams County and was married in 1944. We settled in Williston where I and my husband raised 8 children. We moved to Bismarck, ND in 1959.

2. During my growing up years in my parent's home, I spent much of my time assisting with the family farming operation, my dad was a wheat farmer. I recall doing a variety of tasks like driving grain trucks or delivering lunch to my dad and brothers in the field. One of the fields where he grew wheat was in the east Trenton valley near the Missouri River. We called that the "big field." I recall working in that field in the spring and fall clearing old roots that would come to the surface every year. We called these "grubs" and would gather them to burn in our furnace as a source of fuel. The attached photo was taken by my brother James Wilkinson and shows my brother Tom Wilkinson driving the tractor pulling the swather and combine being operated by my father John Thomas (Tom sr.) Wilkinson. The exact location of the photo is not known but it is in the east Trenton valley and could be in the "big field" in sections 12 and 13.

3. In my married years while living in Williston, we would often take our kids for a relaxing summer evening drive down to that area to show them the fields where their mother worked with their grandfather and other family members in the fields. Many times their grandfather would comment that it looked like there was going to be another bumper crop from those fields.

4. My father, John Thomas Wilkinson, sold that land to the U.S. government in 1958 because they said Garrison Dam was likely to cause it to be flooded someday.

5. My father reserved the mineral rights when the title of the land was transferred to the U.S. government.

6. I have no recollection or knowledge of flooding occurring on this land in the years I lived in Trenton or Williston. However, I possess a letter from my father where he describes the joys and hardships of life in the Trenton Valley. He mentions the occasional flooding from Painted Woods Creek that might wash away his seed or lodge his wheat. Painted Woods creek passes through the fields in Section 12 and 13. I have fond memories of play along the dry

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creek banks with my sisters as my dad and brothers worked in the fields.

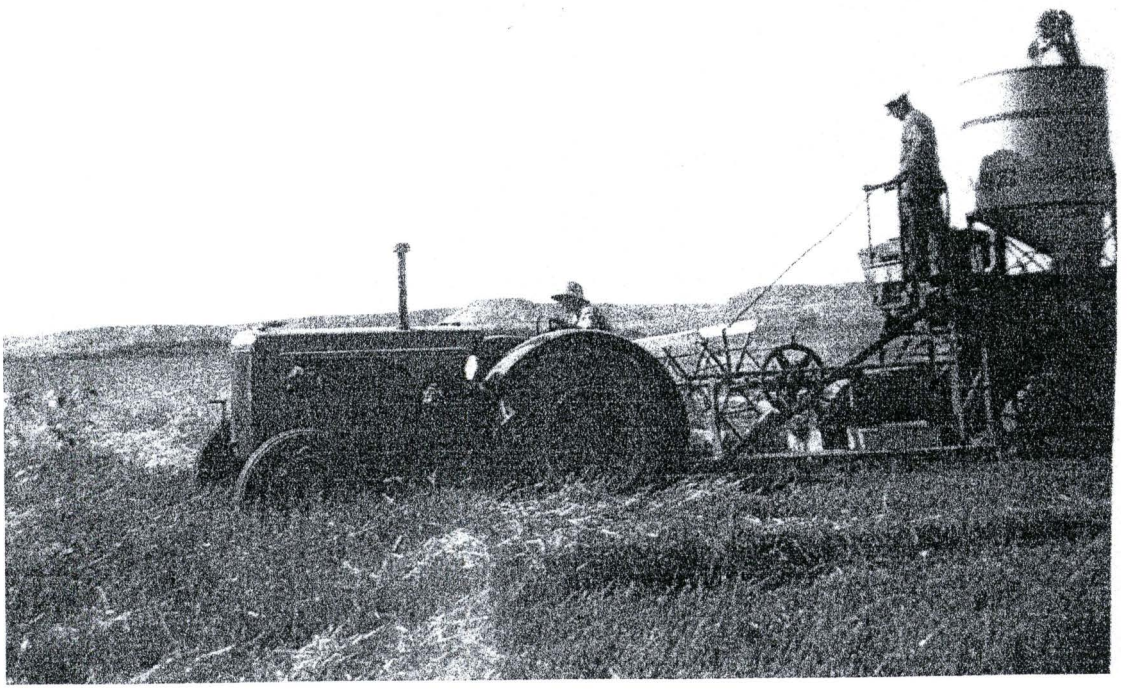
RACHAEL CASPERS
Notary Public
State of North Dakota
My Commission Expires Sept. 15, 2015

Lois Jean Patch
Lois Jean Patch

Subscribed and sworn to before me this 20 day of April, 2011.

Rachael Caspers
Notary Public

My commission expires: Sept 15, 2015.



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AFFIDAVIT

State of Michigan
ss.
County of Ingham

I, William S. Wilkinson, of East Lansing, Michigan, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. That I was born in Williston, North Dakota on September 6, 1933 and lived with my parents, John T. and Evelyn Wilkinson, in Trenton, North Dakota until approximately 1955.

2. That during these years, my parents owned and farmed various parcels of land in the Trenton area, growing mainly spring wheat, along with some barley and flax.

3. That two of these parcels were in the Missouri River valley east of Trenton, described as the Southwest Quarter and the South Half of the Northwest Quarter, except that portion which constitutes the Great Northern Railway Company right of way, in Section 12; and Farm Unit No. 312 in the Buford-Trenton Project, according to the recorded plat thereof, in Section 13; all being located in Township 153 North, Range 102 West, Williams County, North Dakota.

4. That during my teenage years, I assisted my father each year in growing and harvesting mainly spring wheat on these parcels of land.

5. That in 1958, the United States of America purchased these parcels from my parents because, as it was stated to me, it was necessary because the parcels were subject to flooding from the lake created by the construction of the Garrison Dam downstream on the Missouri River. The deed reserved the oil and gas rights to my parents. These rights are presently owned by my siblings and me.

6. That during the years that I lived with my parents and to and including the year the parcels were sold to the United States of America, I have no recollection or knowledge of there being any flooding associated with these parcels.

William S. Wilkinson

Subscribed and sworn to before me this 15th day of April, 2011

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K Doyle
Notary Public

My commission expires: 8/14/17

K DOYLE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF EATON
My Commission Expires: August 14, 2017
Acting in the County of Ingham

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Attach #8

AFFIDAVIT

I, Vanessa E. Blaine of 12801 Deer Dancer TRAIL NE, Albuquerque, New Mexico, 87112, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. I was born in Trenton, North Dakota on February 8, 1928. I am the daughter of John T. and Evelyn M. Wilkinson and lived in Trenton until the fall of 1945. I then lived in Williston, North Dakota until January 1948.
2. During the WW II years my two older brothers enlisted in AAF and Navy respectively. In preparing my being able to help in the fields and with farm work, my mother took me before Judge Owens to obtain a driver's license at twelve years of age. I was fifteen when my brother Tom entered the Navy and I began driving a ¾ ton truck hauling grain from the harvested fields to the local grain elevator.
3. During these years my parents farmed land along the Missouri River in what was known as the Trenton Valley. My father planted spring wheat, barley, and flax on many parcels of land, totaling 1,100 acres at one point in time. The parcels I remember well were known as the Purcell, Mitchell, Macklemerry, Karels, and the field most easterly was known to me as the Big Field.
4. It is my belief that the Big Field was in the SW1/4, S1/2 NW1/4, of Section 12. One parcel was also in Section 13 known as Farm Unit 312 of the Buford-Trenton Project all being located in Township 153 North, Range 102 West, Williams County, North Dakota.
5. The mineral rights were reserved when the parcels in Section 12 and 13 were sold to the Corps of Engineers as it was reported that the construction of the Garrison Dam would subject them to flooding.
6. I have no recollection or knowledge of any flooding of the parcels farmed by my father and no knowledge of any flooding whatsoever in the Trenton Valley.

Vanessa E. Blaine

Vanessa E. Blaine

Subscribed and sworn before me this 14 day of April 2011

Tammy Wieman

Notary Public

My commission expires:

OFFICIAL SEAL
TAMMY WIEMAN
NOTARY PUBLIC-State of New Mexico
My Commission Expires 2.14.2014

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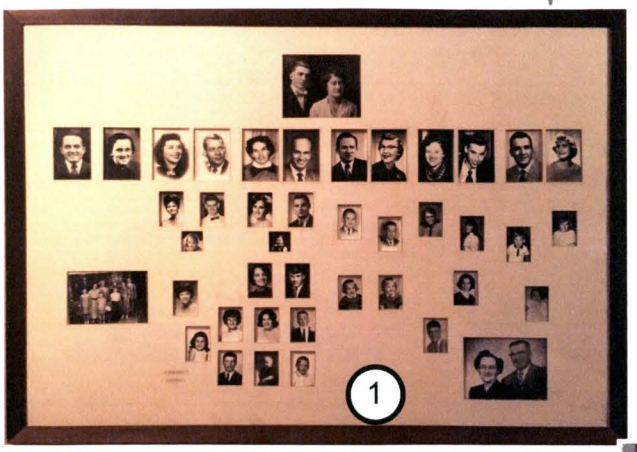
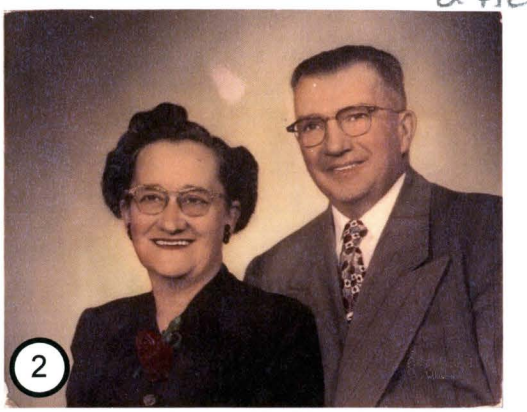
Hi Jon -
Thought you'd find
this interesting

Trenton Farmer Has Splendid Wheat Crop

Tom Wilkinson, farmer on the Missouri bottoms in the country near Trenton, is believed to have the best wheat crop harvested this year in Williams county, friends said Tuesday. He has harvested and threshed 255 acres which gave an average yield of 25 bushels of No. 1 wheat. The quality and average yield are the best so far reported this season here.

1940 & 41



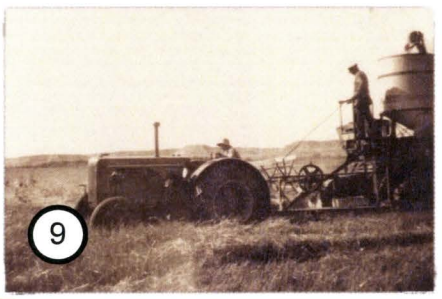


1. This is a 4 foot by 3 foot professionally framed and matted collage of J.T. and Evelyn's legacy. The collage was commissioned by James Wilkinson as a gift to his parents in 1964.

2. J.T. and Evelyn Wilkinson - 1964.

3. James Wilkinson. He served as a pilot in WW II in the north African theater. He compiled an incredible collection of Theodore Roosevelt books which he donated to the TR foundation and are currently housed at the Roughrider Hotel lobby in Medora, ND.

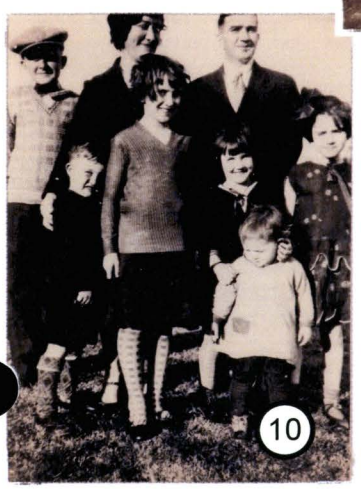
4. Jackie Wilkinson Petty with her husband Dwight Petty taken in (1944). Jackie worked in Williston while her husband served in the Army in the European theater during WW II.



5 .William Wilkinson taken while serving in the Air Force in the 1950's.

6. Vanessa Wilkinson and Charlie Blaine met after Charlie returned from his service in the Army in the Korean theater.

7. Lois Jean Wilkinson and Richard Marvin Patch had been married for one week in 1944 Marvin was called home to attend his father's funeral and took the opportunity to tie the knot with Lois Jean. He was called back to service with the Army Air Force stationed in India. He was a pilot who flew C-46 transports to carry supplies and personnel from India to China over the Himalayas known as "flying the hump". This was known to be one of the most dangerous assignments for pilots. Their oldest child, Lana Sundahl, was born while Marvin was overseas. Marv and Jean went on to raise 9 children. One child, Billy, died at one year of age in 1958. Another son, Rich, died at the age of 41 in 1989.



8.Tom Wilkinson who served his country in the Navy.

9. J.T Wilkinson standing of the pull-type combine with J.T. Jr. (Tom) Wilkinson driving. This was taken in about 1940. The location is in the east bottoms possibly the at "big field."

10. The Wilkinson family circa 1930

11. The Wilkinson family circa 1957

12. The Wilkinson family circa 1966

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Jon Patch

June 19, 2013

HoustonEngineering Inc.

Wilkinson Trust Estate

Ordinary High Water Mark

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CERTIFICATION

I hereby certify that this report was prepared by me or under my direct supervision, and that I am a duly Registered Professional Engineer under the laws of the State of North Dakota.

Lawrence H. Woodbury, PhD, P.E. P.H.
North Dakota Reg. No. 1729

Date: June 20, 2013

REGISTERED PROFESSIONAL ENGINEER
LAWRENCE H. WOODBURY
PE-1729
DATE June 20, 2013
NORTH DAKOTA

HoustonEngineering Inc.

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The Problem

The State of North Dakota holds the beds of navigable lakes and streams in public trust. The surface interests are managed by the ND State Engineer, and the mineral interests are managed by the ND Land Commissioner as head of the ND Department of Trust Lands. The State of North Dakota asserts that the Ordinary High Water Mark serves as the boundary between the public's mineral interests and the interests of the riparian owner.

The surface interests in the Wilkinson Tract were sold to the US Army Corps of Engineers in 1958 in anticipation of flooding resulting from the construction of Garrison Dam, and the mineral interests were explicitly retained. The ND Department of Trust Lands sponsored a study to identify the Ordinary High Water Mark along the Missouri River from the North Dakota/Montana border to a location downstream of US Highway 85 in 2010. That delineation process was based largely on current vegetative indicators as observed in the field at that time. Subsequently, the ND Department of Trust Lands sponsored another study in 2011 to identify the Ordinary High Water Mark of the Missouri River under Lake Sakakawea as it would have existed at the time the lake initially filled. The boundary as delineated by this second study was apparently intended to serve as the boundary between the public and private mineral interests as though the filling of Lake Sakakawea froze that boundary in time. The lineal extent of this second delineation extended upstream of US Highway 85 to include the area of the Wilkinson Tract. There is a significant overlap between the two studies, and the Wilkinson Tract is located within the overlap area.

Thus two separate delineations of the Ordinary High Water Mark (OHWM) have been completed for the area in question, using two distinctly different processes and yielding two distinctly different results. The ND Department of Trust Lands has asserted that the boundary delineated using the vegetative indicators observed in the field is a more applicable approximation of the boundary between the private and public interests in the area of the Wilkinson Tract, a subjective decision that maximizes the state's interests at the expense of the riparian owner, even though they had enough doubt in their own mind that they sponsored a second study that provided another delineation for this area. The state's position suggests that US Highway 85 is somehow the boundary between the applicability of using current vegetative indicators and the applicability of recognizing that Lake Sakakawea has artificially altered the vegetative markers in this reach to an extent that they are no longer indicative of the Ordinary High Water Mark of the Missouri River and are instead direct indicators of the effect of water levels in Lake Sakakawea.

Figure 1 illustrates the location of the property in question as well as the results of the two OHWM delineations. It also includes the river mile designations assigned by the US Army Corps of Engineers for this reach. The property in question is located between river mile 1554.0 and 1554.5.

History

The property in question is located in Sections 12 and 13, Township 153 North, Range 102 West, as illustrated in **Figure 1**. These lands were actively farmed by J.T. Wilkinson starting in the 1930's until he and Evelyn M. Wilkinson sold the surface interests to the United States of America in 1958, explicitly reserving the mineral interests. These lands, excluding the mineral interests, have since become part of the Trenton State Wildlife Management Area. Affidavits support the fact that, prior to the construction of Garrison Dam, the land was used extensively for agricultural purposes and was not subject to any frequent flooding from the Missouri River.

In 2006, the State Engineer developed Ordinary High Water Mark Delineation Guidelines (Reference 1).

In 2008, the North Dakota Board of University and School Lands issued a Request for Proposals for delineation of the Ordinary High Water Mark along the Yellowstone and Missouri Rivers from the Montana/North Dakota border to River Mile Marker 1549.0, which is located approximately five to six miles downstream of the Highway 85 Bridge. This has become known as the Phase I study and was completed with a Technical Report dated November 2010 (Reference 2).

In 2009, the North Dakota Board of University and School Lands issued another Request for Proposals, this time for delineation of the Ordinary High Water Mark of the Missouri River Bed under Lake Sakakawea, specifically from mile marker 1482, at the approximate northern boundary of the Fort Berthold Reservation upstream to mile marker 1574.5. This study culminated with a Technical Report dated March 2011 (Reference 3). This resulted in a 25.5 river mile overlap between the two studies, and the Wilkinson estate is included in that overlap. This has been referred to as their Phase II study. The second RFP noted:

> Because the area to be delineated for the OHWM has been inundated or potentially inundated, the contractor may not rely on observations of the current location of the OHWM where it may be exposed in making the determination. Determination of the OHWM must be made using historical information and current technology to interpret this historic information.

The objective of the study contractor for both the Phase I and Phase II studies was to identify the OHWM. They were not charged with making any determinations as to ownership or shared interests. However, the State of North Dakota has subsequently refused to release their claim to the mineral interests for the property in the Wilkinson Tract found to be below the OHWM in the Phase I study, even though their own Phase II analysis contradicts the Phase I findings. They have asserted that US Highway 85 is the boundary between where the Phase I findings are an appropriate delineation of the boundary between the public and the riparian interests and where the Phase II findings are appropriately applied.

Figure 2 illustrates the Phase I and Phase II study reaches, their overlap, and the location of the Wilkinson property (Reference 2,3).

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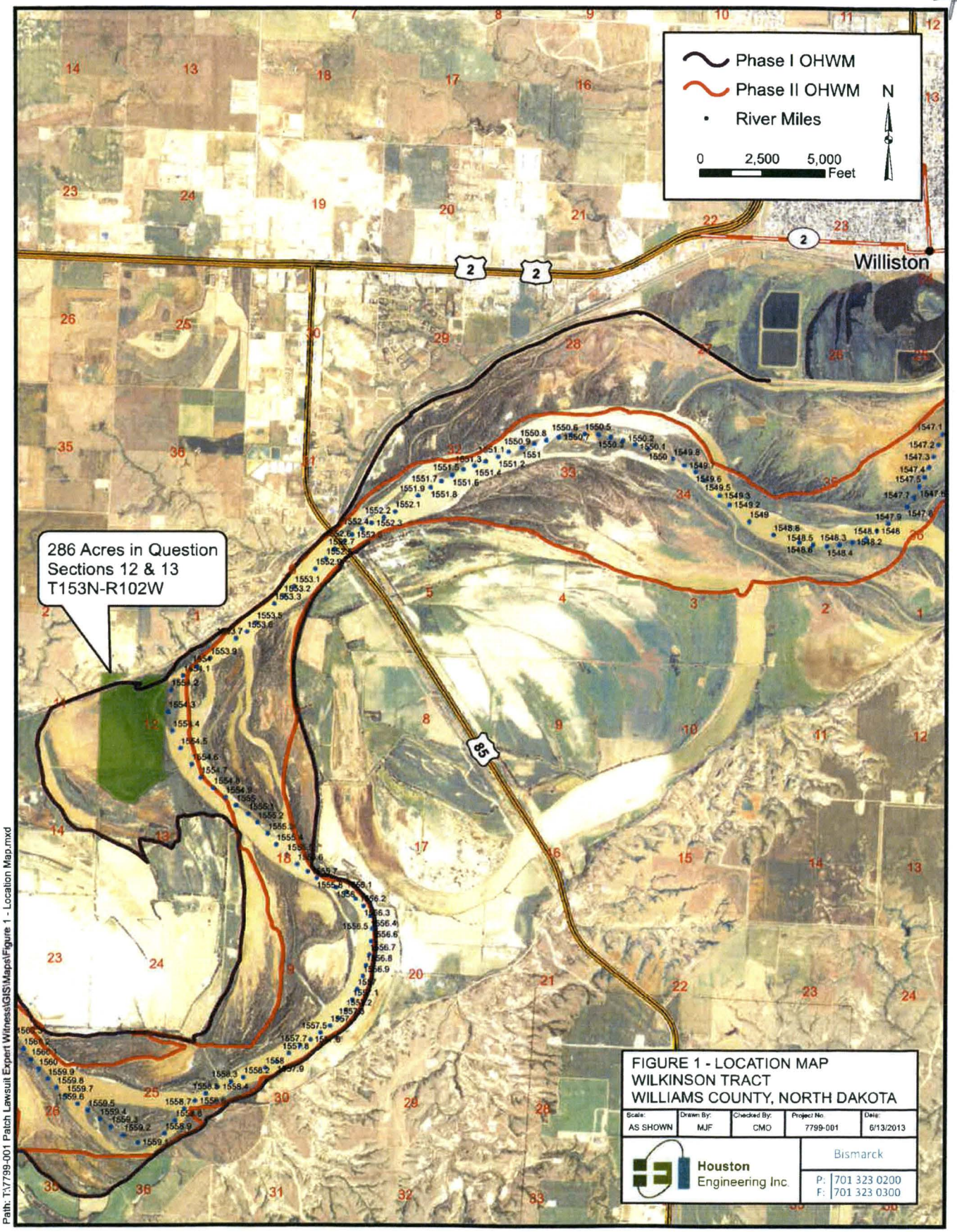

FIGURE 1 - LOCATION MAP
WILKINSON TRACT
WILLIAMS COUNTY, NORTH DAKOTA

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AS SHOWN	MJF	CMO	7799-001	6/13/2013

Houston Engineering Inc.
Bismarck
P: 701 323 0200
F: 701 323 0300

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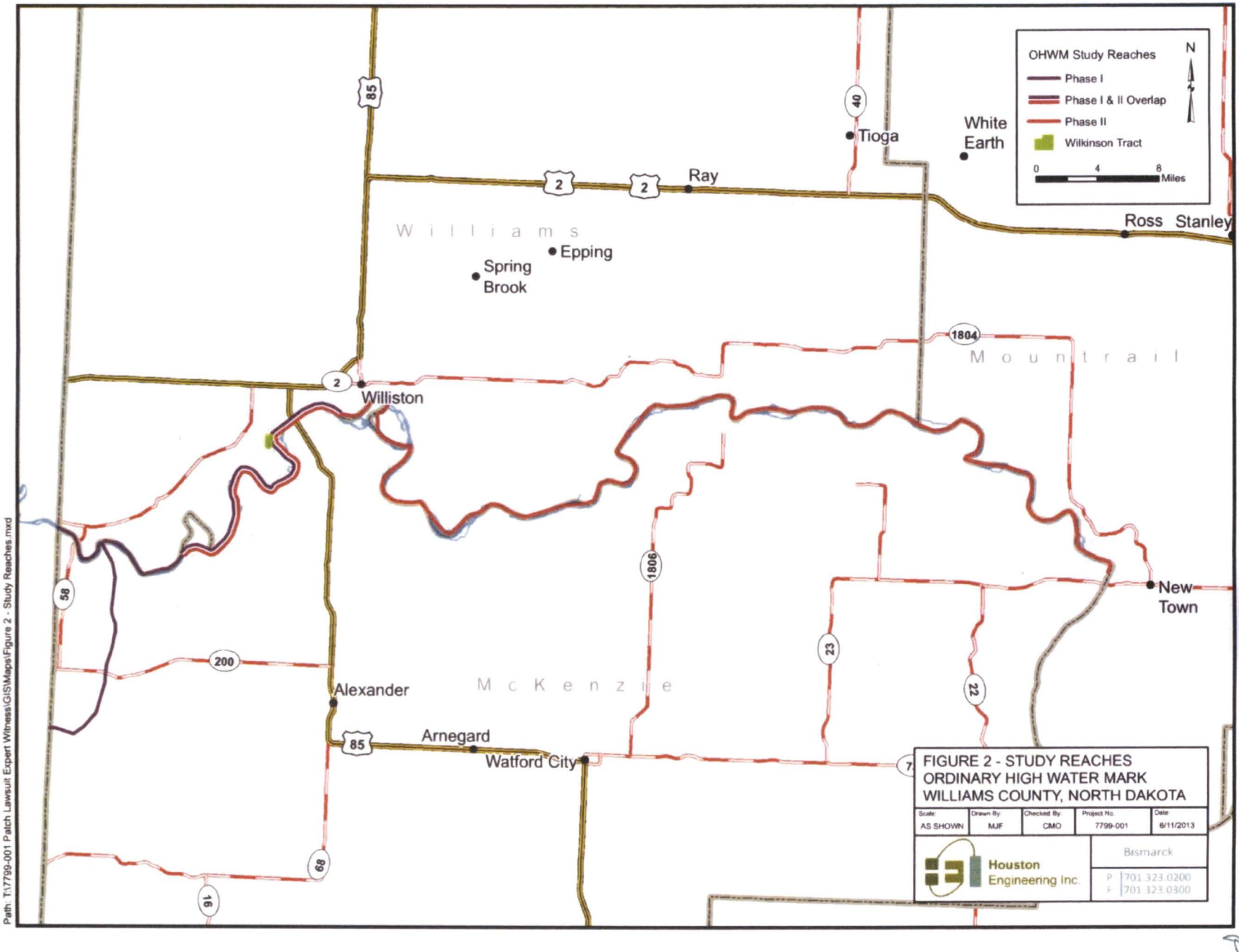

FIGURE 2 - STUDY REACHES
ORDINARY HIGH WATER MARK
WILLIAMS COUNTY, NORTH DAKOTA

Scale:	Drawn By:	Checked By:	Project No.	Date
AS SHOWN	MJF	CMO	7799-001	6/11/2013

Houston Engineering Inc.
Bismarck
P 701.323.0200
F 701.323.0300

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Pg 1

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Ordinary High Water Mark Delineation

North Dakota Administrative Code Section 89-10-01-03 defines Ordinary High Water Mark as:

> That 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…

The North Dakota Supreme Court has defined Ordinary High Water Mark as:

> ….a water mark. It is co-ordinate with the limit of the bed of 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 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.

The North Dakota State Engineer developed Ordinary High Water Mark Delineation Guidelines in 2006 (Reference 1). These guidelines established and defined a consistent approach for completing delineations in North Dakota taking into account North Dakota statutory and case law guidance as well as common scientific principles. These guidelines documented the importance of vegetative and soil indicators but also recognized the potential applicability of hydrology and an assessment of the suitability of the lands for agricultural purposes. These guidelines noted:

> A review of long term and recent hydrology may indicate whether physical indicators evident in the field are truly indicative of the ordinary high water mark or whether they reflect an extraordinary event.

The guidelines also recognized research completed by the State of Washington that suggested the Ordinary High Water Mark has been shown to be equivalent to the water surface elevation generally equivalent to a 1.0 to 1.75 year peak flow (Reference 4).

Point #1 The Wilkinson Tract was Above OHWM Prior to Construction of Garrison Dam

One important indicator of the Ordinary High Water Mark is whether or not the land is suitable for agricultural production. If the land is located below the OHWM, the frequency of inundation would destroy its suitability for agricultural production. There is an abundance of information clearly demonstrating that the Wilkinson property was used extensively for agricultural production up to the time the property was sold to the US Government in 1958. Affidavits provided by Lois Jean Patch, William Wilkinson and Vanessa Blaine all document the property's historic use for agricultural production and the fact that those familiar with the farming operation

throughout that period had no memory of the property being flooded by the Missouri River. Copies of these affidavits are included in **Appendix A.**

Figure 3 is 1958 aerial photography that includes the lands in question. The Wilkinson Tract has been identified on the photograph, and it is clear that the land was used for agricultural purposes in 1958. The field lines are readily apparent.

Figure 4 illustrates the topographical information available for the Wilkinson Tract. **Figure 5** is a distribution plot of the land surface elevation (NGVD 29) for the 286 acres in question in Sections 12 & 13, Township 153 North, Range 102 West. The distribution plot was developed from the 10-meter digital elevation model (DEM) created by the US Geological Survey (USGS) based on their 1:24,000 scale 7.5 minute quadrangle topographic maps. The lands in question fall into the Trenton, N. Dak. quadrangle, published in 1969 and the Williston SW, N. Dak. quadrangle published in 1979. The Trenton quad was created from 1968 aerial photography and 1969 plane-table surveys and the Williston SW quad was created from topography and photometric methods from aerial photographs taken in 1973 and 1977.

Less than 10% of the property within the Wilkinson Tract is below an elevation of 1849.5 (NGVD 29) with a majority of the property at an elevation of approximately 1850.0. In 1993 the US Army Corps of Engineers published a Reconnaissance Report (Reference 5) which included water surface profiles for various events throughout the headwaters of Lake Sakakawea including a plot of pre-dam water surface elevations which has been reproduced in **Figure 6**. With pre-dam conditions, the streambed is shown to be at an elevation of 1824.0 (NGVD 29), and the 10-year peak flow water surface elevation is shown to be about 1850.0 (NGVD 29) at river mile 1854.0 which is adjacent to the Wilkinson Tract. Thus, before the construction of Garrison Dam, it took approximately a 10-year event to flood the formerly cultivated portions of the Wilkinson Tract. Research completed by the State of Washington has shown that the OHWM is typically equivalent to approximately a 1.75 year peak, which is much less than a 10-year peak (Reference 4).

Figure 7 illustrates the annual peak water surface elevations for the Missouri River Near Williston Gage for the period of 1928 through 1965. This gage is located at the Highway 85 bridge at river mile 1552.7, approximately 1.3 miles downstream of the Wilkinson Tract. Based on this record, the water surface elevation only exceeded 1850.0 (NGVD 29) on one occasion in 1959 throughout this 37 year period of record.

Point #1 Summary

The majority of the Wilkinson Tract was clearly above the OHWM before the construction of Garrison Dam. The affidavits and aerial imagery clearly show the land was used for typical agricultural production. Most of the tract is at an elevation of approximately 1850.0 (NGVD 29) and historic stage records show that the Missouri River only reached that level at this location on a very infrequent basis, actually only once in 37 years of record.

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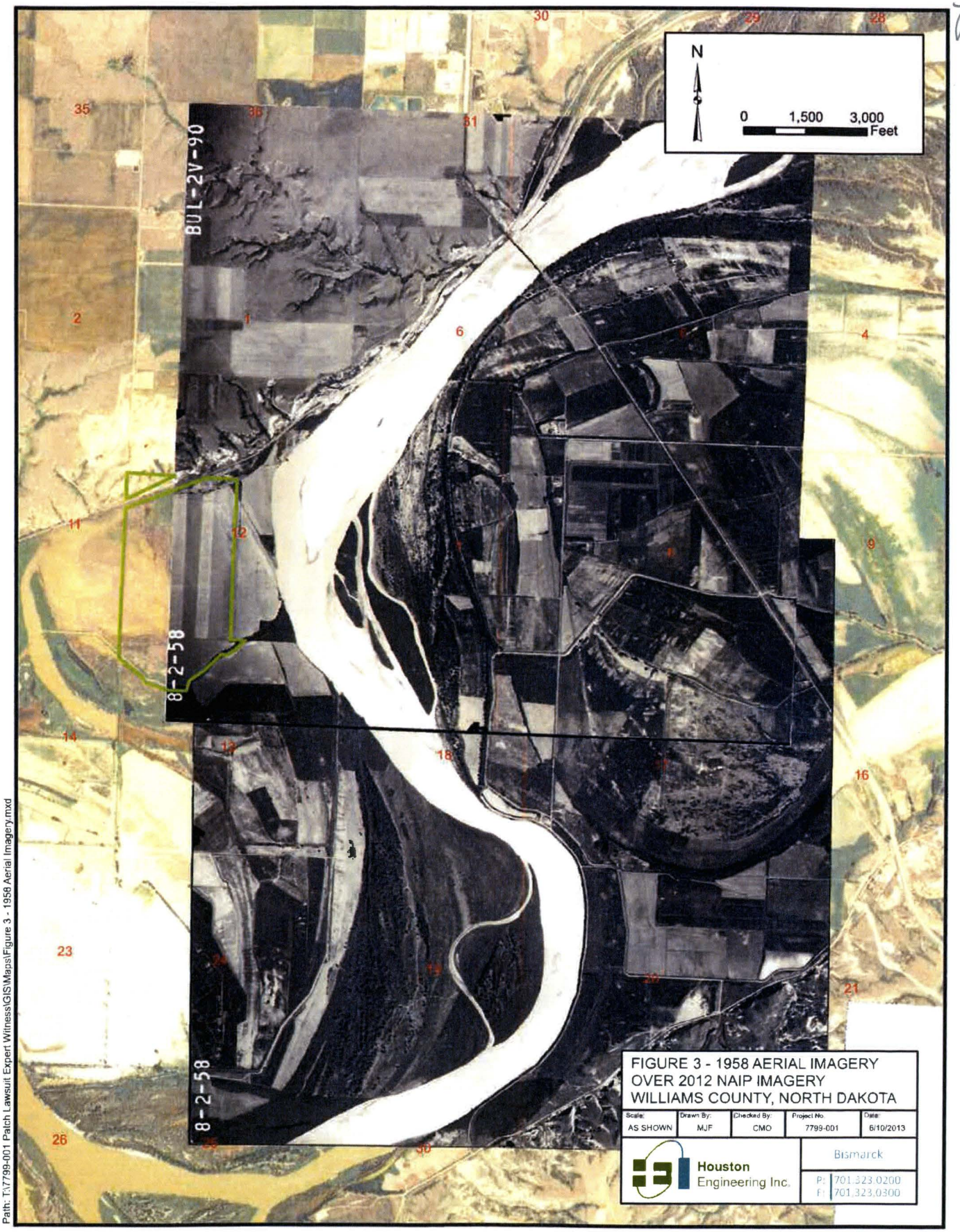

FIGURE 3 - 1958 AERIAL IMAGERY
OVER 2012 NAIP IMAGERY
WILLIAMS COUNTY, NORTH DAKOTA

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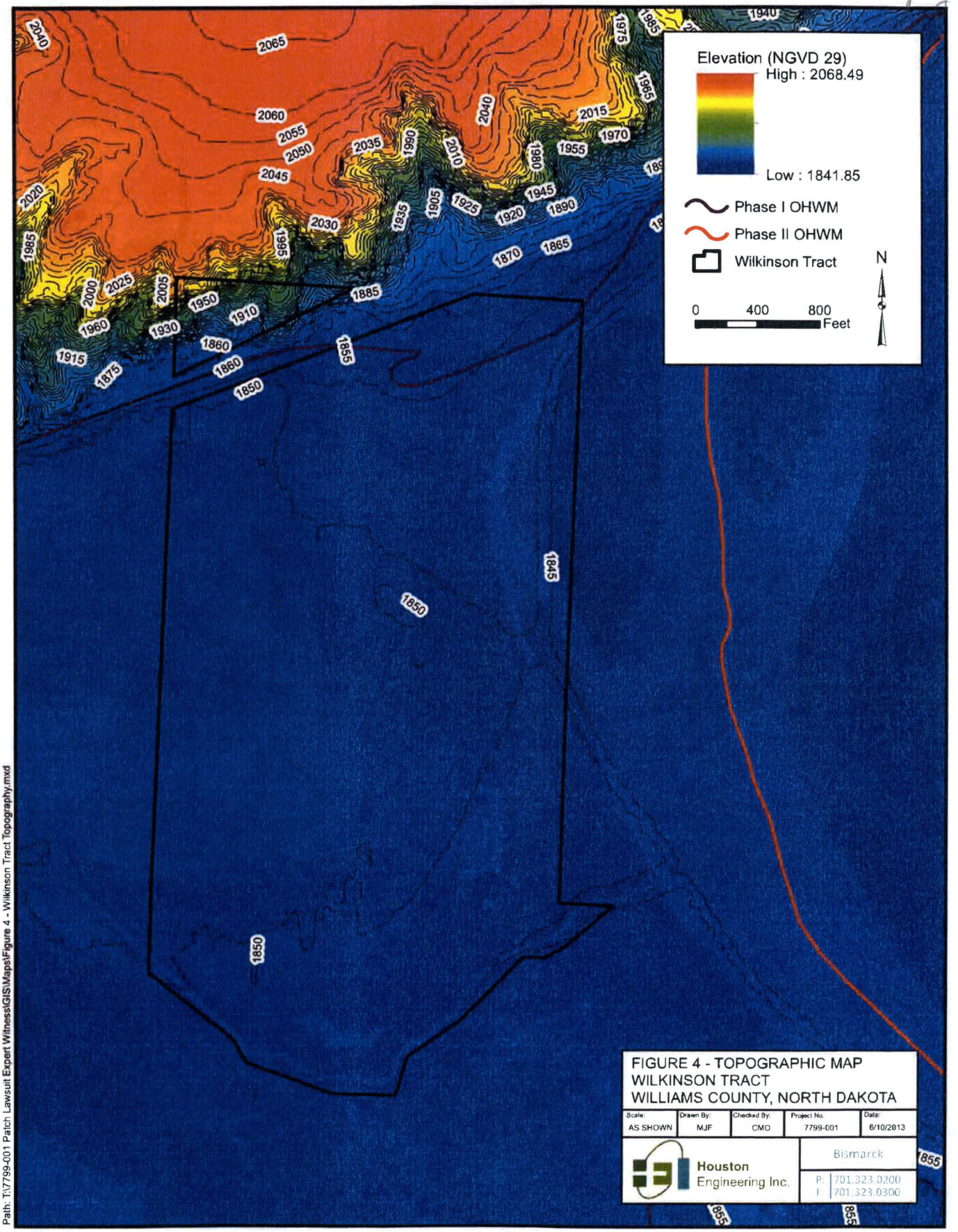

FIGURE 4 - TOPOGRAPHIC MAP
WILKINSON TRACT
WILLIAMS COUNTY, NORTH DAKOTA

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FIGURE 5
DISTRIBUTION PLOT OF LAND SURFACE ELEVATION (NGVD 29)
OF THE 286 ACRES IN QUESTION
LOCATED IN SECTIONS 12 & 13, 153-102

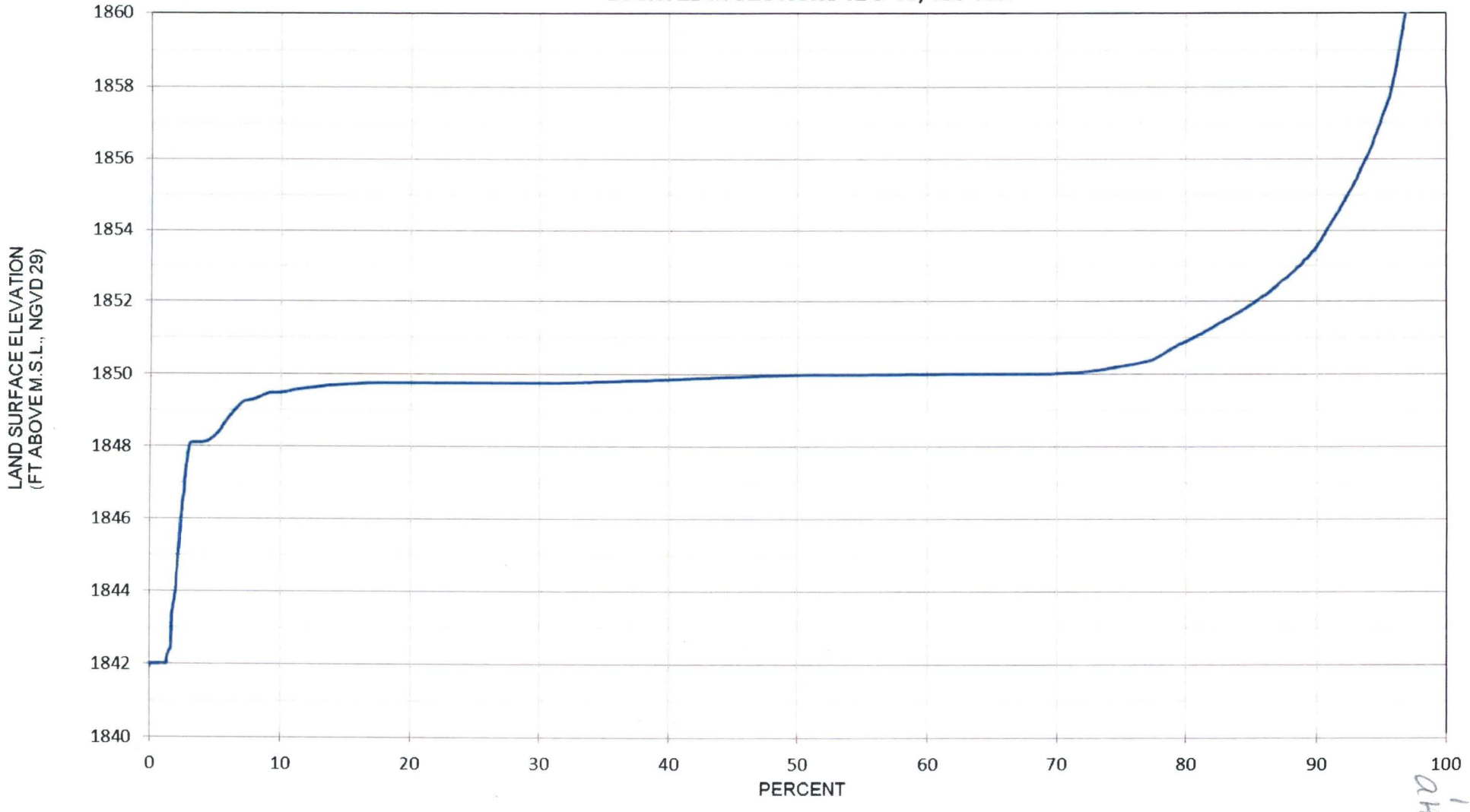

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FIGURE 6

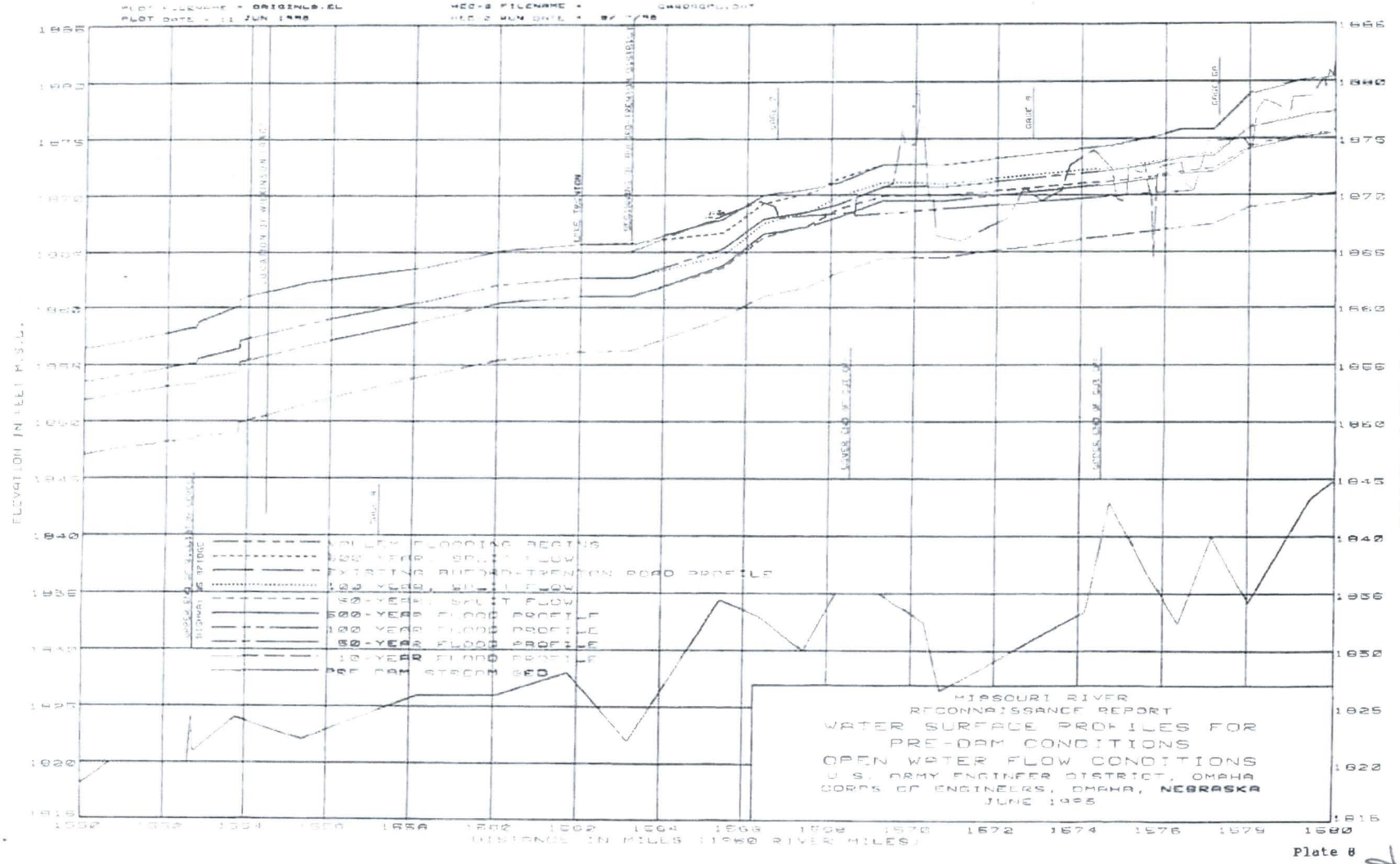

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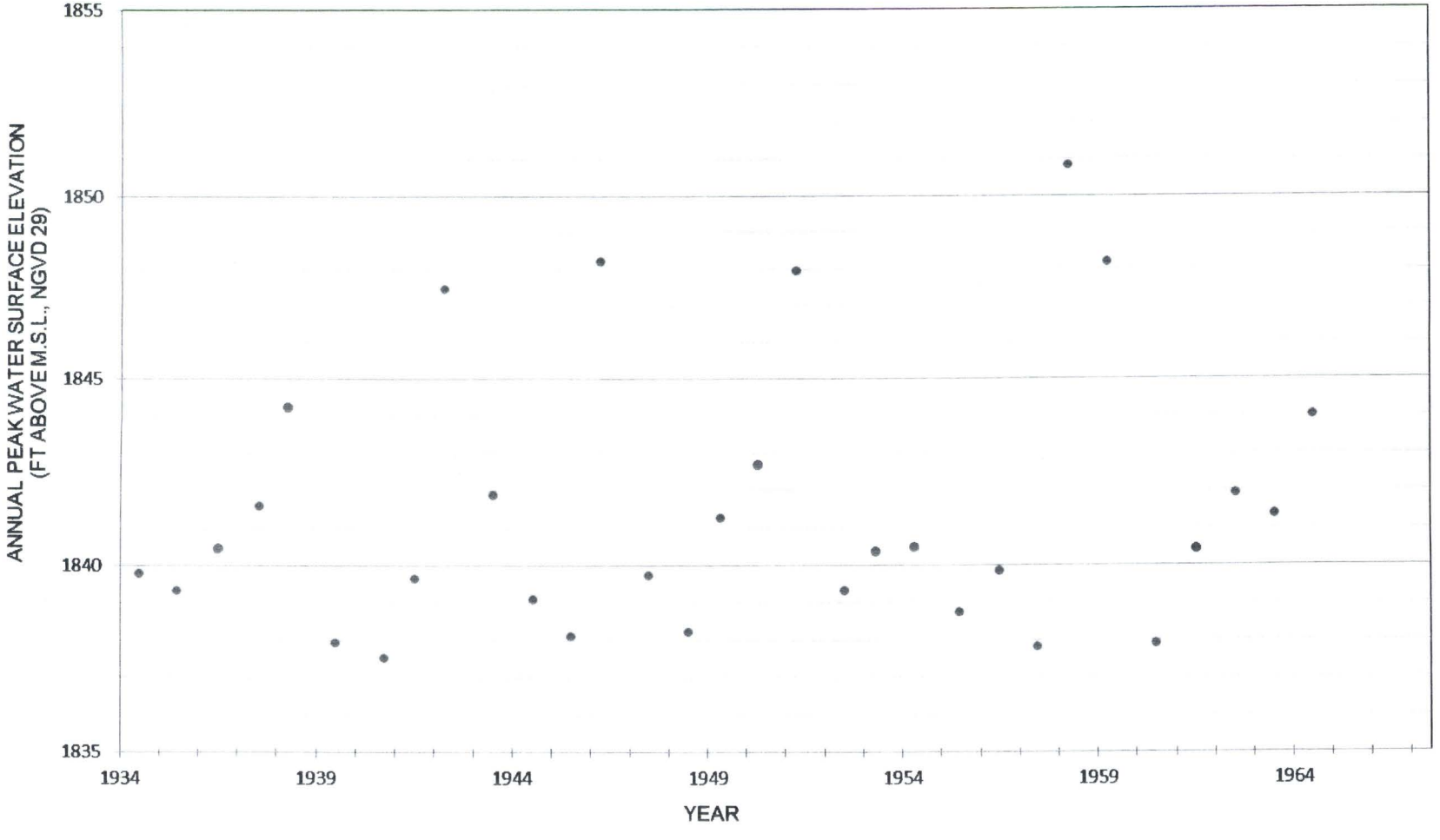
FIGURE 7
PRE-GARRISION DAM PEAK GAGE HEIGHTS



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Point #2 Garrison Dam/Lake Sakakawea Directly Affects Property

The fact that the US Government chose to purchase this property as part of the Garrison Dam and Reservoir project, as evidenced in the Certificate of Inspection and Possession (Appendix B), is an indication of the US Government's acknowledgment that the construction of Garrison Dam would increase the frequency with which this property is flooded.

Garrison Dam was designed and constructed with the following target pool elevations (NGVD 29):

Maximum Operating Pool:	1854.0
Maximum Normal Pool	1850.0
Base Flood Control	1837.5
Minimum Operating Pool	1775.0

As noted in **Figure 5**, more than 80% of the Wilkinson Tract is situated below an elevation of 1851.0 (NGVD 29), and approximately 70% is at or below an elevation of 1850.0. **Figure 8** is a reproduction of monthly reservoir levels for Garrison Dam/Lake Sakakawea with those readings above elevation 1850.0 highlighted (Reference 6). Since 1967, the reservoir has exceeded an elevation of 1850.0 six years out of 45 years of record. This is a significant increase in frequency with which a majority of the Wilkinson Tract is flooded compared to the one occurrence that occurred in 37 years of record prior to the construction of Garrison Dam.

The US Army Corps of Engineers Master Manual for Garrison Dam (Reference 7) projects a 20% chance of the reservoir pool exceeding an elevation of 1850.0 in any one year which correlates to a 5-year recurrence interval.

Figure 9 illustrates the location of the Wilkinson Tract along with the area that would be inundated with a pool elevation of 1854.0. Clearly, most of the property is within the operational pool of Lake Sakakawea with more than 90% of the tract being situated below the full pool elevation of 1854.0.

Figures 10, 11, and 12 illustrate the Wilkinson Tract in aerial imagery collected during high reservoir levels in 1975, 1997, and 2011. These figures again show that the Wilkinson Tract is located within the pool of Lake Sakakawea.

The direct inundation associated with being located within the operating pool of Lake Sakakawea is not the only impact resulting from the construction of Garrison Dam. When the water level in Lake Sakakawea is just below 1850.0, most of the land in the Wilkinson Tract would not be directly flooded by the static pool elevation. However, the pool elevation will alter the hydraulics of the Missouri River in this headwater area resulting in a higher water surface elevation for a given rate of discharge. Thus, even when the level of water in Lake Sakakawea is lower than 1850.0, it could still contribute to the inundation of the Wilkinson Tract.

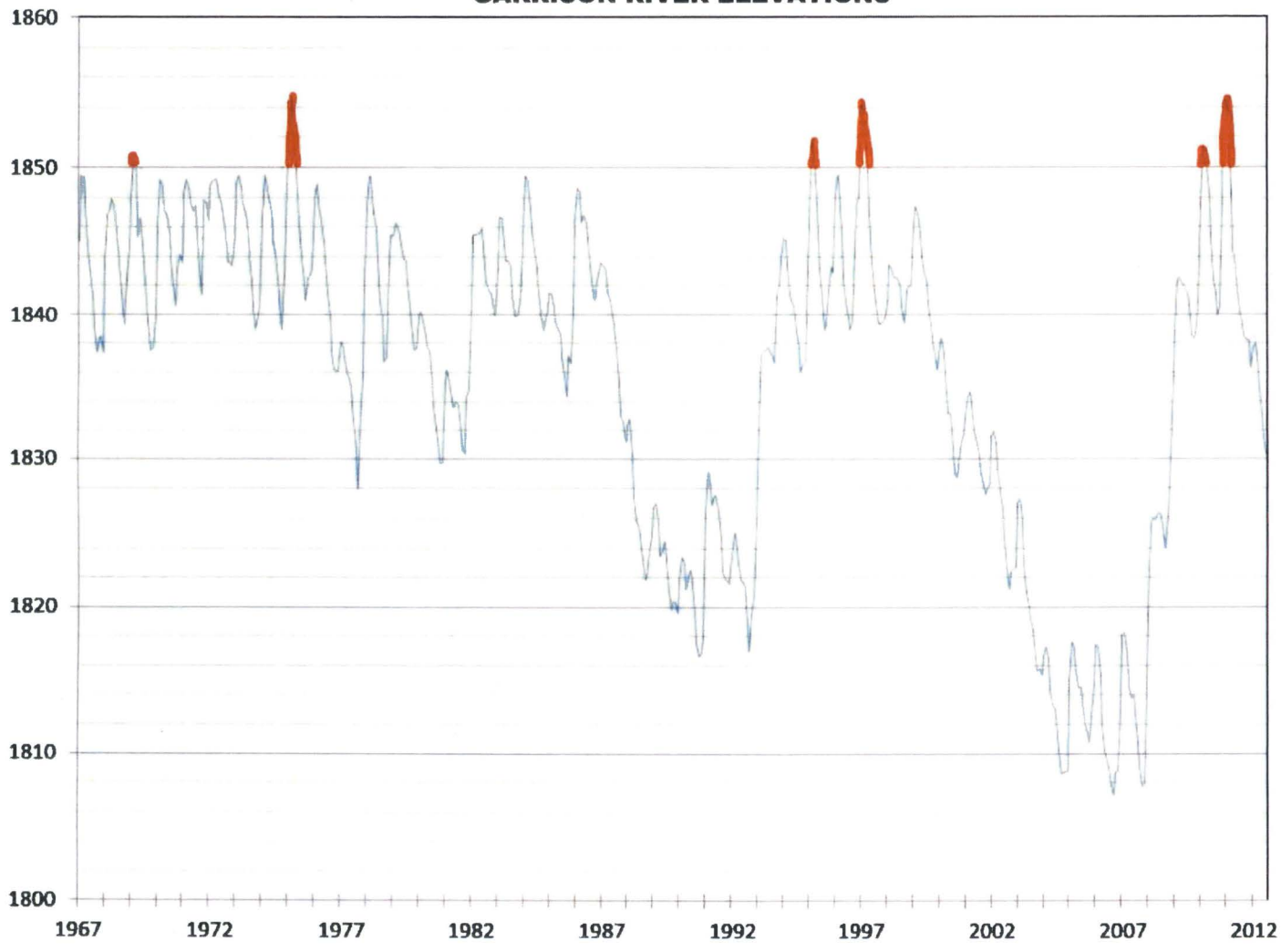
In addition to this hydraulic impact resulting from high reservoir levels, the development of a depositional delta in this location is well documented. **Figure 13** is a reproduction of a plate from the USACE Reconnaissance Report (Reference 5) documenting the increase in stage for a given discharge over time. Gage 8 is located approximately three miles upstream of Section 12. The stage associated with a 10,000 cfs flow increased by more than 10 feet from 1960 to 1979.

All post-1953 maps published by the USGS, US Army Corps of Engineers, and the US Bureau of Reclamation identify the area of the Wilkinson Tract as being "Subject to controlled inundation".

Point #2 Summary

The Wilkinson Tract is located within the pool of Lake Sakakawea and the frequency with which the property is flooded has increased significantly since the construction of Garrison Dam. Aerial imagery illustrates the property's inundation from Lake Sakakawea.

FIGURE 8
GARRISON RIVER ELEVATIONS



*End of Month - Midnight Observations

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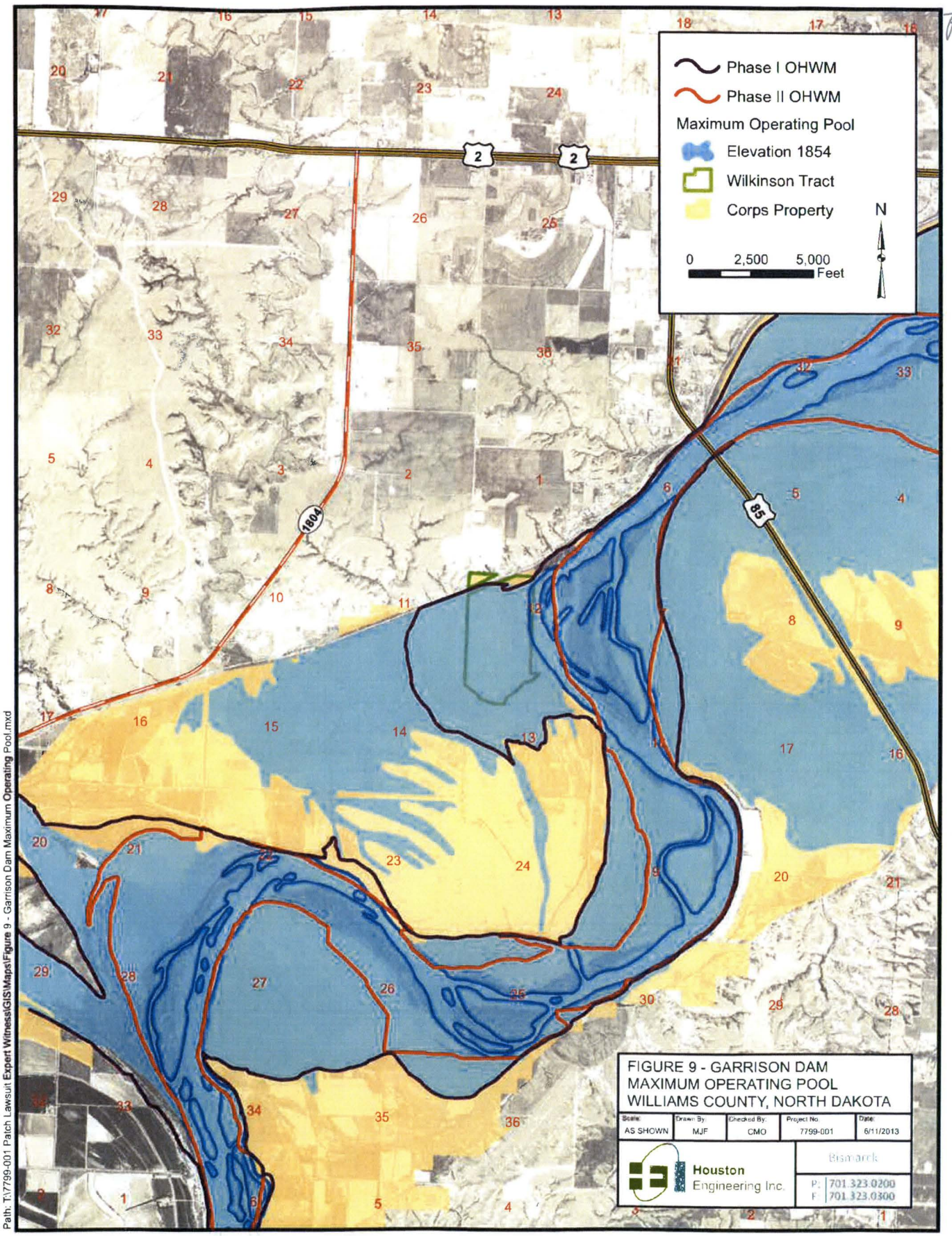

FIGURE 9 - GARRISON DAM
MAXIMUM OPERATING POOL
WILLIAMS COUNTY, NORTH DAKOTA

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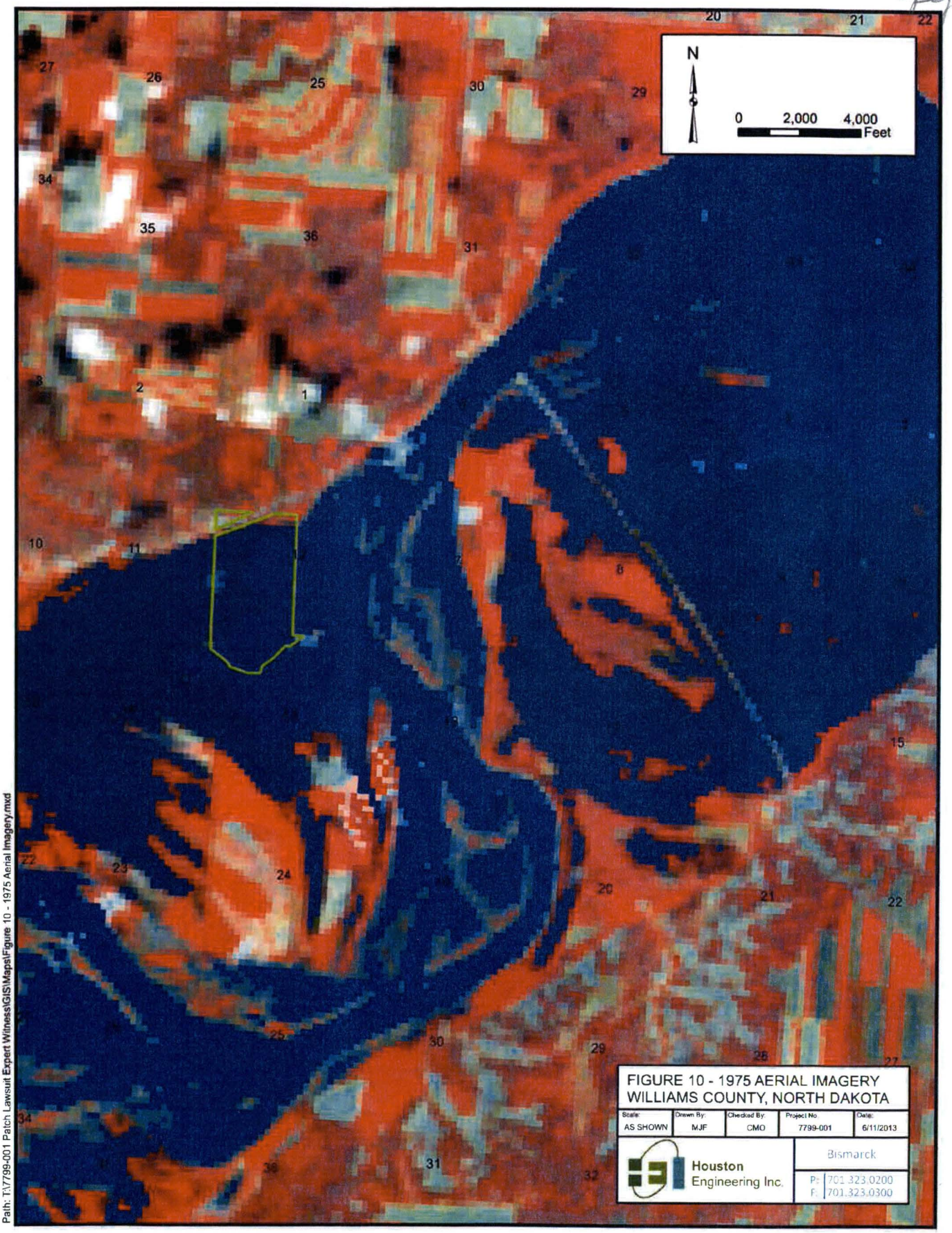

FIGURE 10 - 1975 AERIAL IMAGERY
WILLIAMS COUNTY, NORTH DAKOTA

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FIGURE 11 - 1997 AERIAL IMAGERY
WILLIAMS COUNTY, NORTH DAKOTA

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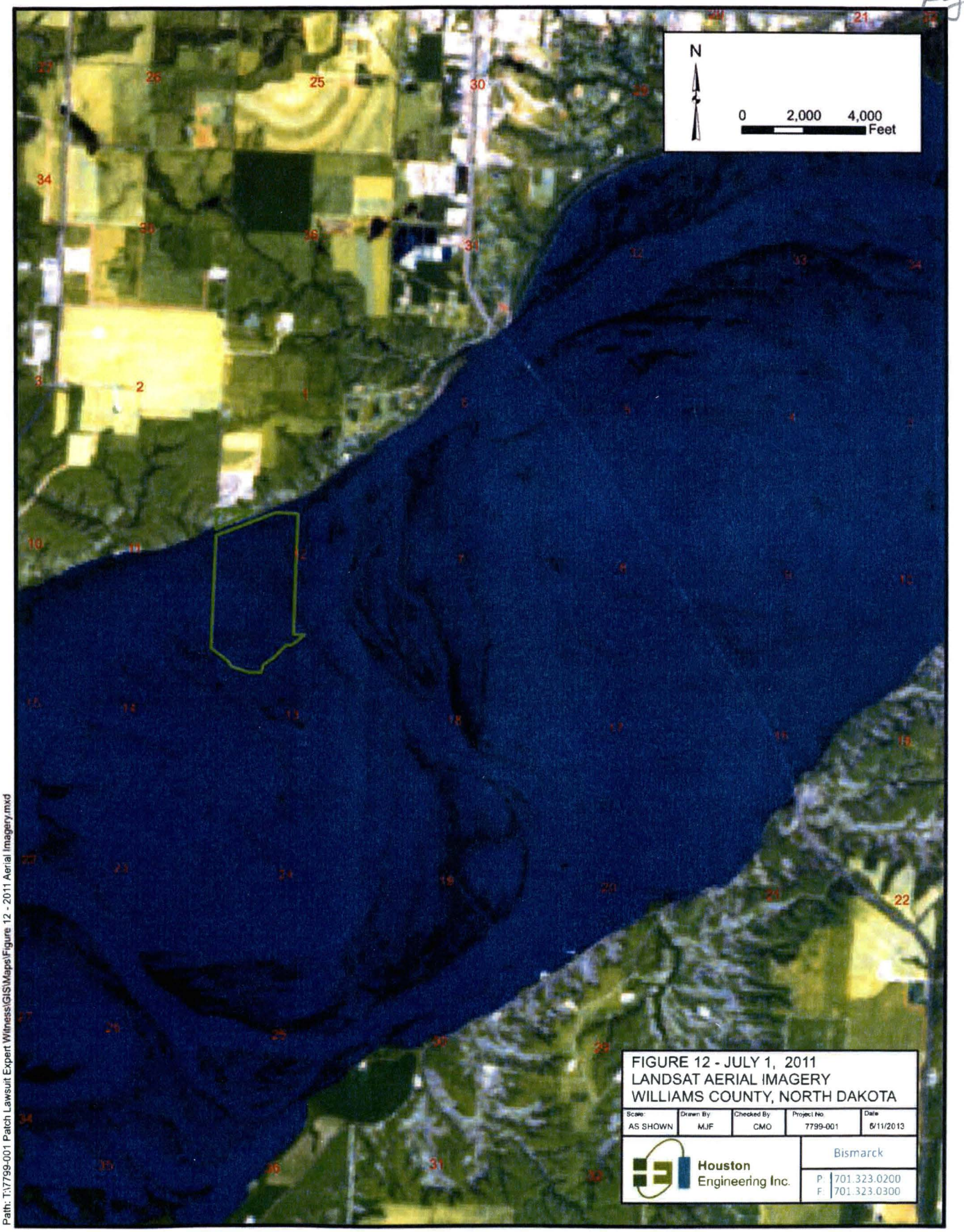

FIGURE 12 - JULY 1, 2011
LANDSAT AERIAL IMAGERY
WILLIAMS COUNTY, NORTH DAKOTA

Scale:	Drawn By:	Checked By:	Project No.	Date
AS SHOWN	MJF	CMO	7799-001	6/11/2013

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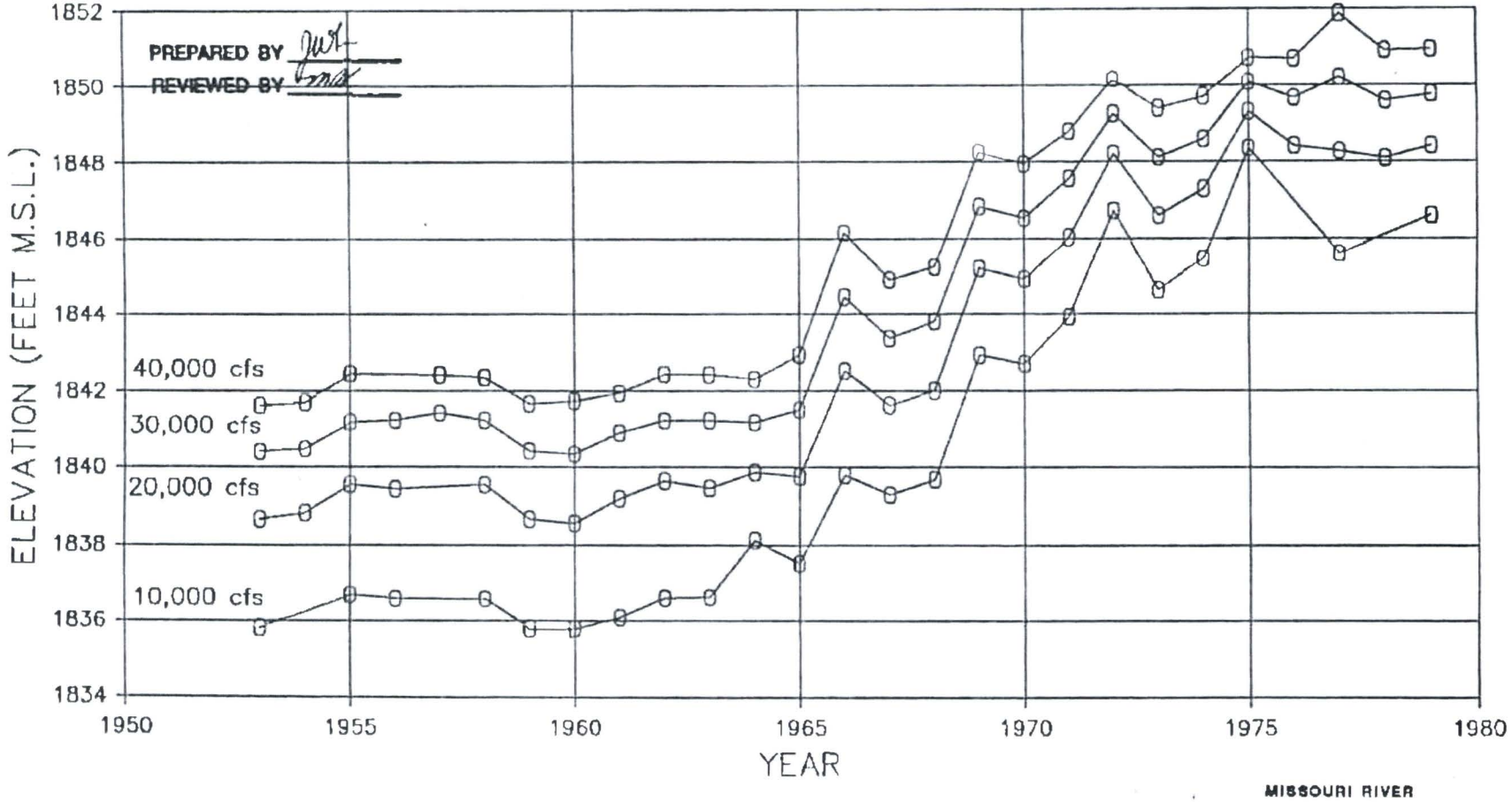
FIGURE 13

MISSOURI RIVER
GAGE 8
1960 RIVER MILE 1557.2



MISSOURI RIVER
LAKE SAKAKAWEA HEADWATER/MISSOURI RIVER
RECONNAISSANCE REPORT

Stage Trends - Gage 8

U.S. ARMY ENGINEER DISTRICT, OMAHA
CORPS OF ENGINEERS, OMAHA, NEBRASKA

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Point #3 Use of Highway 85 as Dividing Line is Arbitrary

The State of North Dakota has apparently taken the position that the OHWM delineation based on vegetative indicators observed in the field (Phase I) is appropriate to define the boundary between the riparian and public interests upstream of the Highway 85 bridge. At the same time, the State decided to use historical records to ascertain the apparent OHWM as it existed prior to the construction of Garrison Dam accepting it as an appropriate indicator of the boundary between the riparian and public interests downstream of the Highway 85 bridge (Phase II). This is an arbitrary line of demarcation that has no scientific basis.

There are no water control structures located at the Highway 85 crossing. The crossing does not limit the impacts of the reservoir upstream of the highway. The pre-dam streambed elevation at the crossing was approximately 1823.0 (NGVD 29). Thus any time the reservoir exceeds that water surface elevation, it is impounding water upstream of the bridge. This occurs more than 95% of the time. **Figure 9** illustrates the extent to which Garrison Dam is capable of inundating properties upstream of the Highway 85 Bridge simply by storing water up to its maximum operation pool elevation of 1854.0.

The fact that the ND Board of Trust Lands opted to delineate this area using two different methods suggest their own uncertainty as to the applicability of the Phase I results for this area.

The fact that the Wilkinson Tract was suitable for agricultural purposes before the construction of Garrison Dam is well documented and is discussed as Point #1 of this report. Prior to the construction of Garrison Dam, the property in question was part of the East Bottom of the Fort Buford-Trenton Irrigation District. In 1958 the Corps of Engineers purchased this East Bottom for the project even though it is upstream of the Highway 85 bridge. Thus the impacts of the project have always been anticipated to extend upstream of the Highway 85 Bridge.

It is interesting to note that the results obtained from the Phase I and Phase II delineations do tend to converge in the area of river mile 1564.5, as illustrated in **Figure 14**. This convergence can be expected to occur once the impacts of periodic inundation from Lake Sakakawea are no longer present. Interestingly enough, the 1993 Reconnaissance Report indicates that prior to the construction of Garrison Dam, the valley in this reach would begin to flood with a water surface elevation of 1857 (NDVD 29), so this area is just beyond the upper extent of the influence of Lake Sakakawea.

Point #3 Summary

The use of Highway 85 as the upstream limit of the reservoir is arbitrary and has no scientific basis. Lake Sakakawea extends west of the bridge including the Wilkinson Tract. The OHWM as delineated using the historic aerial imagery in the Phase II Study is the more appropriate indication of the boundary between the riparian and the public interests in the area of the Wilkinson Tract.

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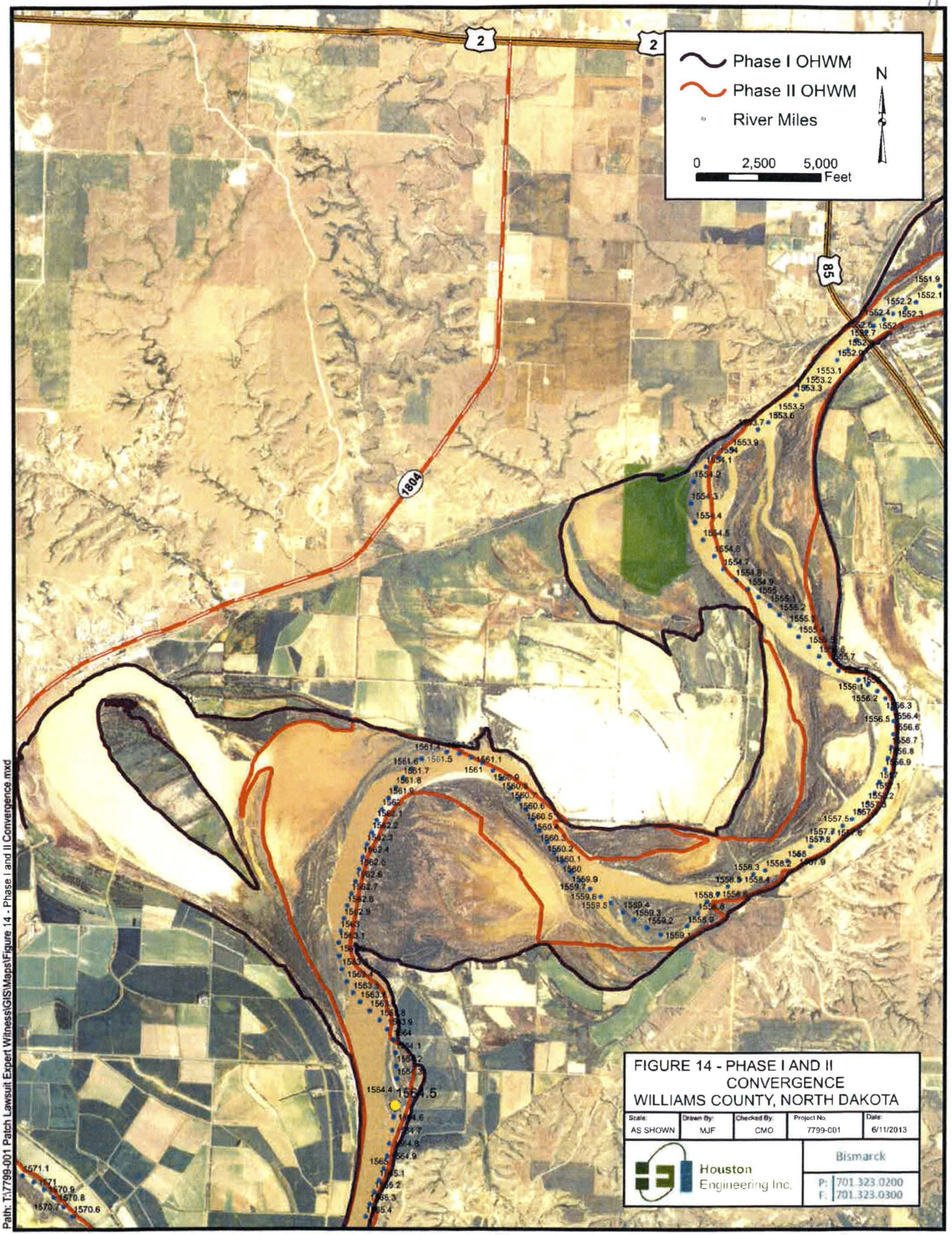

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Point #4 Phase I OWHM Delineation Failed to Adequately Account for Hydrology

Missouri River Mainstream Hydrology

The methodology detailed in the *Technical Report for the Ordinary High Water Mark Delineation of the Yellowstone and Missouri River in Western North Dakota* (Reference 2) included the use of statistical hydrology as a guide and a frame of reference for the vegetative indicators observed in the field. The authors noted that the OHWM is typically between the "high average daily flow" and the peak but closer to the high average daily flow. For the Missouri River at Williston Gage, they estimated the high average daily stage to be 1849.6 (NGVD 29) and the peak stage to be 1856.1 (NGVD 29). They noted that the OHWM at the gage was determined to be between 1850.3 and 1851.3. So they noted that the OHWM as delineated was between the high average daily flow and the peak but much closer to the high average daily flow, thus confirming the reasonableness of their result. Yet upstream only 1.5 miles near the Wilkinson Tract, they found the OHWM along the left bank (looking downstream) to be as high as 1855.0 (NGVD 29). With a general slope of 0.6 feet per mile, taken from the profile included in their report (20 feet over 33 river miles), one would expect the OHWM at the Wilkinson Tract to be between 1850.9 and 1851.9 (NGVD 29).

One would also expect the elevation of the OHWM delineated on the right bank (looking downstream) to generally correspond to the elevation of the OHWM delineated on the left bank. However, in the area of the Wilkinson Tract, the elevation of the OHWM delineation is much higher than that found on the right bank, 1855 vs 1850. The fact that the OHWM delineation is much higher in elevation than that found on the right bank and much higher than the statistical hydrology would suggest for this area is because there are several other factors that influence the vegetative indicators and should have been considered for this location. These include the effect of Lake Sakakawea water levels, the local ground water gradient, and the fact that Painted Woods Creek discharges to the Missouri River at this location.

The degree to which Garrison Dam and Lake Sakakawea impact the area in question is discussed in greater detail under the discussion of Point #2. The vegetative indicators noted in the field should have been considered in their overall context which includes the effects of inundation from Lake Sakakawea. Because this area is within the pool of Lake Sakakawea and is subject to periodic flooding by Lake Sakakawea, those vegetative indicators are no longer directly and solely indicative of the Missouri River when it is normally high.

Ground Water Levels

There is one observation well in the Trenton East Bottom in Section 16, Township 153 North, Range 102 West, about 4 miles from the Wilkinson Tract. The observed water levels are plotted in **Figure 15**. The record from this well clearly illustrates the fact that local ground water levels in the East Bottom have been rising since Garrison Dam was first constructed in 1953 and first filled in 1965. Water levels have risen 6 to 8 feet in this area due to the filling of Lake Sakakawea and the resulting reduction in ground water gradient toward the Missouri River. This phenomenon was noted in the 1993 USACE Reconnaissance Report (Reference 5):

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> In addition to the impacts on crop production, the ground water has caused obvious, serious impacts to farmer's residences. During the late 1960's and early 1970's, the rising ground water resulted in numerous flooded basements. Many of the residents have installed sump pumps in their basements or pervious drains around their houses, and at least two families have had to abandon their homes.

The filling of Lake Sakakawea, created by Garrison Dam on the Missouri River, has resulted in the formation of a delta at the headwaters of the reservoir. The resulting aggradation of the Missouri River channel has reduced the former groundwater gradient to the river and restricted the natural drainage from the area.

These raising ground water levels, which have commonly risen to ground surface, will greatly impact the vegetation occurring in this area. The wetland vegetation that results from these ground water levels is not indicative of the OHWM of the Missouri River.

Painted Woods Creek Influences

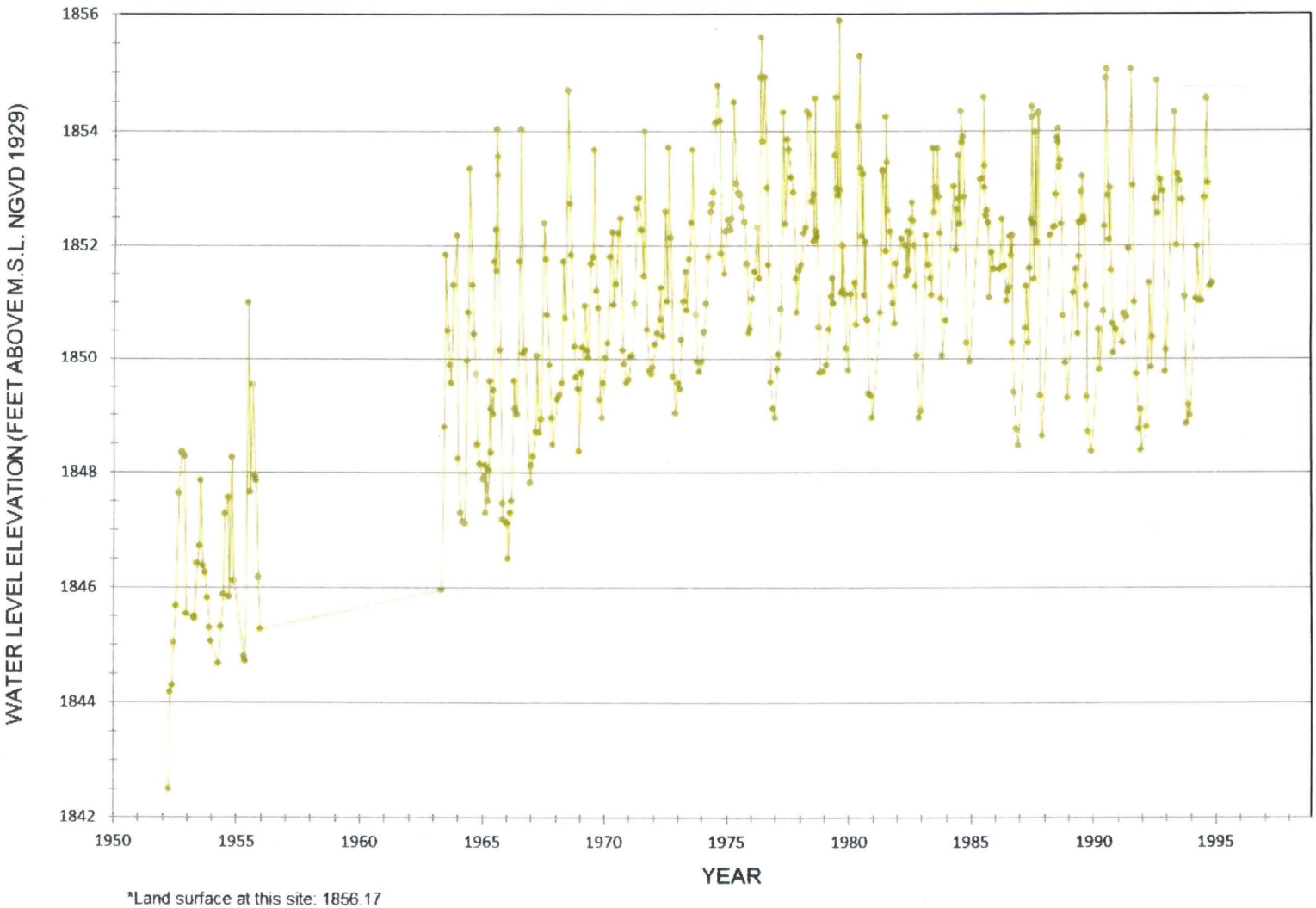
Another factor that influences the vegetative indicators in the area of the Wilkinson Tract is the fact that Painted Woods Creek discharges to the Missouri River just south of the property. Painted Woods Creek has a drainage area of 95 square miles. It's alignment, in relation to the Wilkinson Tract, is illustrated in **Figure 16**. As illustrated in **Figure 17**, the gradient of this tributary flattens significantly when the creek crosses the flats of the Missouri River Valley. This sharp reduction in gradient would increase the likelihood of overbank flooding during significant flow events on Painted Woods Creek. This overbank flooding from the tributary will also influence vegetation in this area, and there is no record of this having been considered during the Phase I delineation. The riparian owner holds all interests in the bed of non-navigable streams, like Painted Woods Creek, and the public's interest in the bed of the Missouri River does not extend up its non-navigable tributaries.

Point #4 Summary

The Phase I OHWM Delineation for this area was based largely on the vegetative indicators noted in the field without taking into account the other factors that influenced those vegetative transitions. Those other factors include the influence of the periodic inundation of this area by Lake Sakakawea, the influence of a well-documented rise in ground water levels in the area, and the influence of periodic flooding from Painted Woods Creek.

The fact that the elevation of the OHWM boundary along the left bank is significantly higher in elevation than the OHWM noted in the field for the right bank supports the fact that the OHWM as delineated for the left bank, using vegetative indicators observed in the field in the area of the Wilkinson Tract, were largely influenced by the local ground water and by Painted Woods Creek.

FIGURE 15
OBSERVATION WELL HYDROGRAPH
153-102-16-ddd



*Land surface at this site: 1856.17

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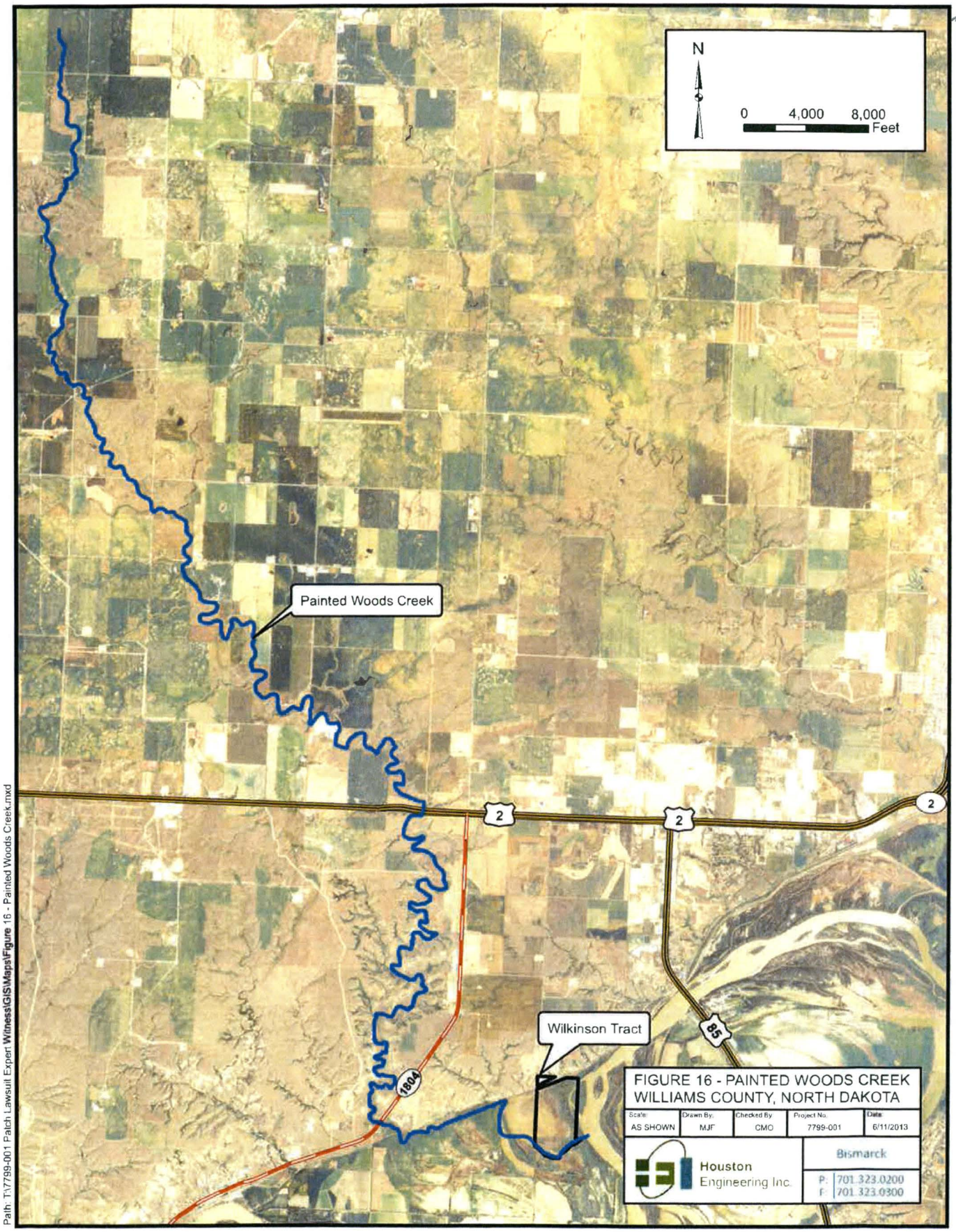

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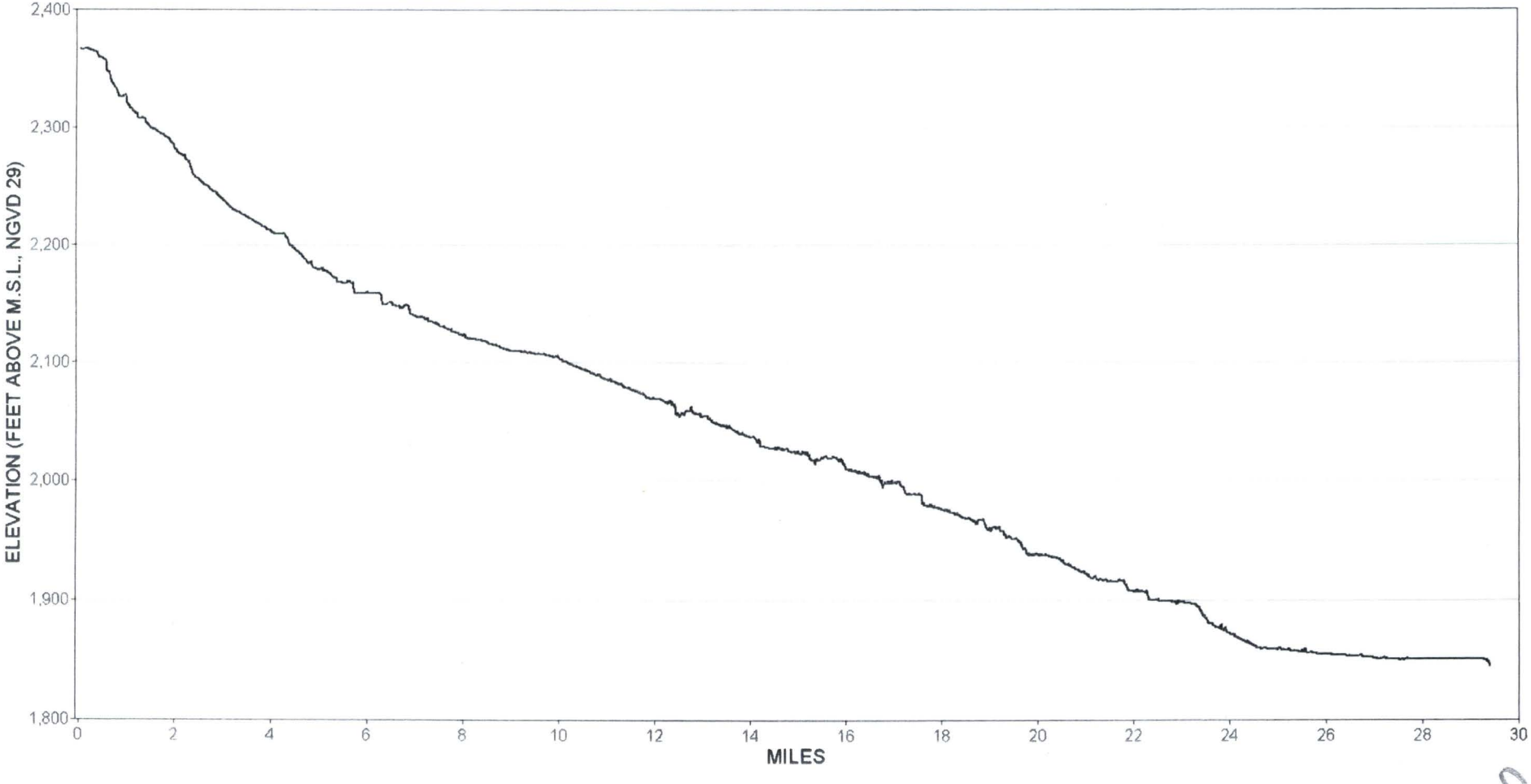
FIGURE 17
ELEVATION GRADIENT OF PAINTED WOODS CREEK IN WILLIAMS CO.



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Summary and Conclusions

A review of the available data strongly supports the position that the boundary between the riparian and the public's interests along the Missouri River in the area of Sections 12 & 13, Township 153 North, Range 102 West lies along the line delineated as the OHWM in the Phase II study.

The majority of the Wilkinson Tract was clearly above the OHWM before the construction of Garrison Dam. The affidavits and aerial imagery clearly show that the land was used for typical agricultural production. Most of the tract is at an elevation of approximately 1850.0 (NGVD29), and historic stage records show that the Missouri River only reached that level on a very infrequent basis, actually only once in the 37 years of record prior to the construction of Garrison Dam.

The Wilkinson Tract is located within the pool of Lake Sakakawea as evidenced by the fact that the USACE purchased the property as part of the Garrison Dam Project. The frequency with which the property is flooded has increased significantly since the construction of Garrison Dam. The pool of Lake Sakakawea has exceeded an elevation of 1850.0 (NGVD29) six years in 45 years of records. Aerial imagery from high water years 1975, 1997, and 2011 clearly show that the property is directly inundated by Lake Sakakawea.

Because it is clearly shown that the Wilkinson Tract, located upstream of the Highway 85 crossing, is a part of the bed of Lake Sakakawea, the use of Highway 85 as a line of demarcation between the applicability of the Phase I study results and the Phase II study results is arbitrary and has no scientific basis. Because this area is subject to direct inundation by Lake Sakakawea, it is in fact part of the lakebed, and the approach used to delineate the OHWM for the rest of the bed of Lake Sakakawea in the Phase II study yielded the appropriate delineation of the OHWM for this property. The report prepared for the Phase II study noted that for the area in Section 12, "the left bank of the OHWM follows along a cut bank with fields on the adjacent upland." Those upland fields are the same fields that were used extensively for agricultural production before the construction of Garrison Dam.

The results obtained in the Phase I OHWM Delineation for the area of the Wilkinson Tract failed to account for all pertinent hydrologic indicators. There was no recognition of the influence that the periodic inundation by Lake Sakakawea had on the transition between upland and wetland vegetation in this area. There was no consideration given to the vegetative influence of the high ground water levels in this area. There was no consideration given to the impacts of Painted Woods Creek and its periodic flooding on the vegetative indicators in this location. The fact that the elevation of the OHWM boundary along the left bank is significantly higher in elevation than the OHWM noted in the field for the right bank supports the fact that the OHWM as delineated for the left bank using vegetative indicators was significantly influenced by the local ground water levels, periodic inundation by Lake Sakakawea and by flooding from Painted Woods Creek. The vegetative indicators in this location are not indicative of those periods when the Missouri River itself is normally high.

References

1. *Ordinary High Water Mark Delineation Guidelines*, ND State Water Commission, prepared by Houston Engineering, November, 2006.

2. *Technical Report for the Ordinary High Water Mark Delineation of the Yellowstone River and Missouri River in Western North Dakota*, prepared for State of North Dakota by Bartlett West & McCain and Associates, Inc., November, 2010.

3. *Technical Report for the Ordinary High Water Mark Investigation for the Missouri River under Lake Sakakawea*, prepared for ND State Land Department by Bartlett & West & McCain and Associates, Inc., March, 2011.

4. *Methods for Delineation of Ordinary High Water Lines (OHWL) and Ordinary High Water Marks (OHWM) for Natural Resources Plans and Permits (Draft Copy)*, Washington Department of Ecology, Washington Department of Fish and Wildlife, June, 2006.

5. *Reconnaissance Report, Missouri River Buford-Trenton Irrigation District, North Dakota*, US Army Corps of Engineers, Omaha District, Missouri River Division, August, 1993.

6. Garrison Dam Reservoir Elevations, Website: http://www.nwo.usace.army.mil/Missions/DamandLakeProjects/MissouriRiverDams/Garrison.aspx

7. *Missouri River Mainstream Reservoir System Master Water Control Manual*, Reservoir Control Center, US Army Corps of Engineers, Omaha, NE, Revised March, 2006.

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1-12-17
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State of North Dakota
ss.
County of Burleigh

Affidavit of Lois Jean Patch

I, Lois Jean Patch, of Bismarck, North Dakota, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. That I was born in Trenton, North Dakota on February 20, 1924 in my parents home. I lived with my parents in Trenton, North Dakota until I was a late teenager when I went away to college in Fargo, ND. I returned to Williams County and was married in 1944. We settled in Williston where I and my husband raised 8 children. We moved to Bismarck, ND in 1959.

2. During my growing up years in my parent's home, I spent much of my time assisting with the family farming operation, my dad was a wheat farmer. I recall doing a variety of tasks like driving grain trucks or delivering lunch to my dad and brothers in the field. One of the fields where he grew wheat was in the east Trenton valley near the Missouri River. We called that the "big field." I recall working in that field in the spring and fall clearing old roots that would come to the surface every year. We called these "grubs" and would gather them to burn in our furnace as a source of fuel. The attached photo was taken by my brother James Wilkinson and shows my brother Tom Wilkinson driving the tractor pulling the swather and combine being operated by my father John Thomas (Tom sr.) Wilkinson. The exact location of the photo is not known but it is in the east Trenton valley and could be in the "big field" in sections 12 and 13.

3. In my married years while living in Williston, we would often take our kids for a relaxing summer evening drive down to that area to show them the fields where their mother worked with their grandfather and other family members in the fields. Many times their grandfather would comment that it looked like there was going to be another bumper crop from those fields.

4. My father, John Thomas Wilkinson, sold that land to the U.S. government in 1958 because they said Garrison Dam was likely to cause it to be flooded someday.

5. My father reserved the mineral rights when the title of the land was transferred to the U.S. government.

6. I have no recollection or knowledge of flooding occurring on this land in the years I lived in Trenton or Williston. However, I possess a letter from my father where he describes the joys and hardships of life in the Trenton Valley. He mentions the occasional flooding from Painted Woods Creek that might wash away his seed or lodge his wheat. Painted Woods creek passes through the fields in Section 12 and 13. I have fond memories of play along the dry

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creek banks with my sisters as my dad and brothers worked in the fields.

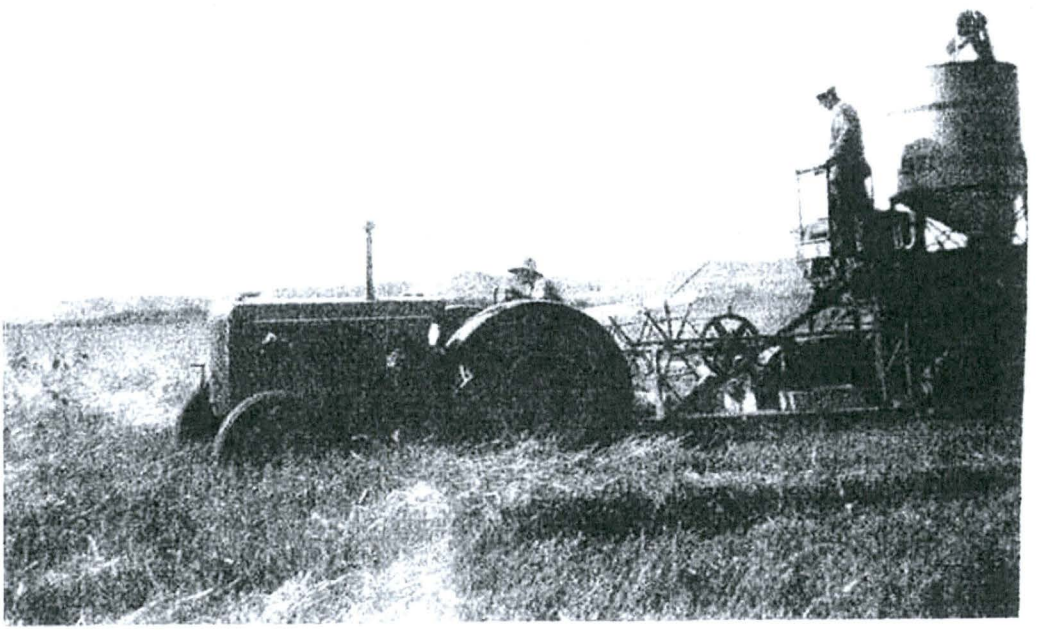
RACHAEL CASPERS
Notary Public
State of North Dakota
My Commission Expires Sept. 15, 2015

Lois Jean Patch
Lois Jean Patch

Subscribed and sworn to before me this 20 day of April, 2011.

Rachael Caspers
Notary Public

My commission expires: Sept 15, 2015.



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AFFIDAVIT

State of Michigan
ss.
County of Ingham

I, William S. Wilkinson, of East Lansing, Michigan, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. That I was born in Williston, North Dakota on September 6, 1933 and lived with my parents, John T. and Evelyn Wilkinson, in Trenton, North Dakota until approximately 1955.

2. That during these years, my parents owned and farmed various parcels of land in the Trenton area, growing mainly spring wheat, along with some barley and flax.

3. That two of these parcels were in the Missouri River valley east of Trenton, described as the Southwest Quarter and the South Half of the Northwest Quarter, except that portion which constitutes the Great Northern Railway Company right of way, in Section 12; and Farm Unit No. 312 in the Buford-Trenton Project, according to the recorded plat thereof, in Section 13; all being located in Township 153 North, Range 102 West, Williams County, North Dakota.

4. That during my teenage years, I assisted my father each year in growing and harvesting mainly spring wheat on these parcels of land.

5. That in 1958, the United States of America purchased these parcels from my parents because, as it was stated to me, it was necessary because the parcels were subject to flooding from the lake created by the construction of the Garrison Dam downstream on the Missouri River. The deed reserved the oil and gas rights to my parents. These rights are presently owned by my siblings and me.

6. That during the years that I lived with my parents and to and including the year the parcels were sold to the United States of America, I have no recollection or knowledge of there being any flooding associated with these parcels.

William S. Wilkinson

William S. Wilkinson
Subscribed and sworn to before me this 1st day of April, 2011

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K Doyle
Notary Public

My commission expires: 8/14/17

K DOYLE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF EATON
My Commission Expires: August 14, 2017
Acting in the County of Ingham

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AFFIDAVIT

I, Vanessa E. Blaine of 12801 Deer Dancer TRAIL NE, Albuquerque, New Mexico, 87112, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. I was born in Trenton, North Dakota on February 8, 1928. I am the daughter of John T. and Evelyn M. Wilkinson and lived in Trenton until the fall of 1945. I then lived in Williston, North Dakota until January 1948.
2. During the WW II years my two older brothers enlisted in AAF and Navy respectively. In preparing my being able to help in the fields and with farm work, my mother took me before Judge Owens to obtain a driver's license at twelve years of age. I was fifteen when my brother Tom entered the Navy and I began driving a ¾ ton truck hauling grain from the harvested fields to the local grain elevator.
3. During these years my parents farmed land along the Missouri River in what was known as the Trenton Valley. My father planted spring wheat, barley, and flax on many parcels of land, totaling 1,100 acres at one point in time. The parcels I remember well were known as the Purcell, Mitchell, Macklemerry, Karels, and the field most easterly was known to me as the Big Field.
4. It is my belief that the Big Field was in the SW1/4, S1/2 NW1/4, of Section 12. One parcel was also in Section 13 known as Farm Unit 312 of the Buford-Trenton Project all being located in Township 153 North, Range 102 West, Williams County, North Dakota.
5. The mineral rights were reserved when the parcels in Section 12 and 13 were sold to the Corps of Engineers as it was reported that the construction of the Garrison Dam would subject them to flooding.
6. I have no recollection or knowledge of any flooding of the parcels farmed by my father and no knowledge of any flooding whatsoever in the Trenton Valley.

Vanessa E Blaine
Vanessa E. Blaine

Subscribed and sworn before me this 14 day of April 2011

Tammy Wieman
Notary Public

My commission expires: OFFICIAL SEAL TAMMY WIEMAN NOTARY PUBLIC-State of New Mexico My Commission Expires 2-14-2014

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Hi Jan -
Thought you'd find
this interesting -

Trenton Farmer Has Splendid Wheat Crop

Tom Wilkinson, farmer on the Missouri bottoms in the country near Trenton, is believed to have the best wheat crop harvested this year in Williams county, friends said Tuesday. He has harvested and threshed 255 acres which gave an average yield of 25 bushels of No. 1 wheat. The quality and average yield are the best so far reported this season here.

1940241

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Eng Form 798-R
1 Jan 46

CERTIFICATE OF INSPECTION AND POSSESSION
(Lands other than Federal Building Sites)

I, John H. Burgum, a representative of the Department of the Army hereby certify that on the 10 day of June, 1958, I made a personal examination and inspection of land situated in the County of Williams, State of North Dakota, designated as Tract No. RR-3190 and containing 286.04 acres, (proposed to be) acquired by the United States of America in connection with the Garrison Dam and Reservoir Project, from J. T. Wilkinson and Evelyn M. Wilkinson, his wife

1. That I found no evidence of any work or labor having been performed or any materials having been furnished in connection with the making of any repairs or improvements on said land; and that I made careful inquiry of the above-named vendor (and of the occupants of said land) and ascertained that nothing had been done or about said premises within the past 3 months that would entitle any person to a lien upon said premises for work or labor performed or materials furnished.

2. That to the best of my knowledge and belief, and after actual and diligent inquiry and physical inspection of said premises, there are no unrecorded visible easements which are not covered by proper releases or which have not been waived in writing by the acquiring agency.

3. That I also made inquiry of all occupant (s) of said land as to his (their) rights of possession and of the vendor and such occupants as to the rights of possession of any person or persons known to him (them) and neither found any evidence nor obtained any information showing or tending to show that any persons had any rights of possession or other interest in said premises adverse to the rights of the above-named owner or the United States of America, except such mineral right, roads, rights-of-way and public utility easements as have been administratively waived by the Department of the Army and the following: (1) (Insert names and addresses together with statement of right of interest claimed.)

NAME	ADDRESS	STATEMENT OF INTEREST CLAIMED

APPROVED:

_____ (Name)

_____ (Title)

John H. Burgum (Name)

Attorney (Title)

This certificate will be executed by a representative of the Department of the Army.)

(1) In purchase cases the rights of all persons in possession or claiming a right of possession exclusive of mineral rights, roads, rights-of-way and public utility easements which have been administratively waived by the Department of the Army, must be eliminated by a proper release, quitclaim deed or disclaimer. However, if the Department of the Army has determined to acquire title subject to outstanding mineral rights, roads, rights-of-way or public utility easements, it will not be necessary to obtain a release, quitclaim deed or disclaimer for such mineral rights, roads, rights-of-way or public utility easements as have been administratively waived in writing by the Department of the Army.

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RECEIPT FOR UNITED STATES TREASURER'S CHECK

Receipt is acknowledged this 10 day of June, 1958, of Treasury Check of the United States No. 10,107, dated May 23, 1958, in the amount of $ 43,327.00, payable to the order of J. T. Wilkinson and Evelyn M. Wilkinson, his wife issued in connection with the acquisition by the United States of America of premises situated in Township 153 North, Range 102 West of the 5th P.M. County of Williams, State of North Dakota, and more particularly described as follows: Farm Unit No. 312 in Buford-Trenton Project, according to the plat thereof recorded in the office of the Register of Deeds of Williams County, North Dakota, in Deed Book 101, Page 413, being a part of Section 13, in Township 153 North, Range 102 West of the Fifth Principal Meridian, and containing 57.09 acres, more or less; also the Southwest quarter ($SW\frac{1}{4}$) and the South half of the Northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) of Section 12, Township and Range aforesaid, excepting that portion of said South half of the Northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) which constitutes right-of-way of the Great Northern Railway Company, containing, exclusive of said exception, 228.95 acres, more or less.
which sum is in full satisfaction and discharge of the interest of the undersigned in the premises conveyed.

(Payee or Payees) J. T. Wilkinson
J. T. Wilkinson
Evelyn M. Wilkinson
Evelyn M. Wilkinson

Address: Trenton, North Dakota

Project: Garrison Dam & Reservoir

Tract No. HH-3190

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Attach 4.9

Pg 1

Testimony of Joshua Swanson
Concerning Senate Bill No. 2134
Senate Energy and Natural Resources Committee
January 12, 2017, 9:00 AM

Chairman Schaible and members of the Committee, thank you for the opportunity to comment on Senate Bill 2134. My remarks focus on the problem caused by using river mile 1552.4, the location of the Highway 85 Bridge, as the dividing line in the Bill that arbitrarily distinguishes between lands east of the Bridge versus lands west of the Bridge that were also acquired as part of the Pick-Sloan Missouri basin project – commonly referred to as the Garrison Project – by the United States because such lands would be affected and inundated by Lake Sakakawea.

BACKGROUND

Historically, the State of North Dakota claimed an interest in only the original 30,000 acres of the Missouri River riverbed as it existed before the existence of Garrison Dam. This is the "historical Missouri riverbed channel." This is noted in an August 13, 2007, letter that the North Dakota State Water Commission submitted to the Army Corps of Engineers in response to the Corps' request for comments on the Garrison Dam/Lake Sakakawea Master Plan. However, departing from decades of policy and practice, the State, through the office of State Engineer and the Land Commissioner, now claims title to all the oil and gas under Lake Sakakawea. The State made this massive land grab despite the fact this property, including property west of the Highway 85 Bridge, was undisputedly acquired by the United States for the Garrison Project because of the flooding that would be caused by Lake Sakakawea. In the warranty deeds dating back to the 1950s whereby the United States acquired this property from North Dakota citizens like Ed Lynch and Jon Patch's predecessors, the oil and gas rights were unquestionably reserved in the private landowners. This is shown by the United States maps for the Garrison Project and the clear and unambiguous language in said warranty deeds. A copy of these maps and warranty deeds are included with this testimony as Exhibits 1 and 2.

This has been the subject of litigation in William S. Wilkinson, et al. v. The Board of University and School Lands of the State of North Dakota, et al., Case No. 53-2012-CV-00038, and EEE Minerals, LLC et al. v. The Board of University and School Lands of the State of North Dakota, et al. (the latter case filed this week in McKenzie County). The Wilkinson case is pending before the North Dakota Supreme Court. The State claims that, regardless of how or when land came to lie within the ordinary high water mark ("OHWM") of Lake Sakakawea, the State automatically acquired ownership of that land as soon as it was flooded. This view is legally erroneous. With the exception of using river mile 1554.2, which is the location of the Highway 85 Bridge, as the boundary for the effect of Garrison Dam and western reach of Lake Sakakawea, the Bill addresses the issues raised in this litigation.

The use of the Highway 85 Bridge as the western reach of Lake Sakakawea and delineating the impacts of Garrison Dam, and in distinguishing between what the State owns versus what it does not own as currently provided for in SB 2134, is lacking in any scientific support and makes the Bill problematic. The fact that property located west of the Highway 85 Bridge – like that owned by the Wilkinson and Vohs families – was and remains affected by and subject to flooding from Lake

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Sakakawea is discussed in detail in the expert report prepared by Dr. Lawrence Woodbury in the Wilkinson case. A copy of that report is included with this testimony at Exhibit 3. Point #3 to Dr. Woodbury's report explains why using the Highway 85 Bridge as a dividing line is arbitrary. The arbitrary nature of using the Highway 85 Bridge as the dividing line for what the State owns, as Mr. Patch notes in his testimony, was acknowledged by several individuals employed by the State who were deposed in the Wilkinson case. These individuals, including John Paczkowski, Todd Sando, Gerald Heiser, Lance Gaebe, Mike Brand, Gary Preszler, and Tom Feeney, each testified they were unaware of any scientific or technical basis for using the Highway 85 Bridge as the western reach of Lake Sakakawea and its impacts. Mr. Preszler, the former Land Commission for the State, summarized the problematic nature of using the Highway 85 Bridge as the dividing line when he stated, "It [Highway 85 Bridge] just represented a recognizable landmark that we all knew and we used that as a basis, … ," and it "represented no scientific analysis or basis whatsoever."

The use of the Highway 85 Bridge as the dividing line in SB 2134 also ignores the undisputed fact that the United States acquired property west of the Highway 85 Bridge for the Garrison Project and flooding that would be caused by Lake Sakakawea. This is illustrated by the United States' maps for the Garrison Project showing dozens of tracts and many acres west of the Bridge – like the property belonging to the Wilkinson and Vohs families – that were acquired by the United States because of the flooding that would be caused by Lake Sakakawea. Similarly, the clear and unambiguous language in the warranty deeds whereby the United States acquired property west of the Highway 85 Bridge for the Garrison Project, like the 1958 Warranty Deed from the Wilkinson family to the United States, provided that the Wilkinsons' reservation of the oil and gas rights were "[s]ubordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation, and maintenance of the Garrison Dam and Reservoir, … ."

These families should not be made to suffer the indignity of losing their property twice at the hands of Lake Sakakawea and their government. The first time some sixty-odd years ago when the federal government took their land, and for a second time in 2017, adding insult to that long-ago injury, this great State seeking to further deprive them of their property by claiming their oil and gas rights – rights they had previously leased to oil companies for nearly sixty years before the State claimed ownership of them.

NORTH DAKOTA'S TITLE TO THE RIVERBED OF THE HISTORIC MISSOURI RIVER

At the time of Statehood, North Dakota took title to the bed of navigable bodies of water as those bodies of water existed at the moment of statehood. (See, e.g., Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1977)). The legal mechanism that gave North Dakota this title is known as the "Equal Footing Doctrine," which grants each State in our Union title to the bed of all navigable bodies of water, including underlying minerals, as of the moment of Statehood. (Id.) After the moment of Statehood, the Equal Footing Doctrine has run its course and is of no further effect. (Id.) The Equal Footing Doctrine does not grant the State title to the bed of any body of water that later becomes navigable, like Lake Sakakawea, whether by natural or artificial means. (Id.) While the State can also acquire property by purchase, the State cannot arbitrarily claim title to property that it does not own. That is the textbook definition of an unconstitutional taking under this State and our United States constitutions.

The State cannot validly designate the Highway 85 Bridge as the cutoff of the effect of Garrison Dam and western reach of Lake Sakakawea. Garrison Dam's effect and the reaches of Lake Sakakawea go beyond this point. Using an artificial cutoff like the Highway 85 Bridge defeats the purpose of the Bill by effectively granting the State title to private land that the State does not own.

NORTH DAKOTA'S ATTEMPTS TO DETERMINE THE STATE'S INTEREST TO THE BED OF LAKE SAKAKAWEA

The State has conducted two studies to determine the OHWM of the Missouri River in the Garrison Dam area. The first study, which began at the Highway 85 Bridge and moved west, used the OHWM as it now sits, without regard for the effect of Lake Sakakawea. The second of these studies, which included the area from Garrison Dam to the Highway 85 Bridge, used the OHWM of the historic Missouri River as it existed prior to Garrison Dam. The first study shares a common flaw with the proposed Bill – the Highway 85 Bridge is not the end of Lake Sakakawea and its impacts as detailed in Dr. Woodbury's report. As Dr. Woodbury explained, "The use of Highway 85 as the upstream limit of the reservoir is arbitrary and has no scientific basis. Lake Sakakawea extends west of the bridge." (Woodbury Report at p. 21). Dr. Woodbury also noted that property belonging to the Wilkinson family, lying to the west of the Highway 85 Bridge, was suitable for agricultural purposes prior to the construction of Garrison Dam. (Id.) Further, as noted by Dr. Woodbury, the United States purchased property extending well beyond the Highway 85 Bridge for the Garrison Project, which demonstrates that Lake Sakakawea was always anticipated to affect areas beyond the Highway 85 Bridge. Moreover, the pre-dam streambed elevation at the Highway 85 Bridge was approximately 1823.0 feet; any time the reservoir impounds water that exceeds that water surface elevation, as it does 95% of the time, the reservoir is impounding water upstream or beyond the Highway 85 Bridge. (Id.)

COMMENTS ON BILL DRAFT

Effectively, SB 2134 recognizes that the State has title to the bed of the historic Missouri River as it existed prior to the Garrison Dam. However, the Bill legislatively mandates that, as a matter of North Dakota law, Garrison Dam's effect and the western reach of Lake Sakakawea ceases at the Highway 85 Bridge. This limitation is arbitrary, unsupported by any scientific or technical grounds, and would lead to unconstitutional results and additional legal challenges.

The State does not need to use an artificial limit on the extent of the effect of Lake Sakakawea. As the Bill notes, the historical Missouri riverbed channel can be determined by prior Army Corps of Engineering surveys, and, if necessary, by studies of historical aerial photos as the State has already done for large parts of Lake Sakakawea. Thus, there is little risk of the State encountering protracted issues with determining the extent of the State's interest absent the artificial cutoff. The artificial cutoff undermines what can be a just and right Bill for people like the Wilkinson and Vohs families that have already been deprived of their property once by the Garrison Project and Lake Sakakawea. The artificial cutoff is a state-sanctioned taking without compensation for all property west of the Highway 85 Bridge that was acquired by the United States for the Garrison Project and, as noted by Dr. Woodbury, clearly affected by Lake Sakakawea.

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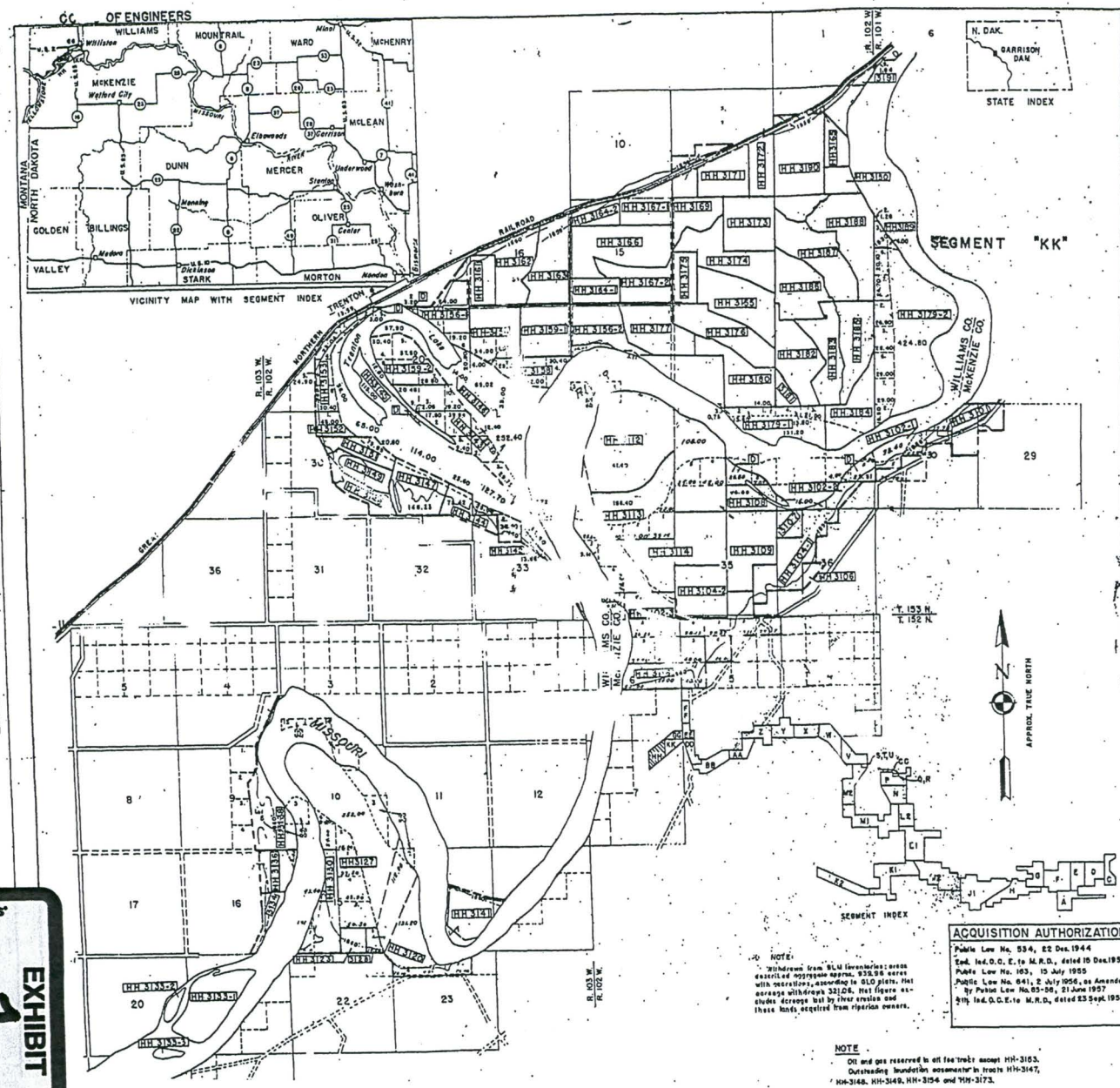
The artificial cutoff for the effect of Lake Sakakawea is a proverbial line in the sand; on one side of the line, the State recognizes that it has no automatic legal right to artificially flooded property, but on the other side of the line the State claims an automatic legal right regardless of whether it is actually affected by Lake Sakakawea. The State can prevent this unfair and unconstitutional treatment by removing the artificial cutoff from the proposed Bill.

Thank you again for the opportunity to present this testimony. I urge you not to pass the proposed Bill without first removing the artificial cutoff point at river mile 1552.4, which is the location of the Highway 85 Bridge.

Respectfully,

Joshua Swanson



ACQUISITION TRACT REGISTER

TRACT NO.	LAND OWNER	AGREAGE FEE	AGREAGE TRANS.	AGREAGE EASM'T.	REMARKS
	McKENZIE COUNTY				
HH 3101	MIRIAM DEH. PAGE	130.90			
HH 3102-1	ARTHUR WOOD	97.10			
HH 3102-2	ARTHUR WOOD	30.40			
HH 3102-3	ARTHUR WOOD	401.25			
HH 3104-1	JOHN W. SLATOR ET UX	216.00			
HH 3104-2	JOHN W. SLATOR ET UX	160.00			
D	U.S.A. DEP'T OF INTERIOR		see remarks		Transferred 27 February 1959, Public Land Order No. 1809, acreage included in tract register of segment GG
HH 3106	STATE OF NORTH DAKOTA	20.00			
HH 3107	HARRY C. NELSEN ET AL	40.00			
HH 3108	FRED A. NELSEN ET UX	76.80			
HH 3109	JOSEPH HACKENBERG, SR.	485.00			
HH 3111	DELETED				
HH 3112	GLINTON A. TIBBITS	441.60			
HH 3113	GLINTON A. TIBBITS	872.93			
HH 3114	MARY A. TIBBITS ET AL	461.44			
HH 3116	HENRY H. REHBERG	173.00			
HH 3117	DELETED				
HH 3118	DELETED				
HH 3119	DELETED				
HH 3120	FRANK W. ERICKSON ET AL	195.65			Formerly Tract No. HH3123-1
HH 3121	DELETED				
HH 3122	DELETED				
HH 3123	FRANK W. ERICKSON ET AL	40.00			Formerly Tract No. HH3123-2
HH 3124-1	DELETED				Included in Tract No. HH3127
HH 3124-2	DELETED				Included in Tract No. HH3126
HH 3126	DELETED				
HH 3127	EMERY N. PAPINEAU ET UX	740.72			
HH 3128	NORMAN PAPINEAU ET UX	131.20			Formerly Tract No. HH3128-2
HH 3129	DELETED				
HH 3130	NORMAN PAPINEAU ET UX	43.40			Formerly Tract No. HH3128-1
HH 3131	DELETED				
HH 3132	DELETED				
HH 3133-1	STATE OF NORTH DAKOTA	196.80			
HH 3133-2	STATE OF NORTH DAKOTA	19.20			
HH 3133-3	STATE OF NORTH DAKOTA	16.00			
	WILLIAMS COUNTY				
HH 3134	JOHN OSTER ET UX	44.81			
HH 3136	ROBERT F. BACHTOLD	83.19			
HH 3137	DELETED				
HH 3138	MARGARET E. KERR	160.00			
HH 3139	DELETED				
HH 3140	EARL T. BAUSTE ET UX	19.20			
HH 3141	IVER BORLAUG ET UX	153.87			
HH 3142	RAYMOND F. HOFFMAN ET UX	38.68			
HH 3143	CARL GROSETH	677.39			
HH 3144	JOHN IRWIN	98.02			
D	U.S.A. DEP'T. OF INTERIOR		see remarks		Transferred 27 February 1959, Public Land Order No. 1809, acreage included in tract register of segment GG
HH 3145	STATE OF NORTH DAKOTA	115.00			
HH 3146-1	STATE OF NORTH DAKOTA	14.00			Formerly known as Tract No. HH3146-1
					" " " " HH3146-2
HH 3147	ORRIN J. JACOBSON ET UX	280.23			
HH 3148	JOHN TOFTE	75.44			
HH 3149	ROBERT D. BERG ET UX	77.57			
HH 3150	LEO O. PIPPENGER ESTATE ET AL	91.80			Formerly known as Tract No. HH3152-2
HH 3151	LESTER G. LARSON ET UX	100.79			
HH 3152	JOHN DEJARLAIS	108.00			
HH 3153	GERALD W. BERGSTROM ET UX	151.42			
HH 3154	HENRY A. BOWEN ET UX	223.52			
HH 3155	CHARLES W. PATCH ET UX	211.39			Formerly known as Tract No. HH3156-2
HH 3156-1	JAMES F. MARTIN ET UX	149.00			
HH 3156-2	JAMES F. MARTIN ET UX	162.43			
HH 3158	MILES C. GROSETH ET UX	138.60			
HH 3159-1	CHARLES A. BOWEN ET UX	160.00			
HH 3159-2	CHARLES A. BOWEN ET UX	207.40			
HH 3161	AGNES MORIN GARFIELD ET AL	94.98			
HH 3162	JOHN C. SOUDY ET UX	166.17			
HH 3163	H. W. ANDERSON ET UX	196.48			
HH 3164-1	MAUD MARTIN	80.00			
HH 3164-2	MAUD MARTIN	64.88			
HH 3165	CHARLES W. PATCH ET UX	63.30			Formerly known as Tract No. HH3169-3
HH 3166	H. AUSTIN MARTIN ET UX	261.50			
HH 3167-1	FRED T. MARTIN ET UX	108.47			
HH 3167-2	FRED T. MARTIN ET UX	139.98			
HH 3168	DELETED				
HH 3169	CHARLES W. PATCH ET UX	175.13			
HH 3170	DELETED				
HH 3171	ROBERT L. KERNS ET UX	127.35			
HH 3172	FRANCES JACKSON SLINGSBY ET VIR	60.75			
HH 3173	HENRY A. BOWEN ET UX	160.00			
HH 3174	RALPH O. FASCHING ET UX	188.50			
HH 3175	MAUD MARTIN	80.00			
HH 3176	THEODORE TOFTE	177.82			
HH 3177	HAROLD E. ZIMMERMAN ET UX	176.04			
HH 3178-1	DELETED				
HH 3178-2	DELETED				
HH 3179-1	OLETA L. METZGER	346.33			
HH 3179-2	OLETA L. METZGER	240.10			
HH 3180	LESTER J. LOHSE ET UX	171.11			

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EXHIBIT
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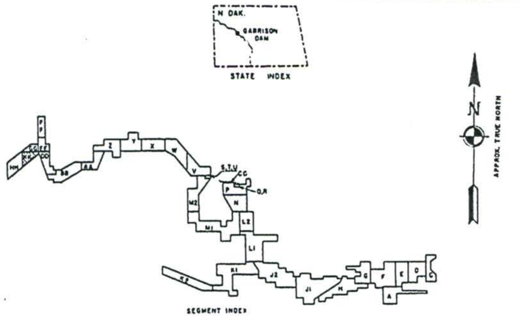
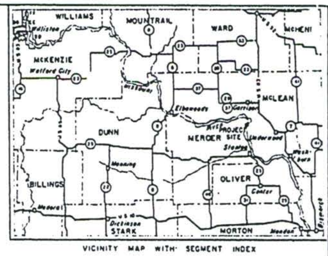
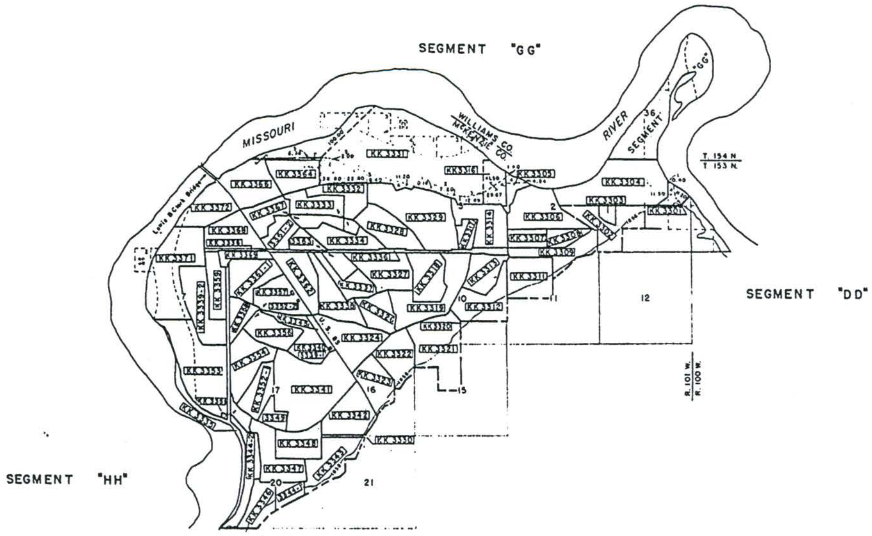
Pg. 5

CORPS OF ENGINEERS

U.S. ARMY







NOTE:
Boundary lines of this segment were determined by deed descriptions, General Land Office Plats, and aerial photos.

ACQUISITION TRACT REGISTER

TRACT NO.	LAND OWNER	ACREAGE FEE	ACREAGE TRANS.	ACREAGE EASM'T.	REMARKS
	McKENZIE COUNTY				
KK 3301	HENRY T. BACON ET AL	27.20			
KK 3302	WILLIAM NELSON ET UX	142.28			
KK 3303	HANSEL MONSON	20.00			
KK 3304	NO. DAK. RURAL REHABIL. CORP. ET AL	285.63			Formerly known as Tract No. KK3304-1
KK 3305	NO. DAK. RURAL REHABIL. CORP. ET AL	32.52			Formerly known as Tract No. KK3304-2
KK 3306	KRISTIAN HOVDE ET UX	169.24			
KK 3307	JOSEPH E. MATHISTAD ET UX	59.39			
KK 3308	BEN G. RISSER	49.45			
KK 3309	AUGUST ESTHENBACHER ET UX	108.68			
KK 3311	EVERETT E. PALMER ET UX	139.79			
KK 3312	DONALD A. NOVAK ET UX	134.15			
KK 3313	LYLE E. SAFELY ET AL	93.30			
KK 3314	WALTER O. BURK ET UX	130.85			
KK 3316	HJALMER HOVDE ET UX	71.17			
KK 3317	KERMIT I. HEEN ET UX	36.08			
KK 3318	JAMES B. SKAARE ET UX	123.06			
KK 3319	JOHN P. SCHMITZ ET UX	172.85			
KK 3320	NO. DAK. RURAL REHABIL. CORP. ET AL	5.00			
KK 3321	LEONARD ZIMMER ET AL	219.45			
KK 3322	ALBERT R. ZIMMER ET UX	116.58			
KK 3323	CARRIE ANSETH ET AL	102.49			
KK 3324	RAYMOND L. BROWN ET UX	156.46			
KK 3325E	DELETED				
KK 3326	GEORGE NOVAK ET UX	86.01			
KK 3327	JOHN ZAGURSKI ET UX	144.76			
KK 3328	CHARLES H. VIZINA ET UX	131.16			
KK 3329	LEONARD H. GREEN ET UX	264.41			
KK 3330	NO. DAK. RURAL REHABIL. CORP. ET AL	3.87			Formerly known as Tract No. KK3336-2
KK 3331	NO. DAK. RURAL REHABIL. CORP. ET AL	796.02			
KK 3332	HAROLD N. GAUTHIER ET UX	69.67			
KK 3333	FRED FALSTAD ET AL	100.65			
KK 3334	ARCHIE D. MACMASTER ET UX	102.30			
KK 3335	NO. DAK. RURAL REHABIL. CORP. ET AL	77.60			Includes area formerly known as Tract No. KK3336-3
KK 3336	NO. DAK. RURAL REHABIL. CORP. ET AL	46.09			Formerly known as Tracts Nos. KK3336-1 & KK3336-4, now combined
KK 3337	ANTON P. NELSON ET UX	74.87			
KK 3338	ALBERT ARNEGARD ET UX	113.79			
KK 3339-1	HENRY T. BACON ET AL	106.24			
KK 3339-2	HENRY T. BACON ET AL	152.84			
KK 3340	JOSEPH R. LANDWEHR ET UX	0.16			
KK 3341	HUGH PATTERSON ET UX	346.78			
KK 3342	LYNN LEE ET UX	140.84			
KK 3343	REUBEN E. BRAKKEN ET UX	138.30			
KK 3344-1	CLOYD J. WEGLEY ET UX	43.91			
KK 3344-2	CLOYD J. WEGLEY ET UX	105.84			
KK 3345	HENRY T. BACON ET AL	18.99			
KK 3346	LARS LEE	83.21			
KK 3347	EMERY N. PAPINEAU ET UX	118.06			
KK 3348	ALOIS STEPANEK ET UX	100.68			
KK 3349	FRED R. PAPINEAU	43.35			
KK 3351	LEWIS & CLARK IRRIGATION DIST.	31.72			
KK 3352-1	WILLIAM J. NASNER ET UX	90.10			
KK 3352-2	WILLIAM J. NASNER ET UX	0.34			
KK 3353	PAUL STEPANEK ET UX	286.91			
KK 3354	ALFRED I. OSSING ET AL	144.76			
KK 3356	DONALD S. SATHE ET AL	216.63			
KK 3357	ANDREW SATHE, SR. ET UX	0.69			
KK 3358	EVELYN ALICE PAULSON ET VIR	56.49			
KK 3359	LORENZ SCWITCH ET UX	93.10			
KK 3361-1	JOSEPH C. PAULSON ET UX	118.29			
KK 3361-2	JOSEPH C. PAULSON ET UX	62.14			
KK 3362	EDWIN M. DAHL ET UX	124.92			
KK 3363	DENNIS GEORGE ET UX	80.12			
KK 3364	HENRY I. SOVIG	104.81			
KK 3366	WAYNE S. BOYCE ET UX	254.11			
KK 3367	CLIFFORD I. SOVIG ET UX	116.25			
KK 3368	PHILANDER A. HODGSON ET UX	123.19			
KK 3369	STATE OF NORTH DAKOTA	41.01			
KK 3371	HENRY P. VOHS ET AL	276.80			
KK 3372	LEONARD M. FIXEN ET UX	119.67			

NOTE:
Oil and gas reserved in all fee tracts.

NOTE:
Withdrawn from BLM inventory areas described aggregate approx. 933.24 acres with accretions, according to GLO plats. Net acreage withdrawn 33.06. Net figure reflects acreage lost by erosion and those lands acquired from riparian owners.

ACQUISITION AUTHORIZATION
Public Law No. 534, 22 Dec 1944
Public Law No 163, 15 July 1955
Public Law No. 641, dated 2 July 1956
4th Ind. O.C.E. to M.R.D., dated 23 Sept. 1957

FINAL
PROJECT MAP
TYPE OF MAP

STATE: NORTH DAKOTA
COUNTY: McKENZIE
DIVISION: MISSOURI RIVER
DISTRICT: GARRISON
LOCATION OF DAM: SEC. 5 T.146 N. R. 84 W. OF 5TH P.M.
10 MILES S OF GARRISON
15 MILES N OF STANTON

SEGMENT KK
— LAND AREA —
TOTAL ACRES IN SEGMENT 8,168.25
ACRES FEE
ACRES EASEMENT
ACRES TRANSFERRED TO W.D.
ACRES PERMITS OR LICENSES

— DISPOSALS —
TOTAL ACRES DISPOSED OF
ACRES TRANSFERRED
ACRES LEASED FROM W.D.
ACRES OTHERWISE

— LEGEND —
TAKING LINE FOR DAM SITE
TAKING LINE FOR RESERVOIR
PERTINENT CONTOUR LINES
CEMETERY
STATE OR PROVINCE LINES
COUNTY LINE
TOWNSHIP LINE
SECTION LINE
PROPERTY LINE
STREAMS
RAILROADS
POWER LINES
TELEPHONE LINES
IMPROVED ROADS
UNIMPROVED ROADS

— SCALE —

DEPARTMENT OF THE ARMY
OFFICE OF THE DISTRICT ENGINEER
GARRISON DISTRICT
MISSOURI RIVER DIVISION
REAL ESTATE

GARRISON DAM & LAKE SAKAKAWEA

SEGMENT KK

RECOMMENDED: [signature] DATE:
APPROVED: H L Hille DATE:
COL. CORPS OF ENGINEERS

COMPILED: [initials] TRACED: [initials] CHECKED: RH

DATE	BY	REVISIONS	APPROVED
7-1-76	R.E.P.	Added Tr. KK 3373	
2-22-65	M.W.P.	Name of Project changed [illegible]	
3-25-64	H.A.Z.	Due to Final Audit	
3-13-64	H.A.Z.	Tract KK-3325E, 56.29 ac. was deleted and acreage now included in tracts abutting highway as shown	
1-20-1958	M.W.B.	Added Tract No. KK3325E 56.29 acres	

SHEET: 36 OF 36 DRAWING NO.

OFFICE, CHIEF OF ENGINEERS, WASHINGTON, D.C.
AUDITED
INSTALLATION OR PROJECT NO. C2-2-1895

Date	Revision	By
12-3-64	Added [illegible] and note	S.I.S.

THIS DRAWING HAS BEEN REDUCED TO ONE-HALF THE ORIGINAL SCALE

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Tract No. HH-3190

1. WARRANTY DEED; AM-2-61 To Red Line" Legal Blanks, Bismarck, N. D.

411

THIS INDENTURE, Made this 9th day of June in the year of our Lord one thousand nine hundred and fifty-eight between J. T. Wilkinson and Evelyn M. Wilkinson, his wife whose postoffice address is Trenton, North Dakota part ies of the first part, and United States of America whose postoffice address is Washington, D. C. party of the second part;

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of FORTY-THREE THOUSAND THREE HUNDRED TWENTY-SEVEN AND NO/100 DOLLARS, to them in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, do by these presents GRANT, BARGAIN, SELL and CONVEY unto the said party of the second part, and its heirs and assigns FOREVER, all that tract or parcel of land lying and being in the County of Williams and State of North Dakota, and described as follows, to-wit: Farm Unit No. 312 in Buford-Trenton Project, according to the plat thereof recorded in the office of the Register of Deeds of Williams County, North Dakota, in Deed Book 101, Page 413, being a part of Section 13, in Township 153 North, Range 102 West of the Fifth Principal Meridian, and containing 57.09 acres, more or less; also the Southwest quarter ($SW\frac{1}{4}$) and the South half of the Northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) of Section 12, Township and Range aforesaid, excepting that portion of said South half of the Northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) which constitutes right-of-way of the Great Northern Railway Company, containing, exclusive of said exception, 228.95 acres, more or less; subject to existing easements for public roads and highways, [redacted] ner of any interest therein, including third party lessees, their heirs, successors and assigns, all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved are subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation and maintenance of the Garrison Dam and Reservoir, and that any exploration or development of such rights shall be subject to federal or state laws with respect to pollution of waters of the reservoir; provided further that the District Engineer, Corps of Engineers, Garrison District, or his duly authorized representative shall approve, in furtherance of the exploration and/or development of such reserved interests, the type of any structure and/or appurtenances thereto now existing or to be erected or constructed in connection with such exploration and/or development, said structures and/or appurtenances thereto not to be of a material determined to create floatable debris.

and they assigns, that they are well seized in fee of the land and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances,

and the above bargained and granted land and premises in the quiet and peaceable possession of said party of the second part, and its heirs and assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said part ies of the first part will warrant and defend.

IN WITNESS WHEREOF, The said parties of the first part hereunto set their hands the day and year first above written.

Signed and Delivered in Presence of

J. T. Wilkinson

Evelyn M. Wilkinson, his wife

EXHIBIT 2 tabbies

Filed - Clerk of District Cour
7/1/2014 2:37:29 PI
Williams County, N

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Attch # 9
pg. 8

12

J. T. Wilkinson and Evelyn M. Wilkinson, his wife, Trenton, North Dakota

to

WARRANTY DEED DOC. # 288165
Book 131 Deeds page 411
Filed June 10, 1958, 4:50 P.M.
Dated June 9, 1958

United States of America
Address: Washington, D. C.

In consideration of $ 43,327.00 Grant, Bargain, Sell and Convey unto second party and its assigns, all that tract or parcel of land lying and being in the County of Williams and State of North Dakota, and described as follows, to-wit: Farm Unit No. 312 in Buford-Trenton Project, according to the plat thereof recorded in Deed Book 101, Page 413, being a part of Sec. 13, Twp. 153, Rge. 102 and containing 57.09 acres, more or less, also the SW¼ and S½NW¼ of Sec. 12, Twp. and Rge. aforesaid, excepting that portion of said S½NW¼ which constitutes right-of-way of the Great Northern Railway Company, containing, exclusive of said exception 228.95 acres, more or less, subject to existing easments for public roads and highways, public utilities, railroads and pipe lines.

Reserving, however, to the owner of the land or the owner of any interest therein, including third party lessees, their heirs, successors and assigns, all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved are subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation and maintenance of the Garrison Dam and Reservoir, and that any exploration or development of such rights shall be subject to federal or state laws with respect to pollution of waters of the reservoir; provided further that the District Engineer, Corps of Engineers, Garrison District, or his duly authorized representative shall approve, in furtherance of the exploration and/or development of such reserved interests, the type of any structure and/or appurtenances thereto now existing or to be erected or constructed in connection with such exploration and/or development, said structures and/or appurtenances thereto not to be of a material determined to create floatable debris.

Free from all encumbrances.

$47.85 R. S. Cancelled

On this 9th day of June A. D. 19 58, before me personally appeared J. T. Wilkinson and Evelyn M. Wilkinson, his wife known to me to be the same persons described in and who executed the within and foregoing instrument, and severally acknowledged to me that they executed the same.

Telmar B. Rolfstad /s/
Notary Public, Williams County, State of North Dakota

(N. P. Seal)

My commission expires Nov. 19, 1958.

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pg. 9

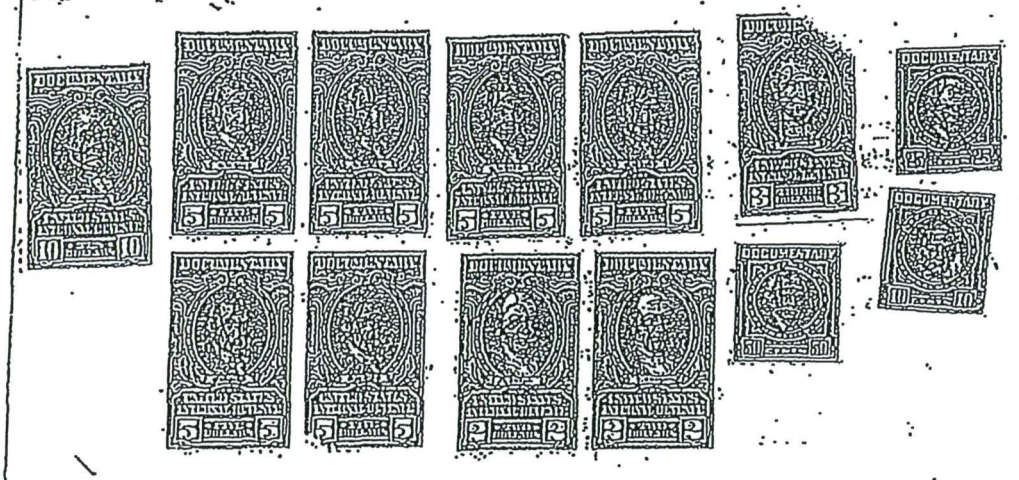
STATE OF NORTH DAKOTA,
County of Williams } ss.

On this 9th day of June A. D. 19 58, before me personally appeared J. T. Wilkinson and Evelyn M. Wilkinson, his wife

known to me to be the same person s described in and who executed the within and foregoing instrument, and severally acknowledged to me that they executed the same.

Theiar E. Rolfstad
THIMAR E. ROLFSTAD
Notary Public for the County of Williams,
State of North Dakota

My commission expires Nov. 19, 1958.



Doc. No. 288165
Book 272
Grantor
Grantee
Compared
Page
Marginal

Warranty Deed

TRANSFER FEE $ .25
TO
RECORDING FEE $1.50

OFFICE OF REGISTER OF DEEDS
STATE OF NORTH DAKOTA, } ss.
County of WILLIAMS

I hereby certify that the within Warranty Deed was filed in this office for record on the ___ day of JUN 10 1958 A. D. 19 ___ at 4:45 o'clock P. M. and was duly recorded in book 272 of Warranty Deeds on page 477

Register of Deeds
By ___ Deputy

Delinquent taxes and special assessments, or installments of special assessments, paid for and transfer entered this ___ day of ___ 19 ___

County Auditor
By ___ Deputy.

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1-12-17
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KK-3371

BOOK 87 PAGE 505

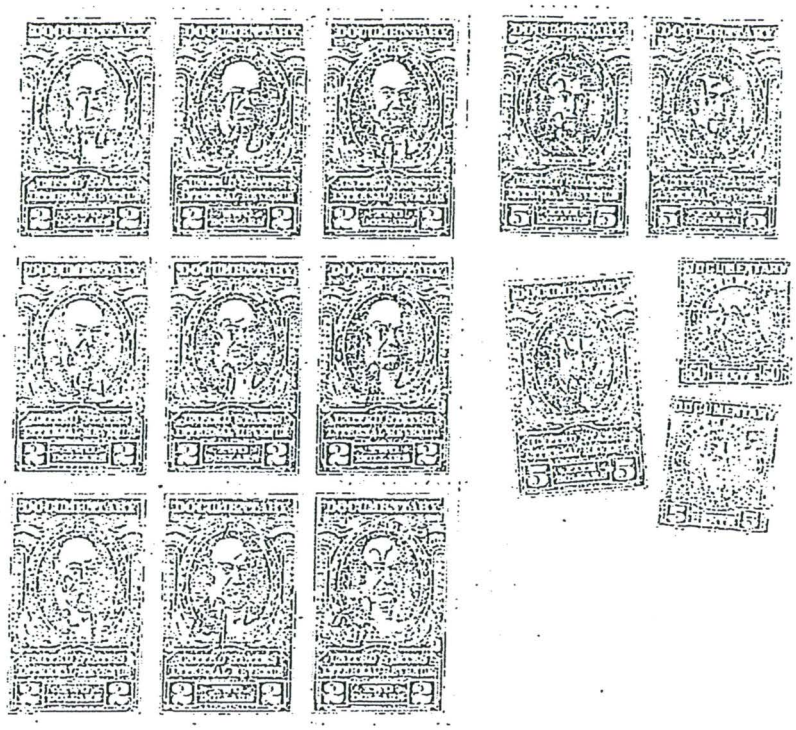
Document No. 155142

WARRANTY DEED

THIS INDENTURE, Made this 24th day of July in the year of our Lord one thousand nine hundred and fifty-seven between Henry P. Vohs and Esther Vohs, his wife, Adolph S. Vohs and Ivy Vohs, his wife, and Alfred J. Vohs, and Iva Vohs, his wife, whose postoffice addresses are Williston, North Dakota, parties of the first part, and United States of America, whose postoffice address is Washington, D. C., party of the second part;

WITNESSETH, That the said parties of the first part, for and in consideration of the sum of THIRTY THOUSAND ONE HUNDRED THIRTY-FIVE AND NO/100 DOLLARS, to them in hand paid by said party of the second part, the receipt whereof is hereby acknowledged, do by these presents GRANT, BARGAIN, SELL AND CONVEY unto the said party of the second part, and its assigns FOREVER, all that tract or parcel of land lying and being in the County of McKenzie and State of North Dakota, and described as follows, to-wit:

Lot Ten (10) of Section Six (6), and those portions of Lots One, Four and Five (1, 4, 5) of Section Seven (7), in Township One Hundred Fifty-three (153) North, Range One Hundred One (101) West of the Fifth Principal Meridian, McKenzie County, North Dakota, together with all lands accreted to said Lots, containing in all Two hundred Seventy-six and Eighty-hundredths (276.80) acres, more or less, bounded and described as follows: Beginning at the northeast corner of Lot Ten (10) of Section Six (6), in Township One Hundred Fifty-three North, Range One Hundred One West of the Fifth Principal Meridian, McKenzie County, North Dakota, which said corner is marked by a two (2) inch iron pipe with brass cap, thence westerly along the south line of Unit Number Twenty (20) of "Lewis and Clark Irrigated Farms" according to the plat thereof on file in the Register of Deeds office in and for said County, on the following courses: South 89 degrees 53.5 minutes west a distance of 1101.00 feet, thence South 89 degrees 37 minutes west a distance of 625 feet, more or less, to the right bank of the Missouri River, as the same traverses said Section Six (6), thence southerly along said right river bank a distance of 5900 feet, more or less, to an iron pipe with brass cap on said bank which constitutes the northwest corner of Unit Number Twenty-two (22) of said "Lewis & Clark Irrigated Farms" thence North Eighty-nine degrees Fifty-four and Five hundredths minutes (89° 54.05') east along the north boundary line of said Unit Number Twenty-two (22) a distance of Two thousand One Hundred Sixty-five and Sixty-five hundredths feet, to an iron pipe with brass cap on the westerly boundary line of Unit Number Twenty-three (23) of said "Lewis & Clark Irrigated Farms," thence northwesterly and easterly along the westerly and northerly boundary lines of said Unit Number Twenty-three (23) on the following courses: North 22 degrees 58.4 minutes west a distance of 484.75 feet, thence north 20 degrees 24 minutes west a distance of 553.3 feet, thence north 18 degrees 31 minutes west a distance of 590.8 feet, thence north 12 degrees west a distance of 504.4 feet, thence north 6 degrees 53 minutes west a distance of 777.5 feet, thence north zero degrees 57 minutes west a distance of 247.8 feet, thence north 89 degrees 53 minutes east a distance of 1467.41 feet to an iron pipe with brass cap on the west boundary line of Unit Number Twenty-four West (24-W) of said "Lewis & Clark Farms" last said iron pipe being also the northeast corner of said Unit Number Twenty-three (23), thence north zero degrees 7 minutes west along the west boundary line of said Unit Number Twenty-four West (24-W) a distance of 886.82 feet to the northwest corner thereof, thence northerly a distance of 100 feet, more or less, to a 2 inch iron pipe with brass cap at the southwest corner of Unit Number Twenty-one (21) of said "Lewis & Clark Irrigated Farms" thence north zero degrees 3.5 minutes west along the boundary line common to said Unit Number Twenty-one (21) and said Lot Ten (10) a distance of 1287.5 feet to the point of beginning, subject to existing easements for public roads and highways, public utilities, railroads and pipe lines, excepting and reserving to the grantor all buildings and improvements now situated on these premises, said buildings and improvements to be removed on or before 1 April 1958. In the event that said buildings and improvements are not removed on or before said date, the right of removal shall terminate automatically, and the United States shall have a good and indefeasible title to said buildings or improvements without notice to grantor. It is further understood that, so long as the said buildings and improvements remain in place, no responsibility will lie with the United States for their maintenance or safety. It is further understood that the consideration for this reservation and right to remove said buildings and improvements is the sum of $385.00 which has been deducted from the total agreed purchase price of $30,520.00, and that the purchase price set forth above is exclusive of the consideration for



97 MAR 506

SO 3134
1-12-17
AHU #4
78-11

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1-12-17
Attach #9
pg. 12

said buildings and improvement reservation; reserving, however, to the owner of the land or the owner of any interest therein, including third party lessees, their heirs, successors and assigns, all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved are subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation and maintenance of the Garrison Dam and Reservoir, and that any exploration or development of such rights shall be subject to federal or state laws with respect to pollution of waters of the reservoir; provided further that the District Engineer, Corps of Engineers, Garrison District, or his duly authorized representative shall approve, in furtherance of the exploration and/or development of such reserved interests, the type of any structure and/or appurtenances thereto now existing or to be erected or constructed in connection with such exploration and/or development, said structures and/or appurtenances thereto not to be of a material determined to create floatable debris.

TO HAVE AND TO HOLD THE SAME, Together with all the hereditaments and appurtenances thereunto belonging or in anywise appertaining, to the said party of the second part, and its assigns FOREVER. And the said Henry P. Vohs and Esther Vohs, his wife, Adolph S. Vohs and Ivy Vohs, his wife, and Alfred J. Vohs and Iva Vohs, his wife, said parties of the first part, for themselves, their heirs, executors and administrators, do covenant with the said party of the second part, and its assigns, that they are well seized in fee of the land and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all incumbrances, and the above bargained and granted land and premises in the quiet and peaceable possession of said party of the second part, and its assigns, against all persons lawfully claiming or to claim the whole or any part thereof, the said parties of the first part will warrant and defend.

IN WITNESS WHEREOF, The said parties of the first part hereunto set their hands the day and year first above written.

Henry P. Vohs

Esther Vohs, his wife

Adolph S. Vohs

Ivy Vohs, his wife

Alfred J. Vohs

Iva Vohs, his wife

STATE OF NORTH DAKOTA)
) ss.
County of Williams)

On this 24th day of July A.D. 1957, before me personally appeared Henry P. Vohs and Esther Vohs, his wife, Adolph S. Vohs and Ivy Vohs, his wife, and Alfred J. Vohs and Iva Vohs, his wife, known to me to be the same persons described in and who executed the within and foregoing instrument, and severally acknowledged to me that they executed the same.

F. A. WENSTROM
NOTARY PUBLIC
STATE OF NORTH DAKOTA

F. A. Wenstrom

Notary Public for the County of Williams, State of North Dakota

My commission expires July 11, 1959

F. A. WENSTROM
Notary Public, WILLIAMS CO., N. DAK.
My commission expires JULY 11, 1959.

Document No. 155142

BOOK 87 PAGE 508

...day of Sept. A.D. 1957 at 4:00 o'clock P. M., and was duly recorded in Book ... of Deeds on Page 505

Kay E. Hermann
REGISTER OF DEEDS

Deputy

REGISTER OF DEEDS OFFICE
McKENZIE COUNTY
STATE OF NORTH DAKOTA

...Current Taxes and Special Assessments, ... Certificates of Sale and Certificates of Special Assessments paid and transferred this 6 day of Sept. 1957

COUNTY AUDITOR

By ... Deputy

Corps of Engineers
Riverdale, N. D.
200

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June 19, 2013

HoustonEngineering Inc.

Wilkinson Trust Estate

Ordinary High Water Mark

EXHIBIT
tabbies
3

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pg. 15

CERTIFICATION

I hereby certify that this report was prepared by me or under my direct supervision, and that I am a duly Registered Professional Engineer under the laws of the State of North Dakota.

Lawrence H. Woodbury, PhD, P.E., P.H.
North Dakota Reg. No. 1729

Date: June 20, 2013

REGISTERED PROFESSIONAL ENGINEER
LAWRENCE H. WOODBURY
PE-1729
DATE June 20, 2013
NORTH DAKOTA

HoustonEngineering Inc.

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Appendix A	*Affidavits*
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The Problem

The State of North Dakota holds the beds of navigable lakes and streams in public trust. The surface interests are managed by the ND State Engineer, and the mineral interests are managed by the ND Land Commissioner as head of the ND Department of Trust Lands. The State of North Dakota asserts that the Ordinary High Water Mark serves as the boundary between the public's mineral interests and the interests of the riparian owner.

The surface interests in the Wilkinson Tract were sold to the US Army Corps of Engineers in 1958 in anticipation of flooding resulting from the construction of Garrison Dam, and the mineral interests were explicitly retained. The ND Department of Trust Lands sponsored a study to identify the Ordinary High Water Mark along the Missouri River from the North Dakota/Montana border to a location downstream of US Highway 85 in 2010. That delineation process was based largely on current vegetative indicators as observed in the field at that time. Subsequently, the ND Department of Trust Lands sponsored another study in 2011 to identify the Ordinary High Water Mark of the Missouri River under Lake Sakakawea as it would have existed at the time the lake initially filled. The boundary as delineated by this second study was apparently intended to serve as the boundary between the public and private mineral interests as though the filling of Lake Sakakawea froze that boundary in time. The lineal extent of this second delineation extended upstream of US Highway 85 to include the area of the Wilkinson Tract. There is a significant overlap between the two studies, and the Wilkinson Tract is located within the overlap area.

Thus two separate delineations of the Ordinary High Water Mark (OHWM) have been completed for the area in question, using two distinctly different processes and yielding two distinctly different results. The ND Department of Trust Lands has asserted that the boundary delineated using the vegetative indicators observed in the field is a more applicable approximation of the boundary between the private and public interests in the area of the Wilkinson Tract, a subjective decision that maximizes the state's interests at the expense of the riparian owner, even though they had enough doubt in their own mind that they sponsored a second study that provided another delineation for this area. The state's position suggests that US Highway 85 is somehow the boundary between the applicability of using current vegetative indicators and the applicability of recognizing that Lake Sakakawea has artificially altered the vegetative markers in this reach to an extent that they are no longer indicative of the Ordinary High Water Mark of the Missouri River and are instead direct indicators of the effect of water levels in Lake Sakakawea.

Figure 1 illustrates the location of the property in question as well as the results of the two OHWM delineations. It also includes the river mile designations assigned by the US Army Corps of Engineers for this reach. The property in question is located between river mile 1554.0 and 1554.5.

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History

The property in question is located in Sections 12 and 13, Township 153 North, Range 102 West, as illustrated in **Figure 1**. These lands were actively farmed by J.T. Wilkinson starting in the 1930's until he and Evelyn M. Wilkinson sold the surface interests to the United States of America in 1958, explicitly reserving the mineral interests. These lands, excluding the mineral interests, have since become part of the Trenton State Wildlife Management Area. Affidavits support the fact that, prior to the construction of Garrison Dam, the land was used extensively for agricultural purposes and was not subject to any frequent flooding from the Missouri River.

In 2006, the State Engineer developed Ordinary High Water Mark Delineation Guidelines (Reference 1).

In 2008, the North Dakota Board of University and School Lands issued a Request for Proposals for delineation of the Ordinary High Water Mark along the Yellowstone and Missouri Rivers from the Montana/North Dakota border to River Mile Marker 1549.0, which is located approximately five to six miles downstream of the Highway 85 Bridge. This has become known as the Phase I study and was completed with a Technical Report dated November 2010 (Reference 2).

In 2009, the North Dakota Board of University and School Lands issued another Request for Proposals, this time for delineation of the Ordinary High Water Mark of the Missouri River Bed under Lake Sakakawea, specifically from mile marker 1482, at the approximate northern boundary of the Fort Berthold Reservation upstream to mile marker 1574.5. This study culminated with a Technical Report dated March 2011 (Reference 3). This resulted in a 25.5 river mile overlap between the two studies, and the Wilkinson estate is included in that overlap. This has been referred to as their Phase II study. The second RFP noted:

> Because the area to be delineated for the OHWM has been inundated or potentially inundated, the contractor may not rely on observations of the current location of the OHWM where it may be exposed in making the determination. Determination of the OHWM must be made using historical information and current technology to interpret this historic information.

The objective of the study contractor for both the Phase I and Phase II studies was to identify the OHWM. They were not charged with making any determinations as to ownership or shared interests. However, the State of North Dakota has subsequently refused to release their claim to the mineral interests for the property in the Wilkinson Tract found to be below the OHWM in the Phase I study, even though their own Phase II analysis contradicts the Phase I findings. They have asserted that US Highway 85 is the boundary between where the Phase I findings are an appropriate delineation of the boundary between the public and the riparian interests and where the Phase II findings are appropriately applied.

Figure 2 illustrates the Phase I and Phase II study reaches, their overlap, and the location of the Wilkinson property (Reference 2,3).

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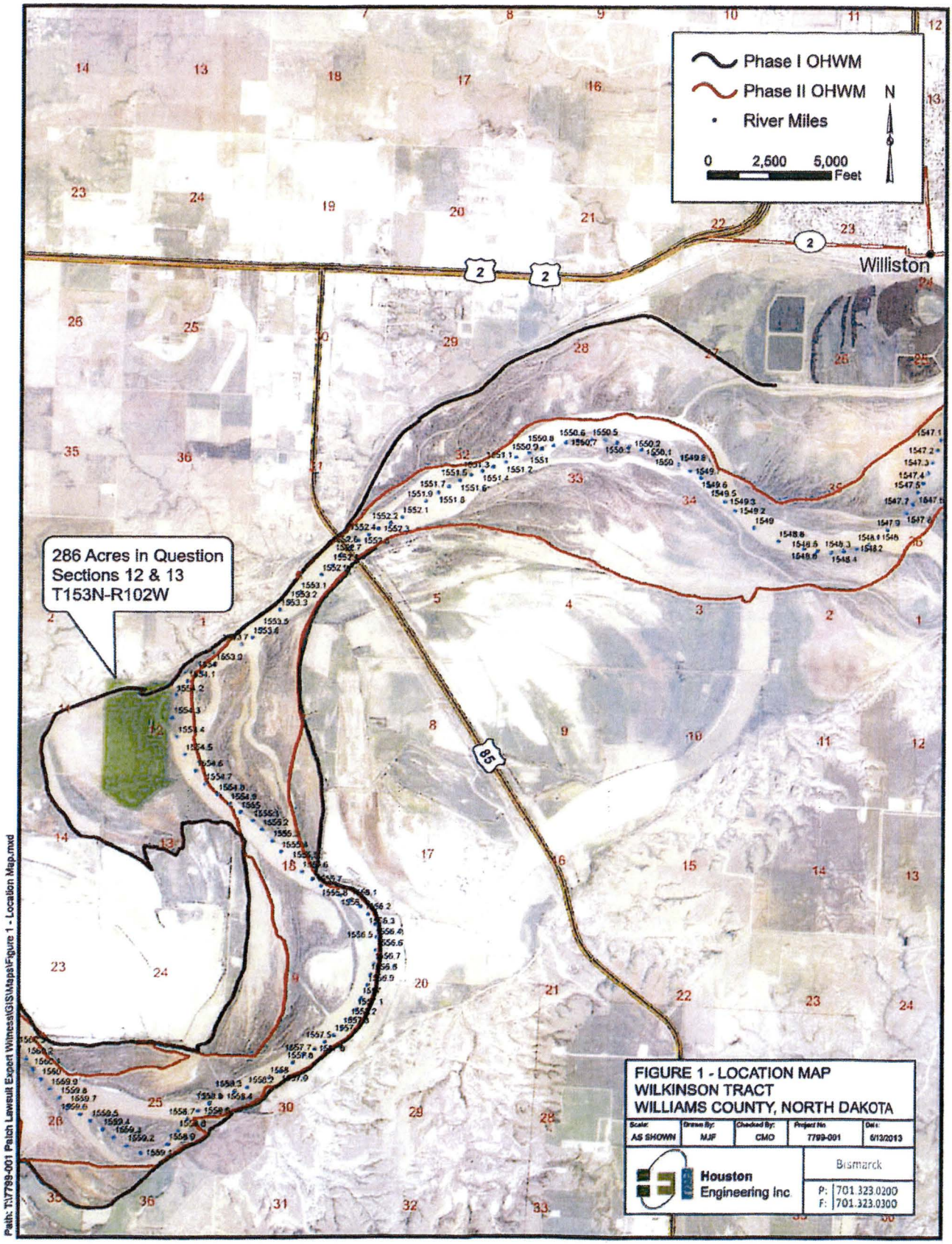

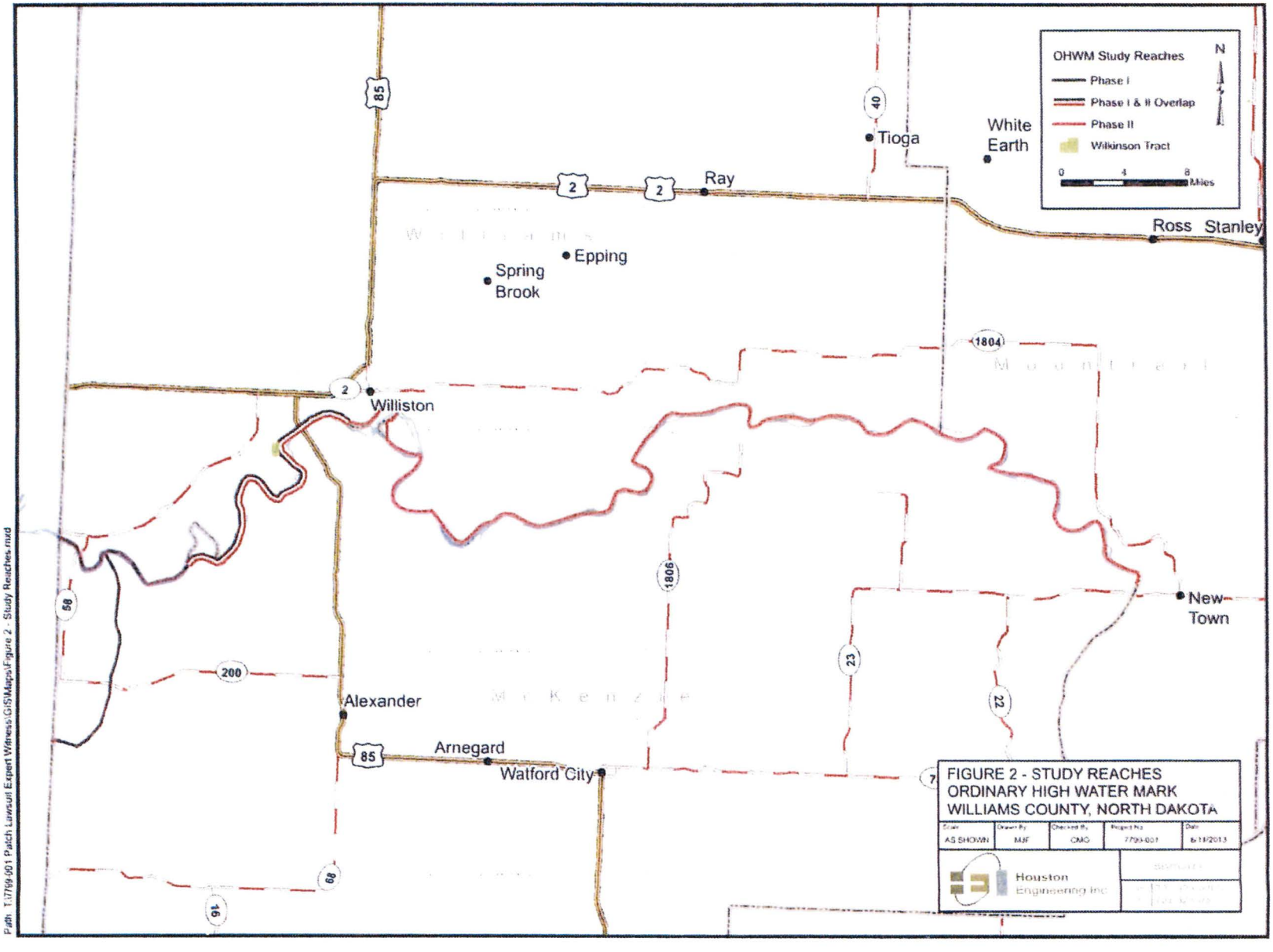

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Ordinary High Water Mark Delineation

North Dakota Administrative Code Section 89-10-01-03 defines Ordinary High Water Mark as:

> That 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…

The North Dakota Supreme Court has defined Ordinary High Water Mark as:

> ….a water mark. It is co-ordinate with the limit of the bed of 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 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.

The North Dakota State Engineer developed Ordinary High Water Mark Delineation Guidelines in 2006 (Reference 1). These guidelines established and defined a consistent approach for completing delineations in North Dakota taking into account North Dakota statutory and case law guidance as well as common scientific principles. These guidelines documented the importance of vegetative and soil indicators but also recognized the potential applicability of hydrology and an assessment of the suitability of the lands for agricultural purposes. These guidelines noted:

> A review of long term and recent hydrology may indicate whether physical indicators evident in the field are truly indicative of the ordinary high water mark or whether they reflect an extraordinary event.

The guidelines also recognized research completed by the State of Washington that suggested the Ordinary High Water Mark has been shown to be equivalent to the water surface elevation generally equivalent to a 1.0 to 1.75 year peak flow (Reference 4).

Point #1 The Wilkinson Tract was Above OHWM Prior to Construction of Garrison Dam

One important indicator of the Ordinary High Water Mark is whether or not the land is suitable for agricultural production. If the land is located below the OHWM, the frequency of inundation would destroy its suitability for agricultural production. There is an abundance of information clearly demonstrating that the Wilkinson property was used extensively for agricultural production up to the time the property was sold to the US Government in 1958. Affidavits provided by Lois Jean Patch, William Wilkinson and Vanessa Blaine all document the property's historic use for agricultural production and the fact that those familiar with the farming operation

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throughout that period had no memory of the property being flooded by the Missouri River. Copies of these affidavits are included in **Appendix A.**

Figure 3 is 1958 aerial photography that includes the lands in question. The Wilkinson Tract has been identified on the photograph, and it is clear that the land was used for agricultural purposes in 1958. The field lines are readily apparent.

Figure 4 illustrates the topographical information available for the Wilkinson Tract. **Figure 5** is a distribution plot of the land surface elevation (NGVD 29) for the 286 acres in question in Sections 12 & 13, Township 153 North, Range 102 West. The distribution plot was developed from the 10-meter digital elevation model (DEM) created by the US Geological Survey (USGS) based on their 1:24,000 scale 7.5 minute quadrangle topographic maps. The lands in question fall into the Trenton, N. Dak. quadrangle, published in 1969 and the Williston SW, N. Dak. quadrangle published in 1979. The Trenton quad was created from 1968 aerial photography and 1969 plane-table surveys and the Williston SW quad was created from topography and photometric methods from aerial photographs taken in 1973 and 1977.

Less than 10% of the property within the Wilkinson Tract is below an elevation of 1849.5 (NGVD 29) with a majority of the property at an elevation of approximately 1850.0. In 1993 the US Army Corps of Engineers published a Reconnaissance Report (Reference 5) which included water surface profiles for various events throughout the headwaters of Lake Sakakawea including a plot of pre-dam water surface elevations which has been reproduced in **Figure 6**. With pre-dam conditions, the streambed is shown to be at an elevation of 1824.0 (NGVD 29), and the 10-year peak flow water surface elevation is shown to be about 1850.0 (NGVD 29) at river mile 1854.0 which is adjacent to the Wilkinson Tract. Thus, before the construction of Garrison Dam, it took approximately a 10-year event to flood the formerly cultivated portions of the Wilkinson Tract. Research completed by the State of Washington has shown that the OHWM is typically equivalent to approximately a 1.75 year peak, which is much less than a 10-year peak (Reference 4).

Figure 7 illustrates the annual peak water surface elevations for the Missouri River Near Williston Gage for the period of 1928 through 1965. This gage is located at the Highway 85 bridge at river mile 1552.7, approximately 1.3 miles downstream of the Wilkinson Tract. Based on this record, the water surface elevation only exceeded 1850.0 (NGVD 29) on one occasion in 1959 throughout this 37 year period of record.

Point #1 Summary

The majority of the Wilkinson Tract was clearly above the OHWM before the construction of Garrison Dam. The affidavits and aerial imagery clearly show the land was used for typical agricultural production. Most of the tract is at an elevation of approximately 1850.0 (NGVD 29) and historic stage records show that the Missouri River only reached that level at this location on a very infrequent basis, actually only once in 37 years of record.

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FIGURE 3 - 1958 AERIAL IMAGERY
OVER 2012 NAIP IMAGERY
WILLIAMS COUNTY, NORTH DAKOTA

Scale:	Drawn By:	Checked By:	Project No	Date
AS SHOWN	MJF	CMO	7799-001	6/10/2013

Houston Engineering Inc
Bismarck
P 701.323.0200
F 701.323.0300

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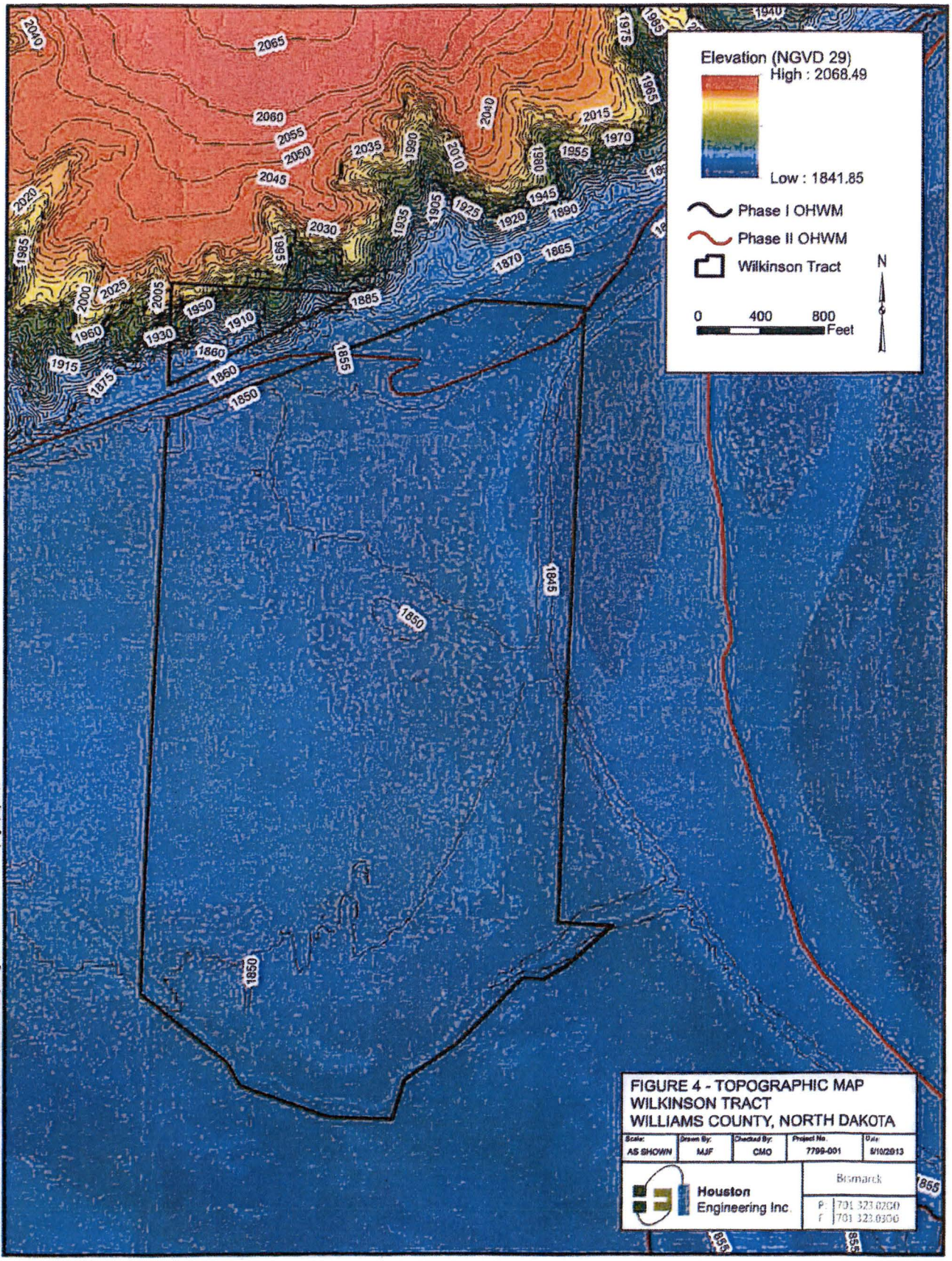

FIGURE 5
DISTRIBUTION PLOT OF LAND SURFACE ELEVATION (NGVD 29)
OF THE 286 ACRES IN QUESTION
LOCATED IN SECTIONS ~~12 & 13,~~ 153-102

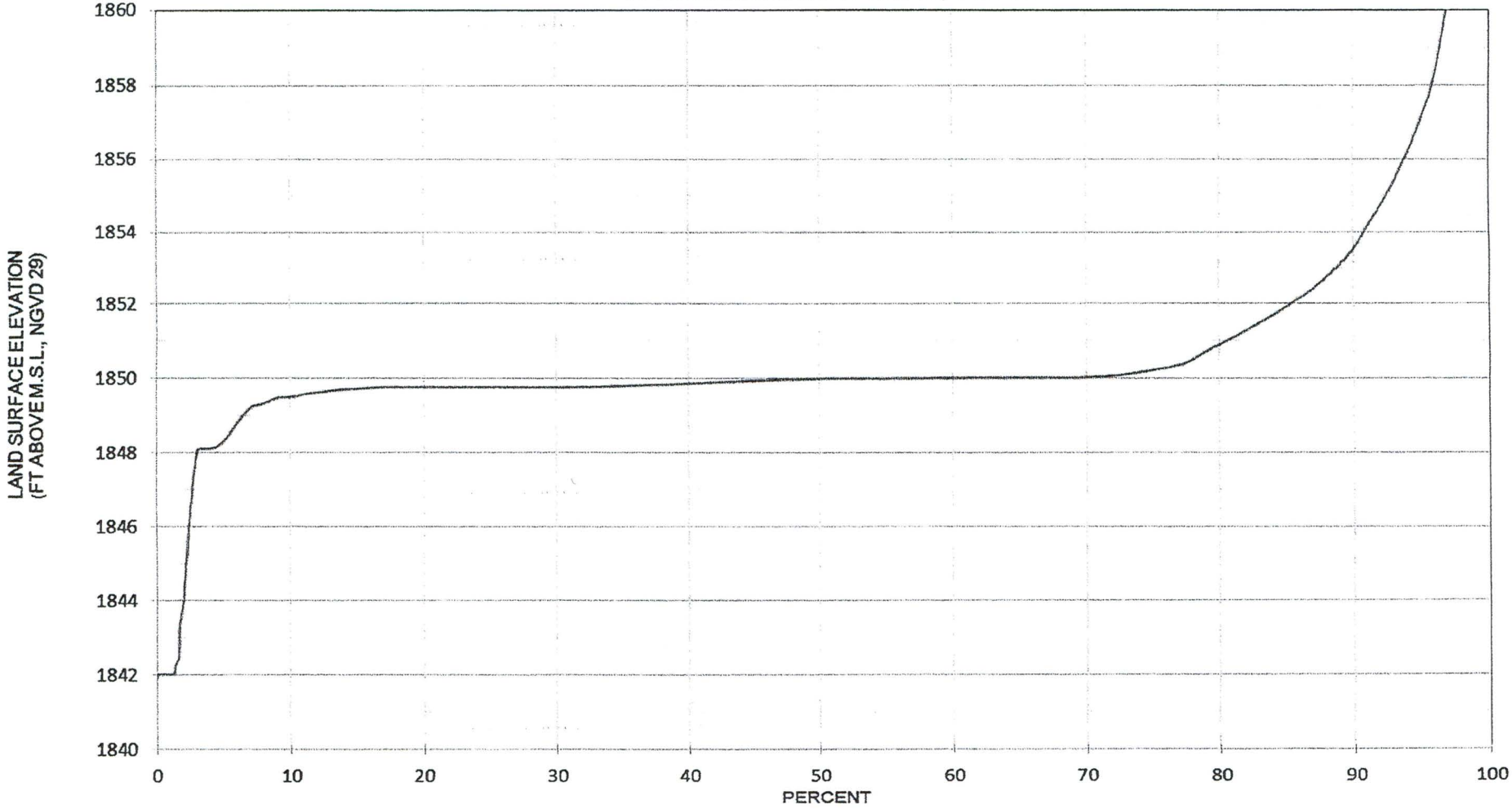

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FIGURE 6

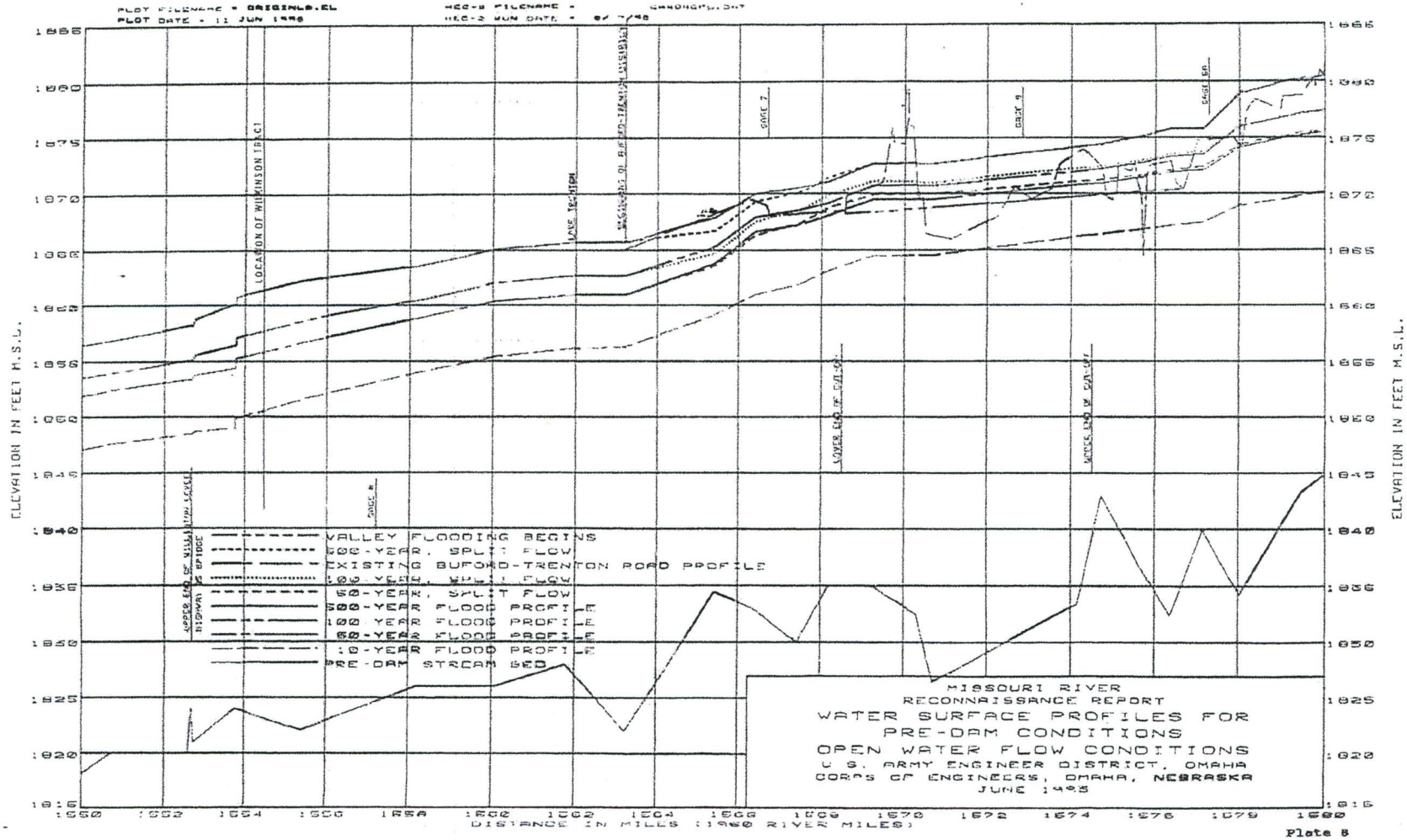

Plate 8

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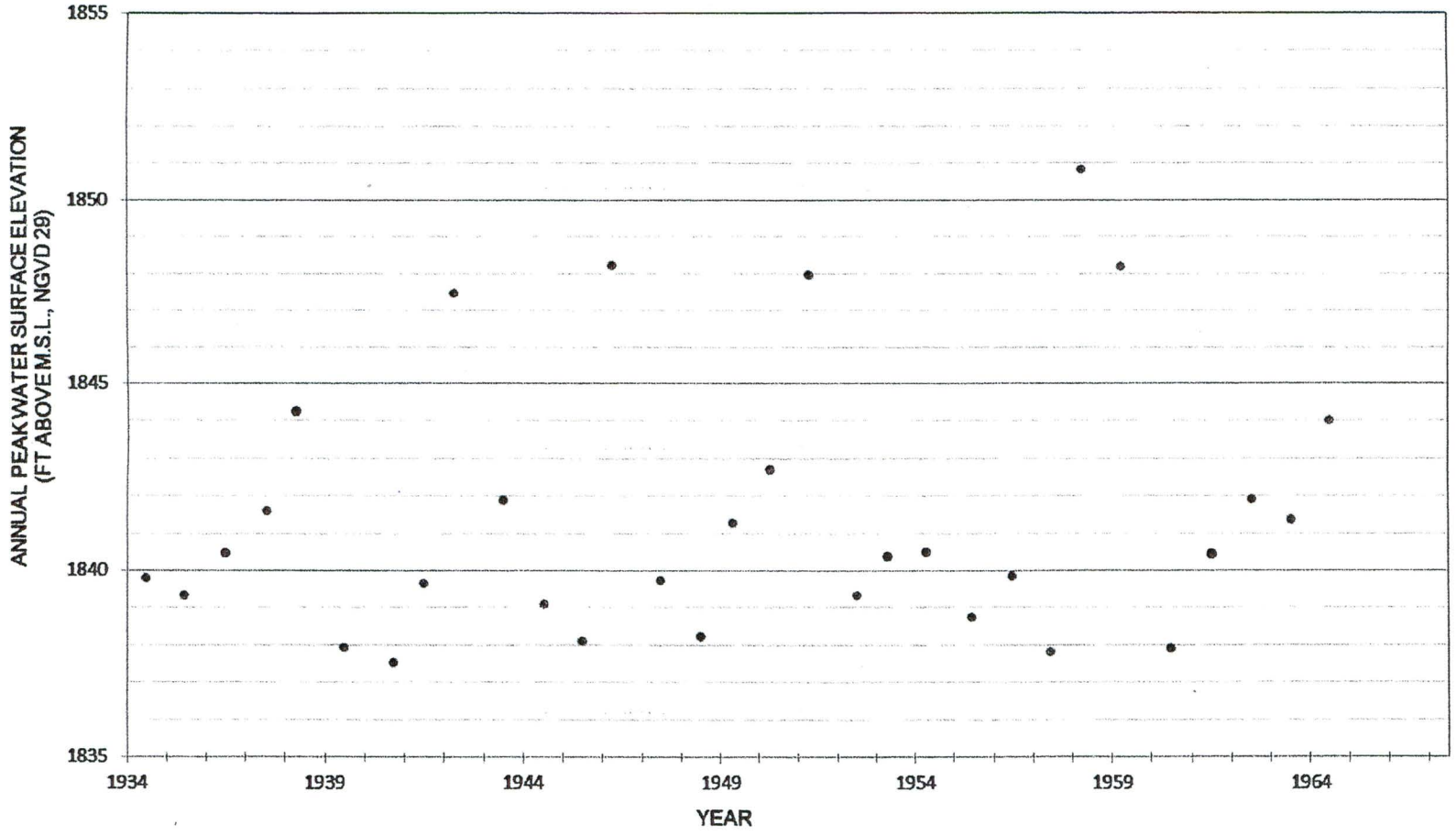
FIGURE 7
PRE-GARRISION DAM PEAK GAGE HEIGHTS



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Point #2 Garrison Dam/Lake Sakakawea Directly Affects Property

The fact that the US Government chose to purchase this property as part of the Garrison Dam and Reservoir project, as evidenced in the Certificate of Inspection and Possession (Appendix B), is an indication of the US Government's acknowledgment that the construction of Garrison Dam would increase the frequency with which this property is flooded.

Garrison Dam was designed and constructed with the following target pool elevations (NGVD 29):

Maximum Operating Pool:	1854.0
Maximum Normal Pool	1850.0
Base Flood Control	1837.5
Minimum Operating Pool	1775.0

As noted in **Figure 5**, more than 80% of the Wilkinson Tract is situated below an elevation of 1851.0 (NGVD 29), and approximately 70% is at or below an elevation of 1850.0. **Figure 8** is a reproduction of monthly reservoir levels for Garrison Dam/Lake Sakakawea with those readings above elevation 1850.0 highlighted (Reference 6). Since 1967, the reservoir has exceeded an elevation of 1850.0 six years out of 45 years of record. This is a significant increase in frequency with which a majority of the Wilkinson Tract is flooded compared to the one occurrence that occurred in 37 years of record prior to the construction of Garrison Dam.

The US Army Corps of Engineers Master Manual for Garrison Dam (Reference 7) projects a 20% chance of the reservoir pool exceeding an elevation of 1850.0 in any one year which correlates to a 5-year recurrence interval.

Figure 9 illustrates the location of the Wilkinson Tract along with the area that would be inundated with a pool elevation of 1854.0. Clearly, most of the property is within the operational pool of Lake Sakakawea with more than 90% of the tract being situated below the full pool elevation of 1854.0.

Figures 10, 11, and 12 illustrate the Wilkinson Tract in aerial imagery collected during high reservoir levels in 1975, 1997, and 2011. These figures again show that the Wilkinson Tract is located within the pool of Lake Sakakawea.

The direct inundation associated with being located within the operating pool of Lake Sakakawea is not the only impact resulting from the construction of Garrison Dam. When the water level in Lake Sakakawea is just below 1850.0, most of the land in the Wilkinson Tract would not be directly flooded by the static pool elevation. However, the pool elevation will alter the hydraulics of the Missouri River in this headwater area resulting in a higher water surface elevation for a given rate of discharge. Thus, even when the level of water in Lake Sakakawea is lower than 1850.0, it could still contribute to the inundation of the Wilkinson Tract.

In addition to this hydraulic impact resulting from high reservoir levels, the development of a depositional delta in this location is well documented. **Figure 13** is a reproduction of a plate from the USACE Reconnaissance Report (Reference 5) documenting the increase in stage for a given discharge over time. Gage 8 is located approximately three miles upstream of Section 12. The stage associated with a 10,000 cfs flow increased by more than 10 feet from 1960 to 1979.

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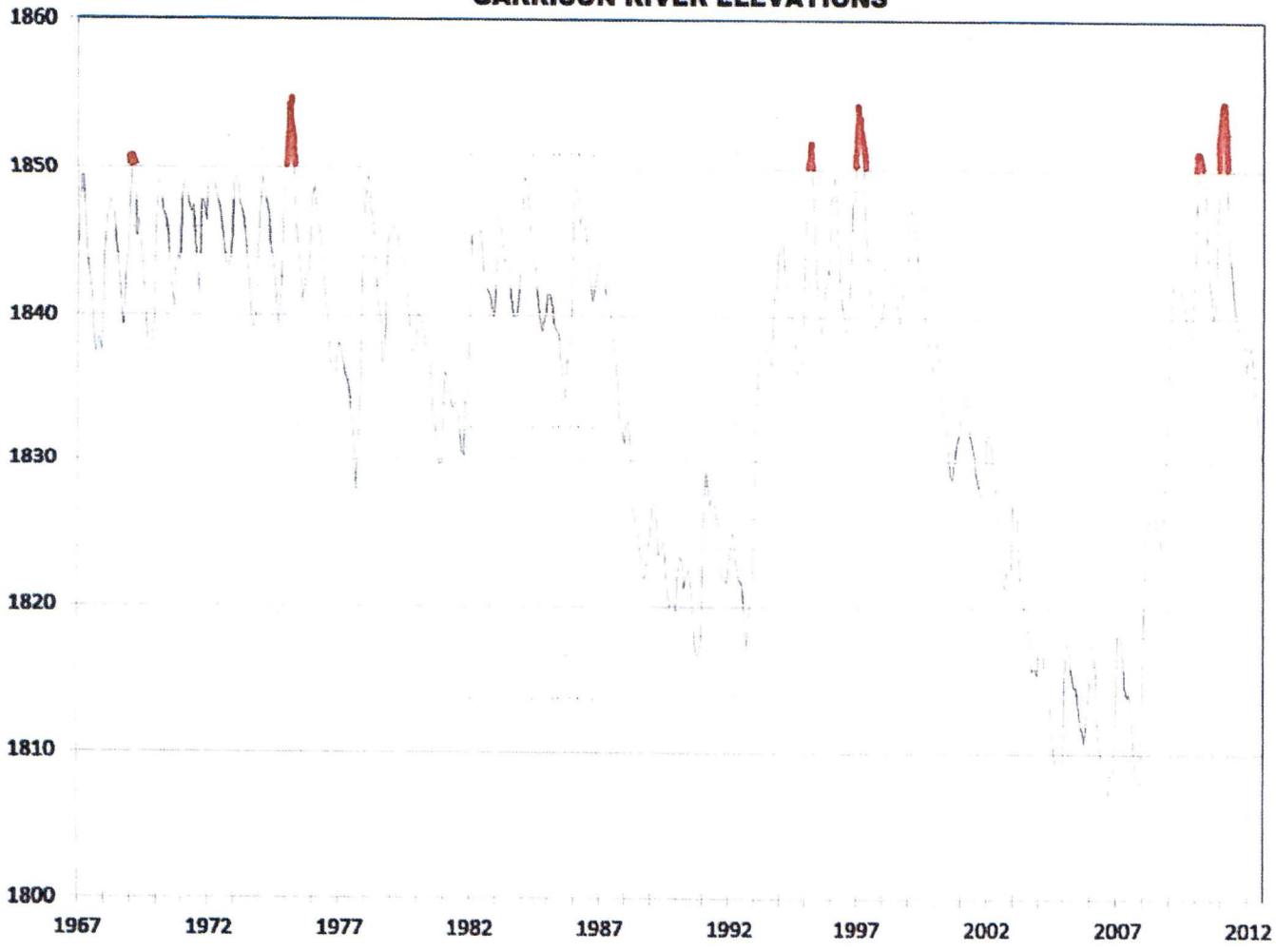
All post-1953 maps published by the USGS, US Army Corps of Engineers, and the US Bureau of Reclamation identify the area of the Wilkinson Tract as being "Subject to controlled inundation".

Point #2 Summary

The Wilkinson Tract is located within the pool of Lake Sakakawea and the frequency with which the property is flooded has increased significantly since the construction of Garrison Dam. Aerial imagery illustrates the property's inundation from Lake Sakakawea.

FIGURE 8
GARRISON RIVER ELEVATIONS



*End of Month - Midnight Observations

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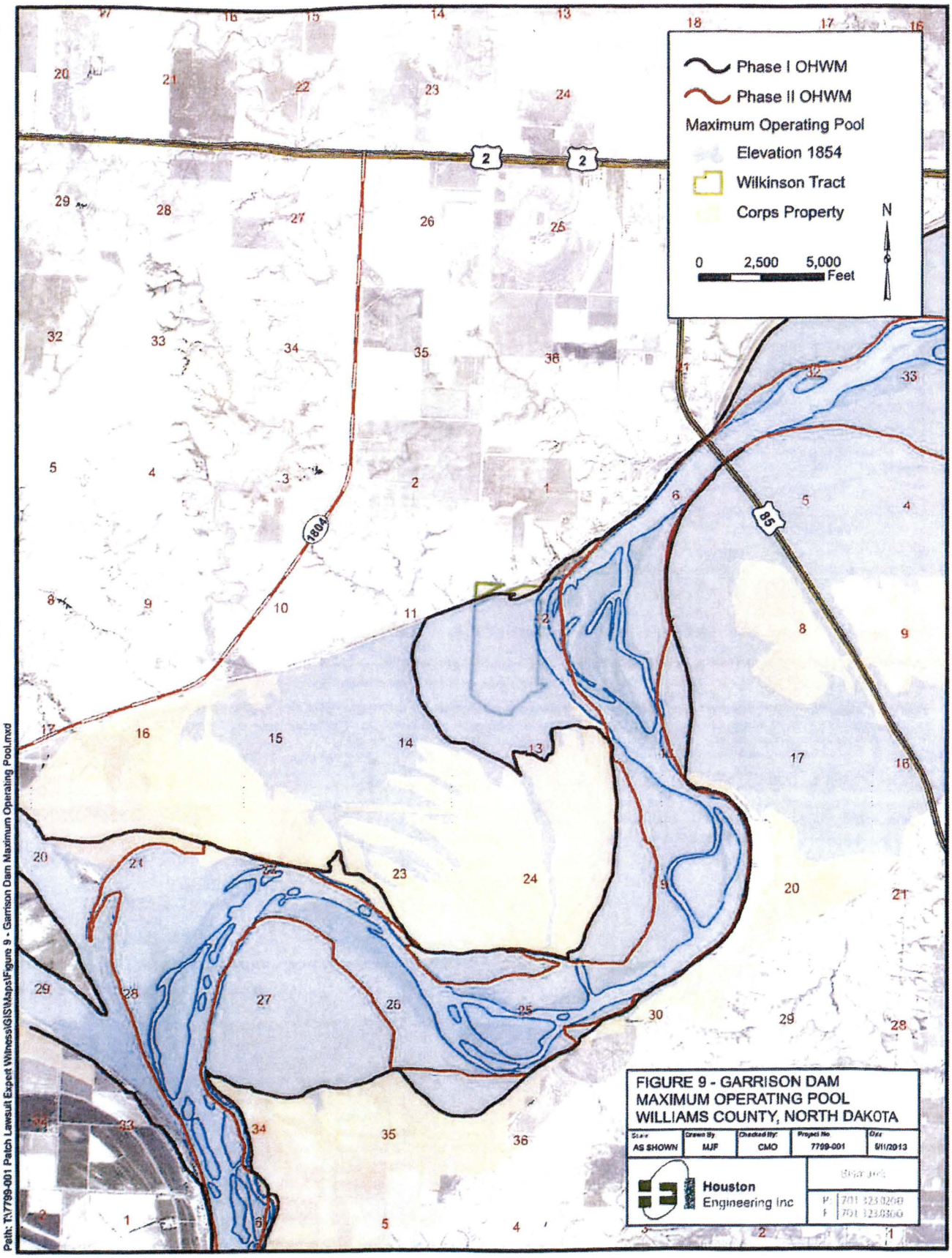

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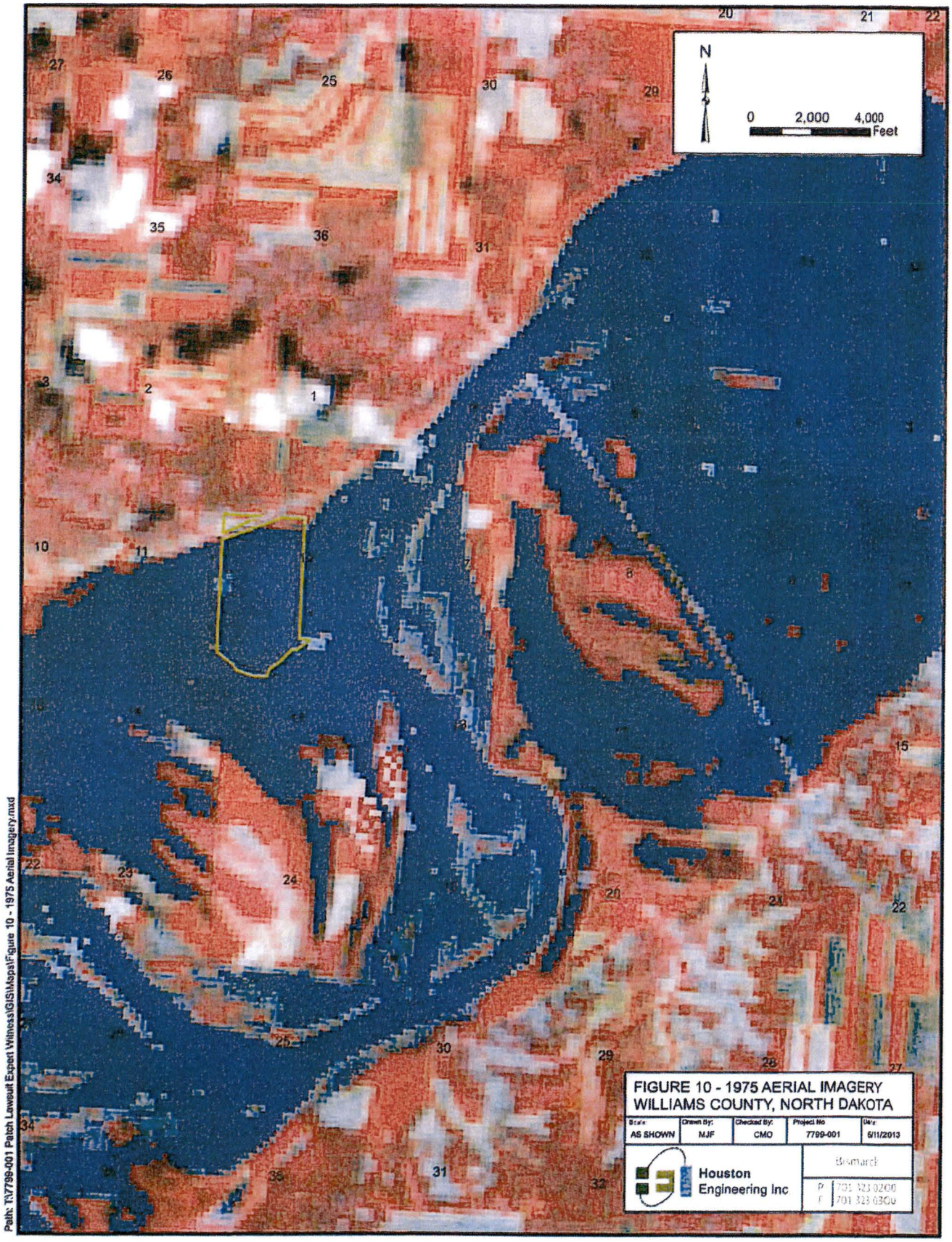

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FIGURE 11 - 1997 AERIAL IMAGERY
WILLIAMS COUNTY, NORTH DAKOTA

Scale	Drawn By	Checked By	Project No	Date
AS SHOWN	MJF	CMO	7799-001	6/11/2013

Houston Engineering Inc.
Bismarck
P 701.323.0200
F 701.323.0300

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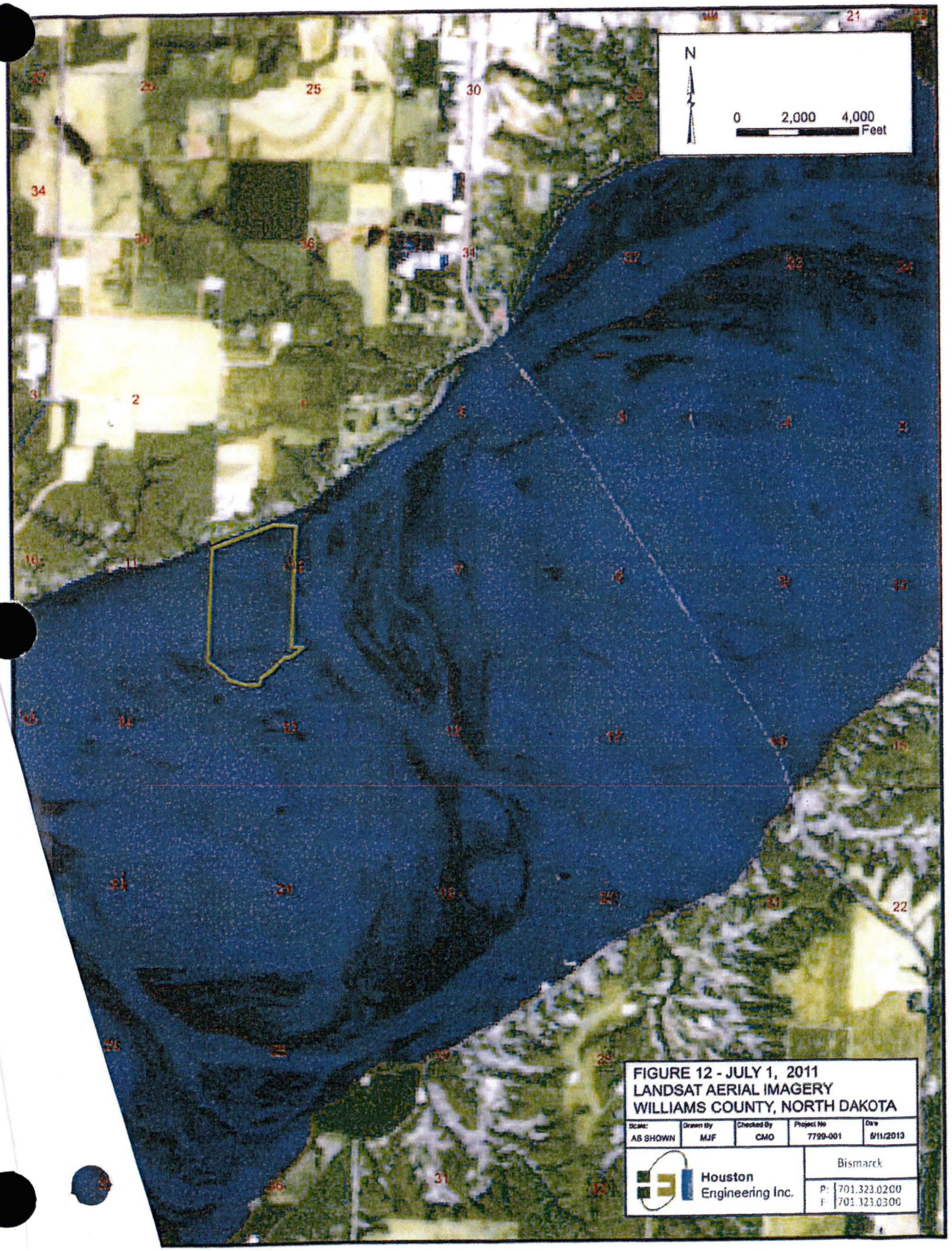
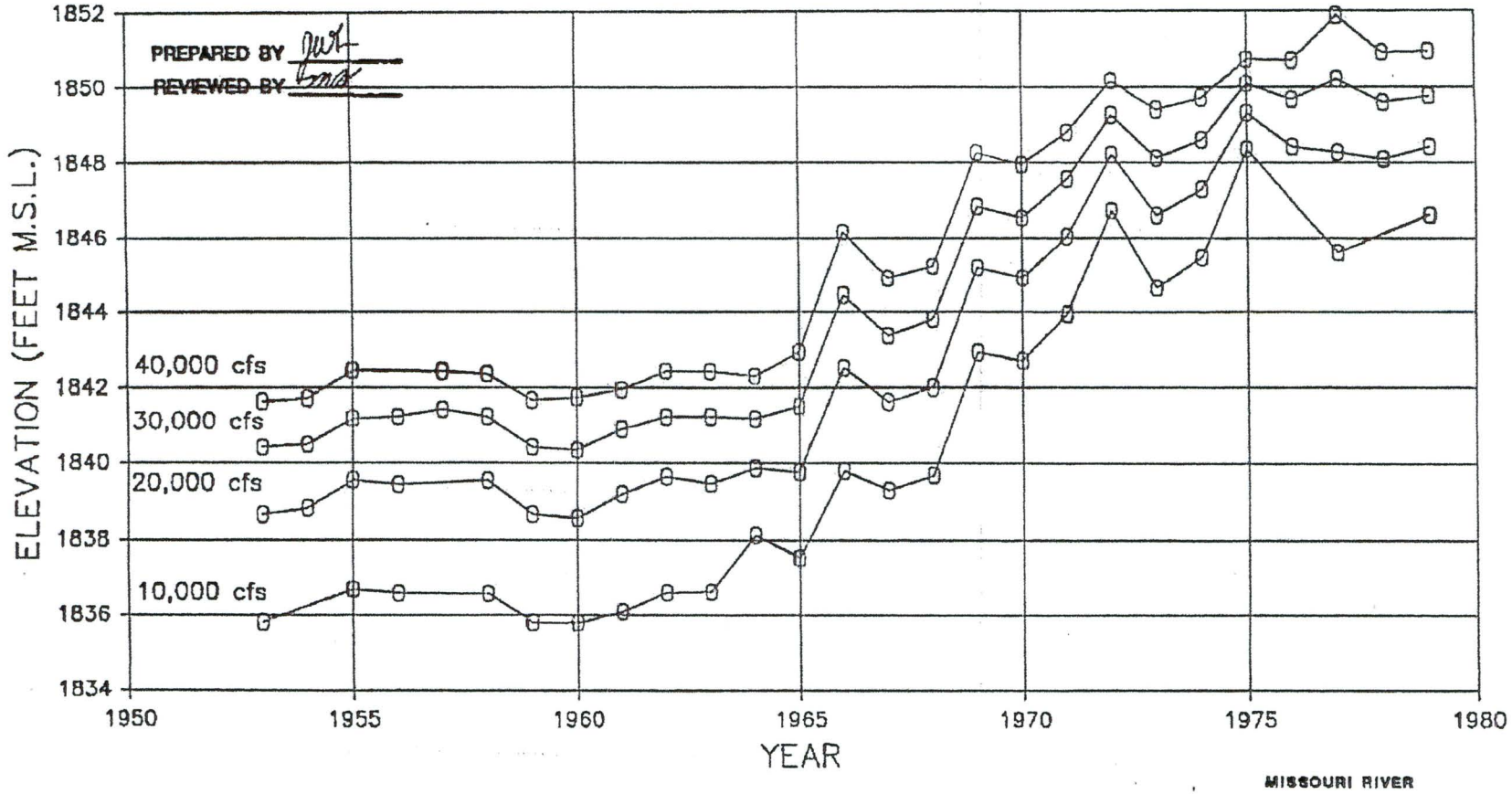


FIGURE 13

MISSOURI RIVER
GAGE 8
1960 RIVER MILE 1557.2



MISSOURI RIVER
LAKE SAKAKAWEA HEADWATER/MISSOURI RIVER
RECONNAISSANCE REPORT
Stage Trends - Gage 8
U.S. ARMY ENGINEER DISTRICT, OMAHA
CORPS OF ENGINEERS, OMAHA, NEBRASKA

PLATE 12

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Point #3 Use of Highway 85 as Dividing Line is Arbitrary

The State of North Dakota has apparently taken the position that the OHWM delineation based on vegetative indicators observed in the field (Phase I) is appropriate to define the boundary between the riparian and public interests upstream of the Highway 85 bridge. At the same time, the State decided to use historical records to ascertain the apparent OHWM as it existed prior to the construction of Garrison Dam accepting it as an appropriate indicator of the boundary between the riparian and public interests downstream of the Highway 85 bridge (Phase II). This is an arbitrary line of demarcation that has no scientific basis.

There are no water control structures located at the Highway 85 crossing. The crossing does not limit the impacts of the reservoir upstream of the highway. The pre-dam streambed elevation at the crossing was approximately 1823.0 (NGVD 29). Thus any time the reservoir exceeds that water surface elevation, it is impounding water upstream of the bridge. This occurs more than 95% of the time. **Figure 9** illustrates the extent to which Garrison Dam is capable of inundating properties upstream of the Highway 85 Bridge simply by storing water up to its maximum operation pool elevation of 1854.0.

The fact that the ND Board of Trust Lands opted to delineate this area using two different methods suggest their own uncertainty as to the applicability of the Phase I results for this area.

The fact that the Wilkinson Tract was suitable for agricultural purposes before the construction of Garrison Dam is well documented and is discussed as Point #1 of this report. Prior to the construction of Garrison Dam, the property in question was part of the East Bottom of the Fort Buford-Trenton Irrigation District. In 1958 the Corps of Engineers purchased this East Bottom for the project even though it is upstream of the Highway 85 bridge. Thus the impacts of the project have always been anticipated to extend upstream of the Highway 85 Bridge.

It is interesting to note that the results obtained from the Phase I and Phase II delineations do tend to converge in the area of river mile 1564.5, as illustrated in **Figure 14**. This convergence can be expected to occur once the impacts of periodic inundation from Lake Sakakawea are no longer present. Interestingly enough, the 1993 Reconnaissance Report indicates that prior to the construction of Garrison Dam, the valley in this reach would begin to flood with a water surface elevation of 1857 (NDVD 29), so this area is just beyond the upper extent of the influence of Lake Sakakawea.

Point #3 Summary

The use of Highway 85 as the upstream limit of the reservoir is arbitrary and has no scientific basis. Lake Sakakawea extends west of the bridge including the Wilkinson Tract. The OHWM as delineated using the historic aerial imagery in the Phase II Study is more appropriate indication of the boundary between the riparian and the public rests in the area of the Wilkinson Tract.

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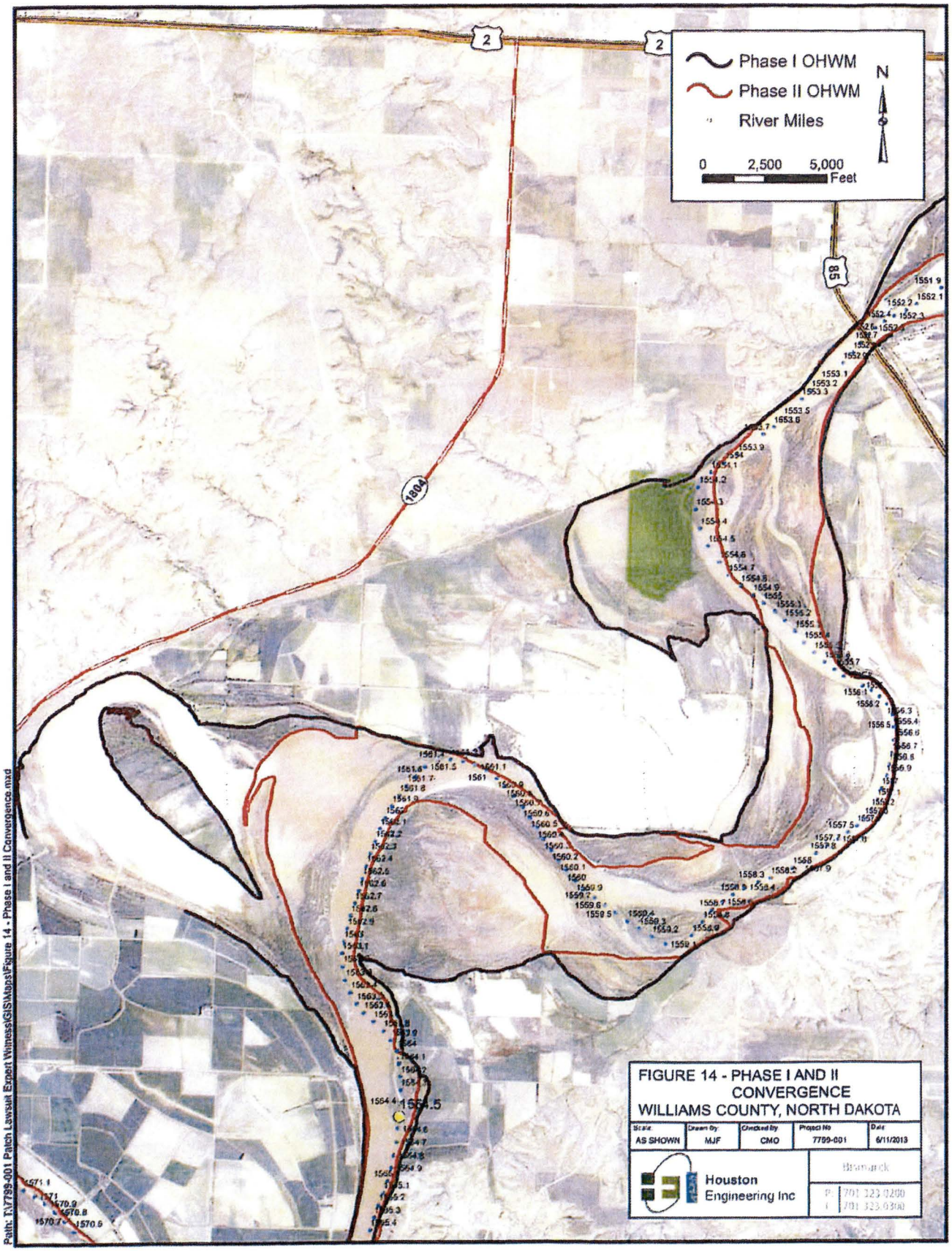

Point #4 Phase I OWHM Delineation Failed to Adequately Account for Hydrology

Missouri River Mainstream Hydrology

The methodology detailed in the *Technical Report for the Ordinary High Water Mark Delineation of the Yellowstone and Missouri River in Western North Dakota* (Reference 2) included the use of statistical hydrology as a guide and a frame of reference for the vegetative indicators observed in the field. The authors noted that the OHWM is typically between the "high average daily flow" and the peak but closer to the high average daily flow. For the Missouri River at Williston Gage, they estimated the high average daily stage to be 1849.6 (NGVD 29) and the peak stage to be 1856.1 (NGVD 29). They noted that the OHWM at the gage was determined to be between 1850.3 and 1851.3. So they noted that the OHWM as delineated was between the high average daily flow and the peak but much closer to the high average daily flow, thus confirming the reasonableness of their result. Yet upstream only 1.5 miles near the Wilkinson Tract, they found the OHWM along the left bank (looking downstream) to be as high as 1855.0 (NGVD 29). With a general slope of 0.6 feet per mile, taken from the profile included in their report (20 feet over 33 river miles), one would expect the OHWM at the Wilkinson Tract to be between 1850.9 and 1851.9 (NGVD 29).

One would also expect the elevation of the OHWM delineated on the right bank (looking downstream) to generally correspond to the elevation of the OHWM delineated on the left bank. However, in the area of the Wilkinson Tract, the elevation of the OHWM delineation is much higher than that found on the right bank, 1855 vs 1850. The fact that the OHWM delineation is much higher in elevation than that found on the right bank and much higher than the statistical hydrology would suggest for this area is because there are several other factors that influence the vegetative indicators and should have been considered for this location. These include the effect of Lake Sakakawea water levels, the local ground water gradient, and the fact that Painted Woods Creek discharges to the Missouri River at this location.

The degree to which Garrison Dam and Lake Sakakawea impact the area in question is discussed in greater detail under the discussion of Point #2. The vegetative indicators noted in the field should have been considered in their overall context which includes the effects of inundation from Lake Sakakawea. Because this area is within the pool of Lake Sakakawea and is subject to periodic flooding by Lake Sakakawea, those vegetative indicators are no longer directly and solely indicative of the Missouri River when it is normally high.

Ground Water Levels

There is one observation well in the Trenton East Bottom in Section 16, Township 153 North, Range 102 West, about 4 miles from the Wilkinson Tract. The observed water levels are plotted in **Figure 15**. The record from this well clearly illustrates the fact that local ground water levels in the East Bottom have been rising since Garrison Dam was first constructed in 1953 and first filled in 1965. Water levels have risen 6 to 8 feet in this area due to the filling of Lake Sakakawea and the resulting reduction in ground water gradient toward the Missouri River. This phenomenon was noted in the 1993 USACE Reconnaissance Report (Reference 5):

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> In addition to the impacts on crop production, the ground water has caused obvious, serious impacts to farmer's residences. During the late 1960's and early 1970's, the rising ground water resulted in numerous flooded basements. Many of the residents have installed sump pumps in their basements or pervious drains around their houses, and at least two families have had to abandon their homes.

The filling of Lake Sakakawea, created by Garrison Dam on the Missouri River, has resulted in the formation of a delta at the headwaters of the reservoir. The resulting aggradation of the Missouri River channel has reduced the former groundwater gradient to the river and restricted the natural drainage from the area.

These raising ground water levels, which have commonly risen to ground surface, will greatly impact the vegetation occurring in this area. The wetland vegetation that results from these ground water levels is not indicative of the OHWM of the Missouri River.

Painted Woods Creek Influences

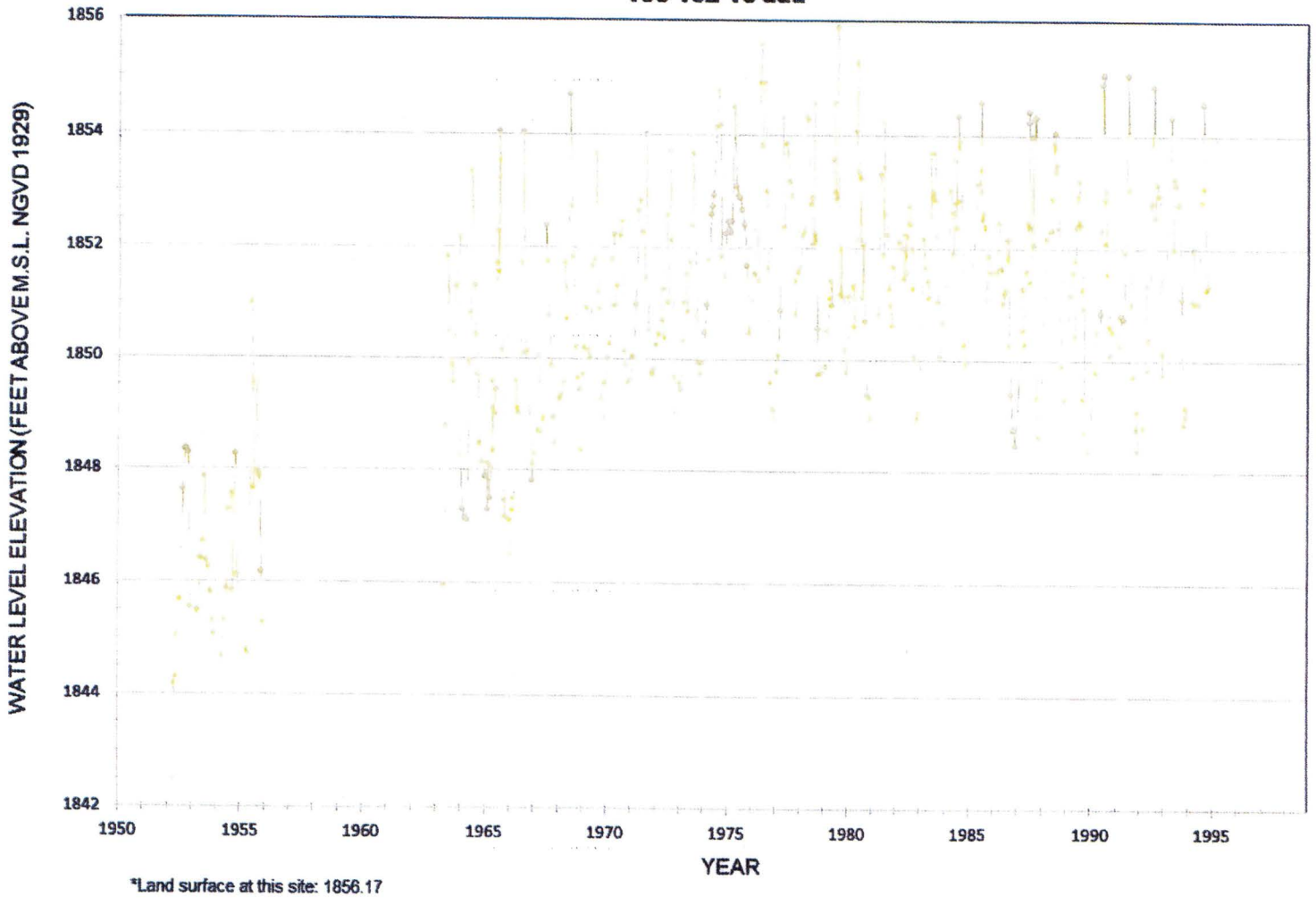
Another factor that influences the vegetative indicators in the area of the Wilkinson Tract is the fact that Painted Woods Creek discharges to the Missouri River just south of the property. Painted Woods Creek has a drainage area of 95 square miles. It's alignment, in relation to the Wilkinson Tract, is illustrated in **Figure 16**. As illustrated in **Figure 17**, the gradient of this tributary flattens significantly when the creek crosses the flats of the Missouri River Valley. This sharp reduction in gradient would increase the likelihood of overbank flooding during significant flow events on Painted Woods Creek. This overbank flooding from the tributary will also influence vegetation in this area, and there is no record of this having been considered during the Phase I delineation. The riparian owner holds all interests in the bed of non-navigable streams, like Painted Woods Creek, and the public's interest in the bed of the Missouri River does not extend up its non-navigable tributaries.

Point #4 Summary

The Phase I OHWM Delineation for this area was based largely on the vegetative indicators noted in the field without taking into account the other factors that influenced those vegetative transitions. Those other factors include the influence of the periodic inundation of this area by Lake Sakakawea, the influence of a well-documented rise in ground water levels in the area, and the influence of periodic flooding from Painted Woods Creek.

The fact that the elevation of the OHWM boundary along the left bank is significantly higher in elevation than the OHWM noted in the field for the right bank supports the fact that the OHWM as delineated for the left bank, using vegetative indicators observed in the field in the area of the Wilkinson Tract, were largely influenced by the local ground water and by Painted Woods Creek.

FIGURE 15
OBSERVATION WELL HYDROGRAPH
153-102-16-ddd



*Land surface at this site: 1856.17

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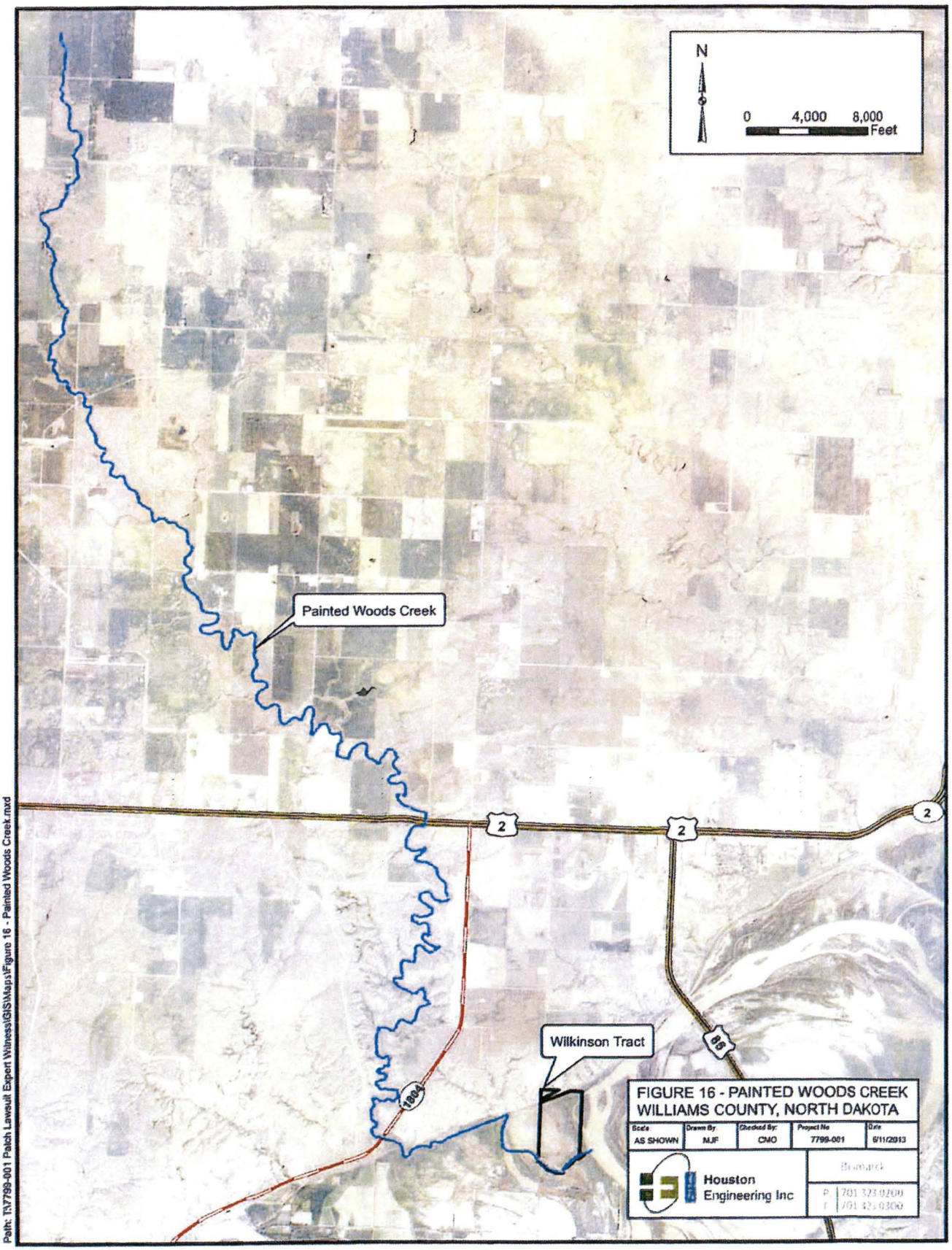
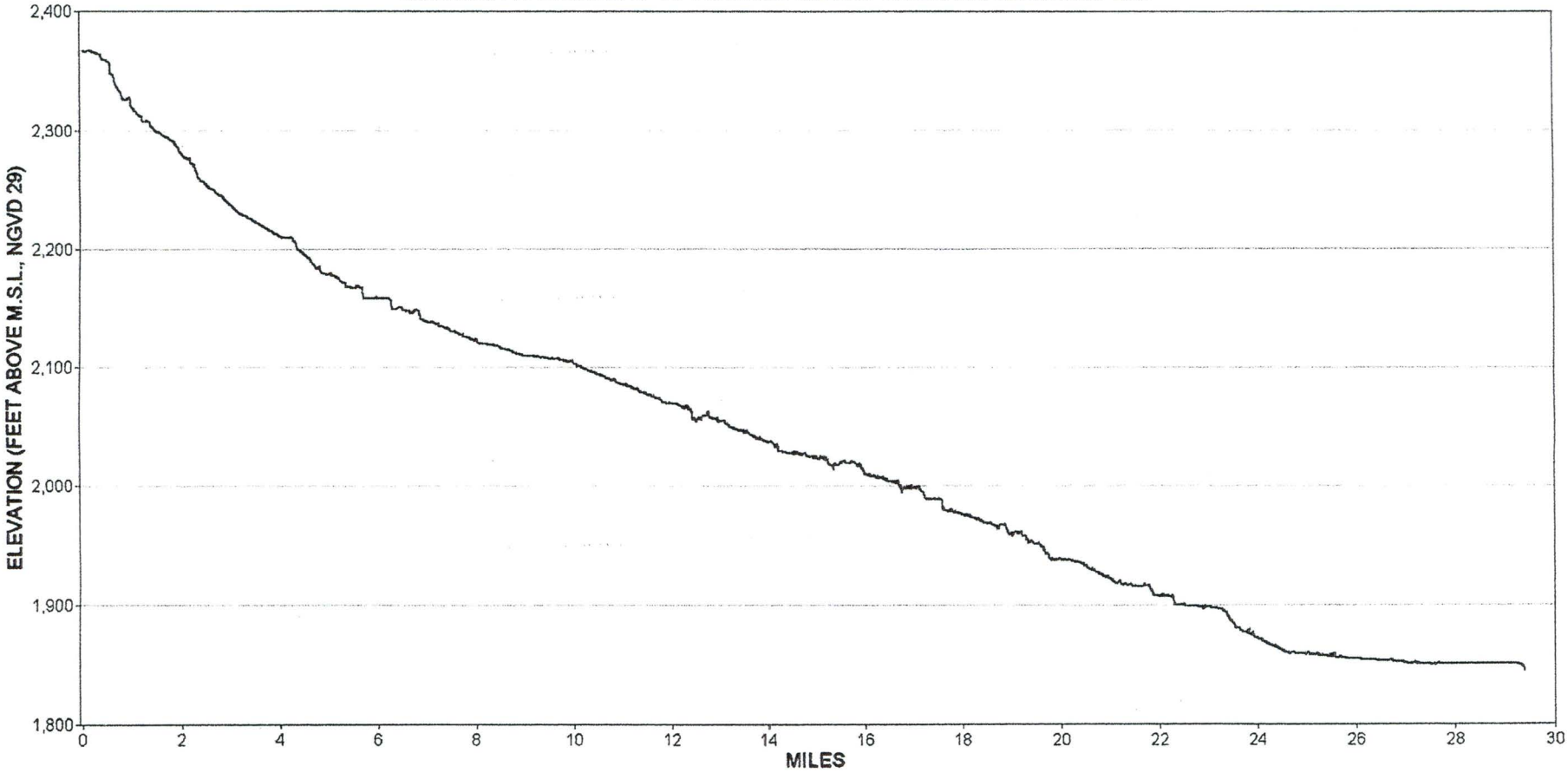


Path: I:\7799-001 Patch Lawsuit Expert Witness\GIS\Maps\Figure 16 - Painted Woods Creek.mxd

FIGURE 17
ELEVATION GRADIENT OF PAINTED WOODS CREEK IN WILLIAMS CO.



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Summary and Conclusions

A review of the available data strongly supports the position that the boundary between the riparian and the public's interests along the Missouri River in the area of Sections 12 & 13, Township 153 North, Range 102 West lies along the line delineated as the OHWM in the Phase II study.

The majority of the Wilkinson Tract was clearly above the OHWM before the construction of Garrison Dam. The affidavits and aerial imagery clearly show that the land was used for typical agricultural production. Most of the tract is at an elevation of approximately 1850.0 (NGVD29), and historic stage records show that the Missouri River only reached that level on a very infrequent basis, actually only once in the 37 years of record prior to the construction of Garrison Dam.

The Wilkinson Tract is located within the pool of Lake Sakakawea as evidenced by the fact that the USACE purchased the property as part of the Garrison Dam Project. The frequency with which the property is flooded has increased significantly since the construction of Garrison Dam. The pool of Lake Sakakawea has exceeded an elevation of 1850.0 (NGVD29) six years in 45 years of records. Aerial imagery from high water years 1975, 1997, and 2011 clearly show that the property is directly inundated by Lake Sakakawea.

Because it is clearly shown that the Wilkinson Tract, located upstream of the Highway 85 crossing, is a part of the bed of Lake Sakakawea, the use of Highway 85 as a line of demarcation between the applicability of the Phase I study results and the Phase II study results is arbitrary and has no scientific basis. Because this area is subject to direct inundation by Lake Sakakawea, it is in fact part of the lakebed, and the approach used to delineate the OHWM for the rest of the bed of Lake Sakakawea in the Phase II study yielded the appropriate delineation of the OHWM for this property. The report prepared for the Phase II study noted that for the area in Section 12, "the left bank of the OHWM follows along a cut bank with fields on the adjacent upland." Those upland fields are the same fields that were used extensively for agricultural production before the construction of Garrison Dam.

The results obtained in the Phase I OHWM Delineation for the area of the Wilkinson Tract failed to account for all pertinent hydrologic indicators. There was no recognition of the influence that the periodic inundation by Lake Sakakawea had on the transition between upland and wetland vegetation in this area. There was no consideration given to the vegetative influence of the high ground water levels in this area. There was no consideration given to the impacts of Painted Woods Creek and its periodic flooding on the vegetative indicators in this location. The fact that the elevation of the OHWM boundary along the left bank is significantly higher in elevation than the OHWM noted in the field for the right bank supports the fact that the OHWM as delineated for the left bank using vegetative indicators was significantly influenced by the local ground water levels, periodic inundation by Lake Sakakawea and by flooding from Painted Woods Creek. The vegetative indicators in this location are not indicative of those periods when the Missouri River itself is normally high.

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References

1. *Ordinary High Water Mark Delineation Guidelines*, ND State Water Commission, prepared by Houston Engineering, November, 2006.

2. *Technical Report for the Ordinary High Water Mark Delineation of the Yellowstone River and Missouri River in Western North Dakota*, prepared for State of North Dakota by Bartlett West & McCain and Associates, Inc., November, 2010.

3. *Technical Report for the Ordinary High Water Mark Investigation for the Missouri River under Lake Sakakawea*, prepared for ND State Land Department by Bartlett & West & McCain and Associates, Inc., March, 2011.

4. *Methods for Delineation of Ordinary High Water Lines (OHWL) and Ordinary High Water Marks (OHWM) for Natural Resources Plans and Permits (Draft Copy)*, Washington Department of Ecology, Washington Department of Fish and Wildlife, June, 2006.

5. *Reconnaissance Report, Missouri River Buford-Trenton Irrigation District, North Dakota*, US Army Corps of Engineers, Omaha District, Missouri River Division, August, 1993.

6. Garrison Dam Reservoir Elevations, Website: http://www.nwo.usace.army.mil/Missions/DamandLakeProjects/MissouriRiverDams/Garrison.aspx

7. *Missouri River Mainstream Reservoir System Master Water Control Manual*, Reservoir Control Center, US Army Corps of Engineers, Omaha, NE, Revised March, 2006.

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State of North Dakota
ss.
County of Burleigh

Affidavit of Lois Jean Patch

I, Lois Jean Patch, of Bismarck, North Dakota, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. That I was born in Trenton, North Dakota on February 20, 1924 in my parents home. I lived with my parents in Trenton, North Dakota until I was a late teenager when I went away to college in Fargo, ND. I returned to Williams County and was married in 1944. We settled in Williston where I and my husband raised 8 children. We moved to Bismarck, ND in 1959.

2. During my growing up years in my parent's home, I spent much of my time assisting with the family farming operation, my dad was a wheat farmer. I recall doing a variety of tasks like driving grain trucks or delivering lunch to my dad and brothers in the field. One of the fields where he grew wheat was in the east Trenton valley near the Missouri River. We called that the "big field." I recall working in that field in the spring and fall clearing old roots that would come to the surface every year. We called these "grubs" and would gather them to burn in our furnace as a source of fuel. The attached photo was taken by my brother James Wilkinson and shows my brother Tom Wilkinson driving the tractor pulling the swather and combine being operated by my father John Thomas (Tom sr.) Wilkinson. The exact location of the photo is not known but it is in the east Trenton valley and could be in the "big field" in sections 12 and 13.

3. In my married years while living in Williston, we would often take our kids for a relaxing summer evening drive down to that area to show them the fields where their mother worked with their grandfather and other family members in the fields. Many times their grandfather would comment that it looked like there was going to be another bumper crop from those fields.

4. My father, John Thomas Wilkinson, sold that land to the U.S. government in 1958 because they said Garrison Dam was likely to cause it to be flooded someday.

5. My father reserved the mineral rights when the title of the land was transferred to the U.S. government.

6. I have no recollection or knowledge of flooding occurring on this land in the years I lived in Trenton or Williston. However, I possess a letter from my father where he describes the joys and hardships of life in the Trenton Valley. He mentions the occasional flooding from Painted Woods Creek that might wash away his seed or lodge his wheat. Painted Woods creek passes through the fields in Section 12 and 13. I have fond memories of play along the dry

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creek banks with my sisters as my dad and brothers worked in the fields.

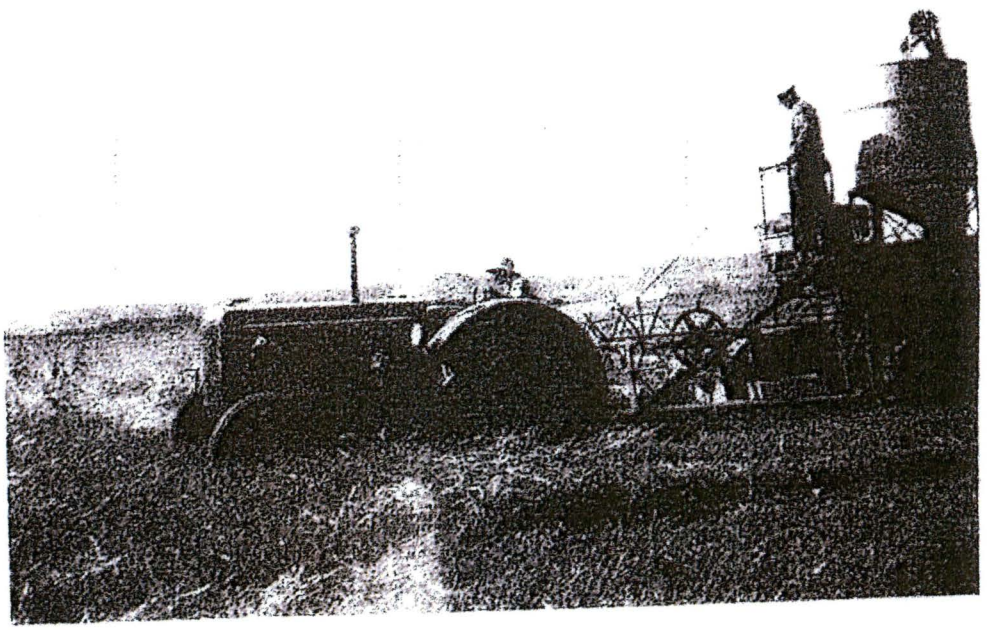
RACHAEL CASPERS
Notary Public
State of North Dakota
My Commission Expires Sept. 15, 2015

Lois Jean Patch
Lois Jean Patch

Subscribed and sworn to before me this 20 day of April, 2011.

Rachael Caspers
Notary Public

My commission expires: Sept 15, 2015.



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AFFIDAVIT

State of Michigan
ss.
County of Ingham

I, William S. Wilkinson, of East Lansing, Michigan, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. *That I was born in Williston, North Dakota on September 6, 1933 and* lived with my parents, John T. and Evelyn Wilkinson, in Trenton, North Dakota until approximately 1955.

2. That during these years, my parents owned and farmed various parcels of land in the Trenton area, growing mainly spring wheat, along with some barley and flax.

3. That two of these parcels were in the Missouri River valley east of Trenton, described as the Southwest Quarter and the South Half of the Northwest Quarter, except that portion which constitutes the Great Northern Railway Company right of way, in Section 12; and Farm Unit *No. 312 in the Buford-Trenton Project, according to the recorded plat* thereof, in Section 13; all being located in Township 153 North, Range 102 West, Williams County, North Dakota.

4. That during my teenage years, I assisted my father each year in growing and harvesting mainly spring wheat on these parcels of land.

5. That in 1958, the United States of America purchased these parcels from my parents because, as it was stated to me, it was necessary because the parcels were subject to flooding from the lake created by the construction of the Garrison Dam downstream on the Missouri River. The deed reserved the oil and gas rights to my parents. These rights are presently owned by my siblings and me.

6. That during the years that I lived with my parents and to and including the year the parcels were sold to the United States of America, I have no recollection or knowledge of there being any flooding associated with these parcels.

William S. Wilkinson

Subscribed and sworn to before me this 15th day of April, 2011

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K Doyle
Notary Public

My commission expires: 8/14/17

K DOYLE
NOTARY PUBLIC - STATE OF MICHIGAN
COUNTY OF EATON
My Commission Expires: August 14, 2017
Acting in the County of Ingham

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AFFIDAVIT

I, Vanessa E. Blaine of 12801 Deer Dancer TRAIL NE, Albuquerque, New Mexico, 87112, being duly sworn, depose and say, to the best of my knowledge, information and belief, as follows:

1. I was born in Trenton, North Dakota on February 8, 1928. I am the daughter of John T. and Evelyn M. Wilkinson and lived in Trenton until the fall of 1945. I then lived in Williston, North Dakota until January 1948.
2. During the WW II years my two older brothers enlisted in AAF and Navy respectively. In preparing my being able to help in the fields and with farm work, my mother took me before Judge Owens to obtain a driver's license at twelve years of age. I was fifteen when my brother Tom entered the Navy and I began driving a ¾ ton truck hauling grain from the harvested fields to the local grain elevator.
3. During these years my parents farmed land along the Missouri River in what was known as the Trenton Valley. My father planted spring wheat, barley, and flax on many parcels of land, totaling 1,100 acres at one point in time. The parcels I remember well were known as the Purcell, Mitchell, Macklemerry, Karels, and the field most easterly was known to me as the Big Field.
4. It is my belief that the Big Field was in the SW1/4, S1/2 NW1/4, of Section 12. One parcel was also in Section 13 known as Farm Unit 312 of the Buford-Trenton Project all being located in Township 153 North, Range 102 West, Williams County, North Dakota.
5. The mineral rights were reserved when the parcels in Section 12 and 13 were sold to the Corps of Engineers as it was reported that the construction of the Garrison Dam would subject them to flooding.
6. I have no recollection or knowledge of any flooding of the parcels farmed by my father and no knowledge of any flooding whatsoever in the Trenton Valley.

Vanessa E. Blaine

Vanessa E. Blaine

Subscribed and sworn before me this 14 day of April 2011

Tammy Wieman

Notary Public

My commission expires: 2.11.2014

OFFICIAL SEAL
TAMMY WIEMAN
NOTARY PUBLIC-State of New Mexico
My Commission Expires

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Hi Jan -
Thought good fun -
This interesting

Trenton Farmer Has Splendid Wheat Crop

Tom Wilkinson, farmer on the Missouri bottoms in the country near Trenton, is believed to have the best wheat crop harvested this year in Williams county, friends said Tuesday. He has harvested and threshed 255 acres which gave an average yield of 25 bushels of No. 1 wheat. The quality and average yield are the best so far reported this season here.

1940241

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Eng Form 798-R
1 Jan 46

CERTIFICATE OF INSPECTION AND POSSESSION
(Lands other than Federal Building Sites)

I, John L. Burgum, a representative of the Department of the Army hereby certify that on the 10 day of June, 1958, I made a personal examination and inspection of land situated in the County of Williams, State of North Dakota, designated as Tract No. HH-3190 and containing 286.04 acres, (proposed to be) acquired by the United States of America in connection with the Garrison Dam and Reservoir Project, from J. T. Wilkinson and Evelyn M. Wilkinson, his wife

1. That I found no evidence of any work or labor having been performed or any materials having been furnished in connection with the making of any repairs or improvements on said land; and that I made careful inquiry of the above-named vendor (and of the occupants of said land) and ascertained that nothing had been done or about said premises within the past 3 months that would entitle any person to a lien upon said premises for work or labor performed or materials furnished.

2. That to the best of my knowledge and belief, and after actual and diligent inquiry and physical inspection of said premises, there are no unrecorded visible easements which are not covered by proper releases or which have not been waived in writing by the acquiring agency.

3. That I also made inquiry of all occupant (s) of said land as to his (their) rights of possession and of the vendor and such occupants as to the rights of possession of any person or persons known to him (them) and neither found any evidence nor obtained any information showing or tending to show that any persons had any rights of possession or other interest in said premises adverse to the rights of the above-named owner or the United States of America, except such mineral right, roads, rights-of-way and public utility easements as have been administratively waived by the Department of the Army and the following: (1) (Insert names and addresses together with statement of right of interest claimed.)

NAME	ADDRESS	STATEMENT OF INTEREST CLAIMED

APPROVED:

(Name)

(Title)

John L. Burgum (Name)

Attorney (Title)

This certificate will be executed by a representative of the Department of the Army.)

(1) In purchase cases the rights of all persons in possession or claiming a right of possession exclusive of mineral rights, roads, rights-of-way and public utility easements which have been administratively waived by the Department of the Army, must be eliminated by a proper release, quitclaim deed or disclaimer. However, if the Department of the Army has determined to acquire title subject to outstanding mineral rights, roads, rights-of-way or public utility easements, it will not be necessary to obtain a release, quitclaim deed or disclaimer for such mineral rights, roads, rights-of-way or public utility easements as have been administratively waived in writing by the Department of the Army.

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RECEIPT FOR UNITED STATES TREASURER'S CHECK

Receipt is acknowledged this 10 day of June, 1958, of Treasury Check of the United States No. 10,107, dated May 23, 1958, in the amount of $ 43,327.00, payable to the order of J. T. Wilkinson and Evelyn M. Wilkinson, his wife issued in connection with the acquisition by the United States of America of premises situated in Township 153 North, Range 102 West of the 5th P.M. County of Williams, State of North Dakota, and more particularly described as follows: Farm Unit No. 312 in Buford-Trenton Project, according to the plat thereof recorded in the office of the Register of Deeds of Williams County, North Dakota, in Deed Book 101, Page 413, being a part of Section 13, in Township 153 North, Range 102 West of the Fifth Principal Meridian, and containing 57.09 acres, more or less; also the Southwest quarter ($SW\frac{1}{4}$) and the South half of the Northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) of Section 12, Township and Range aforesaid, excepting that portion of said South half of the Northwest quarter ($S\frac{1}{2}NW\frac{1}{4}$) which constitutes right-of-way of the Great Northern Railway Company, containing, exclusive of said exception, 228.95 acres, more or less.
which sum is in full satisfaction and discharge of the interest of the undersigned in the premises conveyed.

(Payee or Payees) J. T. Wilkinson
J. T. Wilkinson
Evelyn M. Wilkinson
Evelyn M. Wilkinson

Address: Trenton, North Dakota

Project: Garrison Dam & Reservoir

Tract No. HH-3190

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Testimony of Edward Lynch

Concerning SB2134

Senate Energy and Natural Resources Committee

January 12, 2017, 9:00 AM

Madam Chair, my name is Edward P. Lynch. I was born and raised in Williston North Dakota.

I am here representing myself and my family as well as the Lynch family and members of the Vohs Family past and present. The Lynch and Vohs familys of Williston have very long and storied history's in Western, ND. The Patriarch of the Vohs family Adolph Vohs migrated from South St.Paul, MN with wife Helen Sackett, in the early years after ND was granted Statehood to a small town called Inkster, ND in order to operate and manage a meat market / Butcher shop. Adolph Vohs hired by JD Sears of Swift and Company was by all accounts a success in this venture. So much so that he was once yet again tasked with migrating to Williston in 1904 to do the same, open a butcher shop meat market on main street Williston, ND in the original location of Vohs Meat Market known now as the Grand Theater. The original Vohs homestead located about 7 miles NW of Williston, and also the cattle line ranch located next to the Missouri River approximately 5 miles or so SW of Williston, directly across the Hwy 85 bridge on the west side (township 153 Range 101 sections 6 and 7.)

For many years through trial and hardship, through fires and thievery the Vohs Family endured for 60 and more years. The Vohs Family served and contributed through public service in more ways than one to the community, the city of Williston, Williams County and moreover to the history of State of North Dakota. In 1952 under public Land Order 1809 and Executive order 10355 dated May 26, 1952 The Vohs Family was required to abandon the land they owned and operated due to the building of Garrison Dam which would inundate that area. The Public Land Notice 1809 *(See attached)* describes in detail the lands effected by township, range and sections. At that time, the surface land was being withdrawn from public use, the Vohs Family like so many others at that time were able to reserve the mineral interests.

In 1989 upon the death and passing of my great Aunt Esther Vohs, she bequeathed to me, Grand Nephew and God Son, her portion of mineral acreage located at the former Vohs cattle ranch. There are a total of approximately 276 mineral acers which are owned by the three surviving members of the Vohs Family, Suzanne Vohs, John Vohs and Marge Vohs and myself. The minerals were leased in whole once prior mid 1980's and then again in 2010. At this point the State of ND and the State Land board had never indicated any interest in this property.

In 2012, drilling permits were issued for the Continental Resources Atlanta Super Pad, Continental Resources of course being required to perform due diligence hired Lear and Lear a professional title search and research company to document a detailed historical document of title /chain ownership for the 2560 acre spacing area. It was July of 2014 that I as well as the other Vohs members received from Continental Resources a division order for these Atlanta Wells for the entire 276 + mineral acers as were documented in the official title of ownership

record used by Continental Resources. It was several months later that we also received an amended division order stating that we did not own all of the minerals as was stated in the official title of ownership, and then it was again in January of 2015 we received yet another amended division order stating again that we all owned even less than before.

At that time I then wanted to find out and investigate what was going on but I could not get any straight answers from Continental. I was able to find out later that The ND Department of School Trust Lands (The ND Land Board had also leased our minerals to Continental Resources and was thus the State of ND was claiming ownership of over 2/3rd's of the original 276 + mineral acreage.
The title record of ownership of these minerals have mineral deeds and chain of title deeds filed in Williams County as well as McKenzie County and all of these title records go back many years. Despite the fact that Continentals own official record of title and ownership specifically states that these minerals are owned in fact by myself and the Vohs family, the State of ND Land Board ignores this fact and by the use of some clever legal maneuvering and clever legalese albeit through a legal disclaimer, they have successfully taken private property from myself as well as numerous others. Without so much as a simple phone call, a simple letter or any type of notification, the rightful owners of record for these minerals have had their constitutional rights to private property and due process trampled upon.

The ND Land Board claims and has assumed ownership but then in the same breath use this disclaimer.

Disclaimer: The work completed under this contract is to delineate the ordinary high water mark (OHWM) and is not a final legal determination as to whether any specific property is "sovereign land".

I have read and understand the above disclaimer.

Please note Honorable members of this Committee, I am not a wealthy individual, I have worked hard all these years to be somewhat successful and to raise two wonderful children who were also born in the State of North Dakota. I have always had a very strong connection to this State as well, I have tried to instill pride in my children. I have to say I am deeply disappointed at this time. The State of ND gave no notification of this unconstitutional taking of private property as required under the ND Constitution and also the US Constitution.

I respectfully request that the State of ND by and through legislation or any other means return the private property which was wrongfully taken from myself and others. The State of ND was granted title to the riverbed of the Historical Missouri River and other lakes and such when granted Statehood. Now because of a huge Oil Boom we are witnessing crony capitalism at its finest and the manufacturing of a massive land grab of private property by the land board.

As I previously e-mailed a concern regarding the draft legislation of Senate Bill 2134, my concern is the language of the bill which delineates the highway 85 bridge as the end of Lake Sakakawea. Clearly all of the lands and property as listed in Public Land Order 1809 prior to Garrison Dam are effected, it is just that simple. The State of North Dakota has spent huge sums of money hiring Bartlett and West for multiple surveys attempting to delineate this OHWM. In my eyes there is nothing ordinary in anyway with regards to taking private property. As far as determing the OHWM is very simple, there are numerous USGS water level measurment stations up and down the Missouri River and Lake Sakakawea which scientific data has been compiled and preserved for decades in USGS historical databases.

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[Public Land Order [illegible]]
[illegible]

NORTH DAKOTA

Withdrawing Public Lands for Use of Department of the Army in Connection With Garrison Dam and Reservoir Project

By virtue of the authority vested in the President, and pursuant to Executive Order No. 10355 of May 26, 1952, it is ordered as follows:

Subject to valid existing rights, the following-described public lands in North Dakota are hereby withdrawn from all forms of appropriation under the public land laws, including the mining but not the mineral leasing laws except as hereinafter indicated, nor disposals of materials under the Act of July 31, 1947 (61 Stat. 681; 30 U.S.C. 601-604) as amended, and reserved for use in connection with the Garrison Dam and Reservoir Project, North Dakota, under the supervision of the Department of the Army as authorized by the Flood Control Act of December 22, 1944 (58 Stat. 887, 891):

FIFTH PRINCIPAL MERIDIAN

T. [illegible] N., R. [illegible] W.,
Sec. 3, lots 13 and 14;
Sec. 8, lot 4;
Sec. 10, lots 1, 2, and 3;
Sec. 14, lot 2.
T. [illegible] N., R. [illegible] W.,
Sec. 8, lot 4 and unsurveyed accretions thereto.
T. [illegible] N., R. [illegible] W.,
Sec. 1, lot 9, that portion lying southerly of the Great Northern Railway right-of-way;
Sec. 7, lot 3;
Sec. 10, lots 4, 5, 6, and unsurveyed accretions thereto.
T. [illegible] N., R. [illegible] W.,
Sec. 20, lot 3, lot 2, less Great Northern Railway right-of-way;
Sec. 12, lots 1 and 3.
T. [illegible] N., R. [illegible] W.,
Sec. 25, lot 7, lot 8 and unsurveyed accretions thereto;
Sec. 10, lots 1 and 2;
Sec. [illegible], lot 5;
Sec. 34, lot 1.
T. [illegible] N., R. [illegible] W.,
Sec. 31, lots 2 and 3, lot 4 and unsurveyed accretion thereto.
T. [illegible] N., R. [illegible] W.,
Sec. 16, lots 1 and 2;
Sec. 26, [illegible], that portion lying southerly of the Great Northern Railway right-of-way;
Sec. 33, lots 1, 2, 3, and 4;
Sec. 34, lots 1, 2, and 3;
Sec. 35, lots 1, 4, and 6.

The areas described aggregate [illegible] acres.

The lands shall be subject to leasing under the mineral leasing laws for their oil and gas deposits, but any lease shall include the following conditions:

1. That all rights granted under the lease are subordinate to the rights of the United States to flood and submerge such lands, permanently or intermittently, in connection with the operation and maintenance of the Garrison Dam and Reservoir Project.

2. That the United States shall not be responsible for damages to property or injuries to persons which may arise from or be incident to the use and occupation of the said premises, or for damages to the property of the lessee, or for injuries to the person of the lessee (if an individual), or for damages to the property or injuries to the person of the lessee's officers, agents, servants, or employees, or others who may be on said premises at their invitation or the invitation of any one of them, arising from or incident to the flooding of the said premises by the Government activities, or flooding from any other cause or arising from or incident to any other Governmental activities, and that the lessee shall hold the United States harmless from any and all such claims.

3. That all operations under the lease shall be subject to the approval of the District Engineer, Corps of Engineers, in direct charge of the project, and subject to such conditions and regulations as may be prescribed by him, and the plans and location for all structures and appurtenances thereto, and work on said lands shall be submitted to said District Engineer for approval in advance of commencement of any work on said lands; and that the District Engineer shall have the right to enter on the premises at any time to inspect both the installation and operational activities of the lessee.

4. That no structure or appurtenances thereto shall be of a material or construction apt to create floatable debris.

5. That the construction and operation of said structures and appurtenances thereto shall be of such a nature as not to cause pollution of the soils and the waters of the Garrison Dam and Reservoir Project.

6. That the United States reserves the right to use the said lands jointly with the lessee in connection with the construction, operation and maintenance of the Garrison Dam and Reservoir Project and to place improvements thereon or to remove materials therefrom, including sand and gravel and other construction material, as may be necessary in connection with such work, and that the lessee shall not interfere in any manner with such work or do any act which may increase the cost of performing such work. That if the cost of work performed by the Government at and in connection with the Garrison Dam and Reservoir Project, including work performed on lands outside the property included in the lease, is increased by reason of improvements constructed on the leased property by the lessee, the lessee shall pay to the United States [illegible] an amount, as estimated by the Chief of Engineers, sufficient to compensate for the additional expense involved.

[illegible],
Assistant Secretary of the Interior.

FEBRUARY 27, 1969.

[F.R. Doc. [illegible]; Filed, Mar. 4, 1969; [illegible] a.m.]

But, since the Garrison dam was built, the land has flooded regularly, most recently in 2011 and 2014 when the reservoir was operated at maximum capacity. Please see attached photos the historical photos all the way through current day.

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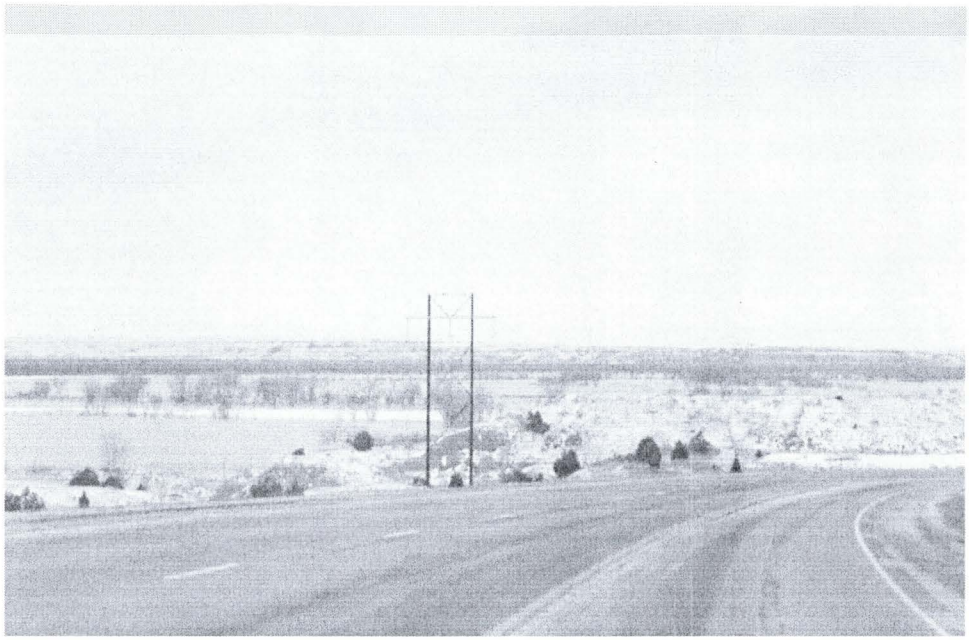
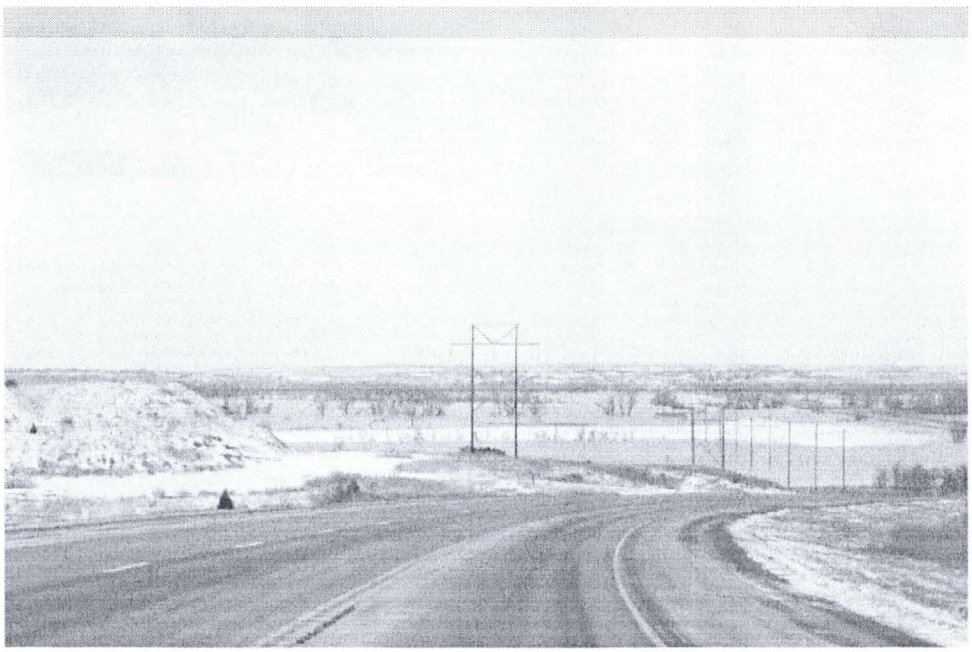


This photograph was taken April of 2014 driving west from atop Indian Hill SE of Williston, the area inundated by flood waters is West of Hwy 85 Bridge.



Hwy 85 West roughly 2.5 miles from Hwy 85 Lewis & Clark Bridge, the entire 2560 acre spacing unit is flooded

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Groups ask for higher releases through Garrison Dam ASAP

APRIL 07, 2014 10:34 PM • BY BRIAN GEPHART

BISMARCK, N.D. _ Despite the U.S. Army Corps of Engineers' forecast that the risk of flooding along the upper Missouri River Basin is minimal this spring, some groups want stepped up releases through Garrison Dam to begin as soon as possible.

The corps hosted a public meeting in Bismarck on Wednesday night on plans for reservoir management in 2014, one of five such meetings conducted along river cities from Missouri to Montana.

Col. Bill Leady, deputy commander for the corps' northwest division, said he believes there is enough storage in the system to handle runoff this spring.

The corps' April 1 runoff forecast was for 32 million acre-feet of water to enter the system through July.

He said average runoff is about 26 million acre-feet. An acre-foot of water is roughly the size of a football field covered with a foot of water.

Still, the North Dakota State Water Commission and other groups urged the corps to crank up releases sooner rather than later to avoid a repeat of 2011 flooding.

According to the corps, current reservoir levels are well below 2011 levels. Fort Peck is 14.5 feet lower, Lake Sakakawea is 5.2 feet lower and Lake Oahe 10.4 feet lower.

Bruce Engelhardt of the State Water Commission's water development division, said conditions in the upper basin have been "more volatile" in recent decade.

Engelhardt said releases can be increased while still maintaining balance on the upper three reservoirs — Fort Peck, Lake Sakakawea and Lake Oahe — which contain about 90 percent of the water storage for the basin.

"Constant vigilance ... be maintained," he said, to avoid flooding like in 2011.

Mountain snowpack above ... Peck is 133 percent of normal and 139 percent of normal between Fort Peck and Garrison.

Jody F... chief, water management chief for the corps, said plans are to step up releases through Garrison Dam from the current 18,000 cubic feet per second to 24,000 cfs by April 15 and 25,000 cfs by the end of the month.

Further said May average releases should be around 27,000 cfs and 30,000 cfs for June.

Press Release in the Bismarck Tribune Requesting higher releases from Garrison Dam, April 2014

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Historical Photographs of 153 / 101 Sec 6 & 7

August 1995

August 23rd 2003

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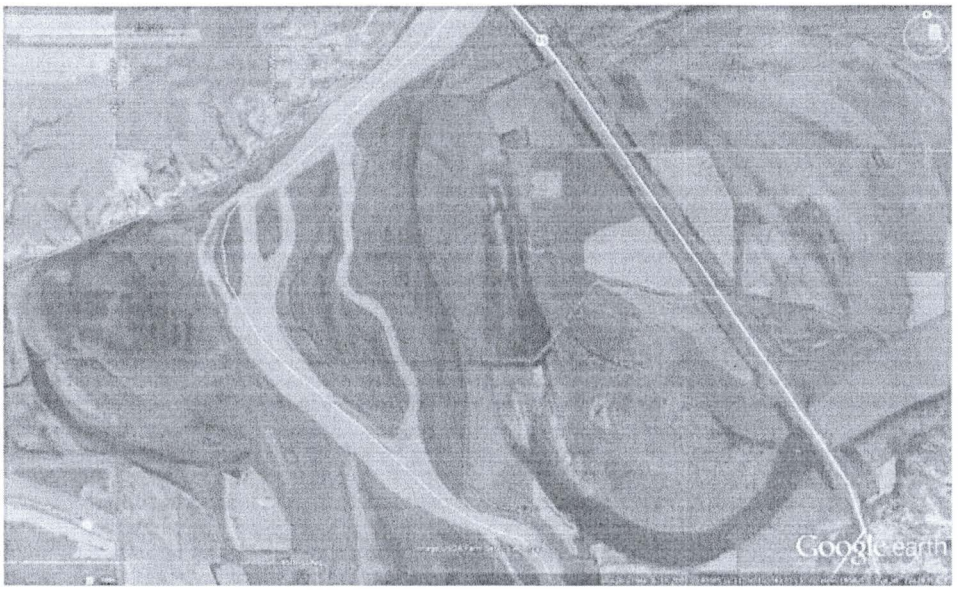

July 29th 2005

August 8th 2006

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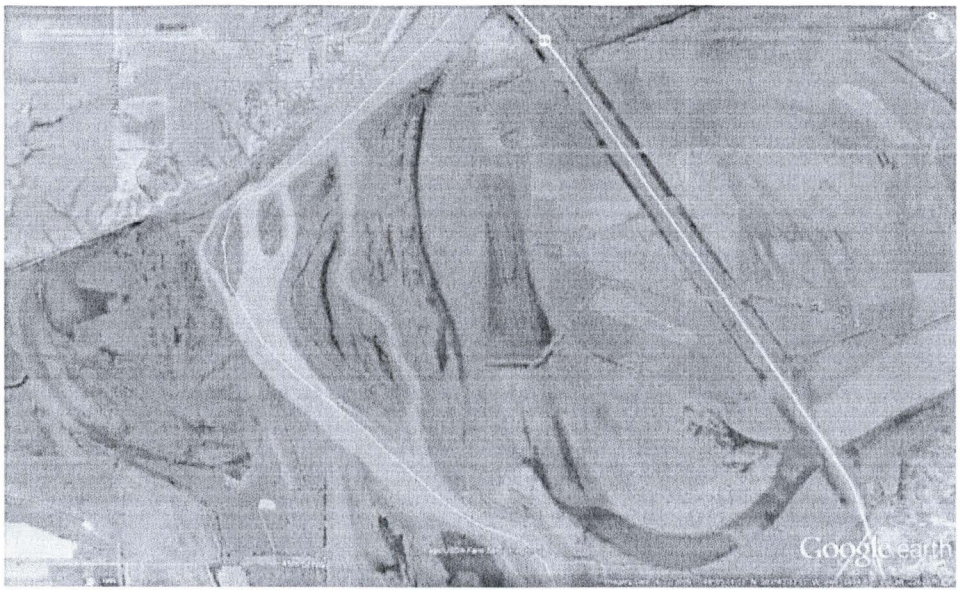
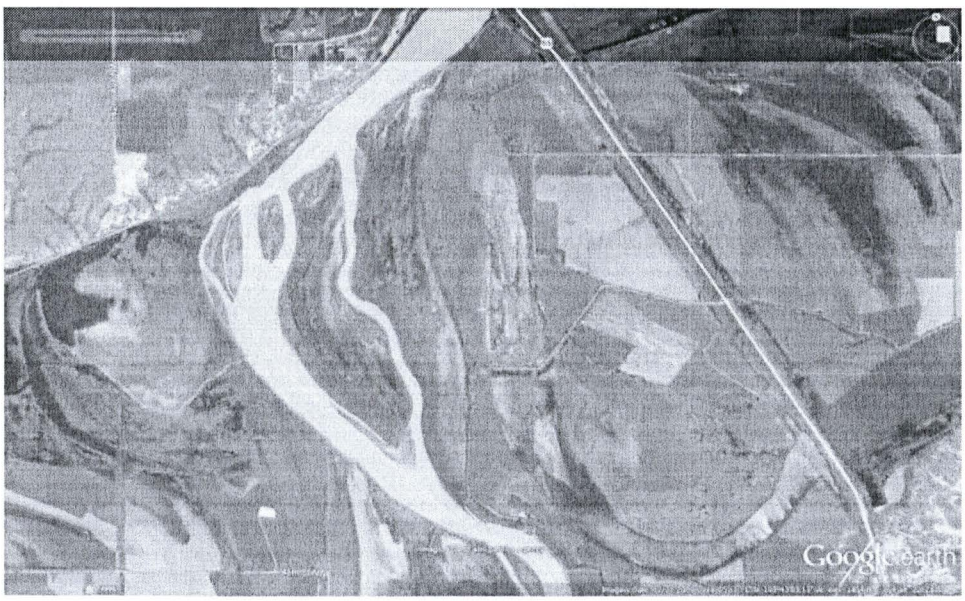


August 31st 2009



December 30th 2010

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December 9th 2011

August 15th 2013

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Aerial view above the Atlanta Well Pad December 2012

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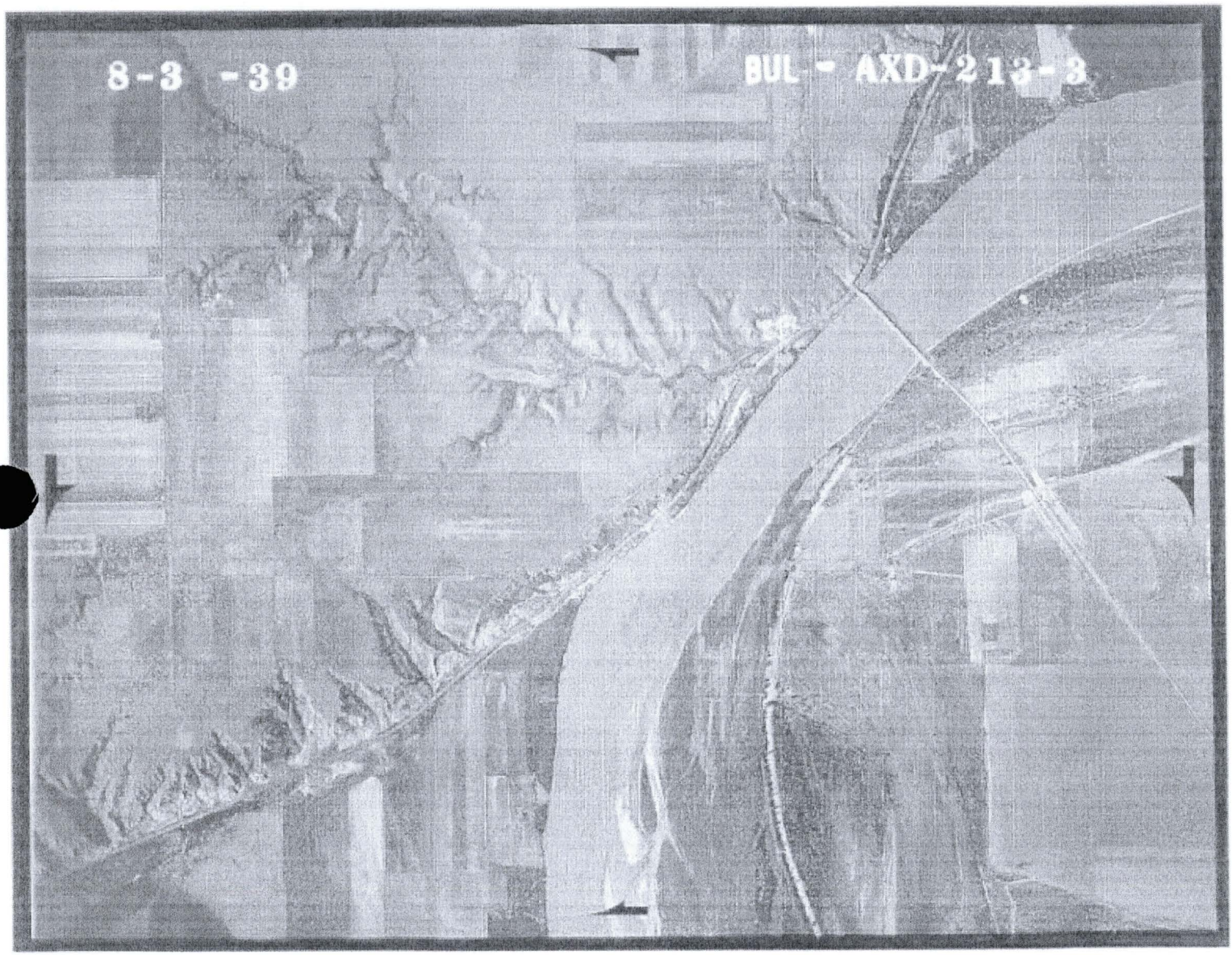

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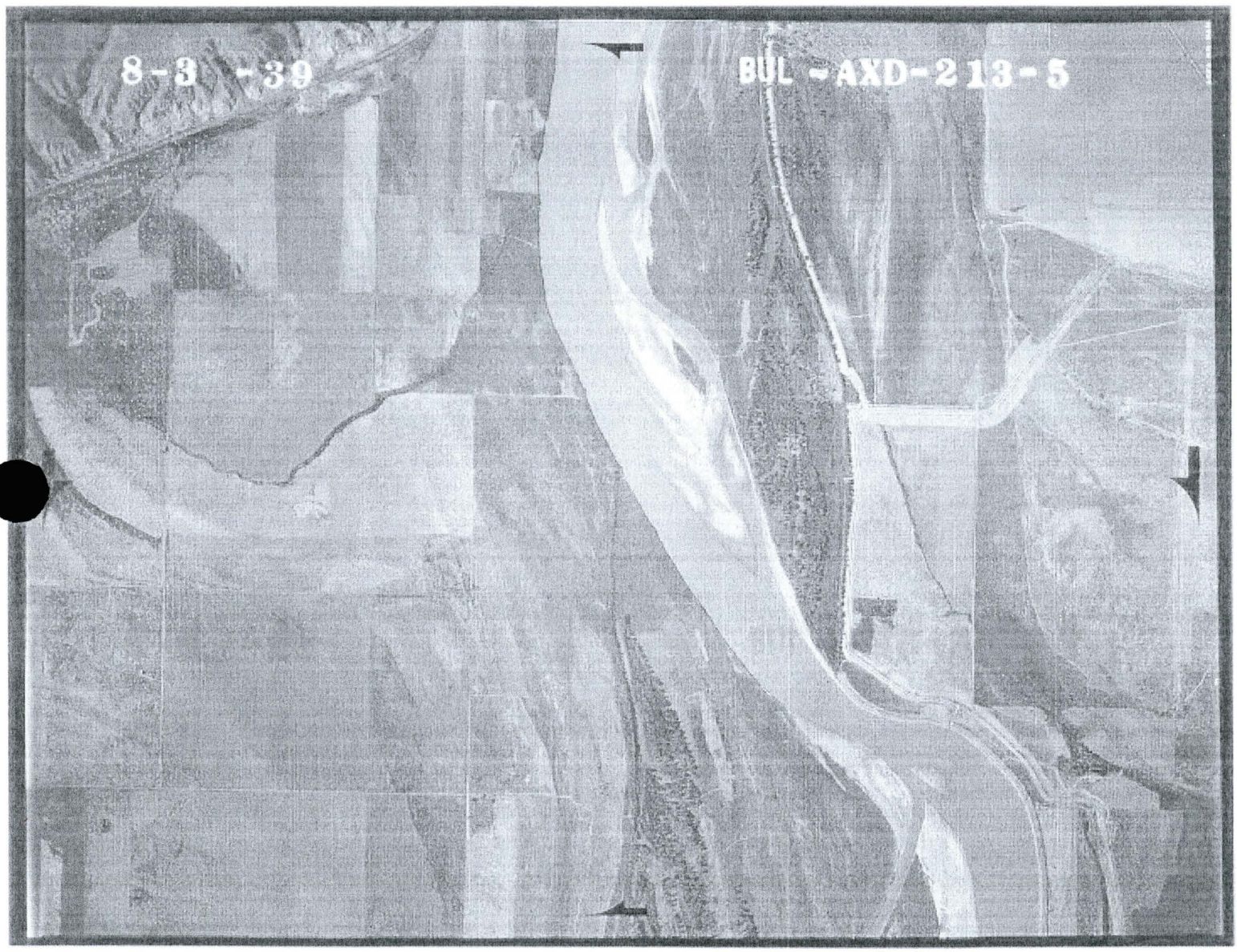

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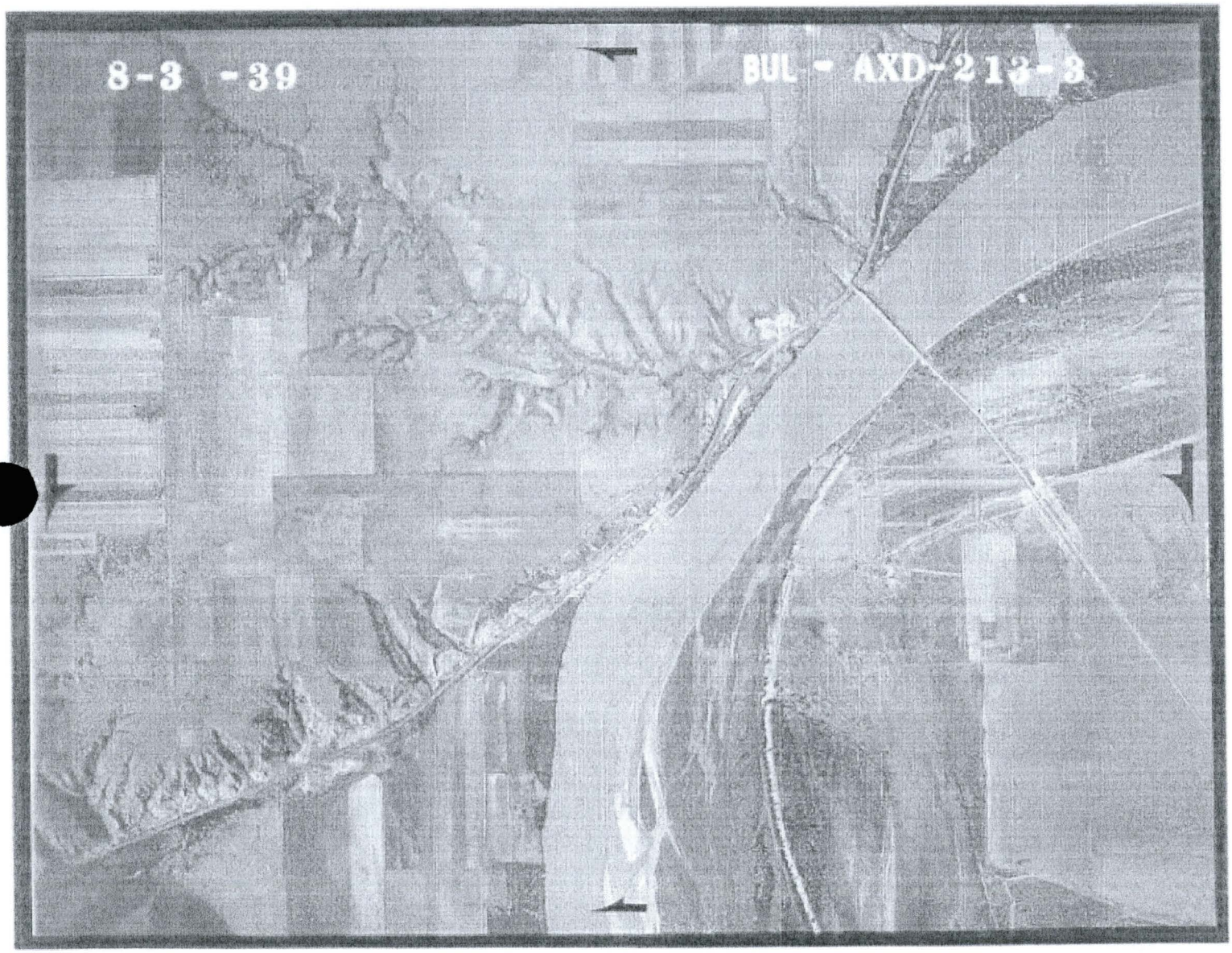

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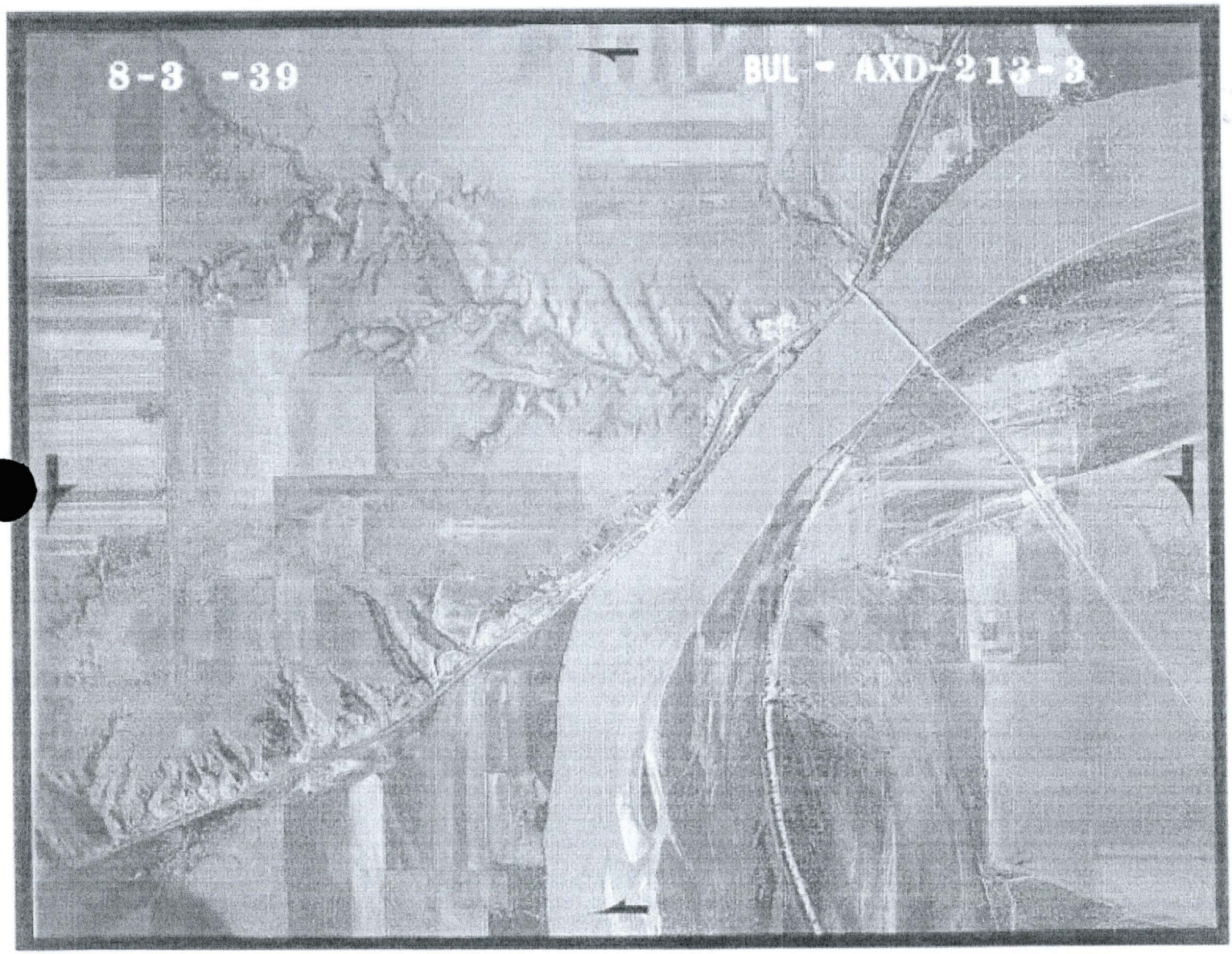

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527305

STATE OF NORTH DAKOTA
RELEASE OF ESTATE TAX LIEN

Re: Estate of Esther A. Vohs, Deceased.

I, M.K. Heidi Heitkamp, duly qualified and acting Tax Commissioner for the State of North Dakota, do hereby certify that:

1. The decedent at the time of her death on October 9, 1989, was a resident of the City of Williston, County of Williams, and State of North Dakota and was owner of certain real property in North Dakota described as follows (specify type of ownership as sole ownership, joint tenancy, life estate, etc., and specify joint tenants where applicable):

(SOLE OWNERSHIP)

WILLIAMS COUNTY, NORTH DAKOTA:

An undivided 6.4/160ths of the oil, gas and other minerals in and under the following:

Township 157 North, Range 96 West
Section 33: SE¼

An undivided 2/160ths of the oil, gas and other minerals in and under the following:

Township 156 North, Range 96 West
Section 20: E½NE¼
Section 21: W½NW¼

MCKENZIE COUNTY, NORTH DAKOTA:

An undivided 92.27/276.80ths interest in and to the oil, gas and other minerals in and under the following:

Township 153 North, Range 101 West
Section 6: Lot 10
Section 7: Portions of Lots 1, 4, and 5, described on a deed recorded in Book 87, Page 505 in the office of the McKenzie County Register of Deeds.

2. Pursuant to Chapter 57-37.1 of the North Dakota Century Code there is no estate tax liability with respect to the estate of the above-named decedent, and as such, no estate tax lien exists on the estate of said decedent.

Dated this 10th day of January, 1990, at Bismarck, ND.

M.K. Heidi Heitkamp
TAX COMMISSIONER

Estate Tax Examiner

RECORD THIS INSTRUMENT FOR RELEASE OF ESTATE TAX LIENS

STATE OF NORTH DAKOTA)
ss.
COUNTY OF WILLIAMS)

I hereby certify that with this office on the _____ day o'clock _____.M., and was duly _____ on page _____ _____.

Register of Deeds
Williams County, N.D.
I hereby certify that the within instrument was filed in this state for record the 17 day of January A.D. 1990 at 08:57:51 o'clock AM., and was duly recorded as microfilm document No. 527305

Register of Deeds
Recording Fee 5.00

(Submit in Duplicate).

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1 Dec 19 2010
2 Dec 19 2011
3 Dec 19 2012

~~PAID UP OIL AND GAS LEASE~~

pg 20

LEASE - 100K plus -

COPY

OIL AND GAS LEASE

PRCD 88

THIS LEASE AGREEMENT is made as of the 19th day of December, 2009 between Edward Patrick Lynch, a married man dealing in his sole and separate property, whose post office address is 694 Hamlet Circle, Goose Creek, SC 29445, hereinafter called Lessor (whether one or more) and Golden Eye Resources, LLC, whose post office address is P. O. Box 2270, Littleton, CO 80161 hereinafter called Lessee. All printed portions of this lease were prepared by the party hereinabove named as Lessee, but all other provisions (including the completion of blank spaces) were prepared jointly by Lessor and Lessee.

Grant of Leased Premises. In consideration of a cash bonus in hand paid and the covenants herein contained, Lessor hereby grants, leases and lets exclusively to Lessee the following described land, hereinafter called leased premises :

Township 153 North, Range 101 West, of the 5th P.M.
Section 6: Lot 10 (41.00)
Section 7: Parts of Lots 1, 4 & 5 more fully described in Book 87 of Deeds-Page 505.
Including any and all accretions or riparian rights thereto.

in the County of McKenzie, State of North Dakota, containing 276.80 gross acres, more or less (including any interests therein which Lessor may hereafter acquire by reversion, prescription or otherwise), for the purpose of exploring for, developing, producing and marketing oil and gas, along with all hydrocarbon and non-hydrocarbon substances produced in association therewith ("Oil and Gas Substances"). The term "gas" as used herein includes helium, carbon dioxide, gaseous sulfur compounds, methane produced from coal formations and other commercial gases, as well as normal hydrocarbon gases. In addition to the above-described land, this lease and the term "leased premises" also covers accretions and any small strips or parcels of land now or hereafter owned by Lessor which are contiguous or adjacent to the above-described land, and, in consideration of the aforementioned cash bonus, Lessor agrees to execute at Lessee's request any additional or supplemental instruments for a more complete or accurate description of the land so covered. For the purpose of determining the amount of any payments based on acreage hereunder, the number of gross acres above specified shall be deemed correct, whether actually more or less.

1. **Ancillary Rights.** The rights granted to Lessee hereunder shall include the right of ingress and egress on the leased premises or lands pooled or unitized therewith, along with such rights as may be reasonably necessary or beneficial to conduct operations for exploring, developing, producing and marketing Oil and Gas Substances, including but not limited to geophysical operations, the drilling of wells, and the construction and use of roads, canals, pipelines, tanks, water wells, disposal wells, injection wells, pits, electric and telephone lines, power stations, and other facilities for Lessee to explore, discover, produce, store, treat and/or transport Oil and Gas Substances and water produced from the leased premises or other lands that share central facilities and are jointly operated with the leased premises for gathering, treating, compression, transporting, processing and water disposal. Lessee may use in such operations, free of cost, any oil, gas, water and/or other substances produced on the leased premises, except water from Lessor's wells or ponds. In exploring, developing, producing or marketing from the leased premises or lands pooled or unitized therewith, the ancillary rights granted herein shall apply (a) to the entire leased premises, notwithstanding any partial release or other partial termination of this lease; and (b) to any other lands in which Lessor now or hereafter has authority to grant such rights in the vicinity of the leased premises or lands pooled or unitized therewith. When requested by Lessor in writing, Lessee shall bury its pipelines below ordinary plow depth on cultivated lands. No well shall be located less than 200 feet from any house or barn now on the leased premises or other lands of Lessor used by Lessee hereunder, without Lessor's consent, and Lessee shall pay for damage caused by its operations to buildings and other improvements now on the leased premises or such other lands, and to commercial timber and growing crops thereon. Lessee shall have the right at any time to remove its fixtures, equipment and materials, including well casing, from the leased premises or such other lands during the term of this lease or within a reasonable time thereafter.

2. **Term of Lease.** This lease shall be in force for a primary term of three (3) years from the date hereof, and for as long thereafter as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises or from lands pooled or unitized therewith or this lease is otherwise maintained in effect pursuant to the provisions hereof.

3. **Operations.** If Lessee drills a well which is incapable of producing in paying quantities (hereinafter called "dry hole") on the leased premises or lands pooled or unitized therewith, or if all production (whether or not in paying quantities) permanently ceases from any cause, including a revision of unit boundaries pursuant to the provisions of this lease or the action of any governmental authority, then in the event this lease is not otherwise being maintained in force it shall nevertheless remain in force if Lessee commences further operations for reworking an existing well or for drilling an additional well or for otherwise obtaining or restoring production on the leased premises or lands pooled or unitized therewith within 90 days after completion of operations on such dry hole or within 90 days after such cessation of all production. If after the primary term this lease is not otherwise being maintained in force, but Lessee is then engaged in Operations, as defined below, this lease shall remain in force so long as any one or more of such Operations are prosecuted with no interruption of more than 90 consecutive days, and if any such Operations result in the production of Oil and Gas Substances, as long thereafter as there is production in paying quantities from the leased premises or lands pooled or unitized therewith. After completion of a well capable of producing in paying quantities hereunder, Lessee shall drill such additional wells on the leased premises or lands pooled or unitized therewith as a reasonably prudent operator would drill under the same or similar circumstances to (a) develop the leased premises as to reservoirs then capable of producing in paying quantities on the leased premises or lands pooled or unitized therewith, or (b) protect the leased premises from uncompensated drainage by any well or wells located on other lands not pooled or unitized therewith. There shall be no covenant to drill exploratory wells or any additional wells except as expressly provided herein. As used herein, the term Operations shall mean any activity conducted on or off the leased premises that is reasonably calculated to obtain or restore production, including without limitation, (i) drilling or any act preparatory to drilling (such as obtaining permits, surveying a drill site, staking a drill site, building roads, clearing a drill site, or hauling equipment or supplies); (ii) reworking, plugging back, deepening, treating, stimulating, refitting, installing any artificial lift or production-enhancement equipment or technique; (iii) constructing facilities related to the production, treatment, transportation and marketing of substances produced from the lease premises; (iv) contracting for marketing services and sale of Oil and Gas Substances; and (v) construction of water disposal facilities and the physical movement of water produced from the leased premises.

4. **Shut-in Royalty.** If after the primary term one or more wells on the leased premises or lands pooled or unitized therewith are capable of producing Oil and Gas Substances in paying quantities, but such well or wells are either shut in or production therefrom

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is not being sold by Lessee, such well or wells shall nevertheless be deemed to be producing in paying quantities for the purpose of maintaining this lease. If for a period of 90 consecutive days such well or wells are shut in or production therefrom is not sold by Lessee, then Lessee shall pay an aggregate shut-in royalty of one dollar per acre then covered by this lease. The payment shall be made to Lessor on or before the first anniversary date of the lease following the end of the 90-day period and thereafter on or before each anniversary while the well or wells are shut in or production therefrom is not being sold by Lessee; provided that if this lease is otherwise being maintained by operations under this lease, or if production is being sold by Lessee from another well or wells on the leased premises or lands pooled or unitized therewith, no shut-in royalty shall be due until the first anniversary date of the lease following the end of the 90-day period after the end of the period next following the cessation of such operations or production, as the case may be. Lessee's failure to properly pay shut-in royalty shall render Lessee liable for the amount due, but shall not operate to terminate this lease. It is agreed, however, that no well may be shut-in and perpetuate this lease for more than three (3) years beyond the primary term; actual production and payment on production is required to perpetuate this lease beyond such period.

5. **Royalty Payment.** For all Oil and Gas Substances that are physically produced from the leased premises, or lands pooled, unitized or communitized therewith, and sold, lessor shall receive as its royalty **three sixteenths (3/16ths)** of the sales proceeds actually received by lessee or, if applicable, its affiliate, as a result of the first sale of the affected production to an unaffiliated party, less this same percentage share of all Post Production Costs and this same percentage share of all production, severance, ad valorem and other taxes. As used in this provision, Post Production Costs shall mean all costs actually incurred by lessee or its affiliate and all losses of produced volumes whether by use as fuel, line loss, flaring, venting or otherwise from and after the wellhead to the point of sale. These costs include without limitation, all costs of gathering, marketing, compression, dehydration, transportation, removal of liquid or gaseous substances or impurities from the affected production, and any other treatment or processing required by the first unaffiliated party who purchases the affected production. For royalty calculation purposes, lessee shall never be required to adjust the sales proceeds to account for the purchaser's costs or charges downstream of the point of sale.

Lessee or its affiliate shall have the right to construct, maintain and operate any facilities providing some or all of the services identified as Post Production Costs. If this occurs, the actual costs of such facilities shall be included in the Post Production Costs as a per barrel or per mcf charge, as appropriate, calculated by spreading the construction, maintenance and operating costs for such facilities over the reasonably estimated total production volumes attributable to the well or wells using such facilities.

If Lessee uses the Oil and Gas Substances (other than as fuel in connection with the production and sale thereof) in lieu of receiving sale proceeds, the price to be used under this provision shall be based upon arm's-length sale(s) to unaffiliated parties for the applicable month that are obtainable, comparable in terms of quality and quantity, and in closest proximity to the leased premises. Such comparable arm's-length sales price shall be less any Post Production Costs applicable to the specific arms-length transaction that is utilized.

6. **Pooling.** Lessee shall have the right but not the obligation to pool all or any part of the leased premises or interest therein with any other lands or interests, as to any or all depths or zones, and as to any or all substances covered by this lease, either before or after the commencement of drilling or production, whenever Lessee deems it necessary or proper to do so in order to prudently develop or operate the leased premises, whether or not similar pooling authority exists with respect to such other lands or interests. The creation of a unit by such pooling shall be based on the following criteria (hereinafter called "pooling criteria"): A unit for an oil well (other than a horizontal completion) shall not exceed 40 acres plus a maximum acreage tolerance of 10%, and for a gas well or a horizontal completion shall not exceed 640 acres plus a maximum acreage tolerance of 10%; provided that a larger unit may be formed for an oil well or gas well or horizontal completion to conform to any well spacing or density pattern that may be prescribed or permitted by any governmental authority having jurisdiction to do so. For the purpose of the foregoing, the terms "oil well" and "gas well" shall have the meanings prescribed by applicable law or the appropriate governmental authority, or, if no definition is so prescribed, "oil well" means a well with an initial gas-oil ratio of less than 100,000 cubic feet per barrel and "gas well" means a well with an initial gas-oil ratio of 100,000 cubic feet or more per barrel, based on a 24-hour production test conducted under normal producing conditions using standard lease separator facilities or equivalent testing equipment; and the term "horizontal completion" means a well in which the horizontal component of the completion interval in the reservoir exceeds the vertical component in such interval. In exercising its pooling rights hereunder, Lessee shall file of record a written declaration describing the unit and stating the effective date of pooling. Production, drilling or reworking operations anywhere on a unit which includes all or any part of the leased premises shall be treated as if it were production, drilling or reworking operations on the leased premises, except that the production on which Lessor's royalty is calculated shall be that proportion of the total unit production which the net acreage covered by this lease and included in the unit bears to the total acreage in the unit, but only to the extent such proportion of unit production is sold by Lessee. In the event a unit is formed hereunder before the unit well is drilled and completed, so that the applicable pooling criteria are not yet known, the unit shall be based on the pooling criteria Lessee expects in good faith to apply upon completion of the well; provided that within a reasonable time after completion of the well, the unit shall be revised if necessary to conform to the pooling criteria that actually exist. Pooling in one or more instances shall not exhaust Lessee's pooling rights hereunder, and Lessee shall have the recurring right but not the obligation to revise any unit formed hereunder by expansion or contraction or both, either before or after commencement of production, in order to conform to the well spacing or density pattern prescribed or permitted by the governmental authority having jurisdiction, or to conform to any productive acreage determination made by such governmental authority. To revise a unit hereunder, Lessee shall file of record a written declaration describing the revised unit and stating the effective date of revision. To the extent any portion of the leased premises is included in or excluded from the unit by virtue of such revision, the proportion of unit production on which royalties are payable hereunder shall thereafter be adjusted accordingly.

7. **Unitization.** Lessee shall have the right but not the obligation to commit all or any part of the leased premises or interest therein to one or more unit plans or agreements for the cooperative development or operation of one or more oil and/or gas reservoirs or portions thereof, if in lessee's judgment such plan or agreement will prevent waste and protect correlative rights, and if such plan or agreement is approved by the federal, state or local governmental authority having jurisdiction. When such a commitment is made, this lease shall be subject to the terms and conditions of the unit plan or agreement, including any formula prescribed therein for the allocation of production from a unit. Upon permanent cessation thereof, Lessee may terminate the unit by filing of record a written declaration describing the unit and stating the date of termination. Pooling hereunder shall not constitute a cross-conveyance of interests.

8. **Payment Reductions.** If Lessor owns less than the full mineral estate in all or any part of the leased premises, payment of royalties and shut-in royalties hereunder shall be reduced as follows: royalties and shut-in royalties for any well on any part of the leased premises or lands pooled therewith shall be reduced to the proportion that Lessor's interest in such part of the leased premises bears to the full mineral estate in such part of the leased premises. To the extent any royalty or other payment attributable

to the mineral estate covered by this lease is payable to someone other than Lessor, such royalty or other payment shall be deducted from the corresponding amount otherwise payable to Lessor hereunder.

9. **Ownership Changes.** The interest of either Lessor or Lessee hereunder may be assigned, devised or otherwise transferred in whole or in part, by area and/or by depth or zone, and the rights and obligations of the parties hereunder shall extend to their respective heirs, devisees, executors, administrators, successors and assigns. No change in Lessor's ownership shall have the effect of reducing the rights or enlarging the obligations of Lessee hereunder, and no change in ownership shall be binding on Lessee until 60 days after Lessee has been furnished the original or duly authenticated copies of the documents establishing such change of ownership to the satisfaction of Lessee or until Lessor has satisfied the notification requirements contained in Lessee's usual form of division order. In the event of the death of any person entitled to shut-in royalties hereunder, Lessee may pay or tender such shut-in royalties to the credit of decedent or decedent's estate. If at any time two or more persons are entitled to shut-in royalties hereunder, Lessee may pay or tender such shut-in royalties to such persons either jointly or separately in proportion to the interest which each owns. If Lessee transfers its interest hereunder in whole or in part Lessee shall be relieved of all obligations thereafter arising with respect to the transferred interest, and failure of the transferee to satisfy such obligations with respect to the transferred interest shall not affect the rights of Lessee with respect to any interest not so transferred. If Lessee transfers a full or undivided interest in all or any portion of the area covered by this lease, the obligation to pay or tender shut-in royalties hereunder shall be divided between Lessee and the transferee in proportion to the net acreage interest in this lease then held by each

10. **Release of Lease.** Lessee may, at any time and from time to time, deliver to Lessor or file of record a written release of this lease as to a full or undivided interest in all or any portion of the area covered by this lease or any depths or zones thereunder, and shall thereupon be relieved of all obligations thereafter arising with respect to the interest so released. If Lessee releases less than all of the interest or area covered hereby, Lessee's obligation to pay or tender shut-in royalties shall be proportionately reduced in accordance with the net acreage interest retained hereunder.

11. **Regulation and Delay.** Lessee's obligations under this lease, whether express or implied, shall be subject to all applicable laws, rules, regulations and orders, governmental action or inaction of any governmental authority having jurisdiction, including restrictions on the drilling and production of wells, and regulation of the price or transportation of oil, gas and other substances covered hereby. When drilling, reworking, production or other operations are prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits, equipment, services, material, water, electricity, fuel, access or easements, or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot, strike or labor disputes, or by inability to obtain a satisfactory market for production or failure of purchasers or carriers to take or transport such production, or by any other cause not reasonably within Lessee's control, this lease shall not terminate because of such prevention or delay, and, at Lessee's option, the period of such prevention or delay shall be added to the term hereof. Lessee shall not be liable for breach of any provisions or implied covenants of this lease when drilling, production or other operations are so prevented or delayed.

12. **Breach or Default.** No litigation shall be initiated by Lessor for damages, forfeiture or cancellation with respect to any breach or default by Lessee hereunder, for a period of at least 60 days after Lessor has given Lessee written notice fully describing the breach or default, and then only if Lessee fails to remedy the breach or default within such period.

13. **Warranty of Title.** Lessor Lessee at Lessee's option may pay and discharge any taxes, mortgages or liens existing, levied or assessed on or against the leased premises. If Lessee exercises such option, Lessee shall be subrogated to the rights of the party to whom payment is made, and, in addition to its other rights, may reimburse itself out of any royalties or shut-in royalties otherwise payable to Lessor hereunder. In the event Lessee is made aware of any claim inconsistent with Lessor's title, Lessee may suspend the payment of royalties and shut-in royalties hereunder, without interest, until Lessee has been furnished satisfactory evidence that such claim has been resolved.

14. **Pugh Clause.** Notwithstanding any provisions of this lease to the contrary, upon expiration of the primary term, or upon cessation of "continuous drilling operations" (as hereinafter defined), whichever is later, this lease shall terminate as to all the lands covered hereby except lands within a production or a spacing unit prescribed by law or administrative authority, on which is located a well producing, or capable of producing, oil and/or gas. Lessee shall be considered to be engaged in "continuous drilling operations" for the purposes hereof if (I) Lessee is engaged in drilling, reworking or completion operations on a well located on the leased lands, or on lands included in a production or a spacing unit which contains a portion of the leased lands, or (II) Lessee has completed or abandoned a well located on the leased lands, or on lands included in a production or a spacing unit which contains a portion of the leased lands, within 180 days prior to the end of the primary term. Lessee shall be deemed to be engaged in continuous drilling operations for as long thereafter as Lessee conducts drilling, reworking or completion operations on the leased lands, or on lands included in a production or a spacing unit which contains a portion of the leased lands, with not more than 180 days elapsing between the completion or abandonment of one well and the beginning of operations for the drilling of an additional well or reworking an existing well.

IN WITNESS WHEREOF, this lease is executed to be effective as of the date first written above, but upon execution shall be binding on the signatory and the signatory's heirs, devisees, executors, administrators, successors and assigns, whether or not this lease has been executed by all parties hereinabove named as Lessor.

LESSOR(S)

Edward Patrick Lynch

Edward Patrick Lynch

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PAID UP OIL AND GAS LEASE

OIL AND GAS LEASE

PROD 88

THIS LEASE AGREEMENT is made as of the 19th day of December, 2009 between Edward Patrick Lynch, a married man dealing in his sole and separate property, whose post office address is 694 Hamlet Circle, Goose Creek, SC 29445, hereinafter called Lessor (whether one or more) and Golden Eye Resources, LLC, whose post office address is P. O. Box 2270, Littleton, CO 80161 hereinafter called Lessee. All printed portions of this lease were prepared by the party hereinabove named as Lessee, but all other provisions (including the completion of blank spaces) were prepared jointly by Lessor and Lessee.

Grant of Leased Premises. In consideration of a cash bonus in hand paid and the covenants herein contained, Lessor hereby grants, leases and lets exclusively to Lessee the following described land, hereinafter called leased premises :

Township 153 North, Range 101 West, of the 5th P.M.
Section 6: Lot 10 (41.00)
Section 7: Parts of Lots 1, 4 & 5 more fully described in Book 87 of Deeds-Page 505.
Including any and all accretions or riparian rights thereto.

in the County of McKenzie, State of North Dakota, containing 276.80 gross acres, more or less (including any interests therein which Lessor may hereafter acquire by reversion, prescription or otherwise), for the purpose of exploring for, developing, producing and marketing oil and gas, along with all hydrocarbon and non-hydrocarbon substances produced in association therewith ("Oil and Gas Substances"). The term "gas" as used herein includes helium, carbon dioxide, gaseous sulfur compounds, methane produced from coal formations and other commercial gases, as well as normal hydrocarbon gases. In addition to the above-described land, this lease and the term "leased premises" also covers accretions and any small strips or parcels of land now or hereafter owned by Lessor which are contiguous or adjacent to the above-described land, and, in consideration of the aforementioned cash bonus, Lessor agrees to execute at Lessee's request any additional or supplemental instruments for a more complete or accurate description of the land so covered. For the purpose of determining the amount of any payments based on acreage hereunder, the number of gross acres above specified shall be deemed correct, whether actually more or less.

1. **Ancillary Rights.** The rights granted to Lessee hereunder shall include the right of ingress and egress on the leased premises or lands pooled or unitized therewith, along with such rights as may be reasonably necessary or beneficial to conduct operations for exploring, developing, producing and marketing Oil and Gas Substances, including but not limited to geophysical operations, the drilling of wells, and the construction and use of roads, canals, pipelines, tanks, water wells, disposal wells, injection wells, pits, electric and telephone lines, power stations, and other facilities for Lessee to explore, discover, produce, store, treat and/or transport Oil and Gas Substances and water produced from the leased premises or other lands that share central facilities and are jointly operated with the leased premises for gathering, treating, compression, transporting, processing and water disposal. Lessee may use in such operations, free of cost, any oil, gas, water and/or other substances produced on the leased premises, except water from Lessor's wells or ponds. In exploring, developing, producing or marketing from the leased premises or lands pooled or unitized therewith, the ancillary rights granted herein shall apply (a) to the entire leased premises, notwithstanding any partial release or other partial termination of this lease, and (b) to any other lands in which Lessor now or hereafter has authority to grant such rights in the vicinity of the leased premises or lands pooled or unitized therewith. When requested by Lessor in writing, Lessee shall bury its pipelines below ordinary plow depth on cultivated lands. No well shall be located less than 200 feet from any house or barn now on the leased premises or other lands of Lessor used by Lessee hereunder, without Lessor's consent, and Lessee shall pay for damage caused by its operations to buildings and other improvements now on the leased premises or such other lands, and to commercial timber and growing crops thereon. Lessee shall have the right at any time to remove its fixtures, equipment and materials, including well casing, from the leased premises or such other lands during the term of this lease or within a reasonable time thereafter.

2. **Term of Lease.** This lease shall be in force for a primary term of three (3) years from the date hereof, and for as long thereafter as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises or from lands pooled or unitized therewith or this lease is otherwise maintained in effect pursuant to the provisions hereof.

3. **Operations.** If Lessee drills a well which is incapable of producing in paying quantities (hereinafter called "dry hole") on the leased premises or lands pooled or unitized therewith, or if all production (whether or not in paying quantities) permanently ceases from any cause, including a revision of unit boundaries pursuant to the provisions of this lease or the action of any governmental authority, then in the event this lease is not otherwise being maintained in force it shall nevertheless remain in force if Lessee commences further operations for reworking an existing well or for drilling an additional well or for otherwise obtaining or restoring production on the leased premises or lands pooled or unitized therewith within 90 days after completion of operations on such dry hole or within 90 days after such cessation of all production. If after the primary term this lease is not otherwise being maintained in force, but Lessee is then engaged in Operations, as defined below, this lease shall remain in force so long as any one or more of such Operations are prosecuted with no interruption of more than 90 consecutive days, and if any such Operations result in the production of Oil and Gas Substances, as long thereafter as there is production in paying quantities from the leased premises or lands pooled or unitized therewith. After completion of a well capable of producing in paying quantities hereunder, Lessee shall drill such additional wells on the leased premises or lands pooled or unitized therewith as a reasonably prudent operator would drill under the same or similar circumstances to (a) develop the leased premises as to reservoirs then capable of producing in paying quantities on the leased premises or lands pooled or unitized therewith, or (b) protect the leased premises from uncompensated drainage by any well or wells located on other lands not pooled or unitized therewith. There shall be no covenant to drill exploratory wells or any additional wells except as expressly provided herein. As used herein, the term Operations shall mean any activity conducted on or off the leased premises that is reasonably calculated to obtain or restore production, including without limitation, (i) drilling or any act preparatory to drilling (such as obtaining permits, surveying a drill site, staking a drill site, building roads, clearing a drill site, or hauling equipment or supplies); (ii) reworking, plugging back, deepening, treating, stimulating, refitting, installing any artificial lift or production-enhancement equipment or technique; (iii) constructing facilities related to the production, treatment, transportation and marketing of substances produced from the lease premises; (iv) contracting for marketing services and sale of Oil and Gas Substances; and (v) construction of water disposal facilities and the physical movement of water produced from the leased premises.

4. **Shut-in Royalty.** If after the primary term one or more wells on the leased premises or lands pooled or unitized therewith are capable of producing Oil and Gas Substances in paying quantities, but such well or wells are either shut in or production therefrom

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DENVER CO 80293-1201

County Recorder
McKenzie County
Watford City ND 58854
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is not being sold by Lessee, such well or wells shall nevertheless be deemed to be producing in paying quantities for the purpose of maintaining this lease. If for a period of 90 consecutive days such well or wells are shut in or production therefrom is not sold by Lessee, then Lessee shall pay an aggregate shut-in royalty of one dollar per acre then covered by this lease. The payment shall be made to Lessor on or before the first anniversary date of the lease following the end of the 90-day period and thereafter on or before each anniversary while the well or wells are shut in or production therefrom is not being sold by Lessee; provided that if this lease is otherwise being maintained by operations under this lease, or if production is being sold by Lessee from another well or wells on the leased premises or lands pooled or unitized therewith, no shut-in royalty shall be due until the first anniversary date of the lease following the end of the 90-day period after the end of the period next following the cessation of such operations or production, as the case may be. Lessee's failure to properly pay shut-in royalty shall render Lessee liable for the amount due, but shall not operate to terminate this lease. It is agreed, however, that no well may be shut-in and perpetuate this lease for more than three (3) years beyond the primary term; actual production and payment on production is required to perpetuate this lease beyond such period.

5. **Royalty Payment**. For all Oil and Gas Substances that are physically produced from the leased premises, or lands pooled, unitized or communitized therewith, and sold, lessor shall receive as its royalty **three sixteenths (3/16ths)** of the sales proceeds actually received by lessee or, if applicable, its affiliate, as a result of the first sale of the affected production to an unaffiliated party, less this same percentage share of all Post Production Costs and this same percentage share of all production, severance, ad valorem and other taxes. As used in this provision, Post Production Costs shall mean all costs actually incurred by lessee or its affiliate and all losses of produced volumes whether by use as fuel, line loss, flaring, venting or otherwise from and after the wellhead to the point of sale. These costs include without limitation, all costs of gathering, marketing, compression, dehydration, transportation, removal of liquid or gaseous substances or impurities from the affected production, and any other treatment or processing required by the first unaffiliated party who purchases the affected production. For royalty calculation purposes, lessee shall never be required to adjust the sales proceeds to account for the purchaser's costs or charges downstream of the point of sale.

Lessee or its affiliate shall have the right to construct, maintain and operate any facilities providing some or all of the services identified as Post Production Costs. If this occurs, the actual costs of such facilities shall be included in the Post Production Costs as a per barrel or per mcf charge, as appropriate, calculated by spreading the construction, maintenance and operating costs for such facilities over the reasonably estimated total production volumes attributable to the well or wells using such facilities.

If Lessee uses the Oil and Gas Substances (other than as fuel in connection with the production and sale thereof) in lieu of receiving sale proceeds, the price to be used under this provision shall be based upon arm's-length sale(s) to unaffiliated parties for the applicable month that are obtainable, comparable in terms of quality and quantity, and in closest proximity to the leased premises. Such comparable arm's-length sales price shall be less any Post Production Costs applicable to the specific arms-length transaction that is utilized.

6. **Pooling.** Lessee shall have the right but not the obligation to pool all or any part of the leased premises or interest therein with any other lands or interests, as to any or all depths or zones, and as to any or all substances covered by this lease, either before or after the commencement of drilling or production, whenever Lessee deems it necessary or proper to do so in order to prudently develop or operate the leased premises, whether or not similar pooling authority exists with respect to such other lands or interests. The creation of a unit by such pooling shall be based on the following criteria (hereinafter called "pooling criteria"): A unit for an oil well (other than a horizontal completion) shall not exceed 40 acres plus a maximum acreage tolerance of 10%, and for a gas well or a horizontal completion shall not exceed 640 acres plus a maximum acreage tolerance of 10%; provided that a larger unit may be formed for an oil well or gas well or horizontal completion to conform to any well spacing or density pattern that may be prescribed or permitted by any governmental authority having jurisdiction to do so. For the purpose of the foregoing, the terms "oil well" and "gas well" shall have the meanings prescribed by applicable law or the appropriate governmental authority, or, if no definition is so prescribed, "oil well" means a well with an initial gas-oil ratio of less than 100,000 cubic feet per barrel and "gas well" means a well with an initial gas-oil ratio of 100,000 cubic feet or more per barrel, based on a 24-hour production test conducted under normal producing conditions using standard lease separator facilities or equivalent testing equipment; and the term "horizontal completion" means a well in which the horizontal component of the completion interval in the reservoir exceeds the vertical component in such interval. In exercising its pooling rights hereunder, Lessee shall file of record a written declaration describing the unit and stating the effective date of pooling. Production, drilling or reworking operations anywhere on a unit which includes all or any part of the leased premises shall be treated as if it were production, drilling or reworking operations on the leased premises, except that the production on which Lessor's royalty is calculated shall be that proportion of the total unit production which the net acreage covered by this lease and included in the unit bears to the total acreage in the unit, but only to the extent such proportion of unit production is sold by Lessee. In the event a unit is formed hereunder before the unit well is drilled and completed, so that the applicable pooling criteria are not yet known, the unit shall be based on the pooling criteria Lessee expects in good faith to apply upon completion of the well; provided that within a reasonable time after completion of the well, the unit shall be revised if necessary to conform to the pooling criteria that actually exist. Pooling in one or more instances shall not exhaust Lessee's pooling rights hereunder, and Lessee shall have the recurring right but not the obligation to revise any unit formed hereunder by expansion or contraction or both, either before or after commencement of production, in order to conform to the well spacing or density pattern prescribed or permitted by the governmental authority having jurisdiction, or to conform to any productive acreage determination made by such governmental authority. To revise a unit hereunder, Lessee shall file of record a written declaration describing the revised unit and stating the effective date of revision. To the extent any portion of the leased premises is included in or excluded from the unit by virtue of such revision, the proportion of unit production on which royalties are payable hereunder shall thereafter be adjusted accordingly.

7. **Unitization.** Lessee shall have the right but not the obligation to commit all or any part of the leased premises or interest therein to one or more unit plans or agreements for the cooperative development or operation of one or more oil and/or gas reservoirs or portions thereof, if in lessee's judgment such plan or agreement will prevent waste and protect correlative rights, and if such plan or agreement is approved by the federal, state or local governmental authority having jurisdiction. When such a commitment is made, this lease shall be subject to the terms and conditions of the unit plan or agreement, including any formula prescribed therein for the allocation of production from a unit. Upon permanent cessation thereof, Lessee may terminate the unit by filing of record a written declaration describing the unit and stating the date of termination. Pooling hereunder shall not constitute a cross-conveyance of interests.

8. **Payment Reductions.** If Lessor owns less than the full mineral estate in all or any part of the leased premises, payment of royalties and shut-in royalties hereunder shall be reduced as follows: royalties and shut-in royalties for any well on any part of the leased premises or lands pooled therewith shall be reduced to the proportion that Lessor's interest in such part of the leased premises bears to the full mineral estate in such part of the leased premises. To the extent any royalty or other payment attributable

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to the mineral estate covered by this lease is payable to someone other than Lessor, such royalty or other payment shall be deducted from the corresponding amount otherwise payable to Lessor hereunder.

9. **Ownership Changes.** The interest of either Lessor or Lessee hereunder may be assigned, devised or otherwise transferred in whole or in part, by area and/or by depth or zone, and the rights and obligations of the parties hereunder shall extend to their respective heirs, devisees, executors, administrators, successors and assigns. No change in Lessor's ownership shall have the effect of reducing the rights or enlarging the obligations of Lessee hereunder, and no change in ownership shall be binding on Lessee until 60 days after Lessee has been furnished the original or duly authenticated copies of the documents establishing such change of ownership to the satisfaction of Lessee or until Lessor has satisfied the notification requirements contained in Lessee's usual form of division order. In the event of the death of any person entitled to shut-in royalties hereunder, Lessee may pay or tender such shut-in royalties to the credit of decedent or decedent's estate. If at any time two or more persons are entitled to shut-in royalties hereunder, Lessee may pay or tender such shut-in royalties to such persons either jointly or separately in proportion to the interest which each owns. If Lessee transfers its interest hereunder in whole or in part Lessee shall be relieved of all obligations thereafter arising with respect to the transferred interest, and failure of the transferee to satisfy such obligations with respect to the transferred interest shall not affect the rights of Lessee with respect to any interest not so transferred. If Lessee transfers a full or undivided interest in all or any portion of the area covered by this lease, the obligation to pay or tender shut-in royalties hereunder shall be divided between Lessee and the transferee in proportion to the net acreage interest in this lease then held by each

10. **Release of Lease.** Lessee may, at any time and from time to time, deliver to Lessor or file of record a written release of this lease as to a full or undivided interest in all or any portion of the area covered by this lease or any depths or zones thereunder, and shall thereupon be relieved of all obligations thereafter arising with respect to the interest so released. If Lessee releases less than all of the interest or area covered hereby, Lessee's obligation to pay or tender shut-in royalties shall be proportionately reduced in accordance with the net acreage interest retained hereunder.

11. **Regulation and Delay.** Lessee's obligations under this lease, whether express or implied, shall be subject to all applicable laws, rules, regulations and orders, governmental action or inaction of any governmental authority having jurisdiction, including restrictions on the drilling and production of wells, and regulation of the price or transportation of oil, gas and other substances covered hereby. When drilling, reworking, production or other operations are prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits, equipment, services, material, water, electricity, fuel, access or easements, or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot, strike or labor disputes, or by inability to obtain a satisfactory market for production or failure of purchasers or carriers to take or transport such production, or by any other cause not reasonably within Lessee's control, this lease shall not terminate because of such prevention or delay, and, at Lessee's option, the period of such prevention or delay shall be added to the term hereof. Lessee shall not be liable for breach of any provisions or implied covenants of this lease when drilling, production or other operations are so prevented or delayed.

12. **Breach or Default.** No litigation shall be initiated by Lessor for damages, forfeiture or cancellation with respect to any breach or default by Lessee hereunder, for a period of at least 60 days after Lessor has given Lessee written notice fully describing the breach or default, and then only if Lessee fails to remedy the breach or default within such period.

13. **Warranty of Title.** Lessor Lessee at Lessee's option may pay and discharge any taxes, mortgages or liens existing, levied or assessed on or against the leased premises. If Lessee exercises such option, Lessee shall be subrogated to the rights of the party to whom payment is made, and, in addition to its other rights, may reimburse itself out of any royalties or shut-in royalties otherwise payable to Lessor hereunder. In the event Lessee is made aware of any claim inconsistent with Lessor's title, Lessee may suspend the payment of royalties and shut-in royalties hereunder, without interest, until Lessee has been furnished satisfactory evidence that such claim has been resolved.

14. **Pugh Clause.** Notwithstanding any provisions of this lease to the contrary, upon expiration of the primary term, or upon cessation of "continuous drilling operations" (as hereinafter defined), whichever is later, this lease shall terminate as to all the lands covered hereby except lands within a production or a spacing unit prescribed by law or administrative authority, on which is located a well producing, or capable of producing, oil and/or gas. Lessee shall be considered to be engaged in "continuous drilling operations" for the purposes hereof if (I) Lessee is engaged in drilling, reworking or completion operations on a well located on the leased lands, or on lands included in a production or a spacing unit which contains a portion of the leased lands, or (II) Lessee has completed or abandoned a well located on the leased lands, or on lands included in a production or a spacing unit which contains a portion of the leased lands, within 180 days prior to the end of the primary term. Lessee shall be deemed to be engaged in continuous drilling operations for as long thereafter as Lessee conducts drilling, reworking or completion operations on the leased lands, or on lands included in a production or a spacing unit which contains a portion of the leased lands, with not more than 180 days elapsing between the completion or abandonment of one well and the beginning of operations for the drilling of an additional well or reworking an existing well.

IN WITNESS WHEREOF, this lease is executed to be effective as of the date first written above, but upon execution shall be binding on the signatory and the signatory's heirs, devisees, executors, administrators, successors and assigns, whether or not this lease has been executed by all parties hereinabove named as Lessor.

LESSOR(S)

Edward Patrick Lynch

Edward Patrick Lynch

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ACKNOWLEDGEMENTS

STATE OF ND)
) ss.
COUNTY OF WILLIAMS)

On this 20th day of DECEMBER, 2009, before me, the undersigned Notary Public in and for said county and state, personally appeared **Edward Patrick Lynch, a married man dealing in his sole and separate property** known to me to be the person or persons whose names are subscribed to the foregoing instrument, and acknowledged that the same was executed and delivered as their free and voluntary act for the purposes therein set forth. In witness whereof I hereunto set my hand and official seal as of the date hereinabove stated.

My Commission Expires 11/3/2012

Kent M Lynch
Notary Public
Williston, ND

KENT M LYNCH
NOTARY PUBLIC
STATE OF NORTH DAKOTA
My Commission Expires November 3, 2012

COUNTY RECORDER
McKENZIE COUNTY
STATE OF NORTH DAKOTA

County Recorder 396124
McKenzie County
Watford City ND 58854 Page 4 of 4
COUNTY RECORDER, MCKENZIE COUNTY, ND
I certify that this instrument was filed and recorded. 396124
Ann M Johnsrud, County Recorder Fee $19.00
By Ann M. Johnsrud Jan 07, 2010 03:59 PM

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Testimony of Suzanne Vohs
Concerning SB2134

Senate Energy and Natural Resources Committee
January 12, 2017, 9:00 AM

For Against

Honorable Senators and Representatives:

In regards to SB 2134. I am deeply troubled by the unlawful taking of a great many of my families mineral rights. I hope you have the courage to do what is right and pass legislation to correct this terribly unjust and illegal taking of not only my family's legacy of mineral rights, but many other family's mineral right legacies in addition to ours. Let me tell you my family's story.

In 1904 my Great Grandfather Adolph Vohs brought his family to North Dakota. He and the family worked hard to to eke out an existence in harsh conditions in the early days of Williston, North Dakota. Words echo through my mind from a recording his son, my Grandfather A.J. Vohs, recorded for the the oral history project at the North Dakota Historical Society. Those words related how they built a 'tar paper shack' to live in for a family of eight. Five children and their parents. A tar paper shack in the harsh weather of North Dakota!! They were determined to make a life there. Sadly, three of those children did not survive to adulthood, and yet the family persevered. Over several years they were able to establish a cattle ranch on the river. It was good planning to position the cattle near the river. One of those ranches was exactly west of where the highway 85 bridge now spans that water source. They supplied Williston and much of the surrounding area with meat. Subsequently, they opened Vohs' City Market. Eventually the ranch and the store passed to my Grandfather, A.J. Vohs and his two brothers Addie and Heinrich Vohs. While the brothers worked the ranches and the City Market they were proud of their town and Williston and helped it grow into the city it is today. My Grandfather, A.J. Vohs, was the first fire chief of Williston. His brother Heinie was also with the fire department. My grandfather was instrumental in creating and making Williston's first food pantry successful in reaching out to those who were suffering through the very difficult times of the dust bowl in the early 1930's. I want you to know they gave of themselves to their community. They were good and honorable citizens. They gave of themselves so their fledgling town and state could thrive. And then,in the early 1950's, the brothers agreed to let the waters from the Garrison Dam occupy some of their precious land. What they did not agree to was giving up any of their mineral rights. They specifically and knowingly reserved the mineral rights and did not relinquish them. The three Vohs brothers all lived on the same street within blocks of each other. My father Donald K. Vohs was able to grow up directly across the street from his two cousins, John Vohs and Margery Vohs. They were 3rd generation North Dakotans. My father married my mother, Florence H. Grover in Williston. Both my parents were born and raised there. My father worked for the Great Northern Railroad for 35 years with his run between Williston and Glasgow. My cousin Eleanor Wallace married Jack Snyder who would eventually become mayor of Williston. My ancestors gave themselves to that community and had the utmost faith in the government of North Dakota. I always have fondly revered the people of North Dakota for their ethics and moral fiber. My ancestors believed in and trusted their state and local government. They worked for their town and they worked for the betterment of their state. Now we come to the 4th generation. As my ancestors before me I worked and worked and worked my whole life. My first job was an entire summer at the age of twelve. I, and my disabled brother, are the last of my dad's line. I have struggled

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to make ends meet most of my life. I got married straight out of high school at the age of seventeen. With no college, wages weren't so good. Although I worked and took college courses throughout my life, it just seemed the financial struggling and juggling was ever present. When my parents passed away within three months of each other, I chose to rearrange my life in order to care for my brother, who has brain damage from birth. I have taken care of him for 13 years now. I don't get a break. Sometimes I just wish I could have a day for me but, really I am happy knowing my brother is cared for by someone who loves him and I know he is safe. It seems like I was always juggling dollars just to get by. My father left the family mineral rights to me. I didn't know exactly what that meant or what it would hold for us. A few years later I started getting what I thought was junk mail from people wanting to discuss my minerals with me. They all went in the trash until one day when I got a call from my Dad's cousin John Vohs inquiring as to why I hadn't responded to those perceived 'junk mails'. I then actually spoke to one of them. He called himself a landman. Unfamiliar term to me. Oh my goodness!! Suddenly there was light at end of a very long tunnel. They were offering me money to lease those minerals. It seemed our existence would no longer be a struggle. What a massive relief that would be. I read everything I could in an effort to understand this new world. It was very complicated to sort out. On December 18, 2009, I, as Trustee, signed a lease indicating '276.80 gross acres more less for the purpose of developing and producing oil and gas' !! This would lead any reasonable person to rely on a contract. An offer and acceptance had taken place. What my agreement states and what actually happened are not the same. I was grossly misled. When I learned Continental Oil was building a much publicized and acclaimed 14 well super pad, I was relieved all the years of struggle would come to an end. As the super pad was completed, I set out for North Dakota to see it. I was so proud of North Dakota and my 14 well super pad. Imagine my confusion when I was contacted, while on the road in North Dakota, and told not to go near that super pad. I was told there was a guard and I was not even to go near there and definitely not to take pictures. This was strange since I had already reached North Dakota and driven by many oil wells. They were not fenced in and they definitely didn't have guards. Well, I did drive by the super pad anyway. I hadn't driven thousands of miles just to turn around a go home. They were fenced in with a fence that may have been 10 or 12 feet high. I couldn't see in. The fence was solid. Imagine my further consternation when, within days, the press was indicating Heidi Heitkamp would be touring the super pad. What was secret from me, a mineral owner whose oil would soon be extracted from the earth, that wasn't secret from a North Dakota Senator? It just seemed so cloak and dagger kind of weird to me. I can only wonder, as I look back on that, if they had already stolen my minerals from me. I was heartbroken and shocked to eventually learn the State of North Dakota had used some illegal creative angle to steal (yes Steal!) property that had been in my family for over 125 years. They took what had been worked so hard for, over the course of 125 years, without any due process, compensation or even notice so that I could voice my protest. It is my understanding they were given a dollar amount in the millions just for the lease! North Dakota and Big Oil picking on the little guy. Me. Someone without the dollars to fight back. I'm sure they know all of us little guys they stole from can't possibly have the kind of financial resources to fight back. I'm certain I am not their only victim. The highway 85 bridge does not stop the Garrison Dam from changing the flow of water that inundated my family's land and changed the High water mark that was the historic high water mark when my Grandfather signed his agreement which did not include relinquishing his mineral rights.

How does that bridge become come some arbitrary point to determine where North Dakota can and cannot steal mineral rights? What basis of fact is there that suddenly, West of that bridge, the high water mark is determined differently than East of that bridge????? Are you kidding me? That's nonsensical. The state of North Dakota should be ashamed of their failure to recognize and follow the North Dakota State Constitution. I feel as if I was preyed upon. This has created in me gut wrenching emotions and mind boggling

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thoughts attempting to sort through all of this injustice. My thoughts question how could something so egregious could be happening in this country? And in North Dakota? The state I have heretofore thought so highly of. I was grateful the 3 generations of my family before me had the foresight to retain those mineral rights. I was relieved that in the later years of my life to finally be getting a break from my financial hardships and experience the benefits the legacy my beloved ancestors had the foresight to preserve and hang onto all the way to me, the fourth generation from my family's beginnings in North Dakota 125 years ago. I just wanted you to know who I am. I am a descendant of hard working North Dakota citizens who trusted the agreements they made would be honored. They have not been honored. I ask that you please right this injustice. I ask you to please recognize those mineral owners West of the highway 85 bridge have been victims of an unlawful taking also. Please pass legislation to correct this huge wrong done to many trusting North Dakota citizens.

Suzanne Vohs

John Paczkowski

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TESTIMONY ON SENATE BILL NO. 2134

Senate Energy and Natural Resources Committee

John Paczkowski, Assistant State Engineer
Office of the State Engineer/State Water Commission

January 12, 2017

Madam Chairwoman and members of the Senate Energy and Natural Resources Committee, my name is John Paczkowski. I am the Assistant State Engineer for the Office of the State Engineer/State Water Commission. I am here on behalf of State Engineer Garland Erbele to present our testimony regarding Senate Bill No. 2134, which seeks to create and enact a new section to chapter 54-01 of the North Dakota Century Code.

Let me start off by saying that given the various, ongoing sovereign land-related lawsuits that the Office of the State Engineer is party to, I am limited as to the information I may be able to provide and the questions I may be able to address. Therefore, my testimony will focus on providing background information as it relates to the State Engineer's responsibilities to manage the state's sovereign lands.

North Dakota's sovereign lands are those areas, including beds and islands, lying within the ordinary high water mark of the state's navigable waters.

There are two key terms in the definition I just gave you that I would like to further clarify. The first is "navigable waters." The United States Supreme Court has stated that navigable waters are those waters that are navigable in fact when they are used, or are susceptible of being used, as highways for commerce in the customary modes of trade or travel.

The second important term is "ordinary high water mark" which the North Dakota Supreme Court has affirmed as that 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. 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 state jurisdiction and ownership.

Given the importance of the ordinary high water mark when it comes to determining the boundary of the state's sovereign land, in 2007 the Office of the State Engineer developed a document entitled, "Ordinary High Water Mark Delineation Guidelines," the goal of which was to develop a consistent and technically defensible approach for delineating the ordinary high water mark in both riverine and lake settings in North Dakota. This document spells out the various indicators that can be used to

delineate the ordinary high water mark. A delineation will normally involve the assessment of a combination of several different indicators including: vegetation, soils, hydrology, and other physical indicators. Because of the widely varying indicators needing to be considered, a delineation often requires the application of expertise in various scientific disciplines. It should also be noted that the ordinary high water mark moves as the river or lake changes course or elevation. So too does the state's ownership change. As an example, as a river erodes property, the boundary of the state's ownership would move with that erosion. Conversely, as sediment accumulates in the bend of an oxbow, the landowner adjacent to the river could gain property and the state would lose ownership. Similarly, if the river cuts a new channel through an oxbow, the state's ownership interest would move with the water and the previous oxbow would return to the upland owners. Finally, a further example is Devils Lake, where the state's ownership rises and fall with the level of the lake.

It is the State Engineer's responsibility, as statutorily mandated in N.D.C.C. § 61-33-05 to manage, operate, and supervise North Dakota's sovereign lands for multiple uses that are consistent with the Public Trust Doctrine, and in the best interest of present and future generations. Therefore, it is the State Engineer that determines which waters are navigable and the ordinary high water mark on those waters.

Thank you for the opportunity to comment on this matter.

Lance Gaebe

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(neutral)

DEPARTMENT OF
ND TRUST LANDS
INVESTING FOR EDUCATION

Lance D. Gaebe, Commissioner

TESTIMONY OF LANCE GAEBE
on SENATE BILL 2134

SENATE ENERGY AND NATURAL RESOURCES COMMITTEE
January 12, 2017

I am Lance Gaebe, Commissioner of University and School Lands. Along with my coworkers in the Department of Trust Lands, I work for the Board of University and School Lands.

The State Constitution and Century Code designate the Board of University and School Lands (Board) as the governing body for a grant of land received at statehood for the benefit of education and certain institutions. The land, the proceeds and investments are managed in several permanent trusts, including the Common Schools Trust Fund, for the benefit of the institutions for which the land was granted.

This responsibility for permanent trusts is separate and distinct from the oversight of sovereign minerals described in Senate Bill 2134.

Statute directs the Board to also manage state-owned minerals and the oil, gas and related hydrocarbons within the beds of the State's navigable waters. On behalf of the State, the Board oversees the Strategic Investment and Improvements Fund (SIIF - formerly the Land and Minerals Trust Fund) which receives the revenues from sovereign minerals. The Board leases the rights to produce oil and gas from the minerals associated with State sovereign lands, which N.D.C.C. ch. 61-33 defines as those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams. The Land Board has had this management responsibility since at least 1977.

Under the Missouri River within Lake Sakakawea, mineral acres have long been leased based upon where the river channel existed prior to inundation by the reservoir. West of the lake, sovereign minerals beneath the Missouri and Yellowstone Rivers are delineated by the ordinary high water mark of the current river channel. The Highway 85 Bridge near Williston serves as the easily distinguished division between these practices.

There has been leasing and production of sovereign oil and gas interests for decades. However, until the onset of horizontal drilling in North Dakota, these management guidelines were rarely challenged. There was not substantial interest in how inundated mineral acres were managed or determined since the technology to produce those acres was not extensively utilized here.

The Office of the State Engineer established the State Ordinary High Water Mark Guidelines in 2007, around the same time as interest was growing in leasing "river acreage" for oil and gas production. Thus, the Board worked in close cooperation with the State Engineer to formally and scientifically delineate the OHWM of the Yellowstone and Missouri Rivers. Since the State has always asserted the public's ownership to be within the boundaries of the OHWM, the studies were conducted simply to determine, to the greatest degree of accuracy possible, where those boundaries lie.

An engineering consulting firm was contracted to complete four separate task orders or phases of a study. West of the Williston area, the firm used the State Engineer's OHWM delineation standards and conducted on-the-ground and on-the-water inspections to analyze the vegetation, soils and hydraulic characteristics for a determination of the ordinary high water mark of the free-flowing river. In the areas east of Williston, the contractor used a combination of pre-reservoir maps and photos, and high resolution scanning equipment to gather the best information available on the historic ordinary high water mark of the Missouri River prior to the formation of Lake Sakakawea.

Prior to these formal investigations, the Department of Trust Lands determined State mineral ownership using in-house aerial photographs. Mineral acreage was generally determined only when specific tracts were nominated for oil and gas leasing.

Bartlett and West Engineering was the primary contractor for all of the technical reviews which were a primary step in the process of determining eligible acreages for state-issued oil and gas leases on sovereign lands. However, embedded islands and previous stipulations of interest are examined on a case-by-case basis. The State Engineer retains final authority as to the boundaries of the OHWM.

While the Board on University and School Lands has not reviewed this specific bill, it will no doubt appreciate the legislative efforts to codify policy on state ownership of oil, gas and related hydrocarbons beneath Missouri River reservoirs.

During its meeting on October 18, 2016, the Board stated that it has been consistent in its leasing practices concerning the minerals under the Missouri River and Lake Sakakawea. During its discussion, the Board stressed that for purposes of leasing sovereign minerals it has utilized the Phase I Delineation, which established the ordinary high water mark of the Yellowstone and Missouri Rivers from the Montana state line to the Highway 85 Bridge. The Board also emphasized its policy to continue leasing minerals between the Highway 85 Bridge and the Four Bears Bridge using the Phase II study which identified the historic river channel as it existed immediately prior to inundation by Lake Sakakawea. The Board did not initiate any of the litigation regarding the minerals.

At that meeting, the Board adopted a motion which emphasized that it will not change its leasing practices concerning the minerals under the Missouri River and Lake Sakakawea until the Legislative Assembly has considered a definition of the Ordinary High Water Mark as it is used in establishing the State's sovereign ownership of oil and gas minerals.

Attached for review are:
1) Citations to existing law relating to the public's ownership of navigable waters and associated lands;
2) A timeline of the State's practices and actions related to sovereign lands;
3) An excerpt of the Barlett and West presentation related to Task Order II, including a list of the references used to determine the historic OHWM; and
4) A depiction of a portion of the Phase II historic Missouri River channel showing the estimated difference with the approximate Corps of Engineers survey of the River.

The OHWM delineation was undertaken to protect the integrity of sovereign assets by having a scientific and defensible basis of evidence of State acreage available to lease. The resources are managed in the best interest of all North Dakotans. In partnership with commercial operators who have leased these assets, the State and its residents have benefitted from substantial oil and gas revenue on these publicly owned lands.

We look forward to working with the Committee on these issues.

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Applicable Laws and Standards

Equal Footing Doctrine - Those States entering the Union after 1789 did so on "equal footing" with the original Thirteen, possessing the same ownership over sovereignty lands.

Submerged Lands Act of 1953. 43 U.S.C. § 1301

North Dakota Century Code (excepts)

61-33-01. Definitions.
As used in this chapter, unless the context otherwise requires:
1. "Board" means the sovereign lands advisory board.
2. "Board of university and school lands" means that entity created by section 15-01-01.
3. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the ordinary high watermark and are not sovereign lands.
4. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

61-33-03 Transfer of possessory interests in real property. All possessory interests now owned or that may be acquired except oil, gas, and related hydrocarbons, in the sovereign lands of the state owned or controlled by the state or any of its officers, departments, or the Bank of North Dakota, together with any future increments, are transferred to the state of North Dakota, acting by and through the state engineer. All such possessory interests in oil, gas, and related hydrocarbons in the sovereign lands of the state are transferred to the state of North Dakota, acting by and through the board of university and school lands. These transfers are self-executing. No evidence other than the provisions of this chapter is required to establish the fact of transfer of title to the state of North Dakota, acting by and through the state engineer and board of university and school lands. Proper and sufficient delivery of all title documents is conclusively presumed.

. . .

61-33-06. Duties and powers of the board of university and school lands. The board of university and school lands shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all subsurface rights of the owner in its own name; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter

North Dakota Administrative Code (Article 89-10),
North Dakota Sovereign Lands Management Plan,
North Dakota Office of the State Engineer- Ordinary High Water Mark Delineation Guidelines

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Timeline of State Activity Related to Sovereign Lands

- The 1977 Legislature defined "sovereign lands" as everything "within the ordinary high watermark." 1977 N.D. Session Laws ch. 144 § 1 (repealed 1989 N.D. Sess. L. ch. 552, § 4).

- From 1977 to 1989, the Board had authority over both the surface and subsurface of sovereign lands, including the power to convey interests.

- In 1989, the Legislature again defined state title as everything "within the ordinary high watermark." N.D.C.C. ch. 61-33, 1989 N.D. Session Laws ch. 552

- The 1989 legislature gave the State Engineer's Office authority to manage the surface and the Board authority over the oil, gas and hydrocarbons within the subsurface, with each agency having the power to convey interests.

- In 2007 the Office of the State Engineer issued the North Dakota Sovereign Land Management Plan and Ordinary High Water Mark Delineation Guidelines.

- In 2009, the Board and the State Engineer engaged Bartlett & West, a private engineering company, to undertake a comprehensive study of the OHWM along the Yellowstone River and the Missouri River from the Montana border to river mile marker 1549 near Williston (Phase I Delineation).

- In 2010, the Board again contracted with Bartlett & West to approximate the location of the OHWM of the Missouri River before inundation by Lake Sakakawea from river mile marker 1574 near the Furlong Loop to river mile marker 1482, the border of the Fort Berthold Reservation (Phase II). Study was completed using historical aerial photography, elevation data, and topographic maps.

- In 2010 the Board authorized Phase III to investigate specific and isolated sections of the Missouri and Yellowstone Rivers between Williston to the Montana border that could not be fully completed under Phase I due to location and complexity.

- In 2012 the Board initiated the review of the estimated historic OHWM between the Four Bears Bridge and the Garrison Dam (Phase IV) using the same techniques as Phase II.

- In 2013, the North Dakota Supreme Court issued a decision in *Reep v. State* and *Brigham v. State* holding that the State owns the mineral interests up to the ordinary high water mark of navigable rivers and water bodies.

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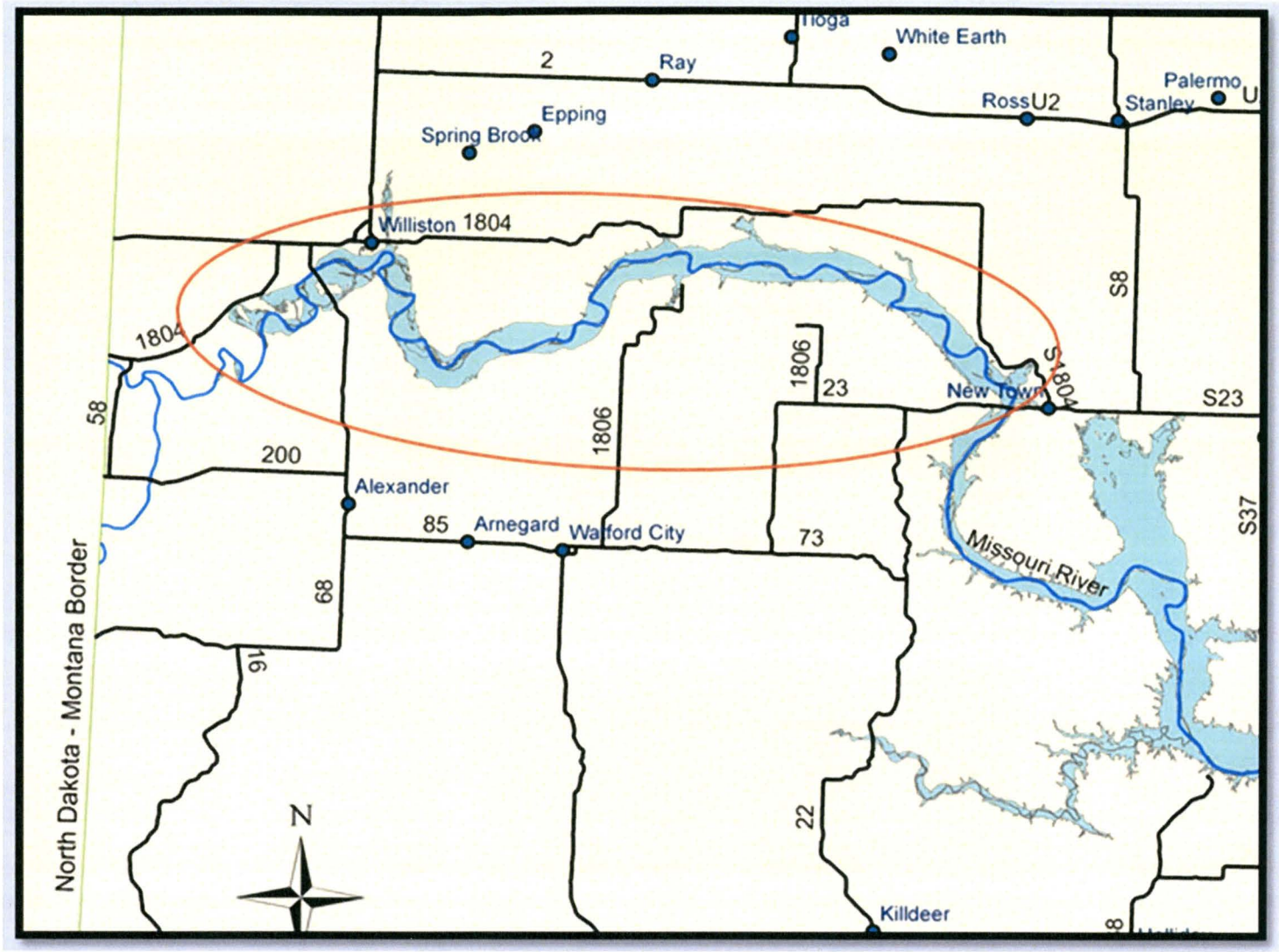
Selections of Bartlett and West 2011 Presentation Related to Task Order II



AERIAL PHOTOS/TOPO DATA

- 1943 – Corps of Engineers (Aerial and Topo)
  - Section Corners Identified
  - Photos used to generate the topographic information
- 1951 – ND Geological Survey
- 1958 – ND Geological Survey (Best Quality)
- USGS Quad Maps; 2009 Aerial Photos; GLO

INVESTIGATION

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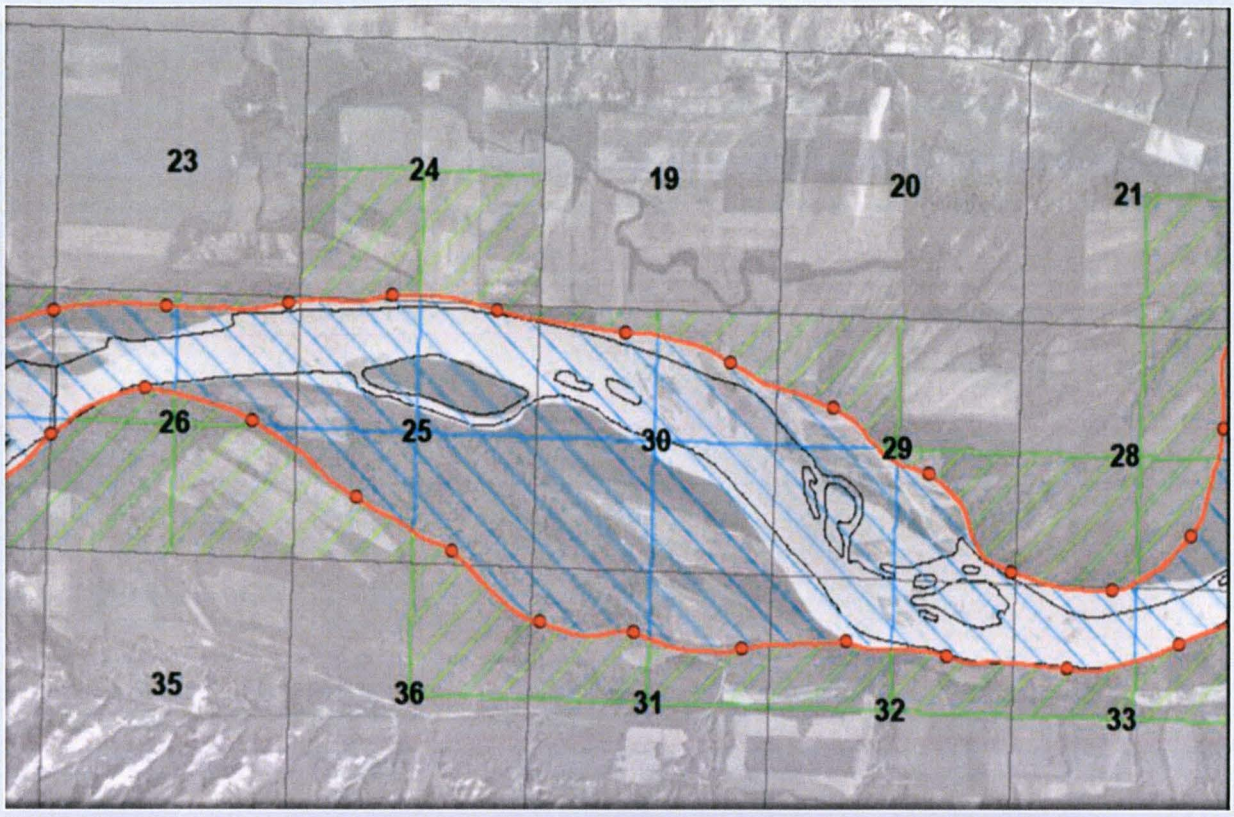
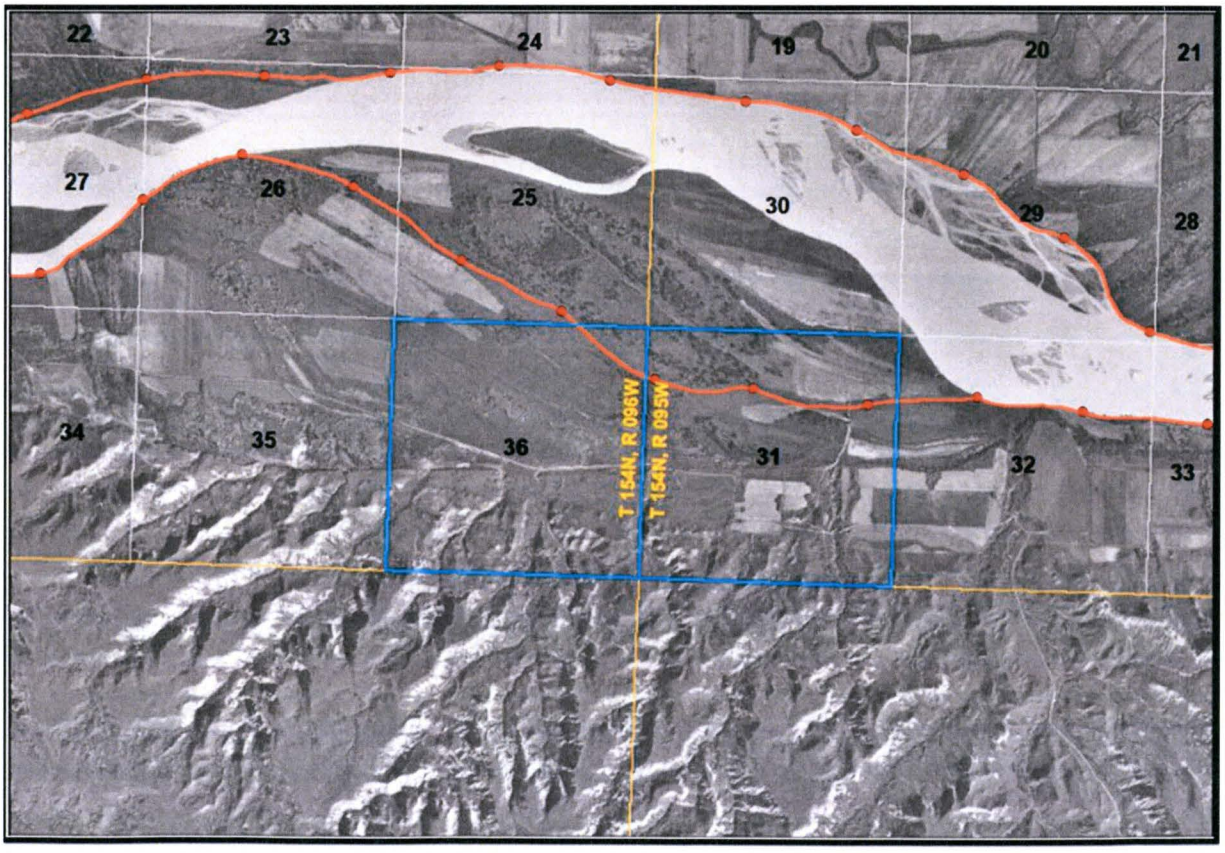
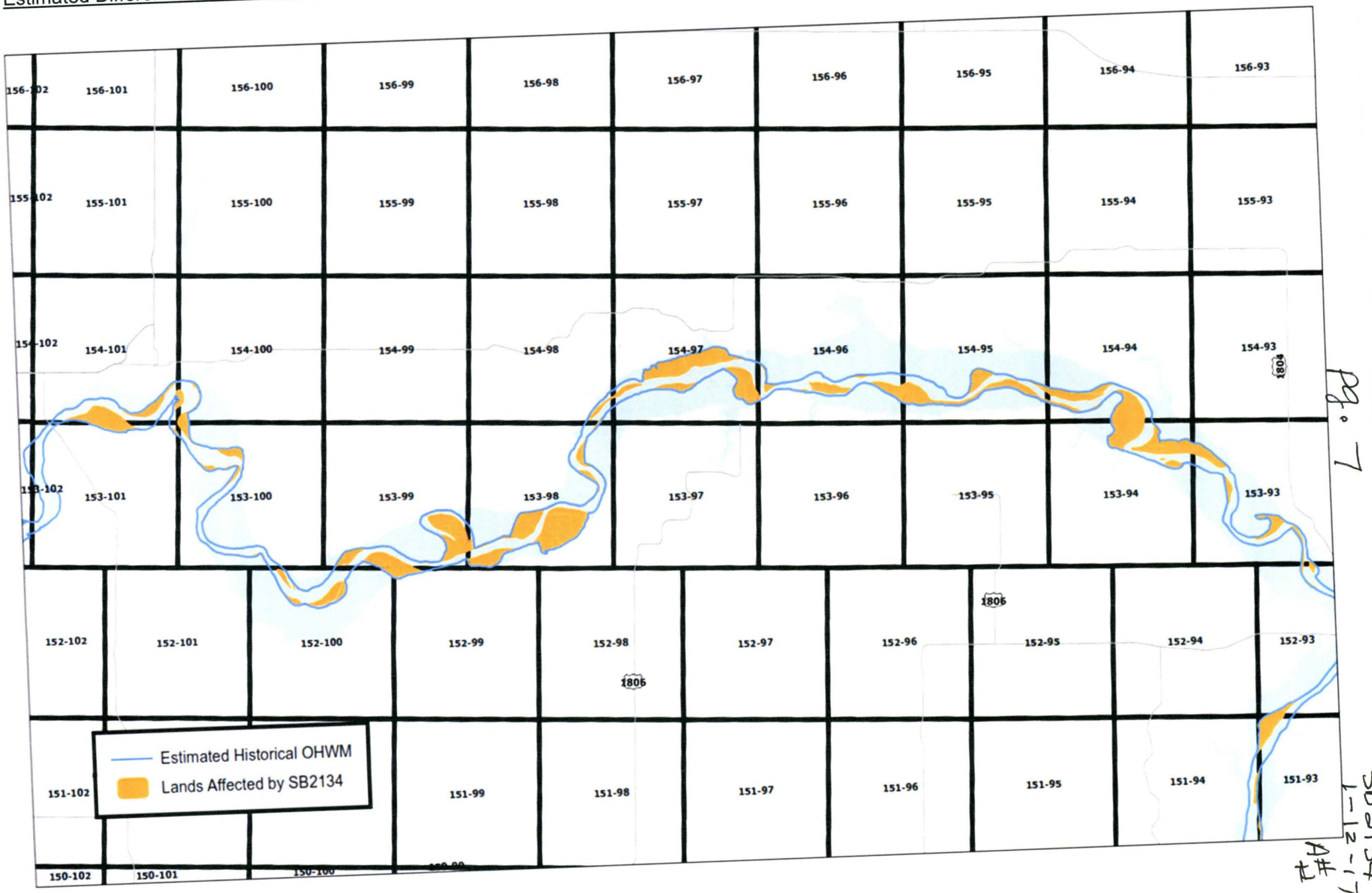




Estimated Difference Betweeen Phase II Depiction of Historic River Channel and the Approximate Corps of Engineers Survey of the Pre-Dam River



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January 12, 2017

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To: Chair Jessica Unruh
NS State Legislature

From: Standing Rock Sioux Tribe
Fort Yates, ND

Attached are documents relative to Mineral Rights reserved by the Standing Rock Sioux Tribe.

Please find the Dakota Territorial Act prior to the 1868 Treaty of April 29, 1868 at Fort Laramie.

Public Law 85-915 of September 2, 1958 which is negotiated language to reserve the river bed which is 20,000 acres and the mineral rights of 55,993.82 acres

Submitted on behalf of the Standing Rock Sioux Tribe.

Phyllis Young
Box 69
Fort Yates, ND 58538

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Dakota Territorial Act

Chapter LXXXVI.—*An Act to provide a temporary Government for the Territory of Dakota, and to create the Office of Surveyor General therein.*

Provided, That nothing in this act contained shall be construed to impair the rights of person or property now pertaining to the Indians in said Territory, so long as such rights shall remain unextinguished by treaty between the United States and such Indians, or to include any territory which, by treaty with any Indian tribe, is not, without the consent of said tribe, to be included within the territorial limits or jurisdiction of any State or Territory; but all such territory shall be excepted out of the boundaries and constitute no part of the Territory of Dakota, until said tribe shall signify their assent to the President of the United States to be included in said Territory, or to affect the authority of the government of the United States to make any regulations respecting such Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for the government to make if this act had never passed: *Provided further*, That nothing in this act contained shall be construed to inhibit the government of the United States from dividing said Territory into two or more Territories, in such manner and at such times as Congress shall deem convenient and proper, or from attaching any portion thereof to any other Territory or State.

Source: THIRTY-SIXTH CONGRESS. Sess.II. CH. 85. 1861. Chapter LXXXVI.
(The Statutes at Large, Treaties, and Proclamations of the United States of America, from December 5, 1859, to March 3, 1863., Ed. George P. Sanger, Boston: Little, Brown and Company, 1863)

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Public Law 85-915

September 2, 1958
[H. R. 12662]

AN ACT

To provide for the acquisition of lands by the United States required for the reservoir created by the construction of Oahe Dam on the Missouri River and for rehabilitation of the Indians of the Standing Rock Sioux Reservation in South Dakota and North Dakota, and for other purposes.

Oahe Dam and Reservoir Project, Mo.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in furtherance of the Oahe Dam and Reservoir project as authorized by the Act of December 22, 1944 (58 Stat. 887, 891)—

Acquisition of land.

(a) title to the entire interest, excluding the interest in oil, gas, and all other minerals of any nature whatsoever, in approximately 55,993.82 acres of land within the taking area described in this Act on the Standing Rock Reservation in South Dakota and North Dakota, in which Indians have a trust or restricted interest, and title to any interest Indians may have in the bed of the Missouri River so far as it is within the boundaries of the Standing Rock Reservation, are hereby taken by the United States for the Oahe project on the Missouri River and in consideration thereof the United States will pay to the Standing Rock Sioux Tribe and the individual Indian owners out of funds available for the Oahe Dam and Reservoir project:

(1) a sum aggregating $1,952,040, to be disbursed in accordance with schedules prepared by the Missouri River Basin project investigation staff; and

(2) the amount of $3,299,513, which shall be in settlement of all claims, rights, and demands of the tribe and individual Indians arising out of the taking under this Act, to be disbursed in accordance with the provisions of section 2 hereof;

(b) upon a determination by the Secretary of the Army, filed among the appropriate land records of the Department of the Interior within two years from the date of enactment of this Act, that any of the lands described in this Act are not required for Oahe project purposes, title to such land shall be revested in the former owner; and

(c) if the Secretary of the Army determines that additional Indian lands, tribal or individual, within the Standing Rock Reservation are required for project purposes, he may acquire such lands by purchase with the approval of the Secretary of the Interior, or by condemnation.

Standing Rock Sioux Tribe. Payments.

SEC. 2. The payments authorized by this Act, less the amount heretofore deposited by the United States in the case entitled "United States of America, Plaintiff vs. 2,005.32 acres of land etc. and Sioux Indians of Standing Rock Reservation et al., Defendants", civil numbered 722 filed in the United States District Court for the District of South Dakota, shall be deposited to the credit of the Standing Rock Sioux Tribe in the Treasury of the United States to draw interest on the principal at the rate of 4 per centum per annum until expended. The sum of $1,952,040 shall be allocated in accordance with the tract and ownership schedules to be prepared by the Missouri River Basin investigation staff after consultation with the tribal council to correct known errors. The amounts allocated to the lands owned by individual Indians shall be credited to their respective individual Indian money accounts. No part of the compensation for the property taken by this Act shall be subject to any lien, debt, or claim of any nature whatsoever against the tribe or individual Indians except delinquent debts owed by the tribe to the United States or owed by individual Indians to the tribe or to the United States. One-half of the amount

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paid pursuant to subsection 1 (a) (2) of this Act shall be consolidated with the rehabilitation appropriation authorized by section 5 of this Act and shall be expended in accordance with the provisions of section 5: *Provided*, That a sum not to exceed $726,546 shall be available from said remaining one-half to pay expenses, costs, losses, and damages of members of the tribe as a direct result of moving themselves and their possessions on account of the taking under section 1 of this Act. No part of such amounts shall be used for per capita payments.

Limitation.

SEC. 3. The Secretary of the Army, out of funds appropriated for the construction of the Oahe project other than those authorized by this Act, shall relocate and reestablish such Indian cemeteries, tribal monuments, and shrines within the area taken under this Act as the Standing Rock Tribal Council shall select and designate, with the approval of the Secretary of the Interior.

Indian Cemeteries, Monuments, etc.

SEC. 4. The Secretary of the Army is authorized and directed, out of funds appropriated for the Oahe project, to protect, replace, relocate, or reconstruct any existing essential agency facilities on the Standing Rock Sioux Reservation, including schools, hospitals, service buildings, agents' and employees' quarters, roads, bridges, and incidental matters or facilities in connection therewith, which the Secretary of the Interior determines will be impaired by the construction of the Oahe project.

Reconstruction of facilities.

SEC. 5. There is authorized to be appropriated the further sum of $6,960,000, which shall be deposited in the Treasury of the United States to the credit of the Standing Rock Sioux Tribe to draw interest on the principal at the rate of 4 per centum per annum until expended for the purpose of developing individual and family plans, relocating, reestablishing, and providing other assistance designed to help improve the economic and social conditions of all recognized members of the Standing Rock Sioux Tribe regardless of residence on the reservation: *Provided*, That such fund may be expended in accordance with plans and programs approved both by the tribal council and the Secretary of the Interior: *And provided further*, That no part of such funds shall be used for per capita payments, or for the purchase of land by the tribe except for the purpose of resale to individual Indians in furtherance of the rehabilitation program authorized by this section.

Appropriation.

SEC. 6. All minerals, including oil and gas, within the area taken by this Act shall be and hereby are reserved to the tribe or individual Indian owners as their interests may appear, but the exploration, exploitation, and development of the minerals, including oil and gas, shall be subject to all reasonable regulations which may be imposed by the Secretary of the Army for the protection of the Oahe project.

Mineral rights.

SEC. 7. Members of the tribe now residing within the taking area of the project shall have the right without charge to remain on and use the lands taken by this Act until required to vacate in accordance with the provisions of this Act.

Rights in taking area.

SEC. 8. Up to sixty days before the individual landowners are required to vacate the land in accordance with the provisions of this Act, they shall have the right without charge to cut and remove all timber from their respective lands and to salvage the improvements on their respective lands but, if said rights are waived or not exercised within the time limit herein specified, the tribe, through the tribal council, may exercise the rights: *Provided*, That the salvage permitted by this section shall not be construed to be compensation.

SEC. 9. (a) Except as provided in subsection (b), the schedule under which the tribe and the members thereof shall vacate the taking area shall be as follows:

Schedule for vacating.

(1) Little Eagle and Wakpala districts, within eight months from the date of this Act;

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(2) Kenel district, within twelve months from such date;
(3) Agency district, within eighteen months from such date; and
(4) Cannonball district, within twenty-four months from such date.

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(b) The Chief of Engineers, subject to approval by the Secretary of the Interior, may make such changes in the schedule provided in subsection (a) of this section as he deems necessary, except that, in any event, all lands within the taking area shall be vacated within two years after that date on which the Missouri River is diverted through the tunnels at the Oahe Dam or such prior date as the Chief of Engineers may fix, with the approval of the Secretary of the Interior.

Use of land.

SEC. 10. After the Oahe Dam gates are closed and the waters of the Missouri River impounded, the said Indian tribe and the members thereof shall be given exclusive permission, without cost, to graze stock on the land between the water level of the reservoir and the exterior boundary of the taking area. The said tribal council and the members of said Indian tribe shall be permitted to have, without cost, access to the shoreline of the reservoir, including permission to hunt and fish in and on the aforesaid shoreline and reservoir, subject, however, to regulations governing the corresponding use by other citizens of the United States.

Authorization to purchase and sell certain lands.

SEC. 11. For the purposes of (1) providing substitute land for individual Indians whose land is within the taking area, (2) consolidating land holdings, and (3) eliminating fractionated heirship interests within the reservation, the Secretary of the Interior is authorized to purchase, with funds made available by such individual Indians or by the tribe, land or interests in land, and to sell tribal land upon request of the tribe, but no service charge shall be made by the United States. The land selected by and purchased for individual Indians may be either inside or outside the boundaries of the Standing Rock Sioux Reservation as diminished. Title to any land or interests in land acquired within the boundaries of the reservation shall be taken in the name of the United States in trust for the tribe or the individual Indian for whom the land is acquired, and title to any land or interests in land acquired outside the boundaries of the reservation shall be taken in the name of the individual for whom it is acquired. Trust title shall be subject to the laws and regulations applicable to other trust titles within the reservation.

For the purposes of this section, the Secretary of the Interior is also authorized to partition or sell individually owned land in which all interests are in a trust or restricted status upon request of the owners of not less than a 25 per centum interest in the land. Any such sale shall be by competitive bid, except that with the concurrence of the owners of not less than a 25 per centum interest in the land, any owner of an interest in the land, or the tribe, if the land is within the Standing Rock Sioux Reservation, shall have the right to purchase the land within a reasonable time fixed by the Secretary prior to a competitive sale at not less than its appraised value. If more than one preference right is exercised, the sale shall be by competitive bid, limited to the tribe and to the persons entitled to a preference. The Secretary of the Interior may represent for the purpose of this paragraph any Indian owner who is a minor, or who is non compos mentis, or under any other legal disability, and, after giving reasonable notice of the proposed sale by publication, may represent an Indian owner who cannot be located, and he may execute any title documents necessary to convey a marketable and recordable title.

Nothing in this section shall be construed to diminish the authority to acquire, sell, or exchange land that is contained in other provisions of law.

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Restriction.

SEC. 12. No part of any expenditure made by the United States under any or all of the provisions of this agreement and the subsequent acts of ratification shall be charged as an offset or counterclaim against any tribal claim which has arisen under any treaty, law, or Executive order of the United States prior to the effective date of taking of said land as provided for in section 1 hereof and the payment of Sioux benefits as provided for in section 17 of the said Act of March 2, 1889 (25 Stat. 888), as amended, shall be continued under the provision of section 14 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), on the basis now in operation without regard to the loss of tribal land within the taking area under the provisions of this agreement.

25 USC 474.

Reimbursement.

SEC. 13. The Secretary of the Treasury, upon certification by the Secretary of the Interior, shall reimburse the Standing Rock Sioux Tribe for fees and expenses incurred in connection with the taking of Indian lands within the Standing Rock Sioux Reservation for the Oahe project: *Provided*, That such reimbursable fees and expenses do not exceed in the aggregate $135,000: *Provided further*, That attorney fees shall be paid under the terms of a contract approved by the Secretary of the Interior.

Rejection of payment.

SEC. 14. Any individual member of the Standing Rock Sioux Tribe shall have the right to reject the sum tendered to him as payment in accordance with the schedules to be prepared by the Missouri River Basin investigation staff by filing within one year from the date of this Act a notice of rejection with the Chief of Engineers, United States Army, Washington, District of Columbia. If the land of any Indian rejecting payment is included in condemnation proceedings heretofore instituted, the court in those proceedings shall proceed to determine the just compensation to which the individual is entitled and, if the land is not included in such condemnation proceedings, jurisdiction is hereby conferred upon the United States District Court for the District of South Dakota, or the United States District Court for the District of North Dakota, as the case may be, to determine just compensation in accordance with procedures applicable to the determination of just compensation in condemnation proceedings.

Court costs.

No court costs shall be charged against an individual but all other costs and expenses, including counsel fees, shall be at the contesting individual's expense. If the amount fixed by the court exceeds the amount theretofore tendered to the individual, the Secretary of the Army shall deposit the difference in court; if the amount fixed by the court is less than the amount theretofore tendered to the individual, the difference shall be credited to the United States.

Appropriations.

SEC. 15. There is hereby authorized to be appropriated such amounts as may be necessary for the purposes of this Act.

Definition.

SEC. 16. Subject to the provisions of section 1 of this Act, the taking area referred to in this Act and the land for which the compensation of $1,952,040 has been allowed under this Act, containing approximately 55,993.82 acres, is the land defined in report numbered 134, Missouri River Basin investigation project, and delimited on a map entitled "Map Showing Tribal and Individual Indian Restricted and Trust Land of the Standing Rock Sioux Reservation Acquired by the United States for the Oahe Project and Forming the Basis for the Agreed Sale Price of $1,952,040 Under an Agreement Dated March 24, 1958, Between the United States and the Standing Rock Sioux Tribe" on file in the Bureau of Indian Affairs.

Tax exemption.

SEC. 17. All funds authorized by this Act paid to the tribe and individual Indians shall be exempt from all forms of State and Federal taxation.

Approved September 2, 1958.

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Public Law 85-915

AN ACT

To provide for the acquisition of lands by the United States required for the reservoir created by the construction of the Oahe Dam on the Missouri river and for rehabilitation of the Indians of the Standing Rock Sioux Reservation in South Dakota and North Dakota, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in furtherance of the Oahe Dam and Reservoir project as advertised by the Act of December 22, 1944 (58 Stat. 887, 891)—

(a) title to the entire interest, excluding the interest in oil, gas, and all other minerals of any nature whatsovever, in approximately 55,993.82 acres of land within the taking area described in this Act on the Standing Rock Reservation in South Dakota and North Dakota, in which Indians have a trust or restricted interest, and title to any interest Indians may have in the bed of the Missouri River so far as it is within the boundaries of the Standing Rock Reservation, are hereby taken by the United States for the Oahe project on the Missouri River and in consideration thereof the United States will pay to the Standing Rock Sioux Tribe and the individual Indian owners out of funds available for the Oahe Dam and Reservoir project:...

[Sections Omitted]

Sec. 6. All minerals, including oil and gas, within the area taken by this Act shall be and hereby are reserved to the tribe or individual Indian owners as their interests may appear, but the exploration, explotation, and development of the minerals, including oil and gas, shall be subject to all reasonable regulations which may be imposed by the Secretary of the Army for the protection of the Oahe project.

: Estimate of Fiscal Impact of proposed amendments to SENATE BILL NO. 2134

January 18, 2017

To: Adam Mathiak, ND Legislative Council

From: Lance Gaebe, ND Department of Trust Lands

RE
On January 16, you indicated that the Senate Energy and Natural Resources Committee requested information regarding the fiscal impact of Senate Bill No. 2134 of two potential changes to the boundaries of the area included in the historical riverbed channel, specifically:

1) What is the estimated fiscal impact if the western boundary is extended to the Montana state borderline?
2) What is the estimated fiscal impact if the tribal lands are excluded from Senate Bill No. 2134?

I will address the possible financial impact of both proposals separately, in the context of the explanation of calculations and costs summarized in the fiscal note submitted to Legislative Council on January 10, 2017 for Senate Bill No. 2134 as introduced. See: http://www.legis.nd.gov//assembly/65-2017/fiscal-notes/17-0159-05000-fn.pdf

The Strategic Investment and Improvements Fund (SIIF) receives the oil and gas revenues from the minerals associated with State sovereign lands, which N.D.C.C. ch. 61-33 defines as those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams. The Board of University and School Lands manages state-owned minerals and the oil, gas and related hydrocarbons within the beds of the State's navigable waters.

Under the Missouri River within Lake Sakakawea, sovereign mineral acres have historically been leased based upon the estimated OHWM of the river channel as it existed prior to inundation by the reservoir. West of the lake, sovereign minerals beneath the Missouri and Yellowstone Rivers are leased based upon the ordinary high water mark of the current river channel. The Highway 85 Bridge near Williston is the point of change between these practices.

1) Estimated Fiscal Impact of change number extending the use of the U.S. Army Corps of Engineers (USACE) survey to the Montana border.

"[T]he last known survey conducted by the [USACE] in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe" extends only to river mile 1576.8, which is between Williston and the Confluence of the Missouri and Yellowstone Rivers.

The Department of Trust Lands is not aware of any Corps' survey data on the Missouri River (related to the construction of the reservoir) from river mile 1576.8 continuing west the ten river miles to the Montana board (approximately river mile 1586.5) or any similar surveys done within the 17.1 miles of the Yellowstone River within the State. Therefore, a calculation for these two river segments is not possible based on historical records.

In the area from the Hwy 85 Bridge (approximate river mile 1,552) to the end of the USACE survey conducted in connection with the construction of the reservoir up to river mile 1576.8, the

Department estimates that the SIIF would repay revenue collected on an estimated 6,530 acres, and also relinquish future royalty revenue.

The impact includes:

→ The return of $21,030,422 of bonus and rent,
→ The repayment of $8,936,971 of royalties collected and anticipated through FY 2017,
→ Forfeiture of claim to $6,153,486 of presently escrowed royalty.

Additionally, based upon FY 2015 and 2016 average level prices and production, the estimated impacts on future royalty revenue would be a reduction of $2,506,636 in each of the next two biennia.

These estimates are in addition to the amounts detailed in the referenced January 10 fiscal note.

2) Estimated Fiscal Impact of change excluding the area of the Fort Berthold Reservation from Senate Bill No. 2134.

This change would reduce the fiscal impact of the bill, since the implementation a new definition of the ordinary high water mark would not change the leasing practice in this area. Therefore, the State's present claim to its sovereign minerals as determined in a Phase IV investigation of the historical OHWM would not be impacted.

If the area of the Missouri River within the Fort Berthold Reservation is not included in the definition of mineral ownership created by the bill, the January 10 fiscal note's negative revenue would be reduced by $43,863,534 in the 2017-2019 biennium as a result of the SIIF not repaying:

→ $22,581,912 of bonuses that have been collected,
→ $1,435,420 of royalties that have been collected,
→ $16,500,209 of royalties that have been escrowed, in which the state maintains a claim
→ $3,345,993 of royalties projected to be collected during biennium
(based upon 2016-2017 price and production)

In the 2019-2021 biennium, the potential reduction in the negative revenue depicted in the January 10 fiscal note is $3,345,993. This is also based upon 2016-2017 price and production.

Lance:

The Senate Energy and Natural Resources Committee recently heard Senate Bill No. 2134. The committee has requested information regarding the estimated fiscal impact for two potential changes to the boundaries of the area included in the historical riverbed channel.

1) What is the estimated fiscal impact if the western boundary is extended to the Montana state borderline?
2) What is the estimated fiscal impact if the tribal lands are excluded from Senate Bill No. 2134?

Please let me know if you have any questions or need additional information. Thanks.

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#1
3-10-17
SB 2134

SB 2134 TESTIMONY - KELLY ARMSTRONG -DIST. 36

Chairman Porter and members of the House Natural Resources Committee, my name is Kelly Armstrong, Senator, District 36. I am here today in support of Senate Bill 2134. This bill seeks to define the high water mark of the little Missouri river under lakes Sakajawea and Lake Oahe as it relates to mineral ownership. Senate Bill 2134 defines the high water mark of the Missouri River and makes it clear that the State only has claim to those minerals under the river channel and not under the lake. There are over 350 wells currently drilled under the lake. Mineral owners are frustrated. Oil Companies are frustrated. Policy makers are frustrated. There are millions of dollars being held in suspense over this issue. There is over $100 million dollars set aside in state funds because of this issue. Mineral owners and companies have spent hundreds of thousands of dollars on legal fees arguing these issues. This issue has been in dispute and/or litigation for at least the last 10 years. And the truth is no one is any closer to a resolution than we were a decade ago. In fact, last fall the ND Land Board voted that action was needed by the legislature to help resolve this issue.

SB 2134 uses the BLM survey which was done on the ground in preparation for flooding lake Sakajawea to define the high water mark of the Missouri river. Essentially, the bill freezes the river channel in time upon the flooding of the lake. The state will own the minerals inside of that high water mark and private mineral owners will own the minerals outside of that high water mark. In 2009 the state conducted a survey of the original high water mark of the Missouri river using photographs and other techniques. The state and the Federal governments surveys are not the same, resulting in constant dispute placing mineral owners and operators in the middle of a government dispute. The BLM Survey is the most appropriate survey to use as a basis for determining the historical high water mark of the Missouri River, as it was the survey conducted as a part of the Pick Slone Act in preparation for flooding of the lake. As investigations into this survey have continued following the introduction of this bill, it has been discovered that the OHWM in small and isolated segments of the river may be designated incorrectly in the BLM Survey. I hope the committee will work with bill sponsors on keeping the Corps survey as the primary survey as it is the most accurate and reasonable place to start, but possibly include some language to investigate these small and isolated areas further.

Over the last decade the State Land Department has been aggressively claiming minerals under the river in and around lake Sakajawea. Further, in recent Court filings the State has claimed that they may have a claim to all the minerals under the high water mark of Lake Sakajawea which would result in a multi-billion dollar taking. To say that these events have concerned mineral owners, oil operators, legislators, and anyone who cares about private property rights would be a massive understatement. Legislation is needed to clearly define what North Dakota's Policy is regarding mineral ownership and legislation is needed to define the ordinary high water mark of the Missouri river under the lake. These issues can longer be left to the courts, there simply is no satisfactory resolution to be found there.

#2
3-10-17
SB 2134
Unruh

Testimony of Senator Jessica Unruh for SB 2134
House Energy and Natural Resources
Chairman Todd Porter

SB 2134 seeks to define the ordinary high water mark of the Missouri River under lakes Sakajawea and Oahe as it relates to mineral ownership, clarifying that the State of North Dakota only has claim to those minerals under the original river channel, and not the entire lake. This original river channel is defined and outlined in the bill with the river survey completed by the Army Corps of Engineers that utilized OHWM designations pursuant to the Pick-Sloan Missouri basin project. To put this simply, that means that if the state claimed ownership of the surface of the land along the river corridor before the lake was inundated, we clarify with this bill that the state owns only those minerals tied to the surface at that point in time as well.

Since horizontal drilling began in the late 2000's, mineral ownership under Lake Sakakawea has become a point of contention. The State of North Dakota has utilized different surveys to designate mineral ownership, decisions which resulted in multiple law suits and litigation between the State, the Federal government, the companies and the private mineral owners. The later surveys completed by the state in the late 2000's resulted in many additional mineral acres previously designated as private and Federal ownership now as state ownership, without any notice to others with potential interests or guidance from the legislature. The total area affected by this bill is over 40,000 acres .

Particularly, west of the Highway 85 bridge, the western boundary identified 12 river miles west of the bridge in the bill, the state currently claims mineral ownership of everything up to the current day ordinary high water mark in this area. As originally introduced, this area was not included in the bill, and this point of contention was the only opposing testimony we received on the Senate side. The problem with this area is the vast overestimation of state mineral ownership, as the original river channel was much narrower prior to the inundation of Lake Sakakawea. This bill would greatly reduce the mineral acres the state would claim ownership to, rightfully returning those acres to private land owners.

As a result of litigation on this issue, the state of North Dakota set aside some funds in the case that the courts do not rule in the state's favor. There is approximately $142 million set aside in the SIIF fund and $60 million in an escrow account at the Bank of North Dakota. These funds won't cover the negative fiscal impact entirely for the upcoming biennium, but it will reduce the dollar amount you see on the fiscal note.

The amendments that I handed out with my testimony address some of the inconsistencies that have been uncovered since we completed our work in the Senate on this issue. Our goal with this bill is to provide clarity to the courts system on what minerals the state is claiming ownership to under Lake Sakakawea, and without addressing these inconsistencies with the Corps survey, further litigation is possible. These amendments address concerns expressed with

the survey and outline the path to correct them, and also clarify that the state claims ownership only up to the historical OHWM. They also provide clarity to both the implementation of the new OHWM determination and guidance for the process to challenge the final OHWM determinations. Others will walk you through the amendments and inconsistencies with the survey more specifically, but I want to be sure to address two points to the committee this morning.

First, the importance of addressing the entire Missouri River system with this bill. The Missouri River could be split into three segments for the purposes of this bill. The farthest west segment is that which goes from the Montana border to the western edge of current day Lake Sakakawea. Mineral ownership can be defined based on the current day Ordinary High Water Mark (OHWM), with no need to assess this portion of the channel specifically with the bill. The middle segment would be Lake Sakakawea. The southern segment is defined in the amendments as the Historical Missouri riverbed channel. If you look on page one of the amendments, you can see the definition of the historical Missouri riverbed channel. This is defined as the riverbed channel as it existed before the closure of the Pick-Sloan Missouri basin project dams from the Garrison Dam to the southern border. This bill is comprehensive in the fact that it clarifies mineral ownership throughout the whole river system affected by inundation of Lake Sakakawea, which is the premise for the purpose of the bill. The difficulty in specifically defining this lies in the area inundated by Lake Sakakawea, because it is impossible to go out on the ground to complete another survey of what the OHWM was prior to its inundation.

This brings me to the second point I'd like to make this morning. The best and last known on the ground survey was completed by the Corps, as has been previously mentioned, and the importance of using the Corps survey as a basis and starting point for identifying ownership of the minerals is critical. As a professional environmental specialist who works on issues such as OHWM on a daily basis in my job, I can vouch for the fact that nothing can substitute an on the ground survey when determining the OHWM, especially when looking at historical situations such as these. This is why the amendments in front of you state the corps survey must be considered the presumptive determination of the OHWM of the river channel. Any inconsistencies should be proven without a doubt, and that is the purpose of the study listed in Section 2.

With this bill we clarify state ownership of minerals under the Missouri River system. We instill certainty into the oil and gas leasing process under Lakes Sakakawea and Oahe as we look to the future. We clarify the legislature's intent on this issue for the court system. But most importantly, we provide the proper return of mineral acres to their rightful private owners throughout the entire river system.

#2a
3-10-17

17.0159.06005
Title.

Prepared by the Legislative Council staff for
Senator Armstrong
March 8, 2017

SB2134

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide for a legislative management study of the ordinary high water mark of an extent of the historical Missouri riverbed channel; to provide an appropriation; and to provide for retroactive application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed before the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance.

61-33.1-03. Determination of the ordinary high water mark of the historical Missouri riverbed channel.

The corps survey must be considered the presumptive determination of the ordinary high water mark of the historical Missouri riverbed channel, subject only to the

final study adopted by the legislative management's energy development and transmission committee during the 2017-18 interim and judicial review as provided in this chapter.

61-33.1-04. Implementation.

Upon adoption of a final study conducted during the 2017-18 interim by the legislative management's energy development and transmission committee:

1. The board of university and school lands immediately shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final study.

2. Operators of oil and gas wells affected by the study immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the final study. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for the segment of the final study challenged by the action.

61-33.1-05. Actions challenging final study.

An interested party seeking to bring an action challenging the final study conducted during the 2017-18 interim by the legislative management's energy development and transmission committee must commence an action in district court within two years of the date of adoption of the final study. The plaintiff bringing an action under this section may challenge only the segment of the final study which affects the plaintiff's interests. The state and all owners of record of fee or leasehold estates or interests affected by the segment of the final study challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the final study bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by law during the 2017-18 interim by the legislative management's energy development and transmission committee.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.2-07. State engineer regulatory jurisdiction.

This chapter does not affect the authority of the state engineer to regulate the historical Missouri riverbed channel, minerals other than oil and gas, or the waters of the state, provided the regulation does not affect ownership of oil and gas minerals in

and under the riverbed or lands above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.

SECTION 2. LEGISLATIVE MANAGEMENT STUDY - STUDY OF CORPS SURVEY OF EXTENT OF HISTORICAL MISSOURI RIVERBED CHANNEL.

1. During the 2017-18 interim, the energy development and transmission committee shall procure a qualified professional engineering and surveying firm to conduct a study of the corps survey, as defined in section 61-33.1-01, to verify the proper delineation of the ordinary high water mark of the historical Missouri riverbed channel. The study must be limited to the extent from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Upon the effective date of this Act, the legislative management shall commence procurement to select a qualified engineering and surveying firm for the study. Within ninety days of the first date of publication of the invitation, the legislative management shall select and approve an engineering and surveying firm for the study. The firm selected must complete the study within six months of entering a contract with the legislative management. The legislative management may extend the time required to complete the study if the energy development and transmission committee deems an extension necessary.

2. In conducting the study under this section, the delineation of the ordinary high water mark of the corps survey may be adjusted, modified, or corrected only for a segment of the river if clear and convincing evidence establishes the portion of the corps survey for that segment does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, guidelines, and applicable state laws must be considered in the study:

   a. All available historic aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. United States geological survey elevation and Missouri River flow data;

   d. "Ordinary High Water Mark Delineation Guidelines" issued by the state engineer;

   e. "Manual of Surveying Instructions (2009)" issued by the United States bureau of land management;

   f. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high water mark. Lands having agricultural value capable of growing crops or hay, but not merely

intermittent grazing or location of cattle, generally must be considered above the ordinary high water mark; and

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

3. Upon completion of the study, the energy development and transmission committee shall publish notice of the study and make the study available for public inspection and comment. The public must have sixty days after publication of the notice to submit technical comments to the committee and engineering and surveying firm for consideration. The committee shall adopt a final study within sixty days after close of public comments, or such time as the committee may deem necessary. Upon adoption of the study, the study is determinative of the boundary of the ordinary high water mark of the historical Missouri riverbed channel, binding upon the state and all interested parties, subject only to judicial review.

SECTION 3. APPROPRIATION. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the legislative management for the purpose of procuring professional engineering and surveying services in connection with the study required by section 2 of this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 4. RETROACTIVE APPLICATION. This Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high water mark determination by the final study adopted under section 2 of this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership."

Renumber accordingly

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3
3-10-17
SB 2134
Ness

Senate Bill 2134

Testimony of Ron Ness

House Energy and Natural Resources Committee

March 10, 2017

Chairman Porter and members of the House Natural Resources Committee, my name is Ron Ness, president of the North Dakota Petroleum Council. Last year the North Dakota Petroleum Council represented more than 500 companies in all aspects of the oil and gas industry, including oil and gas production, refining, pipeline, transportation, mineral leasing, consulting, legal work, and oilfield service activities in North Dakota. I appear before you today in support of Senate Bill 2134, we support the amendments offered. The amendments provide a clear due process for all parties to have a voice and it can be done in a timely manner and most importantly, it's the right thing to do – get this right.

Senate Bill 2134 is a necessary clarification of mineral ownership under Lake Sakakawea and the high-water mark of the Missouri River essentially from the Highway 85 bridge to the Garrison Dam. The area comprising the Fort Berthold Indian Reservation is a continuing dispute between the State of North Dakota and the Three Affiliated Tribes over the ownership of the Missouri riverbed; that issue will likely need to be resolved in separate agreement or federal court. This bill as drafted does not address the mineral ownership west of Highway 85 to the Montana border, that area has other unique issues that should be addressed separately from this bill. Over the past year, there have been numerous court filings and pleadings where the state indicated they were seeking claim to the lakebed not just the river and stated, "the lake and the river are

indistinguishable." However, the State Land Board in their November meeting voted unanimously to clarify they were not seeking to change their policy through court pleadings and the Governor suggested legislative policy was the best option to clarify mineral ownership. There have been tens of thousands of acres leased for millions and millions of dollars, 350 Bakken wells drilled, many additional wells to be drilled in this area which will pay billions in royalties. Oil operators under this bill are seeking to clarify who they must pay for the royalty interests, many companies have leased both parties to ensure they have the proper party leased, some have been paid royalties while millions of dollars are held in suspense due to these title issues. The private mineral owners have owned these lands for decades, the operators have leased in good faith and recent court filings by the State of North Dakota have put all the parties in uncertain position.

Senate Bill 2134 is an important piece of legislation. Please see the attached minutes from the March 9, 2010 Administrative Rules Committee. The minutes indicate, Charles Carvel, a former Assistant Attorney General who was the attorney for the Water Commission for more than 30 years stated that the State does not own the lake, rather the federal government does. "Mr. Carvel said, with regard to the lands of Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control." Senate Bill 2134 confirms this long-standing principle of ownership which leasing decisions were based upon for decades.

Craig Smith, NDPC Executive Committee Member and Past Chairman will provide the specific details on the bill on behalf of the industry.

We urge a Do Pass on SB 2134. I would be happy to answer any questions.

NORTH DAKOTA LEGISLATIVE MANAGEMENT

Minutes of the

ADMINISTRATIVE RULES COMMITTEE

Tuesday, March 9, 2010
Roughrider Room, State Capitol
Bismarck, North Dakota

Senator Jerry Klein, Chairman, called the meeting to order at 10:00 a.m.

Members present: Senators Jerry Klein, John M. Andrist, Tom Fischer, Joan Heckaman, Tracy Potter; Representatives Randy Boehning, Chuck Damschen, Duane DeKrey, Jim Kasper, Kim Koppelman, George J. Keiser, Joe Kroeber, Jon Nelson, Blair Thoreson, Francis J. Wald, Lonny Winrich, Dwight Wrangham

Members absent: Senator Layton W. Freborg; Representatives Wesley R. Belter, Stacey Dahl, Mary Ekstrom

Others present: See Appendix A

It was moved by Representative DeKrey, seconded by Representative Koppelman, and carried on a voice vote that the minutes of the previous meeting be approved as distributed.

STATE WATER COMMISSION

Chairman Klein called on Mr. Dale Frink, State Engineer, State Water Commission, for comments on State Water Commission rules carried over from the previous committee meeting. Mr. Frink said the rules submitted for Administrative Rules Committee consideration relate to management of sovereign lands but do not make changes in law or rules determining what is included in sovereign lands. He said in 1989 the Legislative Assembly transferred sovereign lands management from the Land Department to the State Engineer. He said a 2005 Attorney General opinion required development of a comprehensive plan for management of sovereign lands. He said the required comprehensive plan has been completed. He said the existence of the comprehensive plan has been beneficial because issues and uses relating to sovereign lands have grown in recent years. He said some rules changes were needed to conform preexisting rules to the comprehensive plan. He said that is the reason the rules were adopted.

Mr. Frink said the rules adopted cover issues relating to uses of sovereign lands, but he understands the concern of the committee is with obtaining information on what is included in sovereign lands and how the phrase "navigable waters" is defined. He said Mr. Charles Carvell, Director, Natural Resources and Indian Affairs Division, Attorney General's office, is the state's most experienced legal adviser on these issues, and he asked Mr. Carvell to provide information to the committee on these issues.

Representative Keiser asked why these changes were made through rules instead of legislation. Mr. Frink said the comprehensive plan as developed and implemented required adjustment of existing rules of the State Water Commission. Representative Keiser asked why sovereign lands are defined in rules instead of legislation. Mr. Frink said the definition of sovereign lands in the rules is identical to a definition in statute. He said the rules do not make any change in what is included within the coverage of the term sovereign lands.

Mr. Carvell provided testimony (Appendix B) based on a written outline distributed to the committee. He traced the history of the sovereign lands doctrine.

In response to a question from Representative Keiser, Mr. Carvell said constitutionally it is probably not possible for the state to change the status of sovereign lands because the waters that were navigable at statehood are the basis of the state's sovereign lands.

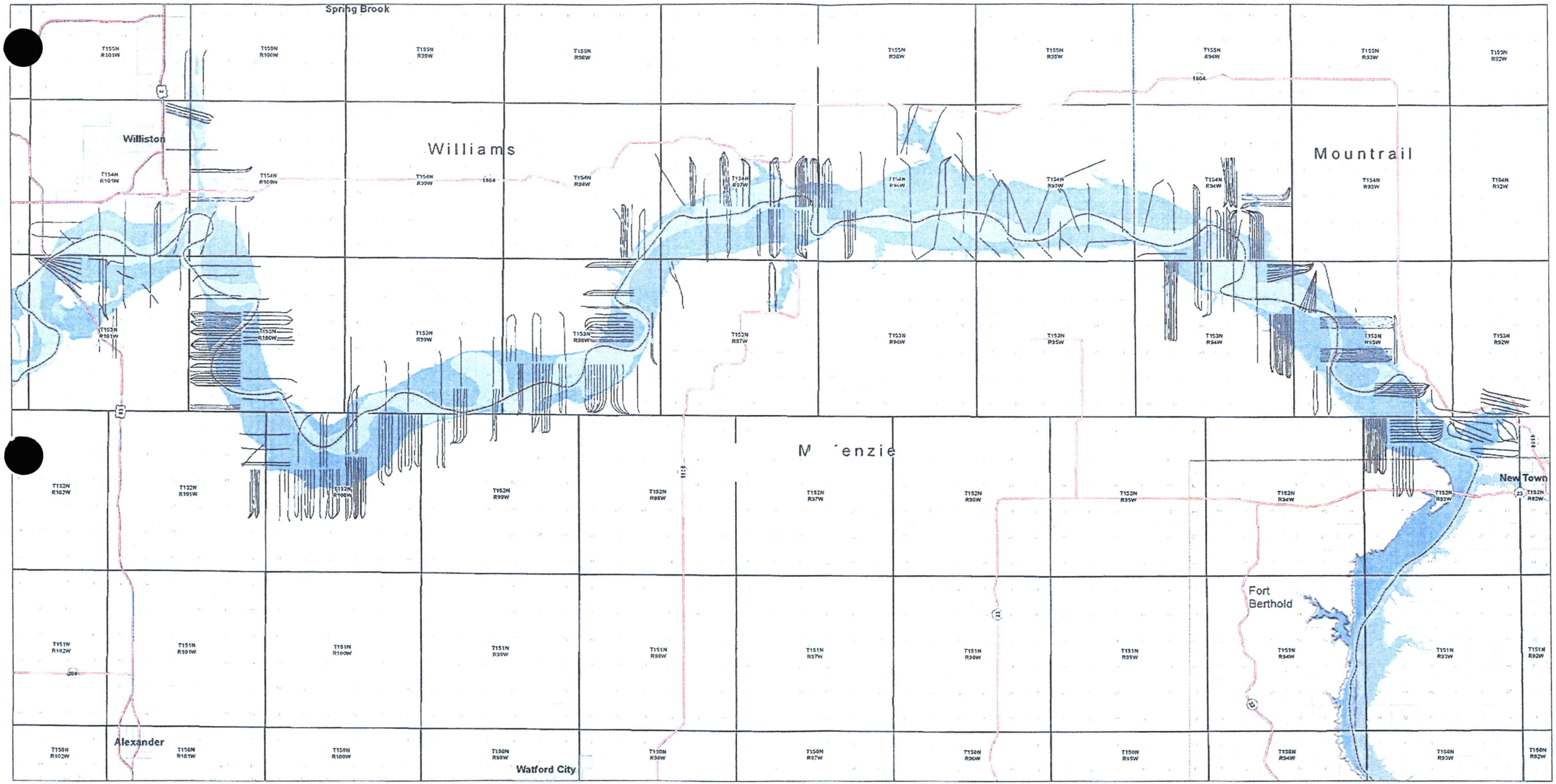
Senator Klein asked whether the federal government under Section 404 of the Clean Water Act is looking for ways to expand its jurisdiction by expanding what are considered navigable waters for Clean Water Act purposes. Mr. Carvell said that appears to be true.

In response to a question from Representative Kasper, Mr. Carvell said with regard to water and lands at Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control.

Representative Koppelman said as he understands the policy, navigable waters at statehood are certain defined waters but water level changes can change what land is included in sovereign lands of the state. Mr. Carvell said that is correct.

Senator Heckaman said at Devils Lake agricultural lands have been inundated and former owners are continuing to pay minimal property taxes on the property. Mr. Carvell said he does not see any reason why those owners should pay property taxes. He said the state owns the land under sovereign lands coverage, and those owners will be restored to ownership when the water recedes.

Mr. Frink said it is a local decision on property taxes on inundated lands. He said owners of those



Date: 8/16/2016
Prepared by N.D.I.C. Oil and Gas Division
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#4
3-10-17
SB 2134

SENATE BILL NO. 2134—Lakebed Minerals

House Energy & Natural Resources Committee

Testimony of Craig C. Smith

March 10, 2017

Chairman Porter and members of the House Energy & Natural Resources Committee, my name is Craig Smith. I am an attorney with the Crowley Fleck law firm in Bismarck practicing oil and gas law for the past 28 years. I'm appearing today on behalf of the North Dakota Petroleum Council.

This Bill involves incredibly important and very complex issues affecting thousands of mineral owners, the State of North Dakota, the public, oil and gas companies and others. Before discussing the Bill provisions and proposed amendments, given the magnitude of this legislation we believe it might be helpful if we first presented an overview of the general historical and legal principles relating to the complex ownership issues created by navigable rivers and the Garrison Dam project.

BACKGROUND

Under the Equal Footing Doctrine, when western states entered the Union, they acquired title to the bed of navigable rivers and lakes up to the Ordinary High Water Mark ("OHWM") including minerals. Thus, when North Dakota entered the Union, it acquired title to the bed of the Missouri River as it existed upon the date of Statehood. (The State's riverbed minerals are considered "Sovereign Lands" administered by the State Land Board and are subject to different requirements than the Common School Trust Lands). After Statehood, a State could elect to take title to either the low or high water mark. You may recall a few years ago there was litigation as to whether the State of North Dakota had elected to own to the low water mark or the high water mark. This issue was resolved in 2013 by the North Dakota Supreme Court in *Reep v. State*, when our Supreme Court held the State's title extends to the OHWM.

Briefly, what is the Ordinary High Water Mark? Judicial case law, including North Dakota cases, often define the OHWM as "**The upper limit of the bed of the water; which the water occupies sufficiently long and continuously to wrest it from vegetation, and destroy its value for agricultural purposes**". *See* Slide No. 6. While other factors and guidelines are considered in the determination, this is the basic definition of OHWM.

EFFECTS OF RIVER MOVEMENT

Large western rivers such as the Missouri often meandered significant distances from their original boundaries. This river movement is typically caused by the hydraulic effects of erosion and accretion. The Doctrine of Erosion is the loss of soil along a river bank caused by current eroding

the bank. The Doctrine of Accretion is the opposite, it is the deposit of soil along the bank of a river as the river shifts away from a bank. When a navigable river shifts from its original banks, the general rule of law is (1) the State's ownership title to the surface and minerals of the riverbed moves with the river. (2) Landowners whose land was eroded away by the new channel lose title to the surface and minerals, and (3) riparian landowners who gain land through accretion as the river moved away from their bank gain title to the accreted surface and minerals.

To demonstrate these principles, refer to Slides 8 and 9. Slide 8 is an example of an Original Government Survey plat from 1896. The survey shows that the Missouri River coursed through the west half of Section 17 but did not touch or enter Section 18. Slide 9 shows the location of the Missouri River 55 years later. The river channel has moved into the NE/4 of Section 18 and also shifted further east in Section 17. What is the legal effect of this change and how has the river movement affected mineral ownership?

The owners in the NE/4 of Section 17 lost title to both the surface and minerals as a result of erosion. The State's title to the bed of the river and the minerals moves with the river channel, so the State now owns minerals in the NE/4 of Section 17, whereas at the time of the original government survey the State owned no interest in Section 17. And while the landowners in Section 17 lost land due to erosion, note the landowners in Section 8 gained land from accretions when the river channel moved into Section 18. This example demonstrates the risk of land ownership near large rivers, particularly prior to the construction of dams and regulated flows. A landowner could either gain title to additional lands, but if the river moved into your land and eroded it away, you lose title.

Because of the movement of the Missouri River since the original government survey, this necessitated a new survey by the Corps of Engineers to determine proper ownership acreages for purposes of acquiring lands for the impoundment of Lake Sakakawea and the Garrison Project. Likewise, the Department of Trust Lands also believed a new survey was necessary for oil and gas leasing purposes. These surveys will be discussed further herein.

GARRISON DAM AND LAKE SAKAKAWEA

Construction of Garrison Dam commenced in 1946. Pursuant to the Flood Control Act of 1944, the Garrison Project required the Corps of Engineers to acquire either through purchase or eminent domain approximately 463,000 acres of land above the historical Missouri riverbed channel. The Corps did not acquire from the State the bed of the Missouri River, which contained about 30,000 acres, and the State still today retains title to the bed and oil and gas minerals underlying the historical riverbed channel.

The land acquisition process took several years. The Corps initiated the land acquisition process beginning at the dam site by Garrison and gradually worked westwardly and did not complete all acquisitions at the western end by Williston until the mid to late 1950s. For the first five years of the process the Corps acquired all of the surface *and* minerals. Then, on April 4, 1951, oil was discovered in North Dakota with the successful completion of the Clarence Iverson well by

Amerada Petroleum. The discovery of oil quickly impacted and increased the value of land in the western segment and landowners demanded much increased compensation for the taking of not just the surface estate but minerals as well. This resulted in the Corps adopting a new policy later in 1951 whereby the Corps allowed landowners to reserve all interests in oil and gas. *See* Slide 14. The timing of the 1951 oil discovery could not have been better for the State and its citizens, as the Corps had yet to acquire lands lying within what we now know are rich with proven oil reserves—whereas if the Iverson discovery well had come five years later the United States would have acquired all of the oil and gas minerals through its Garrison land acquisition process.

As to the Fort Berthold Indian Reservation, the United States acquired 156,000 acres from tribal and allottee owners under the Takings Act of 1949. The Takings Act took both the surface and minerals from Tribal members. However, in 1984, Congress restored the oil and gas taken from Tribal members back to the Three Affiliated Tribes. *See* Pub. L. 81-437, 63 Stat. 1026 (1949) and Pub. L. 98-602, 98 Stat. 3152 (1984)

The Committee should be aware ownership of the riverbed itself on the Reservation is currently in question. Both the Tribe and the State have leased the riverbed channel lying within the Reservation, and although there is no litigation pending, I believe both parties have notified the other in writing of their competing claims. The State's title, if proven, would be based on the Equal Footing Doctrine. However, if the Tribe's claim under the Fort Laramie Treaty prevailed, then the State's claim under Equal Footing Doctrine would be preempted or void. In sum, this Bill does not attempt to resolve the State/Tribal disagreement. Ultimately this is a federal question that can only be resolved by a political agreement between the two sovereign governments or a final federal judicial decision.

The State and Corps surveys of the Ordinary High Water Mark of the Missouri River

In 2008 and 2010, the State Land Board authorized the Department of Trust Lands to conduct two surveys to delineate the ordinary high water mark of the Missouri River for oil and gas leasing purposes. The Phase 1 survey covered the Yellowstone and Missouri River segment from the Montana state line to the Highway 85 Bridge near Williston. This survey was an on the ground survey and depicted the ordinary high water mark of the river as it existed based on current conditions and not as it existed prior to construction of Garrison Dam.

The State's Phase 2 survey was a delineation of the OWHM of the historical Missouri River channel as it existed prior to Lake Sakakawea from the Furlong Loop near Trenton to the northern boundary of the Fort Berthold Indian Reservation. The Phase 2 survey relied upon historical aerial photography, as an on the ground survey was not possible due to the inundation of the river by Garrison Dam. The Phase 1 and Phase 2 surveys overlapped from near Trenton to the Highway 85 Bridge. Ultimately, for oil and gas leasing purposes, the Department of Trust Lands adopted the Highway 85 Bridge as the boundary line separating what it deemed the Missouri River (based on current conditions) and Lake Sakakawea. Thus, the State issued oil and gas leases west of the bridge based on present river conditions and leased east of the bridge based on the Phase 2-historical riverbed channel.

Again, because the Missouri River boundaries had changed (due to river movement caused by erosion/accretion) since the time of the original government survey, for purposes of acquiring land necessary for the Garrison project, the Corps conducted a new survey to determine the exact riparian landowner acreages for land compensation purposes. The Corps survey also relied heavily on aerial photography for its determination of the ordinary high water mark, but unlike the State's Phase 2 survey, the Corps also was able to conduct on the ground surface inspections including detailed land appraisal evaluations. Examples of the Corps' Survey Segment Maps are shown on Slides 9, 12, 15, and 20.

When the Bakken play was first developing, the Bureau of Land Management ("BLM") initially leased its minerals based on the original government survey. However, the BLM Cadastral Survey office realized the original government survey did not depict the actual river boundaries that existed at the time of Garrison Dam. Moving quickly by federal government standards, a few years' later BLM and BLM Cadastral Survey offices elected to adopt the Corps survey as the best evidence available to establish the historical Missouri River channel for federal oil and gas leasing purposes.

CONFLICTS BETWEEN THE CORPS AND STATE SURVEYS

Both the State and Corps maintain their surveys delineate the ordinary high water mark of the Missouri River. However, while the surveys are similar in many segments, the surveys in several segments vary greatly and overall the State's survey shows the State owning several thousand acres more riverbed minerals than the Corps survey.

Slide 15 is an example of a Corps Segment map which demonstrates this difference. The blue shaded area is the historical Missouri riverbed as depicted by the Corps. The orange shaded area is where the river was located at the time of the original government survey. The river shifted south since the original survey, eroding lands south of the original channel and forming accretions to uplands north of the original channel. In its survey, the Corps allocated the accretions to the upland owners and purchased the accreted lands allowing the private landowners to reserve oil and gas. While not depicted on this Slide, the State survey claims the ordinary high water mark includes not just the blue shaded channel, but virtually all of the accreted lands the Corps allocated to private owners. This, of course, results in a conflict between the State and the fee owners, and requires operators to lease both parties and suspend royalties until the conflict is resolved.

Why the large discrepancy in this example between the two surveys? Obviously, the State and Corps applied a different standard of interpretation. NDPC believes that overall the State survey was, at a minimum, an aggressive interpretation of the OHWM favoring state ownership and overlooked in some areas one of the principle tests of determining ordinary high water mark—and that is the "agricultural value" test. As previously stated, North Dakota case law has held that where the land upland from the channel has agricultural value capable of growing agricultural crops, it is generally presumed that land is above the ordinary high water mark. Slide 16 is an example of a Corps land appraisal exhibit which is one of the accreted tracts shown on Slide 15. The appraiser noted the accreted tract contained cropland (shown in blue) and pasture land. The cropland portion of the accreted tract was also allocated the highest value in the appraisal of all of

the owner's land taken. Thus, the Corps survey determines this tract is above the ordinary high water mark and allocates this accreted tract to the private landowner, not the State. Slides 17 and 18 also show "cropland" tracts above the river channel which the Corps allocated to the private landowners but are claimed to be within the ordinary high water mark by the State in its survey.

CONFLICTS BETWEEN STATE AND FEDERAL MINERAL OWNERSHIP

The United States owns several mineral tracts along the Missouri River which are referred to as "Public Domain" lands. These are lands that the United States government never issued a patent and the United States has retained ownership since the State joined the Union.

The BLM does not recognize the State survey for oil and gas leasing purposes. The BLM maintains that federal law applies to public domain lands, but acknowledges that state law applies to lands that were patented from the government to private owners. NDPC agrees that federal law likely applies to the determination of the ordinary high water mark as to public domain lands based on United States Supreme Court decisions. *See* California v. United States, 457 U.S. 273 (1982). However, the State, to date, does not agree federal law applies.

Slide 20 depicts the State vs. Federal lease overlap issue. Lot 3 of Section 31 (shaded pink) is a public domain tract that was never patented. The original river channel was located adjacent to Lot 3 and is shown by the green line. Subsequent, the river moved south and accretions formed to Lot 3 and is shown by the blue area. The BLM claims the 90.40 acre accreted tract, but the State survey also claims this same accreted tract. In this situation operators must lease and pay bonus to both the State and BLM. In addition, both the BLM and State demand royalty payments or operators will incur substantial penalties and interest.

The double lease bonus and royalty payment demands for the overlapping leases substantially reduces the economics of drilling Bakken wells in these spacing units. Operators have typically drilled one or two wells to hold their lease investment, ***but substantial infill drilling will not occur in many spacing units until the overlap issue is resolved costing the State and others millions of lost dollars in royalty and tax revenue.***

The State and Federal lease overlap problem is further exacerbated by the inability to obtain a judicial resolution of the conflict. Operators have attempted to file "interpleader" actions where the operator deposits the disputed royalties into court and attempt to add the United States and the State as parties to litigate the ownership issue. However, to date, in every attempted interpleader the United States and State have raised "sovereign immunity" as a defense and the cases are dismissed. With few judicial options available to resolve this issue, NDPC encourages the legislature to recognize federal law applies to public domain lands—but to public domain lands *only.*

SENATE BILL NO. 2134 –(current version)

The current version of SB 2134 provides the following key provisions:

1. In response to the State's recent statements and filings in *Wilkinson v. State* and *Estate of Bruno Herman Weyrauch v. State Treasurer, et al.*, whereby the State is suggesting it owns oil and gas to all of Lake Sakakawea, SB 2134 clarifies into law the State's long-standing policy that the State's oil and gas ownership is limited to the ordinary high water mark of the historical Missouri riverbed channel.
2. To determine the boundary of the ordinary high water mark, SB 2134 adopts the Corps of Engineers survey conducted in connection with the land acquisition process for the Pick-Sloan project dams.
3. SB 2134 extends the historical Missouri riverbed channel survey approximately 12 river miles further west of the Highway 85 Bridge. This boundary location is the extent of the Garrison project and is depicted on Slides 22 and 23. This boundary location also coincides with a 2009 Corps of Engineers Siltation study of the Missouri River in North Dakota. While the siltation study is not a high water mark study, it confirms that impacts of siltation caused by Garrison Dam on the river channel (and thereby affecting the high water mark) begin at this same boundary line. *See* Slides 24 and 25.

ADDITIONAL REVIEW OF CORPS SURVEY

Considering the magnitude and impact of adopting a particular survey and possible concerns being expressed whether sufficient historical information is known about the Corps survey, NDPC, with the valuable cooperation of the Corps of Engineers offices, has recently conducted additional review of the Corps historical and archival records relating to the survey and the Corps land acquisitions. This review included an analysis of Corps' historical correspondence, internal memorandums, maps, land appraisals and other miscellaneous documentation.

After conducting this additional review, it is our opinion that there may exist some inconsistent or inconclusive determinations of the ordinary high water mark for certain Corps survey tracts sufficient to warrant further study in order to confirm the most accurate and fair determination of the historical high water mark for the entire Missouri riverbed channel.

As an example, Slide 33 is an exhibit from a land appraisal relating to an accreted tract. The red shaded area the appraiser determined was mostly sand and had little or no agricultural value, yet this area was considered above the ordinary high water mark in the Corps survey. Absent other evidence to the contrary, this would appear to be inconsistent with state law determination of the ordinary high water mark.

Based on the foregoing, NDPC recommends SB 2134 be amended to provide for additional study and procedures to confirm the Corps survey ordinary high water mark boundaries.

NDPC COMMENTS ON PROPOSED AMENDMENTS TO SB 2134

NDPC supports the proposed amendments to SB 2134. We believe the amendments establish a comprehensive "road map" to achieve resolution of many of the issues currently clouding mineral ownership title along the river and impeding future oil and gas development.

Briefly, the key provisions of the amendments provide:

1. Clarifies the State holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams. The historical Missouri River channel for the Garrison project is extended approximately 12 river miles west of Highway 85 Bridge.
2. Adopts the Corps survey as the "presumptive determination" of the ordinary high water mark, but requires a new study to confirm the accuracy of the survey.
3. Adopts parameters for the study and that the Corps survey may be adjusted, modified, or corrected for a segment of the river only if clear and convincing evidence establishes a segment does not reasonably reflect the historical ordinary high water mark.
4. Provides that once the study is complete, the public shall be provided notice and allowed an opportunity to submit technical comments. After the comment and review period, a final study shall be adopted.
5. The amendments recognize that it will take time for both the State and operators to implement lease acreage adjustments, payments and refunds. As proposed the State and operators will have two years after adoption of the study to fully implement and complete adjustments.
6. Establishes a two year limitations period for an interested party to challenge any segment of the survey in state court. It also provides that a legal challenge on any particular segment of the study does not affect the remainder of the survey findings.
7. The amendments recognize the federal law will apply to the ordinary high water mark determination for federal public domain lands, but only to public domain lands. This resolves the conflict between the State and federal overlapping leases.
8. The amendments recognize the State Engineer's authority to regulate the bed of the historical Missouri River and the waters of the State, and this Bill only applies to the ordinary high water mark determination for oil and gas.
9. The amendments provide for retroactive application.

SUMMARY

The enormous complexities relating to oil and gas ownership conflicts over river title cannot be resolved overnight or by a "simple fix" as clearly demonstrated by the legal struggles over the last several years. However, we believe the proposed amendments establish a road map for long term resolution of multiple river ownership issues, and provide an open and thorough process for all interested parties including mineral owners, operators, and the State to participate in the process. Thank you for your consideration.

SENATE BILL NO. 2134

House Energy & Natural Resources Committee
March 10, 2017

Testimony of Craig C. Smith
Crowley Fleck, PLLP
On behalf of North Dakota Petroleum Council, Inc.

CROWLEY FLECK
ATTORNEYS

TOPICS COVERED

- Equal Footing Doctrine—historical background
- Issues created by river movement
- State surveys and Corps survey
- Ownership conflicts due to overlapping surveys
- SB 2134 and HB 1199
- Amendments recommending new study concept

Equal Footing Doctrine

- Original 13 colonies owned title underlying navigable tidal waters.
- 1845 U.S. Supreme Court recognized "Equal Footing Doctrine" whereby as States entered the Union they acquired title to the beds of all navigable waters "upon equal footing, in all respects whatever…" with the original states to the Ordinary High Water Mark."

Equal Footing Doctrine

- State law controls ownership rights to beds of navigable waters up to the high water mark after the State joins the Union. *Barney v. Keokuk*, 94 U.S. 324 (1877).
- After joining the Union, States could elect to own up to the low or high water mark.
- North Dakota is a "high water mark" state. *Reep v. State*

Equal Footing Doctrine

- State law controls the determination of all subsequent river movement caused by accretion, erosion and avulsion.
- *Public Domain Lands Exception:* Federal law controls "where the Government has never parted with title and its interest in the property continues." *California v. United States, 457 U.S. 273 (1982).*

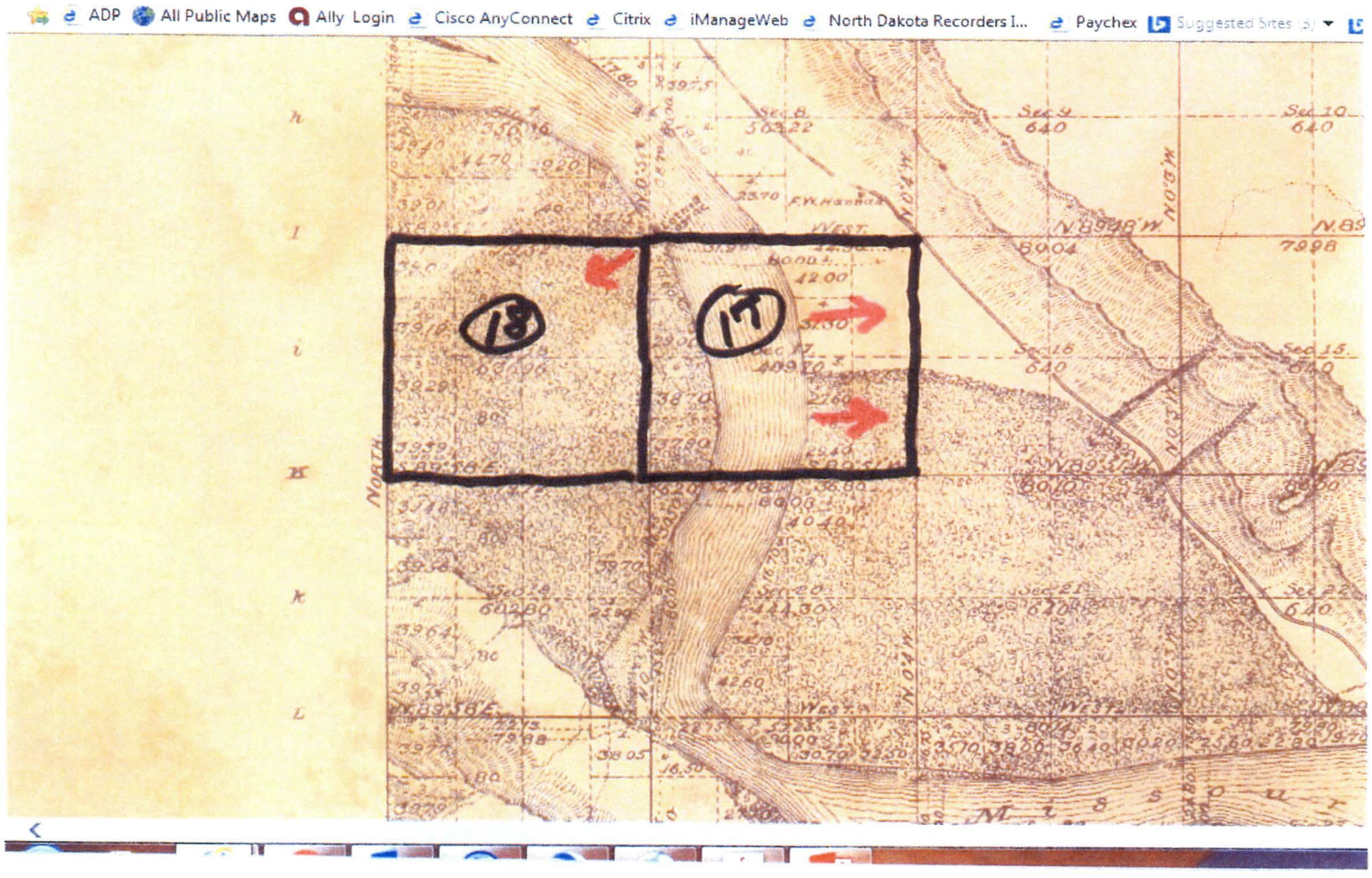
Ordinary High Water Mark

- High water mark is to be considered the mark of the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, **and destroy its value for agricultural purposes.**
- In low and flat lying areas, the line of demarcation may be more difficult to determine.
- "In such cases the effect of water upon vegetation must be the principal test in determining the location of high-water mark. 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 what may be termed an ordinary agricultural crop.

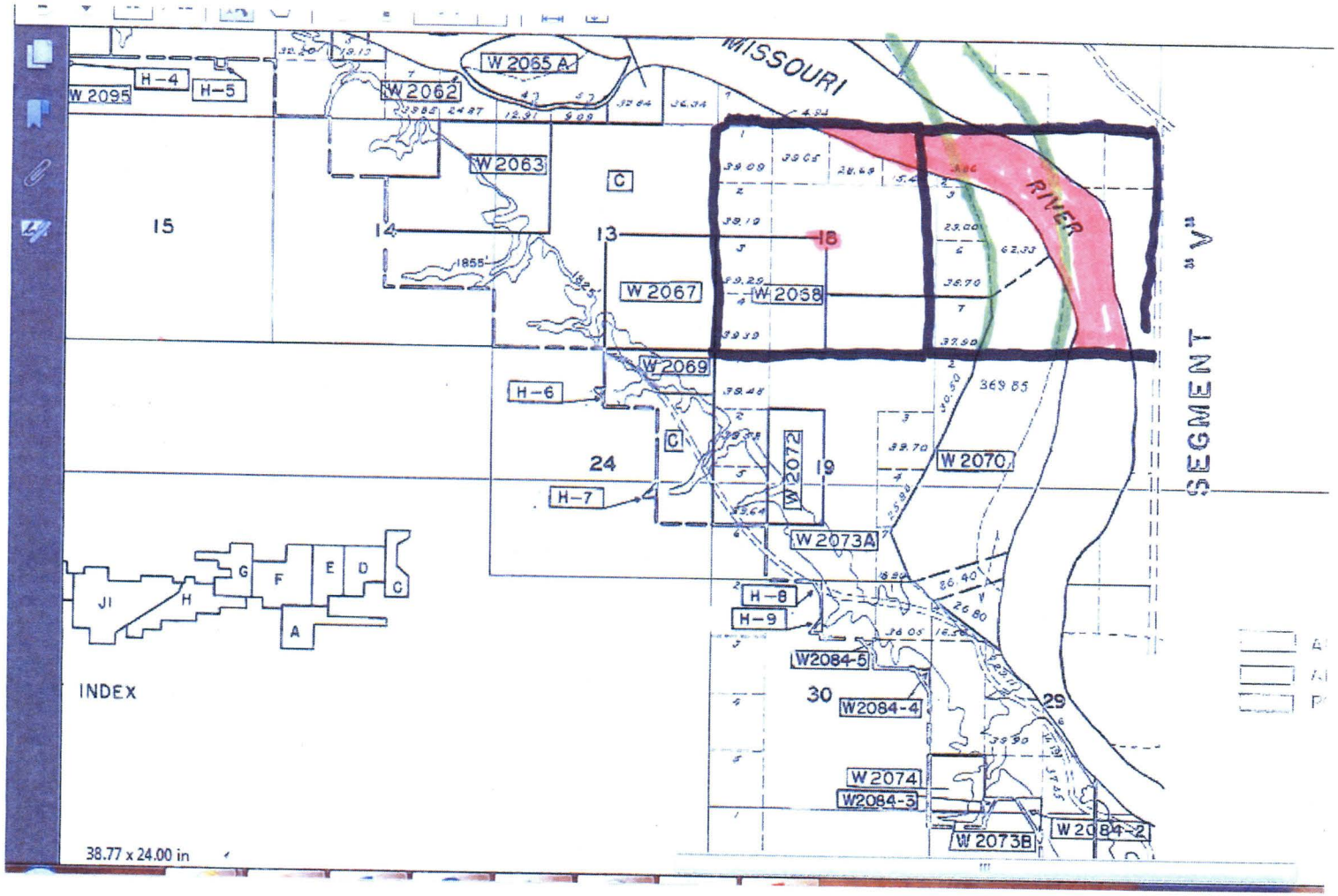
River Movement--Doctrines of Accretion, Erosion and Avulsion

- Accretions: gradual deposit and addition of soil along the bank of a river caused by gradual shift of river away from bank. Riparian owner takes title to additional land.
- Erosion: gradual loss of soil along a bank of a river caused by encroachment of water into eroding bank Riparian owner loses title by erosion.
- Avulsion: A sudden change in the river channel, typically where an oxbow is cut off and abandoned and a new channel formed. States take contrary positions on ownership rights affected by avulsion.

Location of River—original government survey 1896



Location of River --- Corps Survey -- 1950



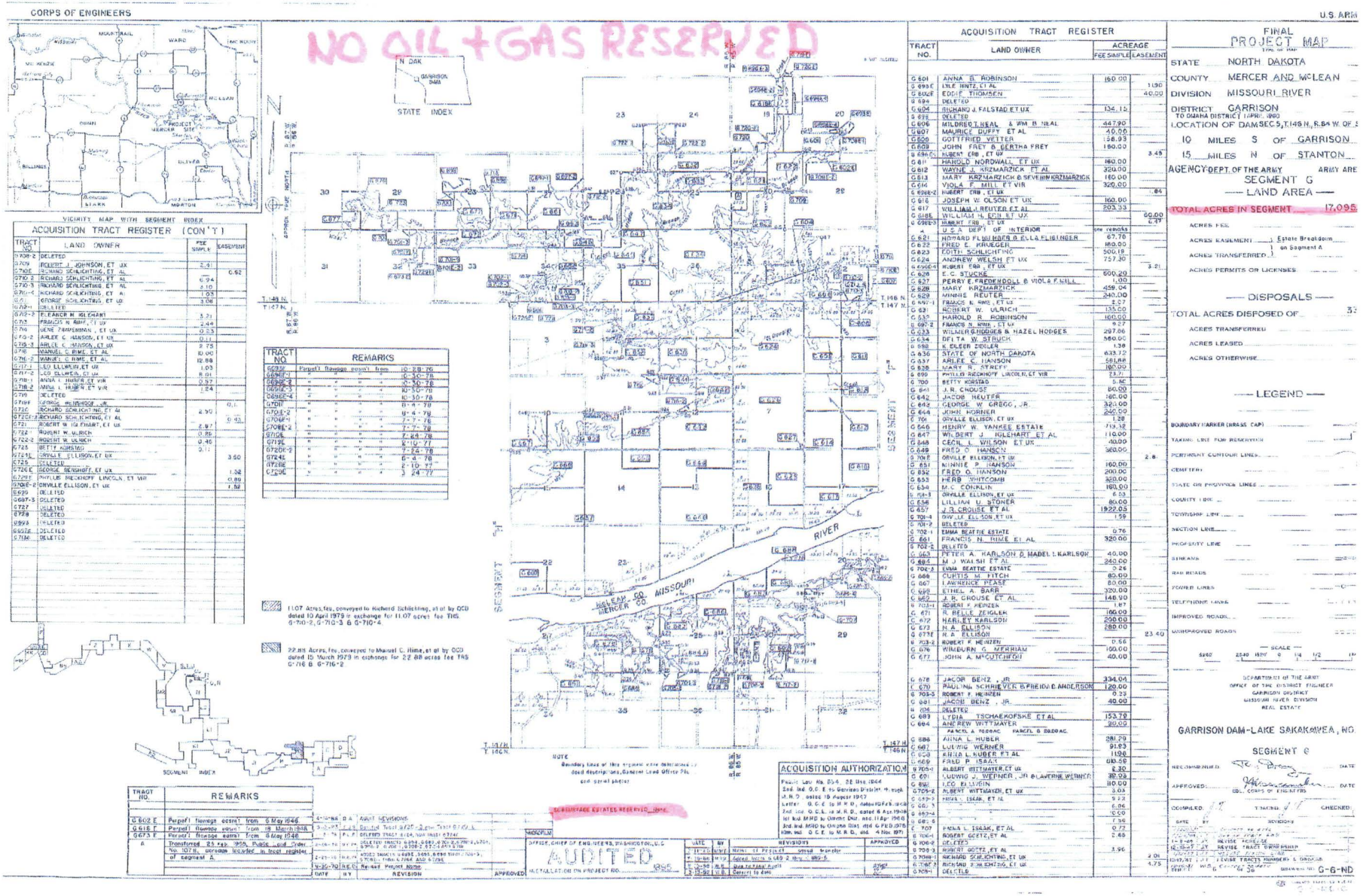
State OHWM Surveys

- Phase 1: Montana state line to Highway 85 bridge based on current river conditions.
- Phase 2: Furlong Loop (near Trenton) to northern boundary of Fort Berthold Indian Reservation based on "historical river channel".
- The surveys overlap between Furlong Loop and Highway 85 bridge. State selected Highway 85 bridge as the cut off point for current river conditions vs. historical river channel/lake
- In recent litigation cases, the State asserts the Phase 2 survey is not a proper OHWM delineation.

Corps Survey

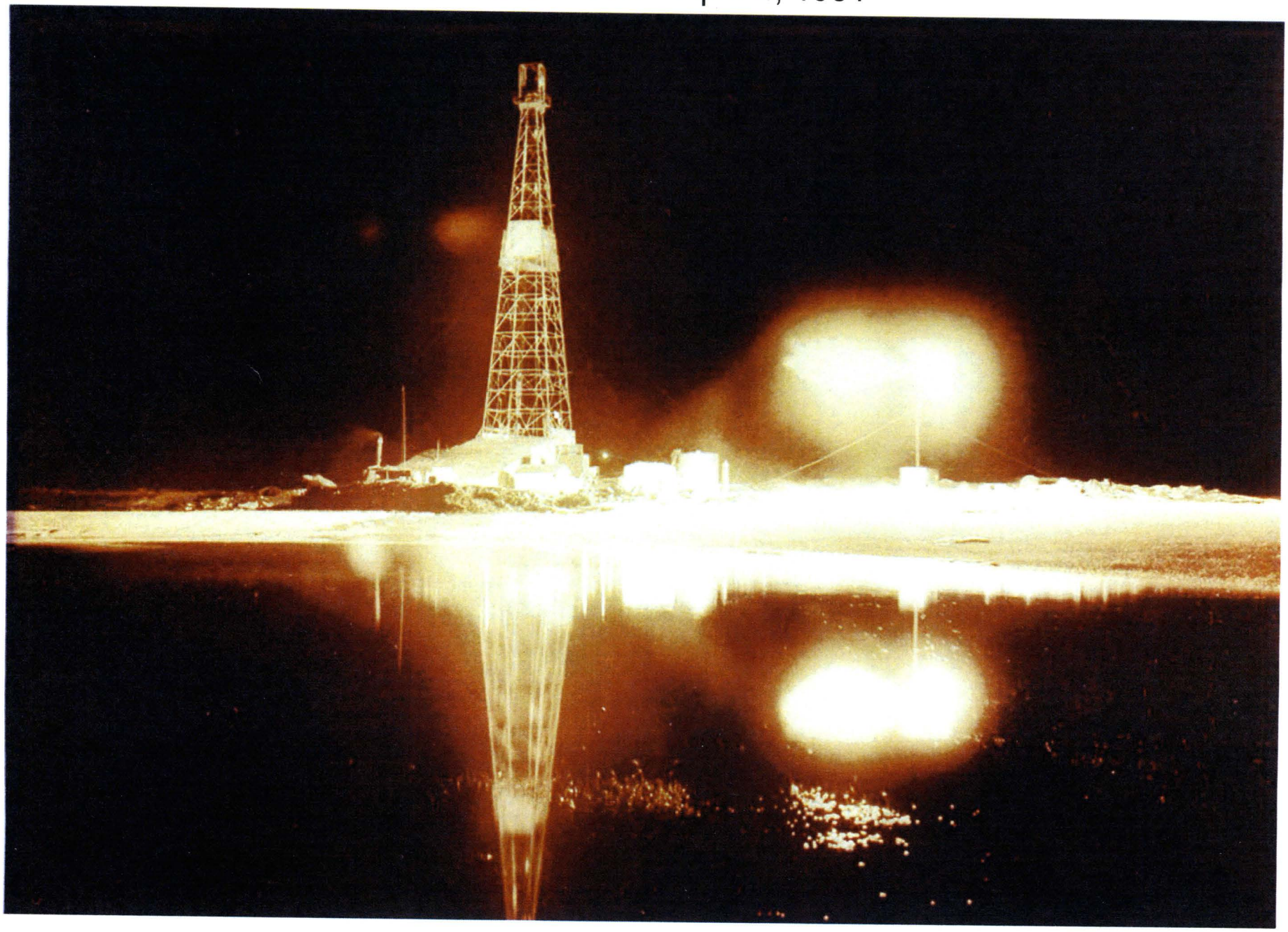
- Because of river movement since original government survey, a new survey was necessary to determine landowner acreages for land acquisitions necessary for lake impoundment.
- Instructions for survey was to establish the ordinary high water mark.
- Survey relied primarily on aerial photography, but also included on the ground work, surface inspections for land use and appraisal purposes for lands taken or purchase.

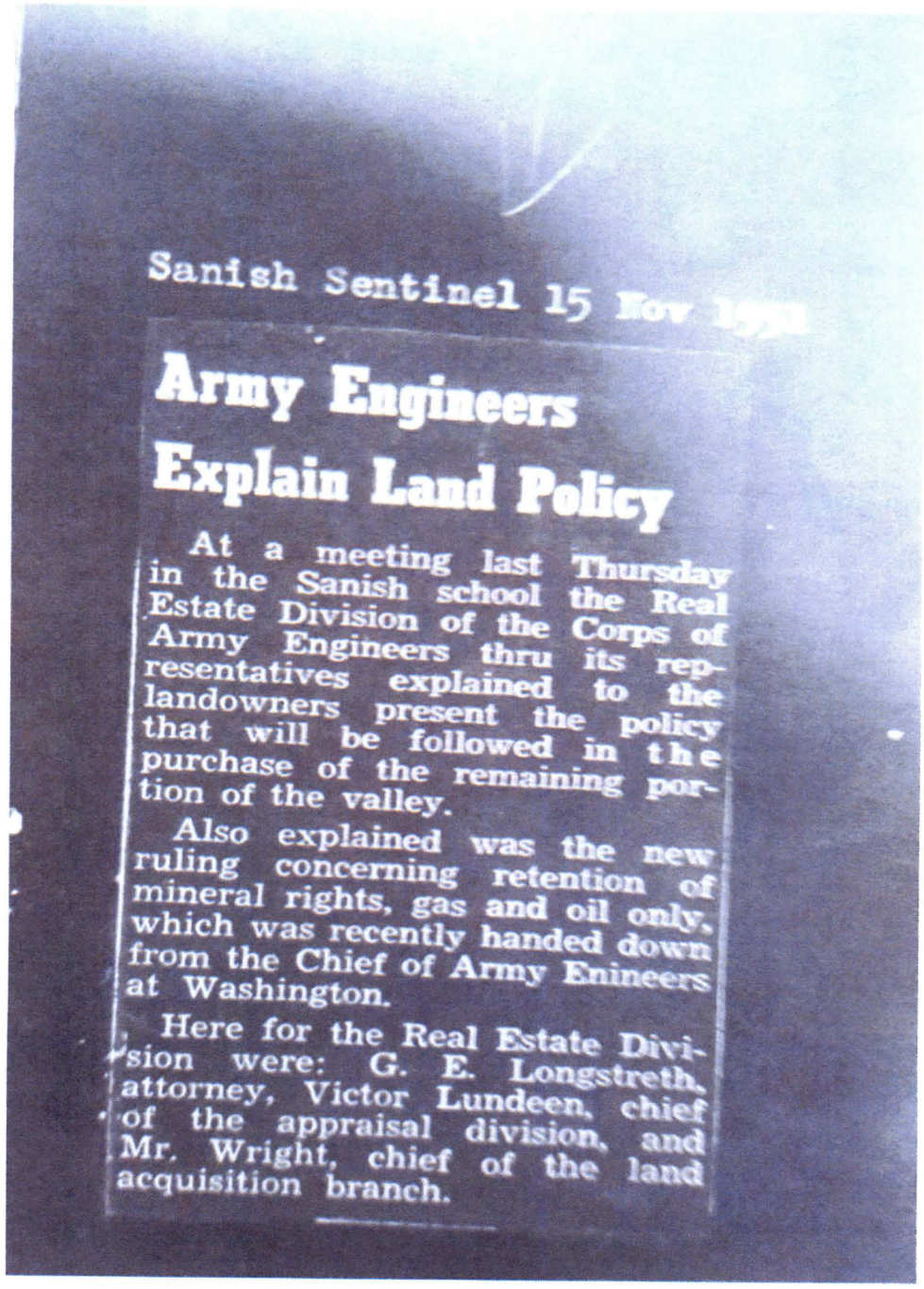
1947 Corps segment map—eastern end—All surface and minerals taken



20

Clarence Iverson well---April 4, 1951





Sanish Sentinel 15 Nov 1951

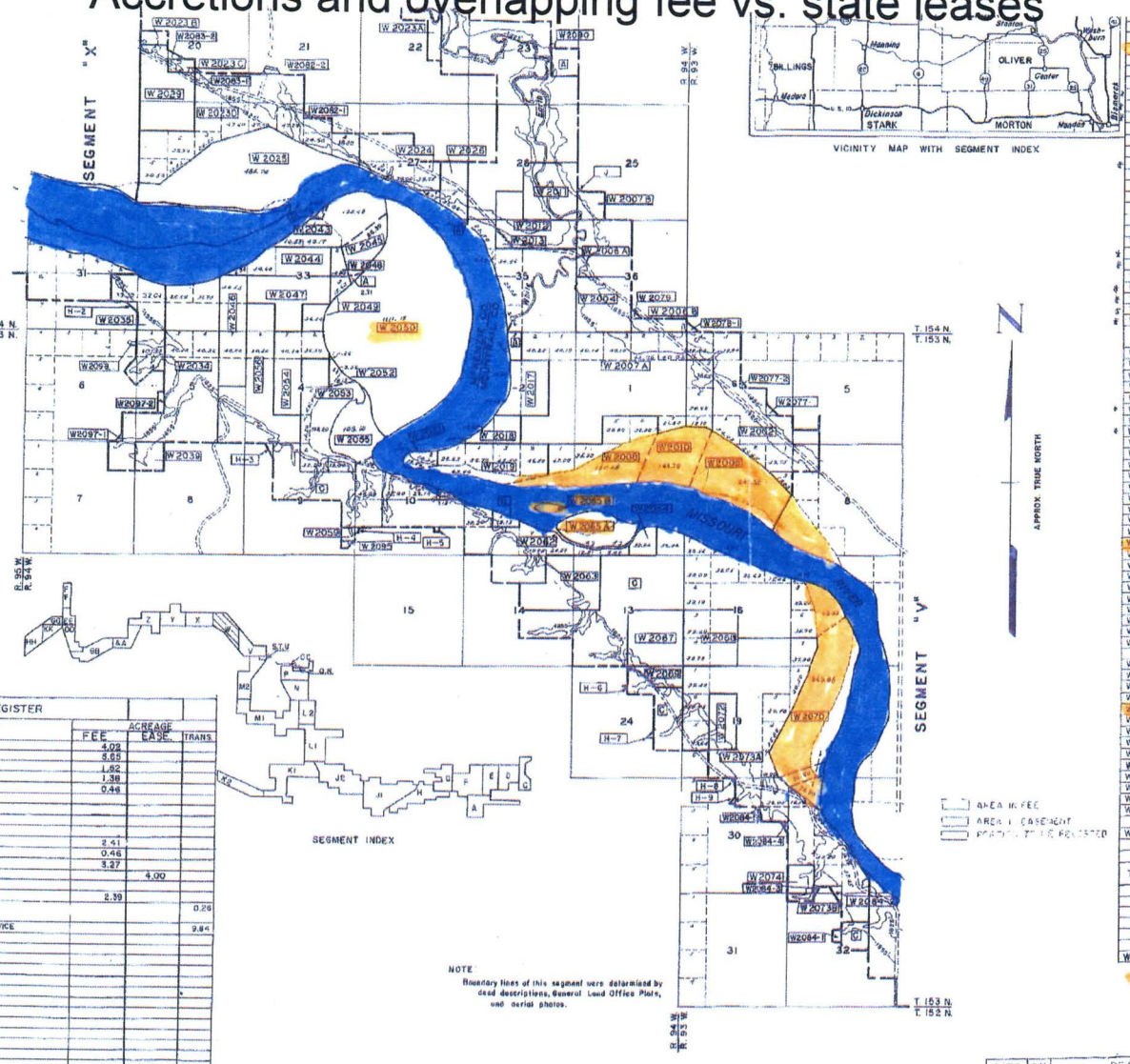
Army Engineers Explain Land Policy

At a meeting last Thursday in the Sanish school the Real Estate Division of the Corps of Army Engineers thru its representatives explained to the landowners present the policy that will be followed in the purchase of the remaining portion of the valley.

Also explained was the new ruling concerning retention of mineral rights, gas and oil only, which was recently handed down from the Chief of Army Enineers at Washington.

Here for the Real Estate Division were: G. E. Longstreth, attorney, Victor Lundeen, chief of the appraisal division, and Mr. Wright, chief of the land acquisition branch.

Accretions and overlapping fee vs. state leases



TRACT	LANDOWNER	ACREAGE FEE	ACREAGE EASE.	TRANS.
-1	ARNE G. & EDITH HARMS	4.02		
-2	ARNE G. & EDITH HARMS	5.65		
-3	ARNE G. & EDITH HARMS	1.82		
-4	ARNE G. & EDITH HARMS	1.38		
-5	ARNE G. & EDITH HARMS	0.46		
-1	DELETED			
-2	DELETED			
	DELETED			
	DELETED			
	RUBY L. QUALE	2.41		
-1	JOHN A. PHELPS	0.46		
-2	JOHN A. PHELPS	3.27		
	AVERY AND DORIS HELLING		4.00	
	DELETED			
	SARA B. PHELPS	2.39		
	BLM, DEPT. OF INTERIOR			0.26
	DEPT. OF AGRICULTURE, FOREST SERVICE			9.84

ACQUISITION TRACT REGISTER

W 2006	MARIE CRAMMER	286.42	
A	U.S.A. DEPT. OF INTERIOR	see remarks	
W 2010	CHARLES E. STEWART	143.76	
W 2011	JOHN LARMER	160.00	
W 2012	KENNETH AUVERSON	149.85	
W 2013	ALFRED COLTON	10.15	
W 2077	NEAL BARTLESON	3.44	
W 2077-2	NEAL BARTLESON	0.46	
W 2078-1	V.P. & R. GRAZING ASSOCIATION	2.20	
W 2017	SINA B. ROGERS	122.73	
W 2018	ANDREW GUNDERSON	58.89	
W 2019	ARTHUR AUVERSON	198.07	
W 2078-2	DELETED		
W 2021	ANDREW GUNDERSON	34.07	
W 2022	DELETED		
W 2023	E. H. OCAIN ET UX		
	PARCEL 'A' 62.80 'B' 20.00 'C' 20.00 'D' 582.05	664.85	
W 2024	ALFRED THOMPSON	165.14	
W 2025	E.H. OCAIN ET UX	484.74	
W 2026	ANNE M. THOMPSON	79.65	
W 2078-3	DELETED		
W 2079	STATE OF NORTH DAKOTA, et al	1.84	
W 2029	FRANK LABAR ET UX	200.00	
W 2080	ARVINE E. OLSON AND MARION E. OLSON	0.82	
W 2081	DELETED		
W 2082-1	LEONA VACHAL WHEELOCK, ET AL	0.46	
W 2082-2	LEONA VACHAL WHEELOCK, ET AL	4.82	
	McKENZIE CO.		
W 2033	DELETED		
W 2034	SARAH B. PHELPS ET AL	527.87	
W 2035	SARAH B. PHELPS ET AL	186.86	
W 2036	DELETED		
W 2037	DELETED		
W 2083-1	ORVILLE T. THRONSON, ET AL	0.69	
W 2039	AL N. NELSON	40.00	
W 2083-2	ORVILLE T. THRONSON, ET AL	2.41	
W 2041	DELETED		
W 2042	DELETED		
W 2043	MRS. MARY ORTLOFF ET AL	163.23	
W 2044	RUBY L. QUALE	116.66	
W 2045	RALPH O. VANGEN ET UX	86.39	
W 2046	ROBERT AMOS BOWYER JR. ET AL	159.85	
W 2047	JOHN A. ANDERSON	160.00	
W 2048	RALPH O. VANGEN ET UX	16.80	
W 2049	CLARENCE VANGEN ET UX	51.96	
W 2050	STATE OF NORTH DAKOTA	111.15	
W 2051	DELETED		
W 2052	FLORENCE POOLE HITLAND ET AL	17.95	
W 2053	MILDRED BANCROFT ET AL	239.90	
W 2054	HELGE SHERVEN	156.84	
W 2055	MILDRED BANCROFT ET AL	109.10	
W 2056	EDWIN HENDRICKSON	320.32	
W 2057	DELETED		
W 2058	DELETED		
W 2059	RUBY L. QUALE	10.00	
W 2061	DELETED		
W 2062	BERTHA C. BENN	398.92	
W 2063	SIDNEY BENN	200.00	
W 2064	AGNES G. SKARET	32.54	
W 2065	STATE OF N.D. PARCEL 'A' 107.30 'B' 14.00	121.30	
W 2066	DELETED		
W 2067	MYRON N. RULAND	160.00	
W 2068	DELLA M. RULAND	158.68	
W 2069	MARION S. RULAND ET AL	43.00	
W 2070	BLAINE OSBURN ET UX	396.65	
W 2071	DELETED		
W 2072	HENRY AASTERUD ET AL	80.00	
W 2075	BLAINE OSBURN ET AL PARCEL 'A' 1036.59 'B' 10.51	1077.10	
W 2074	OLE BREVIG ET UX	40.00	
W 2076	DELETED		
A	U.S.A. DEPT. OF INTERIOR	SEE REMARKS	
C	U.S.A. (DEPT. OF AGR.) (see remarks)		3204.59

TRACT	REMARKS
A	Transferred 25 Feb. 1955, Public Land Order No. 1078, acreage included in tract register of segment A.
C	Transferred 10 March 1954, Executive Order No. 10520, acreage includes the parcels in Segments W, X, Y and Z, and pertain only to Segments covered by this Audit.
W 2010	Formerly part of Tract No. W 2005

NOTE: Oil and gas reserved in all tracts except W 2005

10 MILES
15 MILES
TOTAL ACRES
ACRES FEE
ACRES EASEMEN
ACRES TRANSFE
ACRES PERMITS
TOTAL ACRES DIS
ACRES TRANSFE
ACRES LEASED F
ACRES OTHERWI
THIS TO
BOUNDARY MARKER (BRASS
TAKING LINE FOR RESER
PERTINENT CONTOUR LIN
CEMETERY
STATE OR PROVINCE LIN
COUNTY LINE
TOWNSHIP LINE
SECTION LINE
PROPERTY LINE
STREAMS
RAILROADS
POWER LINES
TELEPHONE LINES
IMPROVED ROADS
UNIMPROVED ROADS
5280' 264
DE
OFFICE
MI
GARRISON DAM
RECOMMENDED:
APPROVED:
LT. COL

DATE	BY	REVISIONS	APPROVED
8-29-69	M.M.R.	Name of Project; added transfer	
9-29-70	R.E.P.	Revised Project Name	
5-17-77	P.L.B.	Revised Tracts W2082-1, W2082-2, W2083-1, W2083-2, W2083-3	
10-11-77	R.E.N.	Revised Owner's name for Tr. W 2082-1 & -2	
1-25-78	P.L.C.	REVISED TR. W2061 TO EASEMENT (NORTH)	
7-7-78	P.L.C.	DELETED TR. W 2079-3, ADDED TR. W 2078	
12-7-78	R.E.C.	ADDED TRACT H	
7-2-79	F.A.I.	DELETED TR. H, REDESIGNATED AS TR. J	

OFFICE, CHIEF OF ENGINEERS, WASHINGTON, D.C.
AUDITED
INSTALLATION OR PROJECT NO. C2-2-1895

ACQUISITION AUTHORIZATION
Public Law No. 534, 22 Dec. 1944
6 th Ind O. C. E. to M.R.D., dated 4 May 1950

COMPILED:

DATE	BY	
10-10-51	W.B.	Correct
5-13-52	W.B.	Correct to
5-8-53	M.F.J.	Taking line at
10-1-56	W.B.	Taking line 987.8 ac.
5-28-62	N.J.Z.	Dun. to Fin

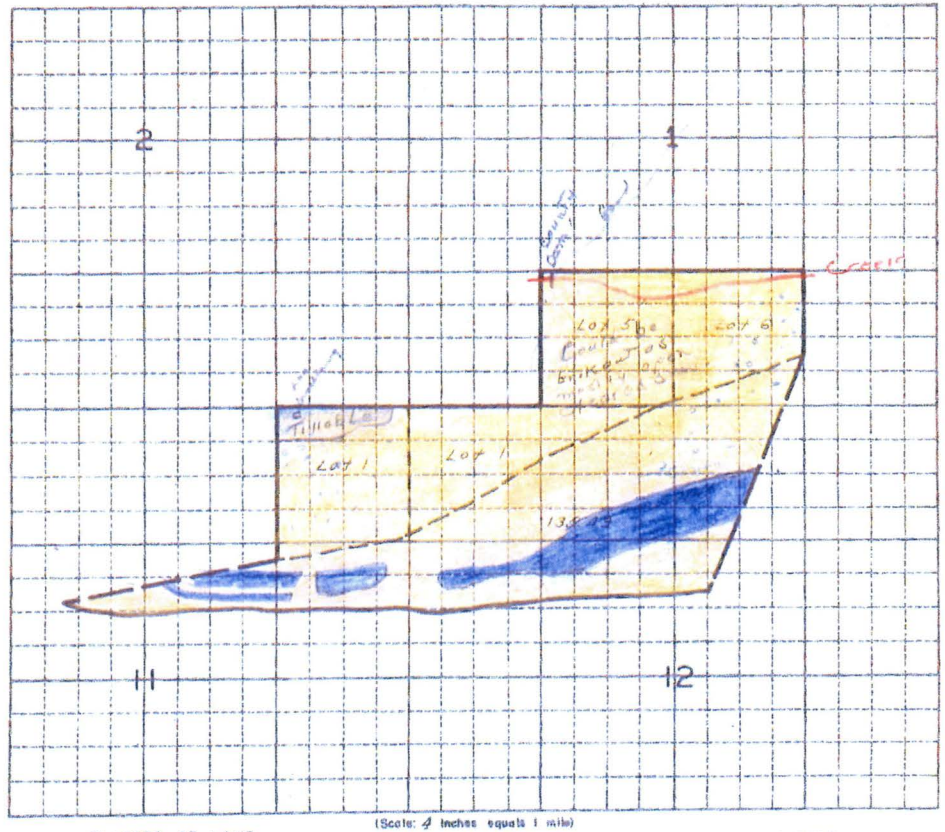
SHEET: 24 OF

State survey areas of concern --- agricultural land claimed within OHWM

E DRN 998
1 x 46

TRACT MAP (WITH GRID)

Project symbol No. Garrison Dam - Reservoir Area Tract No M-2003
Name of owner Marie Crammer, et al
Field work by Jack Turnquist Date 19 October 1950
Description of tract State - North Dakota County - Mountrail
Lots 5 and 6 of Section 1, Lot 1 of Section 11, Lot 1 of Section 12, all in Township 153 North, Range 2 West of the 5th P.M., plus accretions.



(Scale: 4 inches equals 1 mile)

CLASSES OF LAND

Crop land
Pasture land Open Trees Brush, Pasture, Grass, Meadow
Forest land
#
Grades of each class of land must be

I certify that this is an accurate map of Tract M-2003
based on Survey, Deed Desc. & G.L.O. Rods, which shows this tract to contain 286.12 acres, more or less
Name Jack Turnquist
Title Draftsman
Date

24

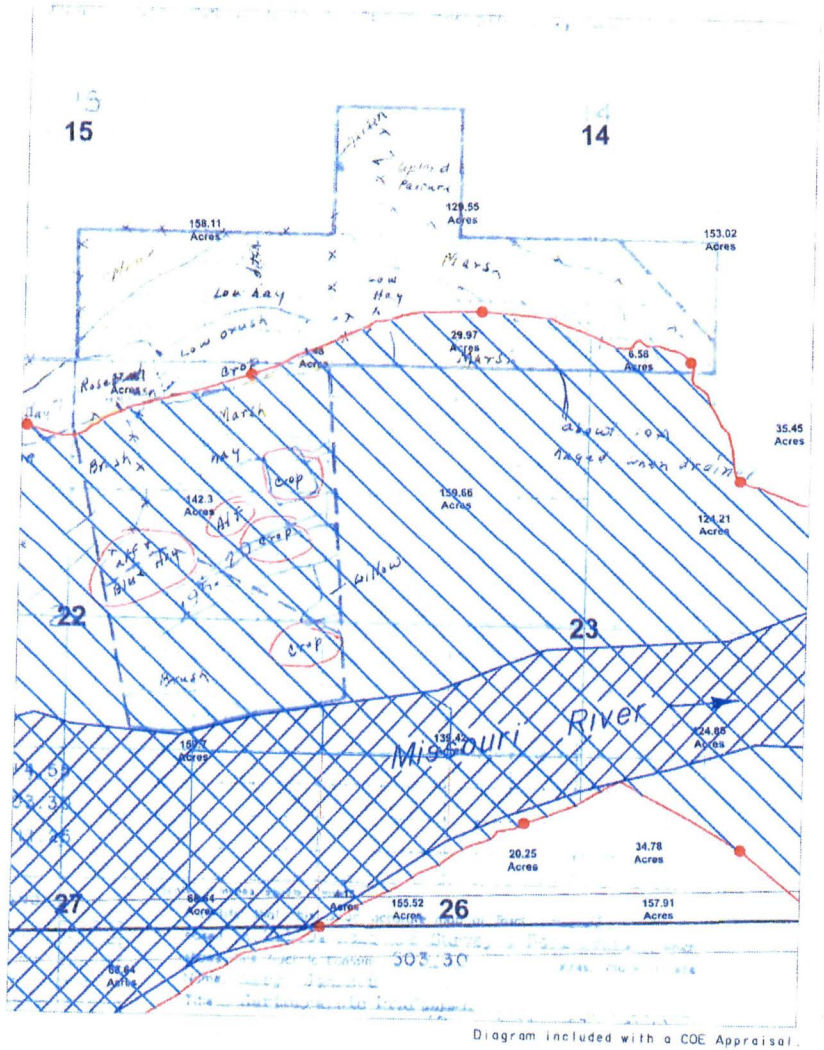


Diagram included with a COE Appraisal.

LEGEND

Missouri Riverbed between OHWM's as determined in ND Task Order #2.

Land above the OHWM as determined in ND Task Order #2.

Missouri Riverbed between OHWM's as determined on the BLM Supplemental Plats from the COE Segment Maps

Note: The vast majority of the Missouri Riverbed determined on the BLM Supplemental Plats is contained within the determination from ND Task Order #2 resulting in overlapped hatching.

EXHIBIT
abbies'
4

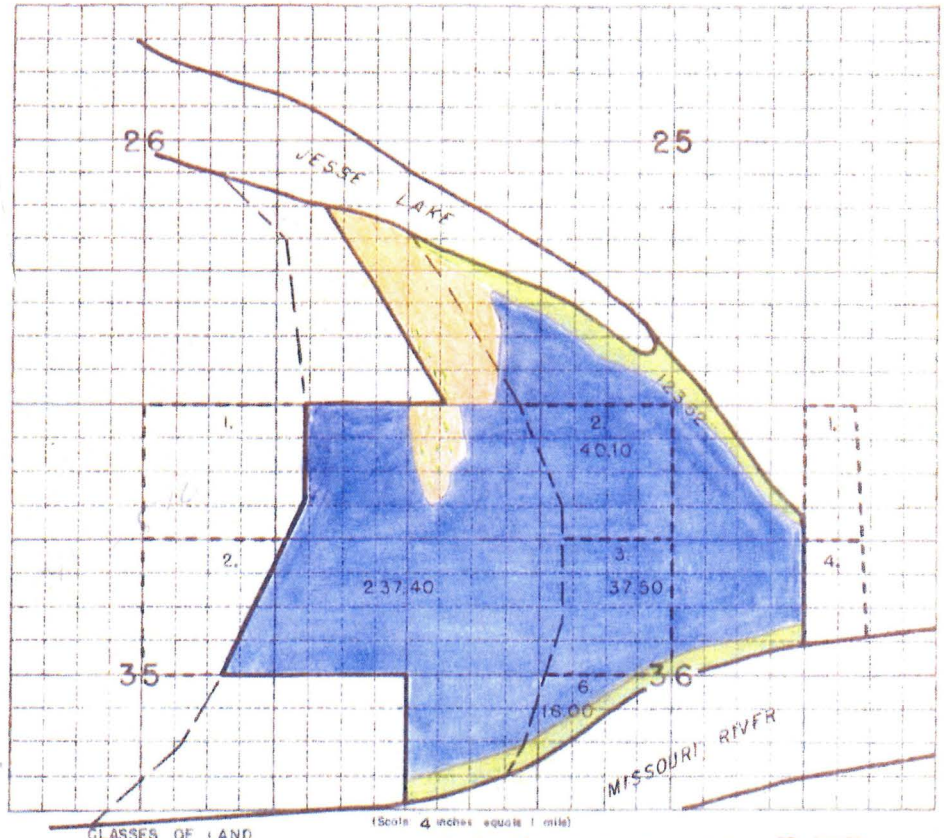
Enclosure 12

ADD - 052

ENG FORM 1 JAN 56 998

TRACT MAP (WITH GRID)

Project symbol No. Garrison Dam - Reservoir Area Tract No. BB-2520D
Name of owner R. E. Delaney
Field work by Wesley W. Belling Date 8 October 1957
Description of tract State - North Dakota County - Williams
See Sheets 2 and 3



(Scale 4 inches equals 1 mile)

CLASSES OF LAND

Crop land
Pasture land
Forest land
* Willow & Brush

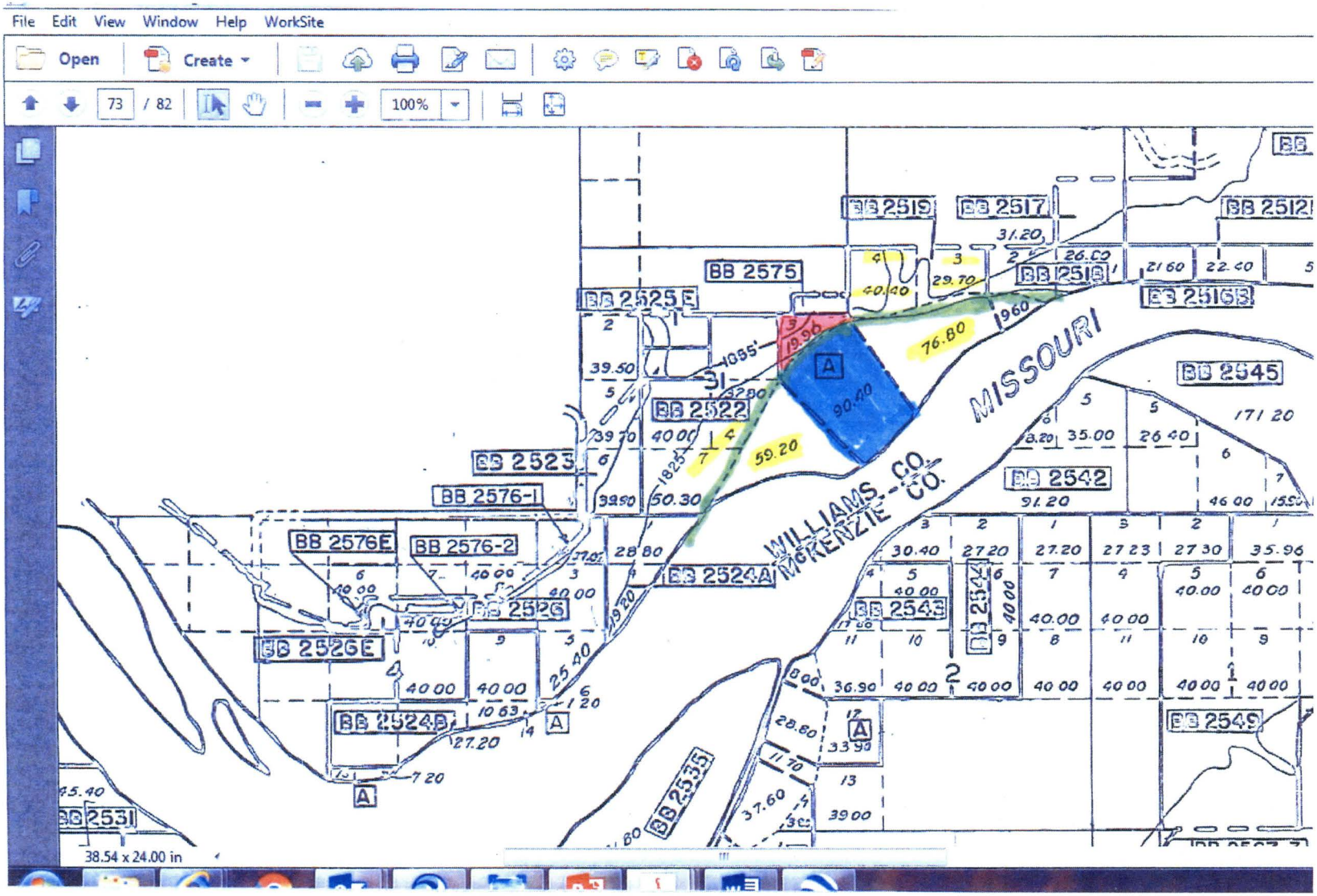
Grades of each class of land must be shown on the map proper.
* Name of any other class of land involved.

I certify that this is an accurate map of Tract BB-2520D based on G. L. O. Reds, Survey and Deed Desc. which shows this tract to contain 454.52 acres, more or less
Name Wesley W. Belling
Title Civil Engineer
Date 8 October 1957
Indicate whether map is based on General Land Office records, aerial survey, deed description or actual survey.

Federal Minerals Riparian to Rivers

- USA owns several smaller unpatented tracts located along Missouri and Yellowstone Rivers.
- USA has adopted Corps Survey.
- USA does NOT recognize State of ND's high water mark claim (on public domain lands).
- Operators forced to double lease and double pay royalties or face penalties.
- No resolution with sovereign immunity.

Federal and State Lease Overlap



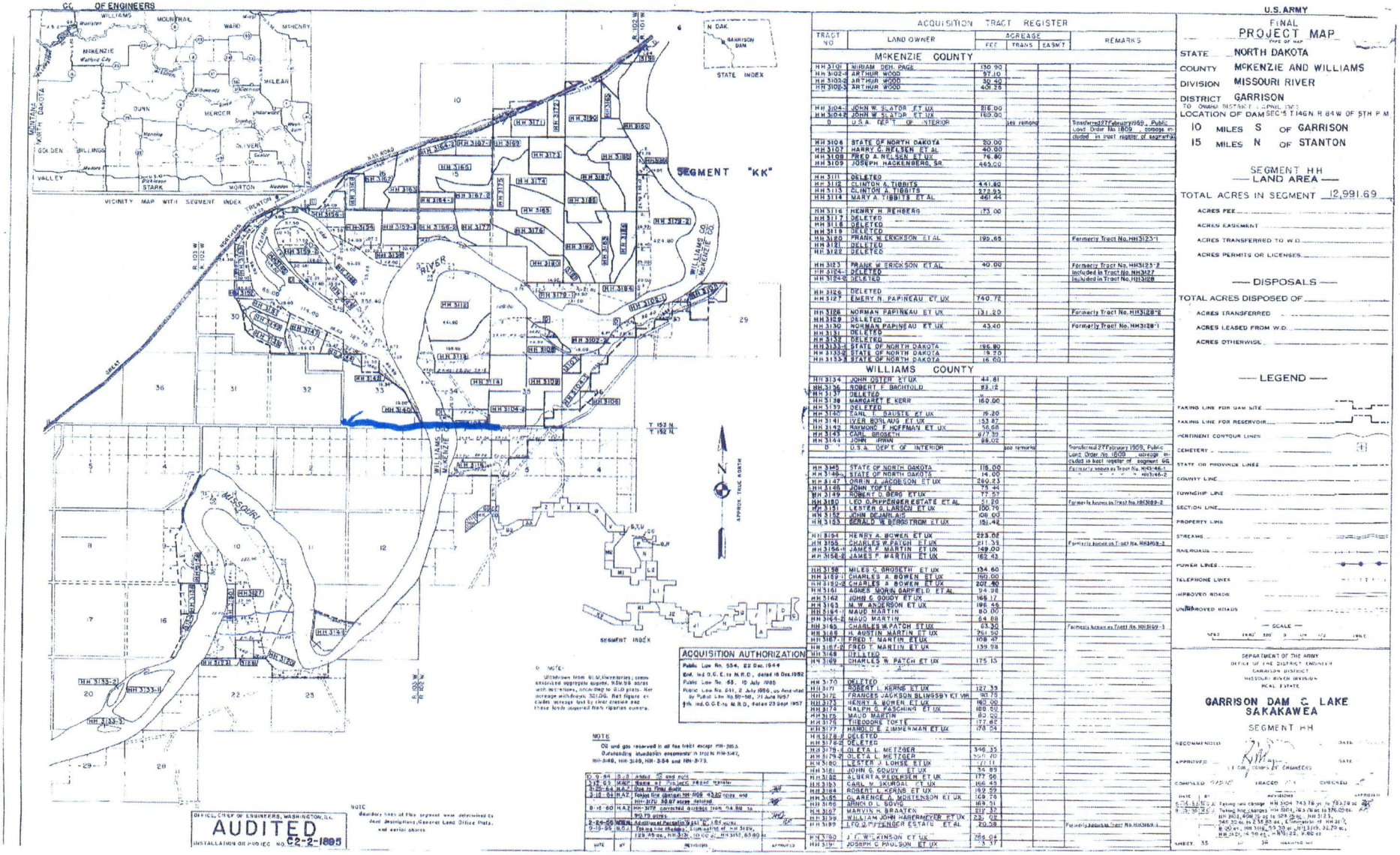
SB 2134—current version

- Clarifies state oil and gas ownership under Lake Sakakawea/Garrison project is limited to the OHWM of the historical Missouri riverbed channel prior to Dam.

- Adopts Corps survey to determine the OHWM boundary (resolves state vs. federal lease overlap as USA adopts Corps survey).

- Extends historical riverbed channel 12 river miles west of Highway 85 bridge (see following slides).

2134 Western boundary



ACQUISITION TRACT REGISTER

TRACT NO	LAND OWNER	ACREAGE FEE	ACREAGE TRANS	ACREAGE EASMT	REMARKS
	McKENZIE COUNTY				
HH 3101	MIRIAM DEH. PAGE	150.90			
HH 3102-A	ARTHUR WOOD	57.10			
HH 3102-B	ARTHUR WOOD	30.40			
HH 3102-C	ARTHUR WOOD	401.25			
HH 3104-A	JOHN W. SLATOR ET UX	816.00			
HH 3104-B	JOHN W. SLATOR ET UX	760.00			
D	U.S.A. DEPT. OF INTERIOR			see remarks	Transferred 27 February 1959, Public Land Order No. 1809 - acreage included in tract register of segment
HH 3106	STATE OF NORTH DAKOTA	20.00			
HH 3107	HARRY C. NELSEN ET AL	40.00			
HH 3108	FRED A. NELSEN ET UX	76.80			
HH 3109	JOSEPH HACKENBERG, SR.	469.00			
HH 3111	DELETED				
HH 3112	CLINTON A. TIBBITS	441.82			
HH 3113	CLINTON A. TIBBITS	372.95			
HH 3114	MARY A TIBBITS ET AL	461.44			
HH 3116	HENRY H. REHBERG	173.00			
HH 3117	DELETED				
HH 3118	DELETED				
HH 3119	DELETED				
HH 3120	FRANK W. ERICKSON ET AL	199.65			Formerly Tract No. HH3123-1
HH 3121	DELETED				
HH 3122	DELETED				
HH 3123	FRANK W. ERICKSON ET AL	40.00			Formerly Tract No. HH3125-2
HH 3124	DELETED				Included in Tract No. HH 3127
HH 3124-B	DELETED				Included in Tract No. HH 3128
HH 3126	DELETED				
HH 3127	EMERY N. PAPINEAU ET UX	740.72			
HH 3128	NORMAN PAPINEAU ET UX	131.20			Formerly Tract No. HH3128-E
HH 3129	DELETED				
HH 3130	NORMAN PAPINEAU ET UX	43.40			Formerly Tract No. HH3128-1
HH 3131	DELETED				
HH 3132	DELETED				
HH 3133-A	STATE OF NORTH DAKOTA	196.80			
HH 3133-B	STATE OF NORTH DAKOTA	19.20			
HH 3133-C	STATE OF NORTH DAKOTA	16.00			
	WILLIAMS COUNTY				
HH 3134	JOHN OSTER ET UX	44.81			
HH 3136	ROBERT F. BACHTOLD	98.12			
HH 3137	DELETED				
HH 3138	MARGARET E. KERR	160.00			
HH 3139	DELETED				
HH 3140	EARL L. BAUSLE ET UX	19.20			
HH 3141	IVER BOHLING ET UX	153.87			
HH 3142	RAYMOND F. HOFFMAN ET UX	56.68			
HH 3143	CARL GROSETH	877.39			
HH 3143	JOHN ERWIN	88.02			
D	U.S.A. DEPT. OF INTERIOR			see remarks	Transferred 27 February 1959, Public Land Order No. 1809 - acreage included in tract register of segment GG
HH 3145	STATE OF NORTH DAKOTA	118.00			
HH 3146	STATE OF NORTH DAKOTA	14.00			Formerly known as Tract No. HH3146-1 HH3146-2
HH 3147	ORRIN J. JACOBSON ET UX	280.23			
HH 3148	JOHN TOFTE	75.44			
HH 3149	NORBERT O. BERG ET UX	77.57			
HH 3150	LEO O. PIPPENGER ESTATE ET AL	51.20			Formerly known as Tract No. HH3189-2
HH 3151	LESTER G. LARSON ET UX	100.79			
HH 3152	JOHN C. JANLAIS	608.00			
HH 3153	GERALD W. BERGSTROM ET UX	151.42			
HH 3154	HENRY A. BOWEN ET UX	225.08			
HH 3155	CHARLES W. PATCH ET UX	211.33			Formerly known as Tract No. HH3169-2
HH 3156-A	JAMES F. MARTIN ET UX	149.00			
HH 3156-B	JAMES F. MARTIN ET UX	162.43			
HH 3158	MILES C. GROSETH ET UX	134.60			
HH 3159-A	CHARLES A. BOWEN ET UX	160.00			
HH 3159-C	CHARLES A. BOWEN ET UX	207.80			
HH 3161	AGNES MORIN GARFIELD ET AL	34.38			
HH 3162	JOHN C. GOUDY ET UX	165.17			
HH 3163	M. W. ANDERSON ET UX	196.46			
HH 3164	MAUD MARTIN	80.00			
HH 3164-B	MAUD MARTIN	64.88			
HH 3165	CHARLES W. PATCH ET UX	63.30			Formerly known as Tract No. HH3169-3
HH 3166	H. AUSTIN MARTIN ET UX	261.60			
HH 3167-A	FRED T. MARTIN ET UX	198.47			
HH 3167-B	FRED T. MARTIN ET UX	139.98			
HH 3168	DELETED				
HH 3169	CHARLES W. PATCH ET UX	175.15			
HH 3170	DELETED				
HH 3171	ROBERT L. KERNS ET UX	127.33			
HH 3172	FRANCES JACKSON SLINGSBY ET VIR	167.73			
HH 3173	HENRY A. BOWEN ET UX	160.00			
HH 3174	RALPH O. PASCHING ET UX	160.00			
HH 3175	MAUD MARTIN	80.00			
HH 3176	THEODORE TOFTE	177.62			
HH 3177	HAROLD E. ZIMMERMAN ET UX	178.54			
HH 3178-B	DELETED				
HH 3178-C	DELETED				
HH 3179-A	OLETA L. METZGER	346.35			
HH 3179-D	OLETA L. METZGER	320.70			
HH 3180	LESTER J. LOMSE ET UX	161.11			
HH 3181	JOHN C. GOUDY ET UX	34.89			
HH 3182	ALBERT A. PEDERSEN ET UX	177.96			
HH 3183	CARL W. SKURDAL ET UX	166.43			
HH 3184	ROBERT L. KERNS ET UX	169.29			
HH 3185	CLARENCE A. MORTENSON ET UX	169.76			
HH 3186	ARNO D. L. SOVIG	169.51			
HH 3187	MARVIN H. BRAATEN	210.32			
HH 3188	WILLIAM JOHN HABERMEYER ET UX	232.02			
HH 3189	LEO J. PIPPENGER ESTATE ET AL	20.58			Formerly known as Tract No. HH3169-1
HH 3190	J. C. WILKINSON ET UX	266.04			
HH 3191	JOSEPH C. PAULSON ET UX	5.37			

2134 Western Boundary

Under Contract No. W912DQ-07-D-005,

Impacts of Siltation of the Missouri River in the State of North Dakota Summary Report

U.S. Army Corps of Engineers - Omaha District
The Missouri River Joint Water Board

29 June 2009

THE Louis Berger Group, INC.

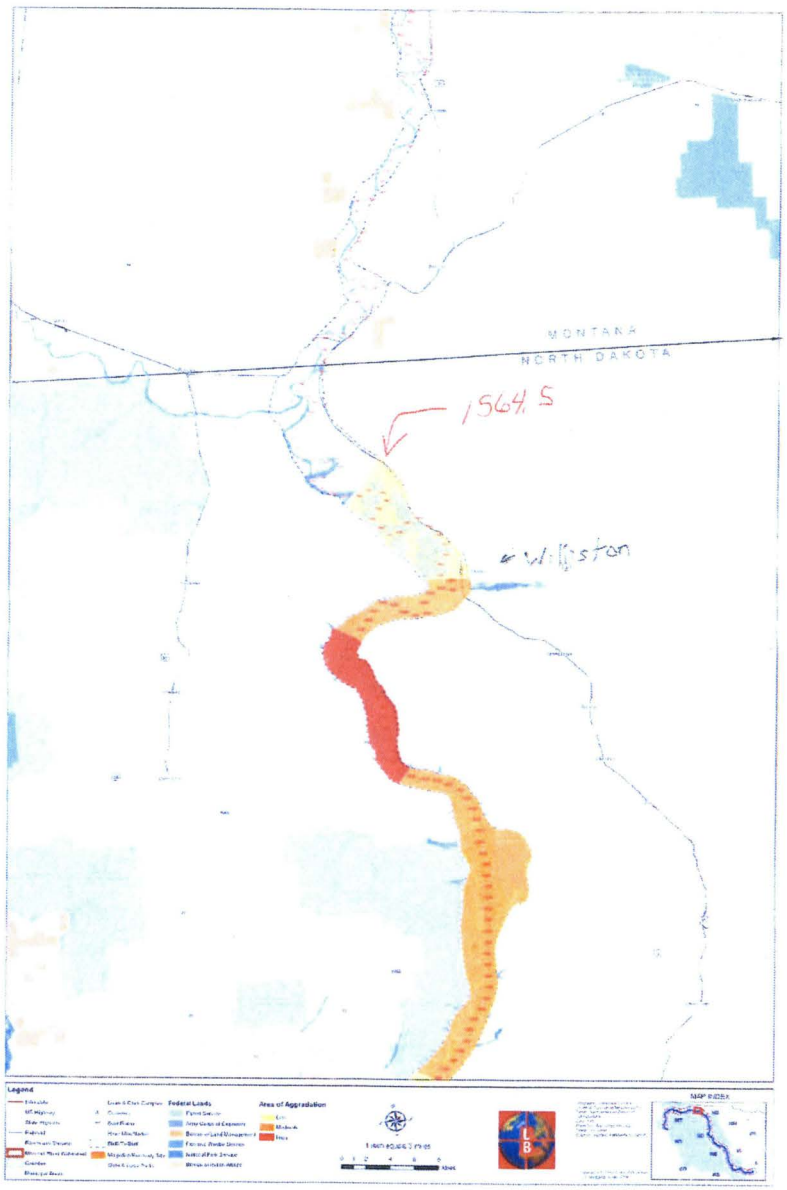


Figure 4-1: Aggradations Area Map - Lake Sakakawea upstream from Garrison Dam through Williston ND

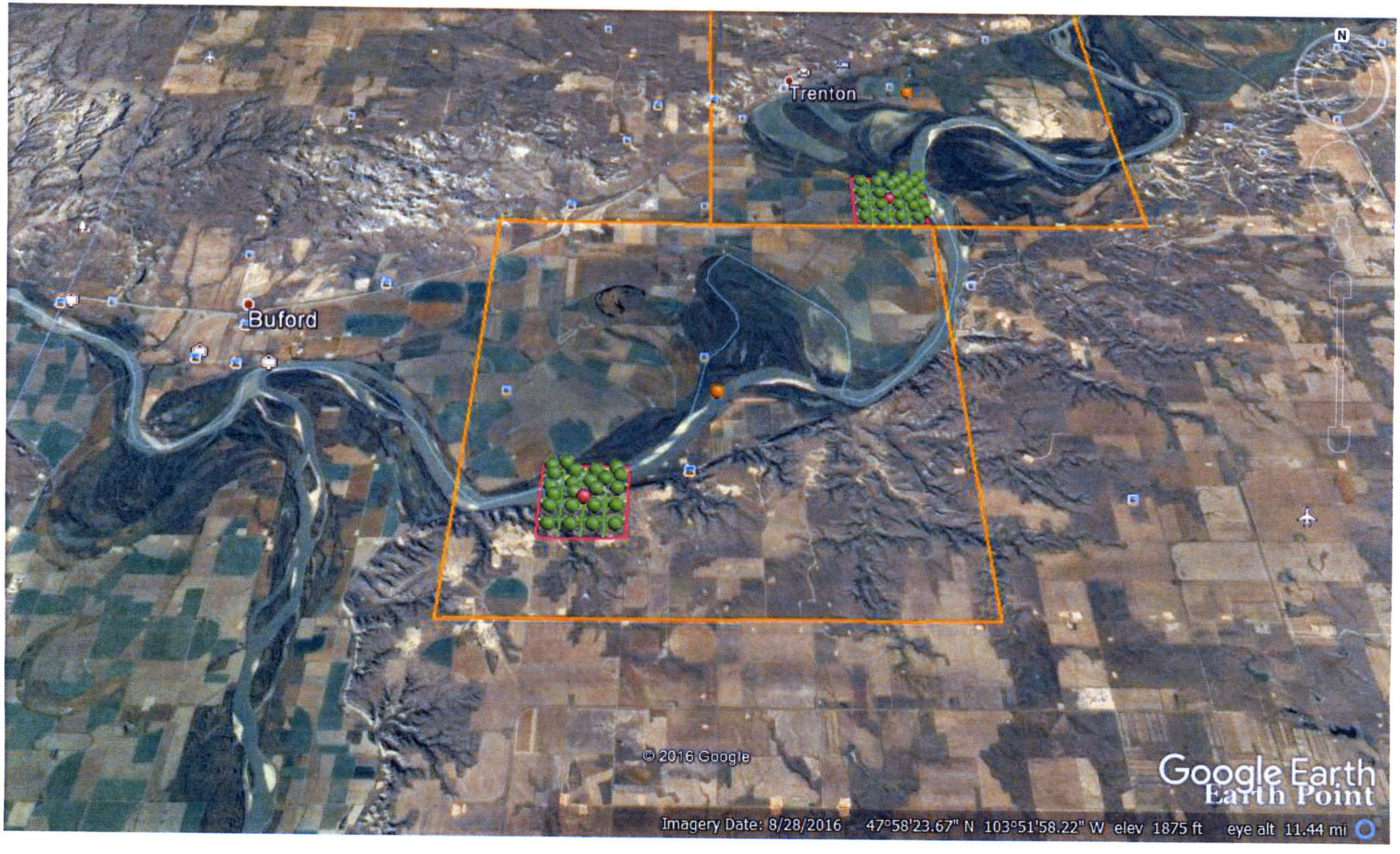
HB 1199—current version

- Clarifies state oil and gas ownership under Lake Sakakawea/Garrison project is limited to the OHWM of the historical Missouri riverbed channel prior to Dam.

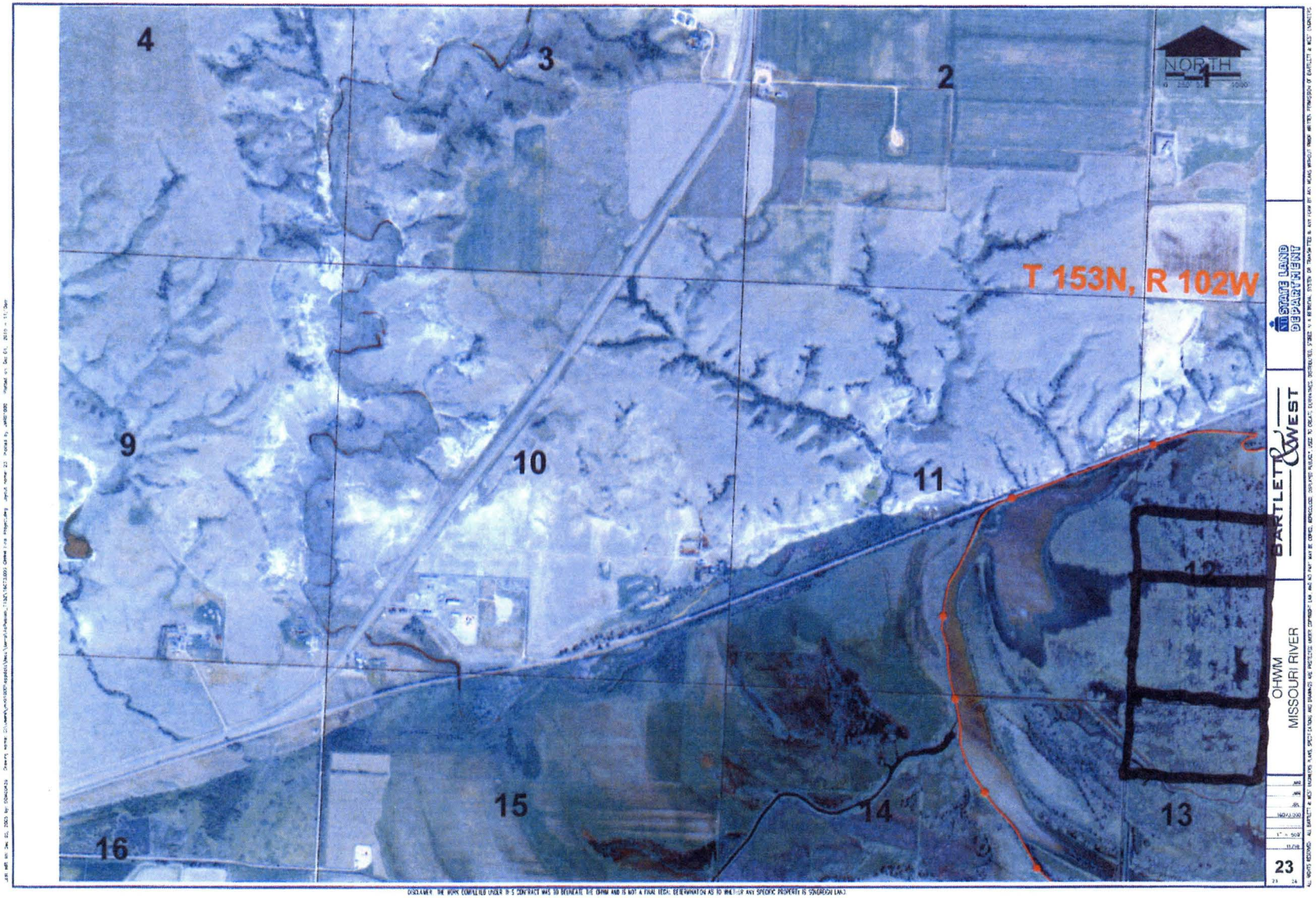
- Does not adopt a particular survey or resolve other pending issues

- Extends historical riverbed channel approximately 25 river miles west of Highway 85 bridge (see following slides).

HB 1199 approximate western boundary 152-103-29

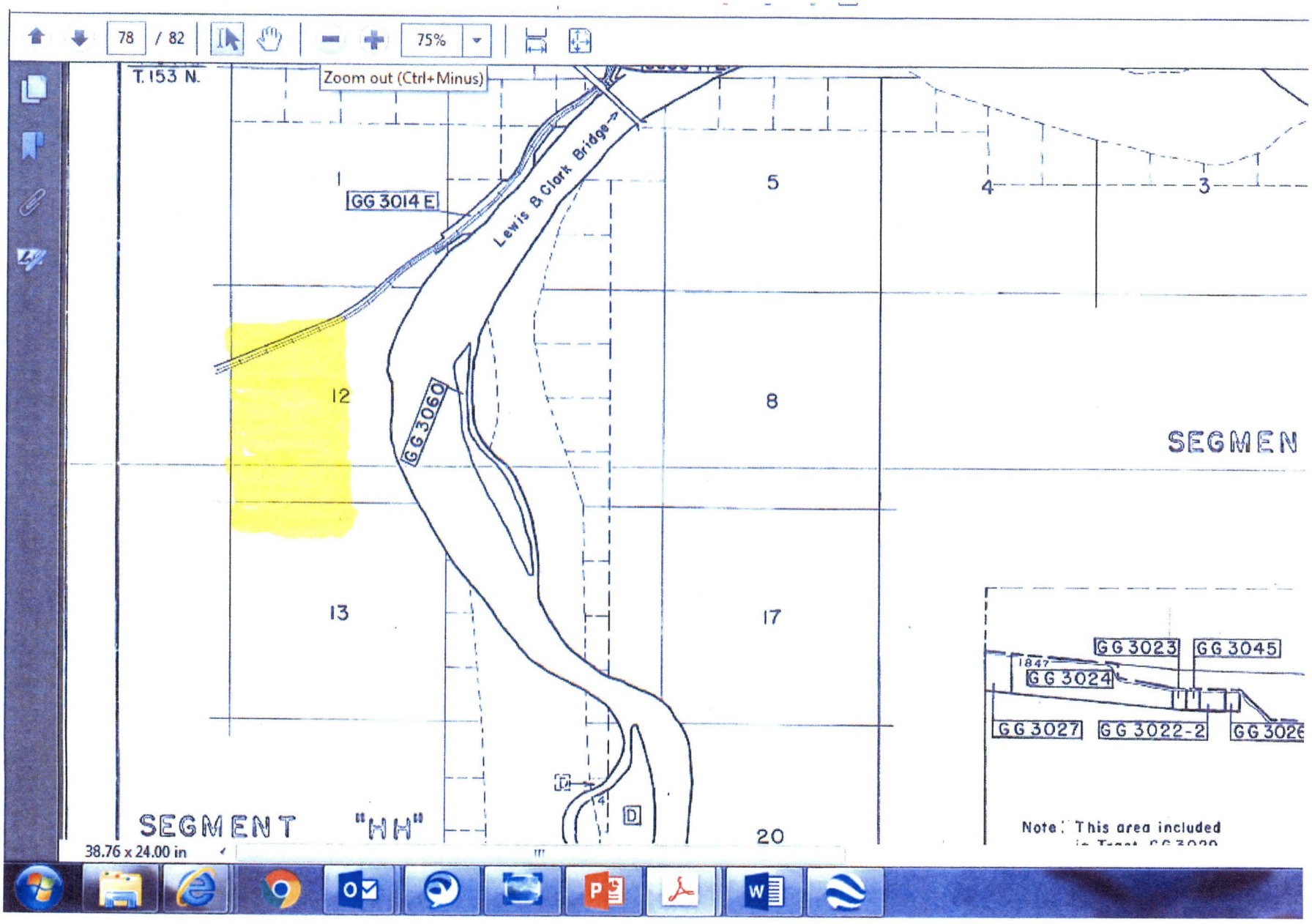


Wilkinson minerals—Phase 1 survey (Red line OHWM)– page 1

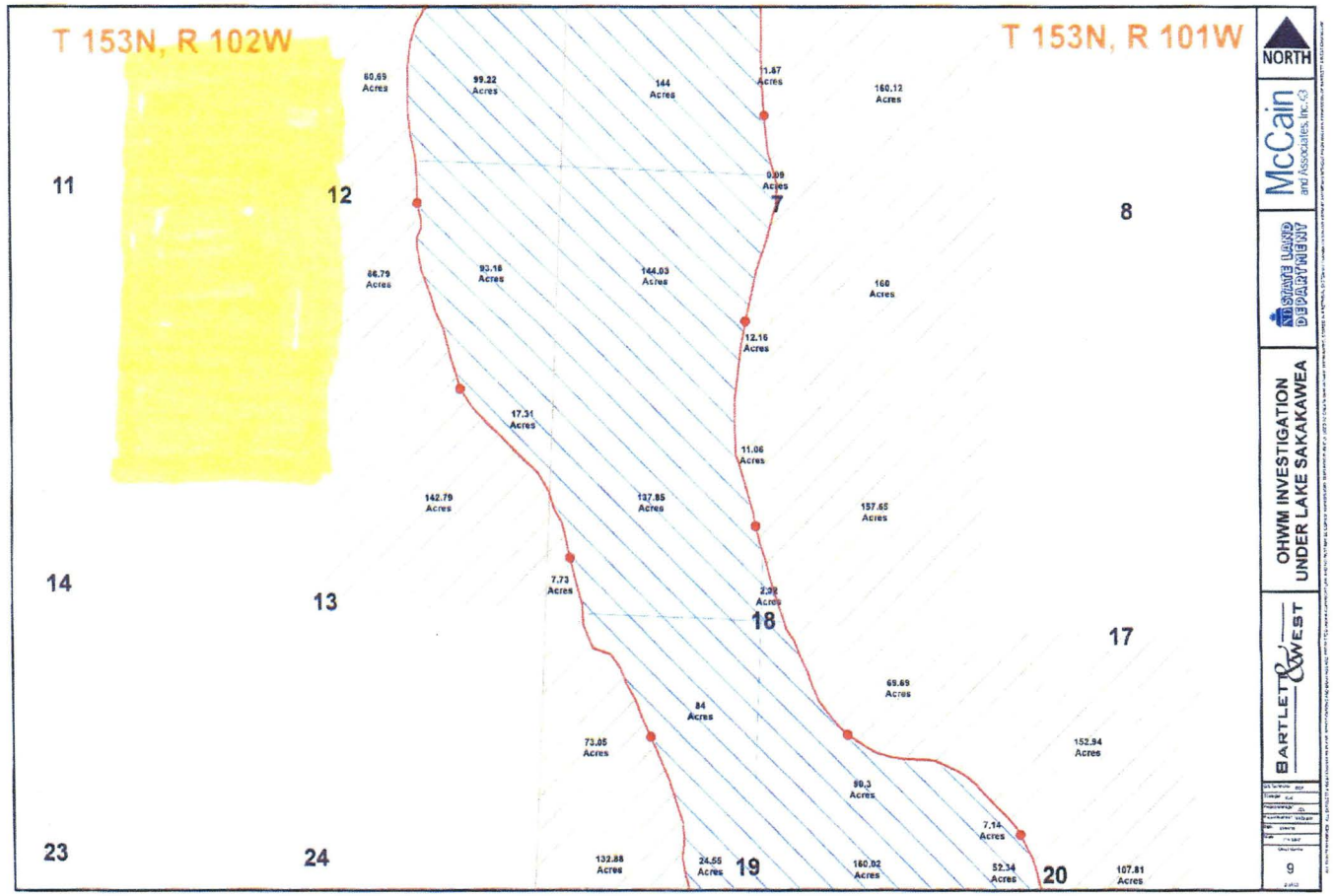


Wilkinson minerals– Phase 1 survey – Page 2

Wilkinson minerals --- Corps survey



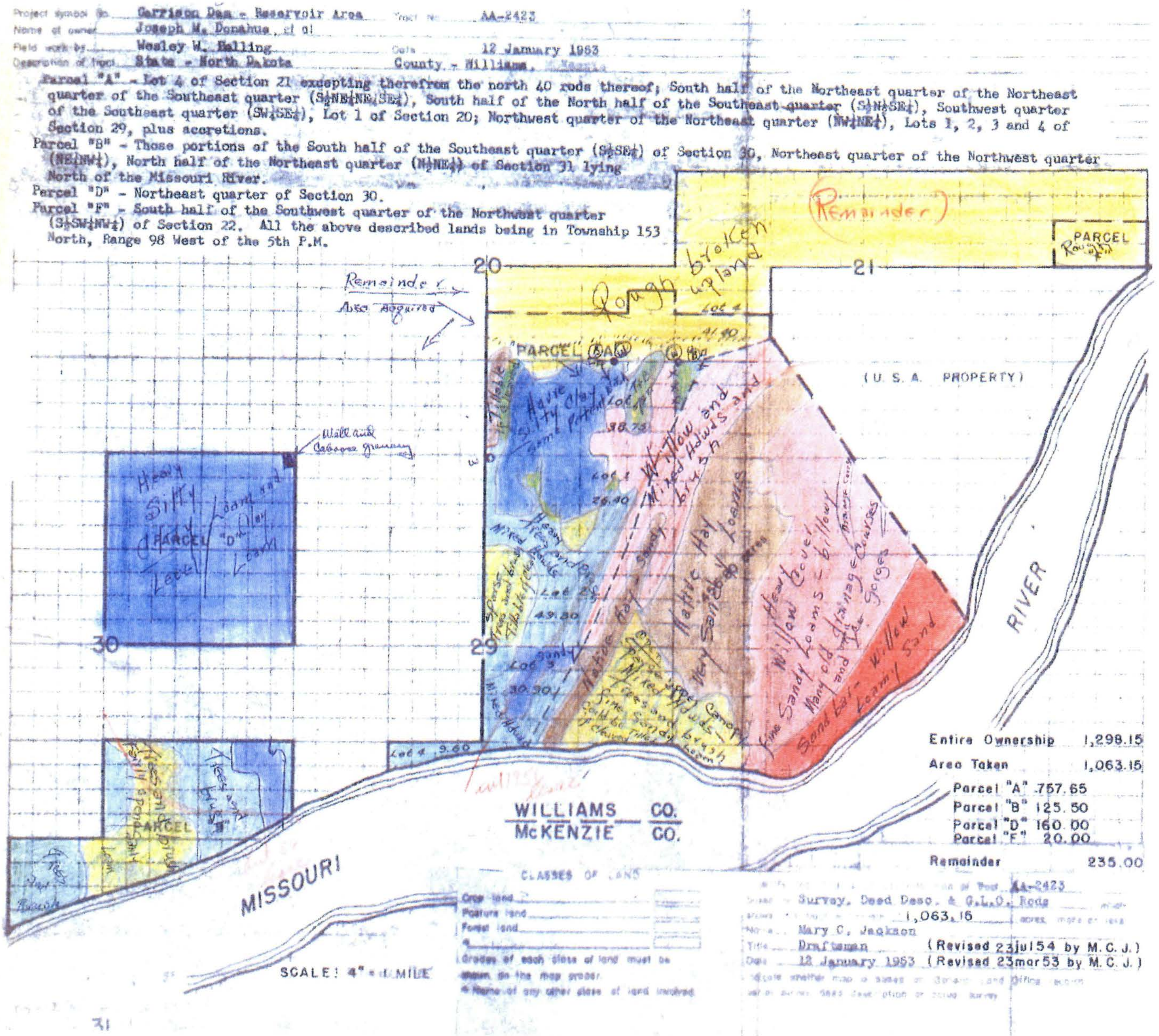
Wilkinson minerals – State Phase 2 (historical) survey



Review of Corps archival records

- Historical correspondence, internal memorandums, maps, land appraisals and other documentation relating to Corps land acquisitions and survey.
- Some inconclusive determinations of OHWM for certain Corps survey tracts may exist (under state law) sufficient to warrant further review to confirm the most accurate and fair determination of the historical OHWM for the entire Missouri river channel.

Corps Land Appraisal—accretions--Red area "no agricultural value"



2134 Proposed Amendments –p.1

- Creates new chapter of NDCC
- 1.State oil and gas ownership under Lake Sakakawea/Garrison project is limited to the OHWM of the historical Missouri riverbed channel prior to Dam closure.
- 2. Adopts corps survey as "presumptive determination" of OHWM. Creates new study to correct or modify segments of corps survey if clear and convincing evidence.
- 3. Sets forth parameters of study.

2134 Proposed Amendments –p.2

- 4. Provides for public notice and opportunity to comment after completion of study.
- 5. Two year period for implementation of final study results for both State and operators to incorporate acreage adjustments, lease bonus and royalty payments and refunds.
- 6. Two year limitations period for any interested party to challenge any portion of the study by judicial review.
- 7. Recognizes federal law prevails for OHWM determination of *Public domain lands only.*

2134 Proposed Amendments –p.3

- 8. Recognizes the state engineer's authority to regulate the historical riverbed channel, minerals other than oil and gas, and the waters of the State.
- 9. Retroactive provisions.

Summary

- The oil and gas ownership created by the complexities of river title cannot be resolved overnight.
- Proposed amendments provide a "road map' for resolution of multiple river ownership related issues, and provides a process for all interested parties including mineral owners, operators, and the state to participate in the process.

CROWLEY FLECK PLLP
ATTORNEYS

#5
SB2134
3/10/17

Testimony of Jon Patch

Concerning SB 2134

House Energy and Natural Resources Committee

March 10, 2017 9:00 AM

Mr. Chairman, esteemed members of the Energy and Natural Resources Committee, my name is Jon Patch. I am here representing the family of my Grandparents, JT and Evelyn Wilkinson to lend our support to SB2134. You heard our story when I testified in support of HB1199 a few weeks ago. This bill, SB2134, and HB1199, both deal with the determination of mineral ownership under lands acquired for the man-made Lake Sakakawea. I won't repeat my testimony other than to say that this bill, as it has been amended in the Senate, has the same result for us (the Wilkinson tract) that HB1199 does. It returns property that was taken, with no notice, no compensation, and no opportunity to respond, to the rightful owners.

Some have called this a complicated issue. It's not. The confusion surrounding this issue has been introduced by the legal "powers-that-be" and those who don't understand fundamental hydrology who have twisted the intent of the equal footing doctrine.

You will often hear their excuse for what has taken place as "Rivers move" or "the river giveth and the river taketh away" – what that means is erosion happens on one bank while accretion happens on the opposite bank, but the net amount owned by the state through sovereign ownership stays about the same.

But, since the construction of the dam its not a natural river – ***it's a reservoir!***

This *is* a man-made lake formed by a man-made dam built on the Missouri River. No one is disputing that the state owns the sovereign lands of the bed and banks of the Missouri River. But to make the argument that the state attorneys have made, that the Lake and River are one in the same, that is, that there is no distinguishing between them is outlandish.

Charles Carvell, J.D., LL.M., Ph.D., the assistant attorney general who was described as the state's most experienced legal adviser on sovereign lands issues, made the direct statement to this body in March, 2010 that "with regard to water and lands at Lake Sakakawea, the Army Corps of Engineers owns most shorelands and land underlying the lake, with the exception of state ownership of the original river channel, and the state cannot preempt federal ownership and control."

There was objection to my statement at the last hearing that I threw "big oil" in the mix. That statement could be modified to say that *one* big oil company was working hand in hand with the State Land Department staff to get insider information, nominate the specific acres from unpublished draft information, pay beaucoup bucks at an auction knowing all the while that if it is determined that these are not the state's minerals their

bonus money paid to the state would be returned in full. Wow! Who wouldn't agree to a deal like that. They even told the state they had doubts those minerals were owned by the state, but they'll go along with the plan as long as they're given the money back guarantee.

Now this committee is tasked with sorting out this mess to ensure the "right thing" is done. I commend you for taking this on, and not shirking your responsibility to the courts.

The wrangling with the Land Board and Attorney Generals office has caused our family to accrue hundreds of thousands of dollars of legal and expert expenses only to have our efforts truncated by a legal maneuver one week before finally getting our day in court, which we never got.

This process, through this body, has been so refreshing. We are finally able to tell our story, to those who are truly listening, and can make a difference. I cannot express to you enough how appreciative we are to have this opportunity to tell our story. Thank you for the work that you do, day in and day out, for the common people of North Dakota.

Passage of this bill will right a wrong that has taken place to hundreds of private mineral owners in North Dakota who have had their private property taken without compensation or due process. Hopefully it will send a clear message to the Land Board and Land Commissioner that their egregious practices are not how we operate here in the Great State of North Dakota.

Thank you and I'll stand for any questions you may have of me.

#6 SB 2134
3/10/17

Testimony of Joshua Swanson
Concerning Senate Bill No. 2134
House Energy and Natural Resources Committee
March 10, 2017, 9:00 AM

Chairman Porter and members of the Committee, thank you for the opportunity to comment on Senate Bill 2134. I'd like to also thank you for your work thus far on this issue, and for the Committee and House's support for HB 1199. As I testified previously to this Committee with regards to House Bill 1199, and to the Senate Energy and Natural Resources Committee with regards to Senate Bill 2134, I represent clients that have been affected by the State's unconstitutional taking of private oil and gas interests under property that was acquired by the United States back in the 1950s because of the flooding that would result from Garrison Dam and its man-made reservoir, Lake Sakakawea.

I will try not to repeat my testimony previously submitted to this Committee and to its counterpart in the Senate considering SB 2134. Instead, I'd like to address some of the questions asked by this Committee during the February 2 hearing on HB 1199, which are relevant to SB 2134, and were discussed in the February 9 letter I sent to the members of this Committee.

First, the Committee asked if SB 2134 and HB 1199 would resolve the lawsuits my clients have filed against the State. While my clients would abide by the legislation in its current form, the answer to this question is, essentially, up to the State. The State has not yet indicated whether they will continue pursuing their claims if legislation passes recognizing that the State does not own the oil and gas interests, which private land owners like the Wilkinson and Vohs families, and the beneficiaries of the property managed by First National Bank, reserved when the United States acquired their property for Lake Sakakawea.

Second, as to what exactly the State is claiming, contrary to the testimony previously offered by the State, in the lawsuit with the Wilkinson family, the State is claiming all the oil and gas interests under Lake Sakakawea. The State's position in the Wilkinson lawsuit is that Lake Sakakawea is one-and-the-same-thing as the Missouri River, and Lake Sakakawea does not exist as a separate body of water. The State's claim is not limited to the 30,000 acres under the "historic Missouri River" as it existed before Garrison Dam and Lake Sakakawea. The State has taken the position in the Wilkinson case that it can flood private property – like my clients' property and all the other acres flooded by Garrison Dam and Lake Sakakawea – and then claim title to that property. The State saying otherwise is simply not true, and flies in the face of the pleadings the State submitted to the court. SB 2134 addresses most of those acres.

As noted during this Committee's hearing on HB 1199, the location of these interests can be determined from the deeds and condemnation orders whereby the United States acquired the property subject only to the reservation of the oil and gas interests by private landowners. For example, if you look at Exhibit 3 to the written testimony I submitted in support of HB 1199, you will see the legal description for the property the United States acquired from the Wilkinson family as Farm Unit 312 in the Buford-Trenton Project, being part of Section 13, containing

57.09 acres; and the SW/4, S/2NW/4 of Section 12, containing 228.95 acres (excepting that portion which constitutes the right-of-way of the Great Northern Railway Company) all in Township 153 North, Range 102 West.

Additionally, contrary to the State's previous testimony, the State's claim to these private oil and gas interests only goes back to the beginning of our most recent oil boom. In 2010, the State placed thousands of acres up for auction that it had never before claimed – including the Wilkinson and Vohs' minerals – without notifying the private mineral owners of its actions. The July 2010 letter from Brigham Oil and Gas to the State, attached to my February 9 letter and included with this testimony as Exhibit 1, while requesting to lease the Wilkinson's property from the State, expressed serious doubts about the State's newfound claim, writing:

> "Brigham is aware of the State of North Dakota's recent claim to the high water mark along the Missouri River, and it appears that the State is claiming and is now leasing more acreage than previously leased and/or claimed. In reflecting the nominations above, Brigham is only nominating the tracts listed above and has not approved or verified title to said river tracts. It is Brigham's understanding that in the event the State's claim to the high water mark is not successful, the State will refund or credit the excess bonus monies paid."

(emphasis added). The State's wholesale deviation from its practice of claiming only those oil and gas interests within the "historic Missouri River" as it existed prior to Garrison Dam and Lake Sakakawea was confirmed during the deposition of Gary Preszler. Mr. Preszler was the acting Land Commissioner who preceded Mr. Gaebe. Mr. Preszler testified that between the time Lake Sakakawea was formed and approximately 2010, the State only claimed those minerals within the "historic Missouri River" as it existed before Garrison Dam.

Even while laying claim to its citizen's private mineral interests, the State suspected the proceeds received from its actions would likely be restored to the rightful owners one day. The State has set aside the bonus and royalty payments from the oil and gas interests outside of the "historic Missouri River" – like those owned by the Wilkinson and Vohs families, and beneficiaries of the property managed by First National Bank. As this Committee noted during its questioning on HB 1199, the State is a stranger to title of these privately held mineral interests. The State says as much in a September 2010 Memorandum prepared by the Land Board, also included with the February 9 letter, and attached to this testimony as Exhibit 2. This Memorandum shows that Mr. Gaebe and Mr. Heiser were both present at the September 2010 meeting where the Land Board stated in unmistakable terms that, "There are many issues that could lead to potential title disputes related to the State's ownership of the minerals beneath navigable bodies of water. … In the meantime, the Commissioner believes that the Board should take action to ensure that if the State does lose title disputes, the money needed to refund bonuses and other revenues received are still available to do so."

SB 2134 is necessary to restore the money wrongfully received by the State at the expense of private landowners – like the Wilkinson and Vohs families, and the beneficiaries of the property managed by First National Bank – which was set aside in anticipation of the day the State would be required to make these private landowners whole again. That day is here. Stated

another way, doing the right thing and correcting the wrong rendered upon the citizens of North Dakota will not cost the State anything. The money required to right this wrong has been set aside and was not the State's to claim in the first place. A review of the Land Board Memorandum also discloses that despite its actions, the Land Board admitted it did not know what interests the State legally owned. To put a finer point on it, take first, sort out actual ownership later.

Finally, while both SB 2134 and HB 1199 address the State's unconstitutional taking of oil and gas interests, we are concerned that SB 2134 arbitrarily draws a dividing line where Lake Sakakawea ends and will continue to deprive some of the private property rights it seeks to protect. There are 15 sections of land in Township 152 North, Range 103 West, and Township 152 North, Range 102 West, that contain land acquired by the United States for Garrison Dam and Lake Sakakawea. Just like the Wilkinson and Vohs families, and the beneficiaries of the property managed by First National Bank, the landowners in these 15 sections reserved their oil and gas interests when their property was acquired by the United States for Lake Sakakawea. Nonetheless, these property owners were omitted in the amendment to SB 2134. There is no reason to exclude the landowners from the protections afforded the mineral owners to the east of the dividing line in SB 2134. They are in the exact same position, having lost their property to the United States because of Garrison Dam and Lake Sakakawea.

Conversely, HB 1199 does not arbitrarily draw a line where property rights are protected and leave potentially thousands of private oil and gas interest owners in the cold. HB 1199 recognizes that all those private landowners that lost their property to the United States because of Lake Sakakawea, but reserved their oil and gas interests, are deserving of protection. This body has taken great strides to protect the interests of it citizens and we urge you to push a form of this legislation across the finish line for all affected property owners; not just most of them.

In sum, I want to thank you again for taking up the mantle to protect private property rights and address the concerns of the Wilkinson and Vohs families, and the beneficiaries of the property managed by First National Bank. It has been a long few years for my clients, and they, and myself, are grateful for your efforts. Mr. Chairman, I'll stand for any questions the Committee may have.

Respectfully,

Joshua Swanson

BRIGHAM
OIL & GAS, L.P.

15202

Brigham Oil & Gas, L.P. ◆ 6300 Bridge Point Parkway, Bldg. 2, Suite 500 ◆ Austin, Texas 78730
Phone (512) 427-3300 ◆ Fax (512) 427-3400

June 10, 2010

Via Email & Overnight Mail
tfeeney@nd.gov

Board of University and School Lands
North Dakota State Land Dept.
Attn: Tom Feeney, Director of Minerals Management
1707 North 9th Street
Bismarck, ND 58506-5523

Checked - Brian ✓

RE: Nominations for the August 3, 2010, State Lease Sale
Williams/McKenzie Counties, ND

Dear Mr. Feeney,

Brigham Oil & Gas, L.P. ("Brigham") would like to nominate the following tracts for the August 3, 2010, State Lease Sale:

#	County	TWN	RNG	SEC	SUB-DIVISION	SLD OWN	NET	GROSS	NOTES	
1	WIL	153N	102W	11	MISSOURI RIVER IN NE4	100%	~~159.98~~ 10.90 BT	159.98	Acreage Calculated from Plat Provided by Tom Feeney - Pending River Survey	(1) ✓
2	WIL	153N	102W	11	MISSOURI RIVER IN SE4	100%	~~159.98~~ 136.84 BT	159.98	Acreage Calculated from Plat Provided by Tom Feeney - Pending River Survey	(2) ✓
3	MCK	153N	102W	12	MISSOURI RIVER IN NW4	100%	~~159.98~~ 53.46 BT	159.98	Acreage Calculated from Plat Provided by Tom Feeney - Pending River Survey	Prev. Nom.
4	MCK	153N	102W	12	MISSOURI RIVER IN SW4	100%	160.04	160.04		Prev. Nom.

EXHIBIT
tabbies
1

DTL002576

ND State Land Department Lease Sale Nominations
June 10, 2010

Nom. Pending 7-1-10 H

5	WIL	154N	103W	21	Parcel 16, described as A strip of land 97 feet wide lying north of, adjoining and extending along the entire south line of WSW, excepting all that portion lying within 33 feet of the section lines, containing 1.89 acres, more or less.	100%	1.89	1.89	This acreage showed up in a partial Title Opinion for Brigham's Abe Owan 21-16 #1-H (NDIC File No. 18796) as unleased being owned by the State of North Dakota
6	WIL	154N	103W	21	Parcel 17, described as A strip of land 97 feet wide lying north of, adjoining and extending along the entire south line of ESW, excepting all that portion lying within 33 feet of the section line; 3.83 acres of SE.	100%	3.83	3.83	This acreage showed up in a partial Title Opinion for Brigham's Abe Owan 21-16 #1-H (NDIC File No. 18796) as unleased being owned by the State of North Dakota

5/23/2010 Spud date

Another tract (#7)

Brigham is aware of the State of North Dakota's recent claim to the high water mark along the Missouri River, and it appears that the State is claiming and is now leasing more acreage than previously leased and/or claimed. In reflecting the nominations above, Brigham is **only** nominating the tracts listed above and has not approved or verified title to said river tracts. It is Brigham's understanding that in the event the State's claim to the high water mark is not successful, the State will refund or credit the excess bonus monies paid.

If you have any questions, please do not hesitate to contact the undersigned.

Regards,

Heath E. Flowers

Heath E. Flowers
Area Landman
Brigham Oil & Gas, L.P.

Cc via email: Ken Treaccar
Heath Thompson

Minutes of the Meeting of the
Board of University and School Lands
September 30, 2010

The September 2010 meeting of the Board of University and School Lands was called to order in the Governor's Conference Room at 9:35 AM by Governor John Hoeven, Chairman.

Members Present:

John Hoeven	Governor
Kelly Schmidt	State Treasurer
Alvin A. Jaeger	Secretary of State
Wayne G. Sanstead	Superintendent of Public Instruction
Wayne Stenehjem	Attorney General

Members Absent:
None

Land Department Personnel:

Lance D. Gaebe	Land Commissioner
Michael D. Brand	Director, Surface Management Division
Jeff Engleson	Director, Investment Division
Tom Feeney	Director, Minerals Management Division
Linda Fisher	Unclaimed Property Administrator
Peggy Gudvangen	Account/Budget Specialist
Judith F. Schell	Administrative Assistant

Others in Attendance:

Charles Carvell	AG Office
Carolyn Kvislen	AG Office
Les Korgel	McLean County Auditor
Steven Lee	McLean County Commissioner
Julie Hudson-Schenfish	McLean County Commissioner
Christopher Friez	Crowley/Fleck Law Firm
Al Fitterer	Al Fitterer Architect PC, McLean County
Jen Veleger	AG Office
Todd Sattler	AG Office
Gerald Heiser	Office of the State Engineer/State Water Commission
John Paczkowski	Office of the State Engineer/State Water Commission
Dale Wetzel	Associated Press

APPROVAL OF MINUTES

A motion to approve the minutes of the July 29, 2010 meeting was made by Al Jaeger and seconded by Wayne Stehenjem. .Motion carried.

Action Record	Aye	Nay	Absent
Secretary Jaeger	X		
Superintendent Sanstead	X		
Treasurer Schmidt	X		
Attorney General Stenehjem	X		
Governor Hoeven	X		

EXHIBIT
tabbies 2

DTL001712

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS
September 30, 2010

RE: **Designated Fund Balance for Land and Minerals Trust**
(Action Required)

There are many issues that could lead to potential title disputes related to the State's ownership of the minerals beneath navigable bodies of water. It may be some time before all of these potential title disputes are resolved, by the courts or through negotiations and agreements between the various parties. In the meantime, the Commissioner believes that the Board should take action to ensure that if the State does lose title disputes, the money needed to refund bonuses and other revenues received are still available to do so.

Revenues from sovereign lands are deposited into the Land and Minerals Trust Fund (LMTF). Each budget cycle, the Commissioner estimates the amount of cash that will be available in the LMTF during the following biennium. Historically, the legislature has then appropriated funds and authorized transfers out of the LMTF to the General Fund based on those estimates. The amount transferred at the end of each biennium has usually been less than $7 million, although that amount increased to approximately $15.9 million during the 2007-2009 biennium, and the amount slated to be transferred from the LMTF this biennium is $35 million.

With the current Bakken/Three Forks oil activity, LMTF revenues have skyrocketed. Our most current estimates indicate that the balance in the LMTF at the end of the current biennium, after the $35 million transfer, could be as high as $180 million. Most of that amount is oil and gas lease bonuses related to the beds of the Missouri and Yellowstone Rivers.

Even though there are questions as to exactly how much riverbed the State owns in any given section, the previous Commissioner felt it was important to lease riverbed tracts to interested oil companies as the Department did not want to hinder development. These companies wanted to lease the minerals, despite the knowledge that there is some uncertainty as to exactly what the State owns. Tracts were leased with the understanding that as title issues were resolved, the Land Department would refund overpayments.

In recent weeks, Land Department staff analyzed all bonus and other lease payments received since 1999 by the Department for riverbed tracts. The purpose of the analysis was to determine how much acreage is involved within the riverbed ownership question.

The analysis involved two parts:

- Determining the amount of bonus and rent collected on riverbed tracts located within boundaries of the Fort Berthold Reservation.
- Determining the amount of bonus and rents collected on the acreage between the ordinary high water mark and the water's edge (shore zone) for riverbed tracts located outside of the Reservation.

Based on this analysis there are 322 tracts that could potentially be questioned, with bonuses and rentals collected in the amount of $51,049,169. This amount can be classified into amounts received before and after June 30, 2010.

Received prior to June 30, 2010	$21,026,092
Received after June 30, 2010	$30,023,077
Total	$51,049,169

As part of this process, the Commissioner met with representatives of the Office of Management and Budget, the Legislative Council and the Auditor's Office to seek guidance on

the appropriate treatment of these moneys. The two reasons for this effort were to quantify the total funds involved in riverbed claims and to determine how to disclose this information on our financial statements.

Based on discussions with the agencies, it was decided that the Commissioner should seek Land Board approval to classify these funds as a "Designated Fund Balance" that should not be transferred out of the LMTF until such time that any potential title disputes related to these leases have been resolved.

It is important to note that no lawsuits have been filed related to these tracts and that there is no expectation that the Board will lose any potential title dispute that may arise related to these tracts. The Commissioner is seeking this action because it is possible, not probable, that at least a portion of these funds may need to be refunded.

The Commissioner recommends that the Board classify $21,026,092 as a "Designated Fund Balance" for FY 2010 financial statement purposes as an indication that the funds should not be transferred from the LMTF until title claims related to these leases have been resolved. The Commissioner also recommends that the $30,023,077, along with additional amounts collected on riverbed acreage during the remainder of the FY 2011 be similarly designated for both distribution purposes and financial statement purposes in fiscal year 2011.

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Sanstead					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Hoeven					

Minutes of the Meeting of the
Board of University and School Lands
August 25, 2011

The August 25, 2011 meeting of the Board of University and School Lands was called to order in the Governor's Conference Room at 9:00 AM by Chairman Jack Dalrymple.

Members Present:

Jack Dalrymple	Governor
Kelly Schmidt	State Treasurer
Alvin A. Jaeger	Secretary of State
Wayne G. Sanstead	Superintendent of Public Instruction

Members Absent:

Wayne Stenehjem	Attorney General

Land Department Personnel:

Lance D. Gaebe	Land Commissioner
Keith Bayley	Land Professional
Michael D. Brand	Director, Surface Management Division
Jeff Engleson	Director, Investment Division
Levi Erdmann	Programmer Analyst
Drew Combs	Director, Minerals Management Division
Linda Fisher	Unclaimed Property Administrator
Peggy Gudvangen	Account/Budget Specialist
Pam Rennich	Director, Revenue Compliance Division
Judith F. Schell	Administrative Assistant

Others in Attendance:

David T. Jenson	Landowner
Jon Patch	Wilkinson Family
Stan Reep	Land/Mineral Owner
John Reep	Land/Mineral Owner
Craig Smith	Crowley/Fleck Law Office
JannelleCombs	Leonard, Street and Deinard
Tony Toepfer	Leonard, Street and Deinard
Tim Kingstad	Fredrickson & Byron
Dwight Wrangham	Landowners Association of ND
Vicky Steiner	ND Oil and Gas Producing Counties
Josh Askvig	North Dakota Education Association
Rebecca Beitsch	Bismarck Tribune

APPROVAL OF MINUTES

A motion to approve the minutes of the July 28, 2011 meeting was made by Al Jaeger and seconded by Kelly Schmidt. Motion carried.

Action Record	Aye	Nay	Absent
Secretary Jaeger	X		
Superintendent Sanstead	X		
Treasurer Schmidt	X		
Attorney General Stenehjem			X
Governor Dalrymple	X		

FEE OWNERS' CLAIMS OF SOVEREIGN MINERALS

Sovereign Minerals. The Board was reminded that for purposes of identifying and leasing sovereign minerals, east of the Highway 85 Bridge, the Department leases the historic channel of the Missouri River as it existed prior to inundation by Lake Sakakawea. West of the bridge, sovereign minerals leasing is based on the location of the existing river channel.

Mr. Jon Patch and Mr. Stan Reep were each provided with an opportunity to address the Board regarding their concerns about the State Land Department's (SLD) leasing of minerals under the Missouri River. Both Mr. Patch and Mr. Reep claim ownership to minerals that the Department has leased as sovereign minerals.

Mr. Patch has met with the Board, with staff of the Attorney General, the State Engineer and the Department. His interests are west of the Hwy 85 bridge, thus within the area where the current river determines what the state leased. Mr. Patch believes that the Department's use of the historic river channel should not stop at the Highway 85 Bridge but should extend farther west and at least to his family's land.

Mr. Reep's interest is in land east of the Highway 85 Bridge. His claim is that the state's use of the historic pre-reservoir channel to determine sovereign minerals is without legal basis. He believes the SLD should take the position that state mineral ownership and leasing should be based on the current location of the river.

Seperately, there is ongoing legal action involving State owned minerals under the Missouri River. Brigham Oil and Gas has filed suit asking that all who assert ownership of minerals within the spacing unit for the Williston 25-36 #1H well present their claims so that Brigham knows who is entitled to royalty payments. The Department is listed in this action as are dozens of other persons, entities and companies. Two separate state interests are involved and may have opposing views, in that the state is the owner of the bed of the Missouri River and its underlying minerals, and there is the Board's interest in land riparian to the Missouri River that the Board manages for the common schools. Mineral ownership issues highlighted by Mr. Patch and Mr. Reep may get addressed within Brigham's suit.

The Board took no action to stipulate or renegotiate mineral settlements on the Missouri or Yellowstone Rivers, citing the legal cases (underway), that when decided will possibly provide a basis for resolving related disputes.

INVESTMENTS DIVISION

Financial Statements. The Board reviewed the Financial Statements as of June 30, 2011. These reports are on file at the Land Department and were for the Board's information; no action was required.

Investment Performance Reports: Quarters Ending March 31, 2011 and June 30, 2011. The investment performance report covered the performance of the Land Board's investment program for the period of March 31, 2011 and June 30, 2011. This report is prepared quarterly by Land Department staff to keep the Board informed on the performance of the investment portfolio as a whole, and the performance of the individual money managers hired to help meet investment goals and objectives. A complete copy of the report is on file at the Land Department and was presented for the Board's information; no action was required.

Designated Fund Balance for the Lands and Minerals Trust Fund. Revenues from sovereign lands are deposited into the Lands and Minerals Trust Fund (LMTF). At its September 30, 2010 meeting, the Land Board established the Designated Fund Balance within the LMTF to account for potential disputes to the State's ownership of the minerals beneath navigable bodies of water. Until there is a resolution of claims of the minerals, the Board determined it was prudent to set aside potential disputed amounts to be available for refunds if needed.

The Land Department has examined all bonus and other lease payments received since 1999 for riverbed tracts. The purpose of the analysis was to determine the acreage involved within the riverbed ownership question.

The analysis involved two parts:

- Determining the amount of bonus and rent collected on riverbed tracts located within boundaries of the Fort Berthold Reservation.
- Determining the amount of bonus and rents collected on the acreage between the ordinary high water mark and the water's edge (shore zone) for riverbed tracts located outside of the Reservation.

Based on this analysis there are approximately 412 tracts that contain acreage that could potentially be disputed or questioned, with bonuses and rentals associated with these acres total an estimated $76,630,216.

Recent legal action has been filed related to sovereign ownership, but there is no specific outcome anticipated related to these tracts. The Commissioner is seeking an updated amount to place within the designated fund because it is possible, not probable that at least a portion of funds related to riverbed tracts may need to be refunded.

Motion: The Board specifed $76,630,216 as the cumulative "Designated Fund Balance" of the Land and Minerals Trust Fund as of June 30, 2011. The funds should not be transferred from the LMTF until title claims related to sovereign lands have been resolved. Secondly, any additional amounts collected on potentially disputed riverbed acreage during FY 2012 be similarly designated for both distribution and financial statement purposes.

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger	X		X		
Superintendent Sanstead			X		
Treasurer Schmidt		X	X		
Attorney General Stenehjem					X
Governor Dalrymple			X		

MINERALS MANAGEMENT DIVISION

Willard Burk Settlement Agreement (WIL-155-100-25-SW4). This matter, involves a dispute over title to 50% of the minerals in a quarter section of Williams County.

While there is no dispute that the State owns 50% of the minerals in the tract there is a dispute over title to the other 50%. Mr. Willard Burk asserts that he acquired the disputed 50% in a 1991 transaction with the State, or more particularly with the Bank of North Dakota and the State Treasurer. A few years ago the Land Board issued an oil and gas lease to the quarter section, a lease covering 100% of the minerals. Not long after that, Mr. Burk issued a lease on what he considered to be his 50% ownership.

While the substantive legal issues of the title dispute are somewhat complex the matter became more difficult when the State's lease was assigned and the assignors retained overriding interests in what they considered a lease covering 100% of the minerals; and was further complicated when a successful well producing from the property in question was drilled by Zavanna LLP. Upon learning of the overlapping leases to minerals in the southwest quarter of section twenty-five, Zavanna did not pay royalties attributable to the contested 50% interest, but instead held them in suspense.

At the May 2011 meeting the Board decided not to litigate title to the disputed 50% and directed the Commissioner to seek an agreement that would recognize that Mr. Burk owns 50% of

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS
August 25, 2011

RE: **Designated Fund Balance for the Lands and Minerals Trust Fund**
(presently known as the Strategic Investment and Improvements Fund)
(Action Requested)

Revenues from sovereign lands are deposited into the Lands and Minerals Trust Fund (LMTF). At its September 30, 2010 meeting, the Land Board classified $21,026,092 of the June 30, 2010 fund balance of the LMTF as a "Designated Fund Balance" that should not be transferred out of the fund until title claims to certain riverbed leases have been resolved. The Board also stipulated that any similar revenues received during the remainder of FY 2011 be included in the Designated Fund Balance. The Commissioner is requesting Board approval of the final "Designated Fund Balance" for the FY 2011 financial statements.

The reason the Board established the Designated Fund Balance relates to potential disputes to the State's ownership of the minerals beneath navigable bodies of water. It will take time for the courts and subsequent negotiations to resolve the ownership issues. Until there is a resolution of claims of the minerals, the Board felt it was prudent to set aside potential disputed amounts so it would be available for refunds if needed.

The Land Department has examined all bonus and other lease payments received since 1999 by the Department for riverbed tracts. The purpose of the analysis was to determine how much acreage is involved within the riverbed ownership question.

The analysis involved two parts:

- Determining the amount of bonus and rent collected on riverbed tracts located within boundaries of the Fort Berthold Reservation.
- Determining the amount of bonus and rents collected on the acreage between the ordinary high water mark and the water's edge (shore zone) for riverbed tracts located outside of the Reservation.

Based on this analysis there are approximately 412 tracts that contain acreage that could potentially be disputed or questioned, with bonuses and rentals associated with these acres totaling an estimated $76,630,216.

Recent legal action has been filed related to sovereign ownership, but there is no specific outcome anticipated related to these tracts. The Commissioner is seeking this action because it is possible, not probable that at least a portion of funds related to riverbed tracts may need to be refunded.

Recommendation: The Board specify $76,630,216 as the cumulative "Designated Fund Balance" of the LMTF as of June 30, 2011. The funds should not be transferred from the LMTF until title claims related to these leases have been resolved. Secondly, any additional amounts collected on potentially disputed riverbed acreage during the remainder of FY 2012 be similarly designated for both distribution and financial statement purposes.

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Sanstead					
Treasurer Schmidt					
Attorney General Stenehjem					
Governor Dalrymple					

For the Board's information: Historically, the legislature has appropriated LMTF funds and authorized transfers to the General Fund. The amount transferred was $15.9 million in the 2007-2009 biennium, $35 million during the 2009-2011 biennium and the current biennium budget has a $305 million transfer.

On July 1, 2011 the Lands and Minerals Trust Fund was merged with the Permanent Oil Tax Trust Fund and renamed the Strategic Investment and Improvements Fund by action of the 2011 Legislature in HB 1451. The bill also codified Board's authority to designate a fund balance relating to potential title disputes regarding certain riverbed leases, and thus not available for transfer to the Legacy Fund.

#7
3-10-17
SB2134
GAEBE

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DEPARTMENT OF
ND TRUST LANDS
INVESTING FOR EDUCATION

Lance D. Gaebe, Commissioner

TESTIMONY OF LANCE GAEBE
ON SENATE BILL 2134

SENATE ENERGY AND NATURAL RESOURCES COMMITTEE
March 10, 2017

I am Lance Gaebe, Commissioner of University and School Lands. Along with my coworkers in the Department of Trust Lands, I work for the Board of University and School Lands. My comments are intended to describe the background and basis for the leasing of the public's sovereign lands, and to detail concerns about Senate Bill 2134 if passed. As drafted, I oppose the bill.

The State Constitution and Century Code designate the Board of University and School Lands (Board) as the governing body for a grant of land received at statehood for the benefit of education and certain institutions. The land, the proceeds, and investments are managed in several permanent trusts, including the Common Schools Trust Fund, for the benefit of the institutions for which the land was granted.

This responsibility for permanent trusts is separate and distinct from the oversight of sovereign minerals described in Senate Bill 2134.

According to state statute, the Board also manages state-owned minerals and the oil, gas and related hydrocarbons within the beds of the State's navigable waters. On behalf of the State, the Board oversees the Strategic Investment and Improvements Fund (SIIF) which receives the revenues from these sovereign minerals. The Board has had this management responsibility since at least 1977.

At the time of statehood, the federal government conveyed ownership of the beds of navigable lakes and streams to North Dakota under the Equal Footing Doctrine. The Board leases the rights to produce oil and gas from the minerals associated with sovereign lands, which N.D.C.C. ch. 61-33 defines as "those areas, including beds and islands, lying within the ordinary high watermark [OHWM] of navigable lakes and streams." The Office of the State Engineer has responsibility for defining the OHWM and management responsibility for the bed of navigable waters and any other minerals therein.

North Dakota Administrative Code § 89-10-01-03 defines OHWM as "that 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 [OHWM] in their entirety."

Under the Missouri River within Lake Sakakawea, mineral acres have long been leased based upon where the historic river channel existed prior to inundation by the reservoir. West of the lake, sovereign minerals beneath the Missouri and Yellowstone Rivers are leased based upon the OHWM of the current river channel. The Highway 85 Bridge near Williston serves as an easily distinguished division between these practices.

This bill would make the U.S. Army Corps of Engineers' river surveys conducted prior to inundation by Lakes Sakakawea and Oahe determinant of the State's sovereign mineral boundary. Because the

method the Board has used to lease the State's oil and gas rights differs markedly from the area of the historic river depicted by the federal surveys, substantial mineral acres would be surrendered to the federal government and to private title claims.

There has been leasing and production of sovereign oil and gas interests for decades. However, there was not substantial interest in inundated mineral acres until the onset of horizontal drilling in North Dakota.

The Office of the State Engineer established the Ordinary High Water Mark Delineation Guidelines in 2007, around the same time as interest was growing in leasing sovereign river acreage for oil and gas production. Thus, the Board worked in close cooperation with the State Engineer to formally and scientifically delineate the OHWM of the Yellowstone and Missouri Rivers from the Montana border to the area near Williston. Since the State has always asserted the public's ownership of rivers to be within the OHWMs, these studies were conducted to determine with greater accuracy, where those boundaries lie.

In 2013, the North Dakota Supreme Court affirmed the State's ownership of the OHWM with the *Reep v. State* decision (2013 ND 253, 841 N.W. 2d 664). In its opinion, the Supreme Court stated that the minerals within the shore zone (area between the ordinary high watermark and ordinary low watermark) cannot be given to upland owners due to the anti-gift clause within Section 18 of Article X of the North Dakota Constitution.

In 2009, Bartlett and West was contracted to complete four studies of the Yellowstone and Missouri River OHWM for areas with potential oil and gas development. It should be noted the purpose of the studies was to determine the location of the OHWM, it was not to determine sovereign lands. This was the largest study of the OHWM ever completed in North Dakota. Phase I of the study focused on the area west of the Williston. Bartlett and West used the State Engineer's OHWM delineation guidelines and conducted an on-the-ground analysis of the vegetation, soils and hydraulic characteristics for a determination of the OHWM of the rivers. The study was conducted jointly with the State Engineer and is referred to as Phase I. The Board and State Engineer believe that this survey is the most current and accurate in existence.

The Phase II and IV studies focused on the areas east of Williston. Bartlett and West used a combination of pre-reservoir maps and photos, and high resolution scanning equipment to gather the best information available on the historic OHWM of the Missouri River prior to the formation of Lake Sakakawea.

This study used aerial photographs taken by the Army Corps of Engineer in 1943, 1951 and 1958 and examined the river location and depiction of vegetation. Bartlett and West was able to utilize the expertise it gained during the on-the-ground survey it conducted west of Williston in Phase I. These studies were done by a qualified firm using the best available historic records, photos and data. The review of the area between the Highway 85 Bridge and the Four Bears Bridge is referred to as Phase II, and from Four Bears to the Garrison Dam is referenced as Phase IV.

The technical reports issued by Bartlett and West for each phase of the study are available on the Department of Trust Lands' website: https://land.nd.gov/minerals/oilandgasleasing.aspx . The reports each describe the general background and methodology, and include detailed and technical information within the body of the report. This web site also includes GIS information, acreage depictions, and tract-by-tract acreage data and maps.

Prior to these formal investigations, the Department of Trust Lands determined State mineral ownership using in-house aerial photographs. Mineral acreage was generally determined only when specific tracts were nominated for oil and gas leasing.

These studies have been used to manage mineral acres underlying navigable waterways and are used as the initial steps in the process of determining eligible acreages for state-issued oil and gas leases on sovereign lands. Embedded islands and previous stipulations which are examined on a case-by-case basis. Regardless, by state law, the State Engineer retains final authority as to the boundaries of sovereign lands.

During its meeting on October 18, 2016, the Board stated that it has been consistent in its leasing practices concerning the minerals under the Missouri River and Lake Sakakawea. During its discussion, the Board stressed that for purposes of leasing sovereign minerals that it has utilized the Phase I Delineation, which established the OHWM of the Yellowstone and Missouri Rivers from the Montana state line to the Highway 85 Bridge. The Board also emphasized its policy to continue leasing minerals between the Highway 85 bridge and the Four Bears bridge using the Phase II study which investigated the historic river channel as it existed immediately prior to inundation by Lake Sakakawea.

In response to rumors of a plan to expand the State's sovereign acreage claim, the Board adopted a motion in 2016 which emphasized that it will not change its mineral leasing practices under the Missouri River and Lake Sakakawea until such time as the Legislature has had the opportunity to consider a definition of the OHWM as it is used in establishing the State's sovereign ownership of oil and gas minerals. I do not believe that this motion was a plea for the Legislature to change the Board's practices, but rather to validate and codify the methodology that is has used.

Like you, we have heard from fee (private) land owners regarding this bill. While we can certainly understand the consternation of those citizens and sympathize with their frustration. The case law provides that the sovereign lands are owned by the public, as is property associated with them.

This bill, and the corresponding HB 1199, have been promoted as an attempt to keep the State government from unlawfully taking private citizens' property. This absolutely has not occurred. The OHWM studies were undertaken to protect the integrity of sovereign assets by having a scientific and defensible basis of evidence of State acreage available to lease. The resources are managed in the best interests of all North Dakotans. The provisions of the Equal Footing Doctrine, the Public Trust Doctrine and the Submerged Lands Act, as well as the State's anti-gift clause of the Constitution, have guided the management of land for the benefit of the public.

Other than its administrative appeals to the federal government regarding overlapping claims, the Board has not initiated any of the litigation regarding the minerals. In partnership with industry that has leased these assets, the State and its residents have benefitted from substantial oil and gas revenue from these publicly owned lands.

The Board has only claimed, on behalf of the citizens of North Dakota, what the public is rightfully due. Since the United States was formed, land ownership along bodies of water has been complex and problematic for every state. State and federal courts have heard numerous cases involving issues surrounding property rights along waterways and have built up a complex set of laws governing the ownership of those properties. The reality is that rivers move and lakes expand and retract in ways that are not entirely within man's control. The legal system is the mechanism for resolving these disputes.

No one wants to see a private citizen's property unlawfully taken. The process undertaken by the State is not a takings, but merely the process to determine the OHWM using established State law. Should anyone feel that their rights are violated, they should bring these matters before the courts. The Board has worked to protect the integrity of the process in the establishment of escrow accounts when title conflict exists; ratifying in its rules and by resolution, its commitment to return mineral revenue if an adjudicative process finds that the minerals are not sovereign. The Board established a reserve within an assigned fund balance of the SIIF to accommodate refunds if a court finds that the State does not own

the minerals that it has leased. These steps are all implemented to ensure that the funds are available if an alternate ownership decision is finalized.

The State's position and methods have already been validated in district and the State Supreme Court, and active litigation is in progress. To modify laws contrary to those already established and implemented on bodies of water across the state would be unprecedented. This is a matter for the courts to decide and changes of the magnitude contemplated in this bill would upend any progress that has been made in rectifying these complicated issues.

Maps attached to this testimony highlight portions of the river depicting acres leased by the federal government which overlap what the State has also leased. Should this bill become law, not only would the federal government have decided the extent of the river in the 1950 era Corps of Engineers' surveys, it would become the largest individual recipient of disputed royalties—acquiring approximately one-third of the minerals affected by this bill (based upon available BLM leasing data). The State has initiated appeals with both the U.S. Bureau of Land Management and the U.S. Bureau of Indian Affairs over competing claims.

I believe that the purpose of federal surveys conducted before the dams were closed were undertaken exclusively to determine which lands needed to be acquired by the U.S. Army Corps of Engineers in advance of inundation by Lake Sakakawea and Lake Oahe. The USACE surveys seeks to depict the river's edge, not necessarily the OHWM. However, if the survey was conducted to determine the high water mark, it was done in accord with a federal definition, instead of a North Dakota standard. The federal manual of survey instructions pronounce North Dakota as a "low watermark" state—in fact the beds to the OHWM and the courts have affirmed that the State the owns the minerals to the OHWM. There is a correlative right to surface ownership within the shorezone.

However, under the equal footing doctrine the states, in their capacity as sovereigns, hold "title in the soil of rivers really navigable," *{Shively v. Bowlby, 152 U. S. 1, 31}*. A State gains title to the beds of navigable waters and it may allocate and govern those lands according to state law subject only to the United States' power "to control such waters for purposes of navigation in interstate and foreign commerce." *{United States v. Oregon, 295 U. S. 1, 14}. {PPL Mont., LLC v. Montana, 565 U.S. 576, 579 (2012)}.*

Engrossed SB 2134 also defers an ownership decision to the federal government regarding all riverbed minerals within the Fort Berthold and Standing Rock Reservations. The State has held ongoing discussions with BIA and tribal officials regarding ownership and proceeds of the minerals within the historic river within the Fort Berthold Reservation. Presently both the State and the Tribe claim this land and have leased the area for the production of oil and gas. Because of the competing claims oil and gas operators have not paid royalties on the river related production on over one hundred wells. The three governments have agreed to work cooperatively to collect and escrow royalties, so that the funds are kept safe while royalty rights are resolved. Engrossed SB 2134 would defer to the US Department of Interior's recent position that at least within the boundary of the Fort Berthold Reservation, that the Missouri River is owned by the tribes. The State disputes this position and continues to claim ownership.

Many of the disputed tracts are leased from both the federal government and the State. The Board's leases in this region carry a 3/16 (18.75%) royalty rate, while the Federal leases carry a 1/8 (12.5%) royalty rate on a longer term lease. One could deduce that a motivation for this bill is less about sorting out private ownership and more about some operators obtaining a cheaper lease.

It has been suggested that this bill will help reduce lawsuits; however, there are hundreds of wells within existing producing units that will be impacted by this bill and ownership changes it would prompt. People who have leased from the State and partnered in drilling of a well may suddenly find their ownership interest drastically reduced or eliminated. These changes will likely lead to additional litigation. The

combination of the anti-gift provisions of the State Constitution and the public trust doctrine could also prompt legal challenges of this Bill. The State cannot grant away its sovereign trust property to private individuals without consideration. The State has a duty to the public to maintain such lands for the benefit of all of its citizens.

It has been asserted that on adjusted acres that bonuses, collected royalties, and escrowed royalties would be paid to private mineral owners but this is not accurate, at least not from the State. It needs to be understood that absent changes prompted by litigation, the Board would:

- Return approximately $130 million to lessees of bonuses that have been collected;
- Return approximately $72 million to operators of royalties; and
- Evaluate approximately $50 million in escrowed royalties to determine if there were other claimants and if no disputes, return those royalties to operators.

Continuing appropriation authority (N.D.C.C. §§ 15-05-19, 15-07-22) is used to manage, preserve, and enhance the value of the funds. However, the Board and Department do not have the authority to distribute funds from the SIIF. In order to accommodate these refunds, the Legislature will need to approve appropriation authority for the return of these dollars.

Royalties held in escrow due to ownership disputes may also be returned to the operating companies until they can disperse funds to their lessors. If disputes between the federal government and fee owners still exist, the companies are likely to hold the owner's royalty in suspense. As mentioned, the State's lease contains a requirement to escrow disputed royalties, the federal government and private leases most likely do not have a similar mechanism. Because the federal government requires full payment, private mineral owner's royalties will likely be suspended. However, the State's escrowing requirement protects these funds until the courts can resolve these issues. This safeguard will go away if this bill passes.

Attached for review are:

1) Citations to existing law relating to the public's ownership of navigable waters and associated lands;
2) A timeline of the State's practices and actions related to sovereign lands;
3) An excerpt of the Bartlett and West presentation related to Phase II, including a list of the references used to determine the historic OHWM;
4) A depiction of a portion of the Phase II historic Missouri River channel showing the estimated difference with the approximate Corps of Engineers survey of the River; and
5) Selected images of sections of the historical river within Lake Sakakawea, including several layers of information:
   - *The first image on each page depicts:*
     - *A base aerial photo and topographic image utilized by Bartlett and West in its investigation of the historic OHWM.*
     - *The Phase II (estimated historical OHWM) area representing the State's mineral claim*
     - *Federal mineral leases where they overlap the Phase II area*
   - *The second image on each page, is the same section of river as the first, but with different information depicting:*
     - *The current reservoir*
     - *The Phase II area*
     - *The U.S. Army Corps of Engineers' survey and acquisition boundaries*
     - *The USACE determination of the Missouri River channel pursuant to federal OHWM definitions*

We look forward to working with the Committee on these issues.

Attachment 1)

Applicable Laws and Standards

Equal Footing Doctrine - Those States entering the Union after 1789 did so on "equal footing" with the original Thirteen, possessing the same ownership over sovereignty lands.

Submerged Lands Act of 1953. 43 U.S.C. § 1301

North Dakota Century Code (excerpts)

61-33-01. Definitions.
As used in this chapter, unless the context otherwise requires:
1. "Board" means the sovereign lands advisory board.
2. "Board of university and school lands" means that entity created by section 15-01-01.
3. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the ordinary high watermark and are not sovereign lands.
4. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

61-33-03 Transfer of possessory interests in real property. All possessory interests now owned or that may be acquired except oil, gas, and related hydrocarbons, in the sovereign lands of the state owned or controlled by the state or any of its officers, departments, or the Bank of North Dakota, together with any future increments, are transferred to the state of North Dakota, acting by and through the state engineer. All such possessory interests in oil, gas, and related hydrocarbons in the sovereign lands of the state are transferred to the state of North Dakota, acting by and through the board of university and school lands. These transfers are self-executing. No evidence other than the provisions of this chapter is required to establish the fact of transfer of title to the state of North Dakota, acting by and through the state engineer and board of university and school lands. Proper and sufficient delivery of all title documents is conclusively presumed.

. . .

61-33-06. Duties and powers of the board of university and school lands. The board of university and school lands shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all subsurface rights of the owner in its own name; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter.

North Dakota Administrative Code (Article 89-10),
North Dakota Sovereign Lands Management Plan,
North Dakota Office of the State Engineer- Ordinary High Water Mark Delineation Guidelines

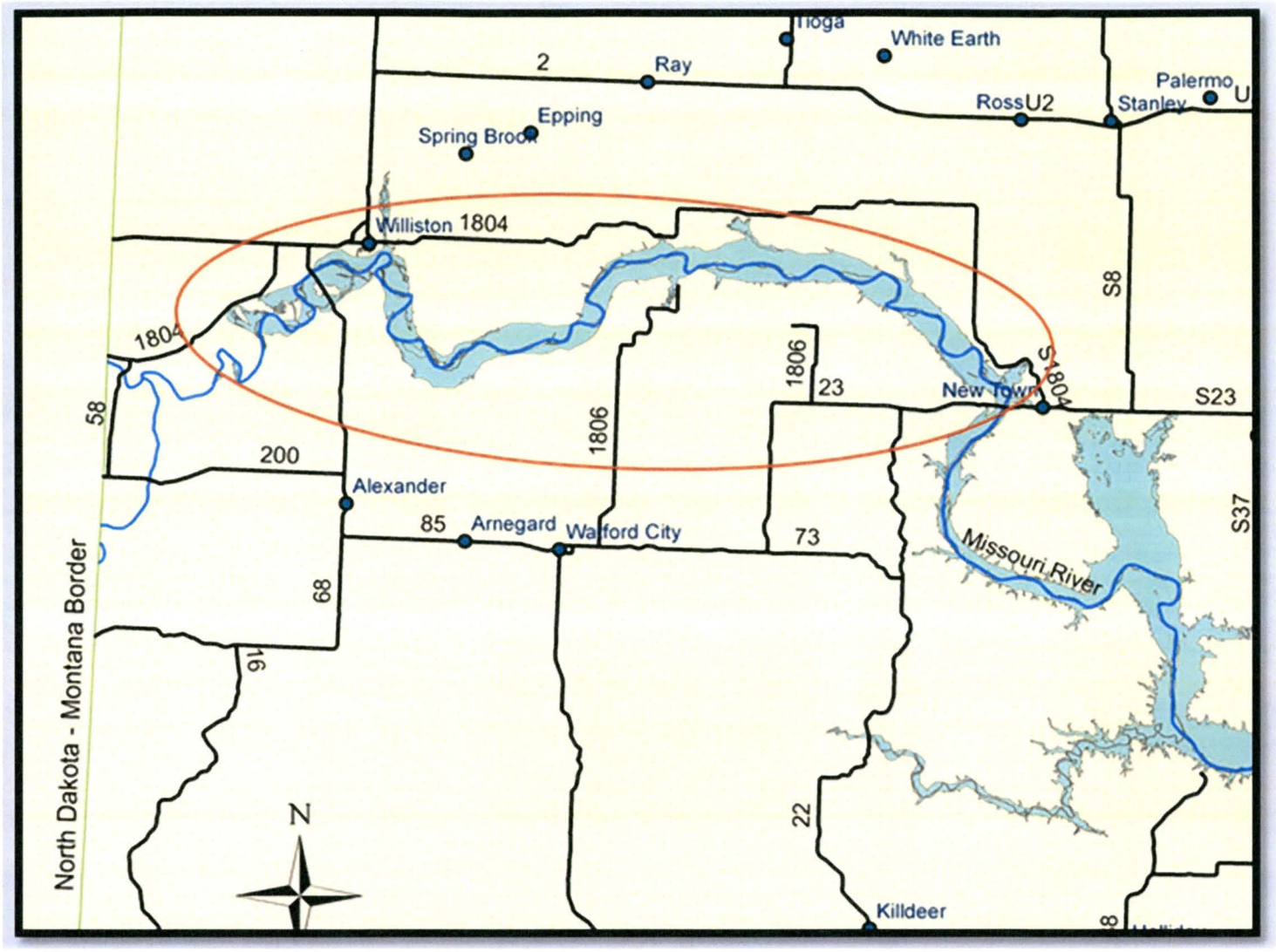
Attachment 2)

Timeline of State Activity Related to Sovereign Lands

- The 1977 Legislature defined "sovereign lands" as everything "within the ordinary high watermark." 1977 N.D. Session Laws ch. 144 § 1 (repealed 1989 N.D. Sess. L. ch. 552, § 4).
- From 1977 to 1989, the Board had authority over both the surface and subsurface of sovereign lands, including the power to convey interests.
- In 1989, the Legislature again defined state title as everything "within the ordinary high watermark." N.D.C.C. ch. 61-33, 1989 N.D. Session Laws ch. 552
- The 1989 legislature gave the State Engineer's Office authority to manage the surface and the Board authority over the oil, gas and hydrocarbons within the subsurface, with each agency having the power to convey interests.
- In 2007 the Office of the State Engineer issued the North Dakota Sovereign Land Management Plan and Ordinary High Water Mark Delineation Guidelines.
- In 2009, the Board and the State Engineer engaged Bartlett & West, a private engineering company, to undertake a comprehensive study of the OHWM along the Yellowstone River and the Missouri River from the Montana border to river mile marker 1549 near Williston (Phase I Delineation).
- In 2010, the Board again contracted with Bartlett & West (State Engineer did not participate or endorse this study) to approximate the location of the OHWM of the Missouri River before inundation by Lake Sakakawea from river mile marker 1574 near the Furlong Loop to river mile marker 1482, the border of the Fort Berthold Reservation (Phase II). Study was completed using historical aerial photography, elevation data, and topographic maps.
- In 2010, the Board authorized Phase III to investigate specific and isolated sections of the Missouri and Yellowstone Rivers between Williston to the Montana border that could not be fully completed under Phase I due to location and complexity. The results of the Phase III study were incorporated into the final report for Phase I. Phase III was endorsed by the State Engineer.
- In 2012, the Board initiated the review of the estimated historic OHWM between the Four Bears Bridge and the Garrison Dam (Phase IV) using the same techniques as Phase II.
- In 2013, the North Dakota Supreme Court issued a decision in *Reep v. State* and *Brigham v. State* holding that the State owns the mineral interests up to the ordinary high water mark of navigable rivers and water bodies.

Attachment 3)

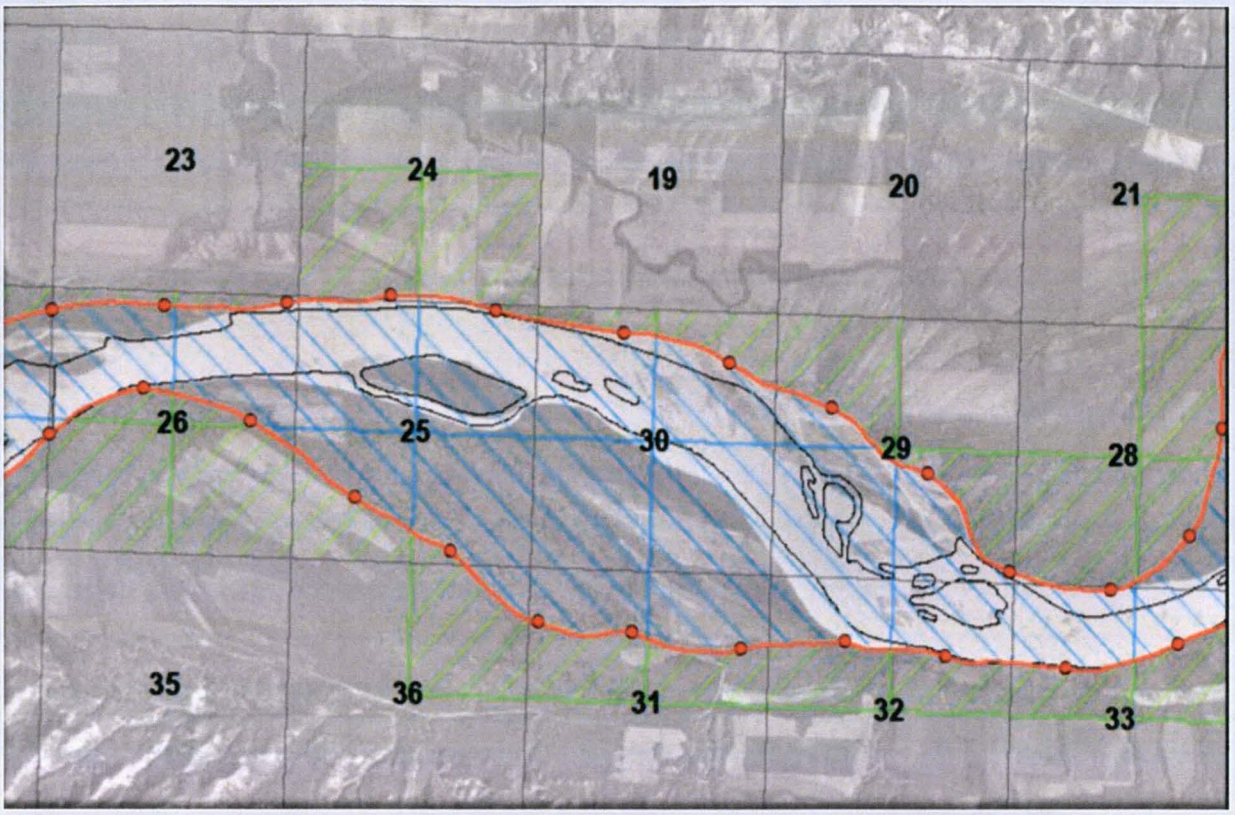
Selections of Bartlett and West 2011 Presentation Related to Task Order II

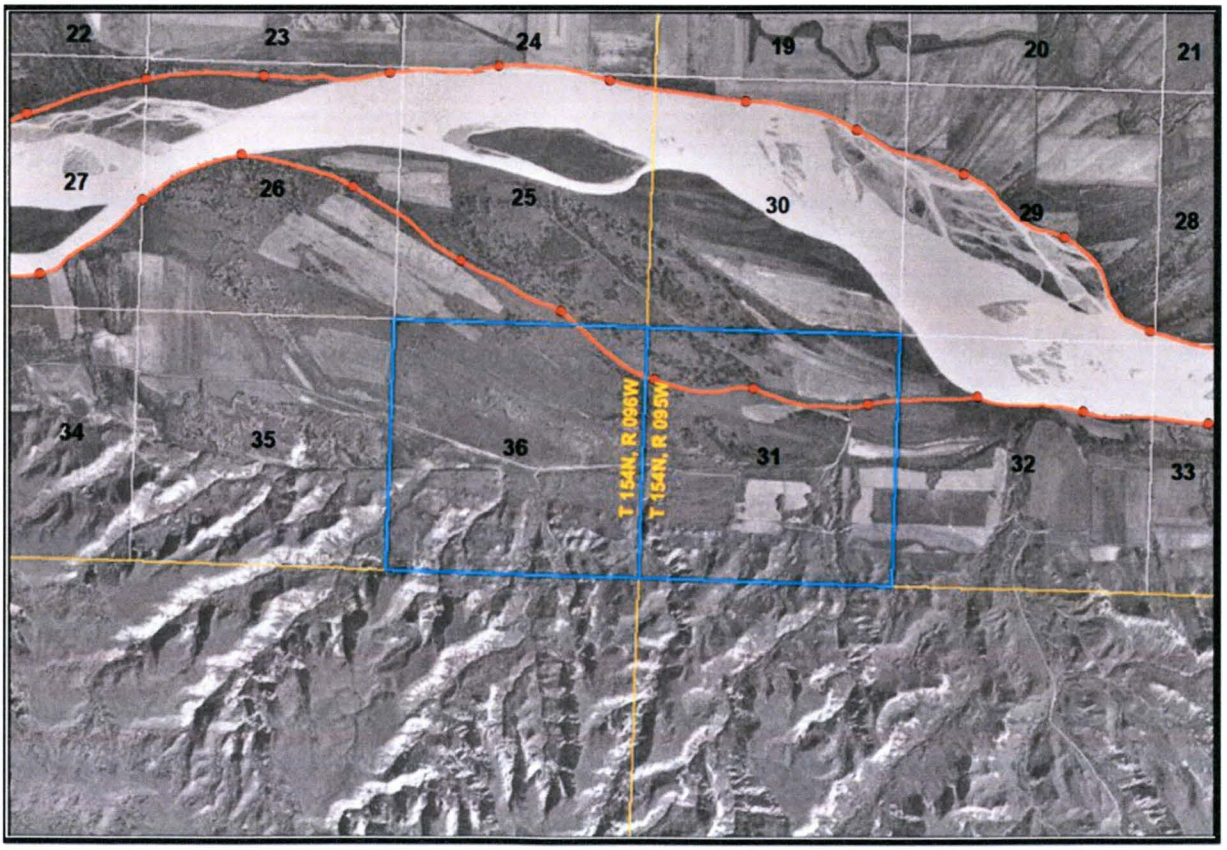


AERIAL PHOTOS/TOPO DATA

- 1943 – Corps of Engineers (Aerial and Topo)
  - Section Corners Identified
  - Photos used to generate the topographic information
- 1951 – ND Geological Survey
- 1958 – ND Geological Survey (Best Quality)
- USGS Quad Maps; 2009 Aerial Photos; GLO

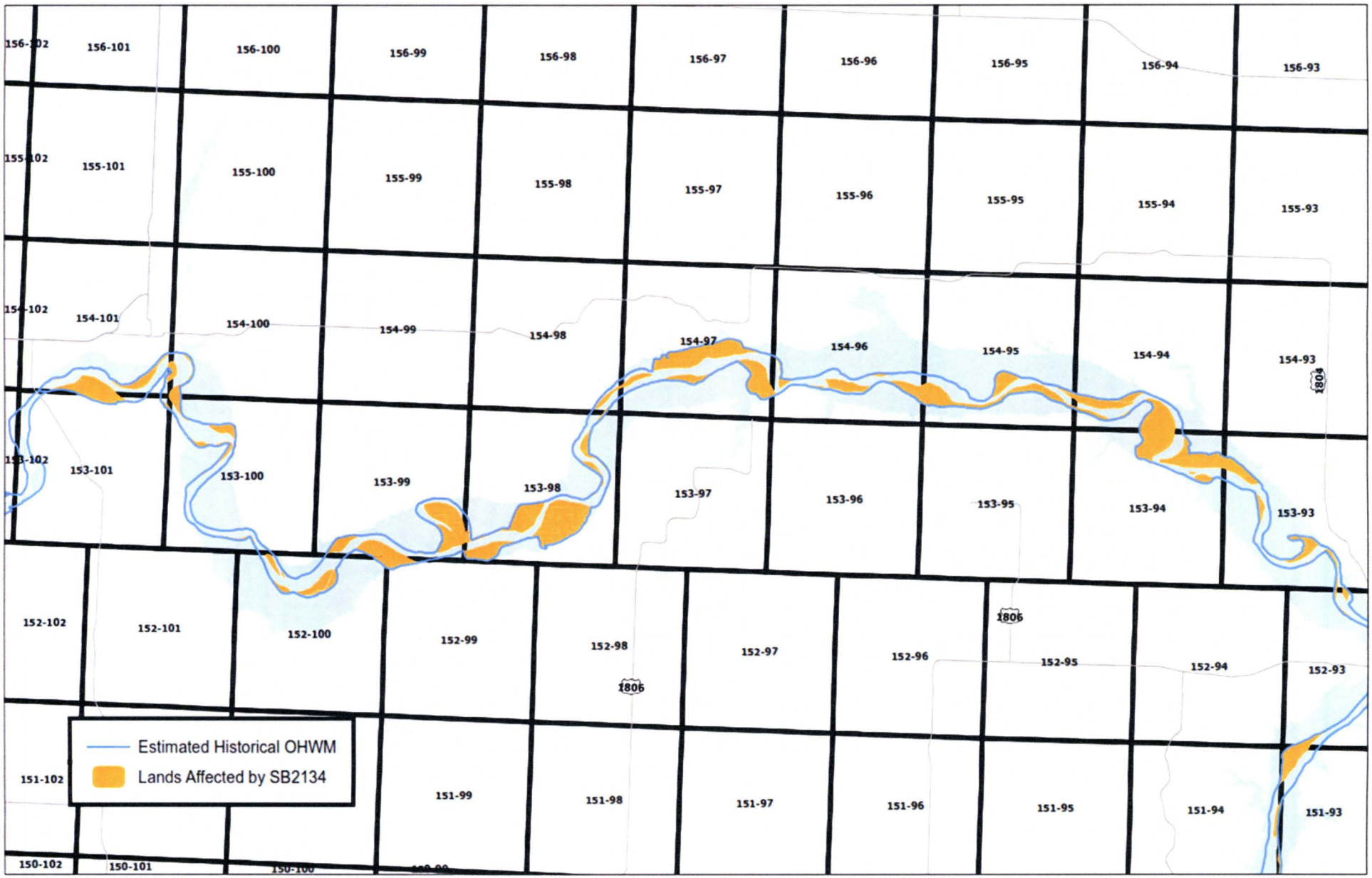
INVESTIGATION



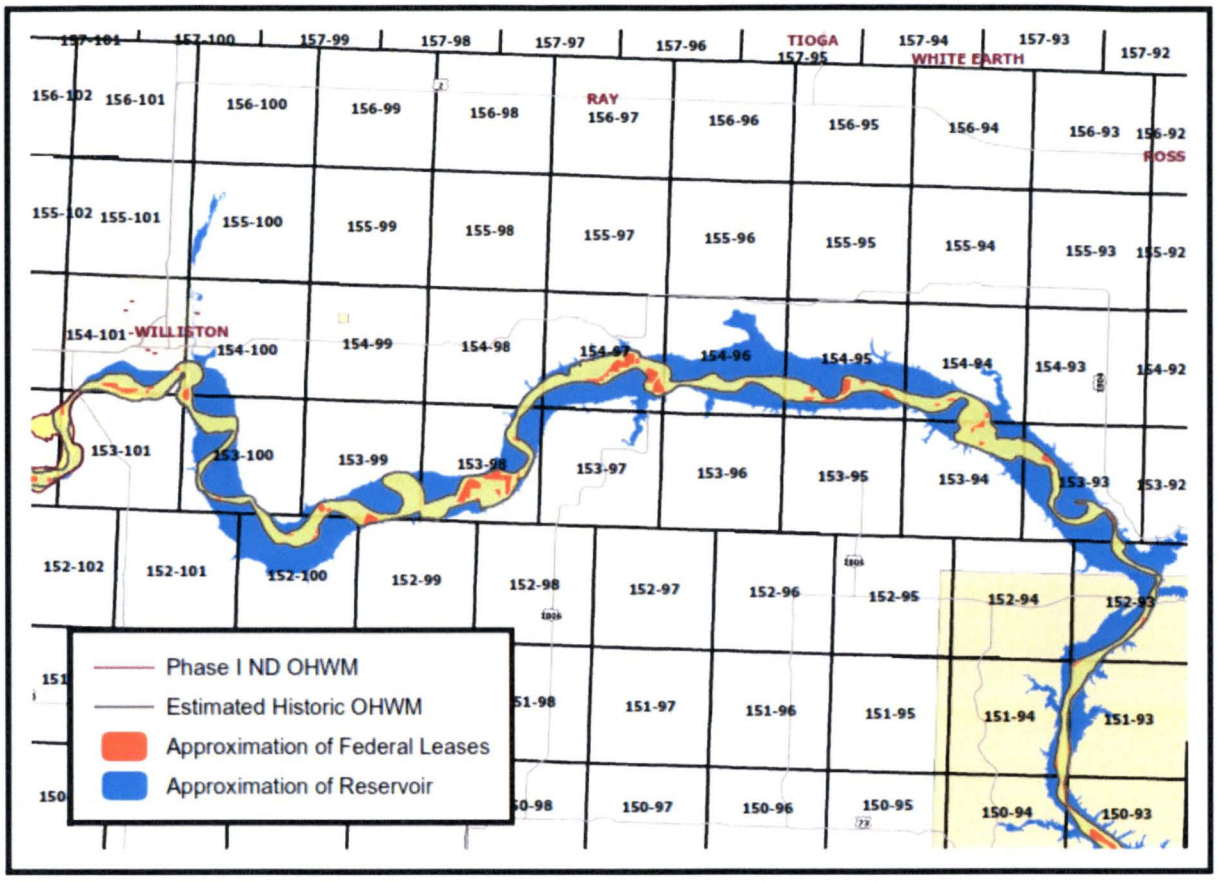


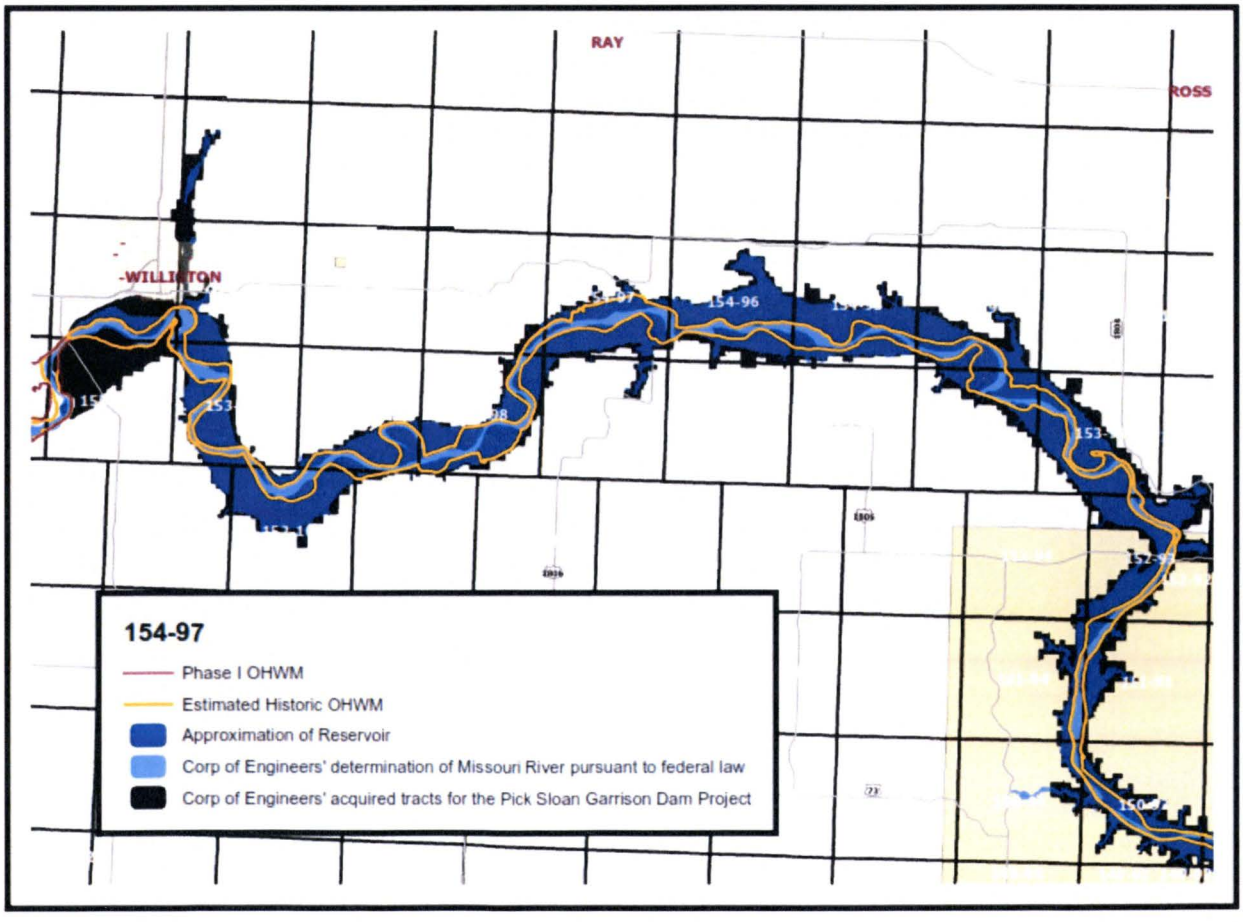
Attachment 4)

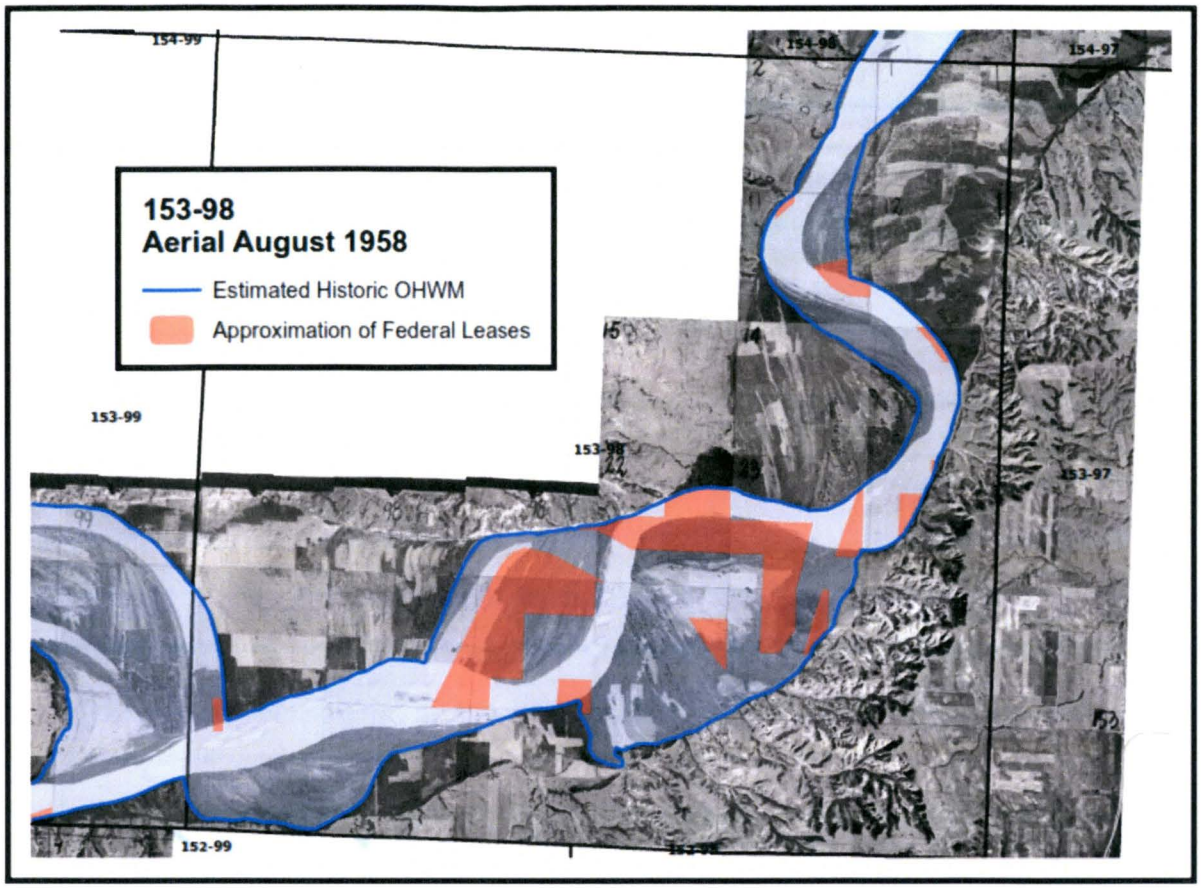
Estimated Difference Betweeen Phase II Depiction of Historic River Channel and the Approximate Corps of Engineers Survey of the Pre-Dam River

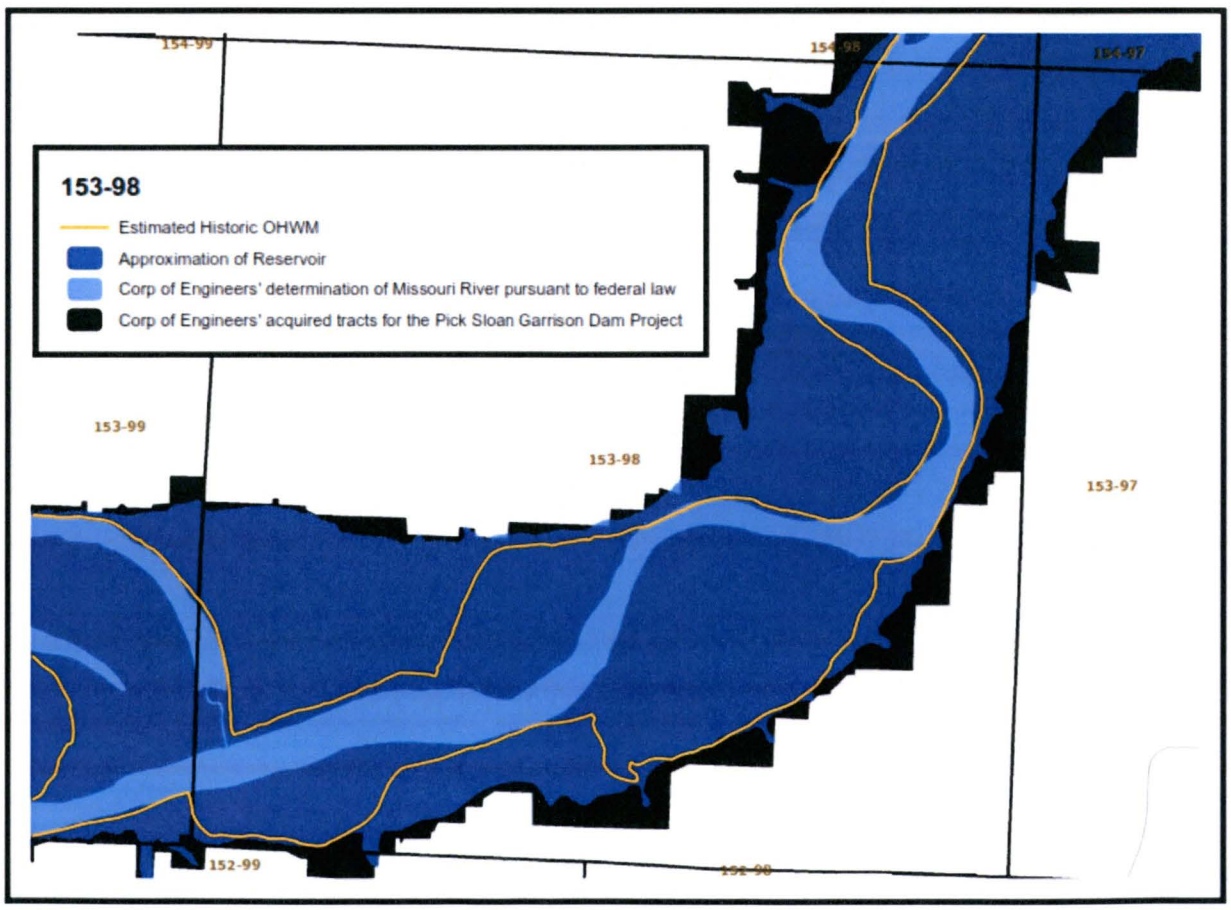


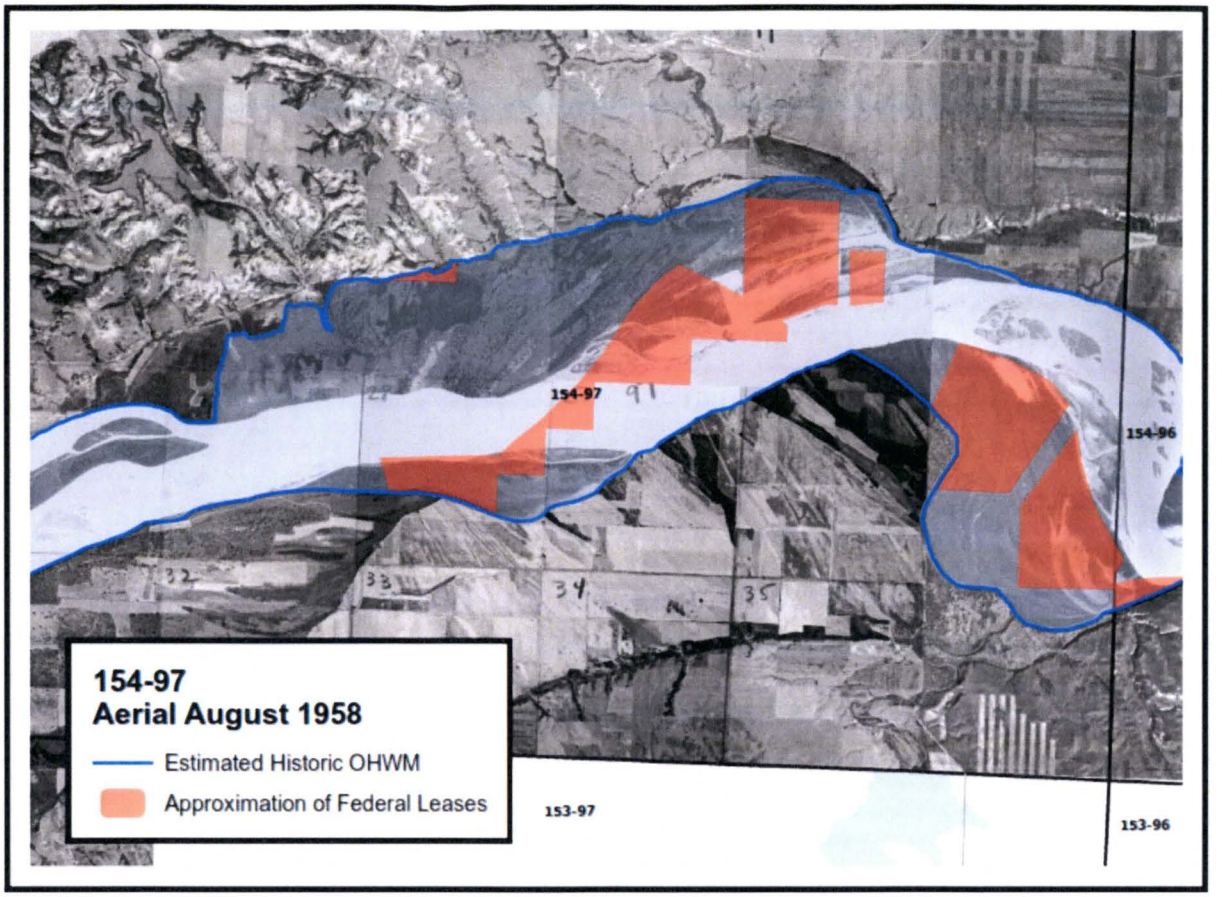
Attachment 5) **Selected images of sections of the historical river within Lake Sakakawea**






154-99
154-98
154-97
153-98
Aerial August 1958
Estimated Historic OHWM
Approximation of Federal Leases
153-99
153-98
153-97
152-99


154-99
154-98
154-97
153-98
Estimated Historic OHWM
Approximation of Reservoir
Corp of Engineers' determination of Missouri River pursuant to federal law
Corp of Engineers' acquired tracts for the Pick Sloan Garrison Dam Project
153-99
153-98
153-97
152-99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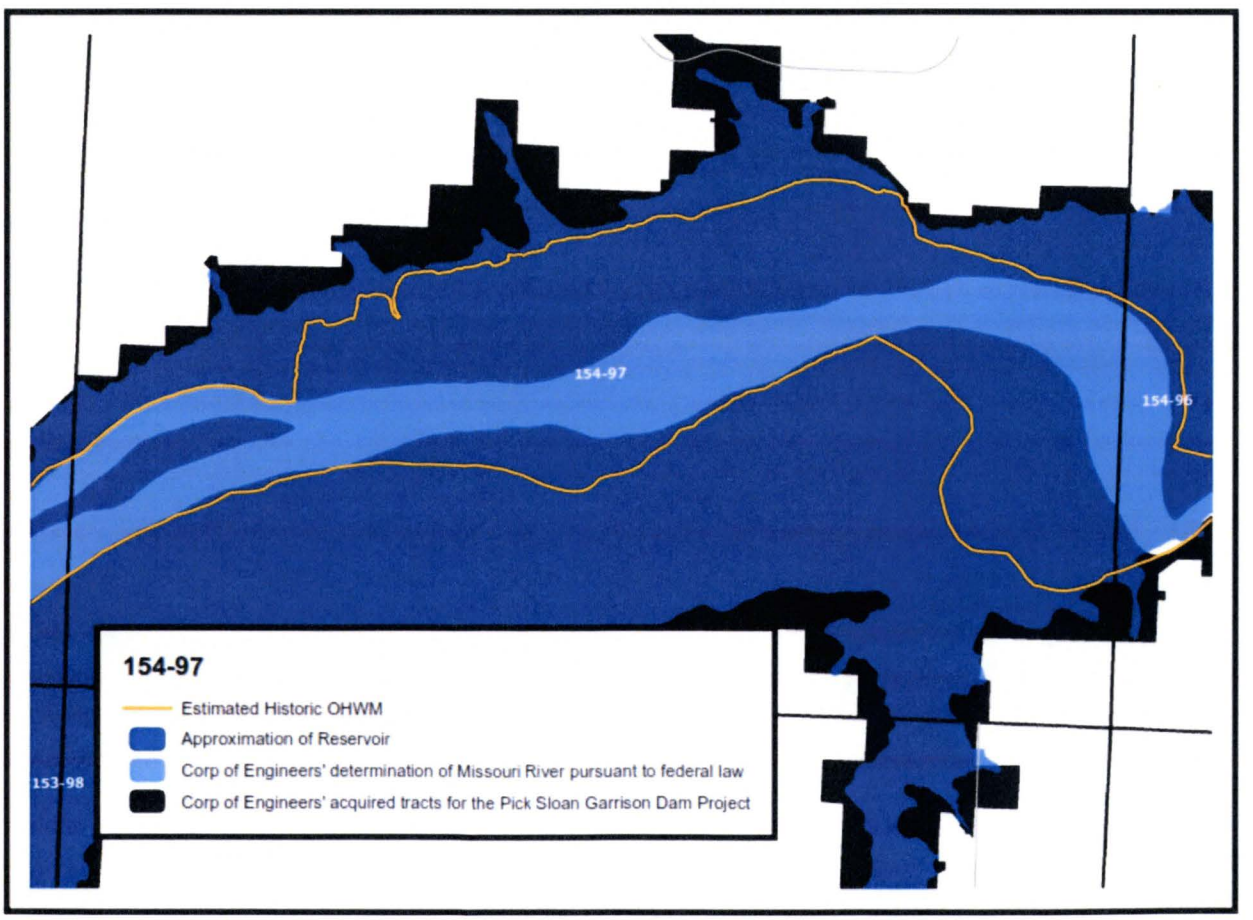
Aerial August 1958
Estimated Historic OHWM
Approximation of Federal Leases
154-97
154-96
153-97
153-96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Estimated Historic OHWM
Approximation of Reservoir
Corp of Engineers' determination of Missouri River pursuant to federal law
Corp of Engineers' acquired tracts for the Pick Sloan Garrison Dam Project
154-97
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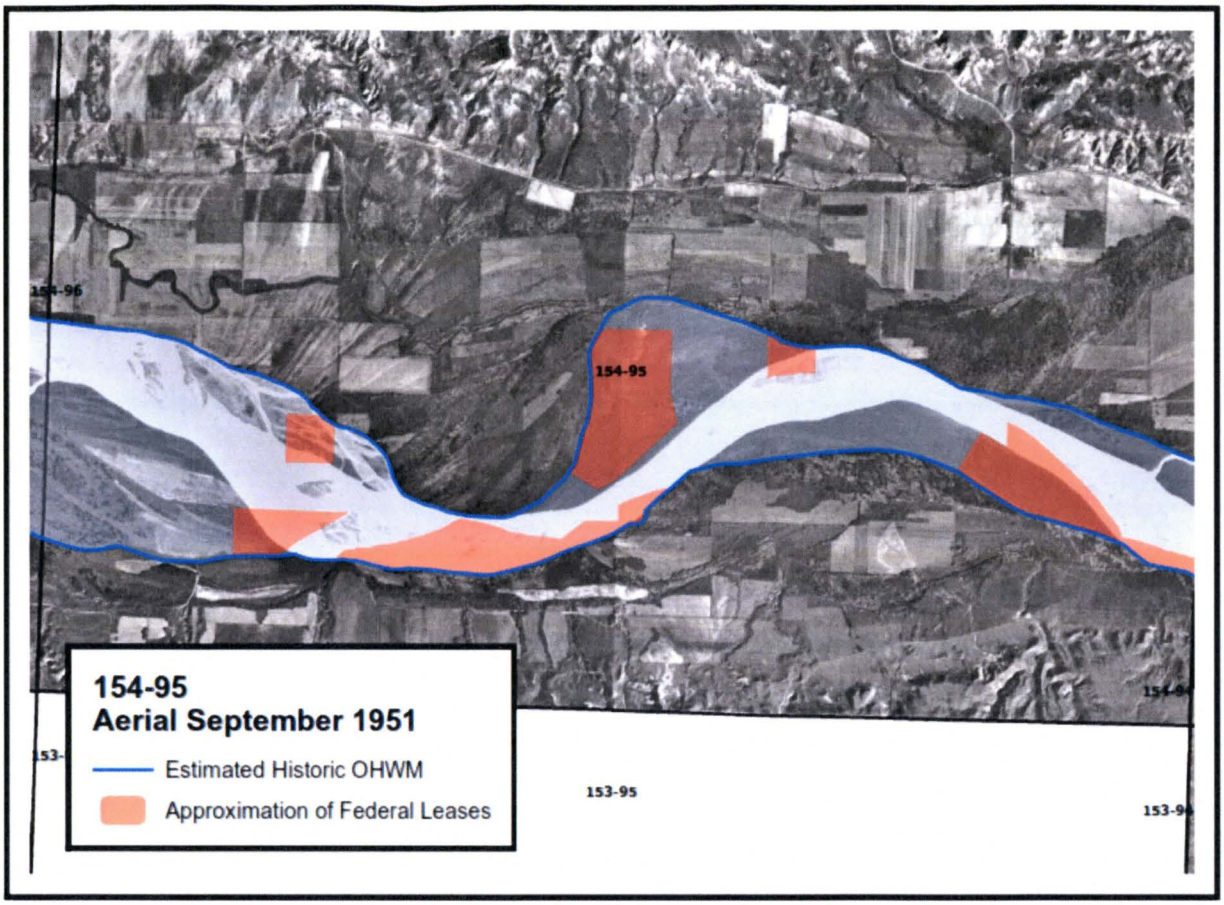
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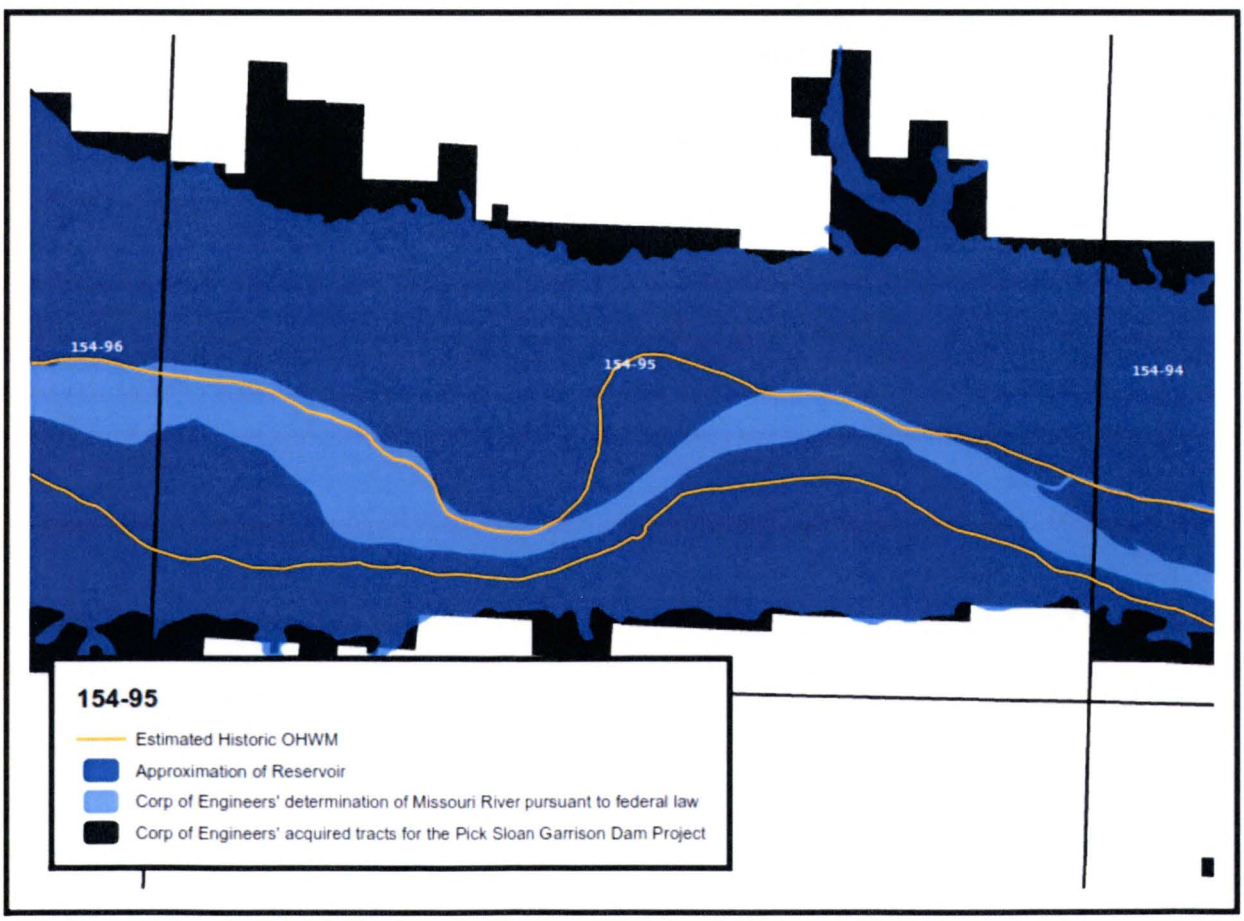
154-95
153-95
154-95
Aerial September 1951
Estimated Historic OHWM
Approximation of Federal Leases


154-96
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Estimated Historic OHWM
Approximation of Reservoir
Corp of Engineers' determination of Missouri River pursuant to federal law
Corp of Engineers' acquired tracts for the Pick Sloan Garrison Dam Project

#8
SB 2134
3/10/17

WRITTEN TESTIMONY OF DENNIS EDWARD JOHNSON IN SUPPORT OF SENATE BILL 2134
HOUSE NATURAL RESOURCES COMMITTEE Friday, March 10, 2017

I am Dennis Edward Johnson from Watford City, ND. I was born and raised on a ranching / farming operation in McKenzie County ND. I am an attorney in Watford City, ND having in the past served as McKenzie County State's Attorney for 31 years. I am also a partner and founding member of the private law firm of Johnson & Sundeen which has been in business since 1980.

In my practice we have several specialties including oil & gas law, primarily representing private mineral owners and surface owners. We sue oil companies. This Senate Bill is one of those rare occurrences when private mineral owners and oil companies are in agreement. I am offering testimony today in support of Senate Bill 2134.

I also adopt the testimony as given by others in support of Senate Bill 2134.

The reason this Bill is before the legislature is because of the uncertainty the actions or inactions of the state of North Dakota has caused in regard to ownership of the minerals lying beneath the backwaters of the Garrison Reservoir.

There are a great many oil wells that have been drilled under Lake Sakakawea and many more yet to be drilled.

When the Garrison Reservoir was approved to be built one of the very first acts the Federal Government had to accomplish was to acquire the land that would be flooded by the dam. Ownership of the lands to be flooded was determined and the United States began to acquire the land owned by private individuals and by the State of North Dakota. This was done primarily through condemnation in many cases. The United States took the surface of the land and paid for it, but the minerals were not taken and continued to be owned by the private citizens.
The dam was built and the lands flooded – in many cases destroying the livelihood of farmers and ranchers by taking the very best land they owned – river bottom land.

For a number of years now the state of North Dakota has insinuated that it owns the minerals that were left to private individuals when the flood waters from the dam built by the United States covered the land that was purchased and taken by the Federal government. This has caused a great uncertainty and halted the payment of money from oil and gas production to the mineral owners and oil companies. It also has undoubtedly halted further development of the oil and gas interests lying under Lake Sakakawea.

Our law firm has approximately 50 clients who are impacted by the state's action or inaction. They are not being paid for the oil and gas production from the minerals they own. I am not being paid by any client to testify in support of Senate Bill 2134.

This entire scenario reminds me of a third world country. Imagine being a property owner or a business owner and getting word from your government that it plans to take your property without compensation? Welcome to Bolivia – Have a nice day! This is exactly the uncertainty the state has caused.

It is settled law that the state of North Dakota owns from ordinary high water mark to ordinary high water mark on the opposite bank of a navigable river. That is the law.

When the back waters of the dam flooded the Missouri River the river channel stopped moving and is frozen and fixed in place. The actual ground survey done by the United States established the ordinary high water mark of the Missouri River before the dam flooded the river valley.

Although there are many examples of how the State's actions or inactions have prevented individuals from being paid for oil production and created uncertainty of title, there is one example that demonstrates that the State's actions are ridiculous and harming individuals.

Example of Injustice:

The heirs of Bruno Herman Weyrauch are the owners of a mineral interest consisting of 50% of all oil, natural gas, and minerals which may be found on or underlying the following described property, situated in the County of Williams, State of North Dakota:

Township 154 North, Range 96
Section 14: W1/2SW1/4
Section 15: E1/2SE1/4

Bruno Weyrauch obtained this property from the State of North Dakota. The State of North Dakota acquired the mineral and surface of the above described lands through a foreclosure and subsequent Sheriff's Deed dated September 27, 1939, recorded at the Offices of the Recorder in and for Williams County on October 2, 1939, at Book of Deeds 171, Page 171. On January 18, 1945, the State of North Dakota sold the surface and 50% of all oil, natural gas, and minerals that may be found on or underlying lands described above to Bruno Weyrauch of Ray, North Dakota under a Contract for Deed. Bruno Weyrauch paid the full amount owed on the Contract for Deed for this land.

The State of North Dakota issued a Special Warranty Deed to Bruno Weyrauch in 1953, but Bruno Weyrauch failed to record the Special Warranty Deed with the Offices of the Recorder in and for Williams County. When the heirs of Bruno Weyrauch requested a duplicate deed be issued for this property the State refused – even though they had been paid the sum of money agreed to – to issue a duplicate deed.

This necessitated bringing a quiet title action by Bruno's heirs against the State of North Dakota. Bruno's heirs obtained copies of documents found in State archives pertaining to the sale of the lands from the State of North Dakota to Bruno Herman Weyrauch. One document obtained from the archived records of the State of North Dakota was an unsigned copy of a Special Warranty Deed from the State of North Dakota to Bruno Herman Weyrauch.

Another document obtained from the records of the State of North Dakota was a State Mineral Reservation Research Verification prepared by the State Department of Trust Lands on March 18, 2014 showing the search revealed information to provide that the Contract for Deed referred to above was paid in full on August 29, 1953 and referencing that a division order (for what is apparently a producing oil and gas well) questioned the title of Bruno Herman Weyrauch and his successors in title due to the lack of a recorded Special Warranty Deed from the State Treasurer to Bruno Herman Weyrauch.

Despite the State acknowledging it owned only 50% of the minerals and Bruno's heirs agreeing to that, the State has continued to refuse to agree to the mineral and surface ownership. This is on land and minerals the State sold to Bruno! Instead the State has indicated that it owns the minerals because it is under the lake.

The land in the Bruno Weyrauch case before the Missouri River was flooded was never even remotely close to the river channel or high water mark.

So what is basically happening in this real case example is the State is attempting to take back land and minerals it sold and was paid for because the Garrison Damn flooded the river valley. Think of it this way to sum it up: ***It's like buying a car and paying for it, and then the salesman steals the car.***

There is also being considered HB 1199 which partially but not completely resolves the title issues created by the State. HB 1199 simply says the State retains the minerals below the Ordinary High Water Mark of the river channel, but it does not do away with the uncertainty of where the Ordinary High Water Mark is! Instead HB 1199 assures that the litigation over that issue continues at great expense to mineral owners, the oil companies and the state. Without certainty of where the Ordinary High Water Mark is, revenue will be held in suspense and taxes on that

income will not be paid to the State of North Dakota. I am uncertain, but it may be that the severance tax on oil production is also not paid on production payments held in suspense which would be another revenue loss to the State.

SB 2134 is a superior and will create more certainty for North Dakota. SB 2134 uses the survey done by the federal government when the land ownership was determined and payments made for land taken for the Garrison Reservoir for boundary determinations. That survey done was when there was still a river to see and land boundaries between the river and the high shore distinguishable. That was the time when the Ordinary High Water Mark could be seen and surveyed accurately.

There is also another reason to support SB 2134 rather than HB 1199. The federal government owns lands and minerals beneath the Garrison Reservoir; this would be land that was never in private hands but always belonged to the federal government. There is a dispute between the federal government and the State over the boundaries of those minerals as well. The federal government has made a decision which greatly impacts issues that the legislature is attempting to resolve. The decision by the federal government denied application of the survey which was done by the State of North Dakota and indicated that only the federal government has jurisdiction and authority to determine Ordinary High Water Mark. It is my understanding from the letter denying the State's appeal from the federal agency determination that the federal government will acknowledge as correct surveys that it performed determining Ordinary High Water Mark. I have attached the letter of March 23, 2016 from the Bureau of Land Management to the State Engineer – North Dakota Water Commission and the State Trust Lands Department.

To adopt HB 1199 is not going to settle a dispute between the State and the federal government. There is also a problem of jurisdiction in regard to having the dispute between the State and federal government resolved. The 11th Amendment to the U.S. Constitution is the reason. SB 2134 will resolve the issues between the State and federal government as it adopts the best survey available for Ordinary High Water Mark of the river channel before it was covered by flood waters from the dam.

The law proposed by Senate Bill 2134 creates certainty and prevents injustice. Certainty allows business to be conducted without fear of taking by the state without compensation. This proposed legislation will stop any contemplated land grab by the state. The state does not lose the minerals it is entitled to but will be prevented from claiming that the lands under the lands flooded by the Garrison Reservoir built by the United State also belongs to them. In other words the State will avoid lawsuits of inverse condemnation where claims will be and can be made that the State has taken private property without compensation.

By removing the uncertainty minerals owners will get paid. Oil companies will invest in drilling more wells. This creates jobs. This boosts the North Dakota economy and will benefit the state in tax revenue.

Passing this law will also restore North Dakota citizen's faith in their government that North Dakota does not take away private property rights.

If this Bill does not become law we are looking at another 10, 20, maybe even 30 years of litigation. Litigation is not the best resolution for the mineral owners, the oil companies or the state.

I ask for your recommendation of "do pass" for Senate Bill 2134. I am here because passing this Bill and making it law is the RIGHT THING TO DO for North Dakota.

I thank you for your time and attention.

Dennis Edward Johnson
P O Box 1260
Watford City, ND 58854

#8a
SB2134
3/10/17

United States Department of the Interior

BUREAU OF LAND MANAGEMENT
Montana State Office
5001 Southgate Drive
Billings, Montana 59101-4669
www.blm.gov/mt

In Reply Refer To:
9661 (MT926)

March 23, 2016

CERTIFIED MAIL – RETURN RECEIPT REQUESTED

Mr. Lance D. Gaebe
Commissioner of University and School Lands
North Dakota Department of Trust Lands
P.O. Box 5523
Bismarck, ND 58506-5523

Mr. Todd Sando
State Engineer
North Dakota State Water Commission
900 East Boulevard Ave.
Bismarck, ND 58505-0850

Dear Messrs. Gaebe and Sando:

We are in receipt of your statement of reasons received on December 10, 2014, supporting the two letters of intent to protest the official filing of Supplemental Plats by the Branch of Cadastral Survey. The letters of intent to protest were received on August 6, 2014, from the North Dakota Department of Trust Lands and August 7, 2014, from the Office of the State Engineer (OSE).

In your statement of reasons, you assert two reasons why the Bureau of Land Management (BLM) should not officially file the Supplemental Plats, approved April 9, 2014, and May 8, 2014, representing the geographic limits of the Public Domain interests. Your reasons are:

1) The BLM's Supplemental Plats should utilize the Ordinary High Water Mark (OHWM) survey initiated by North Dakota in 2009 that follows the OSE's 2007 guidelines; and
2) The Army Corp of Engineer's (COE) Acquisition Segment Maps (Segment Maps), upon which the Supplemental Plats are based, are not an accurate reflection of the OHWM.

The State of North Dakota's (State) OHWM delineation, as depicted on Enclosure 1, claims approximately 1,140 acres of Public Domain[1] subsurface estate and 896 acres of Public Domain surface estate on the Supplemental Plats to be State sovereign land. In addition, the State also claims approximately 2,637 acres of fee subsurface estate and 2,881 acres of COE-acquired surface estate as State sovereign land, which are not addressed on the Supplemental Plats.

[1] For clarification, Public Domain interests in the State of North Dakota refer to land interests (surface and subsurface) where title has never left the Federal Government.

Your protest points are focused on the location of the OHWM line, depicted on the Supplemental Plats, which is the boundary between upland ownership and State riverbed title under the Equal Footing Doctrine.

Riverbed Title Under the Equal Footing Doctrine

Your protest concerns riverbed title and not public trust issues. This distinction is important because it controls the source of law to be applied in defining the OHWM. A recent United States Supreme Court decision distinguishes the two in *PPL Montana, LLC v. Montana* 132 S. Ct. 1215, 1235 (2012):

> *"Under accepted rules of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine."*

Thus, federal law determines riverbed title under the equal footing doctrine. The following leading federal court cases provide the controlling definitions of the OHWM.

In *Howard v. Ingersoll*, 54 U.S. 381, ___ (1851), the United States Supreme Court's ruling focused on a line impressed upon the bank by the action of water as the primary indicator of the OHWM and marking the permanent bed of the river. The court also found that the bed of a river does not encompass lands outside of the banks that are subject to periodic overflow nor does it include those lands that are viable for agriculture or grazing:

> *"It neither takes in overflowed land beyond the bank, nor includes swamps or low grounds liable to be overflowed, but reclaimable for meadows or agriculture, or which, being to low for reclamation, though not always covered with water, may be used for cattle to range upon, as natural or uninclosed pasture. 54 U.S. at 415-16."*

The concurring opinions provide more clarification and established the importance of an examination of vegetation that separates the riverbed from upland, and help provide basis for subsequent federal court case definitions.

Approximately 50 years later, the Eighth Circuit reiterated *Howard v. Ingersoll* in slightly different wording:

> *"The bed of the river is that soil so usually covered by water that it is wrested from vegetation . . . and does not extend to or include that upon which grasses, shrubs, and trees grow, though covered by the great annual rises."*

Harrison v. Fite, 148 F. 781, 783 (8th Cir.1906).

A more recent federal district court case addressed the OHWM of a lake but lends guidance that transitional marshlands are not enough evidence for inclusion within the OHWM:

> *"At most the evidence shows that the dike stands on property that has historically served as marshland for Lake Harney periodically absorbing the lake's high waters*

and periodically serving as productive agricultural land for its owners. This is not enough to infer that the dike stands below the ordinary high water mark the point at which the bed of the lake ends and the fast lands begin."

United States v. Cameron, 466 F. Supp. 1099, 1114 (M.D. Fla. 1978)

And, finally, *United States v. Claridge*, 416 F. 2d 933, 934 (9th Cir.1969) references the definition in *Howard v. Ingersoll* and calls for a natural feature and further explains that the OHWM does not include the floodplain from bluff to bluff due to spring floods:

"The ordinary high water mark of a river is a natural physical characteristic placed upon the lands by the action of the river. It is placed there, as the name implies, from the ordinary flow of the river and does not extend to the peak flow or flood stage so as to include overflow on the flood plain, nor is it confined to the lowest stages of the river flow."

The BLM's Manual of Surveying Instructions, 2009 (Manual) has interpreted these leading cases on OHWM and summarized them into a contemporary definition of the OHWM for the surveyor in section 3-164:

"For inland waters, the OHWM normally used is the line below which the water impresses on the soil by covering it for sufficient periods to deprive it of terrestrial vegetation, and the soil loses its value for agriculture, including the grazing of livestock."

The Manual provides guidance in section 3-167 on locating the OHWM by utilizing the vegetation examination:

"A small pocket of an aquatic type plant growing in low places not in the riverbed is also not an indicator of the OHWM and does not indicate that the OHWM should be moved toward upland to include that pocket of aquatics. It is the most water-ward location of the terrestrial species that is determinative."

Rivers and OHWMs have been moving on the earth's surface for thousands of years and remnants of those movements are evidenced on virtually every aerial photo. However, we concern ourselves with the date on which rights were established, such as date of statehood and subsequent river movements for riverbed title under the Equal Footing Doctrine and entry dates for patents. The original surveys by the General Land Office classified upland of the Public Domain for patenting and created survey plats; generating the first representation of all of the rights within a township in relationship to one another. Since you are not challenging the validity of the original surveys, in this case we concern ourselves with the location of the OHWM prior to the artificial rising of the Missouri River to form Lake Sakakawea.[2]

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[2] Serving as background timeline information, the construction of Garrison Dam was authorized by the Flood Waters Control Act of 1946 and caused the artificial rising of the Missouri River to form Lake Sakakawea. Construction began in 1946 with reservoir filling initiated in December of 1953 and reaching minimum operating pool on August 7, 1955. http://www.nwo.usace.army.mil/Media/FactSheets/FactSheetArticleView/tabid/2034/Article/48763/garrison-project-statistics.aspx

To resolve your protest, we will address locating the line of ordinary high water, both legally and factually. It must be accepted that the OHWM along a river is an ambulatory boundary that migrates through the normal actions of accretion and erosion and has moved since rights were bounded by it. While we agree there will be some differences in location based on dates of aerial photography and dates of field work due to accretion and erosion, it appears that your OHWM guidelines do not comport with federal law and cannot be used to determine riverbed title under the Equal Footing Doctrine.

Discussion of State Reason No. 1

A) OSE's OHWM Delineation Guidelines of 2007

The BLM's Branch of Cadastral Survey has reviewed the OSE's OHWM Delineation Guidelines of 2007 and finds it mostly in conformity with the federal definition except for defining grazing of livestock and certain agriculture as being below the OHWM, as outlined in the Final Technical Report for the OHWM Investigation for the Missouri River Under Lake Sakakawea which states:

> *"Areas below the OHWM may have vegetation suitable for grazing but wetland vegetation capable of being grazed is not an "ordinary agricultural crop."*
>
> *Another complicated area included the low lying hayfields. For this study, the term "field" refers to hayed or mowed areas, and does not imply that the area has been cultivated or seeded. Farming practices along the river during drier, low water periods often extended into the lower floodplain areas, closer to the water's edge. These "fields" may be cut for hay, or cultivated for a short time, but rapid colonization of wetland species on these hay fields likely occurred when the wetter period and subsequent higher water levels returned."*

The grazing statement is in direct contradiction to the *Howard v. Ingersoll* reference of *natural or uninclosed* pasture and the Manual definition of OHWM. *United States v. Cameron* references marshland that periodically absorbs the high waters and periodically serves as productive agriculture which was directly tied to the grazing of livestock and was found not enough to infer the lands were below the OHWM.

The hay field statement is in direct contradiction to the *Howard v. Ingersoll* reference to lands liable to overflow but reclaimable for meadows or agriculture. It also contradicts *Harrison v. Fite* in that the bed does not extend to land which grasses grow although covered by rises in the water. The implication is that the land can ordinarily be utilized for agriculture, even though the remnants of water in low areas of the floodplain caused by rises in the river allow for pockets of aquatic vegetation to grow periodically, which is also addressed in the aforementioned cases.

The BLM's Branch of Cadastral Survey has reviewed the State's OHWM survey Task Order No. 2 and finds the intent to locate the OHWM of the Missouri River prior to the artificial rising of the Missouri River to form Lake Sakakawea to be correct and does not believe the State is attempting to claim the pooled lakebed of Lake Sakakawea as a navigable waterway under the Equal Footing Doctrine.

Cultivation and seeding are not prerequisites for *productive agriculture*[3] which would thereby exclude *natural or uninclosed*[4] pasture suitable for grazing or natural grass haying. Specifically the upland extends towards the river to the lowest extent of upland vegetation and not the landward extent of aquatic vegetation.

These deviations from the Federal definition of OHWM allow the State's delineation of OHWM, which is visually represented on Enclosure 2 hatched in blue and overlaid on the 1958 aerial photo, to impermissibly encompass upland with terrestrial vegetation, hay fields, and cultivated fields.

Likewise, the State's OHWM delineation, depicted on Enclosure 3 hatched in blue and overlaid onto the 1952 aerial photo, spans from *bluff to bluff*[5] taking in uplands temporarily overflowed by *freshets*[6] which is in direct contradiction to all Federal case law and moreover, the State's delineation, which does not reference utilizing the 1952 aerial photo follows the extent of water on the 1952 photo very closely. But, this photo is a representation of one of the highest recorded flows, which is not characterized as "ordinary." The date of the aerial photo, April 5, 1952, has been correlated to United States Geological Survey (USGS) flow data obtained at: http://waterdata.usgs.gov/usa/nwis/inventory/?site_no=06330000&agency_cd=USGS. Thirty-seven years of flow data from 1928-1965 shows that only 21 days had higher flows than the aerial photo date (April 5, 1952), of which 4 days were also in 1952. Enclosure 4a is the mean daily discharges for 1952; 4b is the highest daily means from 1928-1965; 4c is a graph of the 37 year discharges.

Therefore, BLM believes the State's OHWM delineation is skewed due to the aforementioned deviations from the Federal definition of OHWM and residual flood waters from an extraordinary event onto the floodplain. The State's OHWM delineation depicts the riverbed to be three times the width of the General Land Office's originally surveyed meanders. Originally surveyed meanders are typically landward of the actual OHWM, and while it is acknowledged that OHWMs move laterally, no evidence shows why the riverbed has widened, up to triple in size, to encompass lands classified as upland in the original survey.

The sheer width of the State's OHWM delineation, as depicted on Enclosure 1, clearly shows that it ignores the *natural physical characteristic*[7] of the OHWM which is a *natural object*[8] and extends *beyond the banks*[6] to encompass significant portions of the floodplain. Thus, BLM's Supplemental Plats should not utilize North Dakota's 2009 OHWM survey.

B) Chain of Title

At the meeting on July 22, 2014, in Bismarck, ND, Josh Alexander, BLM's Acting Chief Cadastral Surveyor for public lands in North Dakota, specifically asked if the State's OHWM delineation was to determine surface rights, subsurface rights, or both. The verbal response was

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[3] *United States v. Cameron*, 466 F. Supp. 1099 (M.D. Fla. 1978)
[4] *Howard v. Ingersoll*, 54 U.S. 381 (1851)
[5] *United States v. Claridge*, 416 F. 2d 933 (9th Cir.1969)
[6] *United States v. Harrell*, 926 F.2d 1036 (11th Cir. 1991)
[7] *United States v. Claridge*, 416 F. 2d 933 (9th Cir.1969)
[8] *Howard v. Ingersoll*, 54 U.S. 381 (1851)

that it determined the boundary of State Sovereign land encompassing both surface and subsurface rights.

But, the State's delineation did not consider previous conveyances, as evidenced by chain of title research. Enclosures 5a, 5b, and 5c are the State's OHWM delineation, which is hatched in blue and overlaid onto the COE Segment maps, in which the State's delineation encompasses:

1) 188.66 acre island, Y2250 (Enclosure 5a)
2) 228 acres within Y2289 (Enclosure 5b)
3) 71.07 acres within Z2382 (Enclosure 5c)

These parcels were conveyed to the United States by the State as upland (see Enclosure 6 for conveyance documents). The magnitude of acquisitions by the COE clearly shows the intent was to purchase displaced uplands. The chain of title clearly shows that the State agreeably conveyed upland and islands, which is now being depicted and claimed as riverbed. An island must exist above the OHWM to be considered an island; otherwise it is a part of the bed (sandbar). At the time of the conveyance, an OHWM determination was made to facilitate the conveyance of the island and the upland. These conveyances were for upland surface only. The State's new OHWM delineation must omit these areas as they have previously been classified as upland, not below the OHWM, and are not part of surface Sovereign Lands of the State. Thus, BLM's Supplemental Plats should not utilize North Dakota's 2009 OHWM survey.

C) Sovereign Lands

In its protest, the State is utilizing its delineation as a basis for claim to sovereign land and to require mineral lease and royalty payments from oil and gas operators. However, prior to viewing the delineations at https://land.nd.gov/minerals/mineralapps/OHWM2/OHWM2Disclaimer.aspx, there is a caveat:

> *"The work completed under this contract is to delineate the ordinary high water mark (OHWM) and is not a final legal determination as to whether any specific property is "sovereign land.""*

Thus, it is unclear how much weight to give to the State's OHWM delineation even though the State's Statement of Reasons infers that we should honor it wholly. Instead, BLM's Supplemental Plats are without limitation and provide the better evidence of riverbed title.

For the foregoing reasons, the State's first protest point is denied.

Discussion of State Reason No. 2

A) BLM Field Investigations Prior to Flooding

The COE Segment Maps were the basis for land title acquisition by the COE for those upland lands that would be affected by the artificial rising of the Missouri River to create Lake Sakakawea. The Segment Maps depict the Missouri River OHWM and are the most

comprehensive evidence of the Missouri River OHWM just prior to the formation of Lake Sakakawea.

To determine what lands were classified as public lands, the COE engaged BLM's Branch of Cadastral Engineering (now Branch of Cadastral Survey) to execute field investigations prior to flooding. BLM surveyors were guided by Special Instructions dated October 24, 1952 (Enclosure 7). Importantly, there is no evidence that the State of North Dakota raised concerns about the Special Instructions or subsequent acquisitions.

The Special Instructions stated the following regarding the lot or legal subdivision listed:

> *"Ascertain whether any or all of it is above mean high water at the present time*
>
> *If it is found to be above water at present, determine whether any or all of it has been in existence above mean high water continuously since the original survey was made*
>
> *Show what part of the tract has been in existence since the date of the original survey*
>
> *If the land has been entirely washed away and has re-appeared, determine the date it was submerged and when it re-appeared*
>
> *If accretion to a tract of public domain land has formed, show the extent of such accretion*
>
> *If substantial accretion appears to have formed in front of riparian privately-owned lands prior to the date of entry, show the extent of such accretion and the date a substantial amount had formed in front of the original tract*
>
> *Where changes have taken place in the river channel, determine whether the change was due to avulsive action, or to the slow and imperceptible process of reliction and accretion*
>
> *To determine the above facts, you will study all plats, charts, maps, aerial photographs and records found that may have a bearing on the case at hand. You will determine the age of timber growing on the land and obtain such other information as is available including the interviewing of old settlers who may be familiar with the river changes at those places."*

BLM officers were operating under the BLM's Manual of Surveying Instructions, 1947 (1947 Manual), and the term "mean high water" for inland waters carries the same determination principles and conformance to law as the OHWM, as evidenced by guidelines in the 1947 Manual.

The BLM conducted extensive field investigations to determine what lands existed above the OHWM, made a determination on river movement, its effect on land title, and compiled this information in an investigative report. These reports were utilized to determine public lands above the OHWM, addressing both accretion and erosion to public lands. Those determinations

were depicted on the Segment Maps. In other words, the COE Segment maps are based on BLM field work, analysis, and standard practices. See Enclosures 8, 9, and 10 for the progression from BLM field investigation report map (8) to Segment Map (9) to Supplemental Plat (10), all of which depict the same findings from the field investigations.

B) North Dakota State Lands Department (SLD)'s Previous OHWM Delineation

1) Land acquisition documents show that SLD participated in the COE survey process.

A conveyance document in Enclosure 6 infers that the SLD performed an OHWM determination prior to the conveyance. The last page of Enclosure 6 states:

> *"The above is based on Survey Report furnished by the State School Land Department."*

The SLD Survey Report was requested by the BLM's Branch of Cadastral Survey. However, its whereabouts are unknown and remains unfurnished. But, based on the subsequent conveyance, the referenced SLD Survey Report likely made a determination that Y2250 was an island existing above the OHWM, thereby necessitating the need for purchase by the COE as uplands that would be displaced by the artificial rising of the Missouri River to create Lake Sakakawea.

Although the Final Technical Report for the OHWM Investigation for the Missouri River Under Lake Sakakawea states that the SLD was unaware of any previous OHWM determinations, we believe that the land acquisition documents establish that the SLD participated in the OHWM determinations upon which the COE segment maps are based.

2) Documents show that SLD participated in the condemnation process for uplands.

To further outline the SLD's involvement and conclude that the State was aware of upland acquisitions, we obtained correspondence documents (Enclosure 11) showing that SLD and COE deliberations led to a formal and friendly condemnation process, which was followed by the SLD and the COE.

Despite legislation being passed to convey State lands without mineral reservation, the condemnation process was instituted due to the reluctance of then SLD Commissioner, John O. Lyngstad. Mr. Lyngstad was reluctant to sell State lands and supported the condemnation process for fear of political repercussions of selling State land. Mr. Lyngstad relays his reluctance by predicting accusations from farmers that they would be willing to pay the State more money than was being offered by the Federal Government. It is certain that farmers would not be willing to pay for these uplands if they were not productive for agriculture indicating the lands existed as upland above the OHWM. The State's OHWM delineation incorrectly classifies these same uplands as riverbed.

Revisit Enclosure 6 showing the execution of this process whereby the COE sent appraisals for displaced state uplands asking for consideration by the Board of University and School Lands, execution by the Land Commissioner, and condemnation.

C) Appraisals

Full appraisals were conducted for acquisition of displaced uplands to justify and provide basis for the expenditure of appropriated funds. These appraisals quantify upland area and quantify the uses of the upland, including agricultural production, timber, brush, etc. While utilized for appraisal values, these quantifications provide significant documentation with regard to the acquired displaced uplands, depicted on the COE Segment maps, existing above the OHWM. See Enclosure 12, which is the same area as Enclosure 2 showing the State's OHWM delineation encompassing brush and productive agriculture as identified by the land appraisal. The State's delineation does not follow Federal case law or OHWM definitions with the inclusion of these uplands.

For the reasons outlined above, we reject the State's assertion that the COE Segment Maps are not an accurate reflection of the OHWM. The OHWM was established by BLM-led field investigations using Special Instructions that were not disputed by the State. In fact, there is ample evidence showing that the SLD participated in the establishment of the OHWM determination. The second protest point is denied.

Conclusion

The COE Segment Maps are firmly grounded in guidance, methodology, and contemporaneous field investigations of the land prior to the effects of flooding. These Segment Maps are the most comprehensive evidence of the OHWM prior to the artificial rising to create Lake Sakakawea. The Segment Maps were the basis for millions of dollars of appropriated funds being spent to acquire displaced uplands and were generated with determinations from in-the-field investigations by BLM, and involvement from the BLM and ND SLD, and have gone uncontested for over 60 years.

Moreover, the BLM's Branch of Cadastral Survey performed a quality check prior to incorporating them into the Supplemental Plats. The COE Segment Maps were overlaid onto aerial photography and evaluated for OHWM determination and riparian movement effects on land title. Miniscule differences were identified due to difference in dates of aerial photography compared to the dates of the field investigations and the constant movement of rivers. In these areas, deference was given to the Segment Maps due to the field-based reports and techniques and the fact that chain of land title was based upon them and were determined to have been executed in accordance with federal guidelines.

Based on the aforementioned analysis, the BLM finds the State's OHWM delineation:

1) does not comply with the federal definition of the OHWM
2) does not honor chain of title or previous involvement with the COE
3) is an overreaching delineation that impairs:
   a) the mineral rights of private owners as vested from original patents from the Federal Government
   b) the Federal Government's acquired rights in land, and
   c) the rights of all in the Public Domain interests in land.

Your protest to the official filing of plats of survey posted in the *Federal Register* on July 8, 2014, is hereby dismissed. The Supplemental Plats shall be officially filed in this office.

You have the right to appeal this decision to the Office of Hearings and Appeals, Office of the Secretary, U.S. Department of the Interior, Board of Land Appeals (Board), in accordance with the regulations contained in 43 CFR Part 4 and the enclosed Form 1842-1 (Enclosure 13). In taking an appeal, there must be strict compliance with the regulations. If you choose to appeal, a notice of appeal must be filed in this office within thirty (30) days of receipt of this letter for transmittal to the Board. If your notice of appeal does not include a statement of reasons, one must be filed with the Board within thirty (30) days after the notice of appeal was filed. A copy of your notice of appeal and any statement of reasons, written arguments, or briefs, must also be served upon the Office of the Solicitor, Rocky Mountain Region, 2021 Fourth Avenue N., Suite 112, Billings MT 59101. Service must be accomplished within fifteen (15) days after filing in order to be in compliance with appeal regulations.

As provided by 43 CFR Part 4, you have the right to petition the Office of Hearings and Appeals to stay implementation of the decision; however, you must show standing and present reasons for requesting a stay of the decision that address your interests and the manner by which they would be harmed. A petition for stay of a decision pending appeal shall show sufficient justification based on the following standards: (1) The relative harm to the parties if the stay is granted or denied; (2) The likelihood of the appellant's success on the merits; (3) The likelihood of immediate and irreparable harm if the stay is not granted; and (4) Whether the public interest favors granting the stay. Should you choose to file one, your stay request must accompany your notice of appeal. A notice of appeal with petition for stay must be served upon the Board, Regional Solicitor, and adverse parties at the same time such documents are served on the deciding official at this office. The person signing the notice of appeal has the responsibility of proving eligibility to represent the appellant before the Board under its regulations at 43 CFR 1.3.

Sincerely,

Aden L. Seidlitz

Aden L. Seidlitz
Acting State Director

13 Enclosures
1- Overall comparison of OHWM delineations in protested area
2- OHWM comparison overlaid onto 1958 aerial photography
3- OHWM comparison overlaid onto 1952 flood aerial photography
4- USGS flow data
5- State OHWM delineation overlaid onto Segment Maps
6- State land conveyance correspondence and execution documents
7- BLM Special Instructions
8- BLM field investigation report map
9- Portion of Segment Map

10- Portion of BLM Supplemental Plat
11- COE and SLD correspondence
12- Land appraisal map
13- Form 1842-1

cc: Karan Dunnigan
Office of the Solicitor
Billings, MT

Lake Sakakawea Ownership Legislation

Presentation to North Dakota House of Representatives Energy and Natural Resources Committee
March 2, 2017

An **ExxonMobil** Subsidiary

Agenda

- History
- Issue – Where is the ordinary high water mark?
- Riverbed Claims
- Lakebed Claims
- Potential Outcomes from XTO's Perspective
  - COE Survey
  - State Survey
  - No Survey
- Recommendation

An **ExxonMobil** Subsidiary

History

- The Corps of Engineers (“COE”) surveyed the River and created the COE Segment Maps (“COE survey”) to determine the river location and ownership to acquire lands to create Lake Sakakawea – 1952
- Missouri River (“River”) was dammed and flooded – 1953-55
- **XTO and its predecessors started Bakken leasing along River – 2006**
- North Dakota (“State”) performed its own study of the riverbed (“State survey”) to determine the OHWM – 2011
  - Used photos from pre and post damming, including pre-damming photos from one of highest recorded flows
  - State survey includes more River acreage than the COE survey
- Bureau of Land Management (“BLM”) used the COE survey to create supplemental plats
  - State protested the official filing of the supplemental plats
  - Under the March 2016 BLM Director’s decision, State’s protest was dismissed, and all plats were made official by April 2016
  - State appealed this decision, which is still pending

Issue – Where is the ordinary high water mark?

- Per State's Supreme Court decision, State owns the minerals under a navigable river up to the ordinary high water mark ("OHWM")
  - Starting in 2006, XTO and its predecessors leased fee, federal and state owners based on COE survey
  - After the completion of the 2011 State survey, State has claimed at a minimum the OHWM is the acreage within the State survey but has also made claims in litigation to the entire lakebed
    - Fee and federal owners dispute the State's interpretation of the location of the OHWM
      - BLM Director's decision states "the State's OWHM delineation . . . is an overreaching delineation that impairs:
        a) The mineral rights of private owners as vested from original patents from the Federal Government
        b) The Federal Government's acquired rights in land, and
        c) The rights of all in the Public Domain interests in land."
- **Due to the title dispute, XTO is paying into an escrow account for some of the acreage within the State survey**
- **Litigation is pending, but unless resolved by legislation, additional litigation will be required to resolve**

Riverbed Claims

- State is claiming **2636.39 additional** acres under the State survey in XTO operated units
- XTO is paying into an escrow account for some of the disputed acreage
  - If the well was drilled PRIOR to the State survey, State has not demanded payment, and XTO continues to pay as originally set up
    - **If State's additional acreage claim is upheld, XTO will have overpaid ALL royalties and revenues to fee and federal owners and their lessees and will seek recovery of such overpaid royalties and revenues**
  - If the well was drilled AFTER the State survey, XTO is paying royalty into an escrow account for disputed acreage
    - Paid into escrow account back to first production, including royalties already paid to fee and federal owners
    - **If State's additional acreage claim is upheld, XTO will seek recovery of royalties and revenues overpaid to fee and federal owners and their lessees**
  - **For disputed fee acreage, it is unclear whether severance tax is due - both Department of Trust Lands and Tax Commissioner's office are claiming the monies and asserting potential penalties**
- The uncertainty of ownership has forced XTO to carry additional risks and expenses in its operated units
- BLM does not recognize the State survey or payment into the escrow account and continues to demand royalty based on COE survey; could terminate lease if royalty not paid

Lakebed Claims

- State has made claims in pending litigation that the OHWM extends to the lakebed boundary

- If the lakebed is considered the OHWM, **approximately 60,000 additional** acres will be affected from boundary of State survey to boundary of lake
  - Fee and federal owners own majority of acreage between the boundary of State survey to boundary of lake
    - If State prevails on the lakebed claims, majority of current ownership in the lakebed will be wiped out

- Federal government used the COE survey to acquire/condemn land for lake, so litigation for takings is highly likely if extended to entire lakebed
  - XTO estimates **$15B** for total acreage

Potential Outcomes from XTO's Perspective – COE Survey

- If COE survey is specified:
  - All fee and federal issues will be resolved
    - Monies from escrow account will be refunded, and State will refund overpaid royalties and bonuses to lessees without escrow accounts
    - Will end/prevent further litigation from fee and federal owners and their lessees

- If COE survey with additional survey for fee minerals is specified:
  - Federal issues will be resolved
    - Monies related to federal acreage in escrow account will be refunded, and State will refund overpaid royalties and bonuses for federal acreage to lessees without escrow accounts
  - **Uncertainty** on fee ownership will continue during the survey process
    - XTO will continue to pay into escrow account for fee owners, but **uncertainty** remains on how to pay royalty on pre-survey wells since State has not made a demand
    - **Delay in certainty** may cause claims for recoupment of overpaid royalties and revenues to fee owners and their lessees to be barred by the statute of limitations
    - **Uncertainty** remains with respect to severance tax and potential penalties
    - Operators will continue to take risk of carrying non-operating lessees, which hinders further development
    - **Uncertainty** on impact to XTO acreage
  - Fee and State owners will both likely be dissatisfied with outcome of additional survey

Potential Outcomes from XTO's Perspective – State Survey

- If State survey with recognition of federal minerals is specified:
  - Federal issues will be resolved
    - Monies related to federal acreage in escrow account will be refunded, and State will refund the overpaid royalties and bonuses for federal acreage to lessees without escrow accounts
  - This will not resolve current litigation by fee owners and their lessees, and additional fee owners and their lessees will likely initiate further litigation
  - XTO must attempt to recover overpaid royalties and revenues made to fee owners and their lessees
  - Previously leased fee acreage will now become unleased, and State will need to issue or extend leases for increased acreage under the State survey

- If State survey is specified:
  - This will not resolve current litigation by fee owners and their lessees, and additional fee and federal owners and their lessees will likely initiate further litigation
  - XTO must attempt to recover overpaid royalties and revenues made to fee and federal owners and their lessees
  - Previously leased fee and federal acreage will now become unleased, and State will need to issue or extend leases for increased acreage under the State survey

Potential Outcomes from XTO's Perspective – No Survey

- If no survey is specified (either legislation does not pass or only specifies the State owns up to the OHWM):
  - No fee or federal dispute will be resolved; continued and additional litigation will be necessary to resolve
    - XTO will continue to pay money into escrow account and defer development

- If legislation (or litigation [if either legislation fails or does not specify survey]) specifies the OHWM extends to lakebed boundary:
  - Litigation by all fee and federal owners and their lessees for up to $15B for entire lakebed in takings claims

Recommendation

- **XTO recommends using the COE survey in the legislation:**
  - Resolves all issues with fee and federal owners
  - Provides certainty for mineral ownership, which in turn facilitates development
  - Prevents costly and lengthy litigation between State, fee owners, lessees and the federal government

Backup

An ExxonMobil Subsidiary

March 10th, 2017

Testimony of

Edward P Lynch

In
Support for

HB1199 and SB 2134

To

The Joint Energy and Natural Resources Committee
ND State Legislature
65th Assembly

House Committee

Representative Todd Porter
Representative Chuck Damschen
Representative Dick Anderson
Representative Glenn Bosch
Representative Bill Devlin
Representative Pat D. Heinert
Representative George J. Keiser
Representative Mike Lefor
Representative Andrew Marschall
Representative Alisa Mitskog
Representative Corey Mock
Representative Shannon M. Roers Jones
Representative Matthew Ruby
Representative Jay Seibel

Senate Committee

Senator Jessica Unruh
Senator Curt Kreun
Senator Kelly M. Armstrong
Senator Dwight Cook
Senator Erin Oban
Senator Jim P. Roers
Senator Donald Schaible

Special Mention: Senator Brad Bekkedahl

Dear Honorable Senators and Representatives and members of the Joint Energy and Natural Resources Committee State of North Dakota.

I submit this written letter today in full and unequivocal support for HB1199 and SB2134, I want to commend and thank each of the committees for the work you have thus so far accomplished.

It really is very heartening and comforting to know that the process and procedures of the State Government and the respective legislative bodies actually work as intended by the Founders and the Framers of the Constitution of this United States of America and also the Constitution of the Great State of North Dakota.

The State of North Dakota, a wonderful place I was born and raised, a wonderful place that I still consider and call **"HOME"** to this day, and will continue to do so. The work and progress that this joint committee has accomplished with regards to these two bills is wonderful and speaks volumes for the rule of law, liberty, private property rights and due process.

Even though the work is not finished as of this time I am greatly encouraged and optimistic that the final product that emerges from this joint committee will be of the same high quality and caliber and content produced thus far.

As I stated previously I have always called North Dakota home. Even though I do not live and work there at present, I have always dreamed of making North Dakota my primary residence once I retire. For some reason (probably because of the ancestry and family ties) there is a strong connection and calling, there always has been and I suspect there always will be, at least for myself.

In my life and career, I have travelled the world and seen many things, worked with many cultures. The State of North Dakota has certain qualities and activities that I have found nowhere else.

I look forward to the day when I can take my Children and Grand Children Walleye fishing on the Missouri River, Pheasant and Whitetail Deer hunting on the western grasslands. I look forward to continuing to teach them ethics, morals and values and the importance of Family and Faith and Friends. There is no better place in my opinion than “HOME” North Dakota.

Once again Honorable Senators and Representatives thank you for all of the hard work you have accomplished thus far. Please push this legislation over the finish line and claim a victory for the citizens of North Dakota as well as private property rights, liberty, federalism and the rule of law.

Sincerely,

Edward P. Lynch
Edward P. Lynch

MARCH 10, 2017

The Joint Energy and Natural Resources Committee
North Dakota State Legislature
65th Assembly

Representative Todd Porter
Representative Chuck Damschen
Representative Dick Anderson
Representative Glenn Bosch
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Representative Andrew Marschall
Representative Alisa Mitskog
Representative Corey Mock
Representative Shannon M. Roers Jones
Representative Matthew Ruby
Representative Jay Seibel

Senator Jessica Unruh
Senator Curt Kreun
Senator Kelly M. Armstrong
Senator Dwight Cook
Senator Erin Oban
Senator Jim P. Roers
Senator Donald Schaible

Honorable Senators and Representatives of the Joint Energy and Natural Resources Committee:

TESTIMONY IN SUPPORT OF SB 2134 and HB 1199

I am writing to express my appreciation for the support that has been given to SB 2134 and HB 1199 and to urge passage of these two Bills. These Bills have addressed issues that have personally impacted my family's right to own mineral acreage that has been in our family for many decades. I don't have the words to express how shocking and devastating it has been to be deprived of something my ancestors earned through much hard work and sacrifice. Although I do not live in North Dakota, my parents were born, raised and married in that great State. They taught me the morals and ethics and sense of justice of the North Dakota people. My life has been guided by those traits of the North Dakota citizens. It has been very distressing that the great State of North Dakota, contrary to all I know, has taken a portion of our mineral acreage and called it theirs and profited from it. It just doesn't fit with what North Dakotans are and what they do. These bills have come a long way to right that injustice. My family is not the only family affected by this unlawful 'land grab' the State of North Dakota has undertaken. The United States is a Democracy. The State cannot just take from it's citizens as they do in socialistic governments. That should never happen in this country. In North Dakota. In 2017. I have been on a merry-go-round, for years, in the courts attempting to get this wrong remedied. It is my utmost hope that you support these two bills and right this unbelievable injustice.

Thank you for taking your valuable time to understand the impact this issue has had on many mineral owners and to pass legislation that will put an end to this once and for all. Your efforts are greatly appreciated.

Respectfully submitted,

Suzanne Vohs

SB2134

Chairman Porter, members of the Energy and Natural Resources Committee, I am Representative Marvin Nelson, District 9.

I oppose SB 2134. The reason is relatively simple. One of two cases apply in this situation. Either the State of North Dakota owns the minerals under Lake Sakakawea, in which case you cannot give away those rights, or the State of North Dakota does not own the minerals under Lake Sakakawea in which case you cannot give away what you do not own.

Under our fiduciary duties to the people we cannot renounce our sovereign responsibilities.

As such, this bill is moot and the matter is a matter of facts. As such, the state I believe should proceed by asking for a declaratory judgement in Federal District Court to quiet title to determine the facts.

One needs to remember, we are not just talking about private parties here, we will be giving up a lot of minerals to the Army Corps of Engineers.

Under the Equal Footing Doctrine, the land under the navigable waters at the time of statehood, become the property of the State of North Dakota, held in trust for our residents. The Missouri River, for the entire segment under Lake Sakakawea was navigable in fact.

The State Industrial Commission has taken, with a strong basis, the position that these minerals belong to the State of North Dakota. Note that the fiscal note shows the effects for this biennium but the effects will last a lot longer affecting the state's income for years and our trust funds forever.

Public Trust Doctrine rests in the very origins of our laws. We have seen in cases such as Illinois Central R.R. v Illinois that the property held in trust cannot be given away. Not of course that there haven't been repeated attempts to do so in the various states. For instance, Idaho's House Bill 794.

People will be saying end the uncertainty, clear this up by basically quit claiming the minerals. Well that may release the money being held in trust, but lawsuit can still potentially be brought under the Public Trust Doctrine, this bill does not end the issue, does not give us an end to the questions. We should go to court to quiet the title, to reach a resolution.

Mar 16, 2017 SB 2134 1

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Lance D. Gaebe, Commissioner

DEPARTMENT OF
ND TRUST LANDS
INVESTING FOR EDUCATION

March 15, 2017

To: Adam Mathiak, Legislative Council

From: Lance Gaebe, ND Department of Trust Lands

RE: Estimate of Fiscal Impact of Amendment 17.0159.06005 to SB 2134

The Board of University and School Lands manages state-owned minerals and the oil, gas and related hydrocarbons within the beds of the State's navigable waters. The Strategic Investment and Improvements Fund (SIIF) receives the oil and gas revenues from the minerals associated with State sovereign lands.

Under the Missouri River within Lake Sakakawea, the Board has historically leased the sovereign mineral acres based upon the estimated historical ordinary high water mark (OHWM) of the river channel as it existed prior to inundation by the reservoir. The Board has not leased, nor investigated, any sovereign oil and gas minerals within Lake Oahe.

SB 2134, as set forth in Amendment 17.0159.06005, would implement a definition of the OHWM of the historical Missouri riverbed channel within N.D.C.C. ch. 61-33.1. The revised bill would change the determination of the historical OHWM presently used by the Board to lease sovereign minerals. The bill dictates sovereign minerals would be determined based on the results of a study with its basis being the U.S. Army Corps of Engineers' survey of the river channel conducted in connection with creation of Lakes Sakakawea and Oahe prior to inundation.

Amendment 17.0159.06005 would change the area of the historical riverbed as the basis of sovereign oil and gas minerals. There is an acreage difference between the federal river survey and estimated historic OHWM depicted in 2010 and 2013 studies. Because the areas have already been leased for the production of oil and gas, the reduced acres will create a fiscal impact to the SIIF, related to the return of collected bonus and royalty and the anticipated reduction of future royalties.

The revised bill uses the Corps of Engineers' survey as the baseline for the authorized Legislative Management study of the historical Missouri riverbed channel. It is unknown what acreage adjustments may result from the study; thus the approximate

acreage difference between the Corps of Engineers' survey and the Board's studies of the historical and actual OHWM are used to determine fiscal impact of the bill.

Unlike Engrossed Senate Bill 2134 as passed by the Senate, which deferred the ownership of the riverbed within the Fort Berthold reservation to federal determination. Amendment 17.0159.06005 includes this area in the definition of the "[h]istorical Missouri riverbed channel". However, this area is excluded from the authorized study. Ownership of this area is presently disputed with the Bureau of Indian Affairs, with both the BIA and the State leasing mineral acreage. The revenue based on the acreage difference between the Phase IV (study of historic OHWM) and the Corps of Engineers' survey is included in the analysis of fiscal impact.

The State would repay revenue the SIIF has collected on 795 mineral tracts involving an estimated 46,000 acres, and also relinquish future royalty revenue. The 2017-2019 biennium impact would be $248,906,616, which includes:

- The return of $110,245,126 of bonus and rent to lessees;
- The repayment to operators of $70,751,579 of royalties collected and anticipated through FY 2017;
- Forfeiture of claim to $35,157,910 of presently escrowed royalty; and
- Loss of future royalty of $32,752,001, based upon 2015- 2017 biennium (to date) prices and production.

Also, there would be the loss of future royalty in the 2019-2021 biennium of $32,752,001, based upon 2015-2017 biennium (to date) prices and production.

Amendment 17.0159.06005 directs the Board of University and School Lands to implement the resulting acreage and revenue adjustments within two years of the adoption of the final study.

Issuing Oil and Gas Lease Corrections with Refunds

Tract acres are updated into the Department of Trust Lands' information system on a tract-by-tract basis documenting the reason for the change. Once tract acres have been changed the following steps occur:

1) Lease payments are verified (bonus and years of rentals paid);
2) Request for refund form is completed; and
3) Cover letter and Oil and Gas Lease Correction are completed with any attachments in support of the correction.

After documentation is prepared, it is reviewed internally by the Directors of the Minerals Management and the Revenue Compliance Divisions. Following the Commissioner's review, a refund authorization is prepared.

An updated schedule of participation factors and the calculation of the revised decimal interest are prepared to ensure corrections are made to the appropriate trusts or funds.

Once the refunds of bonus and rent are issued, revised lease documentation is mailed to the lessee of record and the operator. If the lessee fails to return an executed copy or cash the check, the Department follows up. Once the operator adjusts to the corrected acres, the operator will make net royalty adjustments on subsequent royalty payments to the Department.

Occasionally lessees transfer their interest to another party without informing the Department of this assignment of interest. Issuing refunds and lease corrections will be delayed if a lessee sells or acquires an interest but has not informed the Department of this change, and corrections/refunds would need to be reissued.

Department Operations Fiscal Impact

Barring delays due to legal challenges or unresponsive lessees, it is anticipated the Department could complete 40 lease corrections each month, resulting in completion of the estimated 800 tract lease corrections within two years of adoption of the final study. The Department will not require additional FTEs or operations funding to implement the provisions of the Bill.

Potential Bonus Repayments

	Total Bonuses & Rents Collected	% Impact Bill 2134	Total
Phase I*	$ 26,083,522	77.53%	$ 20,223,613
Phase II**	119,993,395	56.20%	67,439,601
Phase IV***	41,826,605	53.99%	22,581,912
	$ 187,903,522		$ 110,245,126

Projected Revenues

Projected Future Periods

	Received	Escrowed	Total Estimated Revenue	% Impact Bill 2134	Total
Phase I*	$ 1,999,529	$ 1,067,123	$ 3,066,652	77.53%	$ 2,377,700
Phase II**	40,094,698	7,996,013	48,090,711	56.20%	27,028,308
Phase IV***	813,373	5,384,133	6,197,506	53.99%	3,345,993
	$ 42,907,600	$ 14,447,269	$ 57,354,869		$ 32,752,001

Royalties Collected

	Received	Anticipated FY 2017 Collections	Revenues	% Impact Bill 2134	Total
Phase I*	$ 8,790,483	$ 499,882	$ 9,290,365	77.53%	$ 7,203,197
Phase II**	100,492,181	10,023,675	110,515,856	56.20%	62,112,963
Phase IV***	2,455,366	203,343	2,658,709	53.99%	1,435,420
	$ 111,738,030	$ 10,726,900	$ 122,464,930		$ 70,751,579

Royalties Escrowed

	Escrow Received	Anticipated FY 2017 Escrow Collections	Revenues	% Impact Bill 2134	Total
Phase I*	$ 7,608,180	$ 311,244	$ 7,919,424	77.53%	$ 6,140,251
Phase II**	19,939,778	2,332,171	22,271,949	56.20%	12,517,450
Phase IV***	28,991,598	1,570,372	30,561,970	53.99%	16,500,209
	$ 56,539,556	$ 4,213,787	$ 60,753,343		$ 35,157,910

* Phase I leased (between township 153-102 and Hwy 85)

** Phase II leased (between Hwy 85 and Hwy 23)

*** Phase IV leased (between Hwy 23 and Garrison Dam)

Projected Revenues Based Upon 46,000 Impacted Acres [1]		
	FY 2017-2019 [+]	FY 2019-2021
Oil and Gas Lease Bonus & Rents [2]	$ (110,245,126)	
Royalties Collected [3]	(70,751,579)	
Royalties Collected - Projected [4]	(32,752,001)	(32,752,001)
Royalties Escrowed [5]	(35,157,910)	
Change in Revenue	$ (248,906,616)	$ (32,752,001)

[+] Estimated funds to be disbursed in 2017 - 2019 biennium, but some may be disbursed in 2019 - 2021 biennium.

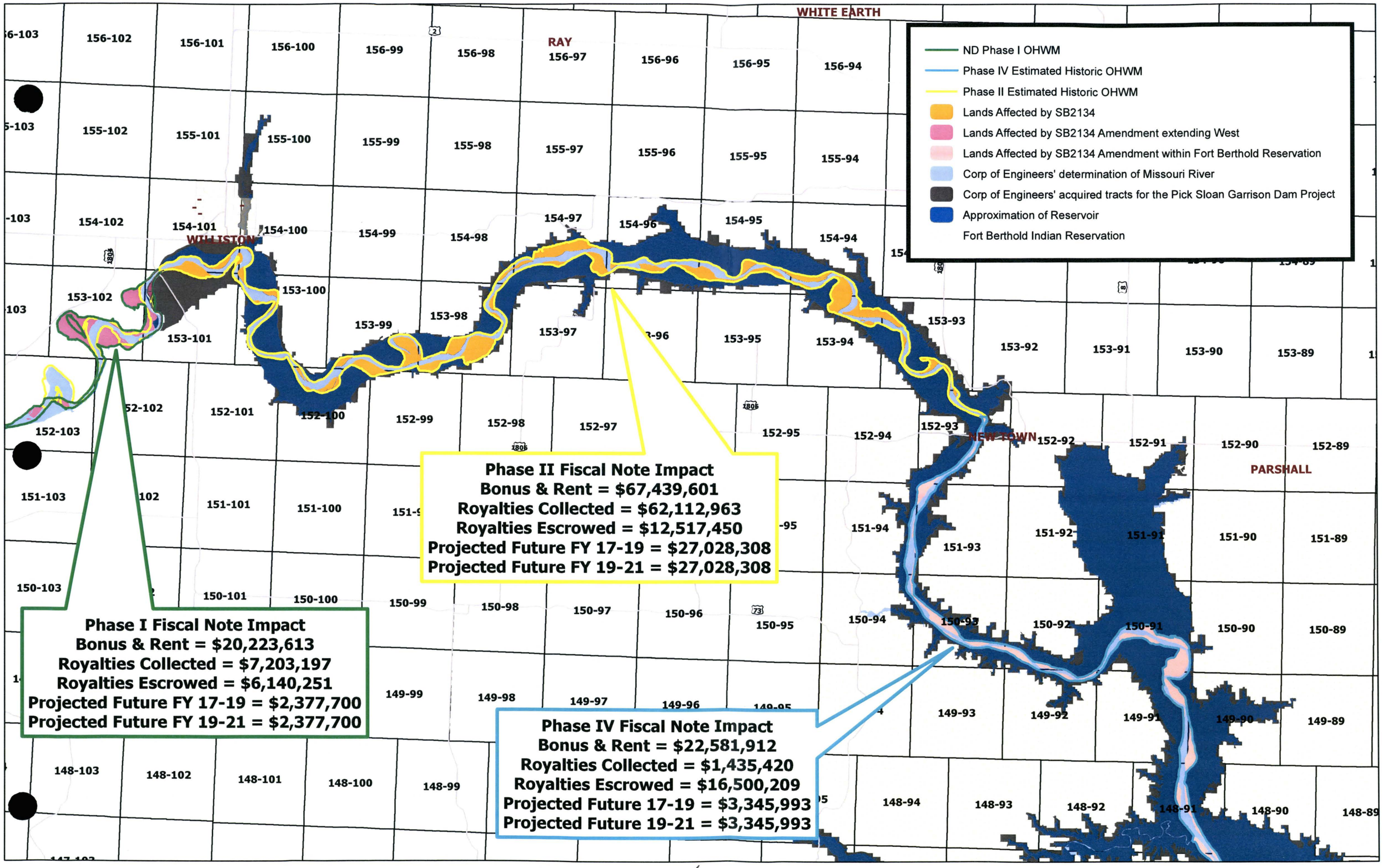
[1] Difference between the Corp's survey and the Board of University and schools Lands' estimated historic ordinary high water mark.

[2] Bonuses collected and held in SIIF, to be returned to lessees.

[3] Includes projected royalties collected through the end of FY 2017. Already collected royalties would be returned to operators.

[4] Based upon 2015-2017 biennium (to date) average level prices and production.

[5] Funds held in escrow accounts at the Bank of North Dakota due to title disputes.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2
3-16-17
SB2134

NDLA, Intern 08 - Pathroff, Dennis

From: Helms, Lynn D.
Sent: Thursday, March 16, 2017 7:59 AM
To: NDLA, Intern 08 - Pathroff, Dennis
Subject: SB 2134 fiscal note information
Attachments: Lakebed.xlsx

Attached is a spreadsheet prepared by my staff that estimates the impact of ongoing litigation of disputed mineral ownership under Lake Sakakawea.
Following is a description of the approach:

1) Used a spatial query to identify spacing units that contain lands between the USACOE Missouri River OHWM and the OSACOE maximum Operating Pool Elevation.
2) Performed count of all Bakken and ThreeForks wells capable of production in the potentially impacted spacing units from number 1.
3) Identified the township and range for each of the potentially impacted spacing units from number 1 above.
    a. Analyzed all spacing units in each township to determine maximum and average well density.
    b. Analyzed cumulative oil production for all wells in each township to determine average well cumulative production.
4) Compared spacing units identified in number 1 with average spacing unit in the same township. Also compared to the maximum density spacing unit in the township, but that is not felt to represent reality.
    a. Calculated how many wells less (if any) have been drilled in the spacing units in number 1 than in the average spacing unit for that township.
        i. Also compared to the maximum density spacing unit in the township, but that is not felt to represent reality.
    b. Multiplied the difference from the average well count times the average cumulative oil per well for that township.

Following is a summary of results:
21 affected townships.
130 affected spacing units.
436 current active Bakken producing wells in those spacing units.
149 more producing wells if the 130 affected spacing units were developed to the average well density of their township.
56.86 million barrels more cumulative production if the 149 wells had been drilled and performed like the average well in their township.
Based on the 4 years the litigation has been ongoing this would equate to 37 wells and 14.2 million barrels of oil per year of unrealized activity.

The challenge is to determine how additional drilling would affect the fiscal note:
On the plus side sales tax, gross production tax, and oil extraction tax would be paid on the unrealized wells and barrels.
37 wells would generate approximately $5.9 million per year sales tax.
14.2 million barrels of oil and associated natural gas would generate approximately $34 million gross production tax and $28 million oil extraction tax per year.
On the minus side royalty payments would go to parties other than the state of North Dakota.
14.2 million barrels of oil and associated natural gas would generate approximately $90 million royalties at 12.5% versus $135 million royalties at 18.75%. Land Department estimates their share at $16.5 million per year with 18.75% royalty.
North Dakota receives ½ of federal royalties, potentially $45 million.
How long will the litigation continue and how much will SB2134 shorten that process?

Lynn D. Helms
Director
600 E Blvd Ave
Bismarck, ND 58505-0840
(701) 328-8020
lhelms@nd.gov

From: Gaebe, Lance D.
Sent: Monday, March 13, 2017 5:33 PM
To: Helms, Lynn D.
Subject: SB 2134 fiscal note information and testimony including maps

Mr. Helms
Thank you for taking a look. For all fiscal note estimates we have used 2015-2017 (so far) level price and production to evaluate 2017-2019 and 2019-2021 impacts.

Lance

#1
SB 2134
3/16/17

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Lance D. Gaebe, Commissioner

DEPARTMENT OF
ND TRUST LANDS
INVESTING FOR EDUCATION

March 15, 2017

To: Adam Mathiak

From: Lance Gaebe, ND Department of Trust Lands

RE: Estimate of Fiscal Impact of Amendment 17.0159.06005 to SB 2134

The Board of University and School Lands manages state-owned minerals and the oil, gas and related hydrocarbons within the beds of the State's navigable waters. The Strategic Investment and Improvements Fund (SIIF) receives the oil and gas revenues from the minerals associated with State sovereign lands.

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Projected Revenues Based Upon 46,000 Impacted Acres [1]		
	FY 2017-2019 [+]	FY 2019-2021
Oil and Gas Lease Bonus & Rents [2]	$ (110,245,126)	
Royalties Collected [3]	(70,751,579)	
Royalties Collected - Projected [4]	(32,752,001)	(32,752,001)
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Change in Revenue	$ (248,906,616)	$ (32,752,001)

[+] Estimated funds to be disbursed in 2017 - 2019 biennium, but some may be disbursed in 2019 - 2021 biennium.

[1] Difference between the Corp's survey and the Board of University and schools Lands' estimated historic ordinary high water mark.

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WHITE EARTH

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Projected Future 17-19 = $3,345,993
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final study adopted by the legislative managements energy development and transmission committee during the 2017-18 interim and judicial review as provided in this chapter.

61-33.1-04. Implementation.

Upon effective date of this Act:

1. The board of university and school lands immediately shall begin to implement any release of claim hold, acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to the state-issued oil and gas leases not subject to the study as outlined in Section 2. The board shall complete the adjustments, refunds, and payment demands within six months after the effective date of this Act.
2. Operators of oil and gas wells shall immediately begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests not subject to the study as outlined in Section 2. The operators shall complete the adjustments within six months after the effective date of this Act.

Upon adoption of the final ordinary high water mark delineation of the tracts of land covered under Section 2 ~~of a final study conducted during the 2017-18 interim by the legislative management's energy development and transmission committee~~:

1. The board of university and school lands immediately shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final study.

2. Operators of oil and gas wells affected by the study immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the final study. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for the segment of the final study challenged by the action.

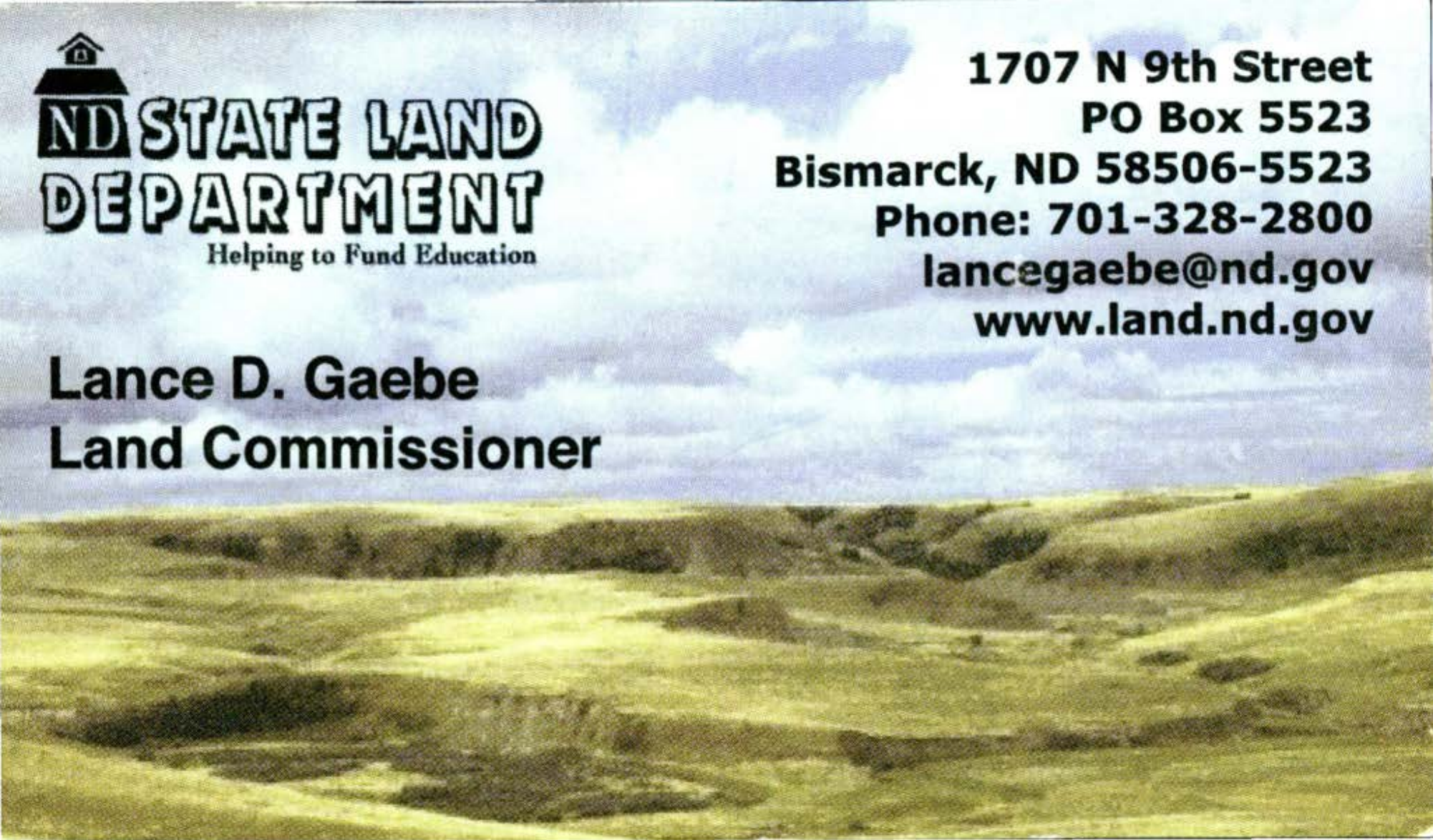
61-33.1-05. Actions challenging final study.

An interested party seeking to bring an action challenging the final study conducted during the 2017-18 interim by the legislative management's energy development and transmission committee must commence an action in district court within two years of the date of adoption of the final study. The plaintiff bringing an action under this section may challenge only the segment of the final study which affects the plaintiff's interests. The state and all owners of record of fee or leasehold estates or interests affected by the segment of the final study challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the final study bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by law during the 2017-18 interim by the legislative management's energy development and transmission committee.

and under the riverbed or lands above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.

SECTION 2. LEGISLATIVE MANAGEMENT STUDY - STUDY OF CORPS SURVEY OF EXTENT OF HISTORICAL MISSOURI RIVERBED CHANNEL.

1. During the 2017-18 interim, the energy development and transmission committee shall procure a qualified professional engineering and surveying firm, with expertise in hydrology, river geomorphology reservoir dynamics, to conduct a study of the corps survey, as defined in section 61-33.1-01, to verify the proper delineation of the ordinary high water mark of the historical Missouri riverbed channel only where there is a discrepancy between the Ordinary High Water Mark Survey Task Order #2 Final Technical Report commissioned by the Department of Trust Lands and the corps survey. The study must be limited to the extent from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Upon the effective date of this Act, the legislative management shall commence procurement to select a qualified engineering and surveying firm for the study. Within ninety days of the first date of publication of the invitation, the legislative management shall select and approve an engineering and surveying firm for the study. The firm selected must complete the study within six months of entering a contract with the legislative management. The legislative management may extend the time required to complete the study if the
energy development and transmission committee deems an extension necessary.


ND STATE LAND DEPARTMENT
Helping to Fund Education
1707 N 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: 701-328-2800
lancegaebe@nd.gov
www.land.nd.gov
Lance D. Gaebe
Land Commissioner

August 19, 2008

North Dakota Board of University and School Lands
1707 North 9th Street
Bismarck, North Dakota 58506-5523
&
North Dakota Office of the State Engineer
900 E Boulevard Avenue
Bismarck, ND 58505-0850

Request For Proposals to Provide Surveying Services – Ordinary High Water Mark Delineations From the MT/ND border along the Yellowstone and Missouri Rivers to River Mile Marker 1549.0 East of Williston

I. Introduction -

The North Dakota Board of University and School Lands is responsible for managing associated mineral interests under sovereign lands, according to North Dakota Century Code ("N.D.C.C.") chapters 15-08.1 and 61-33. The Office of the State Engineer is authorized to manage the state's non-mineral interests in sovereign lands, under N.D.C.C. chapter 61-33. North Dakota's sovereign lands are those areas, including the beds and islands lying within the ordinary high water mark of navigable lakes and streams.

The Board of University and School Lands and the Office of the State Engineer (hereinafter "State") are requesting qualifications and proposals for a survey to delineate OHWM along three reaches of the Yellowstone and Missouri Rivers between the Montana/North Dakota state line and river mile marker #1549. Specifically the tracts are as follows:

1) The entirety of the Yellowstone River in North Dakota beginning at the Montana/North Dakota border to its confluence with the Missouri River, approximately 17.5 miles, less any exclusions.

2) The Missouri River from the Montana/North Dakota border downstream to the Highway #85 Bridge west of Williston, ND, approximately 29 miles, less any exclusions.

3) The Missouri River from the Highway #85 Bridge downstream to mile marker #1549, approximately five to six miles, less any exclusions.

Exclusions:

North Dakota survey in T 152N, R 104W – Sections 15, 16, 21 conducted in 2007 by H.E. Inc.

- See enclosed maps which depict the above-described tracts.

II. Background -

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 and the Board of University and School Lands.

As defined in North Dakota's Administrative Code, ordinary high water mark "means that 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."

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 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 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.

The Office of the State Engineer has published Ordinary High Water Mark Delineation Guidelines. Contractors submitting proposals will be required to make ordinary high water mark delineations in consideration of these Guidelines and to follow the formal documentation protocol outlined in the Guidelines. The Ordinary High Water Mark Delineation Guidelines document can be downloaded at www.swc.nd.gov under Reports and Publications. Alternatively, a copy of these Guidelines can be requested by calling 701-328-2750.

III. Scope of Work -

Ordinary High Water Mark Delineations

The contractor will be expected to:

- Make ordinary high water mark delineations in the area(s) listed in Section I.
- Conduct delineations in compliance with North Dakota's Ordinary High Water Mark Delineation Guidelines including completing a Delineation Data Form at each transect.
- Conduct ordinary high water mark delineations on a frequency that will properly delineate sovereign land and private property in the project area.
- Place markers where the ordinary high water mark has been delineated in the project area, and take two photographs at each location; one facing upland and one facing the river. Include photographs in the appendices.
- Obtain survey grade GPS readings tied to a local datum to aid in a more refined elevation at each delineation point and provide a shape file for those locations along with the associated GPS data. These points should also be referenced to the '88 NAVD datum.
- Obtain access permission from private and Federal owners if necessary for conducting survey. River access is granted by the sponsoring state agencies.
- Provide estimates of acres below the OHWM in each quarter section using available section corner information and shape files. If section corners are not available, then the corners may be estimated based on the best available

information. It is not necessary to establish section corners which have not been recorded.

- Provide a brief narrative explaining the area, process, including the number of cross-sections and the methodology for connecting the plot points, and findings.

IV. Proposal Requirements and Selection Criteria

The State requests the following material for use in the selection of a contractor:

1. Past Performance –

A. Preliminary Estimating Accuracy:

Contractors are asked to submit (2) examples of recent OHWM survey projects. Indicate the survey cost estimate, the actual survey cost, the date of completion, and the location of the projects.

B. Project Experience – (Unlimited time period)

Contractors are asked to submit appropriate material demonstrating their experience with Ordinary High Water Mark Delineations.

2. The Ability of Professional Personnel –

Identify your project team. Provide resumes with particular emphasis on the qualifications of the principals and survey team members proposed for the project including a clear definition of their primary responsibility for this project. The section shall include:

A. An organizational chart for all members proposed for the project. List any in-house or out-of-house special consultants. Identify their function within the survey team. Identify their experience with similar type projects.

B. The names of employed persons that will be designated as the project manager and principal survey member. Indicate the person that will serve as the point of contact for all matters relating to management of contract and survey services.

C. A statement of qualifications concerning the experience and capabilities of the contractor and its personnel pertaining to the processes outlined in the North Dakota Ordinary High Water Mark Delineation Guidelines.

3. **Recent/Current and Project Workload of the Contractor or Firm -**

   Recent/current and project workload of the firm shall be accompanied by:

   A. Indicate specific current project commitments of persons listed in Section 2, part B. Indicate your agreement, unless prevented by circumstances outside your control, to retain the project manager and the principal survey team member on the project until all work of this contract is completed.

   B. Indicate general availability of all personnel included in Section 2, part A.

4. **Willingness to Meet Time and Budget Requirements –**

   A. Provide two (2) reference projects where the members of the survey team completed similar survey projects on time and within the owner's budget. Include specific contact personnel.

   B. Present an outline of the basic work plan anticipated to accomplish the survey as understood by the survey team. Present a schedule pertaining to ordinary high water mark delineations in the project area, including the approximate earliest starting date and estimated time of completion.

   C. Present cost estimate to delineate the Ordinary High Water Mark in the areas specified in Sections I-A, I-B and I-C as a single job as well as a cost estimate to do each of the areas independently.

   D. Present a map showing proposed cross-sections.

5. **Location –**

   Indicate proximity and availability to survey area.

6. **Recent and Current Work for the Agency –**

   Indicate recent and current work with the State of North Dakota over the last five years. Include estimated or actual fees. (Required)

7. **The above referenced criteria are not an all-inclusive listing of items that will be considered in the final selection of a contractor.**

V. Submittal Procedures of Proposals and Cost Estimates -

A. Contractors wishing to be considered shall, no later than 5:00 PM CT, September 15, 2008, submit three copies of their proposals and cost estimates to:

North Dakota State Land Department
ATTN: Gary Preszler, Commissioner
1707 North 9th Street
Bismarck, ND 58506-5523
Telephone: (701) 328-2807
Email: gpreszler@nd.gov

All proposals must be in printed form, submitted in an envelope clearly marked **"Proposal for Surveying Services."** Proposals may not be submitted by electronic or facsimile means. Proposals submitted after the deadline will not be reviewed and will be rejected.

B. Sequence of Events: the following represents the sequence of events contemplated in the qualification and selection procedure established for retaining a contractor and project completion:

- **Advertise for Proposal August 19 through September 12, 2008**
- **Final RFP Questions Accepted September 8, 2008**
- **Proposals Due September 15, 2008**
- **Review Proposals and Prepare Shortlist September 16-17, 2008**
- **Selection Notification and Negotiations September 19, 2008**

C. Any modifications to the above schedule will be in writing, and all contractors who have submitted proposals will be notified of any such modifications either by mail or by email.

D. Proposals will be evaluated by a Selection Committee, which consists of the State Engineer or his designee, and the Land Commissioner, or his designee. The Committee's choice will be based upon an analysis of the proposal, not just the lowest price. Preference will be given to those contractors providing demonstrated capability and experience in similar services and projects.

VI. Additional Information -

A. All non-resident corporations, LLC's, and LLP's must be registered with the Secretary of State to do business in North Dakota before they can enter into the contract.

B. The State of North Dakota will not include an arbitration clause in any contract with the successful firm.

C. Prior to contracting, the winning contractor will be required to show evidence of the insurance coverage of the kind and amount as set out in Exhibit A, attached to this RFP.

D. Explain and provide information concerning any suits filed, judgments entered or claims made against the firm during the last five years with respect to surveying services provided by the firm or any declaration of default or

termination for cause against the firm with respect to such services. In addition, state whether during the past five years the firm has been suspended from bidding or entering into any government contract.

E. Unless otherwise specified, all formal proposals submitted shall be binding for 90 calendar days following the submittal date.

VII. Questions. All questions concerning this RFP shall be referred in writing to:

Gary Preszler, Commissioner, at address or e-mail stated on the previous page. (Questions may be submitted by e-mail).

All such questions shall be submitted no later than September 8, 2008, and each firm will receive a written response to its question(s). Additionally, any questions determined to be of interest to all prospective firms will be answered in writing and provided to all firms either by mail or by e-mail. No contractor may contact any other employee or elected or appointed official of the State Land Department or State Engineer with respect to the RFP or the submission of a proposal.

VIII. Reserved Rights

A. Right of Rejection -
The State reserves the right to reject any and all proposals.

B. **Right to Negotiate -**
The State reserves the right to negotiate with one or more contractors to arrive at a final selection. This includes the right to negotiate all proposed elements to ensure the best possible consideration be afforded to all parties concerned. If the State fails to reach an agreement with the successful contractor, then the State may commence negotiations with an alternative contractor, or reject all proposals and reinstitute the RFP process.

IX. Applicable Open Records Laws. The laws of North Dakota require that, at the conclusion of the selection process, the contents of all proposals shall be placed in the public domain and be open to inspection. Information that is claimed by the contractor to not be subject to disclosure to the public must be recognized as such under applicable North Dakota Open Records Laws. Any information which the contractor desires to have withheld must be clearly identified in the proposal, but the determination on whether the information is not subject to disclosure, pursuant to applicable state laws, rests solely with the State.

END OF REQUEST FOR QUALIFICATIONS

EXHIBIT A

INDEMNIFICATION AND INSURANCE

Indemnity:

a. Contractor agrees to indemnify, save and hold harmless, the State of North Dakota, their officers, agents, employees and members from all liabilities, claims, actions, suits, cases, assertions of right, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees, that arise out of and are limited to acts, errors, or omissions of the Consultant and the employees, agents, sub-consultants, officers, and members of Consultant, in the performance of this contract or matters incidental thereto, except for claims arising out of the State's sole negligence. Contractor also agrees to indemnify, save and hold the State harmless for all costs, disbursements, and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein.

b. Consultant's obligation to indemnify the State shall be derived by multiplying all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees incurred by or assessed against the State times the percentage of fault attributable to Contractor. Contractor's obligation to indemnify on a claim resolved other than through a court judgment shall be an amount equal to the percentage of fault attributable to Contractor, as agreed to by the parties, multiplied times all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees incurred by or assessed against the State.

c. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor shall also defend, indemnify, and hold the State harmless for all costs, expenses, and attorneys' fees incurred in establishing and litigating the indemnification coverage provided in this section. The obligation in this section shall continue after termination of this contract, or any extensions or renewals of it.

Insurance:

Contractor shall secure and keep in force during the term of this agreement, and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of the agreement from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

a. Commercial general liability, including contractual coverage, and products or completed operations coverage (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.

b. Professional errors and omissions, including a three-year "tail coverage endorsement," with minimum liability limits of $1,000,000 per occurrence and in the aggregate.

c. Automobile liability with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.

d. Workers compensation coverage meeting all statutory requirements, if required.

e. Employer's liability or "stop gap" insurance of not less than $1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

1. Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self-retention is subject to approval by the State.

2. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.

3. The State will be defended, indemnified, and held harmless by the Contractor as set forth above.

4. The State shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the rights and coverages as the Contractor under these policies. The additional insured endorsement for the commercial general liability policy shall be written on a form equivalent to the IS0 1985 CG 20 l0- form, or any other form as approved by the State, and shall not limit or delete the State's coverage in any way based upon the State's acts or omissions.

5. The insurance required in this agreement, though a policy or endorsement, shall include:

   a. a "Waiver of Subrogation" waiving any right of recovery the insurance company may have against the State;

   b. a provision that the policy and endorsements may not be canceled or modified without 30 days' prior written notice to the State.

   c. a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;

   d. a provision that the Contractor's insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be excess of the Contractor's insurance and shall not contribute with it; and

e. cross liability-severability of interest coverage for all policies and endorsements.

6. The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary.

7. The Contractor shall furnish a certificate of insurance and all endorsements to the State before commencement of this agreement.

8. Failure to obtain and maintain insurance as required throughout the term of this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

September 4, 2009

North Dakota Board of University and School Lands
1707 North 9th Street
Bismarck, North Dakota 58506-5523

Request For Proposals to Provide an Analysis of the Ordinary High Water Mark (OHWM) of the Missouri River Bed Under Lake Sakakawea and to Provide Information as to the Methodology Proposed for the Above Procedure Including Interpretation and Presentation of the OHWM Delineations

I. INTRODUCTION.

The North Dakota Board of University and School Lands is responsible for managing associated mineral interests under sovereign lands, according to North Dakota Century Code ("N.D.C.C.") chapters 15-08.1 and 61-33. North Dakota's sovereign lands are those areas, including the beds and islands lying within the OHWM of navigable lakes and streams.

The Board of University and School Lands (hereinafter "State") is requesting qualifications and proposals for a survey to delineate OHWM of the Missouri River under part of Lake Sakakawea. The State also requests a detailed explanation of proposed methodology and technology to correctly identify and delineate OHWM as part of the bidder's proposal. Specifically the tract to be analyzed is follows:

1-A) Beginning at mile marker 1482 at the approximate northern border of the Fort Berthold Indian Reservation north-westerly upstream to mile marker 1574.5, a distance of ninety-two and one half (92.5) river miles.

Exclusions: The Trenton Loop area in 15-152-103 where the Corps of Engineers dredged a new channel creating Trenton Loop.

II. BACKGROUND.

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 and the Board of University and School Lands.

As defined in North Dakota's Administrative Code, Ordinary High Water Mark "means that 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."

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 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 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."

Areas below the OHWM may have vegetation suitable for grazing but wetland vegetation capable of being grazed is not an "ordinary agricultural crop". The Office of the State Engineer has published Ordinary High Water Mark Delineation Guidelines. Contractors submitting proposals will be required to make ordinary high water mark delineations in consideration of these Guidelines and to propose modifications of the documentation protocol to apply to the current project. The Ordinary High Water Mark Delineation Guidelines document can be downloaded at www.swc.nd.gov under Reports and Publications. Alternatively, a copy of these Guidelines can be requested by calling 701-328-2750.

Because the area to be delineated for the OHWM has been inundated or potentially inundated, the contractor may not rely on observations of the current location of the OHWM where it may be exposed in making the determination. Determination of the OHWM must be made using historical information and current technology to interpret this historical information.

III. SCOPE OF WORK.

Ordinary High Water Mark Delineations

The contractor will be expected to:

- Make ordinary high water mark delineations in the area(s) listed in Section I.
- Conduct delineations in compliance with North Dakota's Ordinary High Water Mark Delineation Guidelines including completing a delineation data form (to be proposed by contactor) at each delineated point.
- Conduct OHWM delineation points on a frequency of not less than 6 per mile on each side of the river or more if necessary. Contractor may propose some other approved methodology that will accurately delineate sovereign land and private property in the project area.
- Place markers on the photos where the ordinary high water mark has been delineated in the project area. Include photographs in the appendices.
- Provide estimates of acres below the OHWM in each quarter section using available section corner information and shape files. If section corners are not available, then the corners may be estimated based on the best available information. It is not necessary to establish section corners which have not been recorded.
- Provide a detailed narrative explaining the delineation techniques you used such as laser imagery, stereography, orthogonal projection, three-dimensional imagery, or any other available and reliable methodology. Identify the photo series with the date and scale you select, and describe the process, including the number of cross-sections and methodology for connecting the plot points.
- Contractor shall develop a Geodatabase (GDB), based on the model use by State for previous OHWM work and fully compatible with that model, to be used to maintain the spatial datasets required to complete the project. A Feature Dataset will be created within the (GDB), containing three Feature Classes, including:

    - Transect: Point Geometry Type

- ❖ OHWM-Line: Polyline Geometry Type
- ❖ PLSS-Quarters: Polygon Geometry Type

In addition to the three Feature Classes, the GDB will contain various tables which will be used to maintain attribute data connected to the Transect Feature Class. The Contractor will provide to the State a Personal Geodatabase (PGDB) containing all spatial and attribute data developed under this contract.

- ➢ Contractor shall utilize PLSS datasets from the Federal Bureau of Land Management Geographic Coordinate Database (GCDB) as the parcel fabric in which section and quarter line features within the PLSS-Quarters dataset are developed. The PLSS-Quarters dataset will maintain features depicting the boundaries of sovereign lands and the non-sovereign ownership as polygons will be provided as part of the PGDB. From this dataset the contractor shall calculate the acres below the OHWM in each quarter section.
- ➢ Provide four (4) hard copies of the final report.
- ➢ All aerial photography and other maps purchased by the contractor, whether hard copy or electronic, shall be deemed to be the property of the State and shall be turned over to the State at the completion of the project. Contractor may keep copies at contractor's expense.
- ➢ All work product, equipment or materials created or purchased under this contract shall belong to the State and must be delivered to the State at State's request upon termination of this contract. Contractor agrees that all materials prepared under this contract are "works for hire" within the meaning of the copyright laws of the United States and shall assign all rights an interest Engineer may have in the materials it prepares under this contract, including any right to derivative use of the material. Contractor shall execute all necessary documents to enable State to protect its rights under this section.

IV. PROPOSAL REQUIREMENTS AND SELECTION CRITERIA.

State requests the following material for use in the selection of a contractor:

1. **Past Performance -**
   A. Preliminary Estimating Accuracy:
   Contractors are asked to submit two (2) examples of recent OHWM delineation projects and identify the methodology used for each. Indicate the delineation cost estimate, the actual delineation cost, the date of completion, and the location of the projects.
   B. Project Experience - (Unlimited time period)
   Contractors are asked to submit appropriate material demonstrating their experience with OHWM Delineations. Experience with interpreting aerial photography and vegetation on aerial photography is desired.

2. **The Ability of Professional Personnel -**
   Identify your project team. Provide resumes with particular emphasis on the qualifications of the principals and delineation team members proposed for the project including a clear definition of their primary responsibility for this project. The section shall include:
   A. An organizational chart for all members proposed for the project. List any in-house or out-of-house special consultants. Identify their function within the delineation team. Identify their experience with similar type projects and/or their specific skills, training and certifications as applicable.
   B. The names of employed persons that will be designated as the project manager and principal delineation member(s). Indicate the person that will serve as the point of contact for all matters relating to management of contract and delineation services.
   C. A statement of qualifications concerning the experience and capabilities of the contractor and its personnel pertaining to the processes outlined in the North Dakota OHWM Delineation Guidelines.

3. **Recent/Current and Project Workload of the Contractor or Firm -**
   Recent/current and project workload of the firm shall be accompanied by:

A. Indicate specific current project commitments of persons listed in Section 2, part B. Indicate your agreement, unless prevented by circumstances outside your control, to retain the project manager and the principal delineation team member on the project until all work of this contract is completed.

B. Indicate general availability of all personnel included in Section 2, part A.

4. Willingness to Meet Time and Budget Requirements -

A. Provide two (2) reference projects where the members of the delineation team completed similar delineation projects on time and within the owner's budget. Include specific contact personnel.

B. Present an outline of the basic work plan anticipated to accomplish the project as understood by the delineation team. Present a schedule pertaining to ordinary high water mark delineations in the project area, including the approximate earliest starting date and estimated time of completion.

C. Present cost estimate to delineate the OHWM in the areas specified in Sections I-A.

5. Location -

Indicate proximity and availability to Bismarck, North Dakota understanding that this work can be done most efficiently at your home base. The successful bidder will be required to make two trips to Bismarck during the contract development, three trips to Bismarck to present status reports during the project and one trip to Bismarck to present the draft final report.

6. Recent and Current Work for the Agency -

Indicate recent and current work with the State of North Dakota over the last five years. Include estimated or actual fees. (Required)

7. The above referenced criteria are not an all-inclusive listing of items that will be considered in the final selection of a contractor.

V. SUBMITTAL PROCEDURES OF PROPOSALS AND COST ESTIMATES.

A. Contractors wishing to be considered shall, no later than 5:00 PM CT, October 16, 2009, submit three copies of their proposals and cost estimates to:

North Dakota State Land Department
ATTN: Gary Preszler, Commissioner
1707 North 9th Street
Bismarck, ND 58506-5523
Telephone: (701) 328-2800
Email: gpreszle@nd.gov

All proposals must be in printed form, submitted in an envelope clearly marked **"Proposal for Information and Photograph OHWM Survey Services."** Proposals may not be submitted by electronic or facsimile means. Proposals submitted after the deadline will not be reviewed and will be rejected.

B. Sequence of Events: the following represents the sequence of events contemplated in the qualification and selection procedure established for retaining a contractor and project completion:

- **Advertise for Proposal** — **September 8 through October 13, 2009**
- **Final RFP Questions Accepted** — **October 6, 2009**
- **Proposals Due** — **October 16, 2009**
- **Review Proposals and Prepare Shortlist** — **October 19-23, 2009**
- **Interview Contractors** — **October 26-30, 2009**
- **Selection Notification and Negotiations** — **November 2-6, 2009**

C. Any modifications to the above schedule will be in writing, and all contractors who have submitted proposals will be notified of any such modifications either by mail or by email.

Proposals will be evaluated by a Selection Committee, which consists of the Land Commissioner, or his designee, the Surface Management Director, or his designee and the Director of Minerals Management, or his designee. The Committee's choice will be based upon an analysis of the proposal, not just the lowest price. Preference will be given to those contractors providing demonstrated capability and experience in similar services and projects.

VI. ADDITIONAL INFORMATION.

A. All non-resident corporations, LLC's, and LLP's must be registered with the Secretary of State to do business in North Dakota before they can enter into the contract.

B. The State of North Dakota will not include an arbitration clause in any contract with the successful firm.

C. Prior to contracting, the winning contractor will be required to show evidence of the insurance coverage of the kind and amount as set out in Exhibit A, attached to this RFP/RFI.

D. Explain and provide information concerning any suits filed, judgments entered or claims made against the firm during the last five years with respect to surveying services provided by the firm or any declaration of default or termination for cause against the firm with respect to such services. In addition, state whether during the past five years the firm has been suspended from bidding or entering into any government contract.

E. Unless otherwise specified, all formal proposals submitted shall be binding for 90 calendar days following the submittal date.

VII. QUESTIONS. All questions concerning this RFP/RFI shall be referred in writing to:

Gary Preszler, Commissioner, at address or e-mail stated on the previous page. (Questions may be submitted by e-mail).

All such questions shall be submitted no later than October 6, 2009, and each firm will receive a written response to its question(s). Additionally, any questions determined to be of interest to all prospective firms will be answered in writing and provided to all firms either by mail or by e-mail. No contractor may contact any other employee or elected or appointed official of the State Land Department with respect to the RFP/RFI or the submission of a proposal.

VIII. RESERVED RIGHTS.

A. Right of Rejection -
The State reserves the right to reject any and all proposals.

B. Right to Negotiate -
The State reserves the right to negotiate with one or more contractors to arrive at a final selection. This includes the right to negotiate all proposed elements to ensure the best possible consideration be afforded to all parties concerned. If the State fails to reach an agreement with the successful contractor, then the State may commence negotiations with an alternative contractor, or reject all proposals and reinstitute the RFP/RFI process.

IX. APPLICABLE OPEN RECORDS LAWS.

The laws of North Dakota require that, at the conclusion of the selection process, the contents of all proposals shall be placed in the public domain and be open to inspection. Information that is claimed by the contractor to not be subject to disclosure to the public must be recognized as such under applicable North Dakota Open Records Laws. Any information which the contractor desires to have withheld must be clearly identified in the proposal, but the determination on whether the information is not subject to disclosure, pursuant to applicable state laws, rests solely with the State.

END OF REQUEST FOR QUALIFICATIONS

EXHIBIT A

INDEMNIFICATION AND INSURANCE

Indemnity:

a. Contractor agrees to indemnify, save and hold harmless, the State of North Dakota, their officers, agents, employees and members from all liabilities, claims, actions, suits, cases, assertions of right, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees, that arise out of and are limited to acts, errors, or omissions of the Contractor and the employees, agents, sub-consultants, officers, and members of Contractor, in the performance of this contract or matters incidental thereto, except for claims arising out of the State's sole negligence. Contractor also agrees to indemnify, save and hold the State harmless for all costs, disbursements, and attorneys' fees incurred in establishing and litigating the indemnification coverage provided herein.

b. Contractor's obligation to indemnify the State shall be derived by multiplying all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees incurred by or assessed against the State times the percentage of fault attributable to Contractor. Contractor's obligation to indemnify on a claim resolved other than through a court judgment shall be an amount equal to the percentage of fault attributable to Contractor, as agreed to by the parties, multiplied times all liabilities, reasonable settlements, judgments, reasonable alternative dispute resolutions, and/or costs, expenses and attorneys' fees incurred by or assessed against the State.

c. The legal defense provided by Contractor to the State under this provision must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary. Contractor shall also defend, indemnify, and hold the State harmless for all costs, expenses, and attorneys' fees incurred in establishing and litigating the indemnification coverage provided in this section. The obligation in this section shall continue after termination of this contract, or any extensions or renewals of it.

Insurance:

Contractor shall secure and keep in force during the term of this agreement, and Contractor shall require all subcontractors, prior to commencement of an agreement between Contractor and the subcontractor, to secure and keep in force during the term of the agreement from insurance companies, government self-insurance pools or government self-retention funds, authorized to do business in North Dakota, the following insurance coverages:

a. Commercial general liability, including contractual coverage, and products or completed operations coverage (if applicable), with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.

b. Professional errors and omissions, including a three-year "tail coverage endorsement," with minimum liability limits of $1,000,000 per occurrence and in the aggregate.

c. Automobile liability with minimum liability limits of $250,000 per person and $1,000,000 per occurrence.

d. Workers compensation coverage meeting all statutory requirements, if required.

e. Employer's liability or "stop gap" insurance of not less than $1,000,000 as an endorsement on the workers compensation or commercial general liability insurance.

The insurance coverages listed above must meet the following additional requirements:

1. Any deductible or self-insured retention amount or other similar obligation under the policies shall be the sole responsibility of the Contractor. The amount of any deductible or self-retention is subject to approval by the State.

2. This insurance may be in policy or policies of insurance, primary and excess, including the so-called umbrella or catastrophe form and must be placed with insurers rated "A-" or better by A.M. Best Company, Inc., provided any excess policy follows form for coverage. Less than an "A-" rating must be approved by the State. The policies shall be in form and terms approved by the State.
3. The State will be defended, indemnified, and held harmless by the Contractor as set forth above.
4. The State shall be endorsed on the commercial general liability policy, including any excess policies (to the extent applicable), as additional insured. The State shall have all the rights and coverages as the Contractor under these policies. The additional insured endorsement for the commercial general liability policy shall be written on a form equivalent to the ISO 1985 CG 20 I0- form, or any other form as approved by the State, and shall not limit or delete the State's coverage in any way based upon the State's acts or omissions.
5. The insurance required in this agreement, though a policy or endorsement, shall include:
   a. a "Waiver of Subrogation" waiving any right of recovery the insurance company may have against the State;
   b. a provision that the policy and endorsements may not be canceled or modified without 30 days' prior written notice to the State.
   c. a provision that any attorney who represents the State under this policy must first qualify as and be appointed by the North Dakota Attorney General as a Special Assistant Attorney General as required under N.D.C.C. § 54-12-08;
   d. a provision that the Contractor's insurance coverage shall be primary (i.e., pay first) as respects any insurance, self-insurance or self-retention maintained by the State and that any insurance, self-insurance or self-retention maintained by the State shall be excess of the Contractor's insurance and shall not contribute with it; and
   e. cross liability-severability of interest coverage for all policies and endorsements.
6. The legal defense provided to the State under the policy and any endorsements must be free of any conflicts of interest, even if retention of separate legal counsel for the State is necessary.
7. The Contractor shall furnish a certificate of insurance and all endorsements to the State before commencement of this agreement.
8. Failure to obtain and maintain insurance as required throughout the term of this agreement is a material breach of contract entitling the State to terminate this agreement immediately.

17.0159.06007

Sixty-fifth
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2134

1
3-17-17
Kaiser
SB 2134
Subcommittee

Introduced by

Senators Armstrong, Bekkedahl, Unruh

Representatives Bosch, Longmuir, Porter

A BILL ~~for an Act to create and enact a new section to chapter 54-01 of the North Dakota Century Code, relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.~~for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; and to provide for retroactive application.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

~~**SECTION 1.** A new section to chapter 54-01 of the North Dakota Century Code is created and enacted as follows:~~

~~**Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.**~~

~~Unless the state has explicitly transferred ownership of the minerals, the state of North Dakota owns the minerals in and under the Missouri riverbed within state borders, including segments of the riverbed which were artificially inundated as a result of constructing dams pursuant to the Pick-Sloan Missouri basin project. The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark from the northern boundary of the Fort Berthold reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the northern boundary of the Standing Rock Indian reservation to river mile marker one thousand three hundred three. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation are excluded from this section and must be determined under federal law. The state holds no claim to any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan~~

~~Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. For the purposes of this section, "historical Missouri riverbed channel" means the Missouri riverbed channel as delineated by the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe. This section does not affect the authority of the state engineer to regulate the Missouri riverbed or waters of the state provided the regulation does not affect ownership of minerals in and under the riverbed or lands above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.~~

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.
2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed before the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.
3. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel

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

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.
2. Upon the effective date of this Act, the board of university and school lands shall commence procurement to select a qualified engineering and surveying firm to conduct a limited review of the corps survey under this section. Within ninety days of the first date of publication of the invitation, the board shall select and approve a firm for the review. The board may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.
3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey but only for segments of the river where there is a significant discrepancy between the corps survey and the state phase two survey. The review must determine whether clear and convincing evidence establishes that any portion of the corps survey for a segment subject to review does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. Only the following parameters, historical data, materials, guidelines, and applicable state laws may be considered in the review:

a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

b. The historical records of the army corps of engineers pertaining to the corps survey;

c. United States geological survey elevation and Missouri River flow data;

d. "Ordinary High Water Mark Delineation Guidelines" issued by the state engineer;

e. "Manual of Surveying Instructions (2009)" issued by the United States bureau of land management;

f. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. At the conclusion of the review, the firm may recommend adjustments, modifications, or corrections to the corps survey to the board. The firm may recommend an adjustment, modification, or correction to the corps survey only for a segment of the river that the firm reviewed and only if clear and convincing evidence establishes the portion of the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

5. The firm shall complete the review within six months of entering a contract with the board. The board may extend the time required to complete the review if the board deems an extension necessary.

6. Upon completion of the review, the firm shall provide its findings to the board. The findings must address each segment of the river the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for the segment.

7. The board shall publish notice of the review findings and a public meeting to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the board. At the end of the sixty days, the board shall hold a public hearing on the review.

8. After the public hearing, the board shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the board only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months of the effective date of this Act, any suspended or escrowed royalty proceeds held by operators or the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. For segments of the river where there is not a significant discrepancy between the corps survey and the state phase two survey:

   a. The board of university and school lands immediately shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The

board shall complete the adjustments, refunds, and payment demands within six months of that date.

b. Operators of oil and gas wells on these segments immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within six months of that date. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the six-month deadline. The filing of an action under section 61-33.1-05 tolls the deadline for the segment of the river at issue in the action.

3. For segments of the river where there is a significant discrepancy between the corps survey and the state phase two survey:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases immediately after the industrial commission's action on the relevant review finding. The board shall complete the adjustments, refunds, and payment demands within six months of that date.

b. Operators of oil and gas wells on these segments shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests immediately after the industrial commission's action on the relevant review finding. The operators shall complete the adjustments within six months of that date.

4. The filing or pendency of an action seeking to challenge the validity of section 61-33.1-02 or the application of section 61-33.1-03 to any riverbed segment tolls the implementation requirements in this section for that segment.

61-33.1-05. Actions challenging final study.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions must commence an action in district court within two years of the date of adoption of the final study. The plaintiff bringing an action under this section may challenge only the segment of the final study which affects the plaintiff's

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

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the board of university and school lands for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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CHAPTER 61-33
SOVEREIGN LAND MANAGEMENT

61-33-01. Definitions.

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

1. "Board" means the sovereign lands advisory board.
2. "Board of university and school lands" means that entity created by section 15-01-01.
3. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high watermark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the ordinary high watermark and are not sovereign lands.
4. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

61-33-02. Administration of sovereign lands.

All sovereign lands of the state must be administered by the state engineer and the board of university and school lands subject to the provisions of this chapter. Lands managed pursuant to this chapter are not subject to leasing provisions found elsewhere in this code.

61-33-03. Transfer of possessory interests in real property.

All possessory interests now owned or that may be acquired except oil, gas, and related hydrocarbons, in the sovereign lands of the state owned or controlled by the state or any of its officers, departments, or the Bank of North Dakota, together with any future increments, are transferred to the state of North Dakota, acting by and through the state engineer. All such possessory interests in oil, gas, and related hydrocarbons in the sovereign lands of the state are transferred to the state of North Dakota, acting by and through the board of university and school lands. These transfers are self-executing. No evidence other than the provisions of this chapter is required to establish the fact of transfer of title to the state of North Dakota, acting by and through the state engineer and board of university and school lands. Proper and sufficient delivery of all title documents is conclusively presumed.

61-33-04. Existing contracts and encumbrances recognized.

The transfers made by this chapter are subject to all existing contracts, rights, easements, and encumbrances made or sanctioned by the state or any of its officers or departments.

61-33-05. Duties and powers of the state engineer.

The state engineer shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all rights of the owner in its own name; may issue and enforce administrative orders and recover the cost of the enforcement from the party against which enforcement is sought; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter. The state engineer may enter agreements with the game and fish department or other law enforcement entities to enforce this chapter and rules adopted under this chapter.

61-33-06. Duties and powers of the board of university and school lands.

The board of university and school lands shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all subsurface rights of the owner in its own name; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter.

61-33-07. Deposit of income.

All income derived from the lease and management of the lands acquired by the state engineer and board of university and school lands pursuant to this chapter and not belonging to other trust funds must be deposited in the strategic investment and improvements fund.

61-33-08. Advisory board - Responsibilities.

There is created a sovereign lands advisory board. The board's responsibility is to advise the state engineer and the board of university and school lands on general policies as well as specific projects, programs, and uses regarding sovereign lands. The board, being solely advisory, has no authority to require the state engineer or the board of university and school lands to implement or otherwise accept the board's recommendations.

61-33-09. Members of the board - Organization - Meetings.

1. The board consists of the manager of the Garrison Diversion Conservancy District, the state engineer, the commissioner of university and school lands, the director of the parks and recreation department, the director of the game and fish department, and the state health officer, or their representatives.
2. The state engineer is the board's secretary.
3. The board shall meet at least once a year or at the call of the state engineer or two or more members of the board. The board shall meet at the office of the state engineer or at any other place decided upon by the board.
4. The board may adopt rules to govern its activities.

61-33-10. Penalty.

A person who violates this chapter or any rule implementing this chapter is guilty of a class B misdemeanor unless a lesser penalty is indicated. A civil penalty may be imposed by a court in a civil proceeding or by the state engineer through an adjudicative proceeding pursuant to chapter 28-32. The assessment of a civil penalty does not preclude the imposition of other sanctions authorized by law, this chapter, or rules adopted under this chapter. The state engineer may bring a civil action to recover damages resulting from violations and may also recover any costs incurred.

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ARTICLE 89-10
SOVEREIGN LANDS

Chapter
89-10-01 Sovereign Lands

CHAPTER 89-10-01
SOVEREIGN LANDS

Section
89-10-01-01 Authority
89-10-01-02 Prohibition on Permanent Relinquishment
89-10-01-03 Definitions
89-10-01-04 Authorization
89-10-01-05 Application for Permit, Easement, Lease, or Management Agreement
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89-10-01-06.1 Record - Official Notice
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89-10-01-11 Structures
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89-10-01-25 Unattended Watercraft
89-10-01-26 Removal of Public Property
89-10-01-27 Cultural or Historical Resources
89-10-01-28 Disposal of Waste
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89-10-01-30 Abandoned Property
89-10-01-31 Firearms
89-10-01-32 Tree Stands
89-10-01-33 Baiting
89-10-01-34 Dredging or Filling

89-10-01-01. Authority.

These rules are adopted and promulgated by the state engineer under North Dakota Century Code chapter 61-33 to provide consistency in the administration and management of sovereign lands. These rules do not apply to the state of North Dakota's interests in oil, gas, and related hydrocarbons on sovereign lands.

History: Effective November 1, 1989; amended effective April 1, 2008; April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-02. Prohibition on permanent relinquishment.

Sovereign lands may not be permanently relinquished, but must be held in perpetual trust for the benefit of the citizens of the state of North Dakota. All structures permitted or otherwise allowed for private use on sovereign lands are subordinate to public use and values.

History: Effective November 1, 1989; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-03. Definitions.

The following definitions apply to this article:

1. "Authorization" means a permit, easement, lease, or management agreement approved and granted by the state engineer after application; and the authority granted in sections 89-10-01-10 and 89-10-01-19.
2. "Boardwalk" means a walk constructed of planking.
3. "Domestic use" means the use of water as defined by subsection 4 of North Dakota Century Code section 61-04-01.1.
4. "Grantee" means the person, including that person's assigns, successors, and agents who has authorization.
5. "Livestock" means bison, cattle, horses, mules, goats, sheep, and swine.
6. "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 for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.
7. "Ordinary high watermark" means that 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 waters are considered to be below the ordinary high watermark in their entirety.
8. "Project" means any activity that occurs either partially or wholly on sovereign lands.
9. "Riparian owner" means a person who owns land adjacent to navigable waters or the person's authorized agent.
10. "Snagging and clearing" means the removal and disposal of fallen trees and associated debris encountered within and along the channel.
11. "Structure" means something that is formed from parts, including equipment, boat docks, boat ramps, and water intakes.
12. "Watercraft" means any device capable of being used as a means of transportation on waters.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2008; April 1, 2009; April 1, 2010; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-04. Authorization.

Each project requires an authorization from the state engineer before construction or operation, except as otherwise provided by these rules.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2008; April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-05. Application for permit, easement, lease, or management agreement.

Applications for authorization must be on forms prescribed by the state engineer and contain the information required by the state engineer. Applications must be submitted to the North Dakota State Engineer, State Office Building, 900 East Boulevard, Bismarck, North Dakota 58505-0850.

History: Effective November 1, 1989; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-06. Application review.

Upon receipt of a completed application, the state engineer must initiate a review as follows:

1. Comments must be requested from the following entities:
   a. The state game and fish department;
   b. The state department of health;
   c. The state historical society;
   d. The state department of trust lands;
   e. The state parks and recreation department;
   f. The United States fish and wildlife service;
   g. The park district and planning commission of any city or county where the proposed project will be located;
   h. Any water resource district where the proposed project will be located; and
   i. Other agencies, private entities, or landowner associations as appropriate or required by law.
2. Each entity must submit all comments in writing to the state engineer. The state engineer is not bound by any comment submitted. The state engineer must receive comments within thirty days of the date requests for comments were mailed.
3. Upon completion of the review and any public meeting held under section 89-10-01-07, the state engineer may grant, deny, or condition the application.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2008; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-06.1. Record - Official notice.

Unless specifically excluded by the state engineer or the hearing officer, the record in each sovereign land permit application proceeding or adjudicative proceeding under North Dakota Century Code chapter 28-32 includes the following:

1. United States department of agriculture natural resources conservation service reports, including the North Dakota hydrology manual, North Dakota irrigation guide, and county soil survey reports.
2. United States geological survey and state water commission streamflow records.
3. National oceanic and atmospheric administration climatological data.
4. Topographic maps.
5. State engineer sovereign land permit files.
6. Information in state engineer and state water commission files, records, and other published reports.
7. North Dakota sovereign land management plan.
8. Ordinary high watermark delineation guidelines.
9. Aerial photos.

History: Effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-07. Public meeting.

An information-gathering public meeting may be held by the state engineer before final action on a project. The procedure for notice and meeting must be as follows:

1. The state engineer must publish a notice of meeting in the official newspaper for each county where the project is located. The notice must be published once each week for two consecutive weeks.
2. The meeting date must be at least twenty days after the date of last publication.
3. The meeting must be conducted by the state engineer and the meeting may be held in Bismarck.
4. The meeting is not an adjudicative proceeding hearing under North Dakota Century Code chapter 28-32.

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-08. General permit standards.

The state engineer may approve, modify, or deny any permit application. In deciding what action to take on a permit application, the state engineer must consider the potential effects of the proposed project on the following:

1. Riparian owner's rights;

2. Recreation;
3. Navigation;
4. Aesthetics;
5. Environment;
6. Erosion;
7. Maintenance of existing water flows;
8. Fish and wildlife;
9. Water quality;
10. Cultural and historical resources; and
11. Alternative uses.

History: Effective November 1, 1989; amended effective April 1, 2008; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-09. Specific project requirements.

Repealed effective July 1, 2014.

89-10-01-10. Projects not requiring a permit.

The following projects do not require a permit:

1. Boat docks, if all of the following conditions are satisfied:
   a. They are constructed, operated, and maintained by the riparian owner for personal use;
   b. The dock is used only for embarkation, debarkation, moorage of watercraft, water intakes, or recreation;
   c. Only clean, nonpolluting materials are used;
   d. The total length of the dock over the surface of the water does not exceed twenty-five feet [7.6 meters] on a river or fifty feet [15.24 meters] on a lake, and there is no unreasonable interference with navigation or access to an adjacent riparian owner's property;
   e. The dock is connected to a point above the ordinary high watermark by a boardwalk that does not exceed twenty-five feet [7.6 meters] in length and is removed from below the ordinary high watermark each fall; and
   f. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.
2. Water intakes if all of the following conditions are satisfied:
   a. They are constructed, operated, and maintained by the riparian owner for domestic use; and
   b. The intake is removed from below the ordinary high watermark each fall.

3. Watercraft that are temporarily moored.

4. Snagging and clearing, when performed by a federal or state entity or political subdivision.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2009; April 1, 2010; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-10.1. Boat docks and water intakes.

Boat docks and water intakes not meeting the criteria in section 89-10-01-10 require a permit from the state engineer. Any person who violates this section is guilty of a noncriminal offense and must pay a two hundred fifty dollar fee per day. The dock will be subject to removal at the dock owner's expense.

History: Effective April 1, 2009; amended effective April 1, 2010; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-10.2. Boat dock registration.

Boat docks that do not require a permit under this chapter and that are located on the Missouri River between the Oliver and Morton County line (river mile 1328.28) and Lake Oahe wildlife management area (river mile 1303.5) must be registered with the state engineer before placement of any such dock. The state engineer must provide registration forms. Any person who violates this section is guilty of a noncriminal offense and must pay a two hundred fifty dollar fee per occurrence. The dock will be subject to removal at the dock owner's expense.

History: Effective April 1, 2010; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-11. Structures.

Except as otherwise provided in this chapter, the construction or moorage of a structure is prohibited on sovereign lands. If a structure is prohibited, the state engineer must:

1. Issue an order to the structure owner identifying the action required to modify or remove the structure and a date by which the ordered action must be taken. Unless an emergency exists, the date by which the ordered action must be taken must be at least twenty days after the order is issued.

2. If the ordered action is not taken by the date specified in the order, the state engineer may modify or remove the structure at the structure owner's expense.

3. The state engineer may commence a civil proceeding to enforce an order of the state engineer, or, if the state engineer modifies or removes the structure, the state engineer may assess the costs of such action against any property of the structure's owner or may commence a civil proceeding to recover the costs incurred in such action. If the state engineer chooses to recover costs by assessing the costs against property of the structure's owner and the property is insufficient to pay for the costs incurred, the state engineer may commence a civil proceeding to recover any costs not recovered through the assessment process. Any assessment levied under this section must be collected in the same manner as other real estate taxes are collected and paid.

4. A person who receives an order from the state engineer under this section may send a written request to the state engineer for a hearing. The state engineer must receive the request within

ten days of the date the order issued. The request for a hearing must state with particularity the issues, facts, and points of law to be presented at the hearing. If the state engineer determines the issues, facts, and points of law to be presented are well-founded and not frivolous and the request for a hearing was not made merely to interpose delay, the state engineer must set a hearing date without undue delay.

5. Any person aggrieved by the action of the state engineer may appeal the decision to the district court of the county where the sovereign lands at issue are located under North Dakota Century Code chapter 28-32. A request for a hearing as provided in subsection 4 is a prerequisite to any appeal to the district court.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2008; April 1, 2009; April 1, 2010; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-21.3, 61-03-22, 61-33

89-10-01-12. Public recreational use.

The public may use sovereign lands for recreational purposes except as otherwise provided by these rules or by signage posted by the state engineer.

History: Effective November 1, 1989; amended effective April 1, 2008; April 1, 2009.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-13. Vehicular access.

The use of motorized vehicles on sovereign lands is prohibited, except:

1. When on government-established trails that have been permitted by the state engineer;

2. When on sovereign lands immediately adjacent to the Kimball Bottoms off-road riding area located in the south half of sections 23 and 24 and the north half of sections 25 and 26, all in township 137 north, range 80 west, Burleigh County;

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 has been submitted to the state engineer, and the managing government entity has obtained a sovereign lands 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 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 lands is in the most direct manner possible;

7. To access private land that has no other reasonable access point, provided that access across sovereign lands is in the most direct manner possible;

8. By disabled people who possess a mobility-impaired parking permit under North Dakota Century Code section 39-01-15 or shoot from a stationary motor vehicle permit under subsection 10 of North Dakota Century Code section 20.1-02-05;

9. When operation is necessary as part of a permitted activity or project;

10. By the riparian owner on sovereign lands that are adjacent to the riparian owner's property when moving or tending to livestock; installing or maintaining a livestock fence; installing, maintaining, or moving an authorized agricultural irrigation structure; or when engaged in other ordinary agricultural practices, provided the listed activities do not negatively affect public use or values; or

11. When being used by government personnel in the performance of their duties.

Any person who violates this section is guilty of a noncriminal offense and must pay a one hundred dollar fee per occurrence.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2008; April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-14. Cancellation by the state engineer.

The state engineer may cancel any authorization granted under these rules. Cancellation does not release the grantee from any liability. If an applicant is named in an active enforcement action ordered by the state engineer, the state engineer may hold any application submitted by the applicant in abeyance until the order has been satisfied.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2008; April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-15. Termination by applicant.

The grantee may terminate any authorization by notifying the state engineer in writing, paying all fees or other money owed to the state, and reclaiming the site under section 89-10-01-18.

History: Effective November 1, 1989; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-16. Assignments.

Any authorization granted under these regulations may only be assigned with the written consent of the state engineer.

History: Effective November 1, 1989; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-17. Inspections.

The state engineer may inspect all projects on sovereign lands and enter upon a grantee's land during normal working hours to carry out the inspection.

History: Effective November 1, 1989; amended effective August 1, 1994; April 1, 2009.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-18. Reclamation.

After cancellation, termination, abandonment, or expiration of an authorization, grantee must reclaim the project location within one hundred twenty days. If the permit is for mining, reclamation must be within sixty days after the lease expires or the mining is complete. Upon written request, the state engineer may extend the time period if good cause is shown. If grantee fails to reclaim the site to the specifications in the authorization within the required timeframe, the state engineer may enter and restore the project location. The grantee is liable for all reclamation costs.

History: Effective November 1, 1989; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-19. Maintenance and repair.

Maintenance or repair of authorized projects does not require additional authorization provided the work is in conformance with the original authorization, standards, and specifications provided in this article and the work does not alter the use or size of the project.

History: Effective November 1, 1989; amended effective August 1, 1994; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-20. Areas of special interest.

The state engineer may enter agreements for management of areas of high public value. Examples include parks, beaches, public access points, nondevelopment areas, and wildlife management areas.

History: Effective November 1, 1989; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-21. Organized group activities.

Organized group activities that are publicly advertised or are attended by more than twenty-five people are prohibited on sovereign lands without a permit. Any person who violates this section is guilty of a noncriminal offense and must pay a two hundred fifty dollar fee per occurrence.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-22. Pets.

Pets are not allowed to run unattended on sovereign lands. Any person who violates this section is guilty of a noncriminal offense and must pay a fifty dollar fee per occurrence.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-23. Camping.

Camping for longer than ten consecutive days within a thirty-day period in the same vicinity or leaving a campsite unattended for more than twenty-four hours is prohibited on sovereign lands. Any person who violates this section is guilty of a noncriminal offense and must pay a one hundred dollar fee per occurrence.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-24. Hunting, fishing, and trapping.

All sovereign lands are open for public hunting, fishing, and trapping, except as provided in other rules, regulations, or laws or as posted at public entry points. Posting sovereign lands with signage by anyone other than the state engineer is prohibited without a sovereign lands permit. Any person who violates this section is guilty of a noncriminal offense and must pay a one hundred dollar fee per occurrence.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-25. Unattended watercraft.

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

1. When moored to authorized docks; or
2. When moored to private property above the ordinary high watermark with a restraint that does not cause unreasonable interference with navigation or the public's use of land below the ordinary high watermark.

Any person who violates this section is guilty of a noncriminal offense and must pay a fifty dollar fee per day.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-26. Removal of public property.

Public property, including trees, shrubs, vines, plants, soil, gravel, fill, rocks, fossils, sod, firewood, posts, or poles, may not be removed from sovereign lands without a permit. Firewood may be removed under certain stated conditions from designated firewood cutting plots. Commercial cutting of firewood is prohibited on sovereign lands. Gathering of downed wood for campfires is allowed. A riparian owner may hay or graze sovereign lands adjacent to the riparian owner's property, unless prohibited in writing by the state engineer. Berries and fruit may be picked for noncommercial use, unless prohibited by posted notice. Property may not be destroyed or defaced. Any person who violates this section is guilty of a noncriminal offense and must pay a two hundred fifty dollar fee per occurrence.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-27. Cultural or historical resources.

Artifacts or any other cultural or historical resources found on sovereign lands may not be disturbed or destroyed without formal written approval from the state historical society and a permit from the state engineer.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-28. Disposal of waste.

The disposal of refuse, rubbish, bottles, cans, or other waste materials is prohibited on sovereign lands except in garbage containers where provided. Holding tanks of campers or watercraft may not be dumped on sovereign lands. Any person who violates this section is guilty of a noncriminal offense and must pay a two hundred fifty dollar fee per occurrence.

History: Effective April 1, 2008; amended effective April 1, 2009; July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-29. Glass containers.

Glass containers are prohibited on sovereign lands. Any person who violates this section is guilty of a noncriminal offense and must pay a one hundred dollar fee per occurrence.

History: Effective April 1, 2009; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-30. Abandoned property.

Abandonment of vehicles or other personal property is prohibited on sovereign lands.

History: Effective April 1, 2009.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-31. Firearms.

Use of firearms on sovereign lands is allowed except in a reckless and indiscriminate manner or as otherwise posted at public entry points. Any person who violates this section is guilty of a noncriminal offense and must pay a one hundred dollar fee per occurrence.

History: Effective April 1, 2009; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-32. Tree stands.

Construction of a permanent tree stand or permanent steps to a tree stand is prohibited on sovereign lands. Portable tree stands, portable steps, screw-in steps, and natural tree stands may be used. Portable tree stands and portable steps are defined as those that are held to the tree with ropes, straps, cables, chains, or bars. Screw-in steps are those that are screwed into the tree by hand without the aid of tools. Ladder-type stands that lean against the tree are portable stands. Natural stands are those crotches, trunks, down trees, etc., where no platform is used. Tree stands do not preempt hunting rights of others in the vicinity of the tree stand. Tree stands and steps may not be put up before August twentieth and must be removed within three days of the close of the archery deer season. Stands and steps not removed within three days of the close of the archery deer season are considered abandoned property and are subject to removal and confiscation by the state engineer. Any person who violates this section is guilty of a noncriminal offense and must pay a one hundred dollar fee per tree stand.

History: Effective April 1, 2009; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-33. Baiting.

Except as otherwise provided in this chapter, placing or using bait to attract, lure, feed, or habituate wildlife to a bait location for any purpose is prohibited on sovereign lands. Bait includes grains, minerals, salt, fruits, vegetables, hay, or any other natural or manufactured feeds. Bait does not include the use of lures, scents, or liquid attractants for hunting or management activities conducted by the state engineer. Bait may be used to lure and take furbearers when engaged in lawful trapping activities. Any person who violates this section is guilty of a noncriminal offense and must pay a one hundred dollar fee per occurrence.

History: Effective Apirl 1, 2009; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-33

89-10-01-34. Dredging or filling.

Unless permitted by the state engineer, dredging or filling on sovereign lands is prohibited. If prohibited dredging or filling occurs, the state engineer must:

1. Issue an order to the violator identifying the action required to restore the sovereign lands and a date by which the ordered action must be taken. Unless an emergency exists, the date by which the ordered action must be taken must be at least twenty days after the order is issued.

2. If the ordered action is not taken by the date specified in the order, the state engineer may take any action to restore the sovereign lands at the violator's expense.

3. The state engineer may commence a civil proceeding to enforce an order of the state engineer, or, if the state engineer takes action to restore sovereign lands, the state engineer may assess the costs of such action against the riparian owner's property where the dredging or filling occurred or may commence a civil proceeding to recover the costs incurred in such action. If the state engineer chooses to recover costs by assessing the costs against the riparian owner's property where the dredging or filling occurred and the property is insufficient to pay for the costs incurred, or if the riparian owner was not the party responsible for the dredging or filling, the state engineer may commence a civil proceeding to recover any costs not recovered through the assessment process. Any assessment levied under this section must be collected in the same manner as other real estate taxes are collected and paid.

4. A person who receives an order from the state engineer under this section may send a written request to the state engineer for a hearing. The state engineer must receive the request within ten days of the date the order is issued. The request for a hearing must state with particularity the issues, facts, and points of law to be presented at the hearing. If the state engineer determines the issues, facts, and points of law to be presented are well-founded and not frivolous and the request for a hearing was not made merely to interpose delay, the state engineer must set a hearing date without undue delay.

5. Any person aggrieved by the action of the state engineer may appeal the decision to the district court of the county where the sovereign lands at issue are located under North Dakota Century Code chapter 28-32. A request for a hearing as provided in subsection 4 is a prerequisite to any appeal to the district court.

History: Effective April 1, 2010; amended effective July 1, 2014.
General Authority: NDCC 28-32-02, 61-03-13
Law Implemented: NDCC 61-03-21.3, 61-03-22, 61-33

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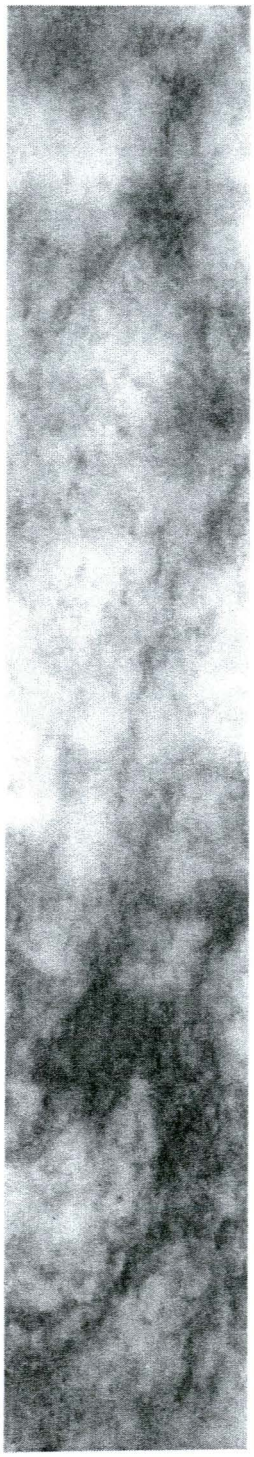
The Ordinary High Water Mark



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)).

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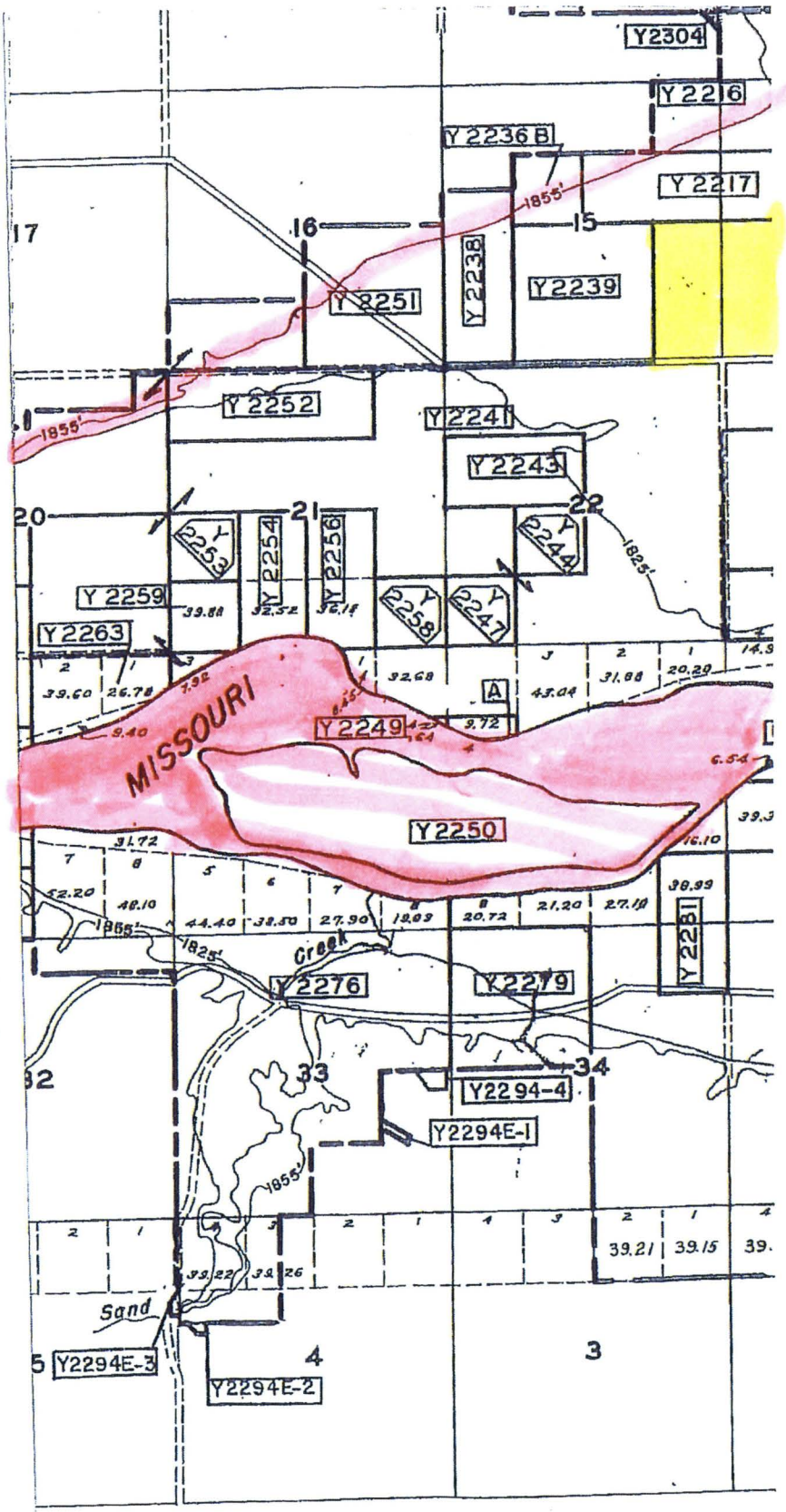

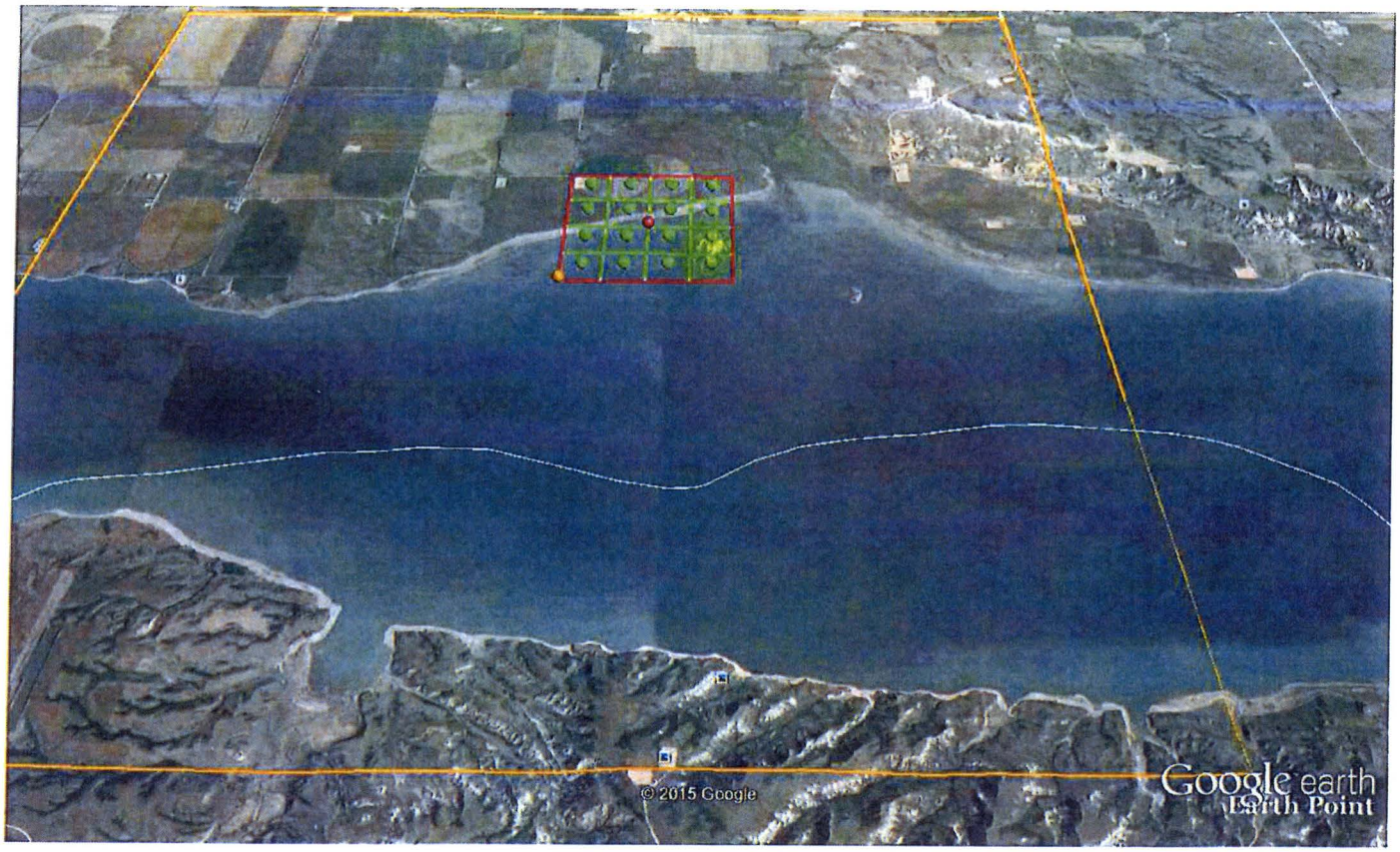

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STATE OF NORTH DAKOTA — IN DISTRICT COURT

COUNTY OF WILLIAMS — NORTHWEST JUDICIAL DISTRICT

Mary K. Starin, as Personal Representative of The Estate of Bruno Herman Weyrauch

Plaintiff,

v.

Kelly Schmidt, State Treasurer, as Trustee for the State of North Dakota, Eric Hardmeyer, President and Chief Executive Officer of the Bank of North Dakota, together Board of University and Trust Lands through its Board of Directors: Governor Jack Dalrymple, Secretary of State Alvin A. Jaeger, Superintendent of Public Instruction Kristen Baesler, and Attorney General Wayne Stenehjem, the State of North Dakota and all other persons unknown claiming estate or interest in or lien or encumbrance upon the property described in the Complaint,

Defendants,

COMPLAINT

CIVIL NO. 53-2015-CV-00986

Plaintiff, as Personal Representative of the Estate of Bruno Herman Weyrauch, for her cause of action against the Defendants, alleges and shows to the Court:

1. Plaintiff is the owner of a mineral interest consisting of 50% of all oil, natural gas, and minerals which may be found on or underlying the following described property, situated in the County of Williams, State of North Dakota, to-wit:

Township 154 North, Range 96
Section 14: W1/2SW1/4
Section 15: E1/2SE1/4

2. The Defendant, State of North Dakota, acquired the mineral and surface of the above described lands through a foreclosure and subsequent Sheriff's Deed dated September 27, 1939, recorded at the Offices of the Recorder in and for Williams County on October 2, 1939, at Book of Deeds 171, Page 171.

3. On January 18, 1945, the State of North Dakota sold the surface and 50% of all oil, natural gas, and minerals that may be found on or underlying lands described above to Bruno Herman Weyrauch of Ray, North Dakota under a Contract for Deed, a recorded true and correct copy of said Contract for Deed being attached hereto as **Exhibit A.**

4. Bruno Herman Weyrauch paid the full amount owed on the Contract for Deed referred to above.

5. The State of North Dakota issued a Special Warranty Deed to Bruno Herman Weyrauch in 1953, but Bruno Herman Weyrauch failed to record said Special Warranty Deed with the Offices of the Recorder in and for Williams County.

6. The Plaintiffs, by and through their counsel, upon inquiry and request to one or more entities or agencies named as Defendants above, obtained copies of documents found in their archives pertaining to the sale of the above lands from the State of North Dakota to Bruno Herman Weyrauch.

7. One such document obtained from the archived records of the State of North Dakota was an unsigned copy of a Special Warranty Deed from the State of

North Dakota to Bruno Herman Weyrauch. A true and correct copy of that unsigned copy of the Special Warranty Deed is attached hereto as **Exhibit B.**

8. Another such document obtained from the records of the State of North Dakota is a State Mineral Reservation Research Verification prepared by the State Department of Trust Lands on March 18, 2014 showing the search revealed information to provide that the Contract for Deed referred to above was paid in full on August 29, 1953 and referencing that a division order (for what is apparently a producing oil and gas well) questioned the title of Bruno Herman Weyrauch and his successors in title due to the lack of a recorded Special Warranty Deed from the State Treasurer to Bruno Herman Weyrauch. A true and correct copy of the State Mineral Reservation Research Verification document is attached hereto as **Exhibit C.**

9. Bruno Herman Weyrauch was also known as B. H. Weyrauch, and as Bruno Weyrauch, and as Bruno H. Weyrauch.

10. Plaintiff, the Estate of Bruno Herman Weyrauch, a/k/a B. H. Weyrauch, a/k/a Bruno Weyrauch, a/k/a Bruno H. Weyrauch owns 50% of all oil, natural gas, and minerals which may be found on or underlying the following described property, situated in the County of Williams, State of North Dakota, to-wit:

Township 154 North, Range 96
Section 14: W1/2SW1/4
Section 15: E1/2SE1/4

free and clear of any claim by the Defendants.

11. The relief sought in this action consists fully in excluding all of the Defendants and each of them from any interest in or lien or encumbrance upon the 50% interest in and to all oil, natural gas, and minerals which may be found on or underlying the herein described property, as described in Paragraph 1 of this Complaint.

12. No personal claim is made against any of the said Defendants.

WHEREFORE PLAINTIFF PRAYS:

1. A decree quieting title in the Plaintiff of 50% interest in and to all oil, natural gas, and minerals which may be found on or underlying the following described real estate:

   Township 154 North, Range 96
   Section 14: W1/2SW1/4
   Section 15: E1/2SE1/4

2. The Defendants be required to set forth all adverse claims to the property above described and that the validity, superiority, and priority thereof be determined;
3. A complete adjudication of the interest and rights of the Plaintiff and the Defendants with respect to the mineral interest described above in and under said lands described above;
4. Any claims of the Defendants adverse to the Plaintiff be adjudicated null and void and that the Defendants be decreed to have no interest or estate in or lien or encumbrance upon the property described in this Complaint;
5. That this title as to the interests attributed to the Estate of Bruno Herman Weyrauch in and under the above described premises be quieted

as to any claims of the Defendants, and that the Defendants and each of them be forever barred and enjoined from further asserting any claim to title in the above described real estate.

6. That the Plaintiff have such other general relief as may be just, together with costs and disbursements as to all answering Defendants.

Dated this 11th day of August, 2015.

Dennis Edward Johnson (#03674)
dennis@dakotalawdogs.com
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STATE OF NORTH DAKOTA

COUNTY OF WILLIAMS

IN DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

Mary K Starin, as Personal Representative of The Estate of Bruno Herman Weyrauch,

Plaintiff,

v.

Kelly Schmidt, State Treasurer, as Trustee for the State of North Dakota, Eric Hardmeyer, President and Chief Executive Officer of the Bank of North Dakota, together Board of University and Trust Lands through its Board of Directors: Governor Jack Dalrymple, Secretary of State Alvin A. Jaeger, Superintendent of Public Instruction Kristen Baesler, and Attorney General Wayne Stenehjem, the State of North Dakota and all other persons unknown claiming Estate or interest in or lien or encumbrance upon the property described in the Complaint,

Defendants.

ANSWER OF THE N.D. BOARD OF UNIVERSITY AND SCHOOL LANDS AND THE STATE OF NORTH DAKOTA

Civil No. 53-2015-CV-00986

ANSWER

[¶1] The Defendants North Dakota Board of University and School Lands and the State of North Dakota (collectively referred to hereinafter as "State"), for its Answer to the Complaint of the Plaintiff Mary E. Starin, as Personal Representative of The Estate of Bruno Herman Weyrauch, states as follows:

[¶2] Except as admitted, or otherwise qualified, the State specifically denies each and every allegation, matter, and thing contained in the Complaint.

[¶3] The State denies the allegations contained in paragraph 1 as it applies to any interest located below the ordinary high watermark (OHWM) of the Missouri River.

[¶4] With respect to the allegations in paragraph 2, the State denies that the Sheriff's Deed was recorded in Book of Deeds 171, Page 171 and specifically asserts that the Sheriff's Deed was recorded in Book 82, Page 171. The State admits all other allegations in paragraph 2.

[¶5] The State admits the allegation contained in paragraphs 3 and 4.

[¶6] The State lacks information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 5.

[¶7] With respect to the allegations contained in paragraph 6, the State admits that Defendant Board of University and School Lands, through the Department of Trust Lands, provided copies of any documents it has retained regarding the transactions described in paragraphs 2-4. The State is without sufficient information or knowledge to admit or deny the allegations as it may pertain to other state agencies.

[¶8] The State admits the allegations contained in paragraph 7.

[¶9] The State admits the allegations contained in paragraph 8 but denies any implications that the State Mineral Reservation Research Verification proves the Plaintiffs own a mineral interest below the OHWM of the Missouri River.

[¶10] The State is without sufficient information or knowledge sufficient to form a belief as to the truth of the allegations contained in paragraph 9.

[¶11] The State denies the allegations contained in paragraph 10 as it applies to any interest located below the OHWM of the Missouri River.

[¶12] With respect to the allegations in paragraph 11, they do not require a response because they explain Plaintiff's request for relief. To the extent a response is required, the State denies there are grounds for the Court to award the Plaintiff the relief it seeks for any minerals located below the OHWM of the Missouri River.

[¶13] With respect to the allegations in paragraph 12, they do not require a response. To the extent a response is required, the State denies the allegations contained therein.

AFFIRMATIVE DEFENSES

[¶14] The State affirmatively alleges that the Complaint fails to state a claim upon which relief can be granted.

[¶15] The State affirmatively alleges that the Plaintiff has failed to join an indispensable party, the North Dakota State Engineer, as required by Rule 19 of the N.D. Rules of Civil Procedure.

[¶16] The State affirmatively alleges that the Plaintiff's claims are barred by laches and the statute of limitations.

[¶17] WHEREFORE, Defendants the North Dakota Board of University and School Lands and the State of North Dakota requests the following relief:

[¶18] A judgment ruling that the Plaintiff does not hold any interests in the property that is located below the Missouri River's OHWM, and dismissing the Complaint with prejudice and ordering that the Plaintiff be forever barred from asserting title to or an interest in that property.

[¶19] A judgment quieting title in the State to all property below the OHWM of the Missouri River as claimed by Plaintiff in the Complaint.

[¶20] A judgment ordering that the Plaintiff be forever barred from asserting title to or an interest in that property.

[¶21] For an award to the State of the costs and disbursements it incurs in this litigation, including reasonable attorneys' fees.

[¶22] For such other and further relief as the Court deems just and equitable.

Dated this 9th day of November, 2015.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Hope L. Hogan

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Attorneys for Defendant North Dakota Board of University and School Lands and the State of North Dakota.

STATE OF NORTH DAKOTA

COUNTY OF WILLIAMS

IN DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

Mary K Starin, as Personal Representative of The Estate of Bruno Herman Weyrauch,

Plaintiff,

v.

Kelly Schmidt, State Treasurer, as Trustee for the State of North Dakota, Eric Hardmeyer, President and Chief Executive Officer of the Bank of North Dakota, together Board of University and Trust Lands through its Board of Directors: Governor Jack Dalrymple, Secretary of State Alvin A. Jaeger, Superintendent of Public Instruction Kristen Baesler, and Attorney General Wayne Stenehjem, the State of North Dakota and all other persons unknown claiming Estate or interest in or lien or encumbrance upon the property described in the Complaint,

Defendants.

STATE ENGINEER'S BRIEF IN SUPPORT OF MOTION TO INTERVENE AS A DEFENDANT

Civil No. 53-2015-CV-00986

STATEMENT OF THE FACTS

[¶1] This case was filed on August 17, 2015. (Doc ID #1). The North Dakota Board of University and School Lands (Land Board) filed an Answer on November 9, 2015. (Doc ID #9).

[¶2] As an affirmative defense, the Land Board alleged the Plaintiff failed to join an indispensable party, the North Dakota State Engineer (SE), as required by Rule 19 of the North Dakota Rules of Civil Procedure. (Doc. ID #9, ¶ 15.)

[¶3] The SE, by and through Wayne Stenehjem, Attorney General for the State of North Dakota, moves to intervene as a defendant in the above-captioned action to address the SE's jurisdiction over its real property possessory interests, including all minerals except oil, gas, and related hydrocarbons; the location of the Ordinary High Water Mark (OHWM); and the SE's administration of sovereign lands.

LAW AND ARGUMENT

I. The State Engineer has an Intervention of Right under N.D.R.Civ.P. 24(a).

[¶4] The SE has a right to intervene under N.D.R.Civ.P. 24(a), which states that a party has a right to intervene in an action if the party "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest."

[¶5] Sovereign lands are "those areas ... lying within the ordinary high watermark of navigable lakes and streams." N.D.C.C. § 61-33-01(3).

[¶6] The Land Board and the SE are co-administrators of sovereign lands. N.D.C.C. § 61-33-02. The SE owns "[a]ll possessory interests ... except oil, gas, and related hydrocarbons, in the sovereign lands of the state." N.D.C.C. § 61-33-03.

[¶7] ""Subsurface minerals' means all naturally occurring elements and their compounds, volcanic ash, precious metals, carbonates, and natural mineral salts of boron, bromine, calcium, fluorine, iodine, lithium, magnesium, phosphorus, potassium, sodium, thorium, uranium, and sulfur, and their compounds, but does not include sand and gravel and rocks crushed for sand and gravel." N.D.C.C. § 38-12-01. The term "minerals" has also been held to include coal. *Olson v. Dillerud*, 226 N.W.2d 363, 366 (N.D. 1975).

[¶8] The Complaint claims the Plaintiff "is the owner of a mineral interest consisting of 50% of all oil, natural gas, and minerals" under the Property[1] and asks the Court to quiet title in the Plaintiff. (Complaint, ¶¶ 1, 12 (Doc ID #1)).

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[1] The Complaint defines the Property as:

Township 154 North, Range 96 West
Section 14: W1/2 SW1/4
Section 15: E1/2 SE1/4

[¶9] Such a request will determine and quiet title to all the minerals underlying Property, not just the oil, gas, and related hydrocarbons. As the owner of all minerals, other than oil, gas and related hydrocarbons, the SE has claims adverse to Plaintiff's that are separate from the Land Board's claims; thus, the SE should properly be allowed to intervene as a Defendant.

[¶10] Under N.D.C.C. § 32-23-11, "[w]hen declaratory relief is sought, all persons who have or claim any interest that would be affected by the declaration must be made parties, and a declaration may not prejudice the rights of persons not parties to the proceeding." The declarations requested by Plaintiff would prejudice the rights of the SE. Accordingly, the SE has a right to intervene.

II. The State Engineer may be permitted to intervene under N.D.R.Civ.P. 24(b).

[¶11] There are two reasons the State Engineer may be permitted to intervene under N.D.R.Civ.P. 24(b). Rule 24(b)(1) allows intervention if a party "has a claim or defense that shares with the main action a common question of law or fact"; and Rule 24(b)(2) allows intervention by a state officer or agency if a party's claim or defense is based on a statute administered by the officer or agency or is based on a regulation or order made under a statute. Both portions of the permissive intervention rule apply in this case.

[¶12] First, the overarching legal question in this case will come down to the location of the OHWM. The SE claims all surface and mineral interests (except oil, gas, and related hydrocarbons) in the sovereign lands of the state, i.e. "those areas ... lying within the ordinary high watermark of navigable lakes and streams." N.D.C.C. § 61-33-01(3). Thus, the paramount question to determine ownership is "*where* is the OHWM?" The location of the OHWM is a common question of law or fact that both the SE and the Land Board share in their respective property claims to co-ownership of sovereign lands and minerals. Therefore, the SE should be allowed to intervene because the court's ruling regarding the location of the OHWM will also impact the SE's claims of both surface and mineral ownership.

[¶13] Additionally, the SE is the state officer/agency that administers sovereign lands management and determines what land is sovereign land. The SE developed the *Ordinary High Watermark Delineation Guidelines*, found at:

http://www.swc.state.nd.us/pdfs/ordinary_high_water.pdf, which states "that delineations must be conducted by Office of the State Engineer staff or a designee in establishing an official ordinary high water mark on any of the state's navigable waters." p. 2. The SE regularly makes determinations of the OHWM location, and in fact, has recently been asked by the Land Board to determine the OHWM between the Highway 85 and Highway 23 bridges – which would cover the property at issue in this litigation. See Exhibit A.

[¶14] Further, the SE has developed administrative rules regarding the management of Sovereign Lands. *See* N.D.A.C. art. 89-10. As such, all project on sovereign lands require authorization from the SE unless specifically exempted by the administrative rules. N.D.A.C. § 89-10-01-04. The SE should be allowed to intervene and make claims or defenses based on its administration of sovereign lands activities through N.D.A.C. art. 89-10 and its authority to determine the location of the State's sovereign lands.

[¶15] Rule 24(b) also requires the court to consider undue delay or prejudice to the other parties' rights. The SE's counsel has conferred with Plaintiff's counsel, who agrees to stipulate to intervention. This litigation is in the beginning stages and no scheduling order has been set, so no undue delay is likely to result from the SE's intervention. Additionally, the SE and Land Board's interests in this case are aligned, and the SE will coordinate with the Land Board and intends to make joint filings whenever possible.

CONCLUSION

[¶16] The SE respectfully requests that the Court grant its motion to intervene as a defendant and allow the SE an opportunity to file an Answer (Exhibit B).

Dated this 20th day of January, 2016.

State of North Dakota
Wayne Stenehjem
Attorney General

By: /s/ Jennifer L. Verleger

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www.land.nd.gov

DEPARTMENT OF TRUST LANDS
INVESTING FOR EDUCATION

Lance D. Gaebe, Commissioner

53-2015-CV-00986

November 20, 2015

TODD SANDO
STATE ENGINEER
STATE WATER COMMISSION DEPT 770
900 EAST BOULEVARD AVENUE
BISMARCK ND 58505-0850

Mr. Sando, Todd

I appreciate the State Engineer's Office and the Department of Trust Lands (DTL) professional collegial role in managing the state's sovereign lands as outlined in North Dakota Century Code Chapter 61-33. While your agency is responsible for defining and managing these sovereign lands, the Land Board is designated by law to manage the oil and gas and other hydrocarbon minerals. The DTL is the administrative arm of the Land Board.

Under N.D.C.C. § 61-33-01, the State's interest in sovereign lands extend up to the ordinary high watermark (OHWM). The DTL understands that your agency determines the location of the OHWM. As you know, our departments previously worked closely in the delineation of the OHWM of the Missouri and Yellowstone Rivers from the Montana border to the Williston area. This survey was conducted in 2009 to determine the current location of the OHWM. The DTL subsequently utilized this information to lease the state's oil and gas interests beneath the Missouri and Yellowstone Rivers. The Land Board also commissioned a study to identify the historical OHWM of the Missouri River prior to the inundation by Lake Sakakawea. I understand this study is not recognized by your office as a delineation of the OHWM. Recently, the Land Board instructed me to work with you on delineating the OHWM of the Missouri River in the areas east of Williston.

Would you please provide me with a timeline and cost estimate for your office to complete a delineation of the OHWM between the Highway 85 Bridge and Highway 23 Bridge?

I look forward to working with you on this effort. Please contact me if I can answer any questions.

Sincerely,

Lance D. Gaebe
Commissioner

EXHIBIT
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17

STATE OF NORTH DAKOTA

COUNTY OF WILLIAMS

IN DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

Mary K. Starin, as Personal Representative of The Estate of Bruno Herman Weyrauch,

Plaintiff,

v.

Kelly Schmidt, State Treasurer, as Trustee for the State of North Dakota, Eric Hardmeyer, President and Chief Executive Officer of the Bank of North Dakota, together Board of University and Trust Lands through its Board of Directors: Governor Jack Dalrymple, Secretary of State Alvin A. Jaeger, Superintendent of Public Instruction Kristen Baesler, and Attorney General Wayne Stenehjem, the State of North Dakota and all other persons unknown claiming Estate or interest in or lien or encumbrance upon the property described in the Complaint,

Defendants.

DEFENDANT-INTERVENOR STATE ENGINEER'S [PROPOSED] ANSWER

Civil No. 53-2015-CV-00986

[¶1] The North Dakota State Engineer (SE), except as admitted or otherwise qualified, specifically denies every allegation and for its Answer to the Complaint of the Plaintiff Mary K. Starin, as Personal Representative of The Estate of Bruno Herman Weyrauch, states as follows:

[¶2] The SE denies the allegations in paragraph 1 as they apply to any interest located below the ordinary high watermark (OHWM) of the Missouri River.

[¶3] With respect to the allegations in paragraph 2, the SE denies that the Sheriff's Deed was recorded in Book of Deeds 171, Page 171 and specifically asserts that the Sheriff's Deed was recorded in Book 82, Page 171. The State admits all other allegations in paragraph 2.

[¶4] The SE admits the allegation in paragraphs 3 and 4.

[¶5] The SE lacks information or knowledge sufficient to form a belief as to the truth of the allegations in paragraphs 5 and 6.

[¶6] The SE admits the allegations in paragraph 7.

EXHIBIT

tabbies

B

18

[¶7] The SE admits the allegations in paragraph 8, but denies any implications that the State Mineral Reservation Research Verification proves the Plaintiffs own a mineral interest below the OHWM of the Missouri River.

[¶8] The SE is without sufficient information or knowledge sufficient to form a belief as to the truth of the allegations in paragraph 9.

[¶9] The SE denies the allegations in paragraph 10 as they applies to any interest located below the OHWM of the Missouri River.

[¶10] With respect to the allegations in paragraph 11, they do not require a response because they explain Plaintiff's request for relief. To the extent a response is required, the SE denies there are grounds for the Court to award the Plaintiff the relief it seeks for any minerals located below the OHWM of the Missouri River.

[¶11] With respect to the allegations in paragraph 12, they do not require a response. To the extent a response is required, the SE denies the allegations contained therein.

AFFIRMATIVE DEFENSES

[¶12] The State affirmatively alleges that the Complaint fails to state a claim upon which relief can be granted.

[¶13] The State affirmatively alleges that the Plaintiff's claims are barred by laches and the statute of limitations.

[¶14] WHEREFORE, Defendants the North Dakota State Engineer requests the following relief:

[¶15] A judgment ruling that the Plaintiff does not hold any interests in the property that is located below the Missouri River's OHWM, and dismissing the Complaint with prejudice and ordering that the Plaintiff be forever barred from asserting title to or an interest in that property.

[¶16] A judgment quieting title in the State of North Dakota to all property below the OHWM of the Missouri River as claimed by Plaintiff in the Complaint.

[¶17] A judgment ordering that the Plaintiff be forever barred from asserting title to or an interest in that property.

[¶18] For an award to the State of the costs and disbursements it incurs in this litigation, including reasonable attorneys' fees.

[¶19] For such other and further relief as the Court deems just and equitable.

Dated January 20, 2016.

By: /s/ Jennifer L. Verleger
Jennifer L. Verleger
Assistant Attorney General
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Attorneys for North Dakota State Engineer.

Mar 23, 2017

17.0159.06011
Title.

Prepared by the Legislative Council staff for
Representative Keiser
March 22, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are

located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that any portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public meeting to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold a public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within one year of the effective date of this Act, any suspended or escrowed royalty proceeds held by operators or the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment

demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. The department of mineral resources and the industrial commission are exempt from chapter 32-28 with respect to activities under this chapter.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a

limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

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17.0159.06011

Sixty-fifth
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2134

March 23, 2017

Introduced by

Senators Armstrong, Bekkedahl, Unruh

Representatives Bosch, Longmuir, Porter

A BILL ~~for an Act to create and enact a new section to chapter 54-01 of the North Dakota Century Code, relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.~~for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

~~**SECTION 1.** A new section to chapter 54-01 of the North Dakota Century Code is created and enacted as follows:~~

~~**Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.**~~

~~Unless the state has explicitly transferred ownership of the minerals, the state of North Dakota owns the minerals in and under the Missouri riverbed within state borders, including segments of the riverbed which were artificially inundated as a result of constructing dams pursuant to the Pick-Sloan Missouri basin project. The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark from the northern boundary of the Fort Berthold reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the northern boundary of the Standing Rock Indian reservation to river mile marker one thousand three hundred three. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation are excluded from this section and must be determined under federal law. The state holds no claim to any minerals above the~~

~~ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. For the purposes of this section, "historical Missouri riverbed channel" means the Missouri riverbed channel as delineated by the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe. This section does not affect the authority of the state engineer to regulate the Missouri riverbed or waters of the state provided the regulation does not affect ownership of minerals in and under the riverbed or lands above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.~~

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.
2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.
3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.
4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

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

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.
2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.
3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and

convincing evidence establishes that any portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

b. The historical records of the army corps of engineers pertaining to the corps survey;

c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public meeting to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold a public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within one year of the effective date of this Act, any suspended or escrowed royalty proceeds held by operators or the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be

necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. The department of mineral resources and the industrial commission are exempt from chapter 32-28 with respect to activities under this chapter.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by

the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION. There is appropriated out of any moneys in the general fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Mar 23, 2017

3

17.0159.06003
Title.

Prepared by the Legislative Council staff for
Representative Keiser
March 3, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

Page 1, line 3, after "dams" insert "; and to provide an appropriation for reimbursement of legal costs"

Page 2, after line 8, insert:

"**SECTION 2. APPROPRIATION - REIMBURSEMENT OF LEGAL EXPENSES.**

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $750,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of reimbursing legal expenses as provided in subsection 2, for the biennium beginning July 1, 2017, and ending June 30, 2019.

2. The commissioner of university and school lands shall use funds appropriated in subsection 1 to reimburse actual legal and expert fees incurred and requested by any private mineral owner, or the owner's successors in interest, who reserved the mineral rights, through deed or condemnation order from the court, when the United States acquired the owner's property as part of the land acquisitions for Garrison Dam and its reservoir, Lake Sakakawea, and who filed a lawsuit against the state of North Dakota after December 31, 2011, but before December 31, 2016, and which lawsuit was pending as of February 1, 2017, claiming title to reserved mineral rights."

Renumber accordingly

4

1707 North 9th Street
PO Box 5523
Bismarck, ND 58506-5523
Phone: (701) 328-2800
Fax: (701) 328-3650

www.land.nd.gov

DEPARTMENT OF
ND TRUST LANDS
INVESTING FOR EDUCATION

Lance D. Gaebe, Commissioner

Date: March 23, 2017

To: Subcommittee Chairman Keiser

cc: SB 2134 Subcommittee members

From: Lance Gaebe, Commissioner of University and School Lands

Re: information pertaining to SB 2134 and proposed amendment 17.0159.06010

The following is a summary of financial information related to the Department of Trust Lands' estimate of the fiscal impact of Senate Bill 2134 if amended by proposed: 17.0159.06010.

The materials also include several aerial maps depicting the summer levels of Lake Sakakawea.

Projected SIIF Activity

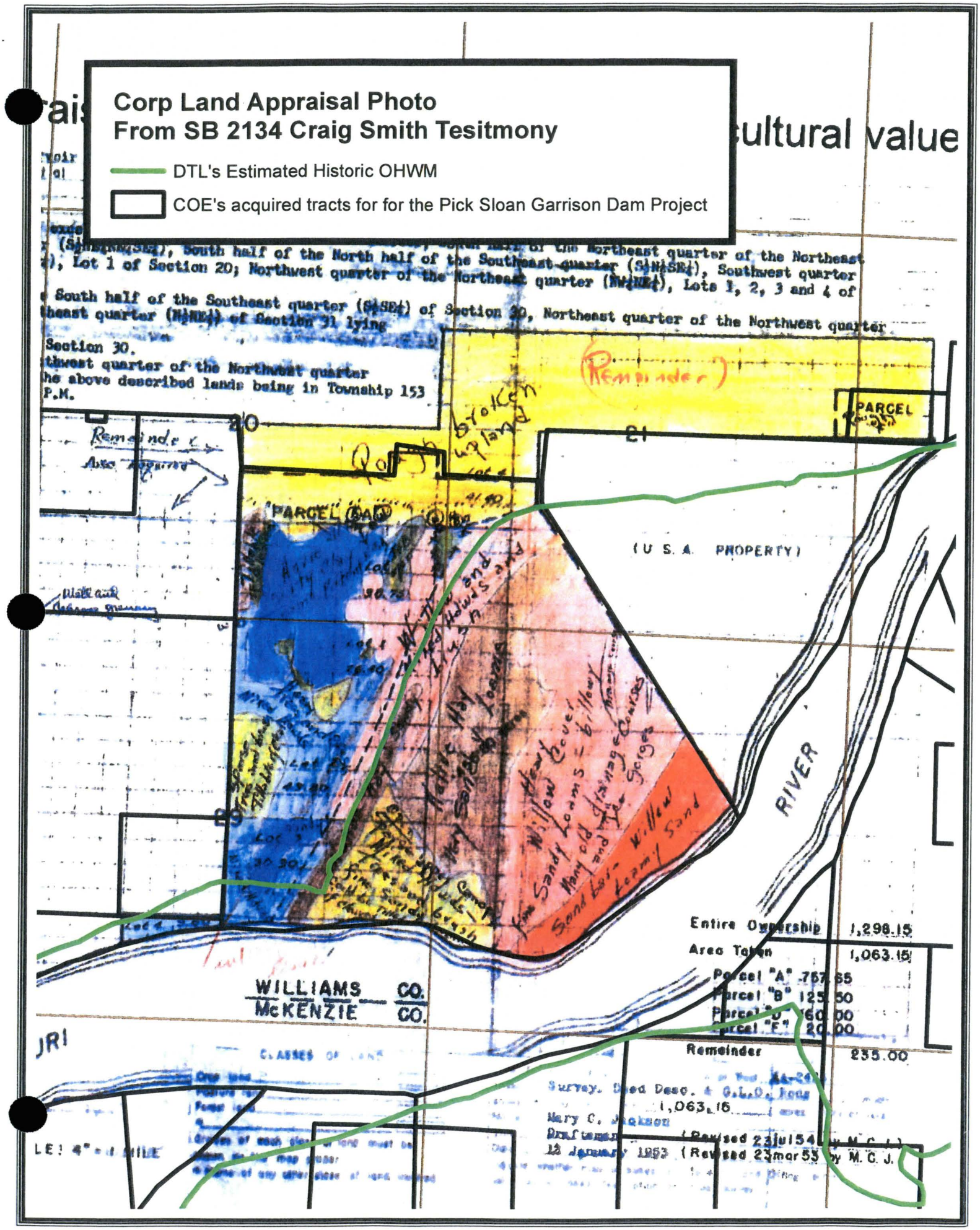
Projected SIIF Balance [1]		$ 420,107,865
Loan Guarantees (Biofuels)		(17,181,230)
Total Assigned Fund Balance	(142,325,049)	
Less: Assigned fund - Phase I & II (Impacted by bill 2134)	100,498,444	
Assigned fund - Phase IV (Reservation)		(41,826,605)
Total Available SIIF Balance		361,100,030
Projected Refunds (Phase I & II)		
Oil and Gas Lease Bonus & Rents (Phase I & II)	(87,663,214)	
Royalties Collected (Phase I & II)	(69,316,160)	
Survey	(800,000)	
Total Projected Refunds		(157,779,374)
Projected SIIF Balance after Projected Refunds		$ 203,320,656

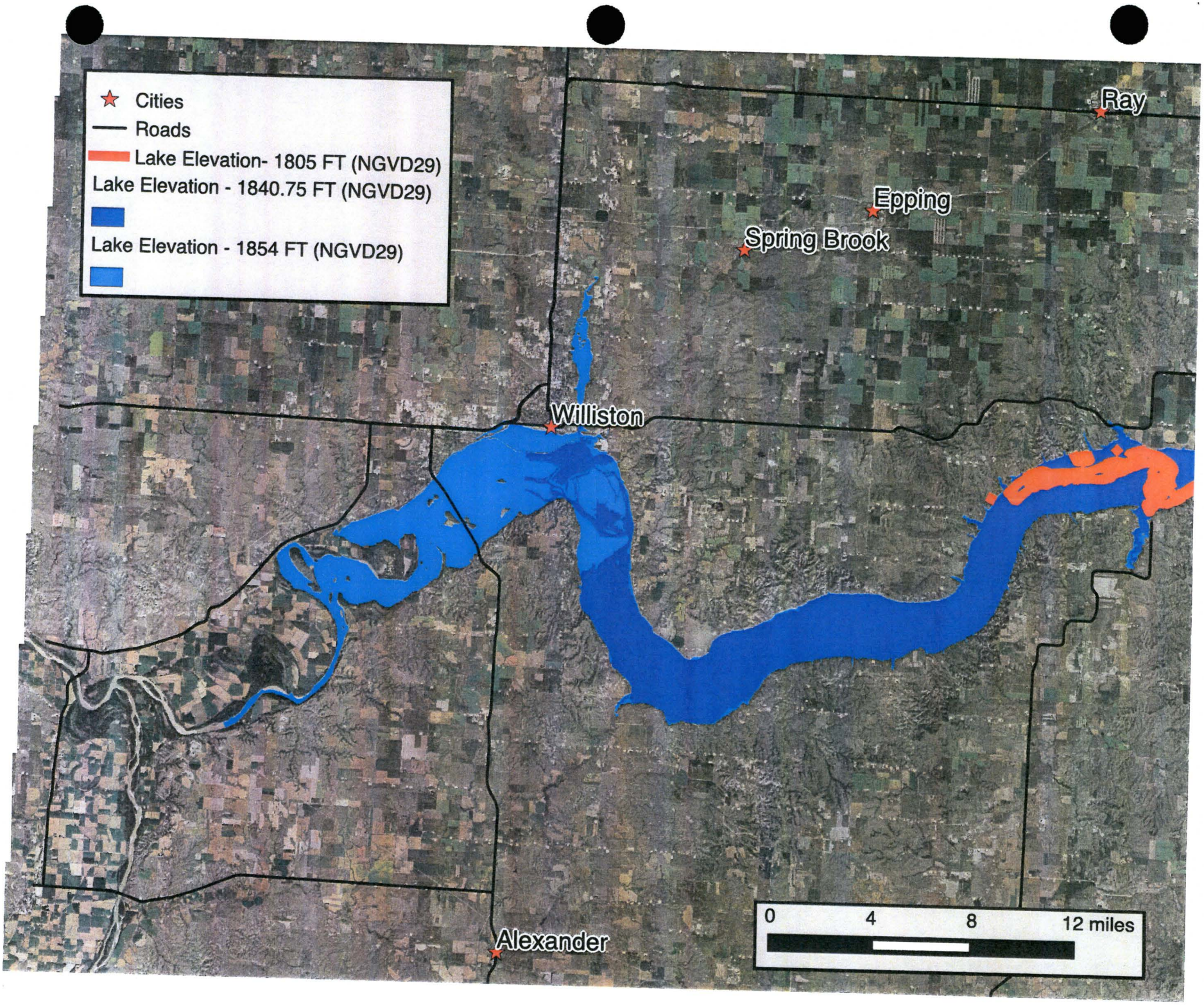
Projected Escrow Activity

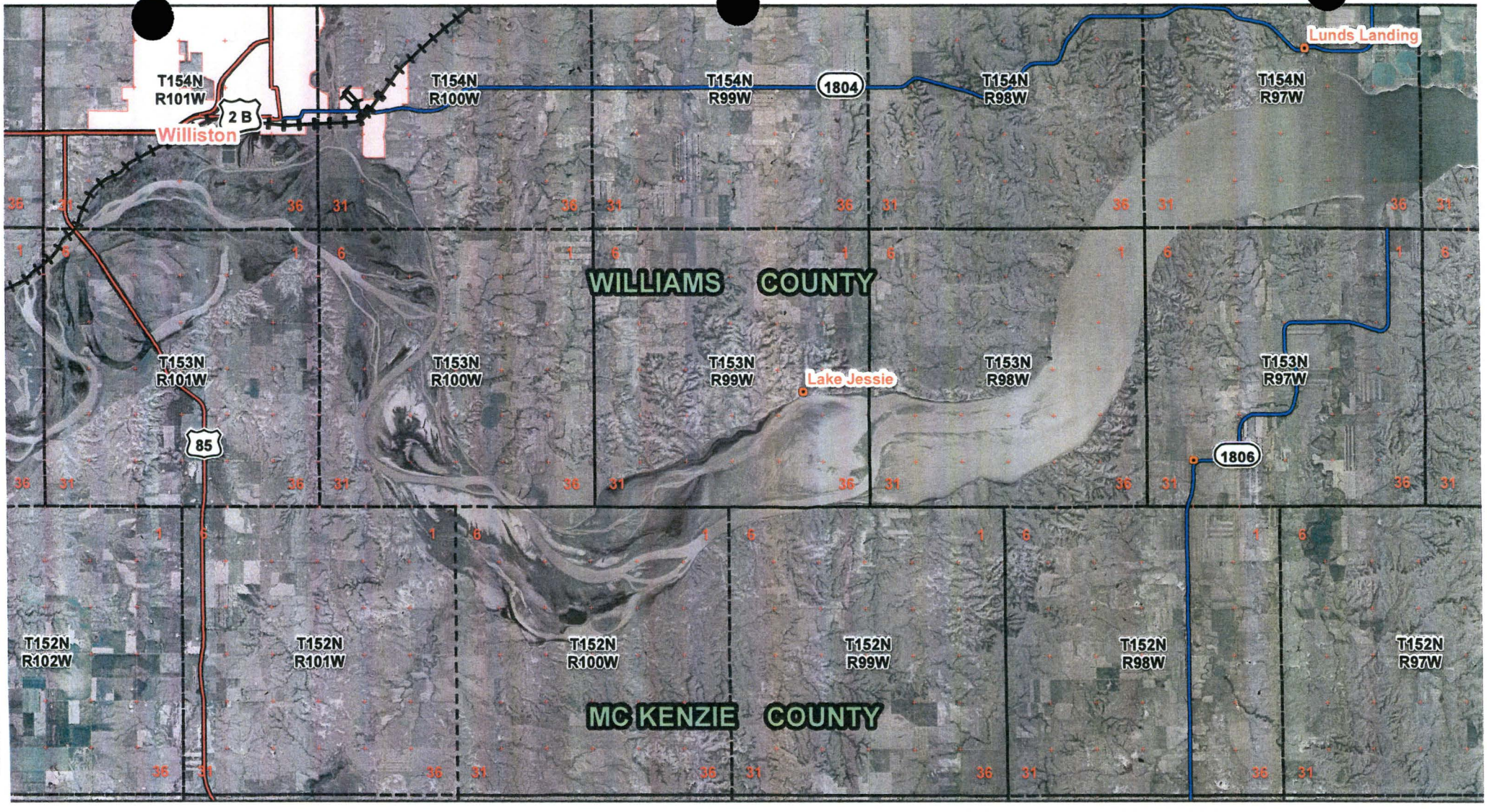
Missouri River Royalties held in Escrow	$ 60,753,343	
Less Phase IV Escrow (Reservation)	(30,561,970)	
Escrow available for refunds (Phase I & II)		$ 30,191,373
Projected Royalties Escrowed Returned to Operators (Phase I & II)		$ (18,657,701)

[1] February 2017 Legislative Council Projections through crossover

Phase I (between township 153-102 and Hwy 85)
Phase II (between Hwy 85 and Hwy 23)
Phase IV (between Hwy 23 and Garrison Dam)


Corp Land Appraisal Photo
From SB 2134 Craig Smith Tesitmony
DTL's Estimated Historic OHWM
COE's acquired tracts for for the Pick Sloan Garrison Dam Project
ultural value
(Remainder)
PARCEL
(U S. A. PROPERTY)
RIVER
WILLIAMS CO.
McKENZIE CO.
Entire Ownership 1,298.15
Area Taken 1,063.15
Remainder 255.00
1,063.16
12 January 1953 (Revised 23mar55 by M.C.J.


Cities
Roads
Lake Elevation- 1805 FT (NGVD29)
Lake Elevation - 1840.75 FT (NGVD29)
Lake Elevation - 1854 FT (NGVD29)
Ray
Epping
Spring Brook
Williston
Alexander
0
4
8
12 miles



Historic Lake Extents

Missouri River / Lake Sakakawea Headwaters

July / August 2009

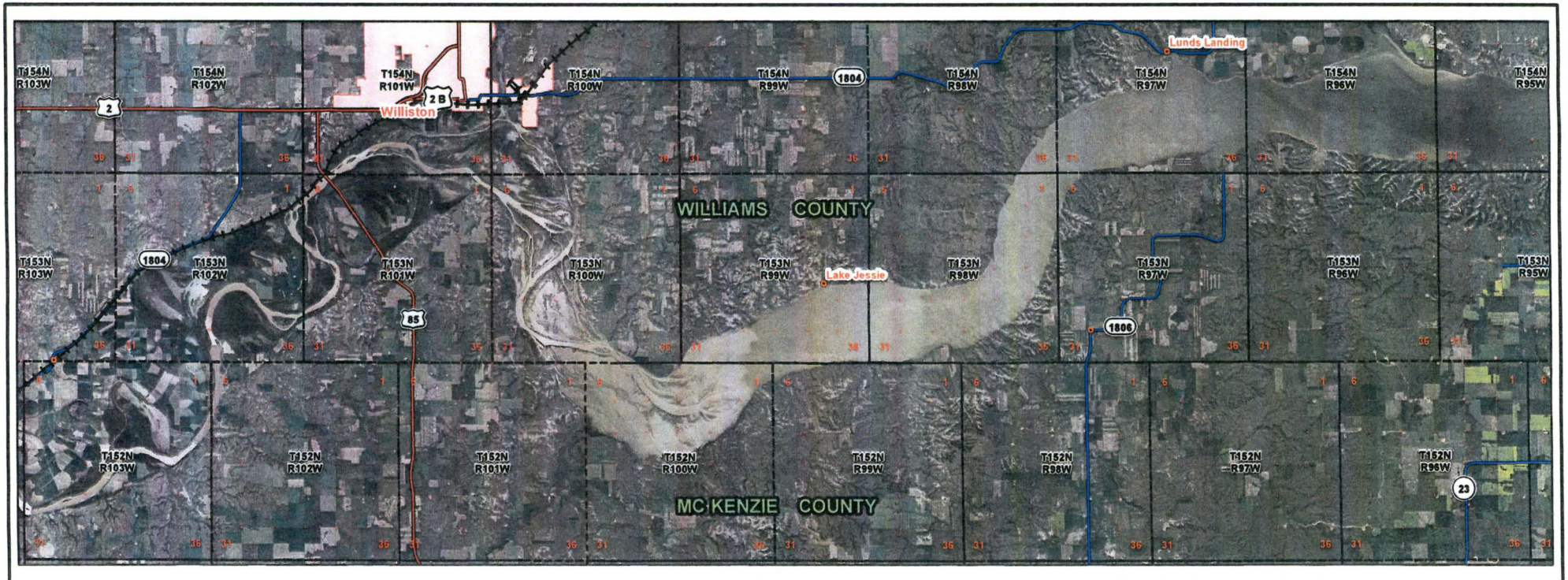
N
W E
S

0 0.5 1 2 3 4
Miles

Scale 1:190,080

One inch represents three miles

5



Headwaters Area, Lake Sakakawea

N
W E
S

Historic Lake Extents

Missouri River / Lake Sakakawea Headwaters

July / August 2010

0 0.5 1 2 3 4

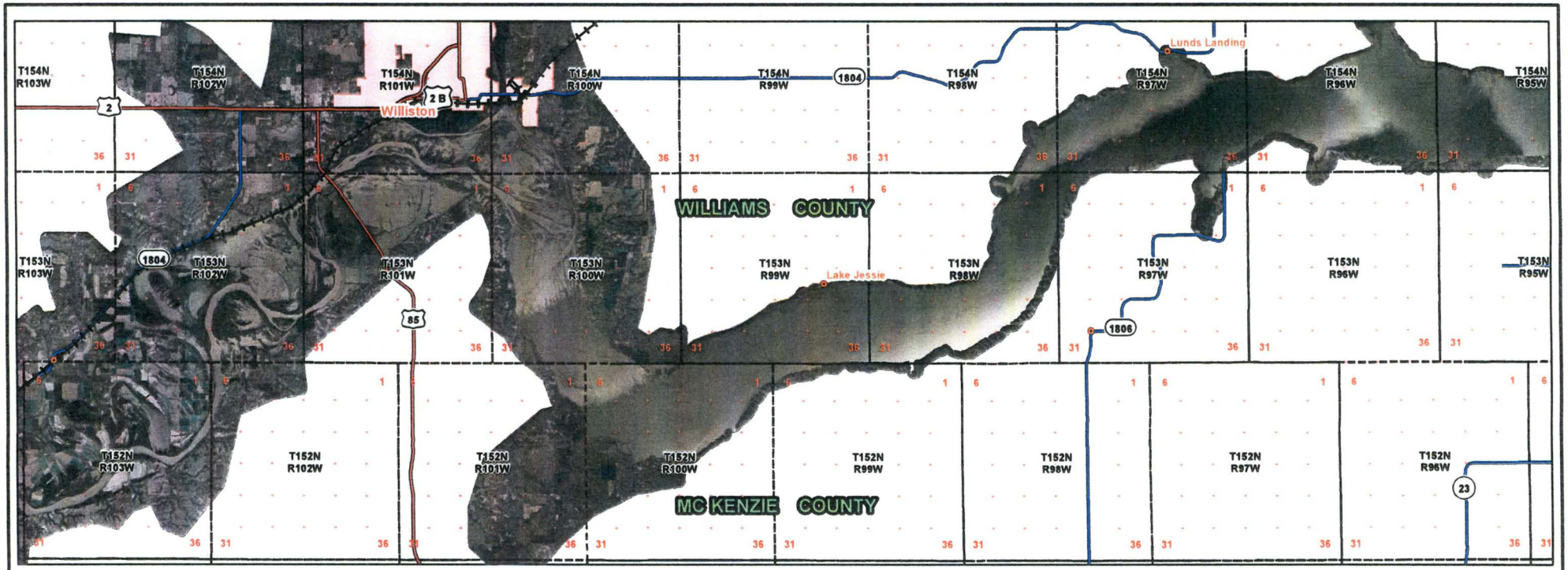
Miles

Scale 1:190,080

One inch represents three miles

NORTH DAKOTA STATE WATER COMMISSION 1937

ND State Water Commission, Oct. 2015



Headwaters Area, Lake Sakakawea

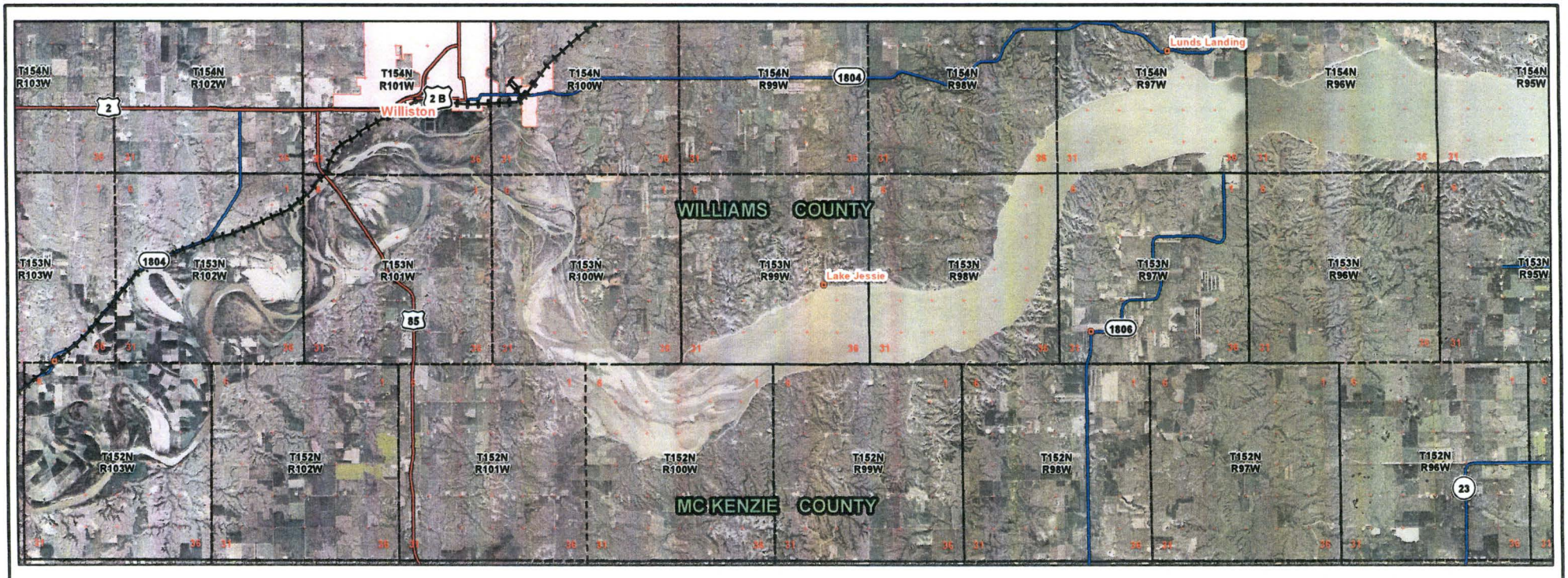
Historic Lake Extents

Missouri River / Lake Sakakawea Headwaters
Peak Inundation July 2011

Scale 1:190,080

One inch represents three miles

ND State Water Commission, Oct. 2015



Headwaters Area, Lake Sakakawea

N
W E
S

Historic Lake Extents

Missouri River / Lake Sakakawea Headwaters

July / August 2012

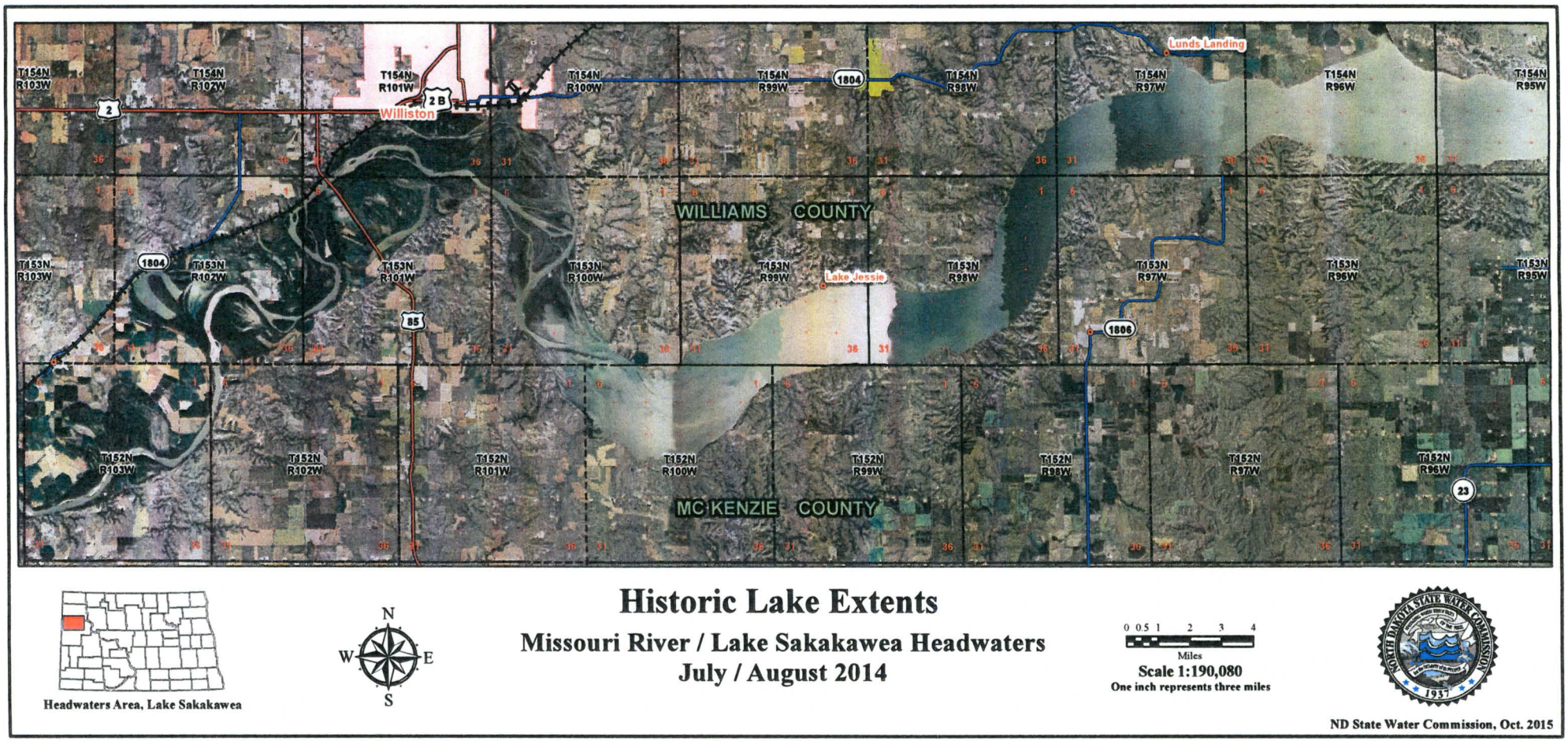
0 0.5 1 2 3 4
Miles

Scale 1:190,080

One inch represents three miles

NORTH DAKOTA STATE WATER COMMISSION 1937

ND State Water Commission, Oct. 2015



Headwaters Area, Lake Sakakawea

Historic Lake Extents

Missouri River / Lake Sakakawea Headwaters

July / August 2014

ND State Water Commission, Oct. 2015

ESTIMATED FISCAL IMPACT - SENATE BILL NO. 2134

The schedule below provides information on the 2017-19 biennium estimated fiscal impact of Engrossed Senate Bill No. 2134 with proposed amendments (LC# 17.0159.06012).

2017-19 Biennium Estimated Fiscal Impact Summary - Senate Bill No. 2134	
	Amounts (In Millions)
Total estimated impact	
Estimated impact - Proposed amendments to Senate Bill No. 2134 (LC# 17.0159.06012)	$211.3
Less: Disputed minerals held in escrow at the Bank of North Dakota[1]	(18.7)
Remaining estimated impact to the strategic investment and improvements fund	$192.6
Potential appropriations from the strategic investment and improvements fund	
Refunds of oil and gas lease bonuses and rents	$87.7
Refunds of royalties collected prior to the 2017-19 biennium	69.3
Refunds of royalties collected during the 2017-19 biennium[2]	35.6
Total potential refund appropriations	$192.6
Less: Funds available from the assigned fund balance[3]	(142.3)
Remaining appropriations from the unobligated balance	$50.3
Add: Appropriation for survey	0.8
Total potential appropriation from the unobligated balance	$51.1

[1]Approximately $60.8 million of disputed mineral revenue payments are held in escrow at the Bank of North Dakota, of which $18.7 million relate to disputes addressed in the provisions of Senate Bill No. 2134, $30.6 million relate to disputes on reservation lands, and $11.5 million relate to other mineral revenue payment disputes.

[2]Depending on the timing of the implementation of the provisions of Senate Bill No. 2134, some or all of the 2017-19 biennium royalties may be paid to the strategic investment and improvements fund, which would require appropriation authority to refund. After the implementation of the provisions, the royalties would be paid to mineral owners.

[3]All of the funds currently in the assigned fund balance in the strategic investment and improvements fund are available to be appropriated. However, other available funds would need to be assigned within the strategic investment and improvements fund to reflect an obligation of $41.8 million relating to mineral disputes on reservation lands.

17.0159.06012

Sixty-fifth
Legislative Assembly
of North Dakota

FIRST ENGROSSMENT

ENGROSSED SENATE BILL NO. 2134

2
3-24-17

Introduced by

Senators Armstrong, Bekkedahl, Unruh

Representatives Bosch, Longmuir, Porter

A BILL ~~for an Act to create and enact a new section to chapter 54-01 of the North Dakota Century Code, relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.~~ for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

~~**SECTION 1.** A new section to chapter 54-01 of the North Dakota Century Code is created and enacted as follows:~~

~~**Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.**~~

~~Unless the state has explicitly transferred ownership of the minerals, the state of North Dakota owns the minerals in and under the Missouri riverbed within state borders, including segments of the riverbed which were artificially inundated as a result of constructing dams pursuant to the Pick-Sloan Missouri basin project. The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark from the northern boundary of the Fort Berthold reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the northern boundary of the Standing Rock Indian reservation to river mile marker one thousand three hundred three. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation are excluded from this section and must be determined under federal law. The state holds no claim to any minerals above the~~

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SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.
2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.
3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.
4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

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

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.
2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.
3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and

convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

b. The historical records of the army corps of engineers pertaining to the corps survey;

c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public meeting to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public meeting on the review.

7. After the public meeting, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within one year of the effective date of this Act, any suspended or escrowed royalty proceeds held by operators or the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be

necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

2A
3-24-17

17.0159.06012
Title.

Prepared by the Legislative Council staff for
Representative Keiser
March 23, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are

located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public meeting to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public meeting on the review.

7. After the public meeting, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within one year of the effective date of this Act, any suspended or escrowed royalty proceeds held by operators or the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

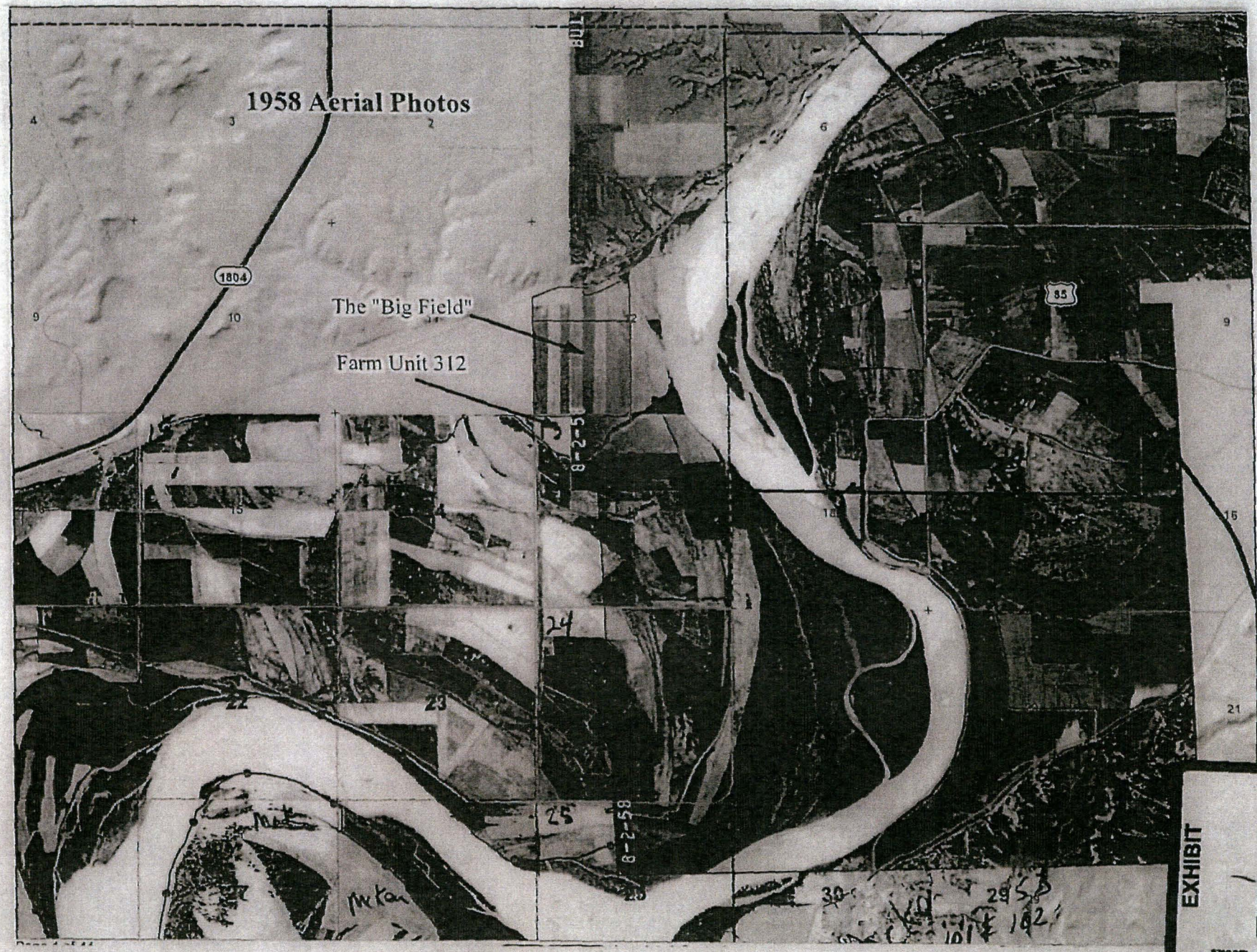
SECTION 2. APPROPRIATION. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

3
3-24-17
SB 2134



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DEPARTMENT OF
ND TRUST LANDS
INVESTING FOR EDUCATION

Lance D. Gaebe, Commissioner

Date: March 24, 2017

To: House Energy and Natural Resources Subcommittee Chairman Keiser and Members

From: Lance Gaebe, Commissioner of University and School Lands

Re: SB 2134 – Proposed Amendment 17.0159.06011

Thank you for the opportunity to review and discuss proposed amendments. Following review of proposed Amendment 17.0159.06011 to SB 2134 (Amendment), there are several issues I want to bring to your attention.

1. New 61-33.1-02 Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams; Page 3:
   The Amendment (thus the Bill) establishes statute dictating that the state sovereign land mineral ownership is limited to the historical riverbed channel. The section later (lines 9-12) exempts the areas within the boundaries of Fort Berthold and Standing Rock Indian Reservations from the section. As a result there would be an inconsistency in using the historical riverbed channel to define everything under the reservoirs and then exempting the reservations. This will leave silent the Legislature's intent on ownership parameters in these areas, and make it unclear what practice the Board should use to determine State sovereign minerals for leasing.

2. New 61-33.1-03 Determination of the ordinary high water mark (OHWM) of the historical Missouri riverbed channel; Subsection 3; Page 4:
   On page 4, lines 3-28, the Amendment provides for a review of the delineation of the ordinary high water mark of the USACE's survey segments as the presumptive determination. It states that the review must consider the listed parameters, historical data, materials and applicable state laws. It may be unclear to the contractor whether the list offered in items a-e is: 1) an all-inclusive list and each is required to be applied in each segment; 2) whether those items are prioritized in the order in which they are set forth; 3) if it includes current North Dakota administrative law; or 4) if the study can consider other information not referenced in the new section.

3. New 61-33.1.04 Implementation; Subsection 1; Page 5:
   In line 25, the Amendment references oil and gas mineral tracts. The proposed section states that in order to receive a refund in advance of the study, an entire tract must lie above both Phase II and the USACE lines. On behalf of the Board of University and School Lands, the Department's lease tracts consist of a ¼ section or a portion thereof. If a portion of the Board's mineral tract is within either investigation it will block repayment of the entirety of that tract, until after the study determines the historical OHWM.

4. Further on Page 5, line 27: The Amendment stipulates that any suspended or escrowed royalty proceeds held by operators or the Board of University and School Lands must be released to the owners of the tracts. The Department does not have records of professed fee owners and could not release proceeds to any entity other than the current lessee or operator, which could then distribute according to their title opinions. Operators' existing royalty payment systems with amended reports would be the most expedient way to remit proceeds to the new owner.

   The Department proposes splitting subsection 1 (lines 23-28) into two parts, with the Board returning proceeds to the operator; and separately the operator with the obligation to return the royalty to the apparent owners of the tracts, absent a showing of other defects affecting mineral title.

   Further, the Amendment references only suspended or escrowed royalty; however, that the word "collected" should probably be added to reference royalty proceeds that have been paid to the Strategic Investment and Improvements Fund.(SIIF).

5. New 61-33.1-06 Public domain lands; Page 6-7:
   The proposed Amendment defers to the federal Bureau of Land Management (BLM) regarding ownership of public domain land, even if those lands fall within or beneath the historical OHWM.

   The Committee should know that this is not established case law as some have suggested. The State has argued that it, not the federal government, defines sovereign ownership. The State is litigating this issue with an administrative appeal with the Department of the Interior Board of Land Appeals and filed pleadings in 2016. The State's has argued that its definitions of Rivers apply, not the federal standard.

   The Amendment will simply defer the ownership decision to the BLM and relinquish thousands of minerals acres from state to federal control.

6. The fiscal impact is estimated at $157,779,374. The Board or Commissioner will need appropriation authority to return an anticipated $87,663,214 of oil and gas lease bonus and rents (Phase I & II) and $69,316,160 of royalties collected (Phase I & II) that have been collected within the SIIF. An appropriation of $156,979,374 will be necessary because the $800,000 for the study is already appropriated in *Section 2. Appropriation;* Page 7 lines 9-13.

Thank you for your time and consideration.

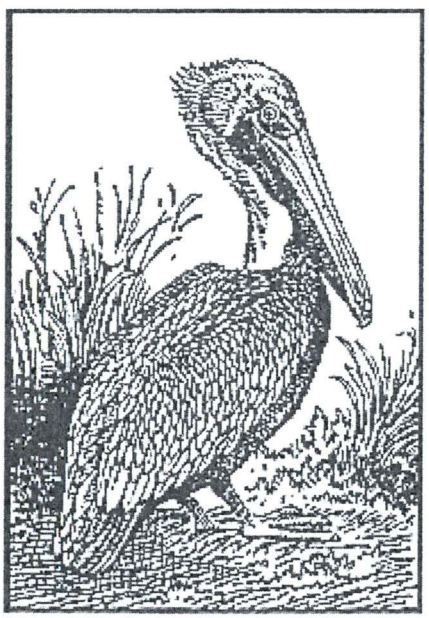
5
3-24-17
SB 2134
Subcommittee

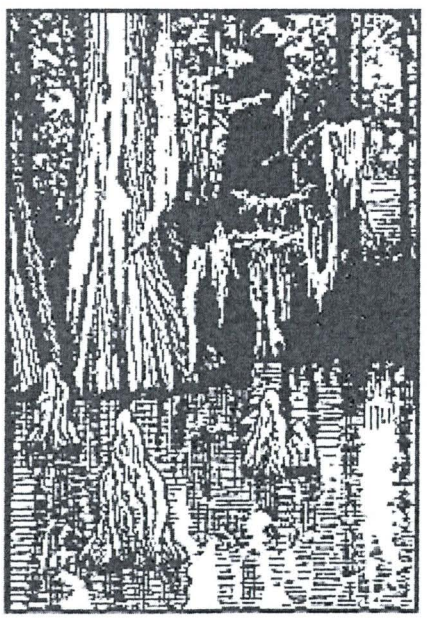
US Army Corps of Engineers
Waterways Experiment Station

Wetlands Research Program Technical Report Y-87-1 (on-line edition)

Corps of Engineers Wetlands Delineation Manual

by Environmental Laboratory





January 1987 - Final Report
Approved For Public Release; Distribution Is Unlimited

1

Preface to the Original Edition

This manual is a product of the Wetlands Research Program (WRP) of the U.S. Army Engineer Waterways Experiment Station (WES), Vicksburg, MS. The work was sponsored by the Office, Chief of Engineers (OCE), U.S. Army. OCE Technical monitors for the WRP were Drs. John R. Hall and Robert J. Pierce, and Mr. Phillip C. Pierce.

The manual has been reviewed and concurred in by the Office of the Chief of Engineers and the Office of the Assistant Secretary of the Army (Civil Works) ~~as a method approved for voluntary use in the field for a trial period of 1 year~~.

~~This manual is not intended to change appreciably the jurisdiction of the Clean Water Act (CWA) as it is currently implemented. Should any District find that use of this method appreciably contracts or expands jurisdiction in their District as the District currently interprets CWA authority, the District should immediately discontinue use of this method and furnish a full report of the circumstances to the Office of the Chief of Engineers~~.

USER NOTES: Use of the 1987 Manual to identify and delineate wetlands potentially subject to regulation under Section 404 is now mandatory. (HQUSACE, 27 Aug 91)

This manual describes technical guidelines and methods using a multiparameter approach to identify and delineate wetlands for purposes of Section 404 of the Clean Water Act. Appendices of supporting technical information are also provided.

The manual is presented in four parts. Part II was prepared by Dr. Robert T. Huffman, formerly of the Environmental Laboratory (EL), WES, and Dr. Dana R. Sanders, Sr., of the Wetland and Terrestrial Habitat Group (WTHG), Environmental Resources Division (ERD), EL. Dr. Huffman prepared the original version of Part II in 1980, entitled "Multiple Parameter Approach to the Field Identification and Delineation of Wetlands." The original version was distributed to all Corps field elements, as well as other Federal resource and environmental regulatory agencies, for review and comments. Dr. Sanders revised the original version in 1982, incorporating review comments. Parts I, III, and IV

2

Part I: Introduction

Background

1. Recognizing the potential for continued or accelerated degradation of the Nation's waters, the U.S. Congress enacted the Clean Water Act (hereafter referred to as the Act), formerly known as the Federal Water Pollution Control Act (33 U.S.C. 1344). The objective of the Act is to maintain and restore the chemical, physical, and biological integrity of the waters of the United States. Section 404 of the Act authorizes the Secretary of the Army, acting through the Chief of Engineers, to issue permits for the discharge of dredged or fill material into the waters of the United States, including wetlands.

Purpose and Objectives

Purpose

2. The purpose of this manual is to provide users with guidelines and methods to determine whether an area is a wetland for purposes of Section 404 of the Act.

Objectives

3. Specific objectives of the manual are to:

a. Present technical guidelines for identifying wetlands and distinguishing them from aquatic habitats and other nonwetlands.[1]

b. Provide methods for applying the technical guidelines.

c. Provide supporting information useful in applying the technical guidelines.

[1] Definitions of terms used in this manual are presented in the Glossary, Appendix A.

Scope

4. This manual is limited in scope to wetlands that are a subset of "waters of the United States" and thus subject to Section 404. The term "waters of the United States" has broad meaning and incorporates both deep-water aquatic habitats and special aquatic sites, including wetlands (*Federal Register* 1982), as follows:

a. The territorial seas with respect to the discharge of fill material.

b. Coastal and inland waters, lakes, rivers, and streams that are navigable waters of the United States, including their adjacent wetlands.

c. Tributaries to navigable waters of the United States, including adjacent wetlands.

d. Interstate waters and their tributaries, including adjacent wetlands.

e. All others waters of the United States not identified above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not a part of a tributary system to interstate waters or navigable waters of the United States, the degradation or destruction of which could affect interstate commerce.

Determination that a water body or wetland is subject to interstate commerce and therefore is a "water of the United States" shall be made independently of procedures described in this manual.

Special aquatic sites

5. The Environmental Protection Agency (EPA) identifies six categories of special aquatic sites in their Section 404 b.(l) guidelines (*Federal Register* 1980), including:

a. Sanctuaries and refuges.

b. Wetlands.

c. Mudflats.

d. Vegetated shallows.

e. Coral reefs.

f. Riffle and pool complexes.

5A
3-24-17
SB2134
Subcommittee

Determining the Ordinary High Water Mark for Shoreline Management Act Compliance in Washington State

DEPARTMENT OF ECOLOGY
State of Washington

October 2016 Final Review
Publication no. 16-06-029

Accurate and defensible OHWM determinations following standardized methods are essential to the fair and consistent regulation of state shorelines. This guidance, relying on decades of field experience, as well as legal decisions related to SMA OHWM determinations, has been developed to provide standardized methods (field and office) and rationale for SMA OHWM determinations. Except in those very rare cases where field indicators cannot be found, OHWM determinations should be based on a site-specific investigation, which relies on field indicators and is briefly described in a write-up that clearly documents the findings and methods used.

Too often, particularly on tidally-influenced waters, SMA OHWM determinations are solely based on readily available data (elevations; gage or tidal data) and not on field indicators, as specified in the SMA and implementing rules (see RCW 90.58.030; WAC 173-22-030 and 173-22-040). The unfortunate result of such an approach is that public resources, including critical habitats, are not protected, and structures may be placed too low on the shoreline, contributing to flooding and erosion that imperils the subject property, as well as neighboring properties, and necessitate the need for additional shoreline stabilization, further exacerbating impacts to the shoreline.

The OHWM is used to establish many legal and regulatory boundaries, such as property ownership. These methods and OHWM definitions are not meant to supersede the standards and methods used by licensed surveyors in determining property boundaries and ownership. The focus of this guidance is compliance with the SMA, and the methods described in this guidance are founded on the standards and goals of the SMA and its implementing rules. These methods are meant to be applied statewide, and this guidance is provided to assist property owners and their representatives, as well as staff in state and local agencies, in understanding the OHWM in relation to the SMA. Uniform application of these methods is essential to the fair and consistent regulation of state shorelines and will help ensure that public resources and private property are protected.

There are three physical criteria within the OHWM definition that apply to all shoreline types: "Presence and action of *waters*… mark upon the *soil*… in respect to *vegetation*… distinct from that of the abutting upland…" The OHWM is the dynamic boundary between the aquatic and terrestrial environments and, in most cases, is not a static elevation. Regular (ordinary) inundation produces visible abiotic (change in topography or substrate) and biotic (change in vegetation) signs on the landscape. In those cases where an OHWM determination is required, this guidance recommends a systematic approach that involves reviewing available information prior to a site visit (office assessment), visiting the site to locate the OHWM based on field indicators (field assessment), and clearly documenting the methods used and results of the investigation. Review of available information (aerial photographs, LiDAR, and gage data) is always recommended prior to a site visit in order to have a clearer understanding of site conditions and to make the visit more efficient.

Of the three principle water types regulated under the SMA, streams (mean annual flow greater than 20 cfs) are perhaps the most variable and, at some sites, challenging in terms of identifying the OHWM. Chapter 3 describes the methods and field indicators to be used in determining a stream OHWM, as well as detailed guidance on how to assess hydrologic data. At complex or contentious sites and where adequate gage data are available, a hydrologic assessment should be done prior to the site visit to help narrow the range of expected OHWM flows and related stages

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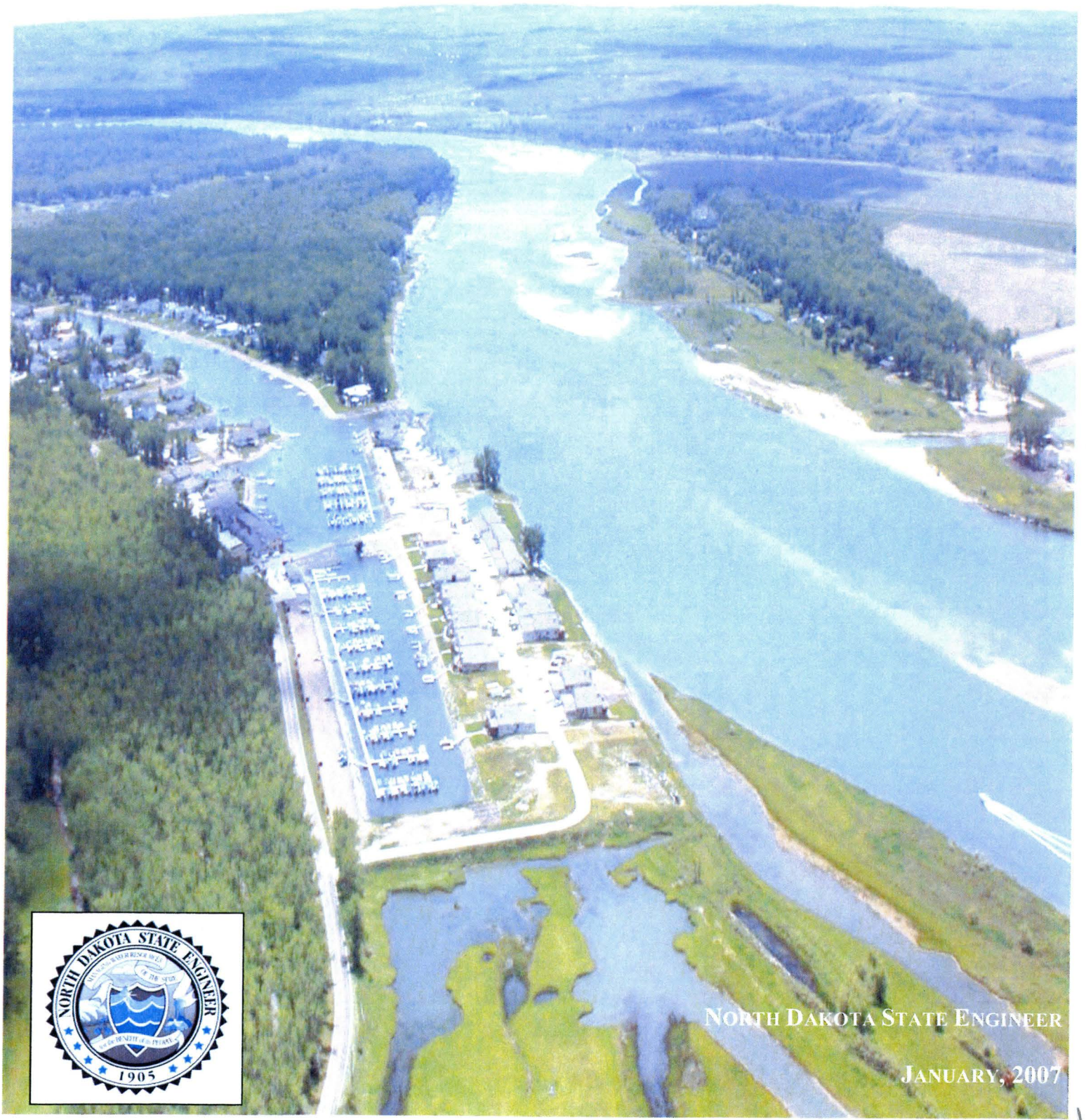
SB
3-24-17
SB 2134
Sub committee

ORDINARY HIGH WATER MARK DELINEATION GUIDELINES



NORTH DAKOTA STATE ENGINEER

JANUARY, 2007

3.1 Vegetation Analysis

Vegetation will commonly be the single most useful OHWM field indicator. That said, it should be used in combination with other indicators whenever possible to ensure an accurate delineation. ND Administrative Code Section 89-10-01-03 (Reference 7) addresses vegetation's importance in defining the OHWM:

> ...that 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.

In State ex rel. Sprynczynatyk v. Mills (Reference 8) the ND Supreme Court reinforces that level of importance in defining the OHWM:

> ...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 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.

Much as these two definitions vary to some degree, there are different approaches to using vegetation as an indicator. The most common approach is to identify the transition between predominantly wetland and predominantly non-wetland species. Another approach is to identify the transition between terrestrial vegetation and aquatic vegetation. The standard procedure for identifying the transition zone is to start in the upland area and proceed toward the water noting the vegetation changes. The emphasis is placed on the assemblage of plant species in the plant community and not individual species (Reference 3). Correct identification of vegetation through the use of plant keys and training is essential to OHWM delineations. If a plant species can not be identified in the field, a sample should be collected and identified in the office. If one is unsure of the plant's indicator status, the Natural Resources Conservation Service Plants Database located at http://plants.usda.gov/wetland.html may provide additional assistance. The plant's name, stratum, and percent cover should be indicated on the field data sheet provided.

The U.S. Fish and Wildlife Service has published a list of plant species found in wetlands in Region 4, which includes North Dakota (Reference 4), and that list is included in **Appendix B**. The Corps of Engineers 1987 Wetland Delineation Manual describes a process for using vegetation as a wetland delineator (Reference 3). To evaluate whether

a plant community is predominantly wetland, one needs to determine what species are dominant and how many of those species are wetland species. The plant community is characterized by the dominant species comprising each stratum (tree, sapling, shrub, herbaceous, woody vines) in the plant community. In order for these plant species to exist, there must be saturation for a long enough duration for them to become established. Dominance is measured by basal area for trees, by height for shrubs/saplings, by percent cover for herbaceous vegetation, and by number of stems for woody vines (Reference 3). **Table 1** provides definitions of the various strata.

Table 1
Definition of Vegetation Strata*

Strata	**Definition**
Tree	≥5 in dbh**, >20 ft in height
Sapling	.4 to <5 in dbh**, >20 ft in height
Shrub	Woody plants 3 to 20 ft in height, often multi stemmed
Herbaceous	Grasses, sedges, ferns, forbs and woody seedlings <3 ft in height
Woody Vine	Vines such as wild grape, etc.

*Modified from Reference 3
**dbh is the diameter at breast height which is approximately 4.5 feet from the ground (Reference 6)

The 50/20 rule is the method recommended by the COE (Reference 3) for determining the dominant species in each plant community. This rule states that:

> ...dominant species in each stratum are the most abundant species (when ranked in descending order of abundance and cumulatively totaled) that immediately exceed 50% of the total dominance measure for that stratum, plus any additional species that individually comprise 20% or more of the total dominance measure for that stratum. The list of dominant species is then combined across strata.

If greater than 50% of the dominant plant species are OBL, FACW, or FAC (excluding FACU) using the 50/20 rule, then the vegetation is predominantly wetland. The 1988 National List of Plant Species that Occur in Wetlands (Reference 4) should be used to determine if the dominant plants are wetland species. The complete list can be found at http://www.fws.gov/nwi/bha/list88.html. The plant indicator status categories are defined in **Table 2**.

Table 2 Plant Indicator Status Categories*		
Indicator Categories	**Indicator Symbol**	**Definition**
Obligate Wetland Plants	OBL	Plants that occur almost always (>99% probability) in wetlands under natural conditions but which may occur (<1% probability) in non-wetlands.
Facultative Wetland Plants	FACW	Plants that occur usually in wetlands (>67% to 99% probability), but occur in non-wetlands (1% to 33% probability).
Facultative Plants	FAC	Plants with a similar likelihood (33% to 76% probability) of occurring in both wetlands and non-wetlands.
Facultative Upland Plants	FACU	Plants that occur sometimes (1% to <33% probability) in wetlands but occur more often (>67% to 99% probability) in non-wetlands.
Obligate Upland Plants	UPL	Plants that occur rarely (<1% probability) in wetlands but occur almost always >99% probability) in non wetlands under natural conditions.
*Modified from Reference 3		

Another approach that may be helpful in some settings is to identify the transition between terrestrial vegetation and aquatic vegetation. This is a different transition generally occurring at a lower elevation, or closer to the water's edge, than the transition between wetland and non-wetland species. Unlike the work that's been done to aid in differentiating between wetland and non-wetland plant species, there are no location specific lists of aquatic versus terrestrial plant species typically found in North Dakota, however a delineator trained in botany will be capable of noting the distinction. Wherever both vegetative transitions are apparent, they should both be noted and considered in combination with all the available indicators.

It is also important to note that while, by definition, the area below the OHWM consists of predominantly wetland species, non-wetland vegetation, can be present below the OHWM, however it may show signs of stress due to exposure to moving water or root saturation. It may also have been washed away by moving water or unable to establish itself because of saturated conditions. Features such as adventitious roots, shallow root systems, waterlines on tree trunks, multiple trunks, and exposed roots are all indicators that water is, or has been, present there often enough, and for a long enough period of time, to cause morphological changes in the plants (Reference 3) or to remove the soils the plants were established in.

Another consideration is that species typically considered wetland species may be found above the OHWM. One example may be the mature cottonwoods on the high bank of the Missouri River which were seeded as a result of inundation during the un-regulated period prior to the construction of Garrison Dam. This is an important example of a situation where the transition between terrestrial and aquatic vegetation may provide

5C
SB2134
3-24-17

TECHNICAL REPORT

FOR THE

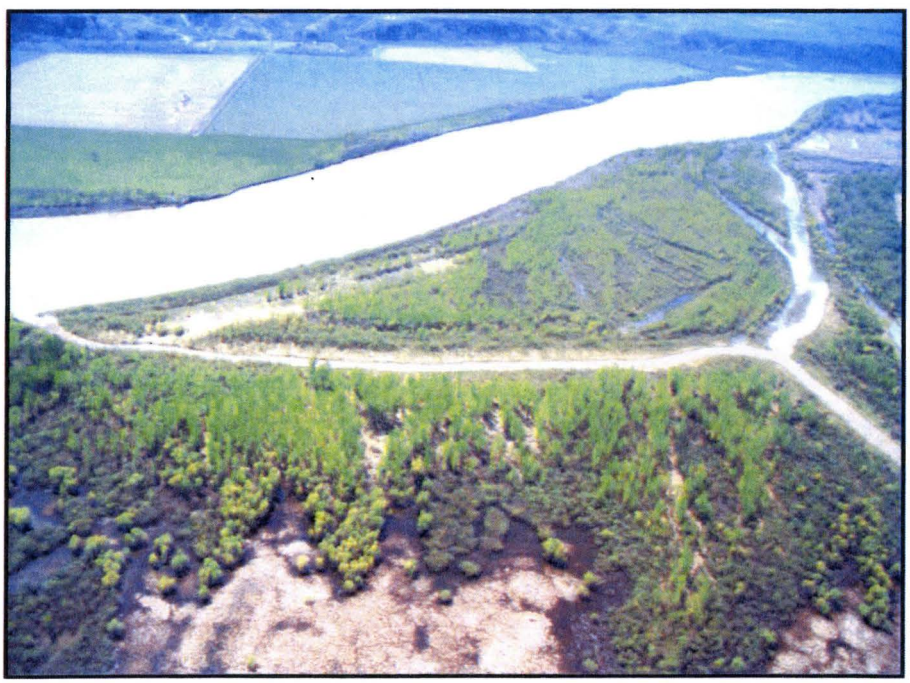
ORDINARY HIGH WATER MARK DELINEATION

OF THE

YELLOWSTONE RIVER
AND
MISSOURI RIVER
(FROM ND/MT BORDER TO WILLISTON, ND)

IN WESTERN NORTH DAKOTA

NOVEMBER 2010



Prepared for:
STATE OF NORTH DAKOTA

Prepared by:

BARTLETT & WEST & McCain and Associates. Inc.

water levels subsided. Once the river flows returned to near normal conditions, the crew remobilized and the field work resumed.

III. BACKGROUND

The OHWM is a legal definition of a physical feature found on the landscape. However, since most rivers are dynamic the location of their channels can meander and therefore, the OHWM can fluctuate over time. Over a period of years the OHWM can move, sometimes suddenly and abruptly (avulsion), but often times it moves more slowly and subtly (accretion). This project was completed with the understanding that this was a snapshot of the current OHWM for these two river systems as existed in the summer/fall of 2009. The OHWM is a transition zone between the aquatic and terrestrial environments. In some instances this transition occurs in a narrow stretch such as along a steep embankment that can be easily identified. In other cases, it can be a broad and gradual change, such as one would find on an alluvial plain, which can be difficult to interpret and requires a detailed and intensive onsite ecological review. The work completed under this contract was to delineate the OHWM and is not a final legal determination as to whether any specific property is "sovereign land".

As defined in the North Dakota Administrative Code *(NDAC 89-10-01-03)*, Ordinary High Water Mark means "that 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." For this Project, "...predominantly wetland species..." meant that greater than 50% of the vegetation was composed of wetland species under the methodologies established by the *"Ordinary High Water Mark Delineation Guidelines"* published by the ND OSE in 2007.

The North Dakota Supreme Court (*State ex rel. Sprynczynatyk v. Mills, 1999 ND 75, ¶ 13, 592 N.W.2d 59)* 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 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 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." Areas below the OHWM may have vegetation suitable for grazing but wetland vegetation capable of being grazed is not an "ordinary agricultural crop".

In order to facilitate the field assessment and maintain a tight schedule, it was decided to delineate the OHWM by accessing each transect location from the river by utilizing a boat and handheld GPS units. This allowed the delineation team to easily travel from one transect location to another and from one side of the river to the other. The 2007 "*Ordinary High Water Mark Delineation Guidelines*" state the OHWM delineation should begin on the uplands and proceed along a transect towards the water until the vegetation is predominantly wetland vegetation. By working from the water to the uplands rather than from the uplands to the water, it was imperative that the delineators traverse inland as far as necessary to properly delineate the OHWM, so as not to miss any back channels or backwater areas that could be below the OHWM.

Once this upper reach location was identified and accessed, the delineator then began working their way back to the river while identifying upland and wetland dominant vegetative species. As soon as the delineator identified the presumed OHWM boundary by locating the 50/50 transition point along the transect, the 1-meter by 1-meter quadrat was placed on the ground and the delineator could then begin filling out the delineation data form. A delineation data form was filled out for each OHWM point on each transect location. The delineator identified and recorded the dominant vegetative species and their percentage composition in the plant community, along with other features indicative of the OHWM including soil formation changes, erosion features, and sediment and wrack deposits. When necessary a Registered Professional Soil Classifier was on site to evaluate the soil properties and identify hydric soils.

Vegetation Sampling Procedure

Quadrat

The presence or lack of certain vegetative species was the primary tool used to locate the OHWM for this project. Canopy cover of existing vegetation is estimated using a 1 x1 meter quadrat. The quadrat is color-coded to indicate position relative to the river, i.e., blue side is always placed towards the river, the green side upland, the pink side upstream and the white side, downstream. Each side of the quadrat is marked in thirds to enable visualization of nine sub-quadrats (discussed below).

Transects perpendicular to and towards the river are traversed to identify the transition from predominantly upland vegetation to wetland vegetation. The quadrat is placed with the upper edge at the "line" between predominantly wetland vegetation and upland vegetation.

Vegetation Measurements

Plant species in each quadrat are categorized by strata as defined by the North Dakota State Engineer Ordinary High Water Mark Delineation Guidelines (2007). Species

dominance is measured as specified in the US Army Corp of Engineers (COE) 1987 guidelines (Table 1).

Table 1. Vegetation Strata and Dominance Measure

Strata	Definition	Measure to Determine Dominance
Tree	≥5 inches DBH[1] and >20 feet in height	Basal cover
Sapling	0.4-<5.0 inches DBH and >20 feet in height	Height
Shrub	Woody plants 3-20 feet in height, often multi-stemmed	Height
Herbaceous	Grasses, sedges, ferns, forbs and woody seedlings <3 feet in height	Cover
Woody Vine	Woody climbing plants, such as wild grape, etc.	Number of stems

[1]DBH is defined as diameter at breast height, where height is equal to 4.5 feet from the ground

Dominant species in each stratum within the quadrat is derived by estimating absolute cover. The 50/20 rule is then used to measure dominance within each stratum. Species within each stratum are ranked in descending order of cover, until the cumulative cover exceeded 50%. These species qualify as a dominant species. If additional species alone exceed 20% cover, they also qualify as a dominant species.

Dominant species are assigned indicator status as defined by the COE (1987). Total absolute cover of dominant species with indicator status of obligate wetland (OBL), facultative wetland (FACW), and facultative (FAC) plants are added to determine the percentage of dominant wetland species. The relative percentage of wetland to terrestrial vegetation is then calculated. Quadrats with >50% relative cover wetland species (OBL, FACW and FAC) is defined as predominantly wetland.

Weekly Sample Verification

To ensure both accuracy and precision, field delineation personnel met each week to review methodologies. Three quadrats were sampled to determine wetland dominance. Field personnel sampled each frame independently. Quadrats were marked into nine sub-quadrats and the percentage of wetland vegetation was estimated within each sub-sample. Quadrats in which five of nine sub-quadrats were dominated by OBL, FACW and FAC plants, were classified as wetland dominated. Sampling results were compared to ensure consistency in sampling procedures between individual delineators.

17.0159.06012

FIRST ENGROSSMENT

Sixty-fifth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2134

Introduced by

Senators Armstrong, Bekkedahl, Unruh

Representatives Bosch, Longmuir, Porter

A BILL ~~for an Act to create and enact a new section to chapter 54-01 of the North Dakota Century Code, relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.~~ for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

~~**SECTION 1.** A new section to chapter 54-01 of the North Dakota Century Code is created and enacted as follows:~~

~~**Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.**~~

~~Unless the state has explicitly transferred ownership of the minerals, the state of North Dakota owns the minerals in and under the Missouri riverbed within state borders, including segments of the riverbed which were artificially inundated as a result of constructing dams pursuant to the Pick-Sloan Missouri basin project. The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark from the northern boundary of the Fort Berthold reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the northern boundary of the Standing Rock Indian reservation to river mile marker one thousand three hundred three. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation are excluded from this section and must be determined under federal law. The state holds no claim to any minerals above the~~

~~ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. For the purposes of this section, "historical Missouri riverbed channel" means the Missouri riverbed channel as delineated by the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe. This section does not affect the authority of the state engineer to regulate the Missouri riverbed or waters of the state provided the regulation does not affect ownership of minerals in and under the riverbed or lands above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.~~

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.
2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.
3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.
4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

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

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.
2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.
3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and

convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

b. The historical records of the army corps of engineers pertaining to the corps survey;

c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public meeting to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public meeting on the review.

7. After the public meeting, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within one year of the effective date of this Act, any suspended or escrowed royalty proceeds held by operators or the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be

necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

1A
3-24-17
SB 2134

Amendments adopted by the subcommittee to 17.0159.06012:

1. Page 5 of the markup:
   Change "public meeting" to "public hearing" in subsections 6 and 7 of section 61-33.1-03.

2. Page 5 of the markup:
   Change the deadline for implementation in subsection 1 of section 61-33.1-04 to be "within six months after the final review findings are adopted" instead of "within one year of the effective date of this Act".

3. Page 5 of the markup:
   Change subsection 1 of section 61-33.1-04 so the Board of University and School Lands will release the proceeds to operators, who will in turn distribute the proceeds to the owners. This is because the operators likely have better information on who the owners are.

4. Page 5 of the markup:
   In subsection 1 of section 61-33.1-04, change "any suspended or escrowed royalty proceeds" to "any proceeds".

1B
3-24-17

ESTIMATED FISCAL IMPACT - SENATE BILL NO. 2134

The schedule below provides information on the 2017-19 biennium estimated fiscal impact of Engrossed Senate Bill No. 2134 with proposed amendments (LC# 17.0159.06012).

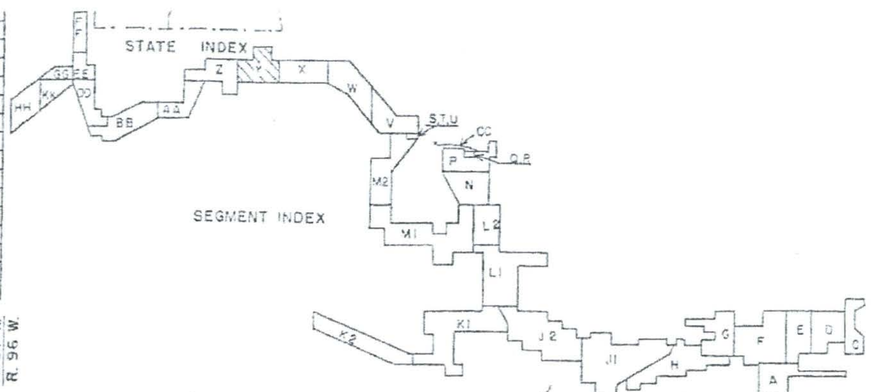
2017-19 Biennium Estimated Fiscal Impact Summary - Senate Bill No. 2134	
	Amounts (In Millions)
Total estimated impact	
Estimated impact - Proposed amendments to Senate Bill No. 2134 (LC# 17.0159.06012)	$211.3
Less: Disputed minerals held in escrow at the Bank of North Dakota[1]	(18.7)
Remaining estimated impact to the strategic investment and improvements fund	$192.6
Potential appropriations from the strategic investment and improvements fund	
Refunds of oil and gas lease bonuses and rents	$87.7
Refunds of royalties collected prior to the 2017-19 biennium	69.3
Refunds of royalties collected during the 2017-19 biennium[2]	35.6
Total potential refund appropriations	$192.6
Less: Funds available from the assigned fund balance[3]	(142.3)
Remaining appropriations from the unobligated balance	$50.3
Add: Appropriation for survey	0.8
Total potential appropriation from the unobligated balance	$51.1

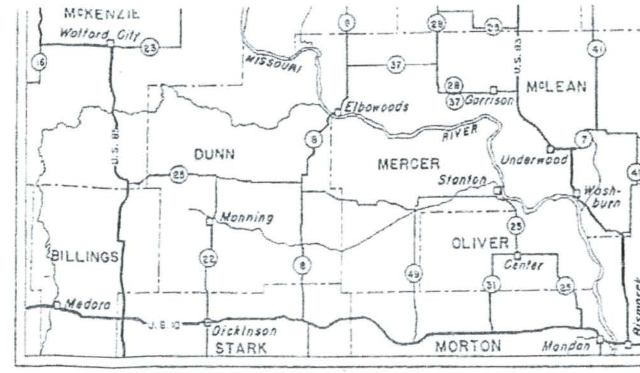
[1]Approximately $60.8 million of disputed mineral revenue payments are held in escrow at the Bank of North Dakota, of which $18.7 million relate to disputes addressed in the provisions of Senate Bill No. 2134, $30.6 million relate to disputes on reservation lands, and $11.5 million relate to other mineral revenue payment disputes.

[2]Depending on the timing of the implementation of the provisions of Senate Bill No. 2134, some or all of the 2017-19 biennium royalties may be paid to the strategic investment and improvements fund, which would require appropriation authority to refund. After the implementation of the provisions, the royalties would be paid to mineral owners.

[3]All of the funds currently in the assigned fund balance in the strategic investment and improvements fund are available to be appropriated. However, other available funds would need to be assigned within the strategic investment and improvements fund to reflect an obligation of $41.8 million relating to mineral disputes on reservation lands.

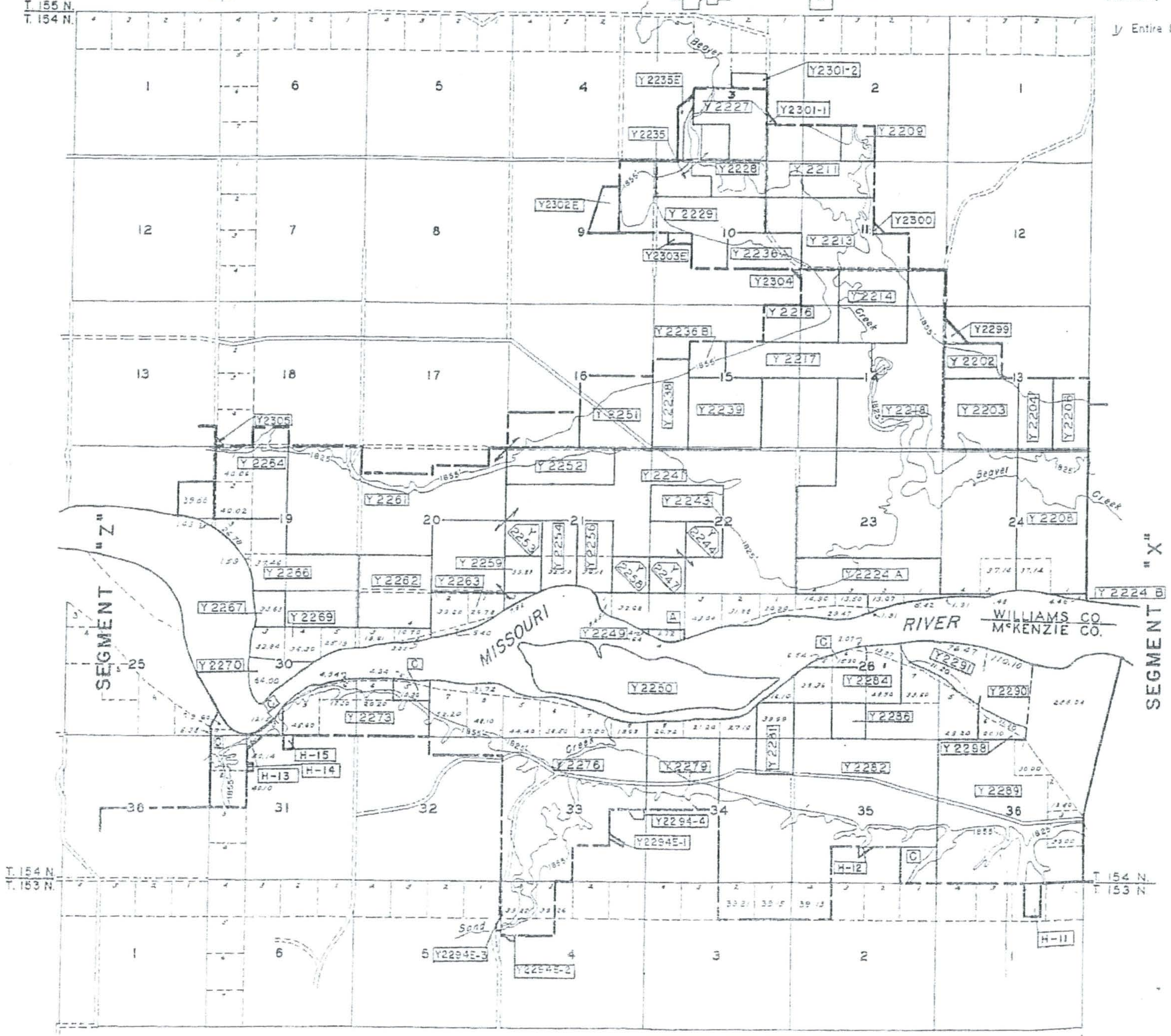
	SCRENSON, ET UX	3.13	
	RICULTURE, FOREST SERVICE		see remarks





VICINITY MAP WITH SEGMENT INDEX

1/ Entire 65.00 Acres Easement merged into fee. Tract Y-2235.



Y 2237	DELETED		
Y 2201	DELETED		
Y 2202	DANIEL T. McCARTHY	60.00	
Y 2203	HAAKON M. HOVE, ET UX	160.00	
Y 2204	EDDIE SANDERSON, ET UX	80.00	
Y 2293	DELETED		
Y 2206	MYRTLE SANDERSON	80.00	
Y 2207	DELETED		
Y 2208	RUDY BARSTAD, ET UX	317.14	
Y 2209	WOODROW SVEEN	40.00	
Y 2294-1	DELETED		
Y 2211	ALBERT A. JOHNSON	200.00	
Y 2212	DELETED		
Y 2294-2	DELETED		
Y 2213	AUGUST MATTSON	240.00	
Y 2214	HERMAN MILES ZAHL	160.00	
Y 2294-3	DELETED		
Y 2216	EUGENE F. PARKER	120.00	
Y 2217	JOHN AUGUST PETERSON	160.00	
Y 2218	CLARA CARTER	1157.14	
Y 2219	DELETED		
Y2295	DELETED		
Y 2221	DELETED		
Y 2222	DELETED		
Y 2223	DELETED		
Y 2224	ELMER HENDRICKSON		
	PARCEL 'A' 182.79 PARCEL 'B' 4.46	187.25	
Y 2226	DELETED		
Y 2227	ROSA KAMP	120.00	
Y 2228	ELLEN HARTSOCH	87.50	
1/ Y 2228E	DELETED (NOW KNOWN AS Y2235)		–
Y 2229	WALTER S. FERGUSON	240.00	
Y 2231	DELETED		
Y 2232	DELETED		
Y 2233	DELETED		
Y 2234	DELETED		
Y 2297	DELETED		
Y 2236	HAROLD S. NELSON		
	PARCEL 'A' 80.00 'B' 40.00	120.00	
Y2298	DELETED		
Y 2238	B. P. MURPHY	100.00	
Y 2239	E. L. GUNDERSON	160.00	
Y 2299	ARVEY J. HARTSOCH, ET UX	6.82	
Y 2241	BRUNO H. WEYRAUCH, ET UX	1322.04	
Y 2242	DELETED		
Y 2243	MARGARET M. FLICK	80.00	
Y 2244	CLARA CARTER	40.00	
Y 2300	CRAIG A. HARTSOCH, ET UX	1.03	
Y 2246	DELETED		
Y 2247	G. E. PETTERS	40.00	
A	U.S.A. DEP'T OF INTERIOR	see remarks	
Y 2249	WILLIAMS COUNTY, NORTH DAKOTA	.64	
Y 2301-1	WALTER C. KAMP, ET UX	1.40	
Y 2251	STATE OF N. DAK.	160.00	
Y 2252	EVA BROWNELL ESTATE	120.00	
Y 2253	LILLIAN E. HAGEN	40.00	
Y 2254	HAL S. DAVIES	72.52	
Y 2301-2	WALTER C. KAMP, ET UX	13.64	
Y 2256	MILDRED H. REED, ET AL	76.18	
Y 2257	DELETED		
Y 2258	WALTER C. KAMP	40.00	
Y 2259	A. R. HEALEY	39.88	
Y 2302	DELETED		
Y 2261	J. G. HOVE ET UX	530.00	
Y 2262	MRS. DOROTHY WHEELER	160.00	
Y 2263	J. C. BOLINGER, TRUSTEE	75.78	
Y 2264	ELLEN HARTSOCH	180.08	
Y 2303	DELETED		
Y 2266	VERNON KNOX	306.94	
Y 2267	MRS. WINIFRED I. WEISS	33.63	
Y 2304	ROGER BAKER, ET UX	0.72	
Y 2269	BRUNO H. WEYRAUCH, ET UX	127.99	
Y 2270	BRUNO H. WEYRAUCH, ET UX	64.00	
Y 2235E	VIRGIL A. HARTSOCH, ET UX		10.82
Y 2303E	BEAVER CREEK FREE LUTHERAN CONGREGATION		6.43
Y 2250	STATE OF N. DAK.	186.66	
Y 2271	DELETED		
Y 2272	DELETED		
Y 2273	SHANNON WALTER, ET AL	208.54	
Y 2274	DELETED		
Y 2276	R. J. COUGHLIN	91[illegible].60	
Y 2277	DELETED		
Y 2278	DELETED		
Y 2279	JOSIE PETERSON COX, ET AL	160.00	
Y 2305	VIRGIL HARTSOCH, ET UX	0.46	
Y 2281	ELVA ANNA GABBERT, ET AL	79.99	
Y 2282	CARRIE MENDENHALL	1200.51	
Y 2283	DELETED		
Y 2284	CARRIE MENDENHALL	157.63	
Y 2302E	FRED FERGUSON		32.60
Y 2286	JULIA M. BJORKLUND	40.00	
Y 2287	DELETED		
Y 2288	ANNA THOMPSON MEHLUM	21.30	
Y 2289	STATE OF N. DAK.	855.44	
Y2290	ANNA THOMPSON MENLUM	110.10	
Y2291	CARRIE MENDENHALL	76.47	
C	U. S. A. (DEP'T. OF AGR.)	see remarks	

TRACT	REMARKS
A	Transferred 25 Feb. 1955, Public Land Order No. 1078, acreage included in tract register of segment A.
C	Transferred 10 March 1954, Executive Order No. 10520, acreage included in tract register of Segment W
Y2228E	Perpet'l. Flowage Easm't. from 27 Feb. 1956. (Entire acreage merged into fee Tract Y-2235)
Y2291	Formerly part of Tract No. Y2290

STATE NORTH DAKOTA
COUNTY McKENZIE & WILL
DIVISION MISSOURI RIVE
DISTRICT GARRISON
TO OMAHA DISTRICT 1 APRIL 1960
LOCATION OF DAM SEC. 5 T. 146 N. R
10 MILES S OF GAR
15 MILES N OF STA

SEGMENT Y
— LAND AREA —

TOTAL ACRES IN SEGMENT

ACRES FEE

ACRES EASEMENT

ACRES TRANSFERRED TO W.D.

ACRES PERMITS OR LICENSES

2/ Total does not include 65.00 acres Eas

— DISPOSALS —

TOTAL ACRES DISPOSED OF

ACRES TRANSFERRED

ACRES LEASED FROM W.D.

ACRES OTHERWISE

— LEGEND —

BOUNDARY MARKER (BRASS CAP)
TAKING LINE FOR RESERVOIR
PERTINENT CONTOUR LINES
CEMETERY
STATE OR PROVINCE LINES
COUNTY LINE
TOWNSHIP LINE
SECTION LINE
PROPERTY LINE
STREAMS
RAILROADS
POWER LINES
TELEPHONE LINES
IMPROVED ROADS
UNIMPROVED ROADS

— SCALE — 2"=1 M
5280' 2640' 1320' 0 1/4 1/2

DEPARTMENT OF THE ARMY
OFFICE OF THE DISTRICT ENGI
GARRISON DISTRICT
MISSOURI RIVER DIVISION
REAL ESTATE

GARRISON DAM-LAKE SAKAKAW

SEGMENT Y

RECOMMENDED:
APPROVED: LT. COL. CORPS OF ENGINEERS
COMPILED: TRACED:

DATE	BY	REVISIONS
10-10-51	W.B.	Correct to date
3-13-52	W.B.	Correct to date
5-1-52	M.C.J.	Taking line change Y2201 (20.00 ac.) elimi
6-16-52	M.C.J.	Taking line change Y2202, 160.00 ac. to
3-14-52	M.C.J.	Taking line change Y2261, 720.00 ac. to

ACQUISITION AUTHORIZATION

Public Law No. 534, 22 Dec 1944
6th Ind. O.C.E. to M.R.D., dated 4 May 1950
Letter O.C.E. to Dept of Justice, dated 22 Dec. 1955
10th Ind. O.C.E. to M.R.D., dated 4 Nov. 1971

NOTE:
Oil and gas reserved in all fee tracts except Y2251.

THIS DRAWING HAS BEEN REDUCED TO ONE-HALF THE ORIGINAL SCALE

DATE	BY	REVISIONS	APPROVED
7-3-69	M.P.	Name of Project, added transfer	
9-29-70	R.E.P.	Revised Project Name	
12-9-77	P.L.P.	REVISED Y2303 TO EASEMENT	
1-26-78	P.L.P.	REVISED TRS. 2302, 2294-1, 2294-2, 2294-3 TO EASEMENT	
1-25-78	K.R.Y.	DELETED TRACT Y2302 AND ADDED TRACT Y2302E	
11-6-78	L.K.N.	Revised Acreage Trs. Y2294E-1, E-2, E-3	
5-25-62	H.A.Z.	Due to Final Audit	
9-12-55	M.C.J.	Taking line change Y2209, 60.00 ac. to 40.00	R.P.
1-9-53	M.C.J.	Taking line change Y2264, 240.08 ac. to 180.08	

NOTE:
Boundary lines of this segment were determined by deed descriptions, General Land Office Plats, and aerial photos.
Contours of 1850 m.s.l. and 1855 m.s.l. extend into tract Y-2294-4.

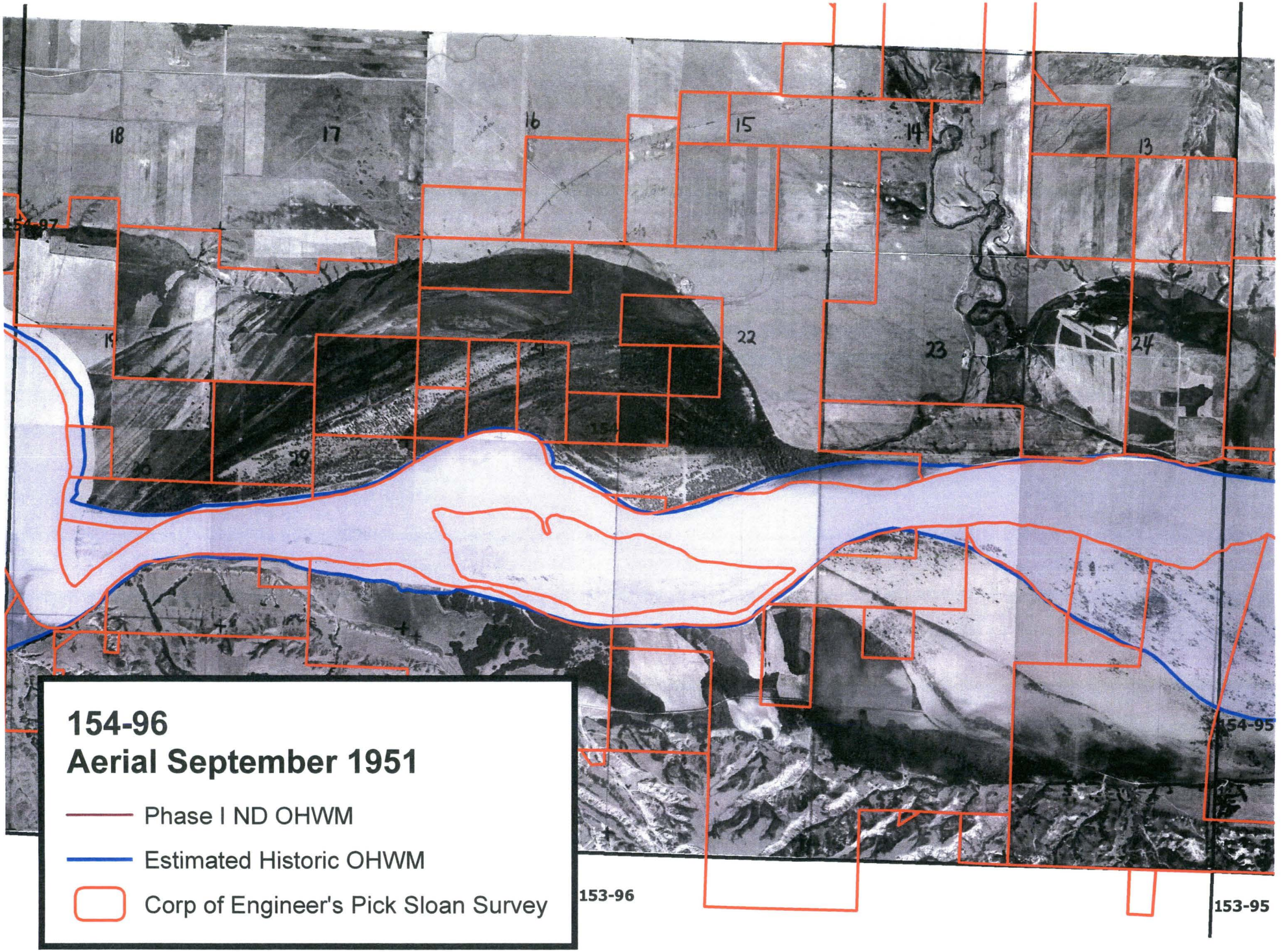
REMARKS

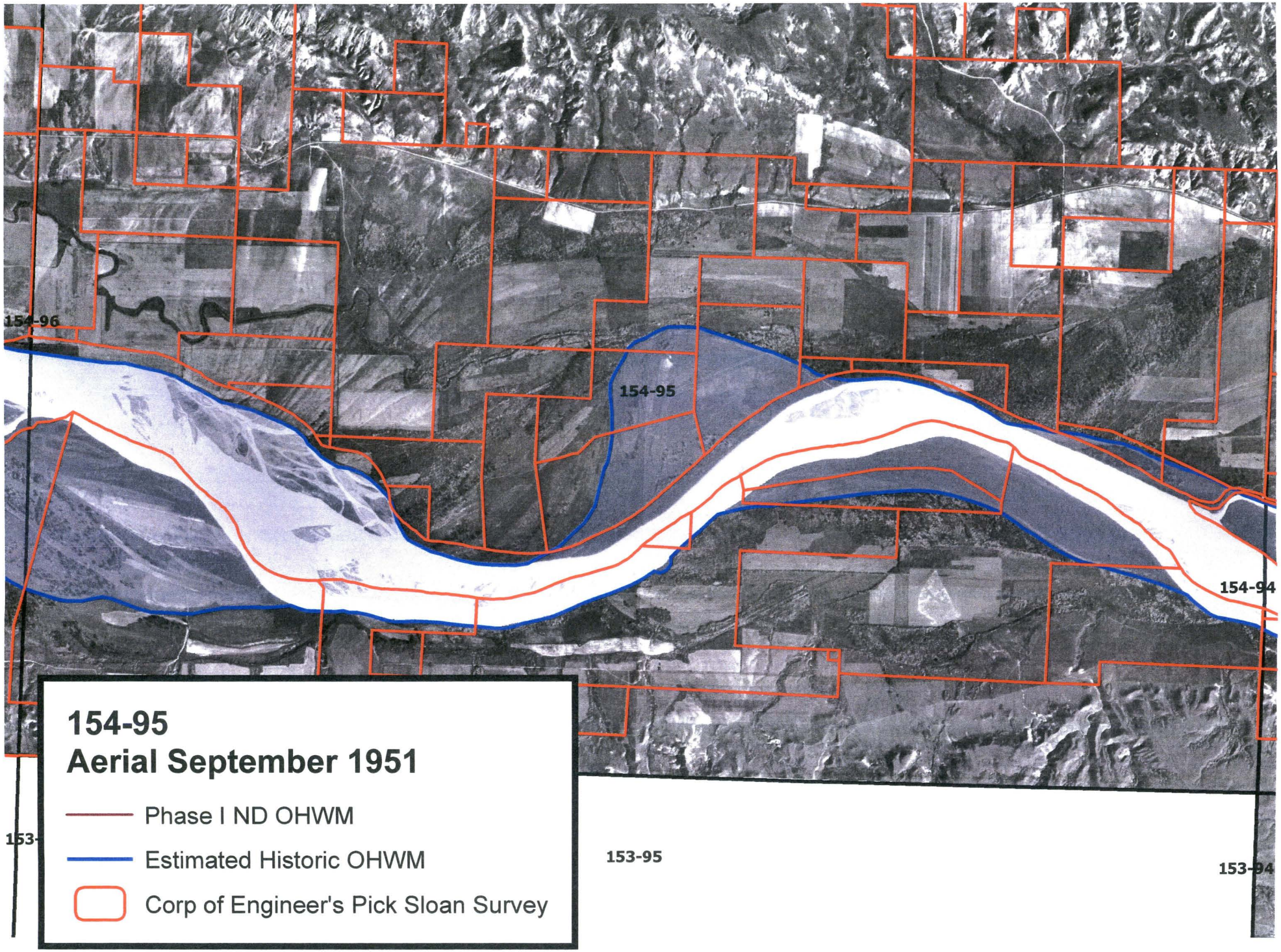
ge Easement from		8-10-77
"	"	12-12-78
"	"	7-20-78
"	"	12-20-80
"	"	"
"	"	"

tanding dtd. 6-29-79.
n Tract Register of Segment W.
ins Par H-11, 16.53 Ac., Par. H-12,
1.72 Ac., Par. H-14, 0.92 Ac., Par.

MICROFILMED	DATE	BY	REVISIONS	APPROVED
	6-30-86	D.A.	Revised up to date	
	4-15-88	WKD	Audit Revisions	

OFFICE, CHIEF OF ENGINEERS, WASHINGTON, D.C.
AUDITED


154-96
Aerial September 1951
Phase I ND OHWM
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey
153-96
154-95
153-95
18
17
16
15
14
13
22
23
24


154-96
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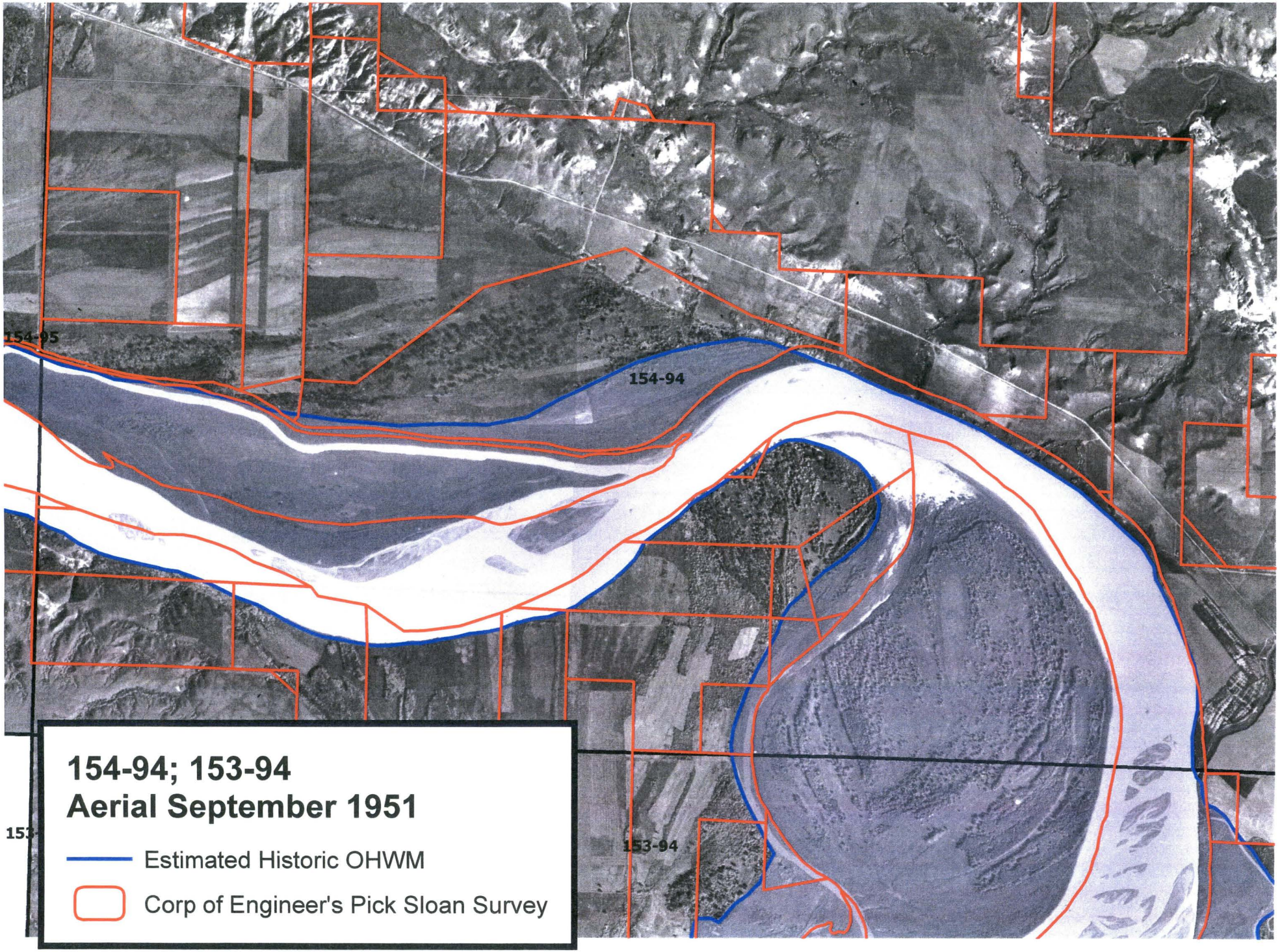
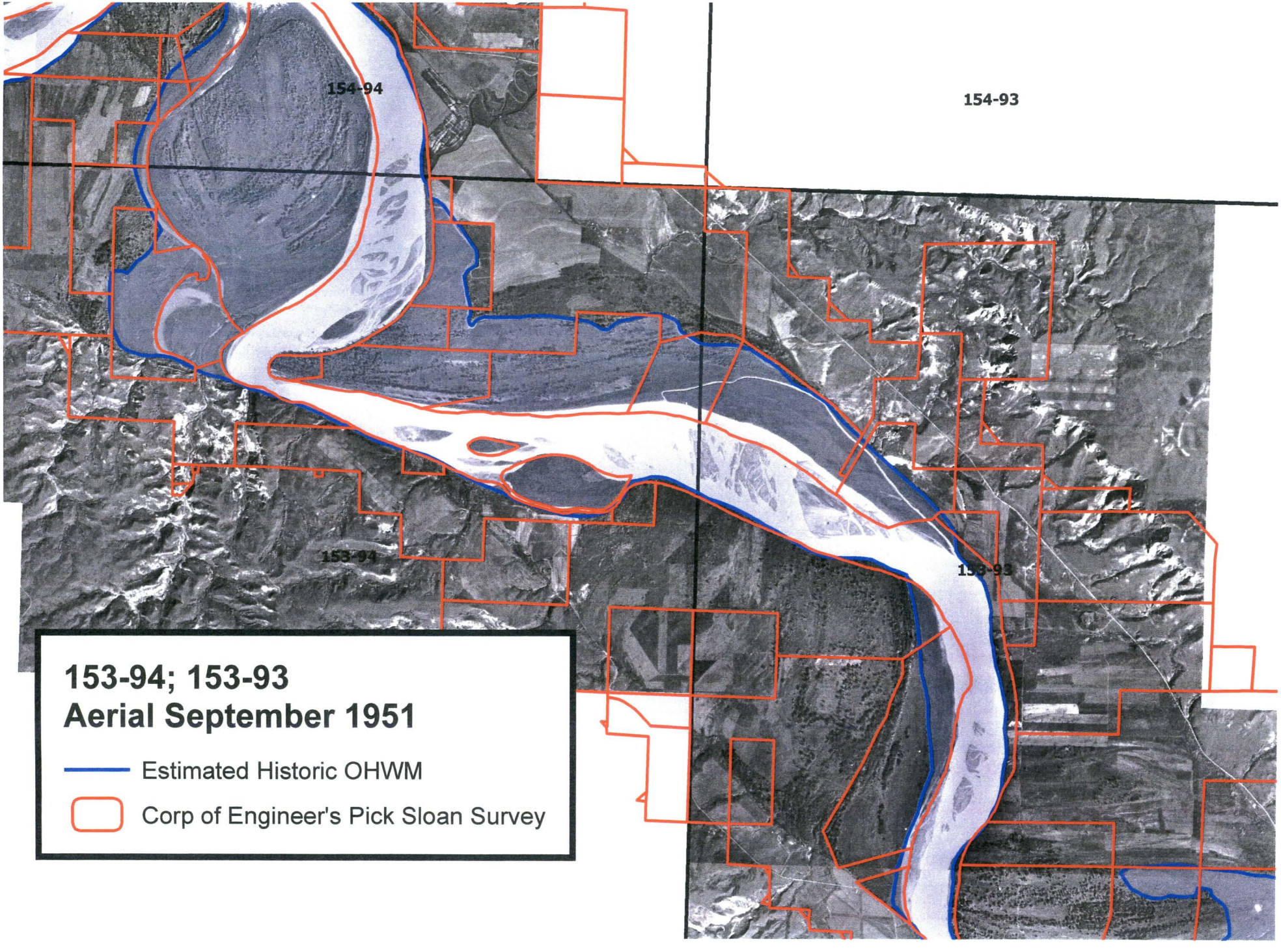
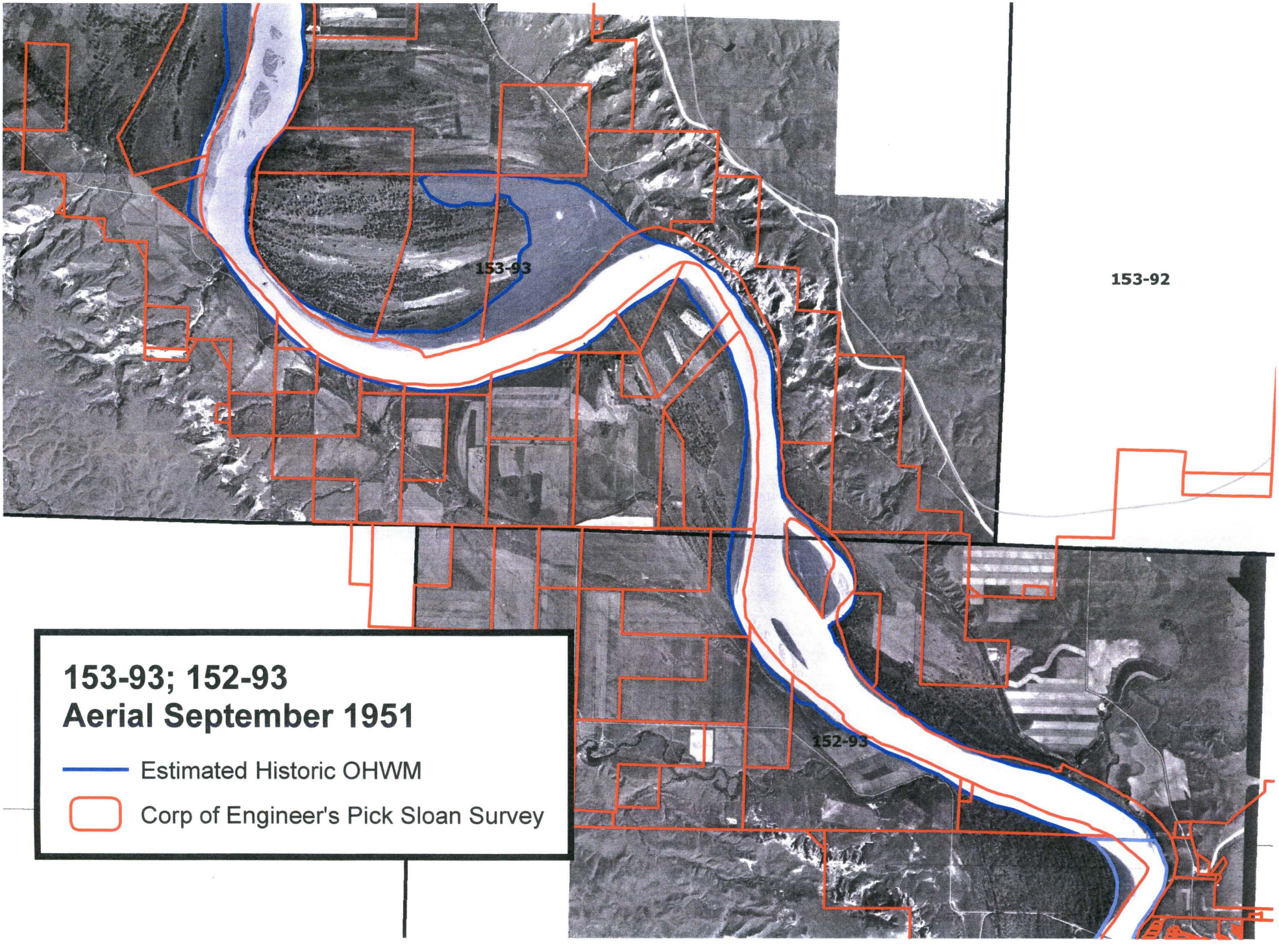
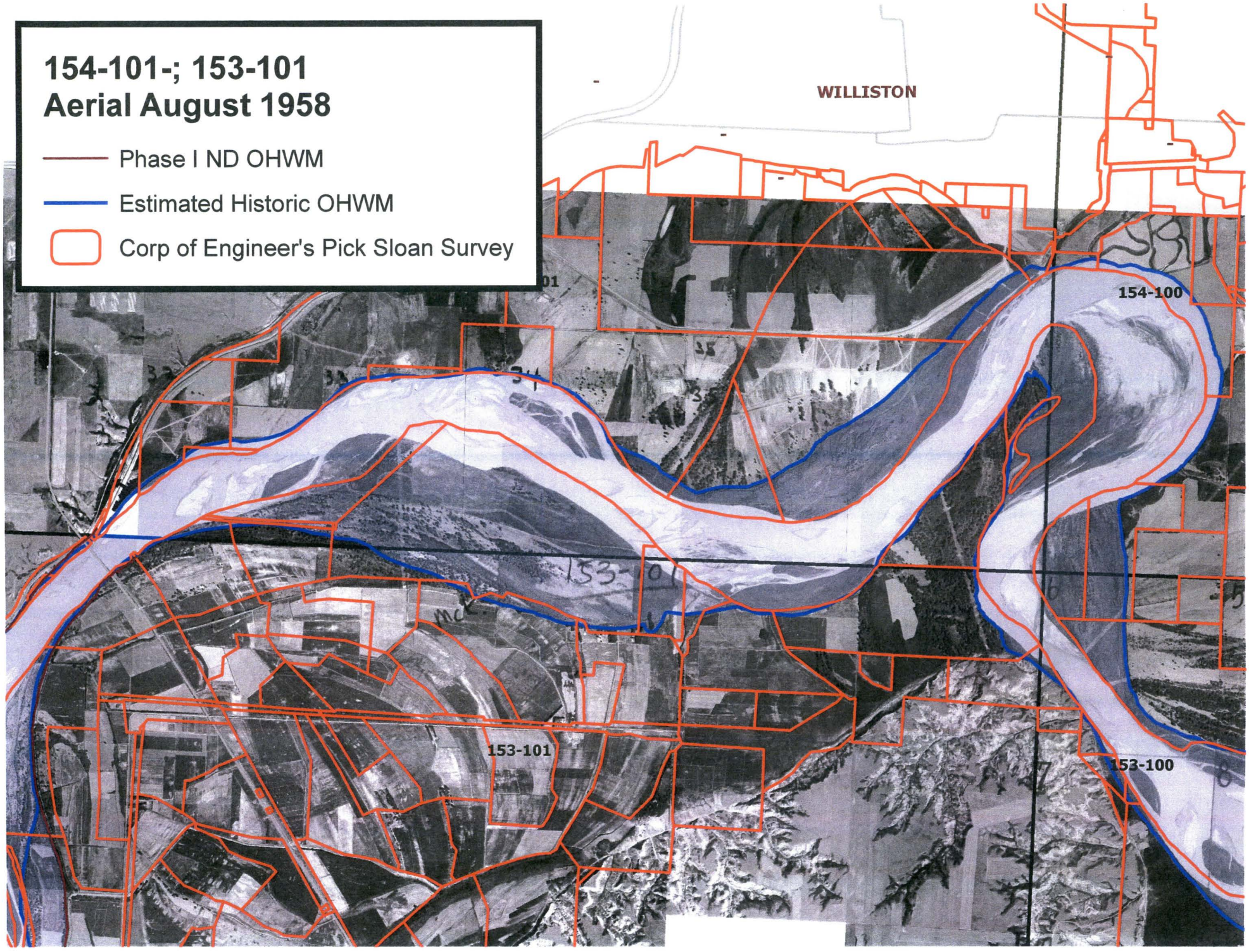
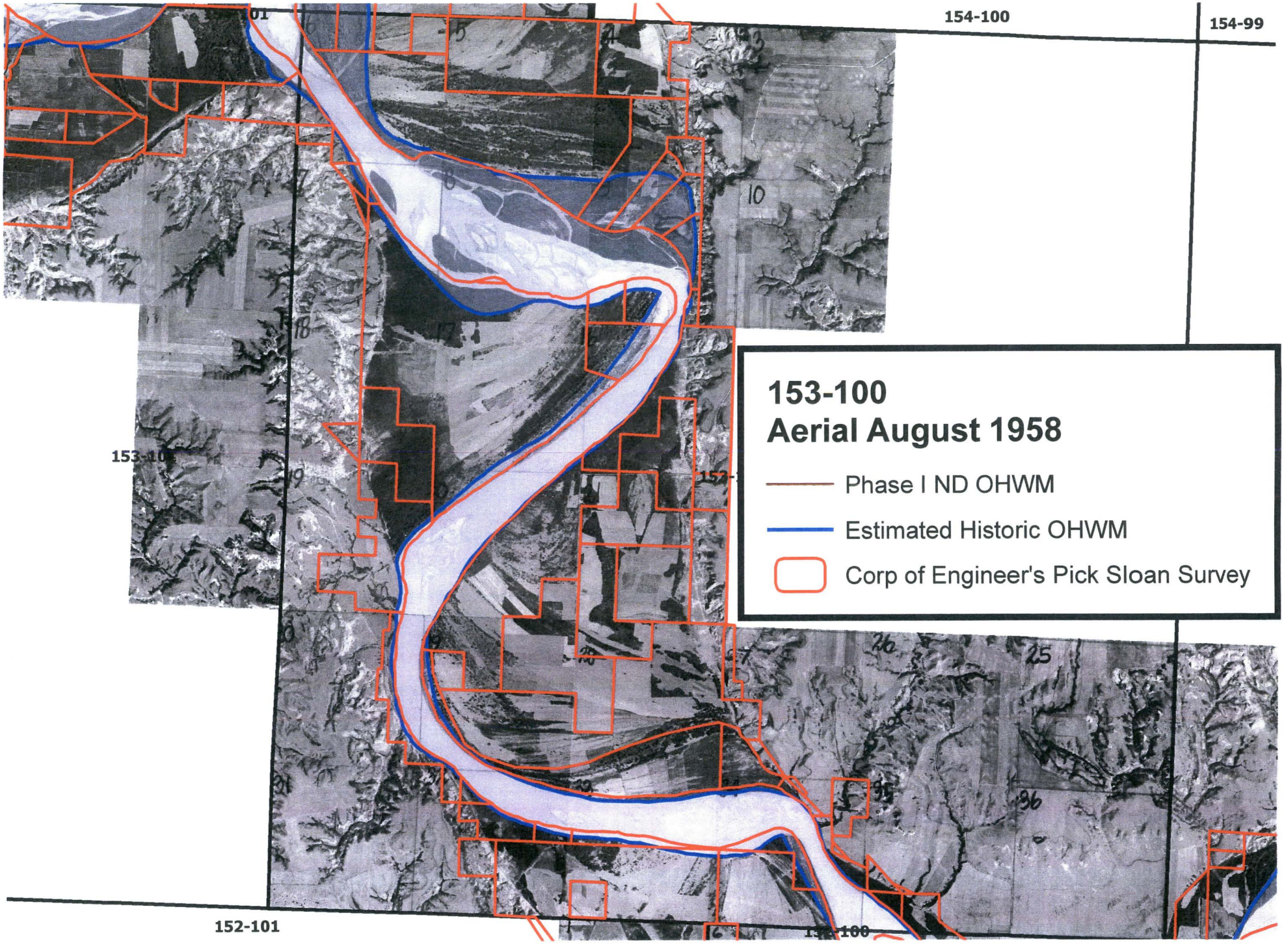
154-95
Aerial September 1951
Phase I ND OHWM
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey


154-95
154-94
153-94
154-94; 153-94
Aerial September 1951
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey


154-94
154-93
153-94
153-93
153-94; 153-93
Aerial September 1951
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey


153-93
153-92
152-93
153-93; 152-93
Aerial September 1951
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey


154-101-; 153-101
Aerial August 1958
Phase I ND OHWM
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey
WILLISTON
154-100
153-101
153-100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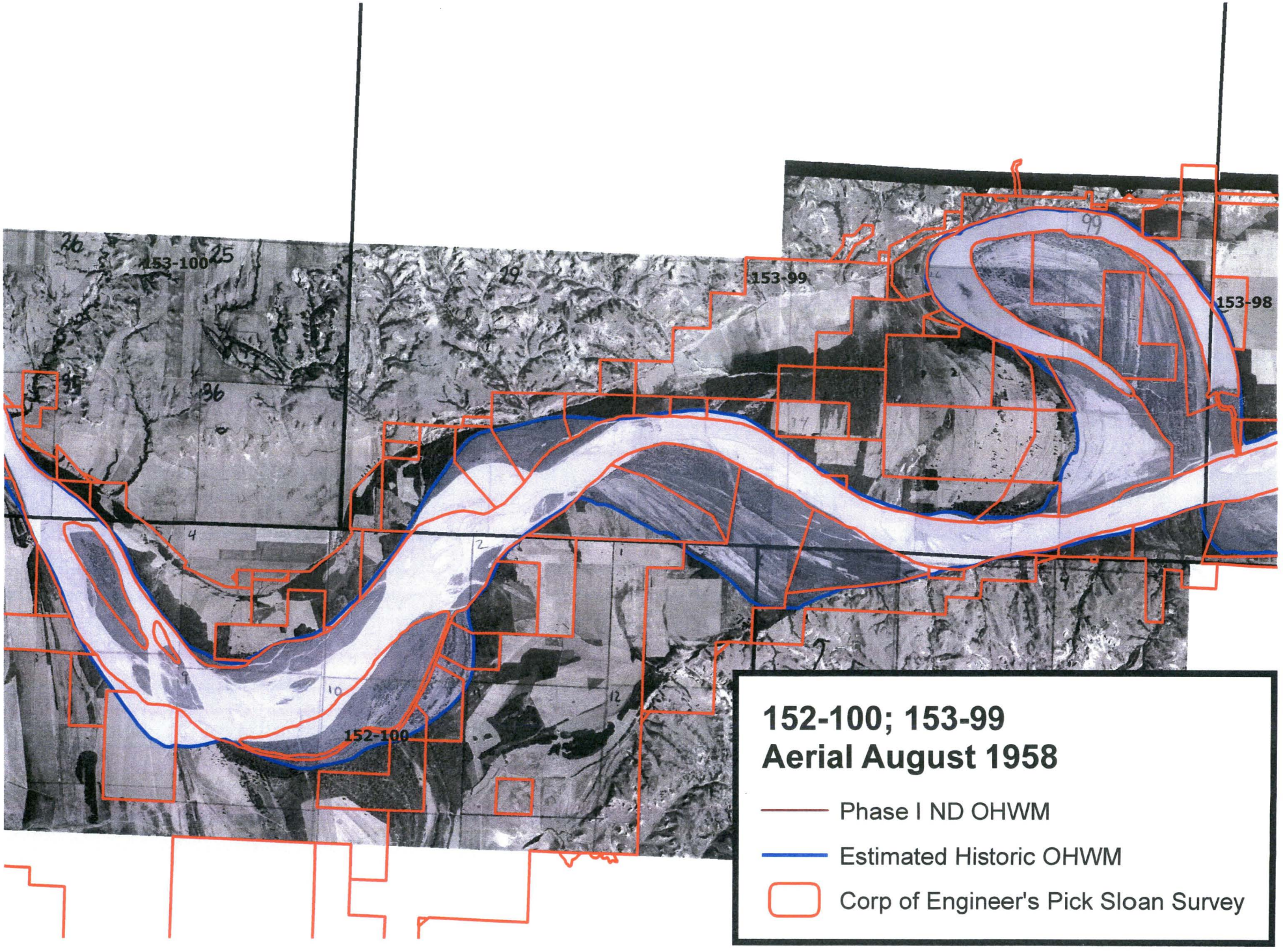
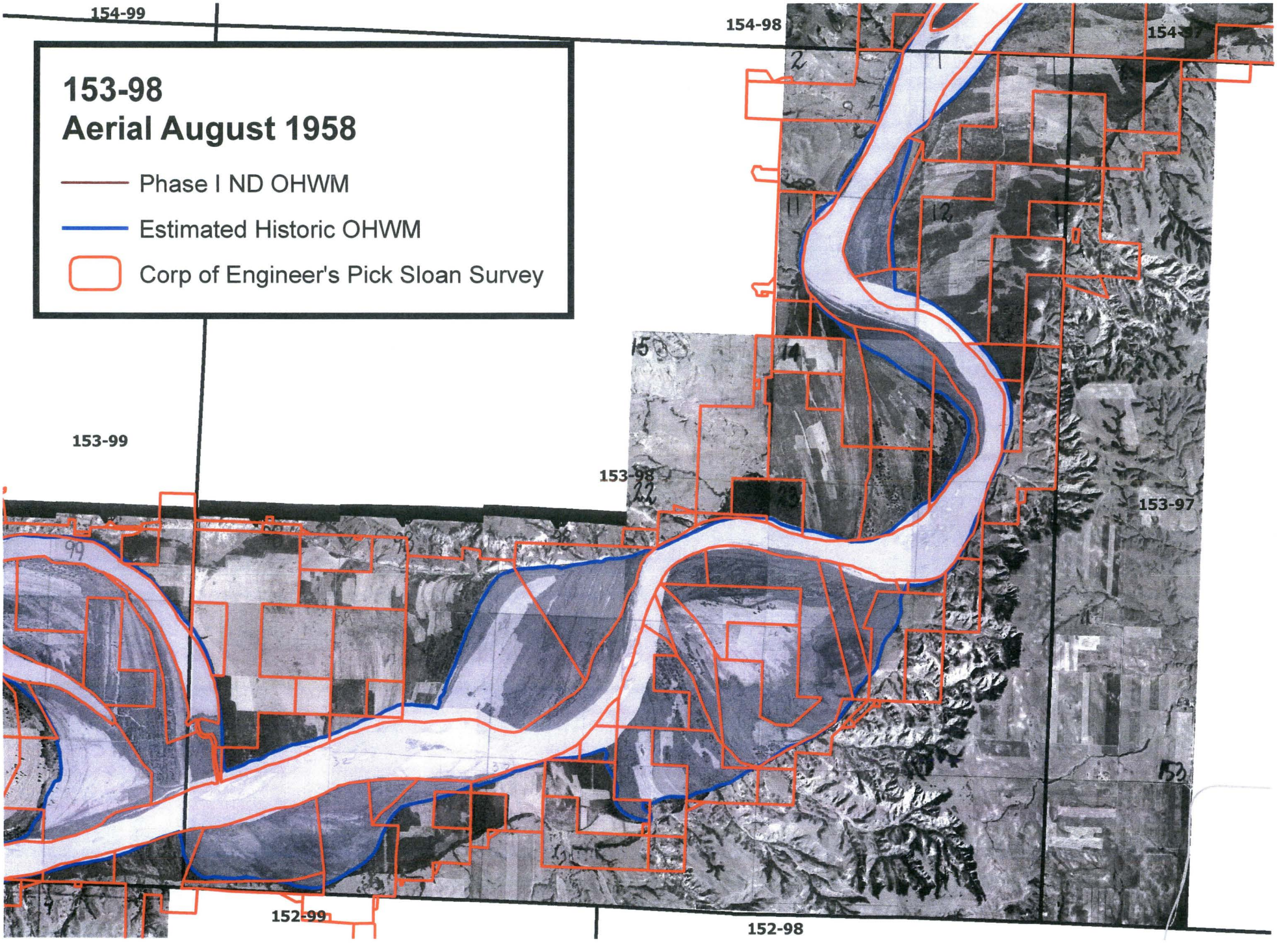
153-100
Aerial August 1958
Phase I ND OHWM
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey
152-101


153-100
153-99
153-98
152-100
152-100; 153-99
Aerial August 1958
Phase I ND OHWM
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey


154-99
154-98
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153-98
Aerial August 1958
Phase I ND OHWM
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey
153-99
153-98
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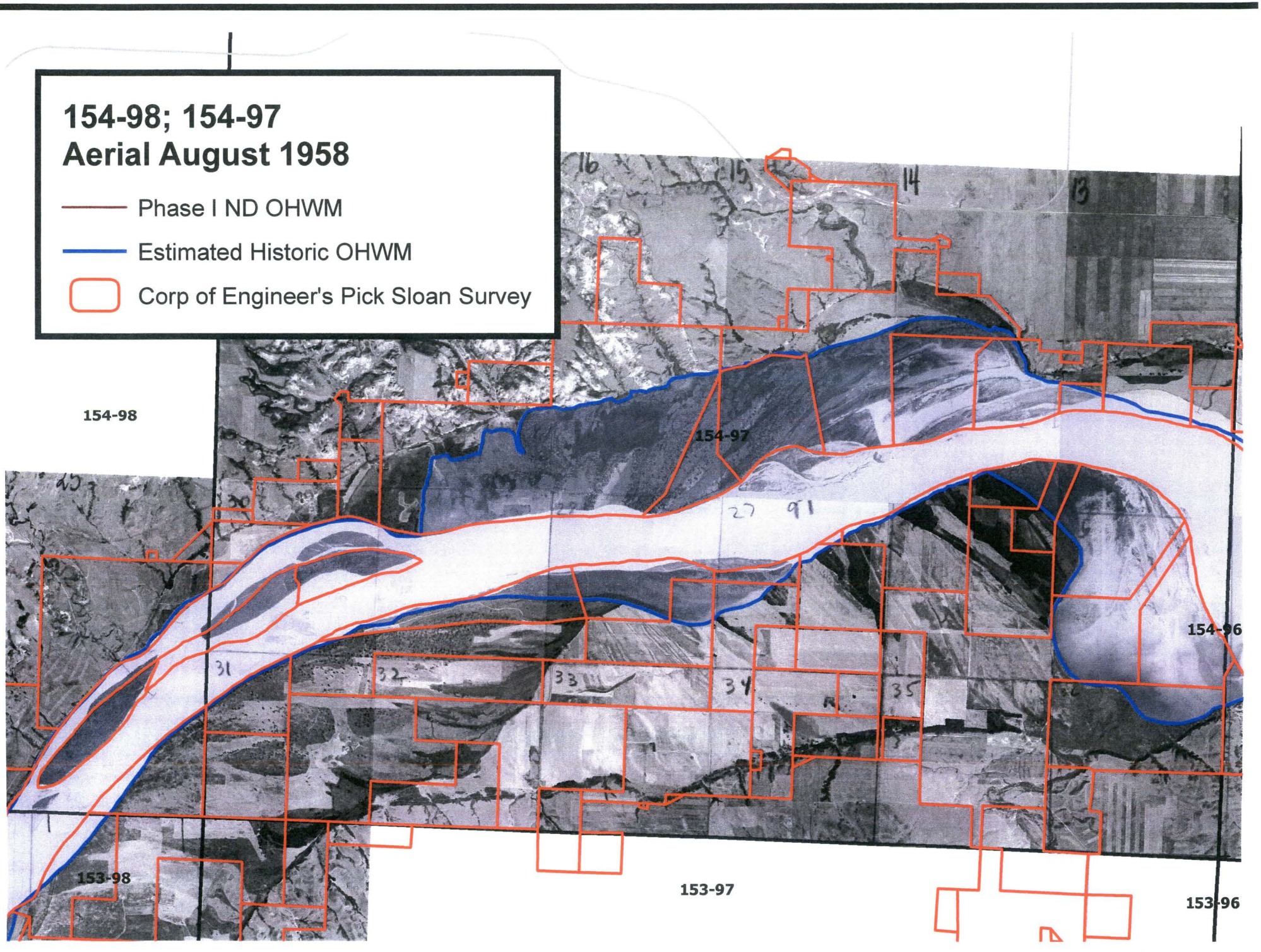
152-99
152-98


154-98; 154-97
Aerial August 1958
Phase I ND OHWM
Estimated Historic OHWM
Corp of Engineer's Pick Sloan Survey
154-98
154-97
154-96
153-98
153-97
153-96

att 1 SB 2134
3-29-2017

SENATE BILL NO. 2134

FIRST ENGROSSMENT WITH HOUSE AMENDMENTS

House Appropriations Committee

March 29, 2017

Craig C. Smith
Crowley Fleck, PLLP
Bismarck, ND 58501
www.crowleyfleck.com

CROWLEY FLECK PLLP
ATTORNEYS

TOPICS COVERED

- Equal Footing Doctrine—historical background
- Issues created by river movement
- State surveys and Corps survey
- Ownership conflicts due to overlapping surveys
- Senate Bill No. 2134 - amendments

Equal Footing Doctrine

- Original 13 colonies owned title underlying navigable tidal waters.
- 1842 U.S. Supreme Court held States retained title to bed of navigable rivers and water bodies.
- 1845 U.S. Supreme Court recognized "Equal Footing Doctrine" whereby as States entered the Union they acquired title to the beds of all navigable waters "upon equal footing, in all respects whatever…" with the original states to the Ordinary High Water Mark."

Equal Footing Doctrine

- State law controls ownership rights to beds of navigable waters up to the high water mark after the State joins the Union. *Barney v. Keokuk*, 94 U.S. 324 (1877).
- After joining the Union, States could elect to own up to the low or high water mark.
- North Dakota is a "high water mark" state. *Reep v. State*

Equal Footing Doctrine

- State law controls the determination of all subsequent river movement caused by accretion, erosion and avulsion.
- *Public Domain Lands Exception:* Federal law controls "where the Government has never parted with title and its interest in the property continues." *California v. United States, 457 U.S. 273 (1982).*

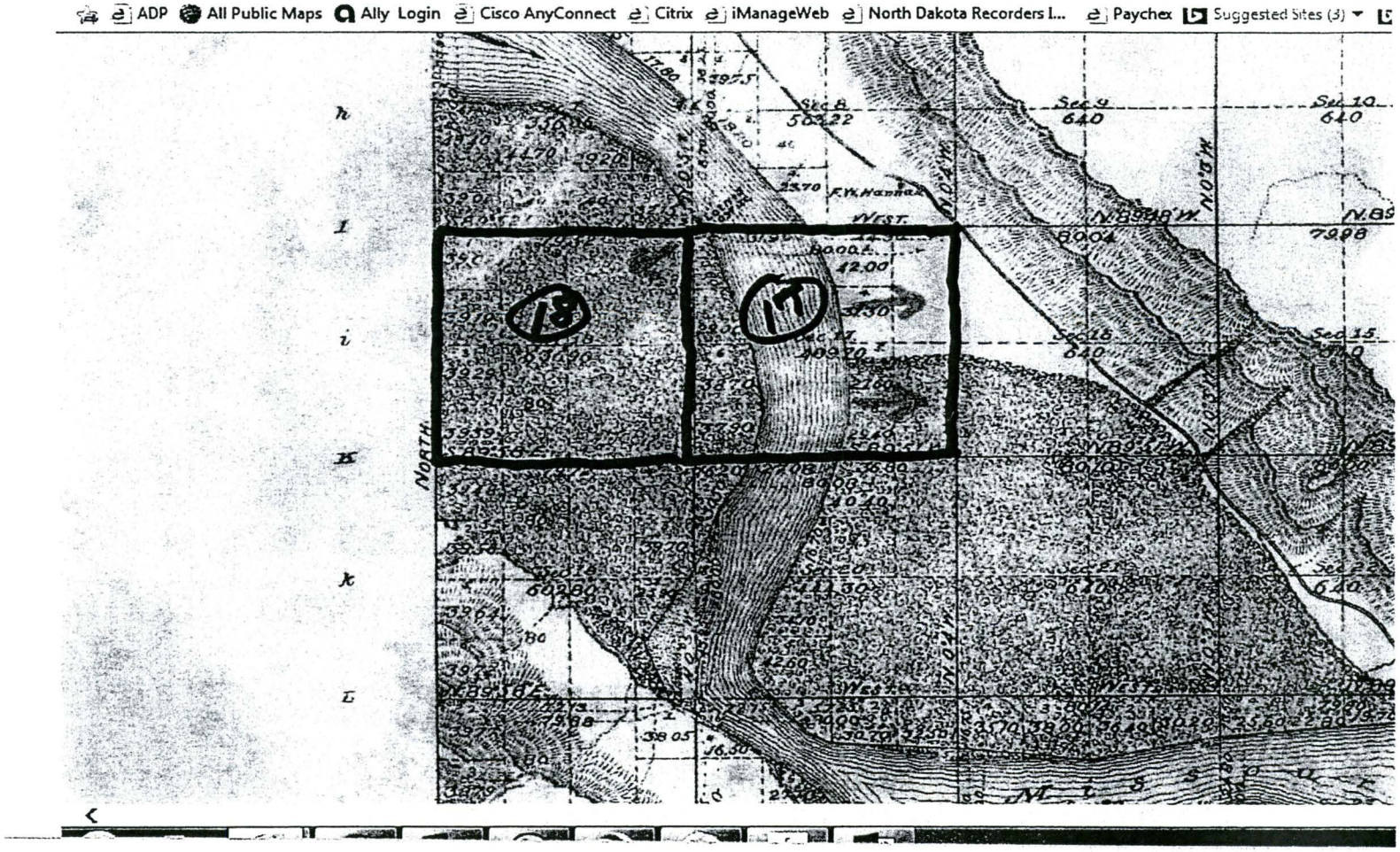
Ordinary High Water Mark

- High water mark is to be considered the mark of the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, **and destroy its value for agricultural purposes.**
- In low and flat lying areas, the line of demarcation may be more difficult to determine.
- "In such cases the effect of water upon vegetation must be the principal test in determining the location of high-water mark. 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 what may be termed an ordinary agricultural crop.

River Movement--Doctrines of Accretion, Erosion and Avulsion

- Accretions: gradual deposit and addition of soil along the bank of a river caused by gradual shift of river away from bank. Riparian owner takes title to additional land.
- Erosion: gradual loss of soil along a bank of a river caused by encroachment of water into eroding bank Riparian owner loses title by erosion.
- Avulsion: A sudden change in the river channel, typically where an oxbow is cut off and abandoned and a new channel formed. States take contrary positions on ownership rights affected by avulsion.

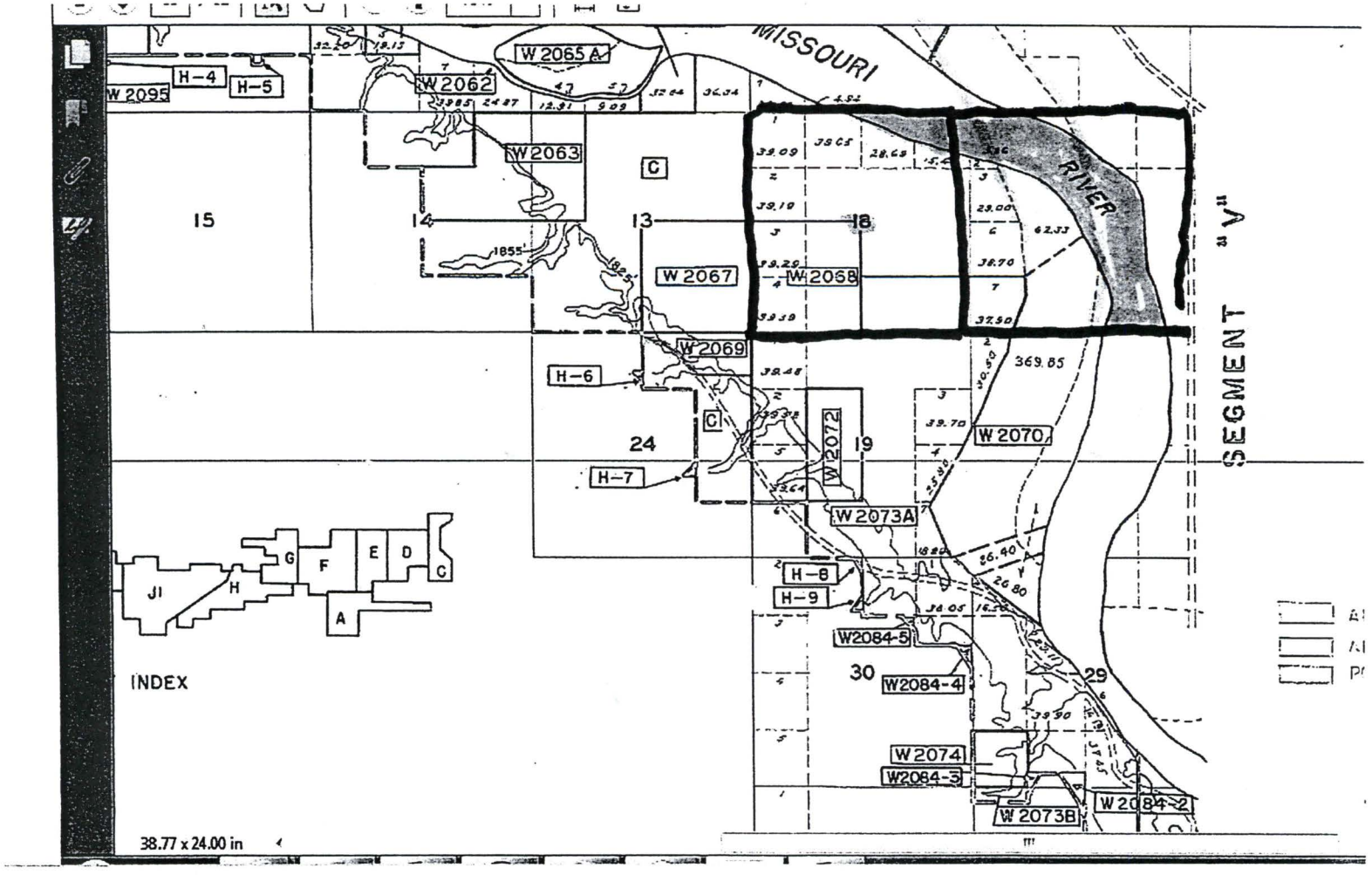
Location of River—original government survey 1896



State OHWM Surveys

- Phase 1: Montana state line to Highway 85 bridge based on current river conditions.
- Phase 2: Furlong Loop (near Trenton) to northern boundary of Fort Berthold Indian Reservation based on "historical river channel".
- The surveys overlap between Furlong Loop and Highway 85 bridge. State selected Highway 85 bridge as the cut off point for current river conditions vs. historical river channel/lake
- In recent litigation cases, the State asserts the Phase 2 survey is not a proper OHWM delineation.

Location of River --- Corps Survey -- 1950



Williston, Williston
Highway 85 Bridge
Trenton
Senate Bill 2134
Buford
State Phase 2
Image Landsat / Copernicus
Google Earth
Earth Point
Imagery Date: 12/30/1999 48°03'11.43" N 103°45'17.96" W elev 1859 ft eye el: 19.42 mi

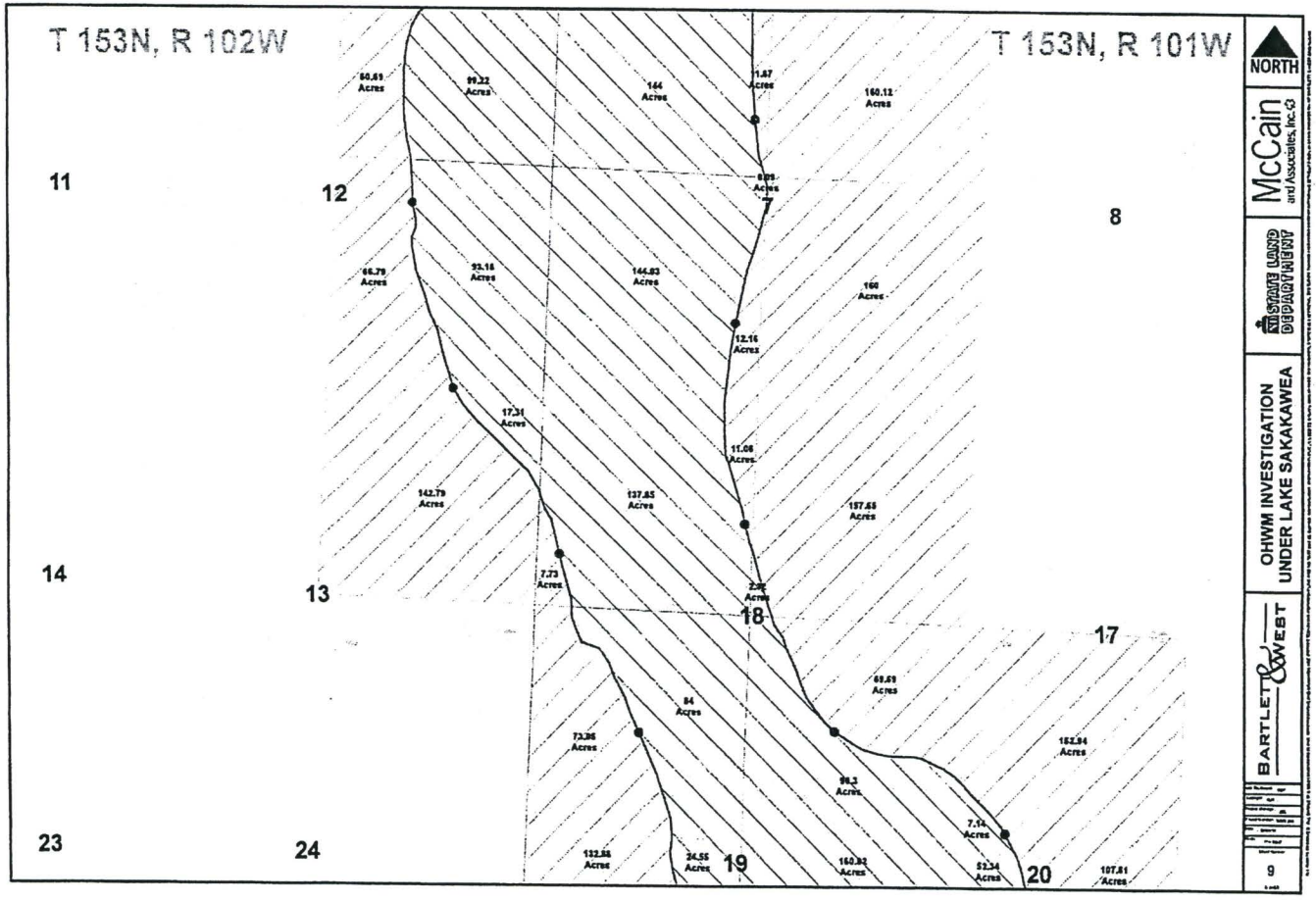
Wilkinson v. State

- *Wilkinson v. State,* Supreme Court No. 20160199
- Plaintiffs own minerals directly west of Highway 85 Bridge. Mineral owners argue the "historical Missouri Riverbed channel" should govern OHWM, not State's Phase 1- current river conditions.
- State argues current river conditions should apply west of Bridge.
- District court granted summary judgment in favor of State.
- Oral arguments stayed pending legislative session.

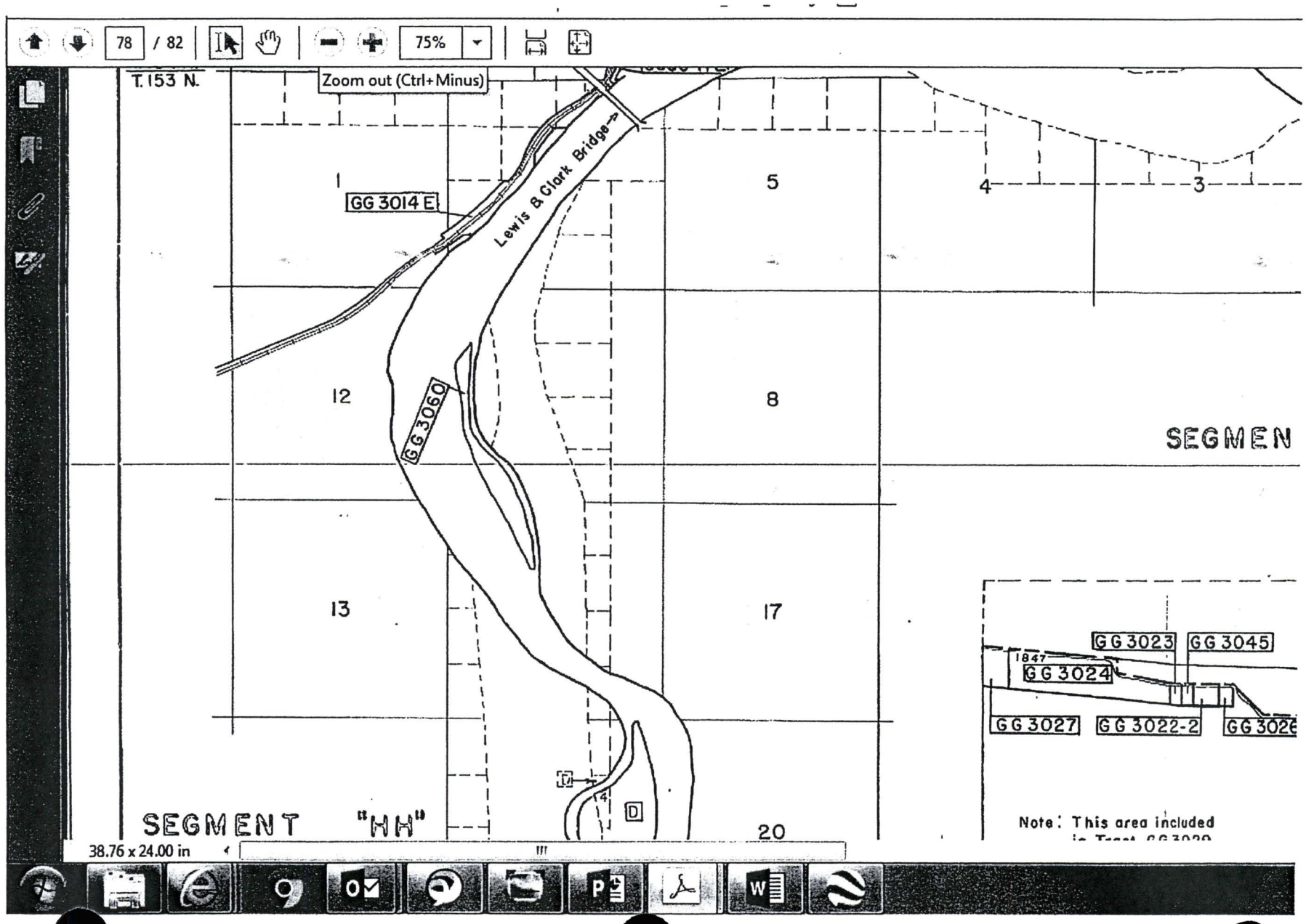
Wilkinson minerals—Phase 1 survey (Red line OHWM)– page 1

Wilkinson minerals– Phase 1 survey – Page 2

Wilkinson minerals – State Phase 2 (historical) survey



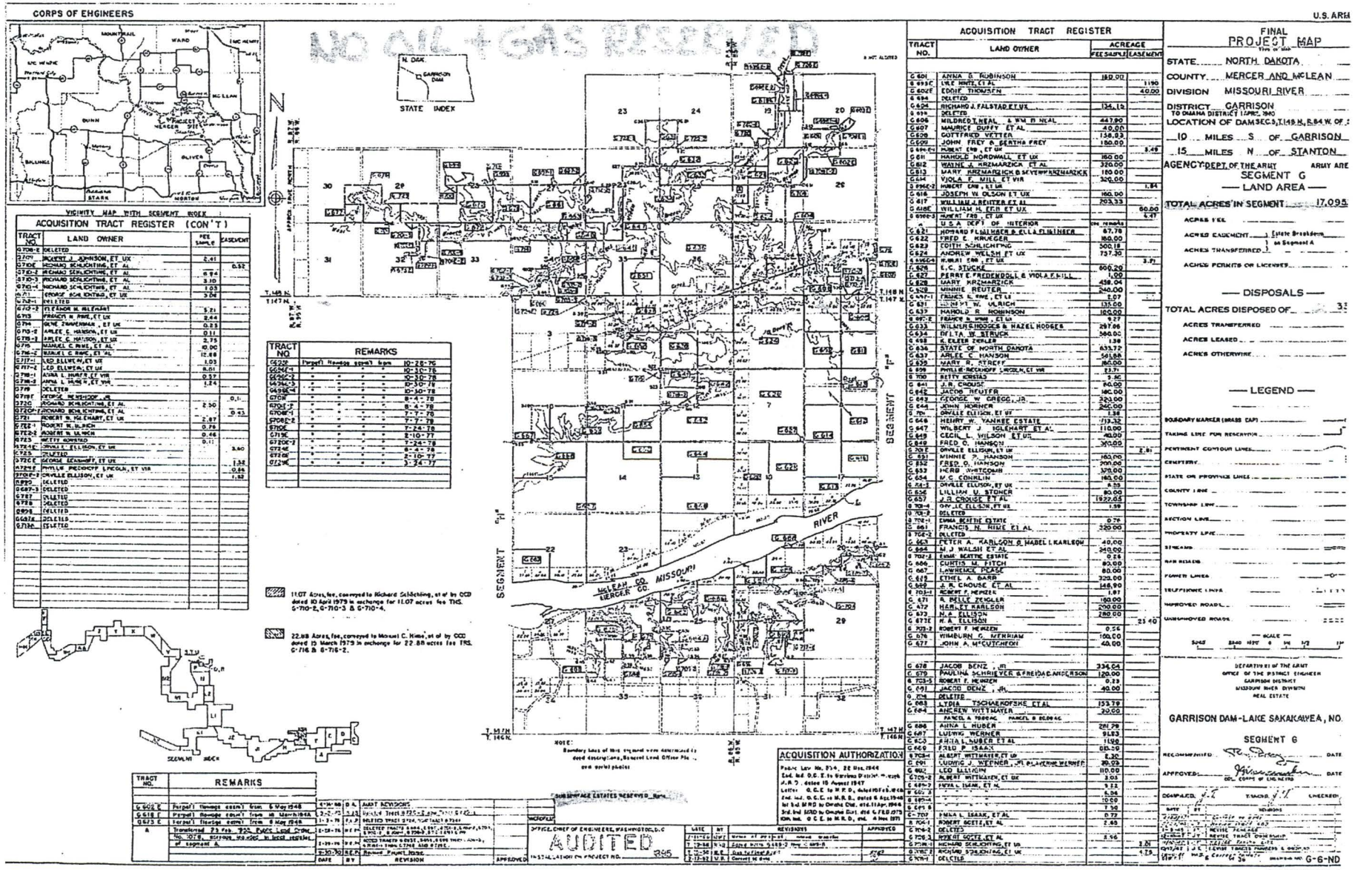
Wilkinson minerals --- Corps survey



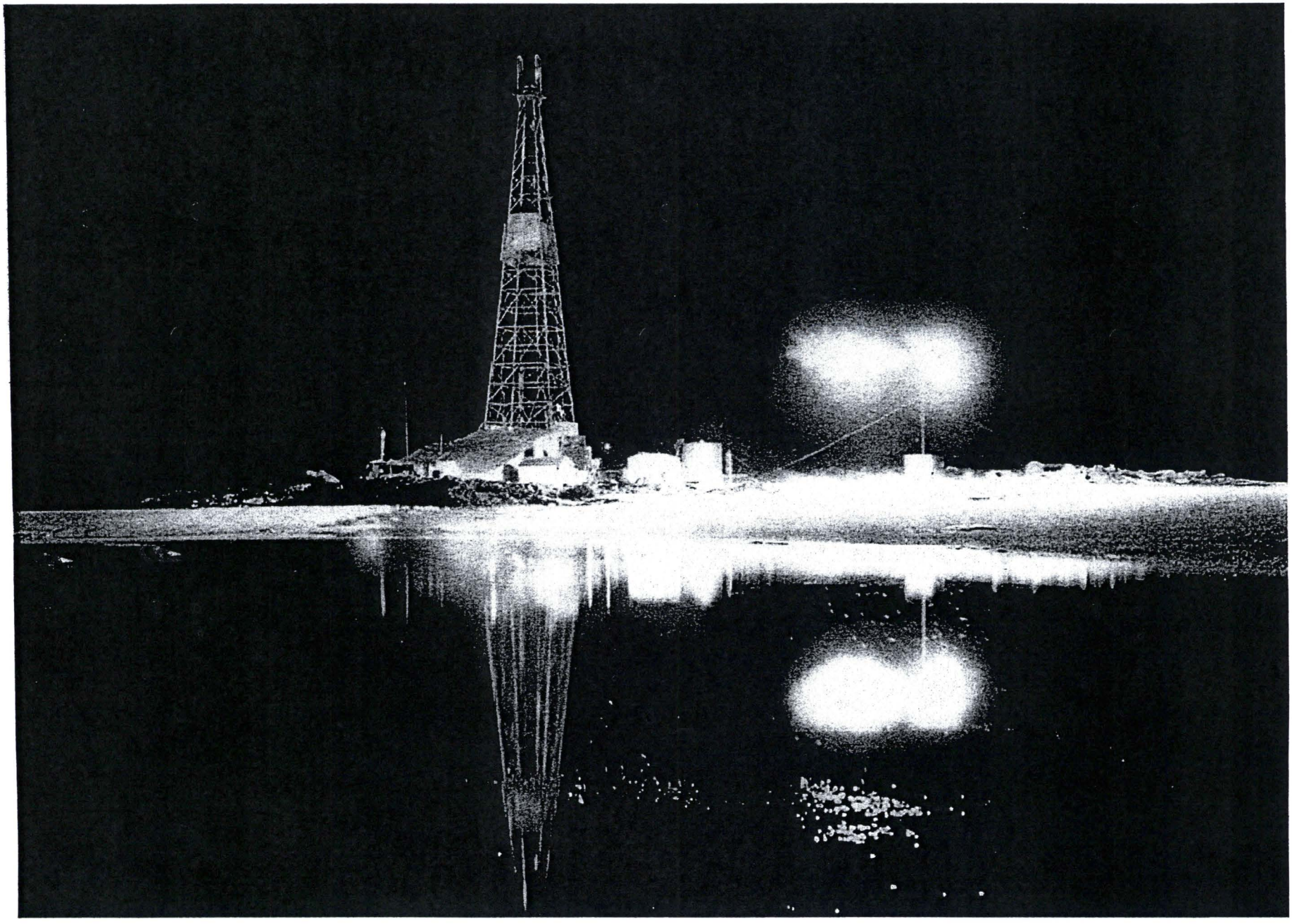
Corps Survey

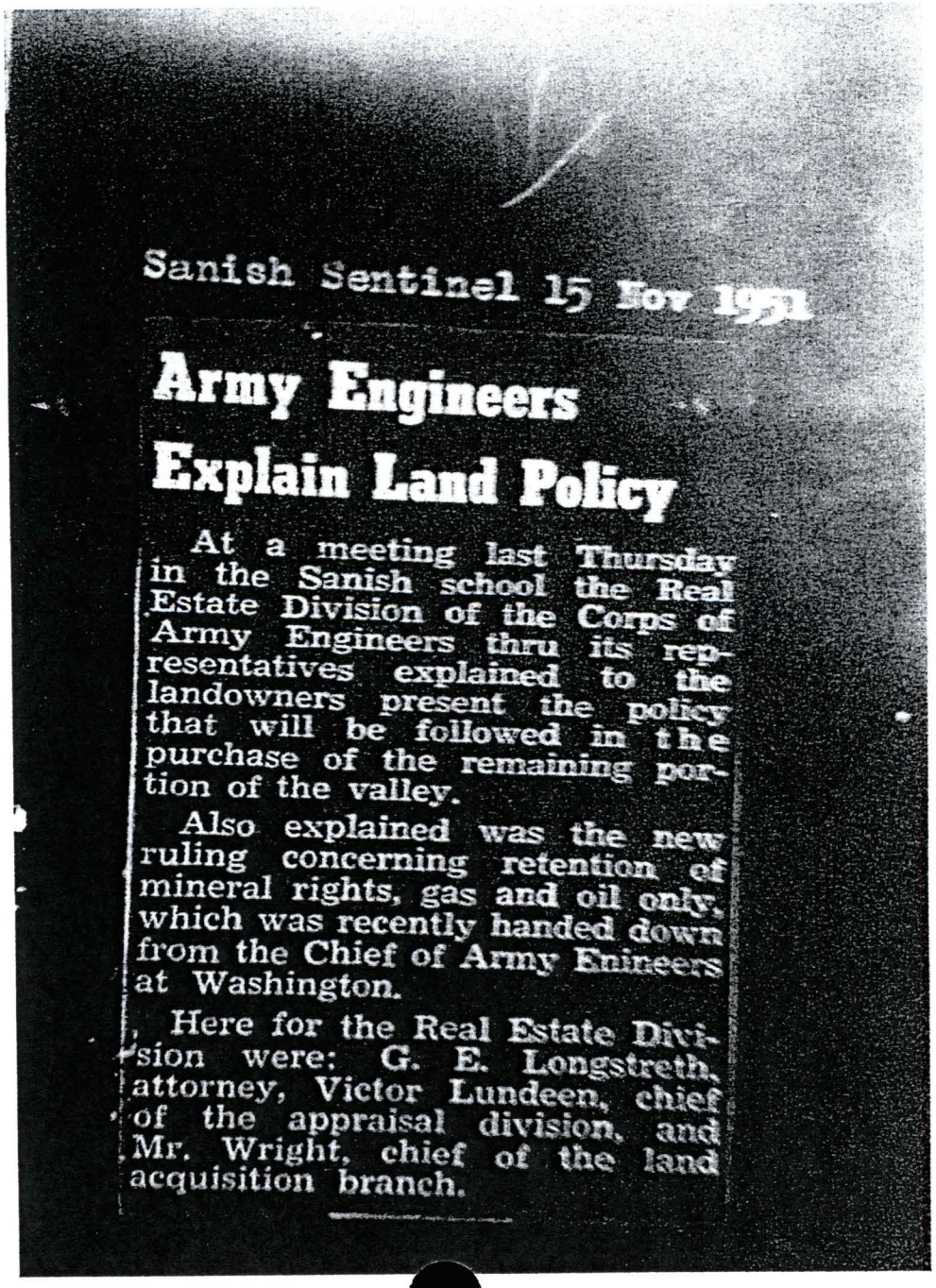
- Because of river movement since original government survey, a new survey was necessary to determine landowner acreages for land acquisitions necessary for lake impoundment.
- Instructions for survey was to establish the ordinary high water mark.
- Survey relied primarily on aerial photography, but also included on the ground work, surface inspections for land use and appraisal purposes for lands taken or purchase.

1947 Corps segment map—eastern end—All surface and minerals taken



Clarence Iverson well---April 4, 1951





Sanish Sentinel 15 Nov 1951

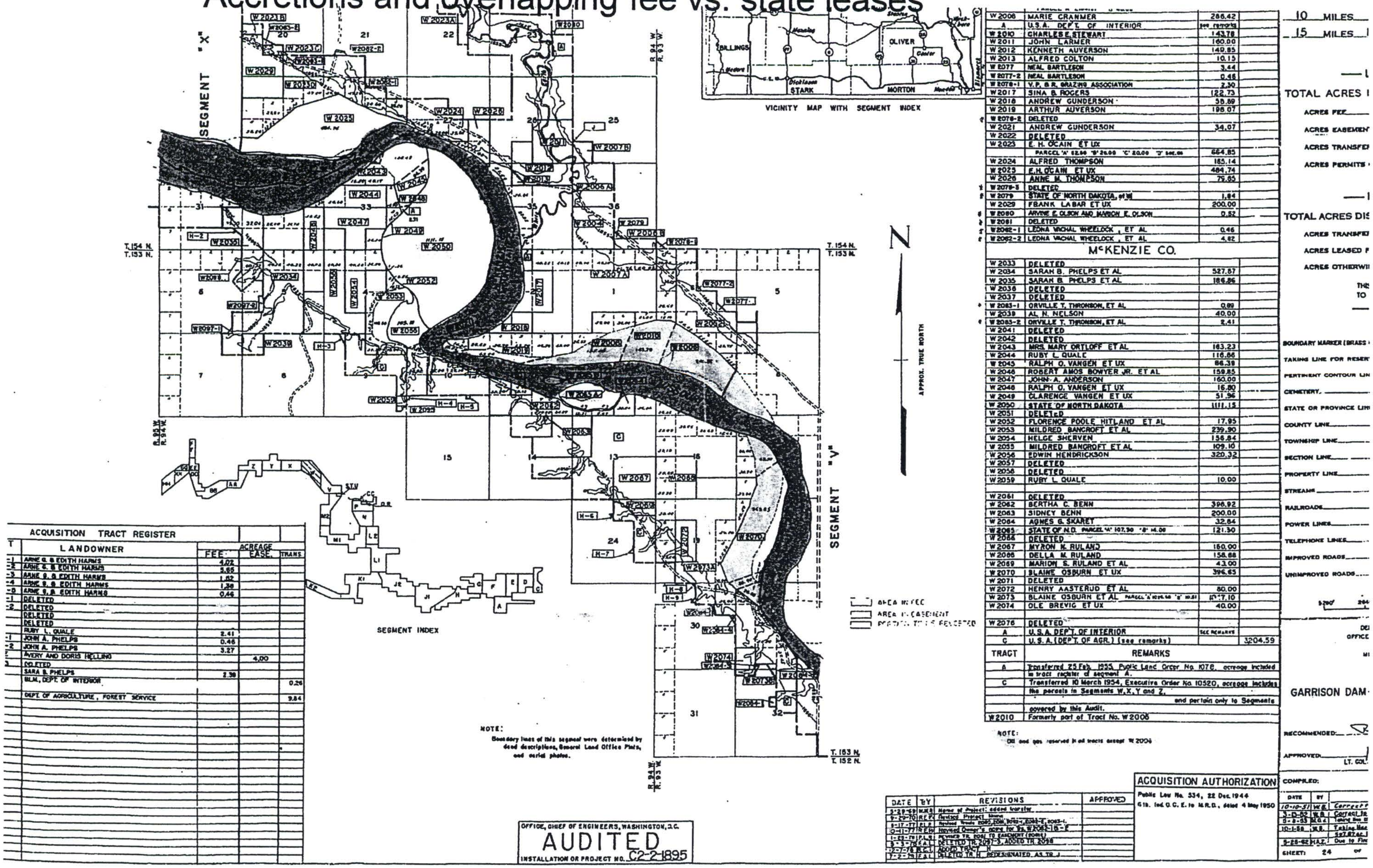
Army Engineers Explain Land Policy

At a meeting last Thursday in the Sanish school the Real Estate Division of the Corps of Army Engineers thru its representatives explained to the landowners present the policy that will be followed in the purchase of the remaining portion of the valley.

Also explained was the new ruling concerning retention of mineral rights, gas and oil only, which was recently handed down from the Chief of Army Enineers at Washington.

Here for the Real Estate Division were: G. E. Longstreth, attorney, Victor Lundeen, chief of the appraisal division, and Mr. Wright, chief of the land acquisition branch.

Accretions and overlapping fee vs. state leases



W 2008	MARIE CRANMER	286.42
A	U.S.A. DEPT. OF INTERIOR	see remarks
W 2010	CHARLES E. STEWART	143.78
W 2011	JOHN LARMER	160.00
W 2012	KENNETH AUVERSON	149.85
W 2013	ALFRED COLTON	10.15
W 2077	NEAL BARTLESON	3.44
W 2077-2	NEAL BARTLESON	0.48
W 2078-1	V.P. & R. GRAZING ASSOCIATION	2.30
W 2017	SINA B. ROGERS	122.73
W 2018	ANDREW GUNDERSON	38.89
W 2019	ARTHUR AUVERSON	198.07
W 2078-2	DELETED	
W 2021	ANDREW GUNDERSON	34.07
W 2022	DELETED	
W 2023	E. H. OCAIN ET UX	
	PARCEL 'A' 52.80 'B' 26.00 'C' 20.00 'D' sec.rem.	664.85
W 2024	ALFRED THOMPSON	165.14
W 2025	E.H. OCAIN ET UX	484.74
W 2026	ANNE M. THOMPSON	79.85
W 2079-5	DELETED	
W 2079	STATE OF NORTH DAKOTA, et al	1.84
W 2029	FRANK LABAR ET UX	200.00
W 2080	ARVINE E. OLSON AND MARION E. OLSON	0.52
W 2081	DELETED	
W 2082-1	LEONA VACHAL WHEELOCK, ET AL	0.46
W 2082-2	LEONA VACHAL WHEELOCK, ET AL	4.82
	McKENZIE CO.	
W 2033	DELETED	
W 2034	SARAH B. PHELPS ET AL	527.87
W 2035	SARAH B. PHELPS ET AL	186.86
W 2036	DELETED	
W 2037	DELETED	
W 2083-1	ORVILLE T. THRONSON, ET AL	0.89
W 2039	AL N. NELSON	40.00
W 2083-2	ORVILLE T. THRONSON, ET AL	2.41
W 2041	DELETED	
W 2042	DELETED	
W 2043	MRS. MARY ORTLOFF ET AL	163.23
W 2044	RUBY L. QUALE	116.86
W 2045	RALPH O. VANGEN ET UX	86.39
W 2046	ROBERT AMOS BOWYER JR. ET AL	159.85
W 2047	JOHN A. ANDERSON	160.00
W 2048	RALPH O. VANGEN ET UX	16.80
W 2049	CLARENCE VANGEN ET UX	51.96
W 2050	STATE OF NORTH DAKOTA	111.15
W 2051	DELETED	
W 2052	FLORENCE POOLE HITLAND ET AL	17.95
W 2053	MILDRED BANCROFT ET AL	239.90
W 2054	HELGE SHERVEN	158.84
W 2055	MILDRED BANCROFT ET AL	109.10
W 2056	EDWIN HENDRICKSON	320.32
W 2057	DELETED	
W 2058	DELETED	
W 2059	RUBY L. QUALE	10.00
W 2061	DELETED	
W 2062	BERTHA C. BENN	396.92
W 2063	SIDNEY BENN	200.00
W 2064	AGNES G. SKARET	32.64
W 2065	STATE OF N.D. PARCEL 'A' 107.30 'B' 14.00	121.30
W 2066	DELETED	
W 2067	MYRON K. RULAND	160.00
W 2068	DELLA M. RULAND	158.88
W 2069	MARION S. RULAND ET AL	43.00
W 2070	BLAINE OSBURN ET UX	396.65
W 2071	DELETED	
W 2072	HENRY AASTERUD ET AL	80.00
W 2073	BLAINE OSBURN ET AL	[illegible]
W 2074	OLE BREVIG ET UX	40.00
W 2076	DELETED	
A	U.S.A. DEPT. OF INTERIOR	see remarks
C	U.S.A. (DEPT. OF AGR.) (see remarks)	3204.59

TRACT	REMARKS
A	Transferred 25 Feb. 1955, Public Land Order No. 1076, acreage included in tract register of segment A.
C	Transferred 10 March 1954, Executive Order No. 10520, acreage includes the parcels in Segments W, X, Y and Z, and pertain only to Segments covered by this Audit.
W 2010	Formerly part of Tract No. W 2008

NOTE: Oil and gas reserved in all tracts except W 2008

NOTE: Boundary lines of this segment were determined by deed descriptions, General Land Office Plats, and aerial photos.

ACQUISITION AUTHORIZATION
Public Law No. 534, 22 Dec. 1944
6th. Ind. O.C.E. to M.R.D., dated 4 May 1950

21

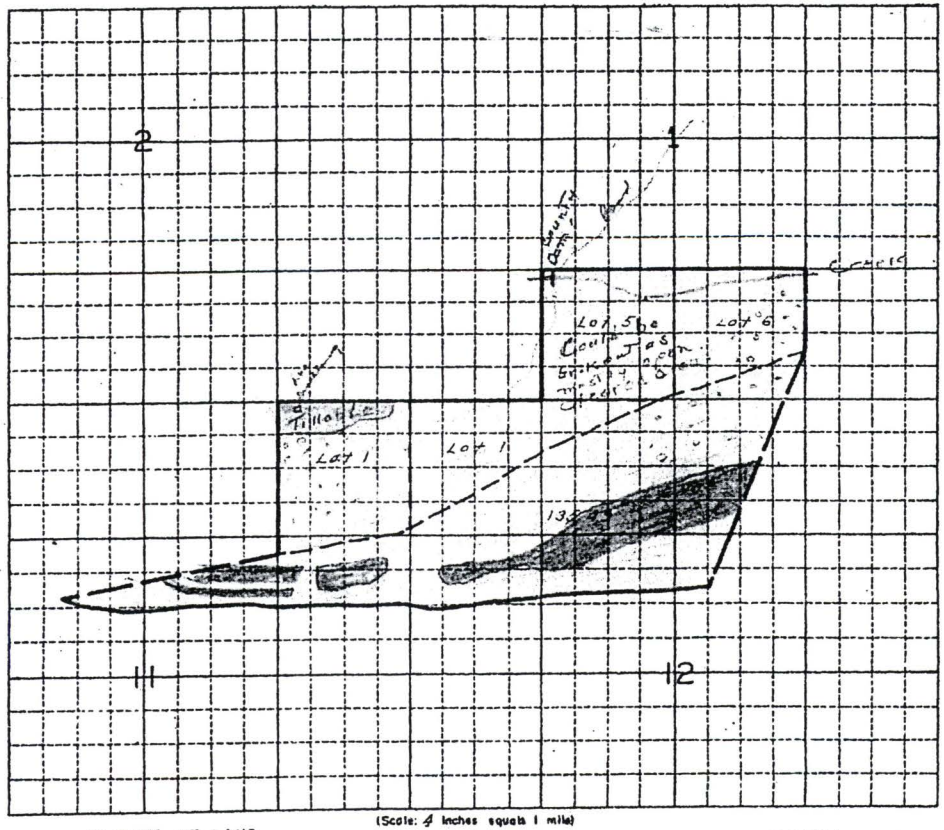
tc

State survey areas of concern --- agricultural land claimed within OHWM

E ORM 998
1 N 46

TRACT MAP (WITH GRID)

Project symbol No. Garrison Dam - Reservoir Area Tract No. N-2008
Name of owner Marie Cramer, et al
Field work by Jack Turnquist Date 19 October 1950
Description of tract State - North Dakota County - Mountrail
Lots 5 and 6 of Section 1, Lot 1 of Section 11, Lot 1 of Section 12, all in Township 153 North, Range 94 West of the 5th P.M., plus accretions.



(Scale: 4 inches equals 1 mile)

GLASSES OF LAND

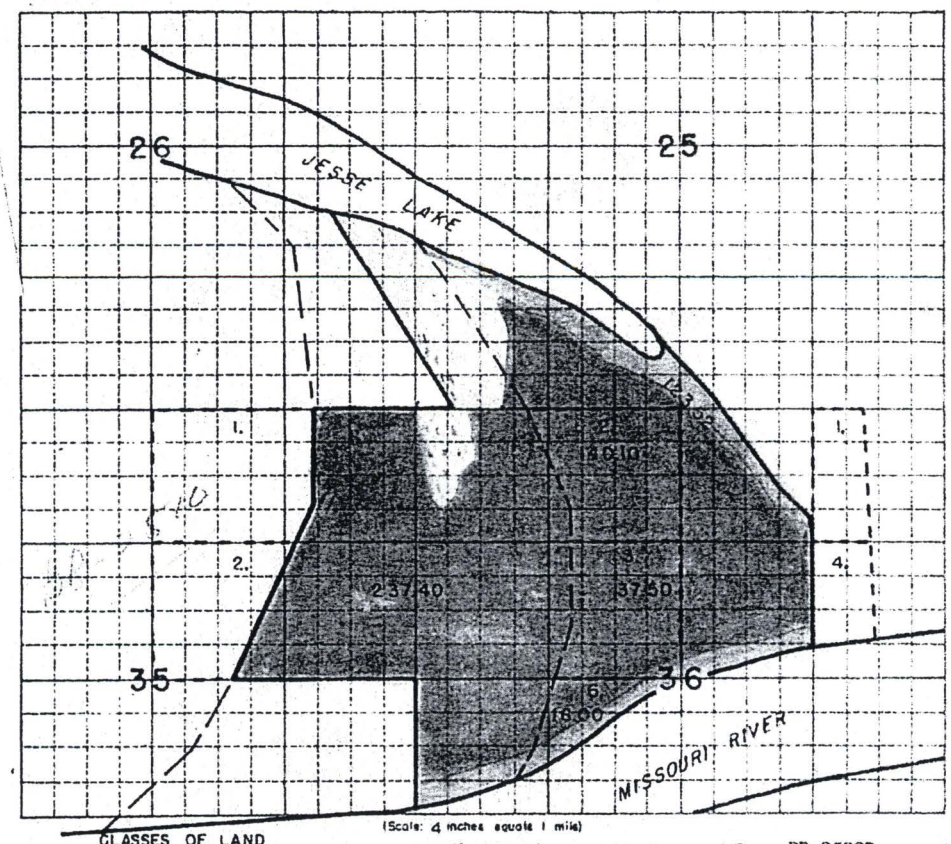
Crop land
Pasture land Open Tree Brush Pasture Fence
Forest land
#
Grades of each class of land must be

I certify that this is an accurate map of Tract N-2008
based on Survey, Deed Desc. & G.L.O. Rods, which
shows this tract to contain 286.42 acres, more or less.
Name Jack Turnquist
Title Draftsman
Date

ENG FORM 998
1 JAN 46

TRACT MAP (WITH GRID)

Project symbol No. Garrison Dam - Reservoir Area Tract No. BB-2520D
Name of owner R. E. Delaney
Field work by Wesley W. Belling Date 8 October 1957
Description of tract State - North Dakota County - Williams
See Sheets 2 and 3



(Scale: 4 inches equals 1 mile)

CLASSES OF LAND

Crop land
Pasture land
Forest land
* Willow + Brush

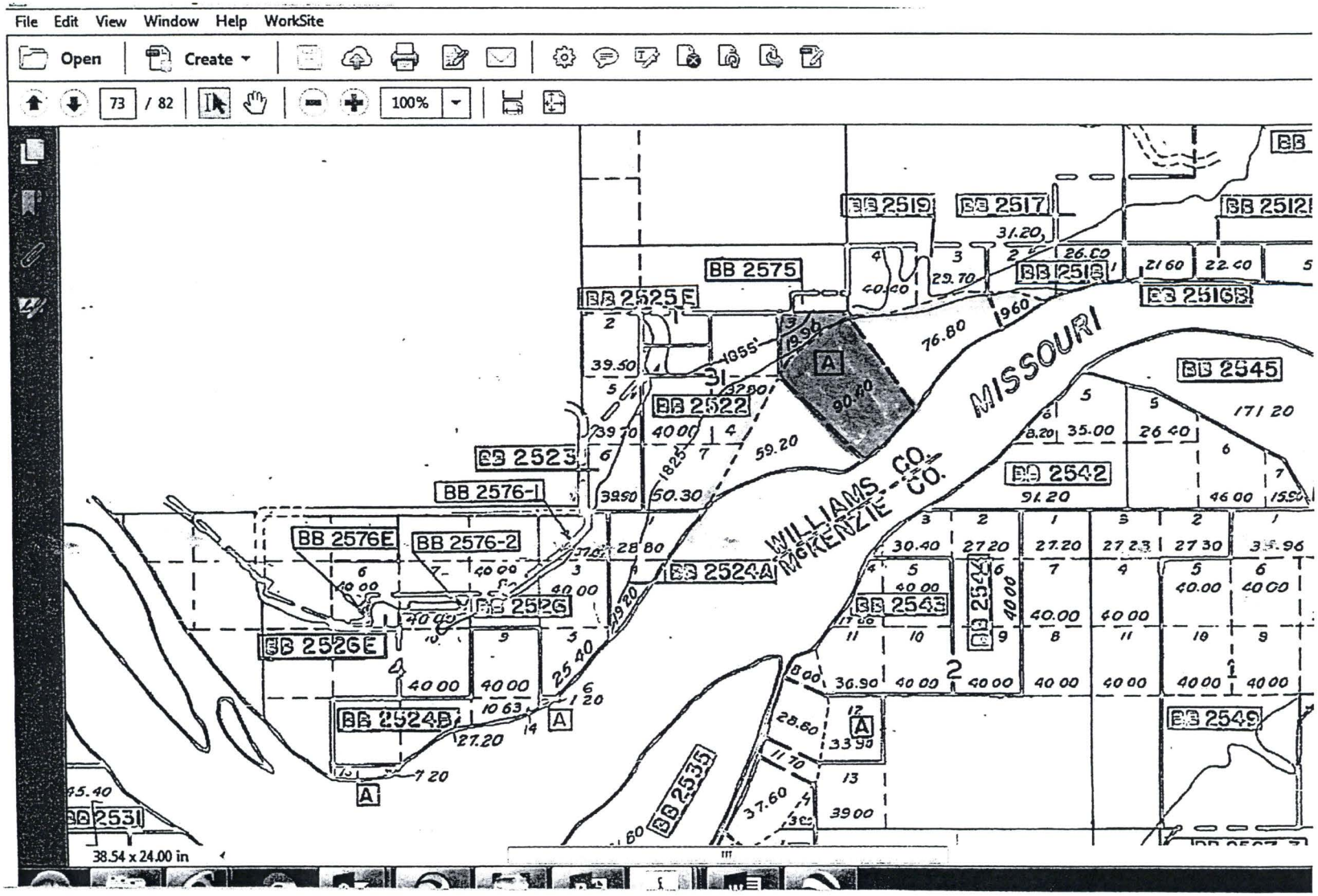
Grades of each class of land must be shown on the map proper.
* Name of any other class of land involved.

I certify that this is an accurate map of Tract BB-2520D based on G. L. O. Reds, Survey and Deed Desc., which shows this tract to contain 454.52 acres, more or less
Name Wesley W. Belling
Title Civil Engineer
Date 8 October 1957
Indicate whether map is based on General Land Office records, aerial survey, deed description or actual survey.

Federal Minerals Riparian to Rivers

- USA owns several smaller unpatented tracts located along Missouri and Yellowstone Rivers.
- USA has adopted Corps Survey.
- USA does NOT recognize State of ND's high water mark claim (on public domain lands).
- Operators forced to double lease and double pay royalties or face penalties.
- No resolution with sovereign immunity.

Federal and State Lease Overlap



SB 2134—Senate Version

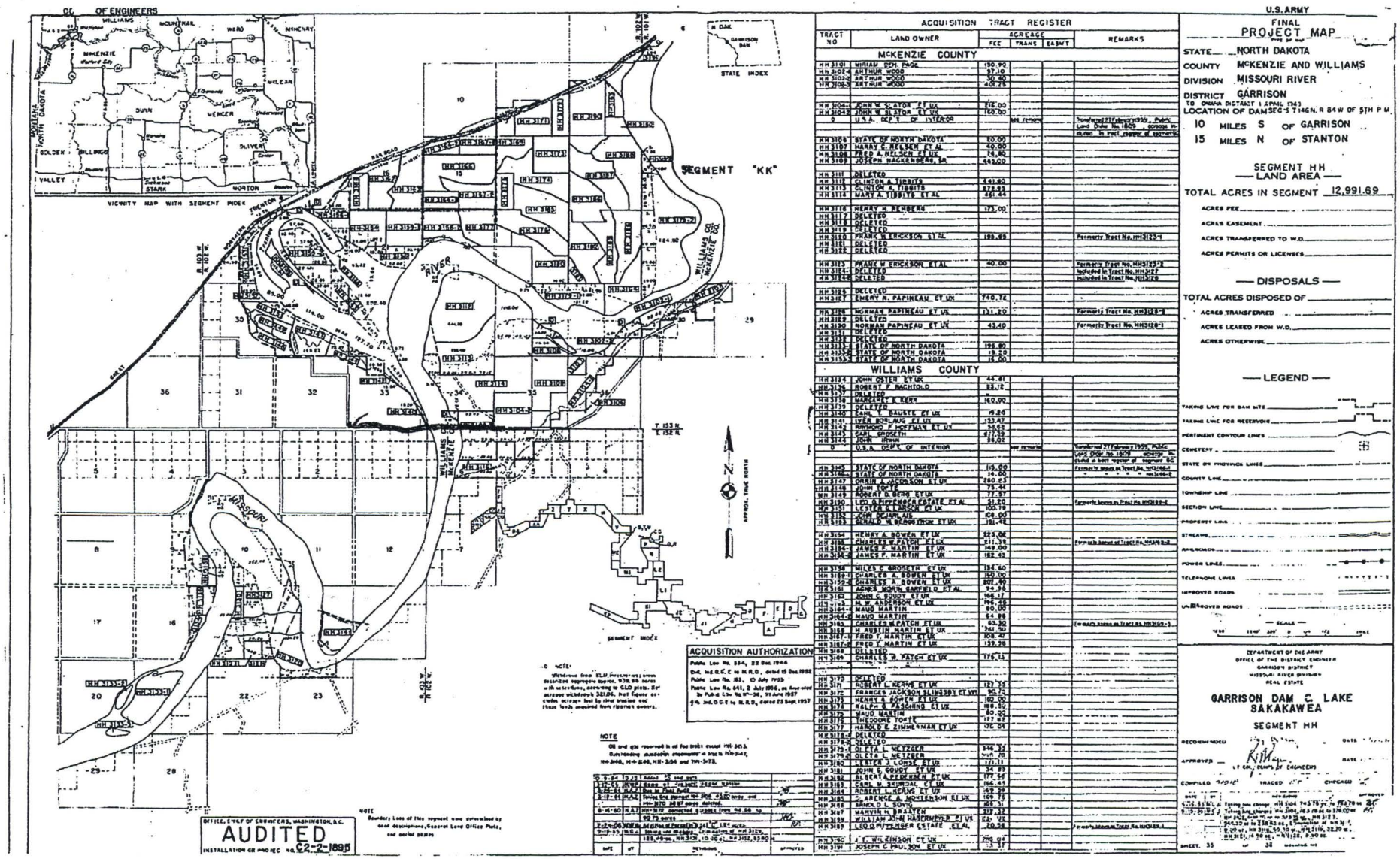
- Clarifies state oil and gas ownership under Lake Sakakawea/Garrison project is limited to the OHWM of the historical Missouri riverbed channel prior to Dam.

- Adopts Corps survey to determine the OHWM boundary (resolves state vs. federal lease overlap as USA adopts Corps survey).

- Extends historical riverbed channel 12 river miles west of Highway 85 bridge (see following slides).

CC

2134 Western boundary



ACQUISITION TRACT REGISTER

TRACT NO	LAND OWNER	ACREAGE FEE	ACREAGE TRANS	ACREAGE EASMT	REMARKS
	McKENZIE COUNTY				
HH 3101	MIRIAM DEM. PAGE	150.92			
HH 3102-E	ARTHUR WOOD	97.10			
HH 3102-S	ARTHUR WOOD	50.50			
HH 3102-S	ARTHUR WOOD	401.25			
HH 3104	JOHN W. SLATOR ET UX	818.00			
HH 3104-E	JOHN W. SLATOR ET UX	160.00			
0	U.S.A. DEP'T OF INTERIOR		NR remark		Transferred 27 January 1959, Public Land Order No. 1809, acreage included in tract register of segment KK
HH 3106	STATE OF NORTH DAKOTA	20.00			
HH 3107	HARRY C. NELSEN ET AL	40.00			
HH 3108	FRED ALMESKOW ET UX	76.90			
HH 3109	JOSEPH HACKENBRACK SR.	643.00			
HH 3111	DELETED				
HH 3112	CLINTON A. TIBBITS	441.60			
HH 3113	CLINTON A. TIBBITS	878.93			
HH 3114	MARY A. TIBBITS ET AL	461.44			
HH 3116	HENRY H. REHBERG	173.00			
HH 3117	DELETED				
HH 3118	DELETED				
HH 3119	DELETED				
HH 3120	FRANK W. ERICKSON ET AL	193.69			Formerly Tract No. HH3123-1
HH 3121	DELETED				
HH 3122	DELETED				
HH 3123	FRANK W ERICKSON ET AL	40.00			Formerly Tract No. HH3125-2
HH 3124-E	DELETED				Included in Tract No. HH3127
HH 3125	DELETED				Included in Tract No. HH3126
HH 3126	DELETED				
HH 3127	EMERY N. PAPINEAU ET UX	748.72			
HH 3128	NORMAN PAPINEAU ET UX	131.20			Formerly Tract No. HH3128-2
HH 3129	DELETED				
HH 3130	NORMAN PAPINEAU ET UX	43.40			Formerly Tract No. HH3128-1
HH 3131	DELETED				
HH 3132	DELETED				
HH 3133-1	STATE OF NORTH DAKOTA	186.80			
HH 3133-E	STATE OF NORTH DAKOTA	19.20			
HH 3133-S	STATE OF NORTH DAKOTA	16.00			
	WILLIAMS COUNTY				
HH 3134	JOHN OSTEN ET UX	44.81			
HH 3136	ROBERT F. BACHTOLD	83.78			
HH 3137	DELETED				
HH 3138	MARGARET E. KERR	160.90			
HH 3139	DELETED				
HH 3140	EARL BAUBTE ET UX	19.86			
HH 3141	IVER BORLAUG ET UX	153.47			
HH 3142	RAYMOND F. HOFFMAN ET UX	38.68			
HH 3143	CARL GROSETH	617.39			
HH 3144	JOHN IRWIN	88.02			
0	U.S.A. DEPT. OF INTERIOR		NR remark		Transferred 27 February 1959, Public Land Order No. 1809, acreage included in tract register of segment KK
HH 3145	STATE OF NORTH DAKOTA	18.00			
HH 3146-E	STATE OF NORTH DAKOTA	16.00			Formerly lands in Tract No. HH3146-1
HH 3147	ORRIN A. JACOBSON ET UX	280.63			
HH 3148	JOHN HOWE	73.44			
HH 3149	ROBERT D. BERG ET UX	77.37			
HH 3150	LEO G. PIPPENGER ESTATE ET AL	31.20			Formerly lands in Tract No. HH3150-2
HH 3151	LESTER R. LARSON ET UX	100.19			
HH 3152	JOHN DE MARAIS	60.00			
HH 3153	GERALD W. BROWN FROM ET UX	121.42			
HH 3154	HENRY A. BOWER ET UX	823.06			
HH 3155	CHARLES W. PATCH ET UX	211.38			Formerly lands in Tract No. HH3155-2
HH 3156-E	JAMES P. MARTIN ET UX	349.00			
HH 3156-S	JAMES P. MARTIN ET UX	182.43			
HH 3158	MILES C. GROSETH ET UX	184.60			
HH 3159-1	CHARLES A. BOWER ET UX	150.00			
HH 3159-2	CHARLES A. BOWER ET UX	802.40			
HH 3161	AGNES MORIN GARFIELD ET AL	94.96			
HH 3162	JOHN C. DOUDT ET UX	148.12			
HH 3163	H. W. ANDERSON ET UX	196.48			
HH 3164-E	MAUD MARTIN	80.00			
HH 3164-S	MAUD MARTIN	64.00			
HH 3165	CHARLES W. PATCH ET UX	63.30			Formerly lands in Tract No. HH3165-1
HH 3166	H. AUSTIN MARTIN ET UX	361.50			
HH 3167-E	FRED T. MARTIN ET UX	308.47			
HH 3167-S	FRED T. MARTIN ET UX	139.28			
HH 3168	DELETED				
HH 3169	CHARLES W. PATCH ET UX	176.14			
HH 3170	DELETED				
HH 3171	ROBERT L. HEATH ET UX	121.35			
HH 3172	FRANCES JACKSON BLUMBERG ET VIR	90.73			
HH 3173	HENRY A. ROPER ET UX	160.00			
HH 3174	RALPH O. WASCHING ET UX	198.32			
HH 3175	MAUD MARTIN	80.00			
HH 3176	THEODORE TOWTE	117.82			
HH 3177	HAROLD E. ZIMMERMAN ET UX	176.54			
HH 3178-E	DELETED				
HH 3178-S	DELETED				
HH 3179-E	OLEVA L. WETZGER	346.32			
HH 3179-S	OLEVA L. WETZGER	140.70			
HH 3180	LESTER J. LOHSE ET UX	121.11			
HH 3181	JOHN G. COUDT ET UX	34.83			
HH 3182	ALBERT A. PEDERSEN ET UX	177.56			
HH 3183	CARL W. SKUNDAL ET UX	146.43			
HH 3184	ROBERT L. HEATH ET UX	152.39			
HH 3185	CLARENCE A. MONTGOMERY ET UX	169.75			
HH 3186	ARNOLD L. SOVIG	185.31			
HH 3187	MARVIN H. BRAATEN	217.32			
HH 3189	WILLIAM JOHN HASENWINKLE ET UX	23.42			
HH 3189	LEO G. PIPPENGER ESTATE ET AL	20.28			Formerly lands in Tract No. HH3189-1
HH 3190	J. C. WILKINSON ET UX	286.64			
HH 3191	JOSEPH C. PAULSON ET UX	3.37			

U.S. ARMY

FINAL

PROJECT MAP

STATE NORTH DAKOTA

COUNTY McKENZIE AND WILLIAMS

DIVISION MISSOURI RIVER

DISTRICT GARRISON

TO OMAHA DISTRICT 1 APRIL 1943

LOCATION OF DAM SEC 5 T146N, R 84W OF 5TH P.M.

10 MILES S OF GARRISON

15 MILES N OF STANTON

SEGMENT HH

— LAND AREA —

TOTAL ACRES IN SEGMENT 12,991.69

ACRES FEE

ACRES EASEMENT

ACRES TRANSFERRED TO W.D.

ACRES PERMITS OR LICENSES

— DISPOSALS —

TOTAL ACRES DISPOSED OF

ACRES TRANSFERRED

ACRES LEASED FROM W.D.

ACRES OTHERWISE

— LEGEND —

TAKING LINE FOR DAM SITE

TAKING LINE FOR RESERVOIR

PERTINENT CONTOUR LINES

CEMETERY

STATE OR PROVINCE LINES

COUNTY LINE

TOWNSHIP LINE

SECTION LINE

PROPERTY LINE

STREAMS

RAILROADS

POWER LINES

TELEPHONE LINES

IMPROVED ROADS

UNIMPROVED ROADS

— SCALE —

DEPARTMENT OF THE ARMY
OFFICE OF THE DISTRICT ENGINEER
GARRISON DISTRICT
MISSOURI RIVER DIVISION
REAL ESTATE

GARRISON DAM & LAKE SAKAKAWEA

SEGMENT HH

RECOMMENDED ____ DATE ____

APPROVED ____ DATE ____

LT. COL., CORPS OF ENGINEERS

COMPILED ____ TRACED ____ CHECKED ____

SHEET 35 OF 38 SHEETS

2134 Western Boundary

Under Contract No. W912DQ-07-D-005,

Impacts of Siltation of the Missouri River in the State of North Dakota Summary Report

U.S. Army Corps of Engineers - Omaha District
The Missouri River Joint Water Board

29 June 2009

THE Louis Berger Group, INC.

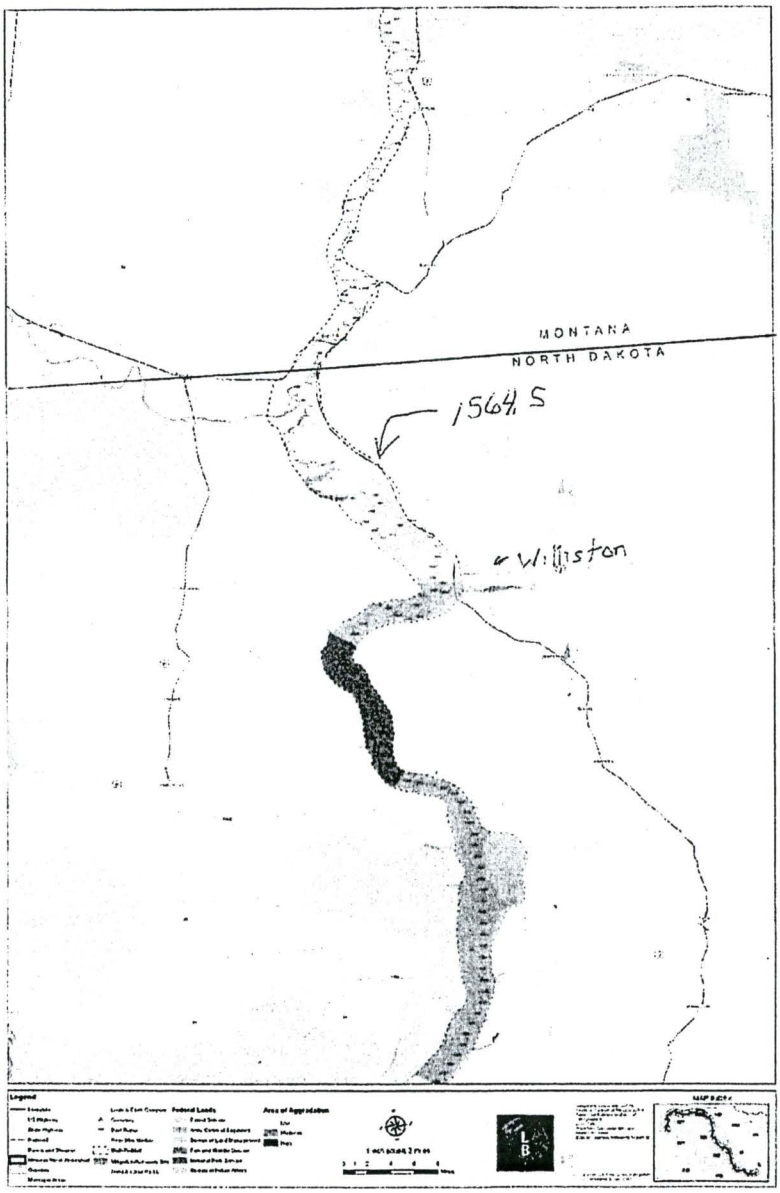
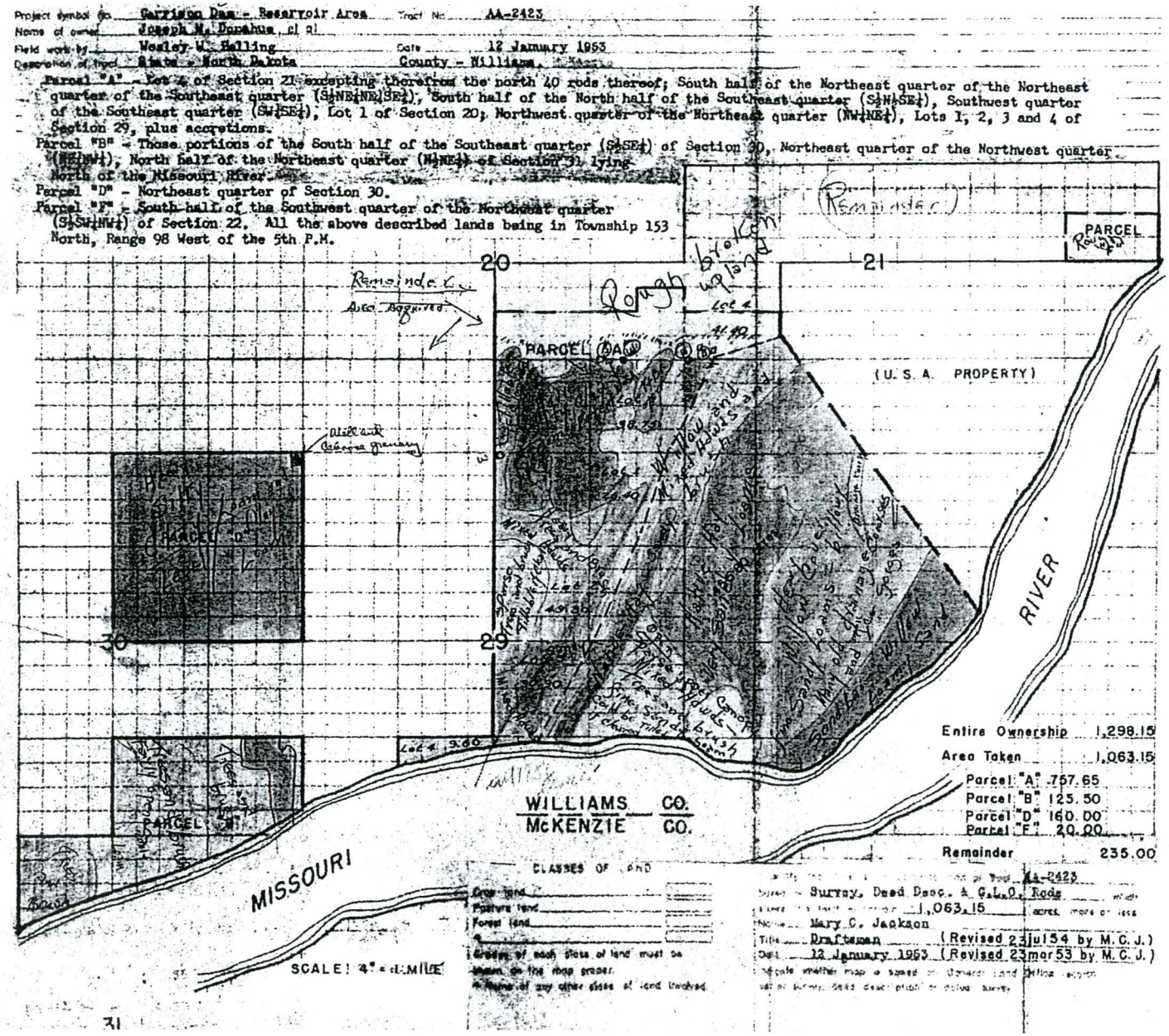


Figure 4-1: Aggradations Area Map - Lake Sakakawea upstream from Garrison Dam through Williston ND

Review of Corps archival records

- Historical correspondence, internal memorandums, maps, land appraisals and other documentation relating to Corps land acquisitions and survey.
- Some inconclusive determinations of OHWM for certain Corps survey tracts may exist (under state law) sufficient to warrant further review to confirm the most accurate and fair determination of the historical OHWM for the entire Missouri river channel.

Corps Land Appraisal—accretions--Red area "no agricultural value"



EE

SB 2134 Amendments –p.1

- Creates new chapter of NDCC
- 1.State oil and gas ownership under Lake Sakakawea/Garrison project is limited to the OHWM of the historical Missouri riverbed channel prior to Dam closure.
- 2. Adopts Corps survey as "presumptive determination" of OHWM. Requires a review of the Corps survey to correct or modify survey segments if clear and convincing evidence shows adjustments needed.
- 3. Sets forth parameters of review (aerial photography, etc).

SB 2134 Amendments –p.2

- 4. Provides for public notice and opportunity to comment after completion of review.
- 5. Two year period for implementation of final review results for both State and operators to incorporate acreage adjustments, lease bonus and royalty payments and refunds.
- 6. Two year limitations period for any interested party to challenge the findings by judicial review.
- 7. Recognizes federal law prevails for OHWM determination of *Public domain lands only.*

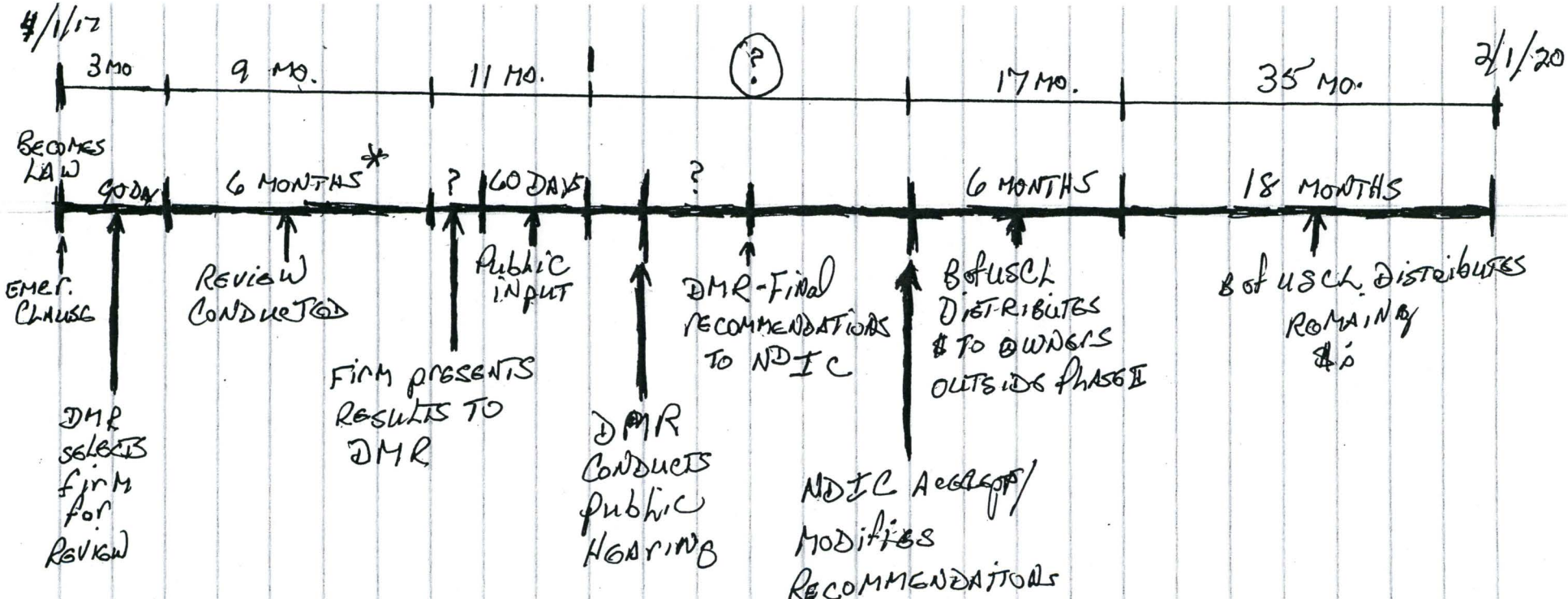
SB 2134 Amendments –p.3

- 8. Recognizes the state engineer's authority to regulate the historical riverbed channel, minerals other than oil and gas, and the waters of the State.
- 9. Retroactive provisions.

Summary

- The oil and gas ownership created by the complexities of river title cannot be resolved overnight.
- SB 2134 with House Amendments provides a "road map' for resolution of multiple river ownership related issues, and provides a process for all interested parties including mineral owners, operators, and the state to participate in the process.

CROWLEY | FLECK PLLP
ATTORNEYS



* MAY be extended by DMR

AH 2
SB 2134
3-29-17

AH 3 SB 2134
3.29.17

17.0159.06013
Title.08000

Prepared by the Legislative Council staff for
House Energy and Natural Resources
Committee
March 24, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide an appropriation; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the

riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

   b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the

ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

   a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

   b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

AH 4 3-29-17
SB 2134

17.9695.02000 **Prepared for Representative Keiser**

ESTIMATED FISCAL IMPACT - SENATE BILL NO. 2134

The schedule below provides information on the 2017-19 biennium estimated fiscal impact of Engrossed Senate Bill No. 2134 with proposed amendments (LC# 17.0159.06013).

2017-19 Biennium Estimated Fiscal Impact Summary - Senate Bill No. 2134	
	Amounts (In Millions)
Total estimated impact	
Estimated impact - Proposed amendments to Senate Bill No. 2134 (LC# 17.0159.06013)	$205.1
Less: Disputed minerals held in escrow at the Bank of North Dakota[1]	(18.7)
Remaining estimated impact to the strategic investment and improvements fund	$186.4
Potential appropriations from the strategic investment and improvements fund	
Refunds of oil and gas lease bonuses and rents	$87.7
Refunds of royalties collected prior to the 2017-19 biennium	69.3
Refunds of royalties collected during the 2017-19 biennium[2]	29.4
Total potential refund appropriations	$186.4
Less: Funds available from the assigned fund balance[3]	(142.3)
Remaining appropriations from the unobligated balance	$44.1
Add: Appropriation for survey	0.8
Total potential appropriation from the unobligated balance	$44.9

[1]Approximately $60.8 million of disputed mineral revenue payments are held in escrow at the Bank of North Dakota, of which $18.7 million relate to disputes addressed in the provisions of Senate Bill No. 2134, $30.6 million relate to disputes on reservation lands, and $11.5 million relate to other mineral revenue payment disputes.

[2]Depending on the timing of the implementation of the provisions of Senate Bill No. 2134, some or all of the 2017-19 biennium royalties may be paid to the strategic investment and improvements fund, which would require appropriation authority to refund. After the implementation of the provisions, the royalties would be paid to mineral owners.

[3]All of the funds currently in the assigned fund balance in the strategic investment and improvements fund are available to be appropriated. However, other available funds would need to be assigned within the strategic investment and improvements fund to reflect an obligation of $41.8 million relating to mineral disputes on reservation lands.

no recorded testimony
attachment 5 3-29-17
SB2134

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www.land.nd.gov

DEPARTMENT OF
NDTRUST LANDS
INVESTING FOR EDUCATION

Lance D. Gaebe, Commissioner

TESTIMONY OF LANCE GAEBE
ON SENATE BILL 2134

HOUSE APPROPRIATIONS COMMITTEE
March 29, 2017

I am Lance Gaebe, Commissioner of University and School Lands. Along with my coworkers in the Department of Trust Lands, I work for the Board of University and School Lands.

The Board manages state-owned minerals and the oil, gas and related hydrocarbons within the beds of the State's navigable waters. On behalf of the State, the Board oversees the Strategic Investment and Improvements Fund (SIIF) which receives the revenues from these, and other sovereign minerals. The Board has had this management responsibility since at least 1977.

Under the Equal Footing Doctrine, North Dakota owns the beds of navigable lakes and streams. The Board leases the rights to produce oil and gas from the minerals associated with sovereign lands, which N.D.C.C. ch. 61-33 defines as "those areas, including beds and islands, lying within the ordinary high watermark [OHWM] of navigable lakes and streams." The Office of the State Engineer has responsibility for defining the OHWM and management responsibility for the bed of navigable waters and any other minerals therein.

North Dakota Administrative Code § 89-10-01-03 defines OHWM as "that 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 [OHWM] in their entirety."

Under the Missouri River within Lake Sakakawea, mineral acres have long been leased based upon where the historic river channel existed prior to inundation by the reservoir. West of the lake, sovereign minerals beneath the Missouri and Yellowstone Rivers are leased based upon the OHWM of the current river channel. The Highway 85 Bridge near Williston has served as the division between these practices.

This bill would make the U.S. Army Corps of Engineers' river surveys conducted prior to inundation by Lakes Sakakawea and Oahe as the base determinant of the State's sovereign mineral boundary. Because the method that the Board has used to determine the historic OWHM, differs from the area of the historic river depicted by the federal surveys, substantial mineral acres would be surrendered to the federal government and to other title claims.

There has been leasing and production of sovereign oil and gas interests for decades. However, there was not substantial interest in inundated mineral acres until the onset of horizontal drilling in North Dakota.

Thus, the Board worked in close cooperation with the State Engineer to formally and scientifically delineate the OHWM of the Yellowstone and Missouri Rivers from the Montana border to the area near Williston. Since the State has always asserted the public's ownership of rivers to be within the OHWMs, these studies were conducted to determine with greater accuracy, where those boundaries lie.

In 2009, Bartlett and West was contracted to complete four studies of the Yellowstone and Missouri River OHWM for areas with potential oil and gas development. Phase I of the study focused on the area west of the Williston. Bartlett and West used the State Engineer's OHWM delineation guidelines and conducted

an on-the-ground analysis of the vegetation, soils and hydraulic characteristics for a determination of the OHWM of the rivers.

The Phase II and IV studies focused on the areas east of Williston. Bartlett and West used a combination of pre-reservoir maps and photos, and high resolution scanning equipment to gather the best information available on the historic OHWM of the Missouri River prior to the formation of Lake Sakakawea. This study used aerial photographs taken by the Army Corps of Engineer in 1943, 1951 and 1958 and examined the river location and depiction of vegetation.

These studies were done by a qualified firm using the best available historic records, photos and data. The review of the area between the Highway 85 Bridge and the Four Bears Bridge is referred to as Phase II, and from Four Bears to the Garrison Dam is referenced as Phase IV.

Prior to these formal investigations, the Department of Trust Lands determined State mineral ownership using in-house pre- reservoir aerial photographs. Mineral acreage was generally determined only when specific tracts were nominated for oil and gas leasing.

This bill has been promoted as an attempt to keep the State from unlawfully taking private citizens' property. This absolutely has not occurred. The OHWM studies were undertaken to protect the integrity of sovereign assets by having a scientific and defensible basis of evidence of State acreage available to lease. The resources are managed in the best interests of all North Dakotans. The provisions of the Equal Footing Doctrine, the Public Trust Doctrine and the Submerged Lands Act, as well as the State's anti-gift clause of the Constitution, have guided the management of land for the benefit of the public.

The Board has worked to protect the integrity of the process by requiring escrow accounts when title conflict exists; ratifying in its rules and by resolution, its commitment to return mineral revenue if an adjudicative process finds that the minerals are not sovereign. The Board established a reserve within an assigned fund balance of the SIIF to accommodate refunds if a court finds that the State does not own the minerals that it has leased.

Maps attached to this testimony, highlight an example portion of the river depicting acres claimed by the federal government which overlap what the State has also leased. Of the estimated impact to 25,000 acres that could be surrendered, the Department estimates that 7,300 acres (30%) are nonpatented public domain acres, which ownership the bill defers to the federal government- even if they are within the historic OHWM.

The Committee should know that it is not established law that this belongs to the United States. The State has argued that it, not the federal government, defines sovereign ownership and is litigating this issue with an administrative appeal with the Department of the Interior Board of Land Appeals. As recently as September the State argued that its definitions of rivers apply, not the federal standard.

The Bill will simply defer the ownership decision to the BLM and relinquish thousands of minerals acres from state to federal control.

Many of the disputed tracts are leased from both the federal government and the State. The Board's leases in this region carry either a 1/6 (16.67%) or a 3/16 (18.75%) royalty rate, while Federal leases carry a 1/8 (12.5%) royalty rate on a longer term lease. One could deduce that a motivation for this bill is less about sorting out private ownership and more about some oil companies obtaining a cheaper lease.

I believe that the purpose of federal surveys conducted before the dams were undertaken exclusively to determine which lands needed to be acquired by the U.S. Army Corps of Engineers in advance of inundation by Lake Sakakawea and Lake Oahe.

Should this bill become law, not only would the federal government have decided the extent of the river in the 1950 era Corps of Engineers' surveys, but it would become the largest individual recipient of disputed royalties—acquiring at least 30% of the mineral acres affected by this bill.

It has been asserted that on adjusted acres that bonuses, collected royalties, and escrowed royalties would be paid to private mineral owners but this is not accurate, at least not from the State. It needs to be understood that absent changes prompted by litigation, the Board would:

- Return approximately $87.7 million to lessees of bonuses and rent that have been collected;
- Return approximately $69.3 million to operators of royalties; and
- Evaluate approximately $18.7 million in escrowed royalties to determine if there were other claimants and if no disputes, return those royalties to operators.

Additionally, based upon 2015-2017 Biennium (to date) average level prices and production, the estimated impact on future royalty revenue would be a reduction of $29,406,007 in each of the next two biennia.

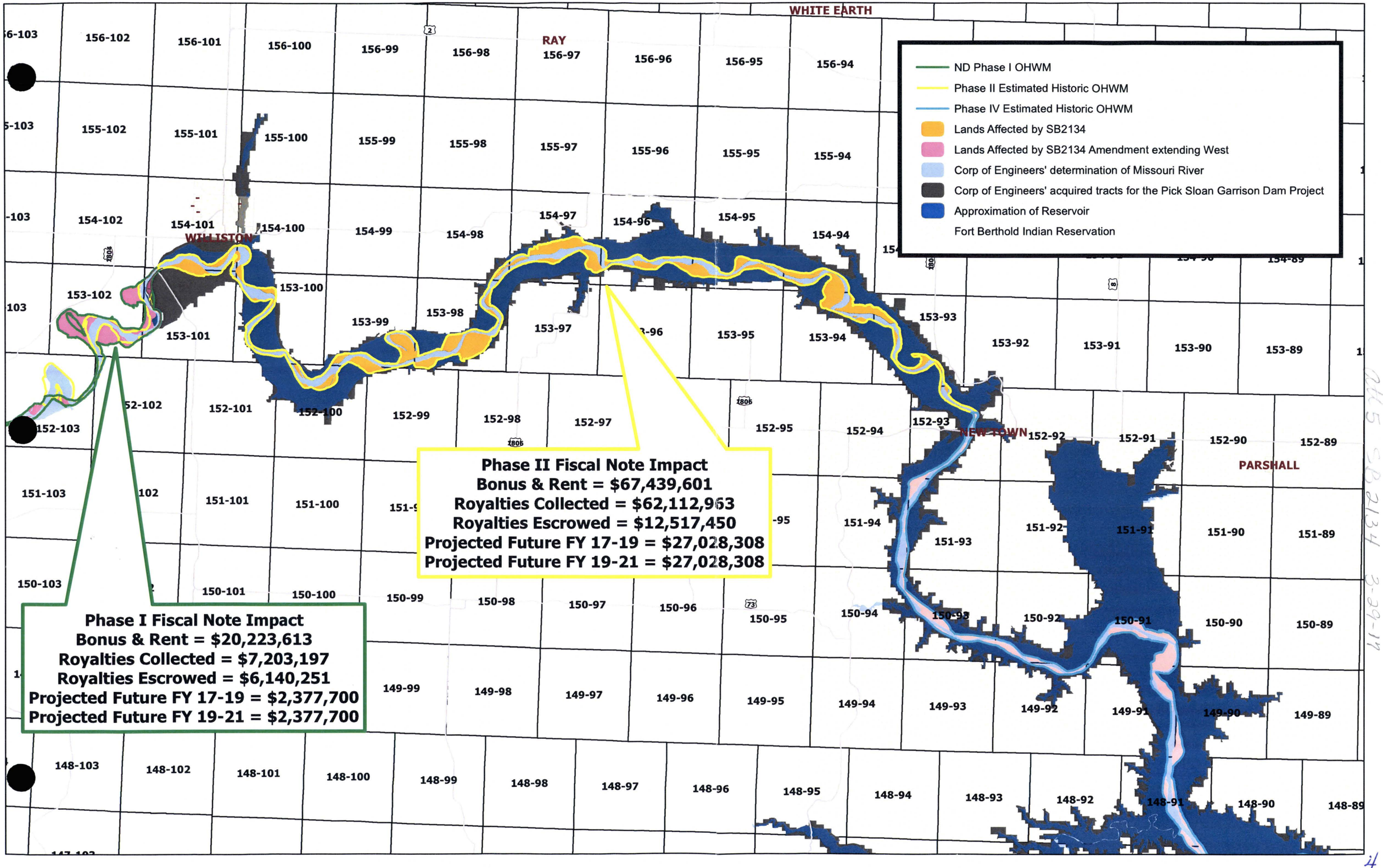
The Board and Department do not have the authority to distribute funds from the SIIF. In order to accommodate these refunds, the Legislature will need to approve appropriation authority of $186,385,381 for the return of the bonus, rent and royalty dollars within the Strategic Investment and Improvements Fund.

Regarding the bonus and rental amount of $87.7 million, it has been suggested that these funds will be refunded back to the private mineral owners along the effected stretch of the river. The bonuses paid were for the right to hold the State's lease, thus the bonus would be returned to that lessee. If a tract was "double-leased" another possible owner has already received their lease bonus and will not have claim to additional bonus and rental payment. If a private mineral owner opted not to lease, the minerals were likely force pooled by current production and are now subject to statutory royalty terms and will not likely receive a bonus payment for the lease.

Regarding the royalties collected prior to the 2017-2019 biennium ($69.3 million) and the royalties expected to be collected in the 2017-2019 biennium ($29.4 million), the largest individual dispute is the Federal government. Because the Federal government does not permit the escrow of disputed proceeds and hence has required full payment of royalties, a large portion of the returned royalties will go to the operator who will not pay them out to any other parties. The remainder may be paid by oil companies to be released to fee owners of record- barring other title disputes or discrepancies. If title questions remain, operators are permitted under State statute to hold those disputed royalties in "suspense".

The largest beneficiaries of this bill are likely the oil and gas operators and the Federal government.

The assigned fund balance, which is included in the SIIF balance, which the Board has set aside related to disputes along the entire extent of the river including within the Fort Berthold Indian Reservation totals $142.3 million. The Legislative Council's estimated fiscal impact estimates distributing the entire assigned fund balance. However, the bill exempts application of the historic OHWM determination within the Boundaries of the Fort Berthold Reservation. Because the State has leased river acreage within this area, $41.8 million of the SIIF's assigned fund balance is mineral revenues herein. If the entirety of the assigned fund balance is appropriated, the Board will need to re-obligate this amount because of the dispute with the Federal government within the boundaries of the Fort Berthold Indian Reservation.



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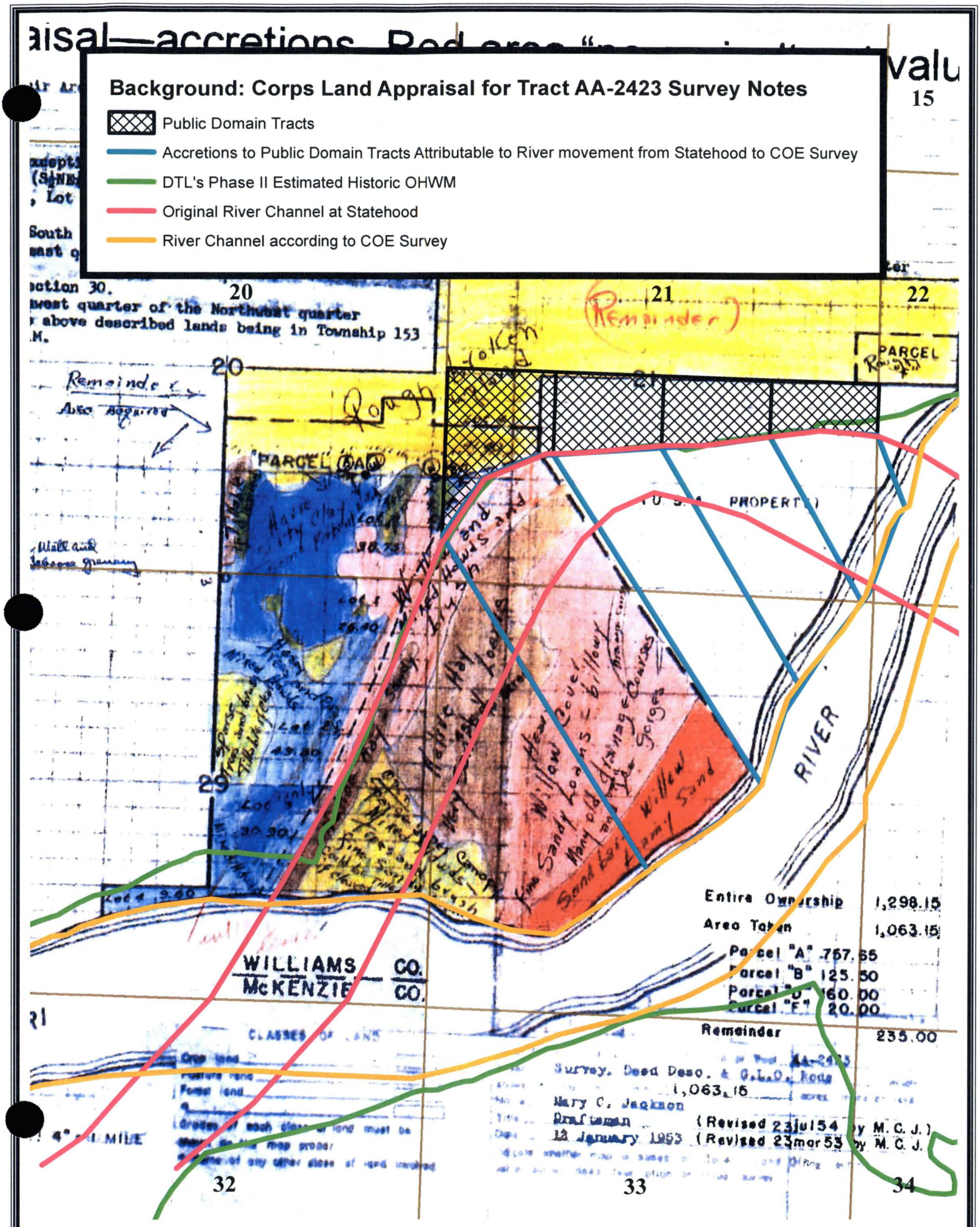
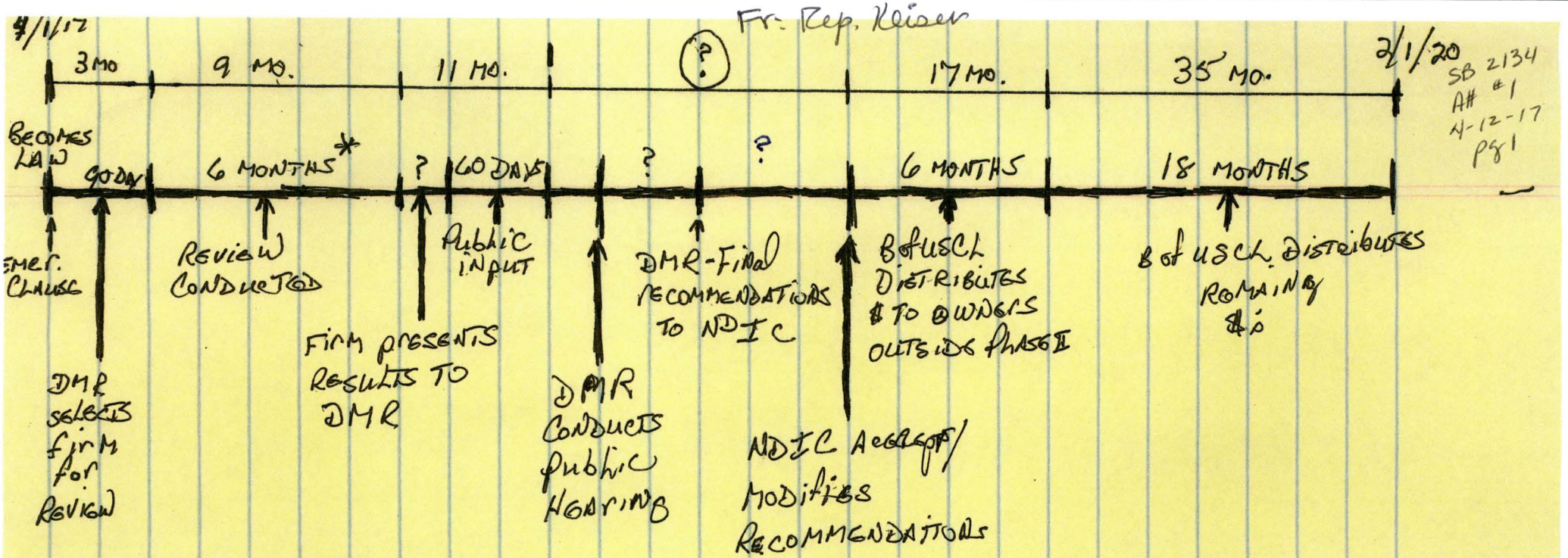

Background: Corps Land Appraisal for Tract AA-2423 Survey Notes
Public Domain Tracts
Accretions to Public Domain Tracts Attributable to River movement from Statehood to COE Survey
DTL's Phase II Estimated Historic OHWM
Original River Channel at Statehood
River Channel according to COE Survey
20
21
22
29
32
33
34
Remainder
PARCEL
RIVER
WILLIAMS CO.
McKENZIE CO.
Entire Ownership 1,298.15
Area Taken 1,063.15
Parcel "A" 767.65
Parcel "B" 125.50
Parcel "C" 160.00
Parcel "E" 20.00
Remainder 235.00
1,063.15
Mary C. Jackson
Draftsman
12 January 1953
(Revised 23jul54 by M.C.J.)
(Revised 23mar53 by M.C.J.)

Fr. Rep. Keiser



SB 2134
A# #1
4-12-17
Pg 1

* MAY be EXTENDED by DMR

STRATEGIC INVESTMENT & IMPROVEMENTS FUND

Board of Univ. & School LANDS

Dept of Mineral Resources

Appropriation:

SIIF

1) $800,000 for review
2) 100,000,000 → Univ. & School LANDS
3) $7,000,000 Line of CR - BND
4) 750,000 Repay legal Fees

EMERG CLAUSE.

OWNERSHIP

SB 2134
4-12-17

17.0159.06021
Title.

Prepared by the Legislative Council staff for
Representative Keiser
April 11, 2017

AH #2
Pg1

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

That the House recede from its amendments as printed on pages 1268-1273 of the Senate Journal and pages 1462-1467 of the House Journal and that Engrossed Senate Bill No. 2134 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide a statement of legislative intent; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to

any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major,

and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the

state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public

domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.

2. The funding provided in this section is available for the following:

   a. Repayment of any bonus, lease, and rent collections that are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   b. Repayment of any royalties collected before July 1, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   c. Repayment of any royalties collected after June 30, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   d. Repayment of any bonus, lease, and rent collections that are attributable to the remaining oil and gas mineral tracts requiring repayments.

   e. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. If the commissioner of university and school lands determines additional funding is necessary for any remaining mineral revenue repayments after the calculation under subsection 3:

   a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue repayments.

   b. If additional funding is needed before funds being made available by the sixty-sixth legislative assembly under subdivision a, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands may access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue repayments for the biennium beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. LEGISLATIVE INTENT - MONEYS HELD IN RESERVE IN THE STRATEGIC INVESTMENT AND IMPROVEMENTS FUND FOR MINERAL TITLE DISPUTES. In mineral title disputes between the state of North Dakota and any private mineral owner, or the owner's successors in interest, who reserved the mineral rights, through deed or condemnation order from the court, when the United States acquired the owner's property as part of the land acquisitions for Garrison Dam and its reservoir, Lake Sakakawea, and who filed a lawsuit against the state of North Dakota, and which lawsuit was pending as of February 1, 2017, claiming title to reserved mineral rights:

1. The board of university and school lands, acting through its commissioner, shall reimburse, as part of settlement agreements, actual legal and expert fees incurred by the private mineral owner; or

2. The court shall award actual legal and expert fees incurred by the private mineral owner if the private mineral owner prevails in the lawsuit.

The reimbursement must be paid from moneys held in reserve in the strategic investment and improvements fund for mineral title disputes.

SECTION 5. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

SB 2134 4/17 #1

17.0159.06023

FIRST ENGROSSMENT

Sixty-fifth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2134

Introduced by

Senators Armstrong, Bekkedahl, Unruh

Representatives Bosch, Longmuir, Porter

A BILL ~~for an Act to create and enact a new section to chapter 54-01 of the North Dakota Century Code, relating to the ownership of minerals inundated by Pick-Sloan Missouri basin project dams.~~for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

~~**SECTION 1.** A new section to chapter 54-01 of the North Dakota Century Code is created and enacted as follows:~~

~~**Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.**~~

~~Unless the state has explicitly transferred ownership of the minerals, the state of North Dakota owns the minerals in and under the Missouri riverbed within state borders, including segments of the riverbed which were artificially inundated as a result of constructing dams pursuant to the Pick-Sloan Missouri basin project. The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark from the northern boundary of the Fort Berthold reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the northern boundary of the Standing Rock Indian reservation to river mile marker one thousand three hundred three. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation are excluded from this section and must be determined under federal law. The state holds no claim to any minerals above the~~

~~ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. For the purposes of this section, "historical Missouri riverbed channel" means the Missouri riverbed channel as delineated by the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe. This section does not affect the authority of the state engineer to regulate the Missouri riverbed or waters of the state provided the regulation does not affect ownership of minerals in and under the riverbed or lands above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.~~

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.
2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.
3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.
4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

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

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.
2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.
3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and

convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

b. The historical records of the army corps of engineers pertaining to the corps survey;

c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

   b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of

the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

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

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

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.
2. The funding provided in this section is available for the following:

a. Repayment of any bonus, lease, and rent collections that are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

b. Repayment of any royalties collected before July 1, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

c. Repayment of any royalties collected after June 30, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

d. Repayment of any bonus, lease, rent, and royalties collections that are attributable to the remaining oil and gas mineral tracts requiring repayments.

e. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. As soon as a repayment amount for a known recipient is calculated but after the expenditure of the $100,000,000 in subsection 1:

a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue or other repayments.

b. If the $100,000,000 is expended before the repayment of all amounts calculated for known recipients and before additional funds are made available by the sixty-sixth legislative assembly, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands shall access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue and other repayments under this Act for the biennium

beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - REIMBURSEMENT OF LEGAL EXPENSES.

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

SECTION 5. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

SB 2134 4/17 #2

17.0159.06023
Title.

Prepared by the Legislative Council staff for
Representative Keiser
April 14, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

That the House recede from its amendments as printed on pages 1268 through 1273 of the Senate Journal and pages 1462 through 1467 of the House Journal and that Engrossed Senate Bill No. 2134 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to

any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major,

and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the

state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public

domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.

2. The funding provided in this section is available for the following:

   a. Repayment of any bonus, lease, and rent collections that are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   b. Repayment of any royalties collected before July 1, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   c. Repayment of any royalties collected after June 30, 2017, which are attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey.

   d. Repayment of any bonus, lease, rent, and royalties collections that are attributable to the remaining oil and gas mineral tracts requiring repayments.

   e. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. As soon as a repayment amount for a known recipient is calculated but after the expenditure of the $100,000,000 in subsection 1:

   a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue or other repayments.

   b. If the $100,000,000 is expended before the repayment of all amounts calculated for known recipients and before additional funds are made available by the sixty-sixth legislative assembly, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands shall access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue and other repayments under this Act for the biennium beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - REIMBURSEMENT OF LEGAL EXPENSES.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $750,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of reimbursing legal expenses as provided in subsection 2, for the biennium beginning July 1, 2017, and ending June 30, 2019.

2. The commissioner of university and school lands shall use funds appropriated in subsection 1 to reimburse actual legal and expert fees incurred and requested by any private mineral owner, or the owner's successors in interest, who reserved the mineral rights, through deed or condemnation order from the court, when the United States acquired the owner's property as part of the land acquisitions for Garrison Dam and its reservoir, Lake Sakakawea, and who filed a lawsuit against the state of North Dakota after December 31, 2011, but before December 31, 2016, and which lawsuit was pending as of February 1, 2017, claiming title to reserved mineral rights. The legal and expert fees may not be reimbursed until the final adjudication, settlement, or other resolution of the lawsuit for which they were incurred.

SECTION 5. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

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

Renumber accordingly

SB 2134
4-18-17
AH #1
pg 1

17.0159.06025
Title.

Prepared by the Legislative Council staff for
Senator Unruh

April 17, 2017

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2134

That the House recede from its amendments as printed on pages 1268-1273 of the Senate Journal and pages 1462-1467 of the House Journal and that Engrossed Senate Bill No. 2134 be amended as follows:

Page 1, line 1, after "A BILL" replace the remainder of the bill with "for an Act to create and enact chapter 61-33.1 of the North Dakota Century Code, relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams; to provide appropriations; to provide a contingent line of credit; to provide for retroactive application; and to declare an emergency.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. Chapter 61-33.1 of the North Dakota Century Code is created and enacted as follows:

61-33.1-01. Definitions.

For purposes of this chapter, unless the context otherwise requires:

1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.

2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west, which is the approximate location of river mile marker one thousand five hundred sixty-five, and from the South Dakota border to river mile marker one thousand three hundred three.

3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams.

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high-water mark. The state holds no claim or title to

any minerals above the ordinary high-water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high-water mark of the historical Missouri riverbed channel.

1. The corps survey must be considered the presumptive determination of the ordinary high-water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.

2. Upon the effective date of this Act, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections thirty-three and thirty-four, township one hundred fifty-three north, range one hundred two west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high-water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;

   b. The historical records of the army corps of engineers pertaining to the corps survey;

   c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

   d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high-water mark. The value for agricultural purposes is destroyed at the level where significant, major,

and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high-water mark; and

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

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high-water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high-water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high-water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation.

1. Within six months after the adoption of the final review findings by the industrial commission:

a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the

state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings.

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high-water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high-water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands.

Notwithstanding any provision of this chapter to the contrary, the ordinary high-water mark of the historical Missouri riverbed channel abutting nonpatented public

domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction.

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

SECTION 2. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND. There is appropriated out of any moneys in the strategic investment and improvements fund in the state treasury, not otherwise appropriated, the sum of $800,000, or so much of the sum as may be necessary, to the department of mineral resources for the purpose of contracting with a qualified engineering and surveying firm to conduct a limited review of the corps survey under this Act, for the biennium beginning July 1, 2017, and ending June 30, 2019.

SECTION 3. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS FUND - CONTINGENT LINE OF CREDIT - MINERAL REVENUE REPAYMENTS.

1. There is appropriated out of any moneys held in reserve in the strategic investment and improvements fund for mineral title disputes, not otherwise appropriated, the sum of $100,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of mineral revenue repayments, for the biennium beginning July 1, 2017, and ending June 30, 2019. The funding provided in this section is considered a one-time funding item.

2. The funding provided in this section is available for the following:

   a. Repayment of any lease, bonus, rents, and royalty collections attributable to oil and gas mineral tracts lying entirely above the ordinary high-water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey, as required in subsection 1 of section 61-33.1-04.

   b. Repayment of any lease, bonus, rents, and royalty collections attributable to the remaining oil and gas mineral tracts, as required in subsection 2 of section 61-33.1-04.

   c. Other mineral revenue repayments or other reimbursements that are attributable to oil and gas mineral tracts requiring repayments under this Act.

3. Upon adoption of the final review findings by the industrial commission, the commissioner of university and school lands shall calculate the amount necessary for mineral revenue repayments based on the final review findings.

4. As soon as a repayment amount for a known recipient is calculated but after the expenditure of the $100,000,000 in subsection 1:

a. The commissioner of university and school lands shall request from the sixty-sixth legislative assembly additional funding sufficient for any remaining mineral revenue or other repayments.

b. If the $100,000,000 is expended before the repayment of all amounts calculated for known recipients and before additional funds are made available by the sixty-sixth legislative assembly, the Bank of North Dakota shall extend a line of credit, not to exceed $87,000,000, to the commissioner of university and school lands. The commissioner of university and school lands shall access the line of credit, to the extent necessary, the sum of which is appropriated, for the purpose of mineral revenue and other repayments under this Act for the biennium beginning July 1, 2017, and ending June 30, 2019. The commissioner of university and school lands shall repay the line of credit from funds available in the strategic investment and improvements fund as appropriated by the legislative assembly.

SECTION 4. RETROACTIVE APPLICATION. Section 1 of this Act is retroactive to the date of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

SECTION 5. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

Match Line Sheet 24

WILLIAMS COUNTY

24. LAKE TRENTON

Trenton

1804

LAKE TRENTON

LAKE TRENTON BOAT RAMP

TRENTON GAME MANAGEMENT AREA

LAKE SAKAKAWEA

HAZARD AREA

SAND BARS

Lewis and Clark Campsite April 22, 1805

Lewis and Clark Campsite August 8, 1806 and August 9, 1806

TRENTON GAME MANAGEMENT AREA

LEWIS AND CLARK GAME MANAGEMENT AREA

85

1555.0
1556.0
1557.0
1558.0
1559.0
1560.0
1561.0
1562.0
1563.0
1564.0
1565.0
1566.0
1567.0
1568.0
1569.0
1570.0
1571.0
1572.0
1573.0
1574.0
1575.0
1576.0

R - 103 - W
R - 102 - W
R - 101 - W
T - 152 - N
T - 153 - N

TRENTON GAME MANAGEMENT AREA

Lewis and Clark Campsite August 7, 1806

HAZARD AREA

SAND BARS

Lewis and Clark Campsite April 23, 1805

Lewis and Clark Campsite April 24, 1805

HAZARD AREA
SAND BARS

McKENZIE COUNTY

NORTH DAKOTA

CAMP CREEK

85

1565

1574.2

Match Line Sheet 24

Match Line Sheet 23

US Army Corps of Engineers
Omaha District

Boat Ramp Coordinates

Lake Trenton:
48° 03' 53" N 103° 49' 33" W

- River Mile
- Boat Ramp
- Time Zone Boundary
- River Channel
- U.S. Government Boundary
- Recreational Boundary
- Reservation Boundary
- Township and Range

N
W E
S

Lake Sakakawea
North Dakota

U.S. Army Engineer District, Omaha
Corps of Engineers Omaha, Nebraska
Operations/Regulatory GIS Unit

Sheet 26 of 26
Orthophoto Year: 1991 - 1998

2000 0 2000 4000 Feet