

Sixty-sixth
Legislative Assembly
of North Dakota

ENGROSSED SENATE BILL NO. 2211

Introduced by

Senators Bekkedahl, Dwyer, Unruh

Representatives Keiser, Porter

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

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

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

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

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

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

- 22 4. "Sovereign lands" means those areas, including beds and islands, lying within the
23 ordinary high water mark of navigable lakes and streams. Lands established to be

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

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

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

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

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

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

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

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

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

3 **61-33.1-02. Mineral ownership of land ~~inundated~~subject to inundation by Pick-Sloan**
4 **Missouri basin project dams. (Retroactive application - [See note](#))**

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

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

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

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

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

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

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

5 **61-33.1-04. Implementation. (Retroactive application - [See note](#))**

6 1. Within six months after the adoption of the ~~final review findings~~acreage determination
7 by the industrial commissionboard of university and school lands:

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

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

18 2. Upon adoption of the ~~final review findings~~acreage determination by the ~~industrial-~~
19 ~~commission~~board of university and school lands:

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

25 b. Operators of oil and gas wells affected by the ~~final review findings~~final acreage
26 determination immediately shall begin to implement any acreage and revenue
27 adjustments relating to state-owned and privately owned oil and gas interests.
28 The operators shall complete the adjustments within two years after ~~the date of~~
29 ~~adoption of the review findings~~the board approves the acreage determination.
30 Any applicable penalties, liability, or interest for late payment of royalties or
31 revenues from an affected oil or gas well may not begin to accrue until the end of

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

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

6 **61-33.1-05. Actions challenging review findings or final acreage determinations.**
7 **(Retroactive application - [See note](#))**

8 1. An interested party seeking to bring an action challenging the review findings or
9 recommendations or the industrial commission actions under this chapter shall
10 commence an action in district court within two years of the date of adoption of the
11 final review findings by the industrial commission. The plaintiff bringing an action under
12 this section may challenge only the final review finding for the section or sections of
13 land in which the plaintiff asserts an interest. The state and all owners of record of fee
14 or leasehold estates or interests affected by the finding, recommendation, or industrial
15 commission action challenged in the action under this section must be joined as
16 parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high
17 water mark of the historical Missouri riverbed channel which varies from the boundary
18 determined under this chapter bears the burden of establishing the variance by clear
19 and convincing evidence based on evidence of the type required to be considered by
20 the engineering and surveying firm under subsection 3 of section 61-33.1-03.

21 2. An interested party seeking to bring an action challenging the final acreage
22 determination under this chapter shall commence an action in district court within two
23 years of the date the ~~acreage determinations were approved~~ ~~payments were made by~~
24 the board of university and school lands. The plaintiff bringing an action under this
25 section may challenge only the acreage determination for the section or sections of
26 land in which the plaintiff asserts an interest. The state and all owners of record of fee
27 or leasehold estates or interests affected by the final acreage determination
28 challenged in the action under this section must be joined as parties to the action. A
29 plaintiff or defendant claiming a determination of the acreage above or below the
30 historical Missouri riverbed channel which varies from the final acreage determination
31 under this chapter bears the burden of establishing the variance by clear and

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

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

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

11 **61-33.1-07. State engineer regulatory jurisdiction. (Retroactive application - [See note](#))**

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

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

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

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

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

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