

Sixty-sixth  
Legislative Assembly  
of North Dakota

## ENGROSSED HOUSE BILL NO. 1192

Introduced by

Representatives Keiser, Martinson

Senator Unruh

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

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

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

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

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

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

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

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

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

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

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

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

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

30       e. Subsection 34 of section 61-33-01 and section 47-06-05, which provide all  
31       accretions are presumed to be above the ordinary high water mark and are not

1                   sovereign lands. Accreted lands may be determined to be within the ordinary high  
2                   water mark of the historical Missouri riverbed channel based on clear and  
3                   convincing evidence. Areas of low-lying and flat lands where the ordinary high  
4                   water mark may be impracticable to determine due to inconclusive aerial  
5                   photography or inconclusive vegetation analysis must be presumed to be above  
6                   the ordinary high water mark and owned by the riparian landowner.

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