

## **CHAPTER 61-33.1**

### **STATE OWNERSHIP OF MISSOURI RIVERBED**

#### **61-33.1-01. Definitions. (Retroactive application - [See note](#))**

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 subject to inundation by Pick-Sloan Missouri basin project dams. (Retroactive application - [See note](#))**

The state sovereign land mineral ownership of the riverbed segments subject to inundation 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 subject to inundation 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 subject to inundation 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. (Retroactive application - [See note](#))**

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. Effective April 21, 2017, 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. 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.
  8. Upon adoption of the final review findings by the industrial commission, the board of university and school lands may contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage on a quarter-quarter basis or government lot basis above and below the ordinary high water mark as delineated by the final review findings of the industrial commission. The acreage determination is final upon approval by the board.

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

1. Within six months after the adoption of the acreage determination by the board of university and school lands:
  - 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 acreage determination by the board of university and school lands:
  - 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 approving the acreage determination.
  - b. Operators of oil and gas wells affected by the final acreage determination 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 board approves the acreage determination. 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 or final acreage determination.

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

1. 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.
2. An interested party seeking to bring an action challenging the final acreage determination under this chapter shall commence an action in district court within two years of the date the acreage determinations were approved by the board of university and school lands. The plaintiff bringing an action under this section may challenge only the acreage determination 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 final acreage determination challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a determination of the acreage above or below the historical Missouri riverbed channel which varies from the final acreage determination 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 contracted by the board of university and school lands under subsection 2 of section 61-33.1-04.

3. 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, determination of the ordinary high water mark, and final acreage determination 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. (Retroactive application - [See note](#))**

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. (Retroactive application - [See note](#))**

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 subject to inundation by Pick-Sloan Missouri basin project dams.