

## **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. "Navigable waters" means waters that were in fact navigable at the time of statehood, and that are used, 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.
4. "Ordinary high water mark" means that line below which the presence and action of the water upon the land is continuous enough so as to prevent the growth of terrestrial vegetation, destroy its value for agricultural purposes by preventing the growth of what may be termed an ordinary agricultural crop, including hay, or restrict its growth to predominantly aquatic species.
5. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high water mark 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 water mark and are not sovereign lands.

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

The department of water resources shall maintain ordinary high water mark delineation guidelines consistent with this section.

1. When determining the ordinary high water mark for delineating the boundary of sovereign lands, vegetation and soils analysis must be considered the primary physical indicators. When considering vegetation, the ordinary high water mark is the line below which the presence and action of the water is frequent enough to prevent the growth of terrestrial vegetation or restrict vegetation growth to predominately aquatic species. Generally, land, including hay land, where the high and continuous presence of water has destroyed the value of the land for agricultural purposes must be deemed within the ordinary high water mark.
2. When feasible, direct hydrological and hydraulic measurements from stream gauge data, elevation data, historic records of water flow, high resolution light detection and ranging systems, prior elevation and survey maps, and statistical hydrological evidence must be considered when determining the ordinary high water mark. The department of water resources shall establish appropriate guidelines, technical standards, and other criteria, including use of light detection and ranging systems or other future technological advancements, as necessary, for conducting hydrologic and hydraulic modeling required by this section.
3. Secondary physical indicators, including litter, debris, or staining, may be considered to supplement the analysis of the ordinary high water mark investigation but may not supersede primary physical indicators unless primary physical indicators are deemed inadequate or inconclusive. Physical indicators directly affected by influent non-navigable tributaries, adjoining water bodies, or wetlands may not be used to delineate the sovereign land boundary of a navigable body of water.

#### **61-33-02. Administration of sovereign lands.**

All sovereign lands of the state must be administered by the department of water resources 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 director of the department of water resources. All 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 director of the department of water resources 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 department of water resources.**

The department of water resources shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding the 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 the assets, whether the agreements were made before or after this section was enacted. The department of water resources may enter agreements with the game and fish department or other law enforcement entities to enforce this chapter and rules adopted under this chapter.

**61-33-05.1. Navigability determinations.**

1. Before making a determination that a body of water or portion of a body of water is navigable, the department of water resources shall:
  - a. Develop and deliver to the state water commission a preliminary finding regarding the navigability of the body of water or portion of a body of water and the legal rationale for the preliminary finding; and
  - b. Consult with the state water commission in an open meeting and demonstrate the public need and purpose for the determination to be made.
2. After completing the requirements of subsection 1, the department of water resources may proceed with making a final determination of navigability by:
  - a. Providing reasonable public notice of the preliminary finding, legal rationale for the preliminary finding, and opportunity for the public to provide comments for no less than sixty days. The notice must:
    - (1) Include the address and electronic mail address to which public comments may be sent and the deadline by which public comments must be received;
    - (2) Clearly identify the specific body of water or portion of a body of water for which the finding of navigability is sought;
    - (3) State the department will hold a public hearing regarding the preliminary finding before a final determination of navigability is made, and provide the date, time, and location of the public hearing;
    - (4) Be provided to the governing body of each soil conservation district, water resource district, and county adjacent to the body of water or portion of a body of water for which the preliminary finding was made;
    - (5) Be published in the official county newspaper for each county adjacent to the body of water or portion of a body of water for which the preliminary finding was made; and

- (6) Briefly state the purpose of the hearing and describe the impact or effect a determination of navigability will have on the property rights of persons who own property adjacent to the body of water or portion of a body of water for which the determination of navigability may be made; and
  - b. Holding a public hearing regarding the preliminary finding.
3. After completing the requirements of subsection 2 and making a determination of navigability, the department of water resources shall prepare a report regarding the determination, including summaries of the information provided to the state water commission, the public hearings held, and the public comments received. The department shall provide the report to the state water commission, send the report by certified mail to any person that appeared at the public hearing required under subsection 2 or provided written comments by the deadline, make the report available to the public, including on the website for the office of the secretary of state, and provide public notice of the report's availability. The report is final on the date it is provided to the state water commission.
4. A determination of navigability may be appealed directly to a court of competent jurisdiction in accordance with sections 28-32-42 through 28-32-46 and sections 28-32-50 and 28-32-51.

**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 department of water resources 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 department of water resources 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 department of water resources 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 director of the department of water resources, 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 director of the department of environmental quality, or their representatives.
2. The director of the department of water resources is the board's secretary.
3. The board shall meet at least once a year or at the call of the director of the department of water resources or two or more members of the board. The board shall meet at the office of the director of the department of water resources or 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 department of water resources 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 department of water resources may bring a civil action to recover damages resulting from violations and may also recover any costs incurred.