

FISCAL NOTE
Requested by Legislative Council
04/24/2019

Amendment to: Engrossed SB 2211

- 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.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues			\$0	\$0	\$0	\$0
Expenditures			\$0	\$2,000,000	\$0	\$0
Appropriations			\$0	\$0	\$0	\$0

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

	2017-2019 Biennium	2019-2021 Biennium	2021-2023 Biennium
Counties	\$0	\$0	\$0
Cities	\$0	\$0	\$0
School Districts	\$0	\$0	\$0
Townships	\$0	\$0	\$0

- 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).*

Senate Bill 2211 is relating to the determination of the ordinary high water mark; to sovereign lands, determining the ordinary high water mark; the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide for application.

- 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 65th Legislative Assembly's adoption of Senate Bill 2134 (SB 2134), codified as N.D.C.C. ch. 61-33.1, provided for the determination of the ordinary high water mark (OHWM) for certain stretches of the Missouri River. The bill directs the North Dakota Industrial Commission (NDIC) to determine the delineation of the OHWM of the US Army Corp of Engineers (USACE) 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, McKenzie, Mountrail, and Williams Counties, North Dakota.

On December 17, 2018, the Board of University and School Lands authorized the Commissioner to request proposals for analysis and GIS services for property related to the OHWM Study of the historical Missouri riverbed channel prepared by Wenck Associates, Inc. and adopted by NDIC on September 27, 2018 in Order No. 29129 to determine acreage above and below the OHWM within the following area: the northern boundary of the Fort Berthold Indian Reservation (approximately river mile 1482) to the southern border of Sections 33 and 34, Township 153 North, Range 102 West (just beyond river mile 1564), a distance of approximately 83 river miles.

An engineering firm will be able to provide the Department with the necessary data 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. Additionally, the Department will provide this information for all property impacted by N.D.C.C. ch. 61-33.1 so that this information is available to operators and the public.

Per the amended language modifying "inundated" to "subject to inundation", the Department cannot determine fiscal impact on revenues without additional information from the State Engineer. The funds in the Strategic Investment and Improvements Fund (SIIF), which includes the amounts generated from leasing the State's sovereign minerals, will likely be impacted if the State is required bonuses, rents and royalties to its lessees.

Per section 7, the additional timeframe for interested parties to bring litigation against the State will result in additional attorney fees.

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.*

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.*

SB 2211 will authorize the Board of University and School Lands to hire a qualified engineering and surveying firm to determine acreage above and below the OHWM within the following area: the northern boundary of the Fort Berthold Indian Reservation (approximately river mile 1482) to the southern border of Sections 33 and 34, Township 153 North, Range 102 West (just beyond river mile 1564), a distance of approximately 83 river miles. However, SB 2211 does not provide an appropriation for the costs of contracting with a qualified engineering and surveying firm as the Board has been provided the authority to utilize SIIF funds per N.D.C.C. § 15-08.1-08 as "management of the property".

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 1 of SB 2211 authorizes the Board of University and School Lands to contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage adjustments.

The cost of the survey is not to exceed \$2.0 million. This cost is a fixed price encompassing all work and direct costs for completion of the Deliverables as outlines in Section IV of the request for proposal. Additional costs may need to be negotiated once a firm is selected for expenses such as legal and expert witness fees.

Name: Jodi Smith

Agency: Department of Trust Lands

Telephone: 701-328-2807

Date Prepared: 03/13/2019

FISCAL NOTE
Requested by Legislative Council
04/17/2019

Amendment to: SB 2211

- 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.*

	2017-2019 Biennium		2019-2021 Biennium		2021-2023 Biennium	
	General Fund	Other Funds	General Fund	Other Funds	General Fund	Other Funds
Revenues			\$0	\$0	\$0	\$0
Expenditures			\$0	\$2,750,000	\$0	\$0
Appropriations			\$0	\$0	\$0	\$0

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

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- 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).*

Senate Bill 2211 is relating to the determination of the ordinary high water mark; to sovereign lands, determining the ordinary high water mark; the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation.

- 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 65th Legislative Assembly's adoption of Senate Bill 2134 (SB 2134), codified as N.D.C.C. ch. 61-33.1, provided for the determination of the ordinary high water mark (OHWM) for certain stretches of the Missouri River. The bill directs the North Dakota Industrial Commission (NDIC) to determine the delineation of the OHWM of the US Army Corp of Engineers (USACE) 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, McKenzie, Mountrail, and Williams Counties, North Dakota.

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An engineering firm will be able to provide the Department with the necessary data 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. Additionally, the Department will provide this information for all property impacted by N.D.C.C. ch. 61-33.1 so that this information is available to operators and the public.

Per the amended language modifying "inundated" to "subject to inundation", the Department cannot determine fiscal impact on revenues without additional information from the State Engineer. The funds in the Strategic Investment and Improvements Fund (SIIF), which includes the amounts generated from leasing the State's sovereign minerals, will likely be impacted if the State is required bonuses, rents and royalties to its lessees.

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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 1 of SB 2211 authorizes the Board of University and School Lands to contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage adjustments.

The cost of the survey is not to exceed \$2.0 million. This cost is a fixed price encompassing all work and direct costs for completion of the Deliverables as outlines in Section IV of the request for proposal. Additional costs may need to be negotiated once a firm is selected for expenses such as legal and expert witness fees.

Section 6 of SB 2211 requires \$750,000 be appropriated to reimburse legal expenses as provided in subsection 2, for the biennium beginning July 1, 2019, and ending June 30, 2021.

Name: Jodi Smith

Agency: Department of Trust Lands

Telephone: 701-328-2807

Date Prepared: 03/13/2019

FISCAL NOTE
Requested by Legislative Council
03/11/2019

Amendment to: SB 2211

- 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.*

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- 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).*

Senate Bill 2211 is relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams.

- 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.*

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Name: Jodi Smith

Agency: Department of Trust Lands

Telephone: 701-328-2807

Date Prepared: 03/13/2019

FISCAL NOTE
Requested by Legislative Council
02/08/2019

Amendment to: SB 2211

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The cost of the survey is not to exceed \$2.5 million.

Name: Jodi Smith

Agency: Department of Trust Lands

Telephone: 701-328-2807

Date Prepared: 01/20/2019

FISCAL NOTE
Requested by Legislative Council
01/12/2019

Revised
 Bill/Resolution No.: SB 2211

- 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.*

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The cost of the survey is not to exceed \$2.5 million.

Name: Jodi Smith

Agency: Department of Trust Lands

Telephone: 701-328-2807

Date Prepared: 01/20/2019

FISCAL NOTE
Requested by Legislative Council
01/12/2019

Bill/Resolution No.: SB 2211

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SB 2211 will authorize the Board of University and School Lands to spend Strategic Investment and Improvement Funds (SIIF) for the costs of a contractor to determine acreage above and below the OHWM within the following area: the northern boundary of the Fort Berthold Indian Reservation (approximately river mile 1482) to the southern border of Sections 33 and 34, Township 153 North, Range 102 West (just beyond river mile 1564), a distance of approximately 83 river miles.

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 1 of SB 2211 authorizes the Board of University and School Lands to contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage adjustments.

Total appropriation not to exceed \$2,500,000.

Name: Jodi Smith

Agency: Department of Trust Lands

Telephone: 701-328-2807

Date Prepared: 01/20/2019

2019 SENATE ENERGY AND NATURAL RESOURCES

SB 2211

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2211
1/31/2019
Job Number 31932

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri project dams.

Minutes:

5 attachments

Chair Unruh: Opened the public hearing.

Senator Brad Bekkedahl, District 1 (0:30-3:35) Introduced the bill, please see attachment #1. Please see attachment #2 for proposed amendments.

Jodie Smith, Commissioner and Secretary, Board of University and School Lands (4:40-14:30) Testified in favor, please see attachment #3.

Ron Ness, North Dakota Petroleum Council (14:30-15:30) Testified in favor. We've got to do this right in order for people to be paid. The amendments passed out by the prime sponsor essentially just rearrange the order in which all this will take place to ensure that the 2-year clock is restarted, if you recall from last session the 2-year clock basically gave people two years to litigate or not litigate. So, you have to get the payments right. We don't want to pay the wrong parties, that's where we're at today until you do the exact determinations acreage by acreage.

Craig Smith, Attorney, Crowley Fleck Law, North Dakota Petroleum Council (15:50-16:28) please see attachments #4-5. I just want to bring the perspective of the North Dakota oil and gas operators, we concur, we need the acreage adjustments. We cannot do any refunds or payment of royalties or adjustment on our paybacks until that is done. It's imperative that that project gets completed.

No agency or opposing testimony.

Chair Unruh: Closed the public hearing.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2211
2/7/2019
Job Number 32354

- Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri project dams.

Minutes:

1 attachment

Chair Unruh: Opened committee action.

Chair Unruh: This was brought to us by Senator Bekkedahl. It addresses a few things, mostly a deadline to some action that we took last session regarding ownership of the minerals under Lake Sakakawea. For those of us on the committee last session, we know how detailed that issue was. We also have an amendment (**Please see attachment #1**) that was brought to us, that should be adopted before we make a motion on the bill. Some permissive language for the Board of University and School Lands.

Senator Schaible: Was this from Craig Smith, was it drafted in original form?

Chair Unruh: It's not in legislative council form, but I trust that it makes sense.

Senator Schaible: Do we need to get that done?

Chair Unruh: No.

Senator Schaible: I move to adopt the amendment.

Senator Cook: I second.

A voice vote was taken.
Motion carries.

Senator Roers: I move a Do Pass As Amended.

Senator Schaible: I second.

A roll call vote was taken.
Motion carries 6-0-0.

Senate Energy and Natural Resources Committee

SB 2211

2/7/19

Page 2

Chair Unruh will carry.

Chair Unruh: Closed the committee action.

February 7, 2019

SL
1051

PROPOSED AMENDMENTS TO SENATE BILL NO. 2211

Page 1, line 1, after "to" insert "create and enact a new subsection to section 61-33.1-03 of the North Dakota Century Code, relating to the determination of the ordinary high water mark; and to"

Page 1, after line 4, insert:

"SECTION 1. A new subsection to section 61-33.1-03 of the North Dakota Century Code is created and enacted as follows:

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."

Page 1, line 8, overstrike "final review findings" and insert immediately thereafter "acreage determination"

Page 1, line 8, overstrike "industrial"

Page 1, line 9, overstrike "commission" and insert immediately thereafter "board of university and school lands"

Page 1, line 20, overstrike "final review findings" and insert immediately thereafter "acreage determination"

Page 1, line 20, overstrike "industrial commission" and insert immediately thereafter "board of university and school lands"

Page 1, line 21, remove "may contract with a qualified"

Page 1, remove lines 22 through 24

Page 2, remove line 1

Page 2, line 2, remove "board. After approving the acreage determination, the board"

ReNUMBER accordingly

Date: 2/7
Roll Call Vote #: 1

**2019 SENATE STANDING COMMITTEE
ROLL CALL VOTES
BILL/RESOLUTION NO. 2211**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0598.02001

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. Schaible Seconded By Sen. Cook

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh			Senator Merrill Piepkorn		
Senator Curt Kreun					
Senator Donald Schaible					
Senator Dwight Cook					
Senator Jim Roers					

Total (Yes) _____ No _____

Absent _____

Floor Assignment _____

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

*Voice Vote
Motion Carries*

Date: 2/7
 Roll Call Vote #: 2

**2019 SENATE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

Senate Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0598.02001

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. Roers Seconded By Sen. Schaible

Senators	Yes	No	Senators	Yes	No
Senator Jessica Unruh	X		Senator Merrill Piepkorn	X	
Senator Curt Kreun	X				
Senator Donald Schaible	X				
Senator Dwight Cook	X				
Senator Jim Roers	X				

Total (Yes) 6 No 0

Absent 0

Floor Assignment Sen. Unruh

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

REPORT OF STANDING COMMITTEE

SB 2211: Energy and Natural Resources Committee (Sen. Unruh, Chairman) recommends **AMENDMENTS AS FOLLOWS** and when so amended, recommends **DO PASS** (6 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). SB 2211 was placed on the Sixth order on the calendar.

Page 1, line 1, after "to" insert "create and enact a new subsection to section 61-33.1-03 of the North Dakota Century Code, relating to the determination of the ordinary high water mark; and to"

Page 1, after line 4, insert:

"SECTION 1. A new subsection to section 61-33.1-03 of the North Dakota Century Code is created and enacted as follows:

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."

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Page 1, line 20, overstrike "final review findings" and insert immediately thereafter "acreage determination"

Page 1, line 20, overstrike "industrial commission" and insert immediately thereafter "board of university and school lands"

Page 1, line 21, remove "may contract with a qualified"

Page 1, remove lines 22 through 24

Page 2, remove line 1

Page 2, line 2, remove "board. After approving the acreage determination, the board"

Renumber accordingly

2019 HOUSE ENERGY AND NATURAL RESOURCES

SB 2211

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2211
3/8/2019
33433

- Subcommittee
 Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to the determination of the ordinary high water mark; to the ownership of mineral rights of land inundated by Pick-Sloan Missouri Basin Project dams.

Minutes:

Attachment 1,2,3

Chairman Porter: opened the hearing on SB 2211.

Sen. Brad Bekkedahl, presented Attachment 1 and 2.

Jodi Smith, ND Trust Lands presented Attachment 3.

Rep. Lefor: Do you feel this bill gives you all the tools you need to complete this task?

21:00

Jodi Smith: yes we do.

Rep. Keiser: When was this issue recognized by the department or anyone within State government?

Jodi Smith: I can only speak to the time period since I came to this position. The issue was raised to the ND Industrial Commission I believe in April. They had a public comment period at the end of June. I provided them a similar testimony at that time.

Rep. Keiser: It's obvious what the intent was of the Legislation passed. We felt there was a taking that was inappropriate, those be returned to the rightful owner. It was our assumption; we didn't put a price tag on the Wenck study. It was our assumption when they got done, you would be able to make the decision. Not come back and say we need 2 more years and \$2.5 million. Did Wenck fail? Did we not write a correct RFP? Why didn't they do this?

Jodi Smith: I don't think I can adequately address that. I think that should be addressed to the ND Industrial Commission only because it wasn't under our purview to do this.

Rep. Keiser: Are you saying all property needs to go through this?

Jodi Smith: We would prefer that every property go through this.

Rep. Keiser: that's not my question.

Jodi Smith: yes I believe every property needs to go through this.

Rep. Keiser: We thought by now this would be done. Shouldn't we now have an amendment with interest to these mineral rights owners at the interest rate earned on those reserved dollars or maximum rate the Bank of ND receives in terms of interest earnings.

Jodi Smith: That's completely up to you to make that determination. At this time we will issue checks to the operators. It will be up to the operators to issue checks to mineral owners.

Rep. Keiser: Not you, we could put into the bill you will, in addition to returning it to the operators, you will pay these mineral right owners the money they have not been able to utilize the last 2 years and now for 2 more years.

Jodi Smith: We can provide you with that interest rate we have garnered from the Bank of ND. I can email you later with that information.

Rep. Devlin: When you were doing your budget did you request additional people so this could be done in one year not two?

Jodi Smith: We did have that conversation and it takes us about 2 years to train someone in that division how to do this work. The only other thing would be to hire outside consultation to assist.

Rep. Keiser: Help us identify who knew what when. This is session oversight. I can't believe you're standing here and telling us now we need a second study when it was clear what the intention was. I want to know who made what decisions when, and did it recognize that we needed this information and add it to the Wenck study. I'm talking that we need to do a 2nd study to determine. Somebody knew about this in advance. I can't believe the light turned on in April.

Jodi Smith: For our department the light went on in April. We weren't part of the Wenck study and I think very intentionally there was a "Chinese wall" created between the ND Industrial Commission and the Dept. of Trust Lands. We weren't involved in the procurement of the first that did this. We didn't understand this wouldn't be part of that information and in April 17, 2018, we realized we had an issue. At that time, we brought our concerns forward through the public comment period. Didn't understand it wasn't under our purview. We didn't understand that this wasn't something they could complete under SB2134 from last session. We made an assumption it could be completed by them. When the order was issued on September 27, 2017 that was when we knew we would not be a part of it and ask for an extension at that time. Understanding if that work had not already been done there was going to be a delay with us being able to release the funds because we didn't have those acreage adjustments we needed to do our portion.

Rep. Keiser: You can say with certainty, you did not know it and it assured in April. What about anyone else in your department? This is one of those should have knowns. We have a major problem that's costing us \$2.5 million. Can you tell me no one else in your department knew?

Jodi Smith: I can tell you no one was talked to in our department. When the final review was issued we knew we were going to have a problem. In our process, we did as the ND Petroleum Council, in particular Craig Smith, expert in ordinary high water mark and Lynn Helms in to help us write the RFP. Our hope and goal was that we would not come into another one of these issues where we weren't getting the information.

Chairman Porter: Inside of Wenck and drawing the line, there are full quarters. Do those need review to pay out? They shouldn't need any additional review.

31:00

Jodi Smith: I think if we can go through the survey and clearly identify those, what we have right now, that Wenck line, when they drop it on top of our lines, is actually dots, not a line. So if you go on Dept. of Mineral Resources, you can pull up that survey, there's little dots. Sometime they abut right next to each other and we need to know very specifically. If there's a clear way above or below, we do have a few circumstances like that I'm aware of. Those are a little easier to go through and start releasing funds. We just got a ruling on the Sorum case. There was an injunction on us releasing any funds. If there's an appeal to that ruling, there's potential that we will be in an injunction to release any of these funds.

Ron Ness, ND Petroleum Council: presented Attachments 4 and 5 for Craig Smith, attorney for Crowley Fleck who was out ill.

36:30

Rep. Lefor: I understand the Sorum case, the State steals their minerals, the Judge rules it's past the statute of limitations. So we protect ourselves with a statute from the mineral owners so we can justify or not justify. Has there been any discussion among your group about having legislature revise the statute in terms of statute of limitations to get these dollars to the rightful owners?

Ron Ness: I think this resets the clock on payment and the ability for individual landowners to appeal.

Rep. Lefor: are you also including those mineral owners where the judge made the ruling that they can't get their money back and the Sorum case, are you referring to those as well?

Ron Ness: I think the judge made the ruling regarding the leases which is the individuals or operators who leased the minerals, but they could not release that mineral. That is going to be appealed in my opinion. The Judge had the wrong lease in hand. That State lease is very clear that it says you refund it if you found that we don't own these minerals.

Rep. Keiser I've lost confidence in Legislative intent having much impact. If you listen to the commissioner she wants to complete the study first. Some of these areas are not in question. There's got to be penalty. These are dollars that somebody else owns. We're reaping the benefit of interest for potentially 4 years and that's not fair.

Ron Ness: that's up to you. The Dept. of Trust Lands or Industrial Commission may have that. The Sorum Nelson lawsuit is also substantially trying to delay payment.

Chairman Porter: further support? Opposition?

Rep. Keiser: Anyone from the Industrial Commission here?

Arlene Fine, Industrial Commission

Rep. Keiser: who knew what when and why wasn't this addressed in the RFP project so we didn't have a further delay.

42:20

Ms. Fine: Mr. Helms was leading drive on drafting the RFP. I was in on the discussion. We thought we had covered what the intent of the legislation was. As the process went through and the information came forward, then in April we were told it wasn't sufficient. At that time the work had already been done.

Chairman Porter: If we as a state thought we had the property verbiage for the RFP and the contractor didn't provide the information, was there a failure inside of the contract that we didn't get what we paid for, or was there a failure that it wasn't written property to get what we wanted?

Ms. Fine: I don't think I can answer that. What we incorporated into the RFP was language that was in the law. That was what was brought forward in the proposals, selected the proposal and entered into the contract. Whether there's some interpretation I can't answer that.

Troy Seibold, Chief Deputy Attorney General: I was here in case there were questions about the Sorum case which is ongoing and a direct constitutional challenge to SB 2134 from the 2017 session.

Chairman Porter: Rep Lefor had a question he asked Mr. Ness in regards to the Judge's ruling and the statute of limitations of that ruling.

Troy Seibold: Essentially what we had is the plaintiffs' in Sorum have challenged the constitutionality of SB 2134, file suit in District Court in Fargo, in front of Judge Erbe. They are saying it's a gift clause problem, there's a public trust doctrine problem. They've alleged the state owns all the minerals under the lake and by giving them away we are violating the gift clause. The state has defended that statute. The defendants are the Industrial Commission, the Land Board, the Governor and Attorney General. The Judge has recently ruled in the last week, essentially the state won. The Judge upheld the constitutionality of the statute for the most part. There's one piece he did declare unconstitutional. The Judge declared in that case the state does not own everything under the lake, it's not a gift. The Judge, we felt was in line with the state. In his order he went into the analysis about the statute of limitations. Where he went and got there was really in the retroactivity of the statute. HB 2134 is retroactive in nature to 2006. As he analyzed the constitutionality he went down the path of looking statute of limitations. We are reviewing that, and have some issues with it. We think the Judge's analysis is maybe flawed. We will be contacting our clients, the Industrial Commission, the Land Board, the governor, the attorney general about what path we take forward. That might involve asking Judge Erbe to clarify his decision. We may be at that point just appealing. Those are things the clients will have to make decisions. I would echo Mr. Ness comment that the parties will appeal. At the end of the day nothing is unconstitutional until 4 of our Supreme Court justices say it is. At this point it's highly likely this will end up at the Supreme Court anyway. Imbedded in that lawsuit is an injunction prohibiting the Land Department from disbursing funds from the effective date of the act which it had an emergency clause so it was April 2017 and prior. So the Land Board is prohibited from disbursing funds from April 2017 and prior to that date due to that order. That's where the case sits. The Judge said because these individuals only had a 3-year statute of limitations, they only had up until 3 years ago to file a lawsuit to try and recover their money from the State. Anything prior to that date would be a gift. It was the retroactivity that the Judge declared unconstitutional.

Rep. Lefor: we can't change anything constitutional. Is there anything we can add to this bill to help the mineral owners in terms of statute of limitations? It's a shame these minerals were taken and now we're going to hide behind, we're not, it's the Judge's ruling that there's a statute of limitations. Anything that can be done statutorily to help the mineral owners?

Troy Seibold: It's highly likely the State will appeal that decision. We have a lot of good arguments that the Judge's ruling is flawed. I can't speak on behalf of the Land Board and the State Industrial Commission.

Rep Heinert: as the attorney general's office reviewed the contract the State signed with the company that did the land survey?

Troy Seibold: we have, we review all State contracts. We haven't had an allegation of breach of contract.

Rep Heinert: are you going to be looking into that further?

Troy Seibold: if that's the wish of the committee absolutely.

Chairman Porter: That is the wish of the committee inside of 61-33.104 with the implementation language that was placed in 21-34, that there was an implementation component inside of that law last session we all thought was included in the survey request and process. When we allocated the funds, I now begin to understand why the Wenck study came in so far under budget, because they only did a component, not all of the work that was necessary to distribute the funds even though the law said it needed to be to the point of funds being distributed.

Rep. Keiser: Could you share with us why there were all the firewalls instead of conversation about within the partnership of what to do relative to, is there something prohibiting talking to people and we have to have these firewalls versus talking with the industry, speak with the land trust department.

Troy Seibold: I'm not aware of the firewalls these individuals are referring to that we heard earlier. I'm not saying they didn't exist. I'm not aware of them. The state has procurement rules, we have a public bidding process, a public comment period. I'm not aware, I hesitate to comment on the firewall specifically because I'm not sure what they're referring to. they existed.

Rep. Keiser: It's not breach of contract but it's breach of common sense. If there's something that requires not to do that, we should know that. If there isn't, that's irresponsible that you don't talk to the impacted parties. We need to know why, who, when, where this broke down. This bill is appropriating \$2.5 million. I assume it's coming out of the School Lands Trust Department. We're raiding the TIF fund. This bill gives the Dept. of Trust Lands to negotiate the new contract, why not the Industrial Commission?

Troy Seibold: makes sense with Trust funds since they'll be cutting the checks. What entity is up to you.

Chairman Porter: closed the hearing on SB 2211.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2211
3/8/2019 afternoon
33453

- Subcommittee
 Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to the determination of the ordinary high water mark; to the ownership of mineral rights of land inundated by Pick-Sloan Missouri Basin Project dams.

Minutes:

Attachment 1

Chairman Porter: opened the hearing on SB 2211. Passed out Attachment 1. The first amendment presented by Sen. Bekkedahl is 19.0598.03001 for the emergency clause.

Rep. Keiser: Move the amendment.

Rep. Lefor: second.

Chairman Porter: We have a motion and a second to move 03001 that inserts the emergency clause. Voice vote, motion carried.

The second amendment from Sen. Bekkedahl presented through the Petroleum Council is 03002, is very specific to how things are looked at in regards to riverbed segments. The word inundated, the way the State Engineer's office has interpreted that, is if it was flooded once then it was inundated and they aren't paying for it. As we worked on the high water mark, this language that Mr. Smith drafted is proper to how we want it looked at.

Rep. Keiser: move to adopt amendment 03002.

Rep. Anderson: second.

Chairman Porter: We have a motion and a second for 03002. Discussion? This is directly related to those areas further upstream on the lake. Voice vote, motion carried.

The third issue is one I handed out last session that was placed on to 2134, went to conference, eventually was removed off of there. You'd have to overstrike on Line 11, that July 2017 and put in July 1, 2019 and ending June 30, 2021. All other dates are correct.

Rep. Keiser: As I suggested during the hearing it'd be nice if we could make them pay the interest on the dollars which they own. That's going to be too difficult. The one thing we could do is pay their legal fees. Some of the mineral owners have pretty much spent the total value of their minerals in trying to fight the case. This would be some compensation the committee could consider. I don't

know if we can get it through the conference committee, but we're at a different time, different reality than 2 years ago. So I would move the adoption of that amendment.

Chairman Porter: The motion is the Sec.4 Line 11 of the sheet I handed out with the date change on Line 11 from July 1, it would read 2019, and then ending June 30, 2021.

Rep. Anderson: second.

Rep Heinert: Line 18 and 19, do we need to make adjustments?

Chairman Porter: No that date is right.

Rep. Zubke: is there any idea how much these families have spent and will this cover it all? I'd heard last session this might all go to one family.

Rep. Keiser: the reality is, 1 or 2 families did take the lead and spent their dollars. One family is in it \$300,000. If you're going to file the lawsuit that issues the same issue I have, I can file as a friend but not have to file a lawsuit because they're going to determine the outcome on your lawsuit. I can sit back and not spend any money on attorneys.

Rep Heinert: Looking at that, not knowing how many families are involved, should we have something identifying a time frame specific? They have to apply for and request these funds, the dollar amount and turn it over to the State Land Board to make a decision on how much each family is going to get?

Chairman Porter: I think the limiting factor based on last session, it's less than 5 different actions, and that sum was very close to what was necessary to do it. I think if we send it off to appropriations and into the conference committee, that can be honed down for the dollar amount where it needs to be.

Rep Heinert: I don't know how many families are outside the 5 main families that may have started some form of an action and may come back after those 5 families and say I hired an attorney too and I got about \$5000-\$6000 then sat back and watched. I would like to add something like the family has to request the fees to be paid and or within a time frame of the finalization of the product the Land Department develops.

Chairman Porter: In order to qualify for this, they would have had to have filed a suit. If they hired a lawyer and decided to sit back, those would not be part of this anyway the way it's written. It's related directly to those who have filed suit.
Voice vote, motion carried.

Rep. Keiser: Page 3, something to consider. Lines 9-10-11-12, if an interested party, I'm a mineral right owner and I want to legally challenge the decision by the land board, my clock starts when they make that decision. I question whether the clock shouldn't start when they pay me. They conceivably could make their decision and withhold payment. We don't have any place in here that says once you've made a decision you have to pay them. They could withhold payment for 3-4 months, and now I've lost 3-4 months. Right now the clock starts when they make their decision. Is that proper given it's their money?

Chairman Porter: On Line 11 what would you propose?

Rep. Keiser: This isn't the correct language but within 2 years of the date, the payment was made by the Board of University and School Trust Lands. It does benefit and give a little more time potentially to the mineral right owner. I'll move this as an amendment.

Rep Bosch: second.

Chairman Porter: discussion?

Rep Bosch: I don't know, once the final decision has been made, their plan of action is to start it right then. I don't know if it really adds, gives that much to the person receiving the funds that we wait.

Rep. Keiser: I point out that the payment isn't made directly to them. Initially it's made to the producer and the producer has to pay them.

Chairman Porter: So it could be 6-12 months they aren't aware of what their payment is going to be.

Rep. Lefor: If we're going to make a mistake, let's make a mistake on the side of the mineral owners. They've been run through the mud on this and I would support this. They've been getting the short end of the stick wherever they've been going. So if this gives them a little more latitude we should do it.

Chairman Porter: Remember what Ms. Smith said, once the determination is made, the check is not written to the individual, the check is written to the lease holder. The lease holder is responsible to pay the mineral holder.

Rep. Lefor: should there be language in there that payments are made to the mineral rights owner versus the lease holder.

Chairman Porter: I don't think that's possible from the standpoint that the person inside of the lease is the person who leased them from the state. It's has to go through that extra hoop to get back to the individual.

Rep. Zubke: that would be my point. The Board of University Lands is going to make their payment back to the operator. It could take the operator up to 18 months to pay the mineral right owners. I don't know that this wording is in a manner to where you're going to accomplish what you're trying to accomplish.

Rep. Keiser: think of the process. Right now the bill reads the day the State makes a determination the clock starts, you've got 2 years. What I'm proposing, is the date they make their payment the clock starts. They make the payment to the producer. If the producer does not transfer it in a proper time manner, the mineral rights owners never sues the state, they sue the producer to get their money. If there's a lag of 2-3 months before the payment is made, that's lost time on the clock for me to challenge.

Rep. Zubke: but I understand that there are operators that can hold funds up to 18 months they're required to pay interest. You might end up with a small window for that individual to file that lawsuit. I just want you to be aware of that.

Rep. Keiser: that's what I'd like to avoid.

Chairman Porter: Wouldn't there be, when the determination is made, the individual would be able to see what the determination is made and how much money went back to the company. So they would immediately have the ability to say I disagree with that and start their action? Then it would be when the check was written from the State to XYZ oil company, then they would see what that was and start their actions against the state.

Rep Bosch: When we pay the money to have the next round done, I assume they're going to break this down into individual landowners. They're not going to do the determination on operator acreage and mineral owners. To your point we should know exactly what's been released. Everyone should know their allocation.

Chairman Porter: yes. This will get down to the point of the parcel, the short quarters, the short line of the ordinary high water mark of the determination. We have a motion and a second on Line 11 to amend, overstrike the words "acreage determination" and "approved" and insert "payments were made" by the Board of University of School Lands. Voice vote, motion carried. We have an amended bill.

Rep. Anderson: I move we pass as amended, SB 2211 and rerefer to appropriations.

Rep Bosch: Second.

Chairman Porter: We have a motion and a second for a Do Pass as Amended for SB 2211 and Rereferred to appropriations. Discussion?
Roll call vote 14 yes 0 no 0 absent. Motion carried. Rep. Keiser is carrier.

2019 HOUSE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Coteau A Room, State Capitol

SB 2211
4/16/19
34758

- Subcommittee
 Conference Committee

Committee Clerk, Kathleen Davis

Explanation or reason for introduction of bill/resolution:

Relating to the determination of the ordinary high water mark; to the ownership of mineral rights of land inundated by Pick-Sloan Missouri Basin Project dams.

Minutes:

Attachment 1

Chairman Porter: opened the hearing on SB 2211. The bill has been referred back to committee

Rep. Keiser: Move to reconsider our actions whereby we passed out SB 2211.

Rep. Lefor: Second

Chairman Porter: We have a motion and a second to reconsider our actions whereby we passed out SB 2211. Voice vote, motion carried.

As you recall this was the lakebeds mineral bill. Approps amended that. The original bill of Rep. Keiser's that had this proposed language was sent back to us as the lakebed minerals bill as a hoghouse in 1192. If you look on Page 3, Sec 8, it says subject to inundation. That was a big component of what we changed as a policy as we sent the bill out. Questions?

Rep. Keiser: move to adopt 03004 to SB 2211.

Rep. Anderson: second.

Chairman Porter: We have a motion and a second to adopt amendment 03004. Discussion? Voice vote, motion carried.

Rep. Anderson: Move a Do Pass as further amended on SB 2211.

Rep. Keiser: Second

Chairman Porter: We have a motion and a second for a Do Pass as amended on SB 2211. Discussion? Roll call vote. 14 yes, 0 no, 0 absent. Motion carried. Rep. Keiser is carrier.

March 4, 2019

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

Page 1, line 2, remove "and"

Page 1, line 5, after "dams" insert "; and to declare an emergency"

Page 3, after line 26, insert:

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

Renumber accordingly

March 7, 2019

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

Page 1, line 3, after "sections" insert "61-33.1-02,"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, after line 6, insert:

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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."

Page 3, after line 26, insert:

"SECTION 5. AMENDMENT. Section 61-33.1-07 of the North Dakota Century Code is amended and reenacted as follows:

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

Renumber accordingly

4 legislative assembly.

5 **SECTION 4. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS**

6 **FUND - REIMBURSEMENT OF LEGAL EXPENSES.**

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

22 **SECTION 5. RETROACTIVE APPLICATION.** Section 1 of this Act is retroactive to the date
23 of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark
24 determination under this Act is retroactive and applies to all oil and gas wells spud after

March 8, 2019

DP 3/8/19
1 of 2

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33.1-02,"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide a contingent appropriation; and to declare an emergency"

Page 1, after line 6, insert:

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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."

Page 3, line 11, replace "acreage determinations were approved" with "payments were made"

Page 3, after line 26, insert:

"SECTION 5. AMENDMENT. Section 61-33.1-07 of the North Dakota Century Code is amended and reenacted as follows:

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

DD 3/8/19

Jul 2

SECTION 6. 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, 2019, and ending June 30, 2021.
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 7. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

DO 4/16/19
1 of 4

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

Page 1, line 1, after "enact" insert "section 61-33-01.1 and"

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide a contingent appropriation; to provide for application; and to declare an emergency"

Page 1, after line 6, insert:

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

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. "Ordinary high water mark" means the continuous line along the banks of navigable rivers and lakes where the presence and action of waters of the navigable river or lake are so common and usual, and so long continued in all ordinary years, as to mark upon the bank of a navigable river or lake a character distinct from that of the abutting upland. The ordinary high water mark line must be continuous in elevation or gently sloping, following the gradient of the river.
4. "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.
- 4.5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

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

DA 4/16/19
2 of 8

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

The state engineer 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 state engineer 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.

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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.

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

DE 4/16/19
3 of 4

- e. Subsection ~~34~~ 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."

Page 3, line 11, replace "acreage determinations were approved" with "payments were made"

Page 3, after line 26, insert:

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

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

SECTION 9. CONTINGENT 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, 2019, and ending June 30, 2021.
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 10. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

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

Do 4/16/19
4 of 4

Renumber accordingly

Date: 3-8-19
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0598.03001

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 Keiser Seconded By Lefor

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. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment voice vote. Motion carried.

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

Date: 3-8-19
 Roll Call Vote #: 2

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19-0598.03002

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 Keiser Seconded By 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. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment Voice vote. Motion carried.

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

Date: 3-8-19
 Roll Call Vote #: 3

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and 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 Keiser Seconded By 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. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment voice vote. Motion carried.

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

*on the sheet Rep Porter handed out
 Sec. 4 Line 11 change 2017 to 2019
 change 2019 to 2021*

Date: 3-8-19
 Roll Call Vote #: 4

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and 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 Keiser Seconded By 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. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment voice vote. Motion carried

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

Line 11 within 2 years of the date the payment was made by the Board of University and School Lands over strike "acreage determination" and "approved" and insert "payments were made"

Date: 3-8-19
 Roll Call Vote #: 5

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and 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 Anderson Seconded By 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. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) 14 No 0

Absent 0

Floor Assignment Rep Keiser

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

Date: 4-16-19
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and 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 Lefor

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. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment Voice vote. Motion carried

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

Date: 4-16-19
 Roll Call Vote #: 2

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0598.03004

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			Rep. Roers Jones		
Rep. Bosch			Rep. Ruby		
Rep. Devlin			Rep. Zubke		
Rep. Heinert					
Rep. Keiser			Rep. Mitskog		
			Rep. Eidson		

Total (Yes) _____ No _____

Absent _____

Floor Assignment Voice vote. Motion carried.

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

Date: 4-16-19
 Roll Call Vote #: 3

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. 2211**

House Energy and Natural Resources Committee

Subcommittee

Amendment LC# or Description: 19.0598.03004

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 Anderson Seconded By Rep Keiser

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. Zubke	✓	
Rep. Heinert	✓				
Rep. Keiser	✓		Rep. Mitskog	✓	
			Rep. Eidson	✓	

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 2211, 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 2211 was placed on the Sixth order on the calendar.

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33.1-02,"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide a contingent appropriation; and to declare an emergency"

Page 1, after line 6, insert:

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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."

Page 3, line 11, replace "acreage determinations were approved" with "payments were made"

Page 3, after line 26, insert:

"SECTION 5. AMENDMENT. Section 61-33.1-07 of the North Dakota Century Code is amended and reenacted as follows:

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

SECTION 6. 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, 2019, and ending June 30, 2021.
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 7. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

REPORT OF STANDING COMMITTEE

SB 2211, as engrossed and amended: Energy and Natural Resources Committee (Rep. Porter, Chairman) recommends AMENDMENTS AS FOLLOWS and when so amended, recommends **DO PASS** (14 YEAS, 0 NAYS, 0 ABSENT AND NOT VOTING). Engrossed SB 2211, as amended, was placed on the Sixth order on the calendar.

Page 1, line 1, after "enact" insert "section 61-33-01.1 and"

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide a contingent appropriation; to provide for application; and to declare an emergency"

Page 1, after line 6, insert:

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

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. "Ordinary high water mark" means the continuous line along the banks of navigable rivers and lakes where the presence and action of waters of the navigable river or lake are so common and usual, and so long continued in all ordinary years, as to mark upon the bank of a navigable river or lake a character distinct from that of the abutting upland. The ordinary high water mark line must be continuous in elevation or gently sloping, following the gradient of the river.
4. "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.
- 4.5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

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

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

The state engineer 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 state engineer 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.

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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.

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

- e. Subsection ~~34~~ 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."

Page 3, line 11, replace "acreage determinations were approved" with "payments were made"

Page 3, after line 26, insert:

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

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

SECTION 9. CONTINGENT 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, 2019, and ending June 30, 2021.
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 10. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

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

Renumber accordingly

2019 HOUSE APPROPRIATIONS

SB 2211

2019 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

SB 2211
3/19/2019
33986

- Subcommittee
- Conference Committee

Committee Clerk: Risa Bergquist by Caitlin Fleck
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Explanation or reason for introduction of bill/resolution:

A BILL for an Act to create and enact a new subsection relating to the determination of the ordinary high water mark; to amend and reenact relating to the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation; and to declare an emergency.

Minutes:

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Chairman Delzer: Opened hearing.

Representative Porter: This is a familiar bill to this committee. It is a companion bill to the bill we passed last session. We came to the conclusion that we need to resurvey the Wanck Survey and re-determine the water park and set the pins for the shore height of the lake. We also want to pay back the money right away. We found that the way the RFP (request for proposal) was drafted and the work was done, it would not be complete enough to actually set the pins to the property lines for the minerals and it would be impossible for the land department to send the money out. These aren't square sections. These are curves on a river that maybe 3 acres that has to be brought down to that level and then determined to go back to the owner. The stuff that is completely under water would still be easy enough for the state to do because it is still in one quarter. The person still has the deed that says they were deeded the mineral areas there. This is to clear up the shoreline areas based on the new study. It would be 2.5 million to higher to company to do the title work. The land department will not be paying the individual back, but they will pay back the oil company. The oil company will then pay the individual back because it has to reverse the transaction that happened. They will figure out who owns the area, and who to pay the money back. They must also determine the bonus lease and then also any allocation that was given. The production side of it is held in escrow of the oil company because there is no title.

Chairman Delzer: It will cost 2-2.5 million, is there authority to use money from the existing list?

Representative Porter: What we took was the basis of the fiscal note told us that SB2211 would authorize the board to hire the survey to determine the acreage and they are determining the cost of that to be 2 million dollars. Section 1 of the fiscal note authorizes the

board to hire the firm. Does it flat out say that they can spend the 2 million in the bill, I don't know. We went off of the fiscal note.

Chairman Delzer: We would have to find that out.

Representative Porter: Section 1 of the bill is new out of the energy and natural resources committee. That is the ongoing fight between the state of ND and the original lawsuit that brought both of these bills to us that said that we agreed that this was wrong and that we took someone else's property. Now the ongoing discussion is how the state engineer's office is using the word inundated and the information we got was that it had been under water once and that it was inundated and that they are now claiming the land. The committee took all of that information and determined that that was not what we meant. So we worked with Mr. Smith who had helped us last session with the drafting of the SB and came up with this language so that it's not just a single inundation, but that the property is subject to inundation in normal flow years. That's what section 1 clears up and then the other amendment is one that you put on during last session in regards to the legal fees in section 6 of this bill. The committee determined that we in fact did take this property and that it does belong to someone else. We felt obligated that we lost, we took something that wasn't ours. They incurred a huge amount of legal fees and we thought it was only fair to reimburse them for those legal fees. That is what section 6 will do.

Chairman Delzer: You said that we had that in there last time, but there weren't any fees paid?

Representative Porter: Yes, but it was pulled out during conference committee. We negotiated to the point of finalizing this, we came to the conclusion that this would again be addressed when appropriate, and we think that we are at the point in this next biennium that the money will be paid out after this study and this would be the appropriate time to discuss paying that back.

Chairman Delzer: Do you remember how we conferenced this?

Representative Porter: The bill came back to me. I chose who I thought would be the A team, and then I pulled off an appropriation person, then we finalized it. We put Representative Kaiser, Representative Martinson, and Representative Mitskog. They took it up with the Senate. My full intention with the bill coming back to me is that it would be Representative Keiser, Representative Martinson and maybe even myself this time. We all felt very strongly this time that we pay back the family.

Chairman Delzer: That 750 is listed to come out of the reserve money? The wording subject to inundation, isn't that even more broad than inundated?

Representative Porter: Yes, line one it is the money held out of reserve. We had that language brought to us by Mrs. Smith and he is the expert in these areas and in this part of the law and he said that this is what fixed it.

Chairman Delzer: Where is that 2.7 million coming from?

14:30 Jody Smith, Commissioner for the Board of University and School land: I would have to go back but there is about 3 that grant the department the authority to oversee the investments for the SIIF fund. We have done four studies along the river and already have that authority from the board. We were requesting the authority and permission to continue those studies.

Chairman Delzer: Where is the money actually coming from?

Mrs. Smith: It's coming from SIIF (strategic investment and improvement fund). We won't be paying it all back out, because the study appropriate 9000 acres more to the state than estimated and we are holding that in escrow at the Bank of North Dakota and the state just wouldn't take that. So to some degree yes it would be coming out of SIIF, so instead of paying it back out, the state would be short 2 million.

Chairman Delzer: How long do you think this will take?

Mrs. Smith: It would be up to 2 million dollars, and are not awarding that contract until you are through session. Last session there were a few stipulations that were put on the industrial commission and some parameters about who would be allowed to complete this process. We expect it will take 12 months to complete the survey and then another 24 months to get those dollars back out the door.

Chairman Delzer: So it's about another 3 years?

Mrs. Smith: If all goes well. We are also asking to reset the clock for fee owners. So the state currently is that the fee owner can bring litigation against the state because they disagree with how the survey was done. We don't have any of that litigation because we don't know the acreage adjustments either.

Chairman Delzer: They have two years after they find that out?

Mrs. Smith: Correct, because there is a disagreement upon the acreage. If all goes well, we anticipate that we could do 40 acreage adjustments a month and we have about 500 to do.

Chairman Delzer: We will hand on to that bill, and have a discussion on it later.

Meeting closed.

2019 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

SB 2211
3/27/2019
34290

- Subcommittee
 Conference Committee

Committee Clerk: Risa Bergquist

Explanation or reason for introduction of bill/resolution:

Relating to the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation; and to declare an emergency.

Minutes:

Chairman Delzer: Called meeting to order for SB 2211, this is the high water mark bill. When we had the discussion here they claimed that they had the right with a continuing appropriation to spend the 2 million dollars for the setting of the high water marks. There's some questions about it so I think we should appropriate it. It does allow them to spend up to the 2 million dollars. Any Further questions?

Representative J. Nelson: I'll move to adopt amendment 19.0598.03006

Representative Kreidt: Second

Chairman Delzer: We have a motion to amend SB 2211 with amendment .03006, any discussion on the motion? Seeing none, **Voice Vote, All in Favor, Motion Carries.** Any further amendments ready for this bill? We will close the meeting until those other amendments are done.

2019 HOUSE STANDING COMMITTEE MINUTES

Appropriations Committee
Roughrider Room, State Capitol

SB 2211
4/4/2019
34290

- Subcommittee
 Conference Committee

Committee Clerk: Risa Bergquist

Explanation or reason for introduction of bill/resolution:

Relating to the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation; and to declare an emergency.

Minutes:

Chairman Delzer: Called meeting to order for SB 2211, this is giving appropriation authority for the 2 million dollars for the high water mark. We amended that onto the bill because there were some questions about the authority. I think this is something that has to go forward, we need to get the answer in all these things. This does also allow for up to 750 thousand out of the money it SIIF, that is set aside for the settlement of this, to go to some of the lawyers of some of the people allowed.

Representative J. Nelson: I didn't have that we moved the amendments?

Chairman Delzer: We previously adopted amendment 19.0598.03006, and it's in addition to the other amendments that where adopted by Energy and Natural Resources.

Representative Kempenich: I will move 2211 as amended

Representative Beadle: Second

Chairman Delzer: Further discussion? Seeing none will call the roll.

A Roll Call vote was taken. Yea: 17 Nay: 0 Absent: 4

Motion Carries, Representative Keiser will carry the bill.

Chairman Delzer: With that we will close this meeting.

Per Chairman Delzer, amendment 19.0598.03006 will be discussed during conference committee. Amendment was not adopted on the house floor.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

In addition to the amendments adopted by the House as printed on pages 1128-1130 of the House Journal, Engrossed Senate Bill No. 2211 is further amended as follows:

Page 1, line 5, after "dams" insert "; to provide an appropriation"

Page 3, after line 26, insert:

"SECTION 7. 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 \$2,000,000, or so much of the sum as may be necessary, to the commissioner of university and school lands for the purpose of contracting with a qualified engineering and surveying firm to analyze the final review findings pursuant to section 2 of this Act, for the biennium beginning July 1, 2019, and ending June 30, 2021."

Renumber accordingly

STATEMENT OF PURPOSE OF AMENDMENT:

This amendment provides an appropriation to the Commissioner of University and School Lands to contract with a qualified engineering and surveying firm to analyze the final review findings.

Date: 3/27/2019
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2211**

House Appropriations Committee

Subcommittee

Amendment LC# or Description: 19.0598.03006

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 J. Nelson Seconded By Representative Kreidt

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer					
Representative Kempenich					
Representative Anderson			Representative Schobinger		
Representative Beadle			Representative Vigesaa		
Representative Bellew					
Representative Brandenburg					
Representative Howe			Representative Boe		
Representative Kreidt			Representative Holman		
Representative Martinson			Representative Mock		
Representative Meier					
Representative Monson					
Representative Nathe					
Representative J. Nelson					
Representative Sanford					
Representative Schatz					
Representative Schmidt					

Total (Yes) _____ No _____
 Absent _____
 Floor Assignment _____

Voice Vote/Motion Carries

Amendment adopted during conference committee

Date: 4/4/2019
 Roll Call Vote #: 1

**2019 HOUSE STANDING COMMITTEE
 ROLL CALL VOTES
 BILL/RESOLUTION NO. SB 2211**

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 Kempenich Seconded By Representative Beadle

Representatives	Yes	No	Representatives	Yes	No
Chairman Delzer	X				
Representative Kempenich	X				
Representative Anderson	X		Representative Schobinger	X	
Representative Beadle	X		Representative Vigesaa	X	
Representative Bellew	X				
Representative Brandenburg	X				
Representative Howe	X		Representative Boe	X	
Representative Kreidt	X		Representative Holman	X	
Representative Martinson	X		Representative Mock	A	
Representative Meier	A				
Representative Monson	A				
Representative Nathe	X				
Representative J. Nelson	X				
Representative Sanford	X				
Representative Schatz	X				
Representative Schmidt	A				

Total (Yes) 17 No 0

Absent 4

Floor Assignment Representative Keiser

Motion Carries

REPORT OF STANDING COMMITTEE

SB 2211, as engrossed and amended: Appropriations Committee (Rep. Delzer, Chairman) recommends DO PASS (17 YEAS, 0 NAYS, 4 ABSENT AND NOT VOTING). Engrossed SB 2211, as amended, was placed on the Fourteenth order on the calendar.

2019 CONFERENCE COMMITTEE

SB 2211

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2211
4/22/2019
Job Number 34885

Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the determination of the ordinary high water mark; relating to sovereign lands, determining the ordinary high water mark, and the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation; to provide for application; and to declare an emergency.

Minutes:

No Attachments

Chair Unruh: Opened the conference committee, all conferees were present.

Representative Keiser: We took SB 2211 and amended the language we had in HB 1192 back in, specifically the definition of Ordinary High Water Mark (OHWM) on page 1, and section 2, the definition of factors to be considered in identifying the OHWM. The next major changes are on section 9, the contingent appropriation for \$750,000 for those folks that were involved in the lawsuit and incurred attorney's fees to be compensated; an application in section 10 and the emergency clause in section 11. You have seen this before in HB 1192, we feel relatively strongly about those areas, so we amended those elements into this bill.

Chair Unruh: We had taken a policy position on not needing the OHWM in the century code, and eliminating that bill. There were some changes to the original version of SB 2211 that didn't make it all the way through. Of course, we had the discussion about the legal fee reimbursement last legislative session; we are back here again, late in the game, with the same thing in front of us. I don't think the Senate position has changed on any of that.

Representative Keiser: The one reason I know our committee feels strongly about these two areas is, one, first the OHWM, the research we did, most states do have a definition in their century code. We feel it appropriate that we do that. On the House hearing side, we looked at several photo examples of inconsistencies that were not defensible. They seemed arbitrary. We've got examples of where immediately across a river, the OHWM being several inches or feet different, that seems impossible. We felt it was important to put it in century code. The second area, we were willing to give that up last session, when the Wenck study was approved and funded, it was our assumption that they would define the original OHWM that could be used for making determination for the mineral assets under the river bed that belong to individuals. We were surprised to discover when this bill was introduced, that the

Wenck study did define the original OHWM, but failed to provide adequate information regarding who owned what. We were now obligated to do a second study, and to fund that in order to make that determination. It was a very contentious hearing on our side, we took all of the parties to task, it was our understanding, clearly our intent that you make these determinations. We were surprised by some of the answers by some of the departments. Two departments claimed they were given instructions to not interfere with this process. For those individuals who went to court, and brought this case forward; we assumed that they would be paid after the Wenck study. Now we are at another two years, another study, to make that determination. I was willing to make an agreement last time; I am not this time. We need to give them some compensation or give them their minerals, and apparently we can't, because the Wenck study did not provide adequate information to make that determination by the land department.

Representative Martinson: My opinion hasn't changed since last session. We have a case where the state of North Dakota stole minerals from private people. The court has agreed that the state stole those minerals. Why should they have to pay over \$450,000 to go to court to get back what was taken from them? That isn't fair.

Representative Porter: A couple things that tie into this, when we looked at the OHWM, and dealt with that, it was prior to the discussion that the Senate had on HB 1202, with the hoghouse amendment that was sent back to us on navigable water. This ties into that, there was another apparent taking of private property. Those two issues tie directly together. If we don't set in code, as the policy makers in North Dakota, the definitions, then we're leaving it up to an agency to make those determinations. We've caught them twice, taking stuff that wasn't theirs. The other key component to this definition is on page 3, section 3, on the 05000 version, is 'subject to inundation'. If you leave it as 'inundated,' you could have somebody's hay land that is flooded once every 30 years, the state of North Dakota would use that and come in and take that property. You just got done fixing a situation with HB 1202. By not fixing the rest of it, you're going to be back here again talking about it again. We can't just pick and choose how we fix this. We have to fix it back to the point that it's on us. That we've already been in a situation twice now where it hasn't been on us, we've given it to administrative rules side of the world. It hasn't worked. Just on the OHWM component of this discussion, I think it's extremely important that we set the policy, because they're not getting the phone calls, or the individuals saying they just took my land. Those all come back to us, and then we sit and say, what did you do? They say it's well within the administrative rules to do that, we have to take on the ownership. If we're going to take on the problem, we have to take on the ownership of the policy too. It's our job to determine the policy to make sure it fair to not only the state, but also to the people that own the land that is being taken.

Chair Unruh: I think that we should take a closer look at the language that the House has in their OWHM definitions. Maybe we can come to a point where we can find some agreement on what it should look like. I think that is feasible; I think what is not feasible, is a contingent \$750,000 appropriation added in at the final hour. While I understand the argument for it, it's not like this was something that was stumbled upon in the middle of this legislative session. A separate bill with own hearing, and its own vetting process through the legislative process, maybe it could have been something that we could have agreed to, but to add it on at the last minute toward the end of the session, two times in a row? The Senate position on it being unconstitutional hasn't changed. Do I think that that family should get those legal fees back?

Absolutely. I hope the court system would do that. That is not our job as a legislature, no matter what the situation was, to make sure that legal fees are paid. I have this constitutionality discussion frequently in our ethics hearings that we've had all session as well. While we would like to do things, while we would like to pass some laws, there are just checks and balances in place such as the constitution, that keep us from doing that. While I would like to do that, it is not our role.

Representative Martinson: Who determines constitutionality of a bill we pass?

Chair Unruh: As you know, the courts do that.

Representative Martinson: So you know the answer too. It is not our job to determine constitutionality.

Chair Unruh: Yes, the courts decide that, certainly, but it is our job as a legislature to act within those bounds that we have. Like I said the Senate stood firm on this last time, we will continue to stand firm on it, even though it is not an easy issue to stand firm on.

Representative Martinson left the meeting.

Senator Piepkorn: The notion that our department heads, who I've found tremendous to work with, were under some instruction to back off, or let it go, I don't understand that language, it's not my experience that these people act in this manner. They act in the best interest of their job description and the state.

Chair Unruh: This issue is an emotional one for all of us, we all feel that the state has wronged people as we've moved through this process. My hope is that we can set the best policy we can moving forward to keep it from ever happening again.

Senator Piepkorn: Perhaps the original action, as you mentioned the Senate bill gives us time to look at the situation, rectify it, not pay these fees in advance and take care of the situation.

Representative Keiser: I am not a constitutional attorney; could you explain the information that you have that makes it unconstitutional to do?

Chair Unruh: I have our intern going through all those pieces to collect those. You can go back to the gifting clause or the separate roles of the legislature, courts system, and the executive branch and constitution. I will collect more information and bring you some specific citations at our next meeting. What I would also like to propose to bring to the next conference committee meeting are some concerns that have been expressed by the surveying society as well as a couple of other folks, as to what the exact language in the first two pieces of the bill are, to try and put all of those pieces together so we can have some of those specific policy discussions at our next conference committee meeting.

Representative Keiser: It was my understanding that the court had the authority to grant attorney's fees, and that the court decided not to, therefore, it seems to me that granting of attorney's fees is constitutional and that the legislature can act in that manner. If you would

have them check that, because in this case the court decided not to do something that was allowable, I've been told.

Chair Unruh: Yes, I would imagine there was a reason for the courts determination there. Closed the conference committee meeting.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2211
4/23/2019
Job Number 34939

Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the determination of the ordinary high water mark; relating to sovereign lands, determining the ordinary high water mark, and the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation; to provide for application; and to declare an emergency

Minutes:

2 Attachments

Chair Unruh: Opened the conference committee. All conferees were present. I have been instructed to get down to business, rather than negotiate; I have brought my final offer, amendments .03008 (**Please see attachment #1**). These include the language from the authorization of the land commissioner to perform the study that needs to be done to make the payments, and the timing of that as well as the authorization to do it. The changes requested by the Surveying Society on the definition of the ordinary high water mark (OHWM). The biggest piece there is the removal of that last sentence in the definition of the OHWM. There were a couple of other things. The rest of the changes were meaningful, but minor verbiage changes. The last section has been removed regarding the legal fees, and the repayment of those for a particular case. I was asked to provide some background on the constitutional aspect of that, **please see attachment #2**. I met with the Attorney General this morning to review everything, to make sure I was reading everything correctly. The two sections of the constitution are in both in article 4, section 13, that is highlighted as a special law, this would qualify as a special law; and also in article 10, section 18, that is what we are all familiar with, known as the gifting clause. We cannot as a state make donations to an individual.

Representative Martinson: Thank you for bringing the constitutional material. I would make the contention that it is not state money, that that money that has been set aside is royalty money. The state had a pretty good idea that they were going to get caught stealing the mineral rights, and they did. They were smart enough to withhold royalty payments. That is not state money. That money is being held in trust so that when it is finally determined, that the money paid off is not state money. In the case of the people who initiated the lawsuit, theirs is basically settled, it's a question of getting them paid subject to the Marvin Nelson lawsuit. I contend it's not state money. It isn't state money, it's being held in trust for the

minerals, it would be state money if the supreme court would have ruled in favor of the state, but they didn't.

Senator Schaible: I move the House recede from its amendment, and we further amend.

Senator Piepkorn: I second.

A roll call vote was taken.

Motion fails 3-3-0.

Representative Martinson: Do you have any thoughts on my contention that it's not state money, and that it can certainly be used for legal fees?

Chair Unruh: I find it difficult to identify a scenario where I think it is appropriate for the legislative branch to direct that legal fees on a case that hasn't been finalized yet, be paid. That is not our role as a legislature. You could make the argument that those are not state dollars, certainly. But I have had multiple lawyers say that they don't understand how they could defend that section of the bill. I am not a lawyer; I do trust those that I have talked to in that regard.

Representative Martinson: Would you go back to those lawyers, and ask them, that if it was not state money, if then they could defend it?

Chair Unruh: I would.

Representative Martinson: Basically, all we are doing is giving the money back to them that was taken from them with legal fees. I have a hard time thinking that when the state takes something from somebody, and it costs them \$450,000 to get it back, why there is not some liability to pay them. I don't understand the reasoning of the Senate, why they don't think the legal fees should be paid.

Chair Unruh: To be clear, it is not the position of the Senate that these people should not be getting the legal fees back. I think the majority of us would agree that they absolutely should, but we also agree that that is the role of the courts, and not the role of the legislature.

Senator Piepkorn: You've used the phrase, 'the state stole the money, the land, the rights,' that statement implies that it is the state's money. If you say the state took the money, well, it must be the state's money. It has to belong to somebody; from my point of view it is the state's money, as Chair Unruh has said, I don't think anybody is opposed to if that money eventually ends up with that person, but it is a matter of process and procedure.

Representative Martinson: What I should have said, they stole the minerals. These people have leased those mineral acres since the early 1950s, it was only seven or eight years ago that the state said those are ours. Then the state said that if it's going to be in dispute, then we will put the money aside in trust. I would say that they probably didn't take the money, but they took the minerals and they got the royalties. It's the royalties that are being held in trust.

Representative Keiser: I am not an attorney, but in section 18, as I read it, the highlighted portion, 'Neither state nor any political subdivision shall loan or give its credit to, or make a

donation to, or in aid of any individual, association etc.’ What we are saying in our position, this is neither a loan nor aid, it’s a debt that the state owes. Like interest or any other debt on a bond, the state does in fact own it. We were more than willing to eventually go along with removing it last session, but given the complications that I’ve stated before that have arisen here, we now are causing these people to not receive this money for up whatever period of time it takes, hypothetically two years, we all owe interest on that money. We owe them their legal fees, and we’re not asking for the interest, but they didn’t screw up, we did. We thought we had it handled, but we didn’t handle it to where that money could in fact be distributed, from my perspective, I define it as a debt the state owes that the state owes these people, not as a loan or a gift.

Chair Unruh: When the court system goes through looking at what gets reimbursed regarding legal fees, they take a very close look at what those expenses are, and I know we as a state have looked at that. Individual line items are parsed out, that is a very detailed process that the court systems go through. I assume they do their best to be just in that decision on what is supposed to be reimbursed and what is not. Why are we so afraid in this case that the courts won’t do the right thing and pay back those fees, which should and would be paid back in any other situation?

Representative Keiser: If it is the right thing, we have a fiduciary responsibility as a state to do it, regardless of what the courts determine.

Senator Piepkorn: There is the possibility of this setting a bad precedent for similar cases in paying someone in advance of a final determination by the courts.

Representative Martinson: Would you agree that we could have an amendment here that says in the event that through the whole process they actually do own the minerals, that then we would pay the legal fees? After the process is complete?

Senator Piepkorn: I’m not sure, I’d have to learn more about that.

Chair Unruh: Seeing no other discussion, we are adjourned.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2211
4/24/2019
Job Number 34967

Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the determination of the ordinary high water mark; relating to sovereign lands, determining the ordinary high water mark, and the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation; to provide for application; and to declare an emergency.

Minutes:

No Attachments

Chair Unruh: Opened the conference committee, all members were present.

Representative Keiser: With great consternation, because we believe it is such a right thing to do, we can agree to removing the reimbursement for legal fees. The case is still in the court, hopefully the court will do the right thing, we'll leave it up to them to do that. The other issue for us it is that it was proposed to strike that last line on the definition of ordinary high water mark (OHWM). That was the OHWM line must be continuous in elevation or gently sloping following the gradient of the river. On the hearing on the House side, we had placed that in the bill, we had testimony from the surveyors group, they identified their concerns with putting that in the definition, but we saw it as reasonable, defensible, and appropriate, so we don't support removing that part in the amendment. If you read the language, it makes common sense, you don't get situations where immediately across the river there were two different definitions of OHWM.

Chair Unruh: Can you give us a history of where this definition of OHWM came from? I know we have one in admin code, I know there's been a lot of case law, specifically to that last sentence; where did that come from? Is it part of case law?

Representative Keiser: On the House, we provided an original definition, and modified it based on input received. This definition is a result of the hearing process we had and the input we received on what was acceptable and not acceptable. Especially to the surveyors, they didn't like that last sentence, but we disagreed with them, so we incorporated it in. It isn't based on case law, it's based on the input provided, definitions in other states, and a variety of sources.

Senator Piepkorn: Not having been in on the meeting; on one side you have the surveyors, and their history and their profession; do you recall, other than other states, who was the input from when you arrived at this definition which you just described as defensible and so on?

Representative Keiser: We had input from private individuals that testified, engineers, surveyors, the Water Commission, as well as all interested parties.

Senator Piepkorn: Those are the parties who gave you the information for you to form this definition.

Chair Unruh: I have grabbed our testimony from when the bill was introduced. I've got a document from the US Army Corps of Engineers, on the benefits and limitations of hydraulic modeling for OHWM delineation and it's got a couple of good things in here. I'd like to spend a little more time looking at that, before I agree to this change.

Representative Keiser: In section 2, we did incorporate some of the concerns you raised initially, in terms of vegetation etc. These were the factors to be considered, in that we attempted to identify all of the factors that should be considered. These attempt to incorporate the concerns of many of the groups who testified. There is, when considering vegetation, concern there, hay land, subsection 2, when feasible, direct hydrologic and hydraulic measurements from the stream gauge data, the elevation data etc., as well as secondary indicators. When those other indicators identified in 1 and 2 are not available, we provided three secondary indicators that can be considered. We have them in the bill.

Chair Unruh: Yes, which is why I would prefer to take the elevation language out of the definition of OHWM. To look at it, in my real life, I am a certified wetland delineator for the US Army Corps of Engineers, these are not foreign concepts to me. I am struggling with that survey language, the elevation language. I've also struggled with section 2, but I'm willing to accept some of those. I am not sure of the other language right now.
We will adjourn.

2019 SENATE STANDING COMMITTEE MINUTES

Energy and Natural Resources Committee Fort Lincoln Room, State Capitol

SB 2211
4/24/2019
Job Number 34986

Subcommittee
 Conference Committee

Committee Clerk: Marne Johnson

Explanation or reason for introduction of bill/resolution:

A bill relating to the determination of the ordinary high water mark; relating to sovereign lands, determining the ordinary high water mark, and the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams; to provide a contingent appropriation; to provide for application; and to declare an emergency.

Minutes:

1 Attachment

Chair Unruh: Opened the conference committee. All conferees were present.

Representative Keiser: We have distributed .03009 (**please see attachment #1**) to you. They are very similar to .03008, there are two major areas of change. On the first page, under section 1, subsection 3, on definitions, is a somewhat different definition. It is similar to the .03008 version. On the second page, under subsection 2, four lines down the .03008 amendment read 'maps and statistical hydrological evidence may be considered.' .03009 reverts it back to the language that was in the bill, 'must be considered when determining ordinary high water mark.' This amendment deletes the request to refund the legal fees for those parties. The reason we feel 'must be considered,' whenever you say 'may be considered,' that means they don't have to do anything, we would like them to consider these factors when they're making their determination. That was the reason for must. Based on input that we received since our last meeting, according to some sources, this definition seems to be a little better than the one in .03008. Those are the parts of the amendment that are different than .03008.

I move that the House recede from its amendments and amend as described in the amendment ending in .03009.

Senator Schaible: I second.

Chair Unruh: I've looked at these; I think they are satisfactory.

A roll call vote was taken.
Motion passes 6-0-0.

Senate Energy and Natural Resources Committee

SB 2211

4/24/19

Page 2

Senator Unruh and Representative Keiser will carry.

Chair Unruh: Closed the conference committee.

April 22, 2019

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

That the House recede from its amendments as printed on pages 1677-1680 of the Senate Journal and pages 1909-1911 of the House Journal and that Engrossed Senate Bill No. 2211 be amended as follows:

Page 1, line 1, after "enact" insert "section 61-33-01.1 and"

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide for application; and to declare an emergency"

Page 1, after line 6, insert:

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

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. "Ordinary high water mark" means the continuous line along the banks of navigable rivers and lakes where the presence and action of waters of the navigable river or lake are so common and usual, and so long continued in all ordinary years, as to mark upon the bank of a navigable river or lake a character distinct from that of the abutting upland."
4. "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.
- 4.5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

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

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

The state engineer 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. Hydrological and hydraulic measurements from stream gauge data, elevation data, ordinary water flow records, high resolution light detection and ranging systems, prior elevation and survey maps, and statistical hydrological evidence may be considered when determining the ordinary high water mark. The state engineer 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 as stated 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.

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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.

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

- e. Subsection ~~34~~ 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."

Page 3, after line 26, insert:

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

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

SECTION 9. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

SECTION 10. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

SK
103
4/2

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

That the House recede from its amendments as printed on pages 1677-1680 of the Senate Journal and pages 1909-1911 of the House Journal and that Engrossed Senate Bill No. 2211 be amended as follows:

Page 1, line 1, after "enact" insert "section 61-33-01.1 and"

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide for application; and to declare an emergency"

Page 1, after line 6, insert:

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

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

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

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

The state engineer 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 state engineer 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.

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

61-33.1-02. Mineral ownership of land inundatedsubject to inundation by Pick-Sloan Missouri basin project dams. (Retroactive application - See note)

The state sovereign land mineral ownership of the riverbed segments inundatedsubject 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 inundatedsubject 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 inundatedsubject 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.

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

- e. Subsection ~~34~~ 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."

Page 3, after line 26, insert:

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

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

SECTION 9. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

SECTION 10. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

Date: _____
 Roll Call Vote #: _____

**2019 SENATE CONFERENCE COMMITTEE
 ROLL CALL VOTES**

BILL/RESOLUTION NO. SB 2211 as (re) engrossed

Senate Energy and 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

Attendance

Motion Made by: _____ Seconded by: _____

Senators	<i>4/22</i>			Yes	No	Representatives	<i>4/22</i>			Yes	No
	<i>X</i>	<i>X</i>	<i>X</i>				<i>X</i>	<i>X</i>	<i>X</i>		
Senator Unruh	<i>X</i>	<i>X</i>	<i>X</i>			Representative Keiser	<i>X</i>	<i>X</i>	<i>X</i>		
Senator Schaible	<i>X</i>	<i>X</i>	<i>X</i>			Representative Martinson	<i>X</i>	<i>X</i>	<i>X</i>		
Senator Piepkorn	<i>X</i>	<i>X</i>	<i>X</i>			Representative Porter	<i>X</i>	<i>X</i>	<i>X</i>		
Total Senate Vote						Total Rep. Vote					

Vote Count Yes: _____ No: _____ Absent: _____

Senate Carrier _____ House Carrier _____

LC Number _____ of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Date: _____
 Roll Call Vote #: _____

**2019 SENATE CONFERENCE COMMITTEE
 ROLL CALL VOTES**

BILL/RESOLUTION NO. SB 2211 as (re) engrossed

Senate Energy and 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

Attendance

Motion Made by: _____ Seconded by: _____

Senators	<i>4/24 PM</i>	Yes	No	Representatives	<i>4/24 PM</i>	Yes	No
Senator Unruh	X			Representative Keiser	X		
Senator Schaible	X			Representative Martinson	X		
Senator Piepkorn	X			Representative Porter	X		
Total Senate Vote				Total Rep. Vote			

Vote Count Yes: _____ No: _____ Absent: _____

Senate Carrier _____ House Carrier _____

LC Number _____ of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Date: 4/23
 Roll Call Vote #: 1

**2019 SENATE CONFERENCE COMMITTEE
 ROLL CALL VOTES**

BILL/RESOLUTION NO. SB 2211 as (re) engrossed

Senate Energy and 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. Schaible Seconded by: Sen. Piepkorn

Senators				Yes	No	Representatives				Yes	No
Senator Unruh				X		Representative Keiser					X
Senator Schaible				X		Representative Martinson					X
Senator Piepkorn				X		Representative Porter					X
Total Senate Vote				3		Total Rep. Vote					3

Vote Count Yes: 3 No: 3 Absent: 0

Senate Carrier _____ House Carrier _____

LC Number 19.0598 . 03008 of amendment

LC Number _____ of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Date: 4/24
 Roll Call Vote #: 1

**2019 SENATE CONFERENCE COMMITTEE
 ROLL CALL VOTES**

BILL/RESOLUTION NO. SB 2211 as (re) engrossed

Senate Energy and 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: Rep. Keiser Seconded by: Sen. Schaible

Senators				Yes	No	Representatives				Yes	No
Senator Unruh				X		Representative Keiser				X	
Senator Schaible				X		Representative Martinson				X	
Senator Piepkorn				X		Representative Porter				X	
Total Senate Vote				3		Total Rep. Vote				3	

Vote Count Yes: 6 No: 0 Absent: 0

Senate Carrier Sen. Unruh House Carrier Rep. Keiser

LC Number 19.0598 . 03009 of amendment

LC Number 19.0598.06000 of engrossment

Emergency clause added or deleted

Statement of purpose of amendment

Insert LC: 19.0598.03009
Senate Carrier: Unruh
House Carrier: Keiser

REPORT OF CONFERENCE COMMITTEE

SB 2211, as engrossed: Your conference committee (Sens. Unruh, Schaible, Piepkorn and Reps. Keiser, Martinson, Porter) recommends that the **HOUSE RECEDE** from the House amendments as printed on SJ pages 1677-1680, adopt amendments as follows, and place SB 2211 on the Seventh order:

That the House recede from its amendments as printed on pages 1677-1680 of the Senate Journal and pages 1909-1911 of the House Journal and that Engrossed Senate Bill No. 2211 be amended as follows:

Page 1, line 1, after "enact" insert "section 61-33-01.1 and"

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide for application; and to declare an emergency"

Page 1, after line 6, insert:

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

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

Insert LC: 19.0598.03009
Senate Carrier: Unruh
House Carrier: Keiser

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

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

The state engineer 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 state engineer 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.

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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.

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

Insert LC: 19.0598.03009
Senate Carrier: Unruh
House Carrier: Keiser

- e. Subsection ~~34~~ 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."

Page 3, after line 26, insert:

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

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

SECTION 9. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

SECTION 10. EMERGENCY. This Act is declared to be an emergency measure."

ReNUMBER accordingly

Engrossed SB 2211 was placed on the Seventh order of business on the calendar.

2019 TESTIMONY

SB 2211

Senate Energy and Natural Resources Committee
January 31, 2019
Honorable Senator Jessica Unruh, Chair
Senate Bill 2211
Testimony by Senator Brad Bekkedahl

Chair Unruh and Committee,

Brad Bekkedahl, Senator from District 1 here to introduce a critical bill relative to minerals development and disposition of payments addressed last session in Senate Bill 2134. This bill has been requested by The Department of Trust Lands, which is the administrative arm of and serves under the Board of Trust Lands. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and the Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund and 13 other permanent education trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages four additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, and the Indian Cultural Education Trust.

The 65th Legislative Assembly's adoption of Senate Bill 2134, codified as N.D.C.C. ch. 61-33.1, provided for the process for determining the ordinary high-water mark of the historical Missouri Riverbed channel. This bill was set up to create a defined process for returning an estimated \$187 million in mineral payments received by the State that, in some cases, may have belonged to private citizens who retained their mineral rights when the U.S. Army Corps of Engineers bought the land for Lake Sakakawea.

The North Dakota Industrial Commission completed the survey of the 83 mile stretch of the Missouri River and Industrial Commission adopted these findings on September 27, 2018, delineating the historical Missouri Riverbed channel.

The Department of Trust Lands is currently procuring an engineering firm to provide the necessary data to implement acreage adjustments, lease bonus and royalty refunds, and payments as may be necessary. The Department is unable to release funds without this additional information. An extension of the time frame as provided in Senate Bill 2211 will allow for the Department to receive the necessary requirements and comply with N.D.C.C. ch. 61.33.1.

It is anticipated the engineering contract will be awarded on May 1, 2019 and will be completed as soon as possible. Upon completion of the of the survey, which is not duplicating efforts already completed by the NDIC, the Board of University and School Lands will approve the acreage adjustments. The Department of Trust Lands will then be properly positioned to release funds based upon these acreage adjustments. Ensuring adequate time is available for the engineering firm and for Board review is necessary to the enhance the integrity of the Wenck Study and ensure legislative intent was followed with SB 2134. Passage of this bill will bring certainty to disposition of royalty revenues currently held in suspense, and conclusion to many areas of contention that still exist relative to these mineral acres, as well as allow the industry to continue to develop areas they have avoided due to this issue. Please recommend a Do Pass for Senate Bill 2211. Thank you, Madam Chairman, and I am happy to stand for any questions.

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PROPOSED AMENDMENTS TO SENATE BILL NO. 2211

Page 1, line 1, after "to" insert "create and enact a new subsection to section 61-33.1-03 of the North Dakota Century Code; and to"

Page 1, after line 4, insert:

SECTION 1. A new subsection to section 61-33.1-03 of the North Dakota Century Code is created and enacted as follows:

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.

Page 1, line 8, overstrike "final review findings" and insert immediately thereafter "acreage determination"

Page 1, line 8, overstrike "industrial"

Page 1, line 9, overstrike "commission" and insert immediately thereafter "board of university and school lands"

Page 1, line 20, overstrike "final review findings" and insert immediately thereafter "acreage determination"

Page 1, line 20, overstrike "industrial commission" and insert immediately thereafter "board of university and school lands"

Page 1, line 21, remove "may contract with a qualified"

Page 1, remove lines 22 through 24

Page 2, remove line 1

Page 2, line 2, remove "board. After approving the acreage determination, the board"

Re-number accordingly

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www.land.nd.gov

Jodi A. Smith, Commissioner

TESTIMONY OF JODI SMITH
Commissioner
North Dakota Department of Trust Lands

Senate Bill 2211

Senate Energy and Natural Resources Committee
January 31, 2019

Chairman Unruh and members of the Senate Energy and Natural Resources Committee, I am Jodi Smith, the Commissioner and Secretary for the Board of University and School Lands (Board). I am here to testify in support of Senate Bill 2211.

The Department of Trust Lands (Department) is the administrative arm of the Board, serving under the direction and authority of the Board. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund and 13 other permanent educational trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages four additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, and the Indian Cultural Education Trust.

The Department also administers the responsibilities outlined in the Uniform Unclaimed Property Act, N.D.C.C. ch. 47-30.1. In this role the Department collects "unclaimed property" (uncashed checks, unused bank accounts, etc.), and processes owners' claims. This property is held in permanent trust for owners to claim, with the revenue from the investment of the property benefiting the Common Schools Trust Fund.

Additionally, the Department operates the Energy Infrastructure and Impact Office (EIIO), which provides financial support to political subdivisions that are affected by energy development. Assistance is provided through both the oil and gas impact grant program and the coal impact loan program. The EIIO also distributes energy and flood grants carried over from prior biennia.

Overview

The North Dakota's Constitution and Century Code designate the Board to 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) which collects the revenues from sovereign minerals. The Board has had this management responsibility since at least 1977.

The 65th Legislative Assembly's adoption of Senate Bill 2134 (SB 2134), codified as N.D.C.C. ch. 61-33.1, provided for the determination of the ordinary high water mark (OHWM) for a certain stretch of the Missouri River. The bill directed the North Dakota Industrial Commission (NDIC) to review the delineation of the OHWM of the US Army Corp of Engineers (USACE) 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, McKenzie, Mountrail, and Williams Counties, North Dakota.

As you may be aware, the Ordinary High Water Mark of the Missouri River Bed review as prepared by Wenck Associates, Inc. (Review) was presented to the NDIC on April 17, 2018. Thereafter, the NDIC issued its Order of the Commission, Order No. 29129, approving the Review on September 27, 2018. Information concerning the Review can be found on the Department of Mineral Resources' website.

Throughout the Review process, the Department did not comment on the OHWM definition provided in the Review, data compilation methods, methodology, legal research conducted to determine clear and convincing evidence standards, or other technical comments relating to the specific boundary delineations. Rather, the Department's comments focused on the usability of the Review for purposes of "implementing any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases", N.D.C.C. § 61-33.1-04(2)(a), specifically: (1) public domain tracts; (2) omitted data and variables; and (3) alignment of data. For purposes of example, the following provides concerns the Department raised which impact its ability to proceed with the Board's directives under N.D.C.C. ch. 61-33.1:

Public Domain Tracts

N.D.C.C. § 61-33.1-06 states:

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting non-patented 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.

A public domain tract is land owned by the Federal Government since statehood or land that has never left the public ownership. Of the estimated 7,300 public domain acres, N.D.C.C. § 61-33.1-06 defers determination of the OHWM to the branch of cadastral study of the United States bureau of land management in accordance with federal law. The Department's interpretation of N.D.C.C. § 61-33.1-06 is that the OHWM of the historical Missouri riverbed channel abutting the public domain tracts was to have been established at statehood or by the Supplemental Plats prepared by "the branch of cadastral study of the United States bureau of land management . . ." *Id.* These Supplemental Plats were prepared for the purpose of delineating the boundaries of public domain oil and gas interests in determining the acreage of the areas affected by the movement of the Missouri River prior to the inundation of Lake Sakakawea.

The Department's initial analysis of the Review, which included comparison to the Supplemental Plats, determined Wenck Associates, Inc. (Wenck): (1) did not identify in its OHWM Delineation Results Tables 2a and 2b (Tables) which tracts are deemed public domain, and (2) delineated the OHWM through public domain tracts, thus affecting the State's total estimated acreage presented in the Review.

Examples of the OHWM delineated through public domain tracts are as follows:

T153- R99 Sec. 34; T152-R99 Sec. 6 – Exhibit A
T153-R98 Sec. 11 – Exhibit B
T153-R98 Sec. 21 & 28 – Exhibit C

Omitted Data and Variables

Through the Department's initial analysis of the Review, the Department found that relevant river acreage data is missing from the Tables which may lead to inaccurate conclusions. The rows of the Tables titled BLM River Corridor appear to provide an overall acreage for the riverbed, but do not identify the acreage for specific quarter-quarter sections. The Review does not fully allocate acreages above or below the OHWM, thus preventing the Department from calculating the number of acres within each section. For the Department to implement acreage adjustments as required under N.D.C.C. ch. 61-33.1, the Department will need this data to be provided through a contract with an independent engineering firm. The Department will also need accretion data attributable to riparian or upland landowners within each quarter-quarter section. Without this data, the Board cannot accurately "implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases." N.D.C.C. § 61-33.1-04(2)(a).

Examples of areas with missing data include:

T153-R99 Sec. 27 – Exhibit D
T154-R96 Sec. 25 – Exhibit E

Alignment of Data

Significant Digit-Decimal Point

The Department requested the columns of the Tables be brought out to at least two decimal points to mirror how land is denoted in the Bureau of Land Management (BLM) Master Title Plats (Master Title Plats) or Public Land Survey System (PLSS). No changes were made concerning this request. Currently, the Tables only provide one decimal point. The rounding of acreage could result in a significant acreage change for the State and fee owners. Without the additional information, the Department would be forced to make assumptions on acreage adjustments.

Total Acres - Tables 2a and 2b

The Department requested additional information regarding Wenck's determination of "Total Acres" as presented in the second column of the Tables, as that information is not clearly defined in the Review. In many instances, it appears acreage in a quarter-quarter has increased or decreased with no explanation of where that acreage went or where it was added from. The Department sought additional information regarding the acreage depicted throughout the Tables as it is not consistent with the Master Title Plats by which the Department and industry's spacing unit boundaries have been determined. That information was not made available to the Department.

Legal Descriptions

Many of the legal descriptions of the tracts of land along the historical Missouri riverbed channel are incorrectly labeled. The Review disregards pre-established government lots that were created per the original Master Title Plats. Instead, in many instances, the Review refers to government lots by their location within the section.

Furthermore, the Review protracts quarter-quarters both in riparian areas and through accreted lands. This does not protect the interests of the upland mineral owners, both in terms of their rights to the shoreline and patented area. Examples of possible inaccurate legal descriptions are:

T153-R93W Sec. 20 – Exhibit F
T153-R93W Sec. 26– Exhibit G
T153-R94W Sec. 3 & 4; T154-R94 Sec. 34 – Exhibit H
T153-R99 Sec. 36 – Exhibit I

In response to comments, NDIC's September 27, 2018 Order of the Commission, Order No. 29129, found among other things that:

1. "[T]he Wenck Study was not intended to provide accurate acreage allocations for property transfer which is outside the scope of the legislation; the data sets provided to Wenck for use in calculating acreages represent the most efficient method for determination of areas necessary for decisions by the [NDIC]; no land surveying was done nor contracted to be done in the course of [the Wenck] study." Order at 4.
2. "[T]he cost to complete the necessary research and surveys to apportion property significantly exceeds the appropriated funds." *Id.*
3. "[A]dequate documentation and data for parties to determine how interests might be impacted were provided in the Wenck Study and subsequent communications." *Id.*

N.D.C.C. § 61-33.1-04(2)(a) provides that upon the adoption of the final review findings by the NDIC:

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.

At this time, the Department does not have the information to determine the exact acreage adjustments required to release any collected bonus and royalty proceeds held by the Board. In order for the Department to fully satisfy its requirements under SB 2134, codified at N.D.C.C. ch. 61-33.1, the Department will need to contract with an engineering firm to analyze the Review and the PLSS maps. Utilizing GIS, the Review's shapefile can be imported and overlaid with the BLM Master Title Plats to break down acreage above and below the Review's OHWM determination coordinates on a quarter-quarter or government lot basis. However, because the State issued its oil and gas leases on a quarter section basis, if the OHWM of the river runs through any part of a particular quarter section, the Department needs the contracted engineering firm to identify:

1. The amount of acreage in each quarter section that would be sovereign lands below the OHWM and subject to State lease (based on a quarter section);

2. Acreage above the OHWM in each quarter-quarter section or government lot owned by upland owners to allow for more finite calculations; and
3. Acreage allocations for accretions (where accretions are present) lying above the OHWM attributable to riparian tracts within each section.

On December 17, 2018, the Board authorized the Commissioner to accept and review proposals for analysis and GIS services for property related to the OHWM Study of the historical Missouri riverbed channel prepared by Wenck Associates, Inc. A Request for Proposal ("RFP") was issued on December 17, 2018. The scope of the project is to verify the boundaries and to calculate the acreage of each PLSS section within the Project Area, broken down by quarter-quarter section or government lot above and below the OHWM as identified by NDIC through the Review pursuant to N.D.C.C. § 61-33.1-03. This includes the entire acreage of any PLSS section that is fully or partially included in the Project Area. The determination of the OHWM from the Review is assumed to be correct.

The project would utilize all available data, records, and resources including the Review, the PLSS, BLM General Land Office (GLO) updated Master Title Plats (available at the BLM), original GLO Survey Plats (available at the North Dakota State Water Commission), BLM field notes, and any other relevant data, records and resources. Where previous survey data is not available, lacking, or otherwise unusable, the engineering firm performing the project would be required to conduct the field work necessary to supply the necessary data to complete and/or verify accurate boundaries within the Project Area.

Conclusion

As the Department does not have complete information to proceed with acreage adjustments, lease bonus and royalty refunds, it is imperative that more time be allowed for additional data to be gathered and compiled. It is unknown the approximate amount of time that it may take an engineering firm to gather and compile the information. It is anticipated this information will be available after the proposals are received by the Department, which are due today, January 31, 2019, with a scheduled award date of May 1, 2019. This project will take time and is not an easy process. Allowing additional time for this to be completed will result in accurate computations and thereafter, accurate refund amounts.

Once the engineering firm completes the work requested in the RFP, the Department will promptly begin updating records to satisfy the Board's duty under N.D.C.C. § 61-33.1-04(2)(a). Unfortunately, this process will be time-consuming due to all that is required of both the engineering firm and the divisions within the Department. At this time, the most logical way to implement this project would be to review each parcel within each spacing unit. Each parcel will need to be reviewed for changes to the database, Correction of Oil and Gas Leases will be prepared for execution, requests for refunds of bonus and royalties will be prepared, each well will need a new royalty management unit to ensure future royalties will be allocated to the correct trust, the Department's shapefiles will be updated, and the Department will need to track all documentation for each lease correction.

Prior to any mailings or issuance of refunds appropriate documentation for each parcel requiring adjustments needs to be reviewed by the Department's Director of Minerals Management and the Revenue Compliance Division. Following review by the Commissioner, a refund authorization would be forwarded to the Accounting Division for submission. Once refunds are issued, Correction of Oil and Gas Lease documentation is mailed to the lessee of record based on the ownership records of the Department and the current operator. If the lessee fails to return an executed copy or cash the check, the Department will need to take additional steps.

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Testimony of Jodi Smith
January 31, 2019

Due to the failure of lessees to submit assignments for Department approval as required by Department policies or the lease, Department records do not always accurately reflect the current lessee of any given lease which could possibly impact the timeliness of the refunds. Refunds of bonus will be issued to the current lessee, based on the records of the Department and royalty payments will be returned to the current operator of each spacing unit.

Senate Bill 2211's provision to essentially start the clock upon the Board's approval of the acreage adjustment calculations is necessary to the implementation of acreage adjustments, lease bonus and royalty refunds. Within the 83 miles reviewed by Wenck, the Department has:





- Approximately 511 active leases covering 44,700 acres;
- 100 different working interest owners with potential refunds due based upon their proportionate interest of the leases; and
- Interests in approximately 525 wells operated by 10 different companies.

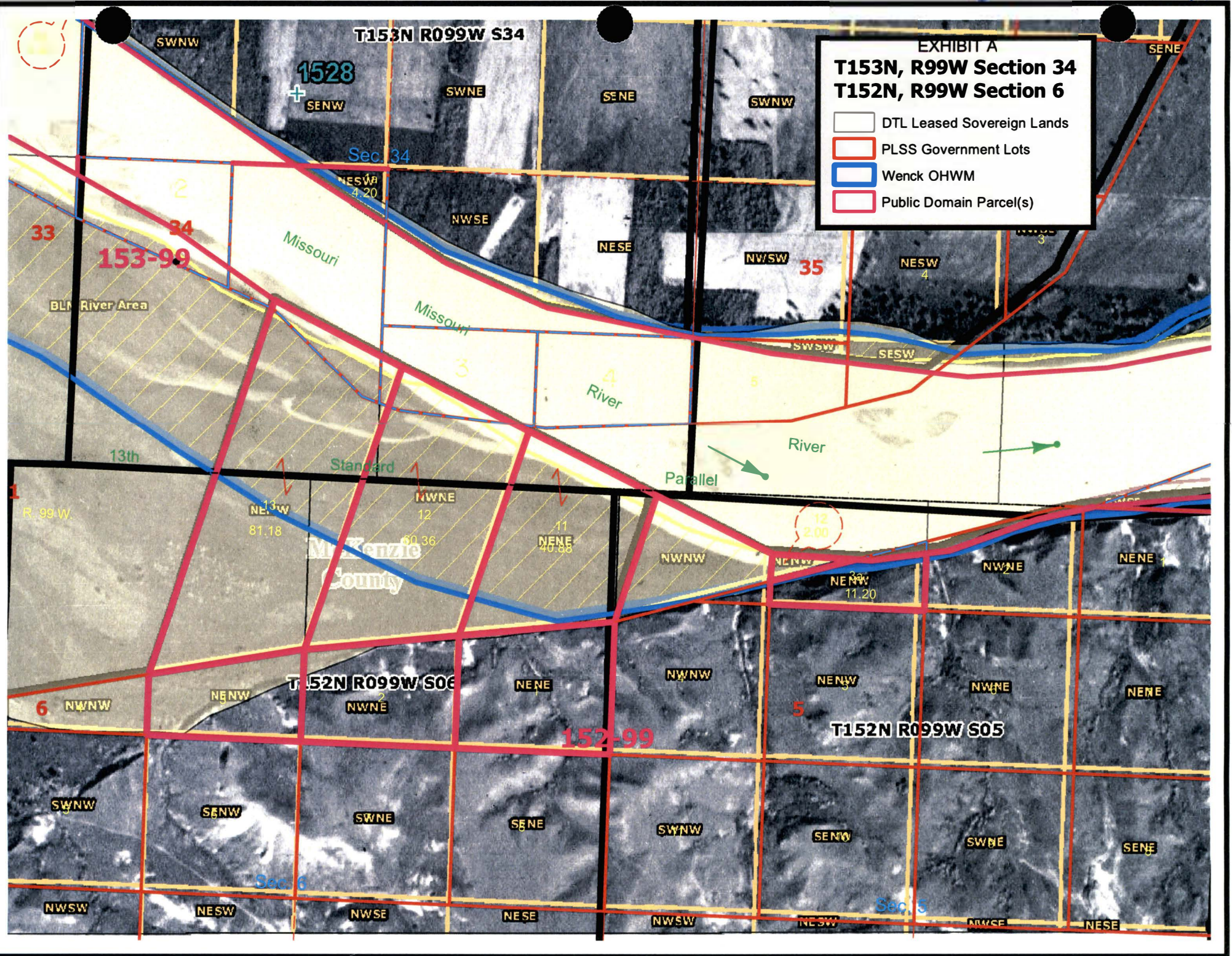
Barring delays due to legal challenges or unresponsive lessees, it is anticipated the Department could complete approximately 40 lease corrections each month, resulting in completion of more than 500 lease corrections within two years of the Board's adoption of the engineering firm's acreage adjustment calculations.

The Department recognizes and appreciates the significant work of Wenck and the NDIC to produce the Review and recognizes it as the initial step in the process; however, additional work is needed to provide the Department with the necessary data 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." N.D.C.C. § 61-33.1-04(2)(a). The Department cannot complete the steps required under N.D.C.C. ch. 61-33.1 without this information. Extension of the time frames as provided in Senate Bill 2211 would allow for the Department to receive the necessary information to comply with the requirements of N.D.C.C. ch. 61-33.1.

I look forward to working with the committee on these issues and would be happy to answer any questions.

EXHIBIT A
T153N, R99W Section 34
T152N, R99W Section 6

-  DTL Leased Sovereign Lands
-  PLSS Government Lots
-  Wenck OHWM
-  Public Domain Parcel(s)



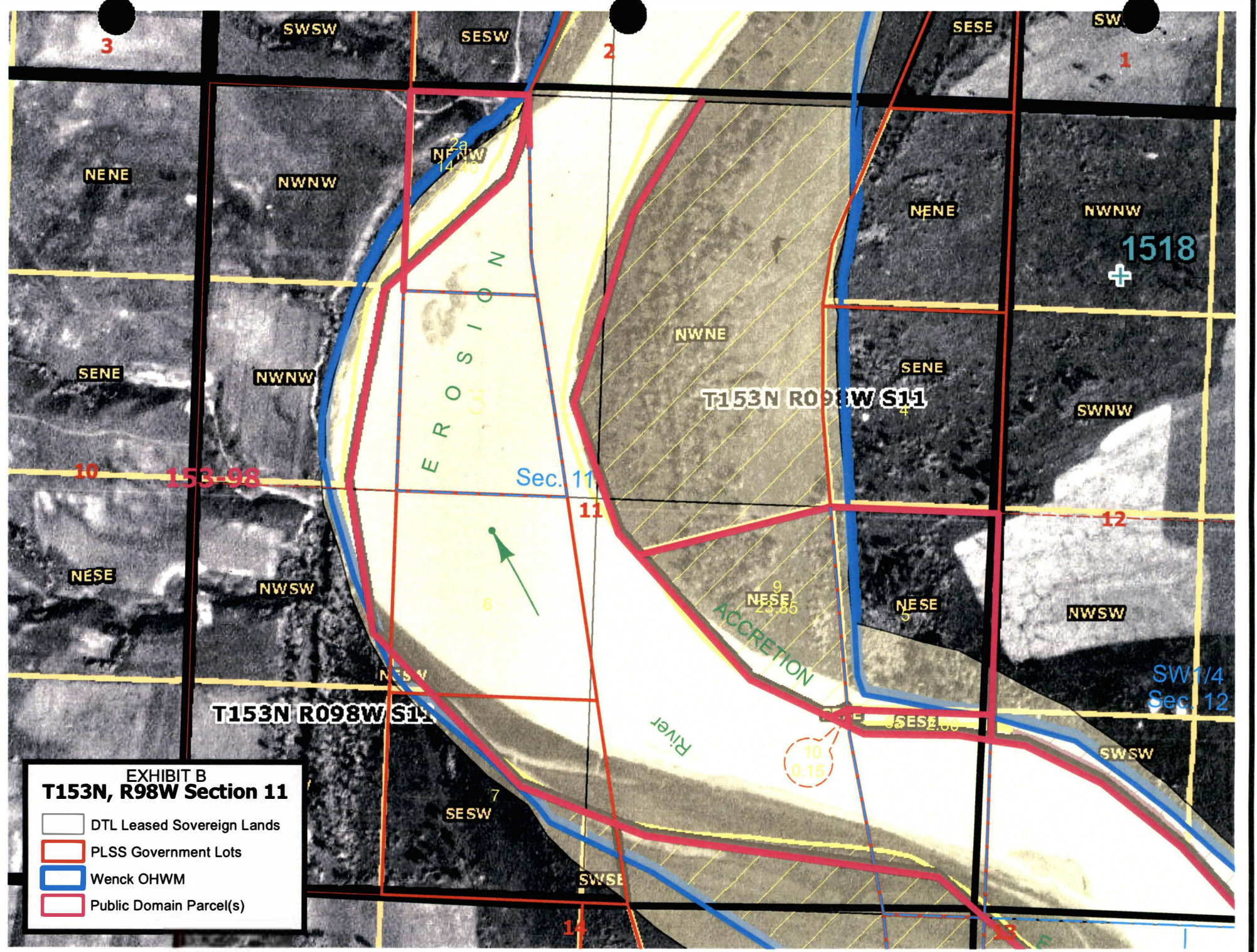


EXHIBIT B
T153N, R98W Section 11

- DTL Leased Sovereign Lands
- PLSS Government Lots
- Wenck OHWM
- Public Domain Parcel(s)

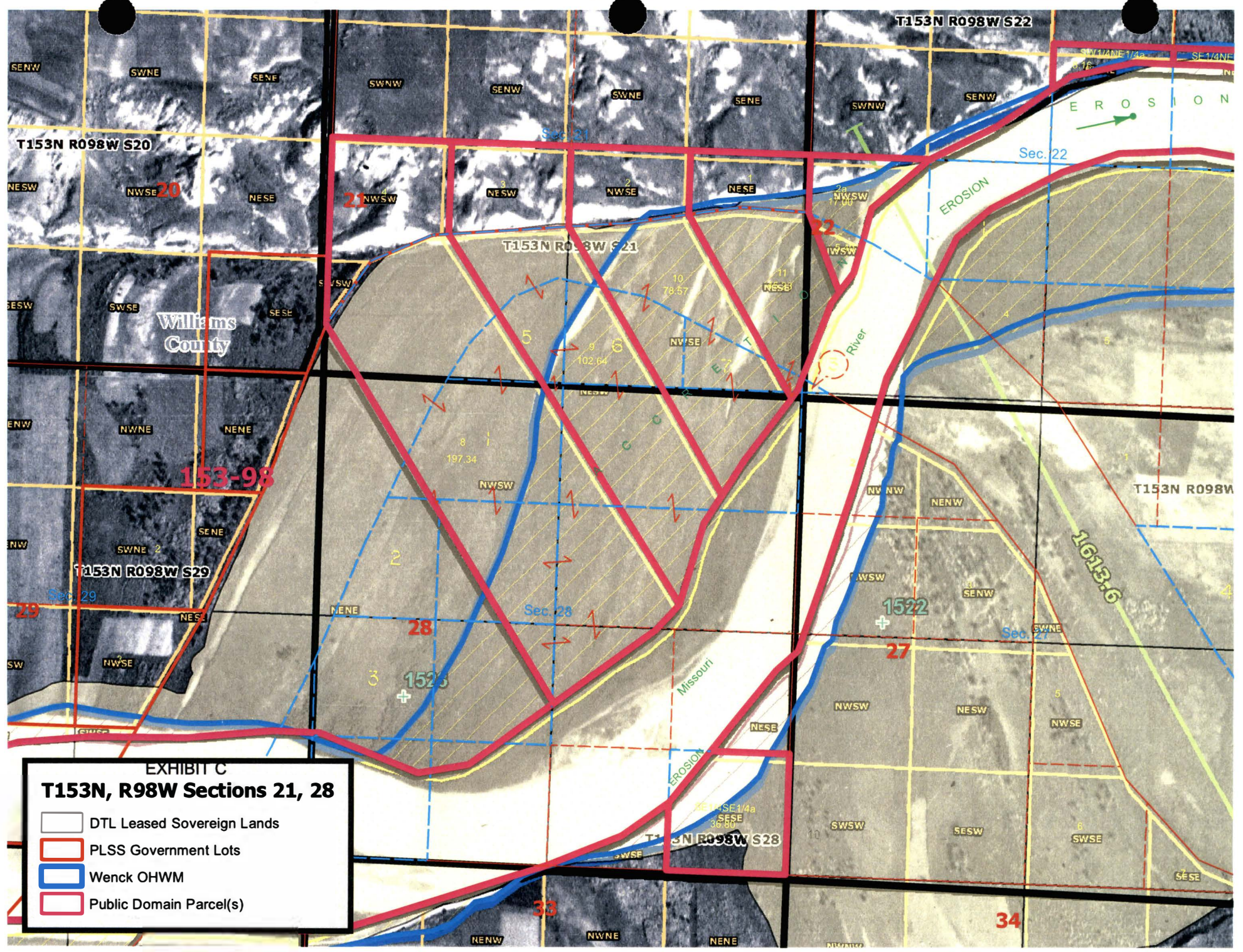
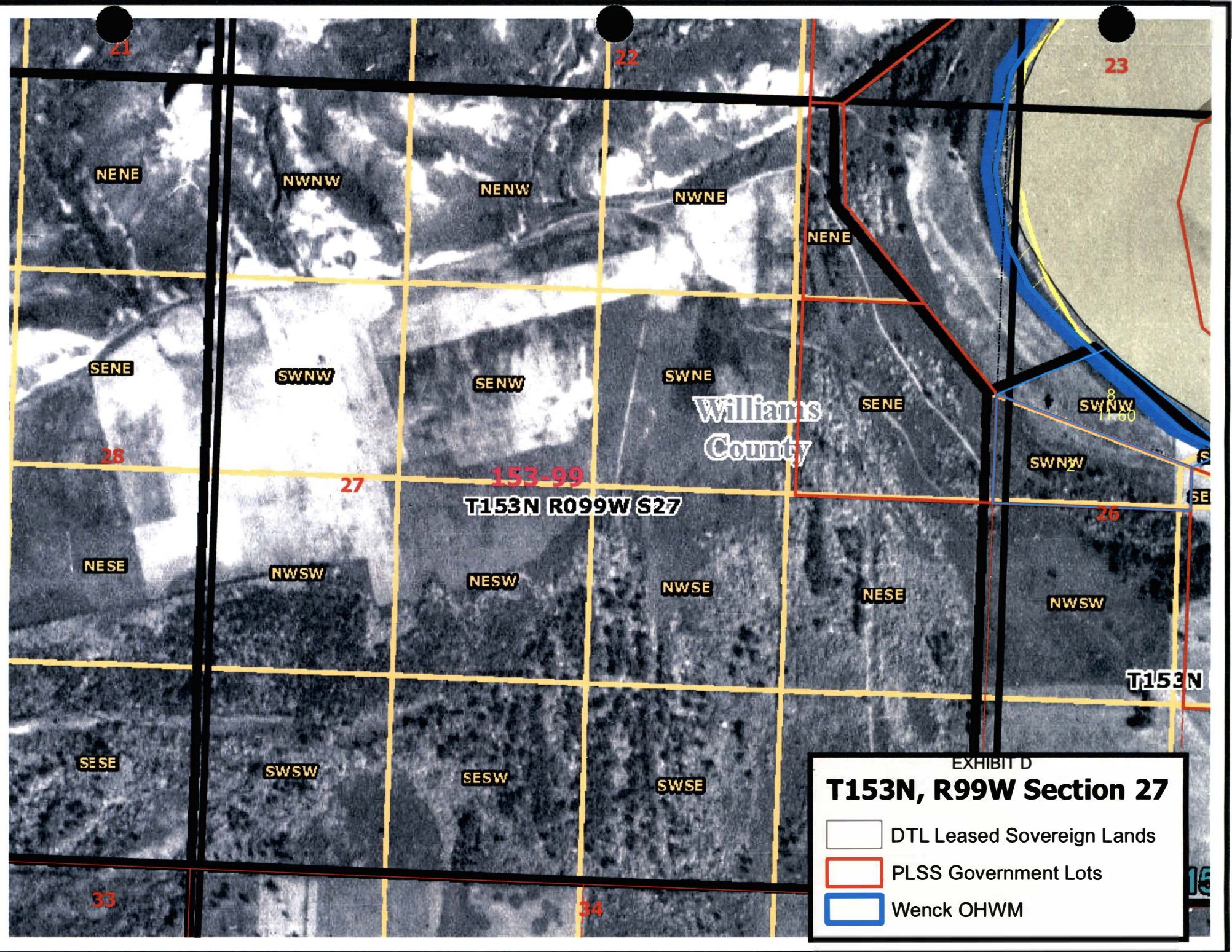


EXHIBIT C
T153N, R98W Sections 21, 28

- DTL Leased Sovereign Lands
- PLSS Government Lots
- Wenck OHWM
- Public Domain Parcel(s)



153-99
T153N R099W S27

EXHIBIT D

T153N, R99W Section 27

- DTL Leased Sovereign Lands
- PLSS Government Lots
- Wenck OHWM

21

22

23

NENE

NWNW

NENW

NWNE

NENE

SENE

SWNW

SENW

SWNE

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NESE

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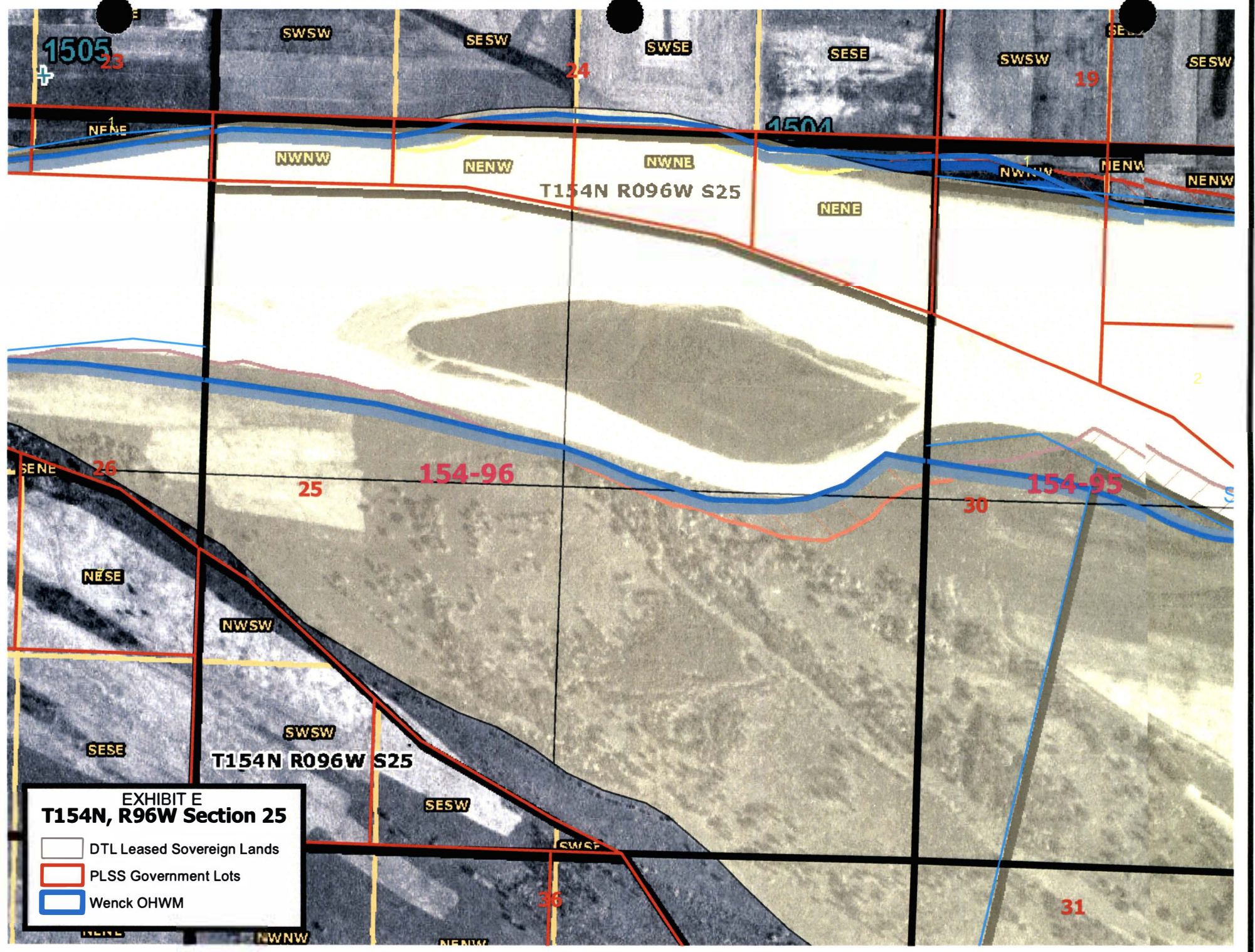





EXHIBIT E
T154N, R96W Section 25

-  DTL Leased Sovereign Lands
-  PLSS Government Lots
-  Wenck OHWM

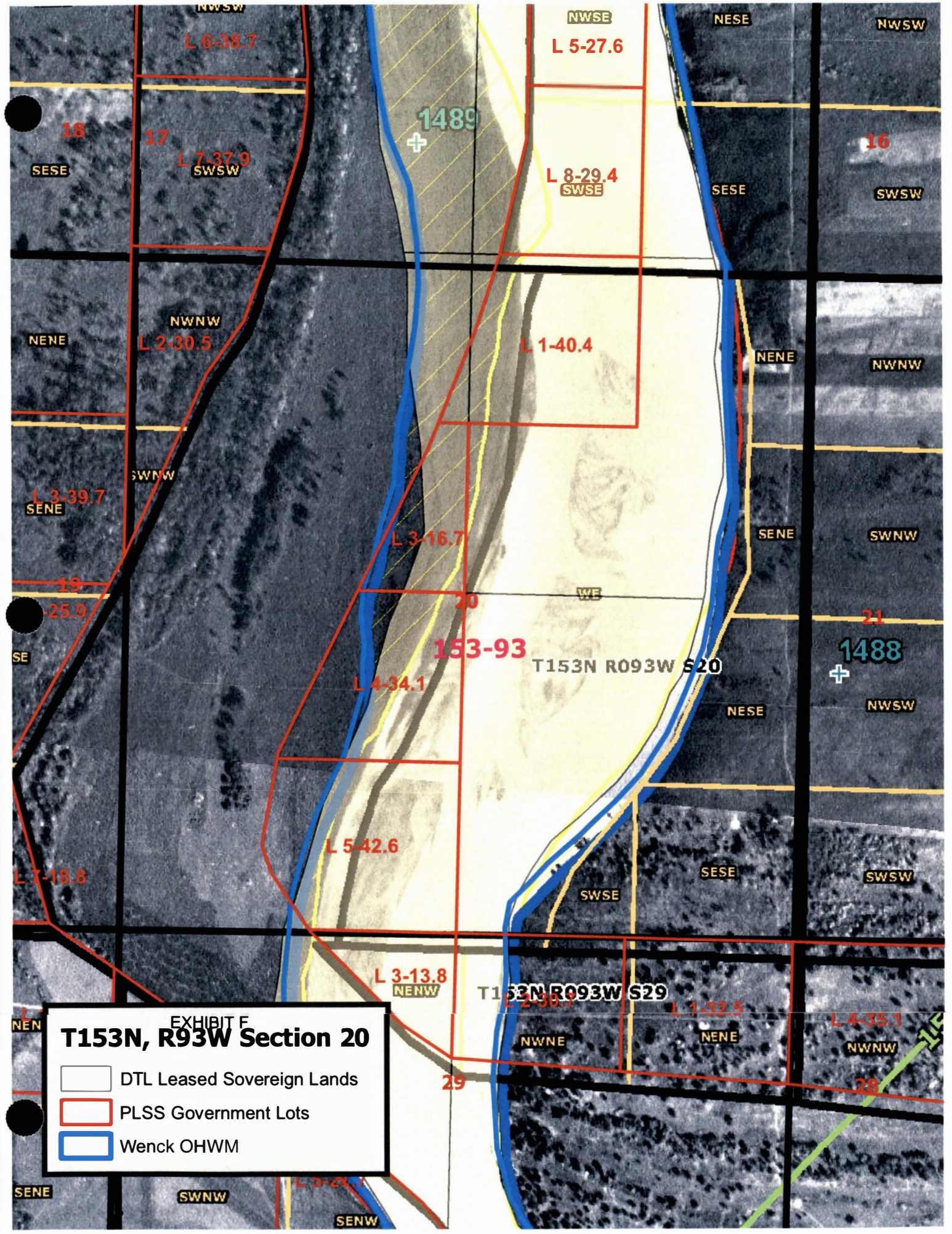


EXHIBIT F
T153N, R93W Section 20

- DTL Leased Sovereign Lands
- PLSS Government Lots
- Wenck OHWM

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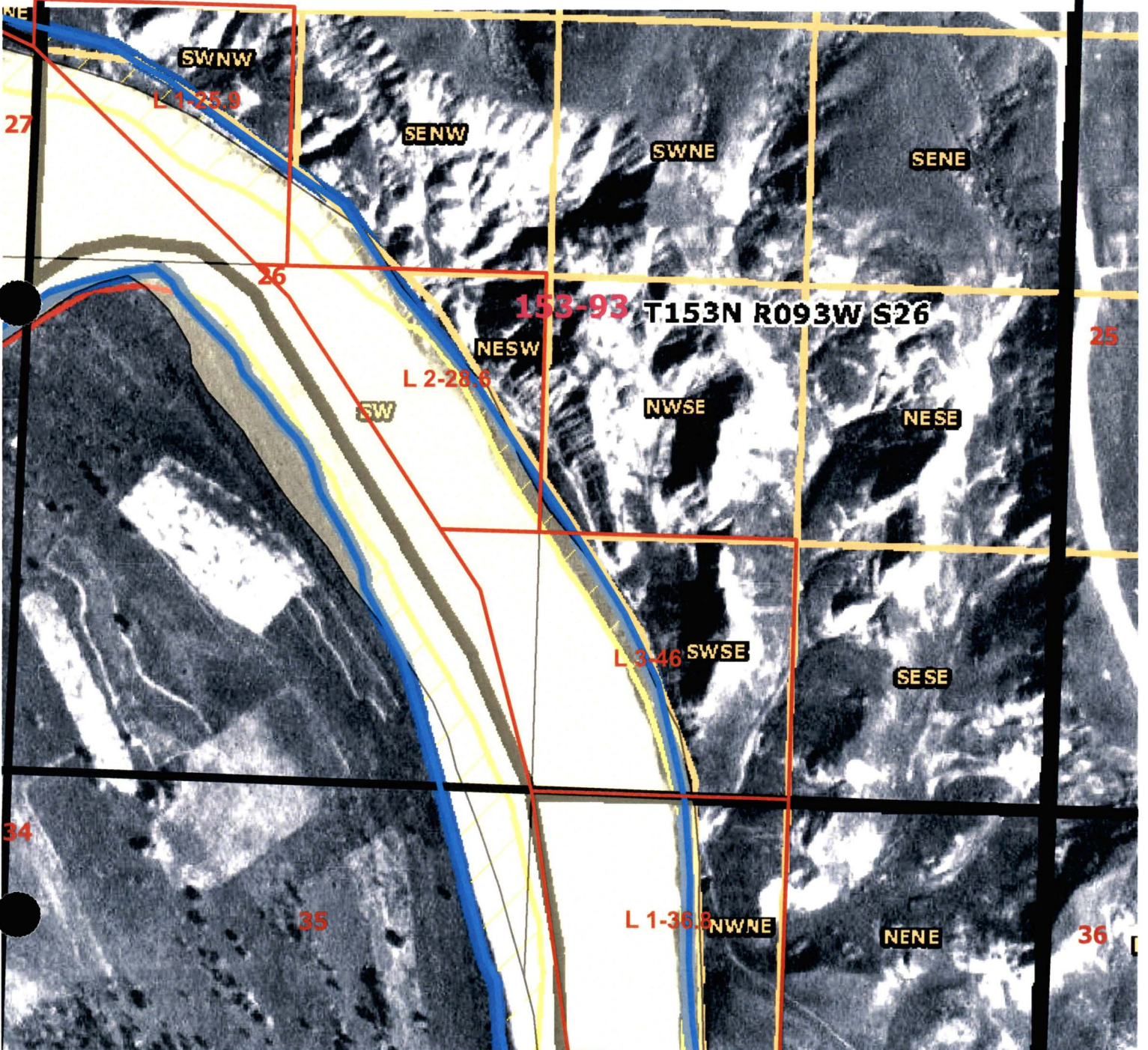
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EXHIBIT G
T153N, R93W Section 26

-  DTL Leased Sovereign Lands
-  PLSS Government Lots
-  Wenck OHWM

L 1-35



27

SWNW

L 1-25.9

SENW

SWNE

SENE

26

153-93 T153N R093W S26

NESW

L 2-28.6

SW

NWSE

NESE

25

L 3-46 SWSE

SESE

34

35

L 1-36.3 NWNE

NENE

36

EXHIBIT H
T153N, R94W Sections 3 and 4;
T154N, R94W Section 34

- DTL Leased Sovereign Lands
- PLSS Government Lots
- Wenck OHWM

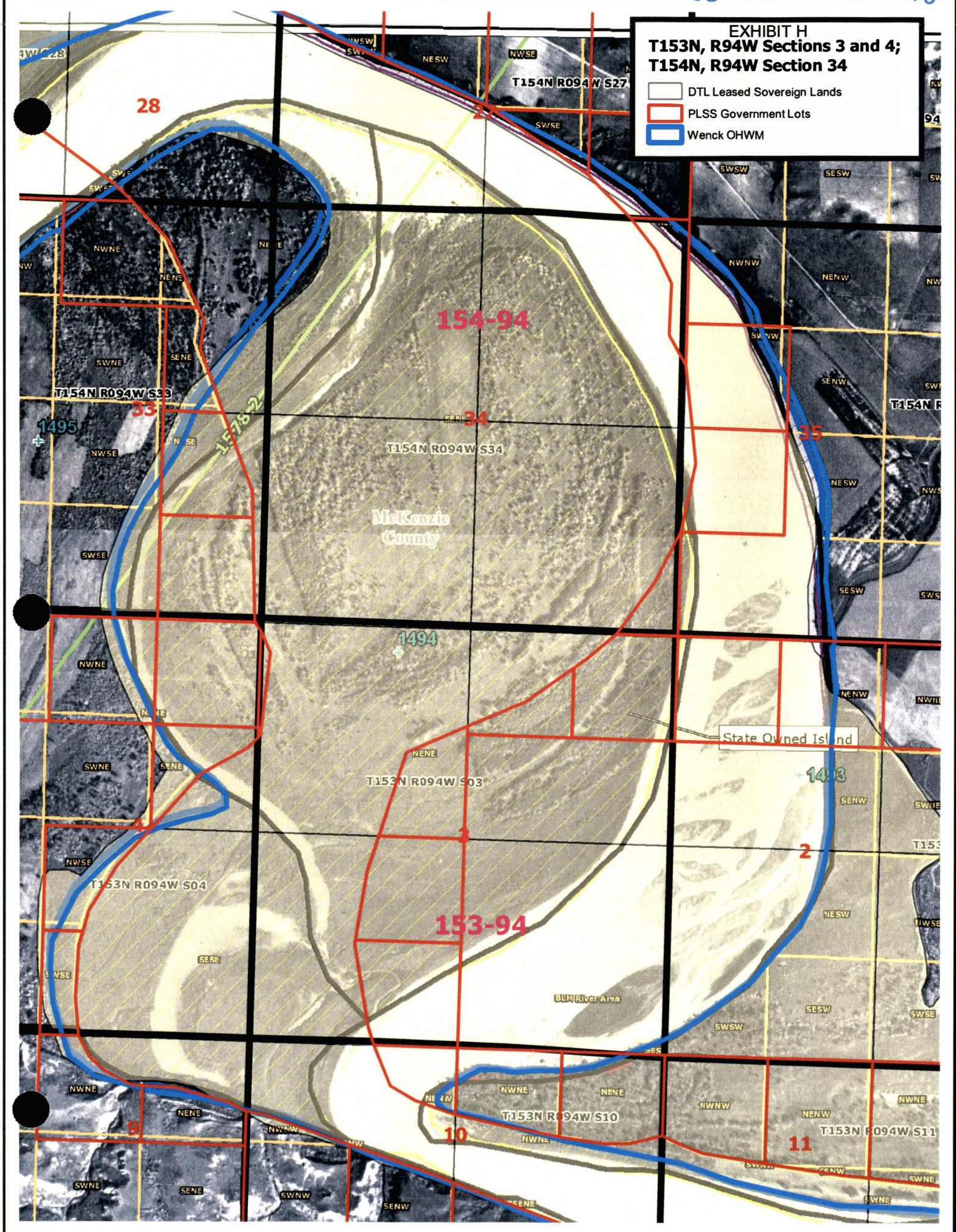



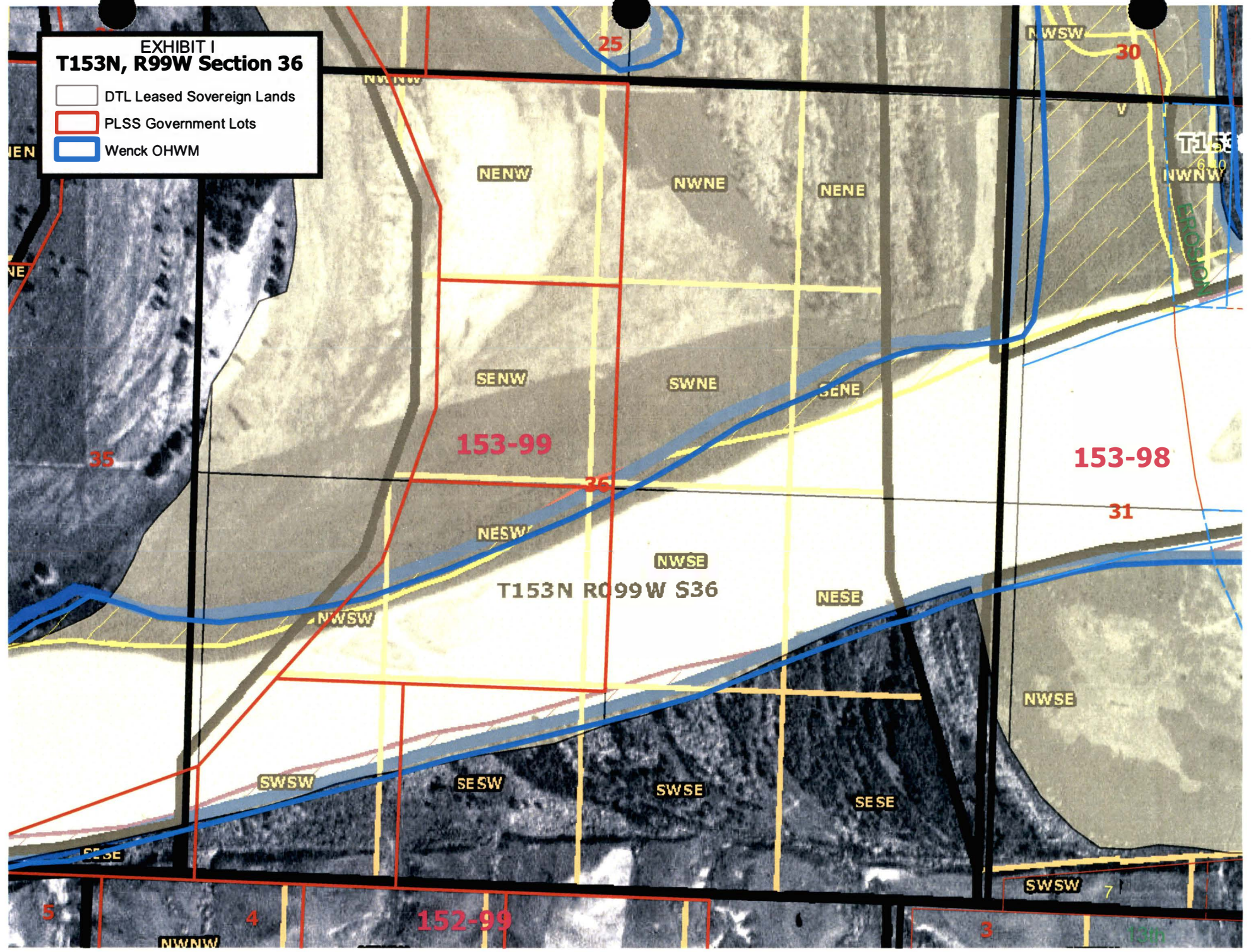


EXHIBIT I
T153N, R99W Section 36

-  DTL Leased Sovereign Lands
-  PLSS Government Lots
-  Wenck OHWM



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SENATE BILL NO. 2122—Lakebed Minerals

Senate Energy and Natural Resources Committee

Testimony of Craig C. Smith

January 31, 2019

Chairman Unruh and members of the Senate 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 30 years. I'm appearing today on behalf of the North Dakota Petroleum Council and in support of Senate Bill 2122.

BACKGROUND

This Bill adds certain amendments to Senate Bill 2134 enacted by the 2017 Legislative Assembly and codified as Chapter 61-33.1 of the Century Code relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams. Prior to discussing the specifics of this Bill, a brief summary of Senate Bill No. 2134 and the status of the Ordinary High Water Mark study may be appropriate.

As you will recall, Senate Bill 2134 was an exhaustive and dedicated effort that culminated in a comprehensive set of laws to establish the parameters and a thorough process for determining the historical Missouri riverbed Ordinary High Water Mark ("OHWM") for an 83 mile stretch of Lake Sakakawea extending from the northern boundary of the Fort Berthold Indian Reservation to a few miles west of Williston. Between January 12, 2017 and April 18, 2017, not counting actions by the full House and Senate, at least 18 separate committee hearings and subcommittee meetings were held, allowing for extensive testimony and dozens of amendments and proposed amendments to be considered. This process resulted in a Legislative history record of 699 pages.¹

The Bill adopted the Corps of Engineers survey of the historical Missouri River channel as the presumptive determination of the OHWM, however, due to some uncertainties of the Corps Survey, a new study was authorized to review the Corps survey to confirm or modify the Corps survey if clear and convincing evidence existed that the survey must be modified to conform to North Dakota law. Briefly, the Bill set forth the following parameters for determining the OHWM:

1. The Department of Mineral Resources ("DMR") is designated to oversee the review process.²
2. Required the DMR to retain an independent Engineering and Surveying Firm ("Firm") to conduct the review.

¹ The legislative history is available online at <http://www.legis.nd.gov/files/resource/65-2017/library/sb2134.pdf>

² The Legislature concluded the DMR was the most appropriate agency to oversee the review based on its own technical expertise as well as extensive experience in conducting public hearings.

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3. Establishes specific parameters the Firm must consider in evaluating the OHWM, including aerial photography, Corps of Engineer historical records, elevation and flow data, and to apply existing state case law defining the OHWM.³
4. Due Process standards. Upon completion of the review, the Firm presents its findings and recommendations for any adjustments, modifications or corrections to the Corps Survey to the Department of Mineral Resources. Unlike either the Corps survey or prior State surveys, the Act provides due process safeguards by requiring the review findings to be published for a 60 day comment period followed by a public hearing. After the public hearing and consideration of comments, the DMR and Engineering Firm must prepare a final recommendation and submit the recommendation to the Industrial Commission. The Industrial Commission may adopt, amend, or reject the new survey.
5. Finally, after the Industrial Commission adopts the final review, Section 61-33.1-05 affords any interested party the right to seek judicial review directly in District Court within two years after the adoption of the new review findings.

After its enactment, the Industrial Commission awarded the study contract to Wenck Associates. In April 2018 Wenck Associates presented its preliminary finding to the NDIC at a public hearing. The preliminary finding concluded the Corps survey delineated 16,687 acres as being within the OHWM and owned by the State. The preliminary Wenck study showed 27,089 acres within the OHWM, or 10,402 more acres than the Corps survey as being owned by the State. However, the preliminary Wenck study was about 15,000 *less* acres than claimed by the State's Phase 2 survey.

Following the publication of the preliminary report, a 60 day comment period was afforded followed by a public hearing on June 26, 2018. Twenty two commenters submitted 1436 pages of written comments and 15 people provided testimony at the hearing. The public comments were reviewed and considered for three months, and on September 27, 2018, a final study proposal was submitted to the NDIC which the NDIC approved. The final study concluded an additional 900 acres or so should be excluded from the OHWM. Thus, the final study determined that the acreage within the OHWM of the historical Missouri River channel extended approximately 9,000 acres more than the Corps survey, but 16,000 acres less than the State's Phase 2 survey.

THE WENCK OHWM STUDY

The Wenck study for the NDIC essentially set the boundary line of where the ordinary high water mark is located along the historical Missouri River Channel. We can look at their graphics and have a visual understanding of where the line lays and identify minerals that lie above and below the blue line. The Wenck study set the boundary line and calculated the total acreage that lies within the riverbed for the 83 mile stretch of the study, however, the study did not break down or otherwise calculate the acreages above and below the OHWM on a tract or per section basis, or calculate the acreages lying above and below the ordinary high water mark for each individual oil well spacing unit. For both the State and oil and gas operators to implement the required ownership

³ Section 61-33.1-03(3)(d) relating to the definition of ordinary high water mark essentially codifies North Dakota judicial decisions.

adjustments for each oil and gas well, it will be necessary to calculate the acreages on a spacing unit basis.

To briefly demonstrate, attached hereto as Exhibit 1 is a segment from the Wenck study. The black square represents Section 23, the pink lines show the quarter sections. Although one can easily see the OHWM designation (the blue line) a title examiner cannot determine the precise acreage of the riverbed in each of the four quarter sections, nor can we determine the acreages of the tracts of land above the blue line.

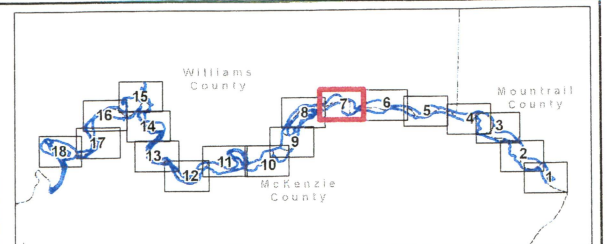
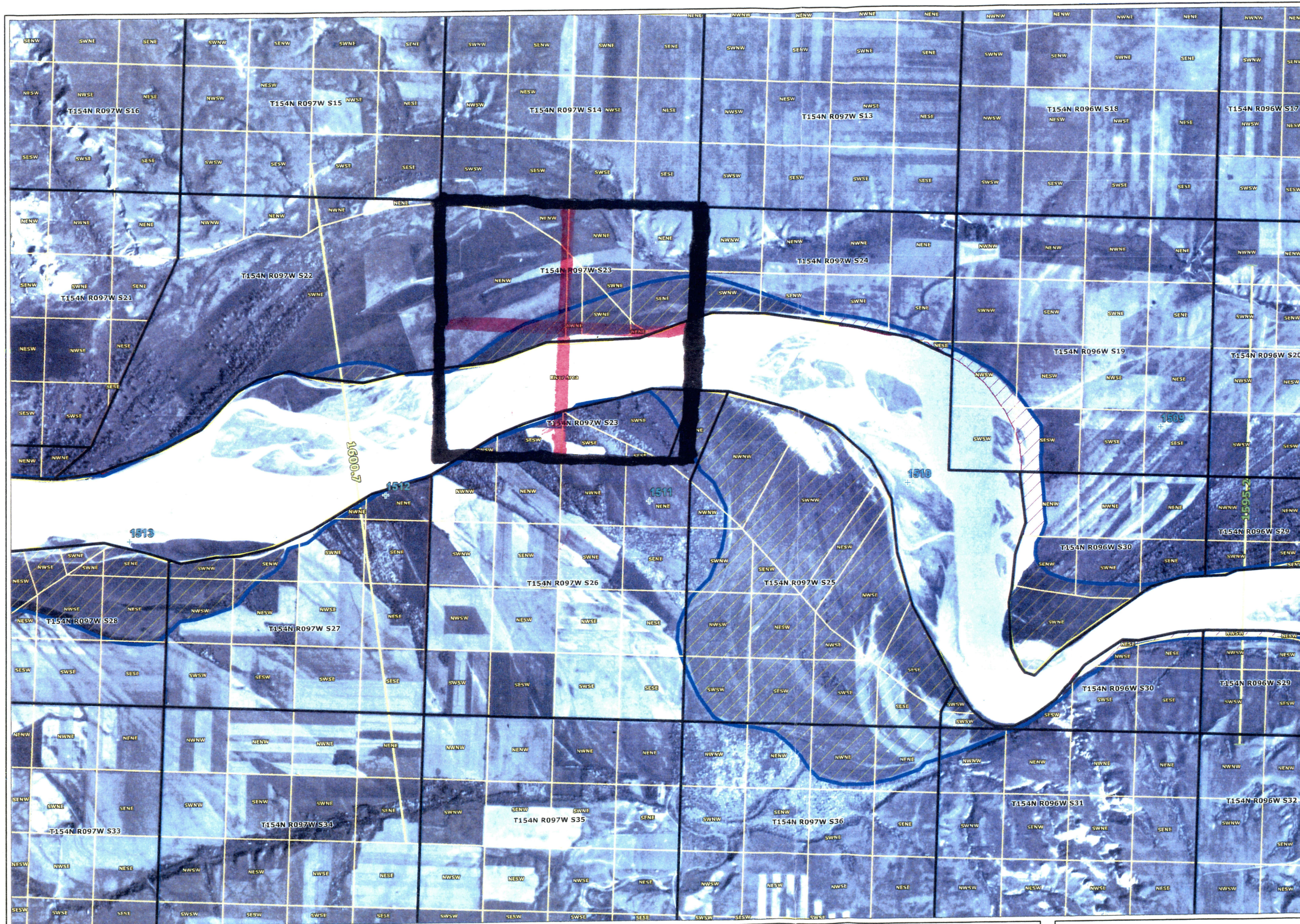
Exhibit 2 shows, in part, what needs to be accomplished. First, a professional surveying firm will incorporate the exact location of known original government survey corners, and then will overlay the coordinates of the OHWM blue line into their survey. They will then calculate the acreages above and below the OHWM, see the red 6.08 acre tract as an example, except that this will need to be done for all tracts.

Therefore, to implement the study, the provision in this Bill authorizing the Land Board to retain a professional surveying and engineering firm to perform the acreage calculations is critical. To be clear, this amendment does not call for a new study of the OHWM, it is simply a necessary measure to properly complete the study by having a professional surveying firm, using well established professional surveying standards, to designate the acreages for each affected tract which will enhance the integrity of the Study and afford proper legal descriptions for future land conveyances.

EXTENSION OF TIME TO IMPLEMENT

The original provisions of Senate Bill 2134 required that operators and the State implement the necessary acreage adjustments within 6 months (for certain tracts) and two years of the adoption of the final study by the Industrial Commission. The NDIC adopted the study on September 27, 2018, meaning that the six month provision technically would take effect on March 27, 2019. This bill amends the two year provision in Section 61-33.1-04(2) such that it will not take effect until “the board approves the acreage determination.” We support this amendment, however, to be consistent and to ensure that operators and the State have the necessary acreage calculations, we are requesting that the six month provision in Section 61-33.1-04(1) also be amended to take effect upon the board approving the acreage determinations.

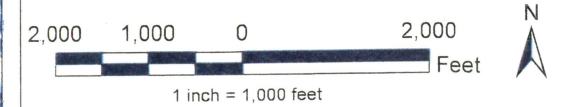
Thank you for your consideration.



- BLM PLSS Section Boundary
- BLM PLSS Qtr Qtr Section Boundary
- River Miles
- USACE Cross Section
- Ordinary High-Water Mark (OHWM)
- Recommend Correction to Account for More Recent Aerial Information
- Recommend Correction to Account for Frequently Flooded Accretion
- Recommend Correction to Account for Active Meandering (Reliction)

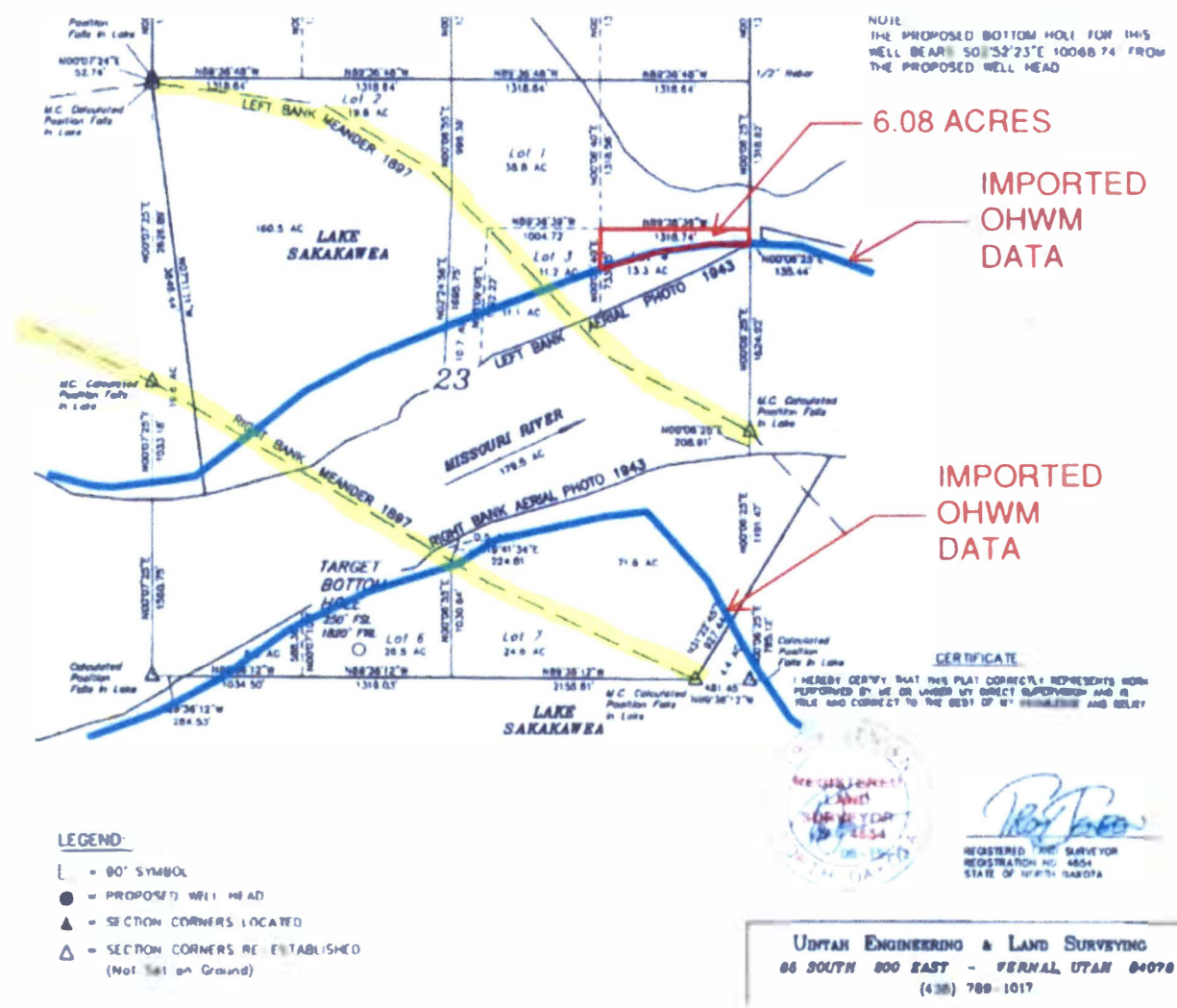
EXHIBIT 1

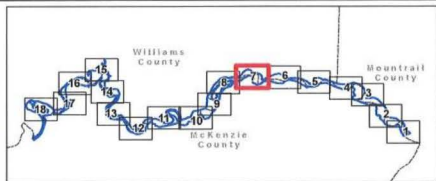
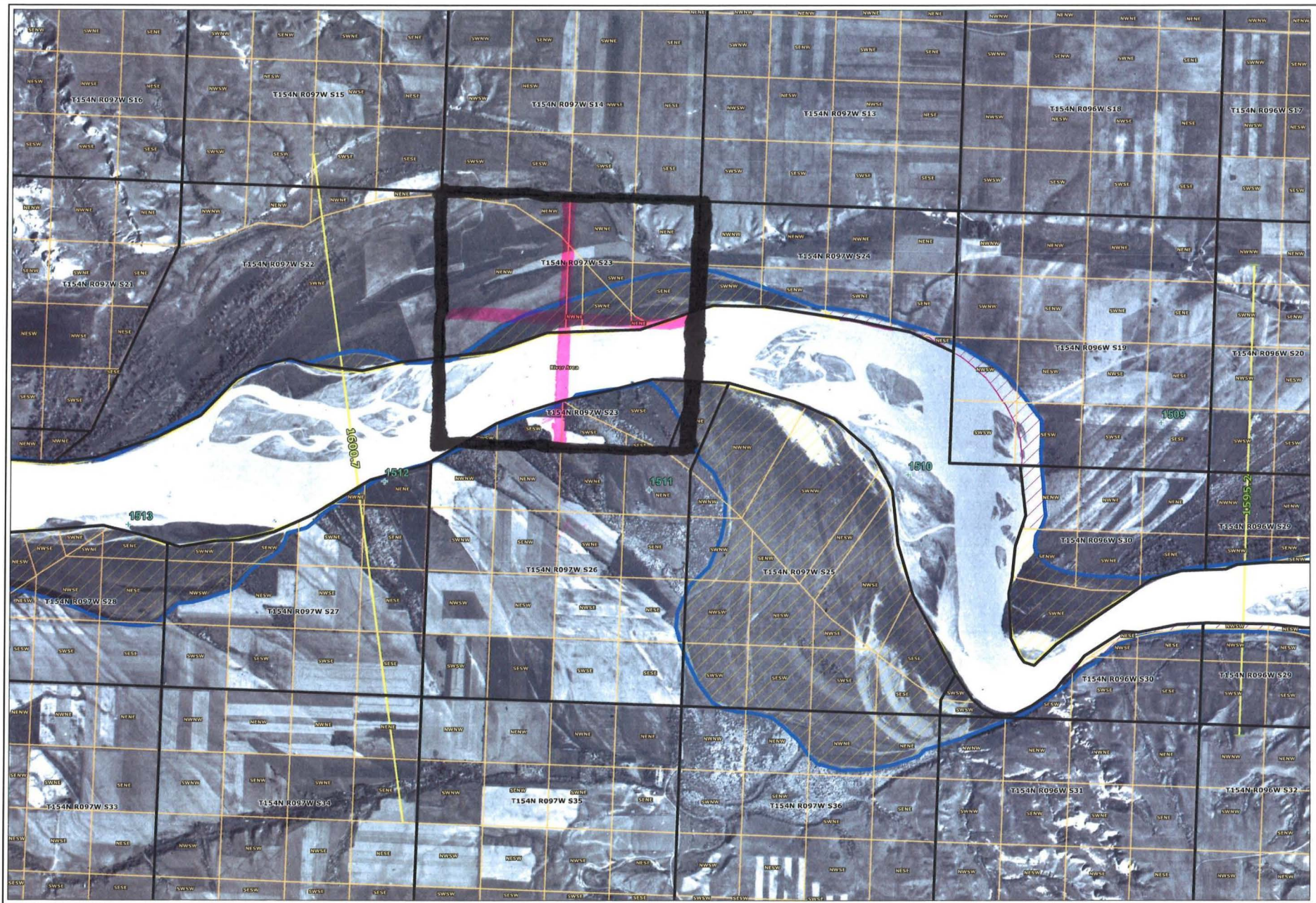
Notes:
 1. PLSS Sections and Quarter Sections: BLM National Public Land Survey System, Department of the Interior
 2. 1951 Aerial Photographs (Source: ND Department of Mineral Resources)



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EXAMPLE OF OHWM DATA USE

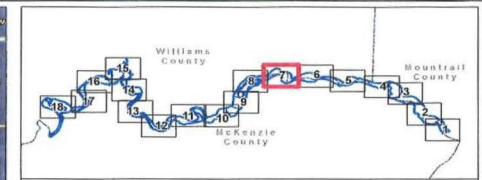
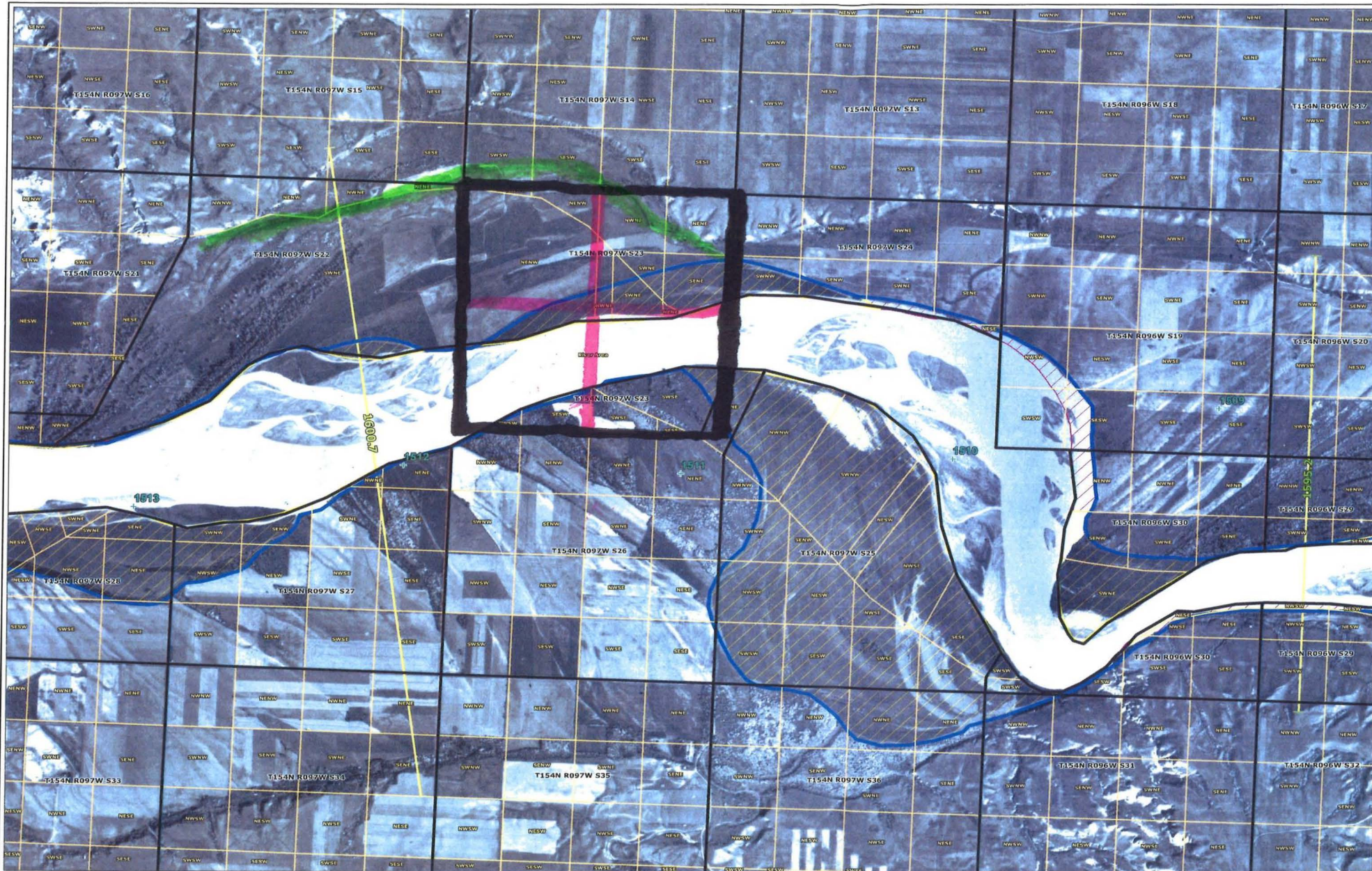




- BLM PLSS Section Boundary
- BLM PLSS Qtr Qtr Section Boundary
- River Miles
- USACE Cross Section
- Ordinary High-Water Mark (OHWM)
- Recommend Correction to Account for More Recent Aerial Information
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Notes:
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- BLM PLSS Section Boundary
- BLM PLSS Qtr Qtr Section Boundary
- River Miles
- USACE Cross Section
- Ordinary High-Water Mark (OHWM)
- Recommend Correction to Account for More Recent Aerial Information
- Recommend Correction to Account for Frequently Flooded Accretion
- Recommend Correction to Account for Active Meandering (Reliction)

EXHIBIT 1

Notes:
 1. PLSS Sections and Quarter Sections: BLM National Public Land Survey System, Department of the Interior
 2. 1951 Aerial Photographs (Source: ND Department of Mineral Resources)



1/2019

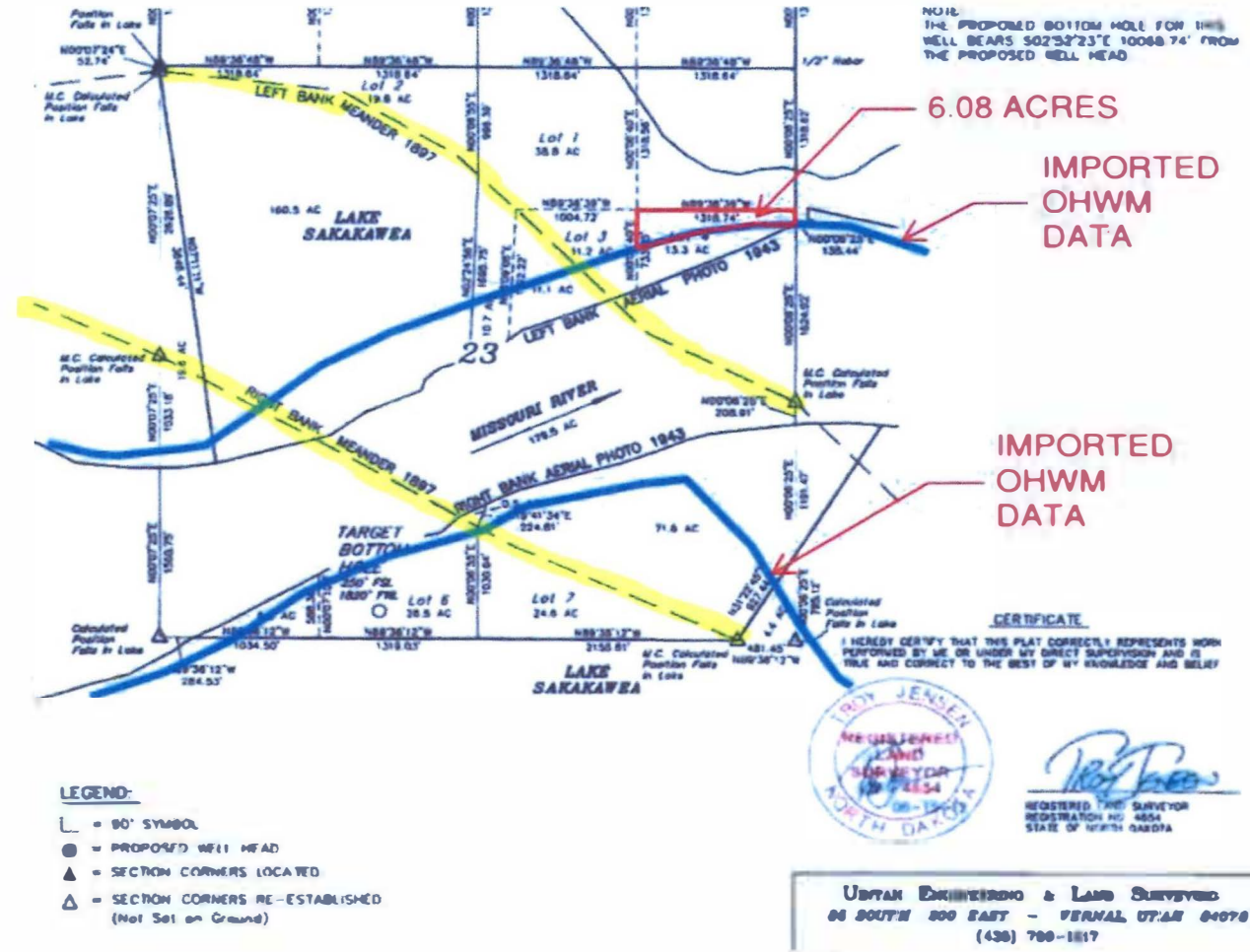


Well pad location

Section 23



EXAMPLE OF OHWM DATA USE



PROPOSED AMENDMENTS TO SENATE BILL NO. 2211

SB 2211
2.7.19
#1
Pg.1

Page 1, line 1, after "to" insert "create and enact a new subsection to section 61-33.1-03 of the North Dakota Century Code; and to"

Page 1, after line 4, insert:

SECTION 1. A new subsection to section 61-33.1-03 of the North Dakota Century Code is created and enacted as follows:

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.

Page 1, line 8, overstrike "final review findings" and insert immediately thereafter "acreage determination"

Page 1, line 8, overstrike "industrial"

Page 1, line 9, overstrike "commission" and insert immediately thereafter "board of university and school lands"

Page 1, line 20, overstrike "final review findings" and insert immediately thereafter "acreage determination"

Page 1, line 20, overstrike "industrial commission" and insert immediately thereafter "board of university and school lands"

Page 1, line 21, remove "may contract with a qualified"

Page 1, remove lines 22 through 24

Page 2, remove line 1

Page 2, line 2, remove "board. After approving the acreage determination, the board"

Renumber accordingly

House Energy and Natural Resources Committee
January 31, 2019 9:00 AM
Honorable Representative Todd Porter, Chairman
Senate Bill 2211
Testimony by Senator Brad Bekkedahl

Chairman Porter and Committee,

Brad Bekkedahl, Senator from District 1 here to introduce a critical bill relative to minerals development and disposition of payments addressed last session in Senate Bill 2134. This bill has been requested by The Department of Trust Lands, which is the administrative arm that serves under the Board of Trust Lands.

The 65th Legislative Assembly's adoption of Senate Bill 2134, codified as N.D.C.C. ch. 61-33.1, provided for the process for determining the ordinary high-water mark of the historical Missouri Riverbed channel. This bill was set up to create a defined process for returning an estimated \$187 million in mineral payments received by the State that, in some cases, may have belonged to private citizens who retained their mineral rights when the U.S. Army Corps of Engineers bought the land for Lake Sakakawea.

The North Dakota Industrial Commission completed the survey of the 83 mile stretch of the Missouri River based on the original Corps of Engineers survey prior to inundation by Garrison Dam, and the Industrial Commission adopted these findings on September 27, 2018, delineating the historical Missouri Riverbed channel.

The Department of Trust Lands is currently procuring an engineering firm to provide the necessary data to implement acreage adjustments, lease bonus and royalty refunds, and payments as may be necessary. The Department is unable to release funds without this additional information. An extension of the time frame as provided in Senate Bill 2211 will allow for the Department to receive the necessary requirements and comply with N.D.C.C. ch. 61.33.1. We would also ask the committee to entertain an amendment we have prepared to place an emergency clause on the bill to comply with current statutory timelines, as well as being beneficial to the timeline for final resolution to those affected.

It is anticipated the engineering contract will be awarded by May 1, 2019 and will be completed as soon as possible. Upon completion of the of the survey, which is not duplicating efforts already completed by the NDIC, the Board of University and School Lands will approve the acreage adjustments. The Department of Trust Lands will then be properly positioned to release funds based upon these acreage adjustments. Ensuring adequate time is available for the engineering firm and for Board review is necessary to the enhance the integrity of the Wenck Study and ensure legislative intent was followed with SB 2134. Passage of this bill will bring certainty to disposition of royalty revenues currently held in suspense, and conclusion to many areas of contention that still exist relative to these mineral acres, as well as allow the industry to continue to develop areas they have avoided due to this issue. Please recommend a Do Pass for Senate Bill 2211. Thank you, Chairman Porter and Committee. I am happy to stand for any questions.

March 4, 2019

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

Page 1, line 2, remove "and"

Page 1, line 5, after "dams" insert "; and to declare an emergency"

Page 3, after line 26, insert:

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

Re-number accordingly

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Jodi A. Smith, Commissioner

**TESTIMONY OF JODI SMITH
Commissioner
North Dakota Department of Trust Lands**

Senate Bill 2211

House Energy and Natural Resources Committee
March 8, 2019

Chairman Porter and members of the House Energy and Natural Resources Committee, I am Jodi Smith, the Commissioner and Secretary for the Board of University and School Lands (Board). I am here to testify in support of Senate Bill 2211.

The Department of Trust Lands (Department) is the administrative arm of the Board, serving under the direction and authority of the Board. The Board is comprised of the Governor, Secretary of State, Attorney General, State Treasurer, and Superintendent of Public Instruction. The Department's primary responsibility is managing the Common Schools Trust Fund and 13 other permanent educational trust funds. The beneficiaries of the trust funds include local school districts, various colleges and universities, and other institutions in North Dakota. The Department manages four additional funds: the Strategic Investment and Improvements Fund, the Coal Development Trust Fund, the Capitol Building Fund, and the Indian Cultural Education Trust.

The Department also administers the responsibilities outlined in the Uniform Unclaimed Property Act, N.D.C.C. ch. 47-30.1. In this role the Department collects "unclaimed property" (uncashed checks, unused bank accounts, etc.), and processes owners' claims. This property is held in permanent trust for owners to claim, with the revenue from the investment of the property benefiting the Common Schools Trust Fund.

Additionally, the Department operates the Energy Infrastructure and Impact Office (EIIO), which provides financial support to political subdivisions that are affected by energy development. Assistance is provided through both the oil and gas impact grant program and the coal impact loan program. The EIIO also distributes energy and flood grants carried over from prior biennia.

Overview

The North Dakota's Constitution and Century Code designate the Board to 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) which collects the revenues from sovereign minerals. The Board has had this management responsibility since at least 1977.

The 65th Legislative Assembly's adoption of Senate Bill 2134 (SB 2134), codified as N.D.C.C. ch. 61-33.1, provided for the determination of the ordinary high water mark (OHWM) for a certain stretch of the Missouri River. The bill directed the North Dakota Industrial Commission (NDIC) to review the delineation of the OHWM of the US Army Corp of Engineers (USAGE) 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, McKenzie, Mountrail, and Williams Counties, North Dakota.

As you may be aware, the Ordinary High Water Mark of the Missouri River Bed review as prepared by Wenck Associates, Inc. (Review) was presented to the NDIC on April 17, 2018. Thereafter, the NDIC issued its Order of the Commission, Order No. 29129, approving the Review on September 27, 2018. Information concerning the Review can be found on the Department of Mineral Resources' website.

Throughout the Review process, the Department did not comment on the OHWM definition provided in the Review, data compilation methods, methodology, legal research conducted to determine clear and convincing evidence standards, or other technical comments relating to the specific boundary delineations. Rather, the Department's comments focused on the usability of the Review for purposes of "implementing any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases", N.D.C.C. § 61-33.1-04(2)(a), specifically: (1) public domain tracts; (2) omitted data and variables; and (3) alignment of data. For purposes of example, the following provides concerns the Department raised which impact its ability to proceed with the Board's directives under N.D.C.C. ch. 61-33.1:

Public Domain Tracts

N.D.C.C. § 61-33.1-06 states:

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting non-patented 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.

A public domain tract is land owned by the Federal Government since statehood or land that has never left the public ownership. Of the estimated 7,300 public domain acres, N.D.C.C. § 61-33.1-06 defers determination of the OHWM to the branch of cadastral study of the United States bureau of land management in accordance with federal law. The Department's interpretation of N.D.C.C. § 61-33.1-06 is that the OHWM of the historical Missouri riverbed channel abutting the public domain tracts was to have been established at statehood or by the Supplemental Plats prepared by "the branch of cadastral study of the United States bureau of land management . . ." *Id.* These Supplemental Plats were prepared for the purpose of delineating the boundaries of public domain oil and gas interests in determining the acreage of the areas affected by the movement of the Missouri River prior to the inundation of Lake Sakakawea.

The Department's initial analysis of the Review, which included comparison to the Supplemental Plats, determined Wenck Associates, Inc. (Wenck): (1) did not identify in its OHWM Delineation Results Tables 2a and 2b (Tables) which tracts are deemed public domain, and (2) delineated the OHWM through public domain tracts, thus affecting the State's total estimated acreage presented in the Review.

Examples of the OHWM delineated through public domain tracts are as follows:

T153- R99 Sec. 34; T152-R99 Sec. 6 – Exhibit A
T153-R98 Sec. 11 – Exhibit B
T153-R98 Sec. 21 & 28 – Exhibit C

Omitted Data and Variables

Through the Department's initial analysis of the Review, the Department found that relevant river acreage data is missing from the Tables which may lead to inaccurate conclusions. The rows of the Tables titled BLM River Corridor appear to provide an overall acreage for the riverbed, but do not identify the acreage for specific quarter-quarter sections. The Review does not fully allocate acreages above or below the OHWM, thus preventing the Department from calculating the number of acres within each section. For the Department to implement acreage adjustments as required under N.D.C.C. ch. 61-33.1, the Department will need this data to be provided through a contract with an independent engineering firm. The Department will also need accretion data attributable to riparian or upland landowners within each quarter-quarter section. Without this data, the Board cannot accurately "implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases." N.D.C.C. § 61-33.1-04(2)(a).

Examples of areas with missing data include:

T153-R99 Sec. 27 – Exhibit D
T154-R96 Sec. 25 – Exhibit E

Alignment of Data

Significant Digit-Decimal Point

The Department requested the columns of the Tables be brought out to at least two decimal points to mirror how land is denoted in the Bureau of Land Management (BLM) Master Title Plats (Master Title Plats) or Public Land Survey System (PLSS). No changes were made concerning this request. Currently, the Tables only provide one decimal point. The rounding of acreage could result in a significant acreage change for the State and fee owners. Without the additional information, the Department would be forced to make assumptions on acreage adjustments.

Total Acres - Tables 2a and 2b

The Department requested additional information regarding Wenck's determination of "Total Acres" as presented in the second column of the Tables, as that information is not clearly defined in the Review. In many instances, it appears acreage in a quarter-quarter has increased or decreased with no explanation of where that acreage went or where it was added from. The Department sought additional information regarding the acreage depicted throughout the Tables as it is not consistent with the Master Title Plats by which the Department and industry's spacing unit boundaries have been determined. That information was not made available to the Department.

Legal Descriptions

Many of the legal descriptions of the tracts of land along the historical Missouri riverbed channel are incorrectly labeled. The Review disregards pre-established government lots that were created per the original Master Title Plats. Instead, in many instances, the Review refers to government lots by their location within the section.

Furthermore, the Review protracts quarter-quarters both in riparian areas and through accreted lands. This does not protect the interests of the upland mineral owners, both in terms of their rights to the shoreline and patented area. Examples of possible inaccurate legal descriptions are:

T153-R93W Sec. 20 – Exhibit F
T153-R93W Sec. 26– Exhibit G
T153-R94W Sec. 3 & 4; T154-R94 Sec. 34 – Exhibit H
T153-R99 Sec. 36 – Exhibit I

In response to comments, NDIC's September 27, 2018 Order of the Commission, Order No. 29129, found among other things that:

1. "[T]he Wenck Study was not intended to provide accurate acreage allocations for property transfer which is outside the scope of the legislation; the data sets provided to Wenck for use in calculating acreages represent the most efficient method for determination of areas necessary for decisions by the [NDIC]; no land surveying was done nor contracted to be done in the course of [the Wenck] study." Order at 4.
2. "[T]he cost to complete the necessary research and surveys to apportion property significantly exceeds the appropriated funds." *Id.*
3. "[A]dequate documentation and data for parties to determine how interests might be impacted were provided in the Wenck Study and subsequent communications." *Id.*

N.D.C.C. § 61-33.1-04(2)(a) provides that upon the adoption of the final review findings by the NDIC:

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.

At this time, the Department does not have the information to determine the exact acreage adjustments required to release any collected bonus and royalty proceeds held by the Board. In order for the Department to fully satisfy its requirements under SB 2134, codified at N.D.C.C. ch. 61-33.1, the Department will need to contract with an engineering firm to analyze the Review and the PLSS maps. Utilizing GIS, the Review's shapefile can be imported and overlaid with the BLM Master Title Plats to break down acreage above and below the Review's OHWM determination coordinates on a quarter-quarter or government lot basis. However, because the State issued its oil and gas leases on a quarter section basis, if the OHWM of the river runs through any part of a particular quarter section, the Department needs the contracted engineering firm to identify:

1. The amount of acreage in each quarter section that would be sovereign lands below the OHWM and subject to State lease (based on a quarter section);

2. Acreage above the OHWM in each quarter-quarter section or government lot owned by upland owners to allow for more finite calculations; and
3. Acreage allocations for accretions (where accretions are present) lying above the OHWM attributable to riparian tracts within each section.

On December 17, 2018, the Board authorized the Commissioner to accept and review proposals for analysis and GIS services for property related to the OHWM Study of the historical Missouri riverbed channel prepared by Wenck Associates, Inc. A Request for Proposal ("RFP") was issued on December 17, 2018. The scope of the project is to verify the boundaries and to calculate the acreage of each PLSS section within the Project Area, broken down by quarter-quarter section or government lot above and below the OHWM as identified by NDIC through the Review pursuant to N.D.C.C. § 61-33.1-03. This includes the entire acreage of any PLSS section that is fully or partially included in the Project Area. The determination of the OHWM from the Review is assumed to be correct.

The project would utilize all available data, records, and resources including the Review, the PLSS, BLM General Land Office (GLO) updated Master Title Plats (available at the BLM), original GLO Survey Plats (available at the North Dakota State Water Commission), BLM field notes, and any other relevant data, records and resources. Where previous survey data is not available, lacking, or otherwise unusable, the engineering firm performing the project would be required to conduct the field work necessary to supply the necessary data to complete and/or verify accurate boundaries within the Project Area.

Conclusion

As the Department does not have complete information to proceed with acreage adjustments, lease bonus and royalty refunds, it is imperative that more time be allowed for additional data to be gathered and compiled. It will take an engineering firm approximately twelve months, from the time of contract execution, to gather and compile the information. Currently, there is a scheduled award date of May 1, 2019. The Department is in support of the proposed Emergency Clause amendment as this will allow the Department to begin the project as soon as possible. This project will take time and is not an easy process. Allowing additional time for this to be completed will result in accurate computations and thereafter, accurate refund amounts.

Once the engineering firm completes the work requested in the RFP, the Department will promptly begin updating records to satisfy the Board's duty under N.D.C.C. § 61-33.1-04(2)(a). Unfortunately, this process will be time-consuming due to all that is required of both the engineering firm and the divisions within the Department. At this time, the most logical way to implement this project would be to review each parcel within each spacing unit. Each parcel will need to be reviewed for changes to the database, Correction of Oil and Gas Leases will be prepared for execution, requests for refunds of bonus and royalties will be prepared, each well will need a new royalty management unit to ensure future royalties will be allocated to the correct trust, the Department's shapefiles will be updated, and the Department will need to track all documentation for each lease correction.

Prior to any mailings or issuance of refunds appropriate documentation for each parcel requiring adjustments needs to be reviewed by the Department's Director of Minerals Management and the Revenue Compliance Division. Following review by the Commissioner, a refund authorization would be forwarded to the Accounting Division for submission. Once refunds are issued, Correction of Oil and Gas Lease documentation is mailed to the lessee of record based on the ownership records of the Department and the current operator. If the lessee fails to return an executed copy or cash the check, the Department will need to take additional steps.

Due to the failure of lessees to submit assignments for Department approval as required by Department policies or the lease, Department records do not always accurately reflect the current lessee of any given lease which could possibly impact the timeliness of the refunds. Refunds of bonus will be issued to the current lessee, based on the records of the Department and royalty payments will be returned to the current operator of each spacing unit.

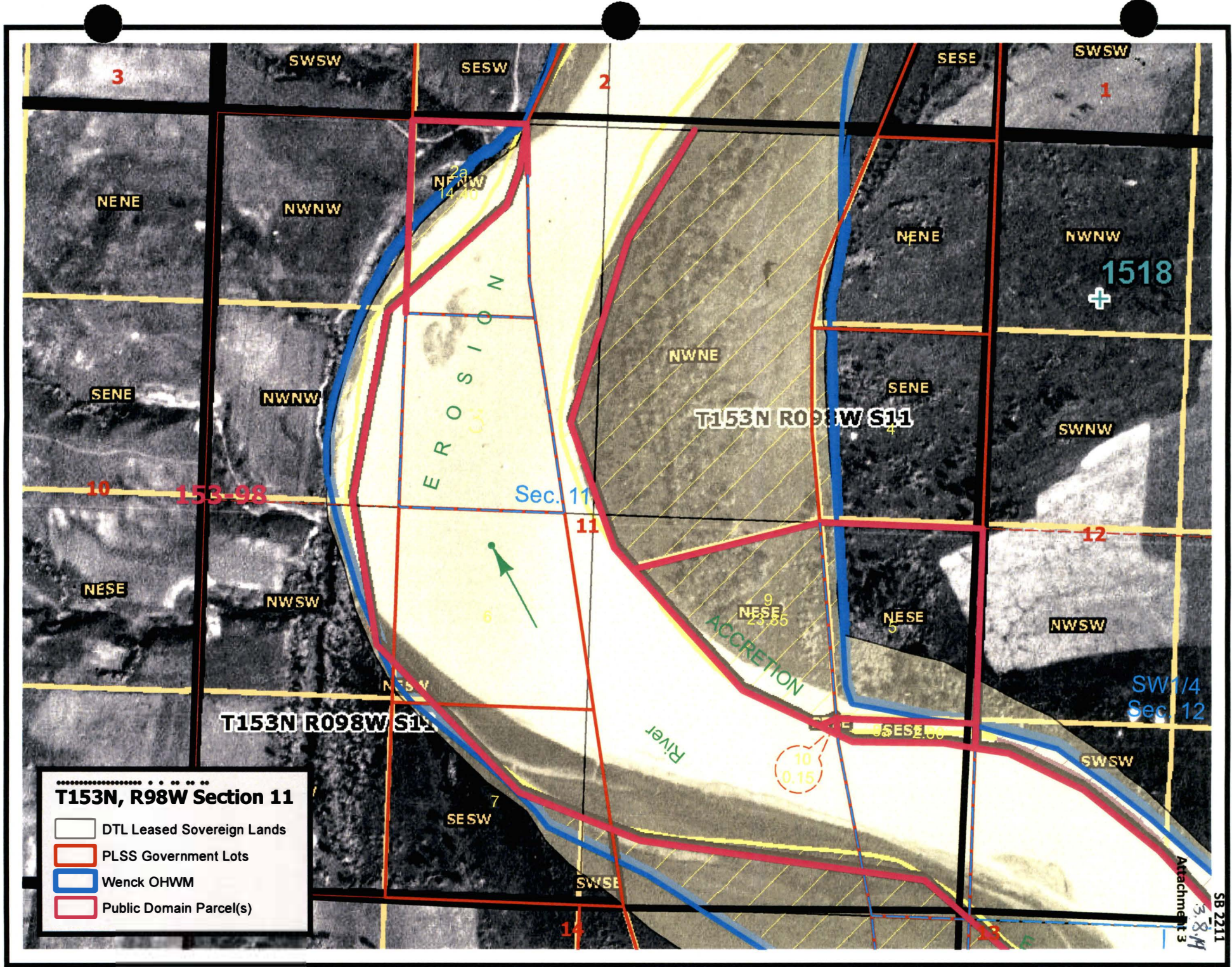
Senate Bill 2211's provision to essentially start the clock upon the Board's approval of the acreage adjustment calculations is necessary to the implementation of acreage adjustments, lease bonus and royalty refunds. Within the 83 miles reviewed by Wenck, the Department has:

- Approximately 511 active leases covering 44,700 acres;
- 100 different working interest owners with potential refunds due based upon their proportionate interest of the leases; and
- Interests in approximately 525 wells operated by 10 different companies.

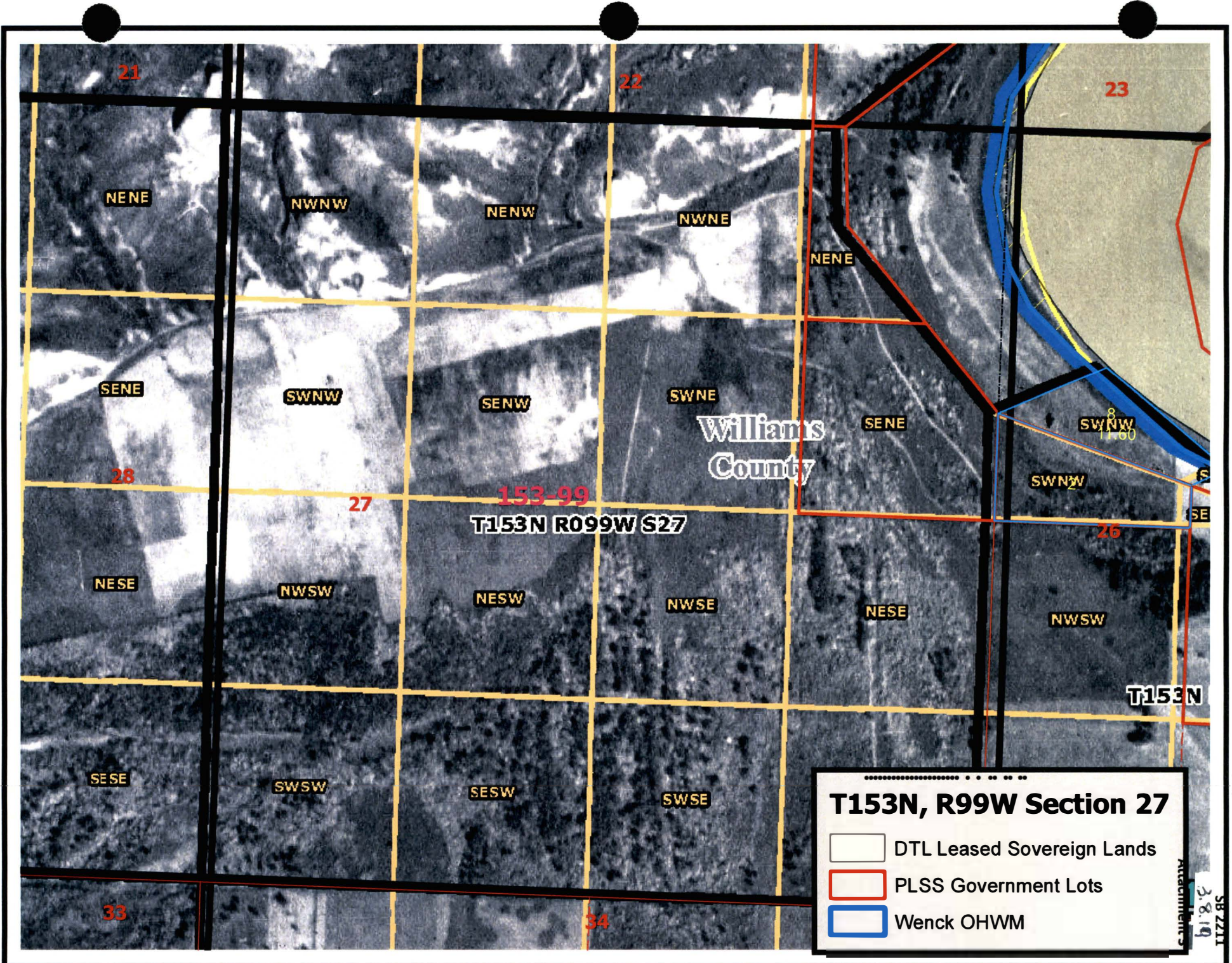
Barring delays due to legal challenges or unresponsive lessees, it is anticipated the Department could complete approximately 40 lease corrections each month, resulting in completion of more than 500 lease corrections within two years of the Board's adoption of the engineering firm's acreage adjustment calculations.

The Department recognizes and appreciates the significant work of Wenck and the NDIC to produce the Review and recognizes it as the initial step in the process; however, additional work is needed to provide the Department with the necessary data 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." N.D.C.C. § 61-33.1-04(2)(a). The Department cannot complete the steps required under N.D.C.C. ch. 61-33.1 without this information. Extension of the time frames as provided in Senate Bill 2211 would allow for the Department to receive the necessary information to comply with the requirements of N.D.C.C. ch. 61-33.1.

I look forward to working with the committee on these issues and would be happy to answer any questions.



8

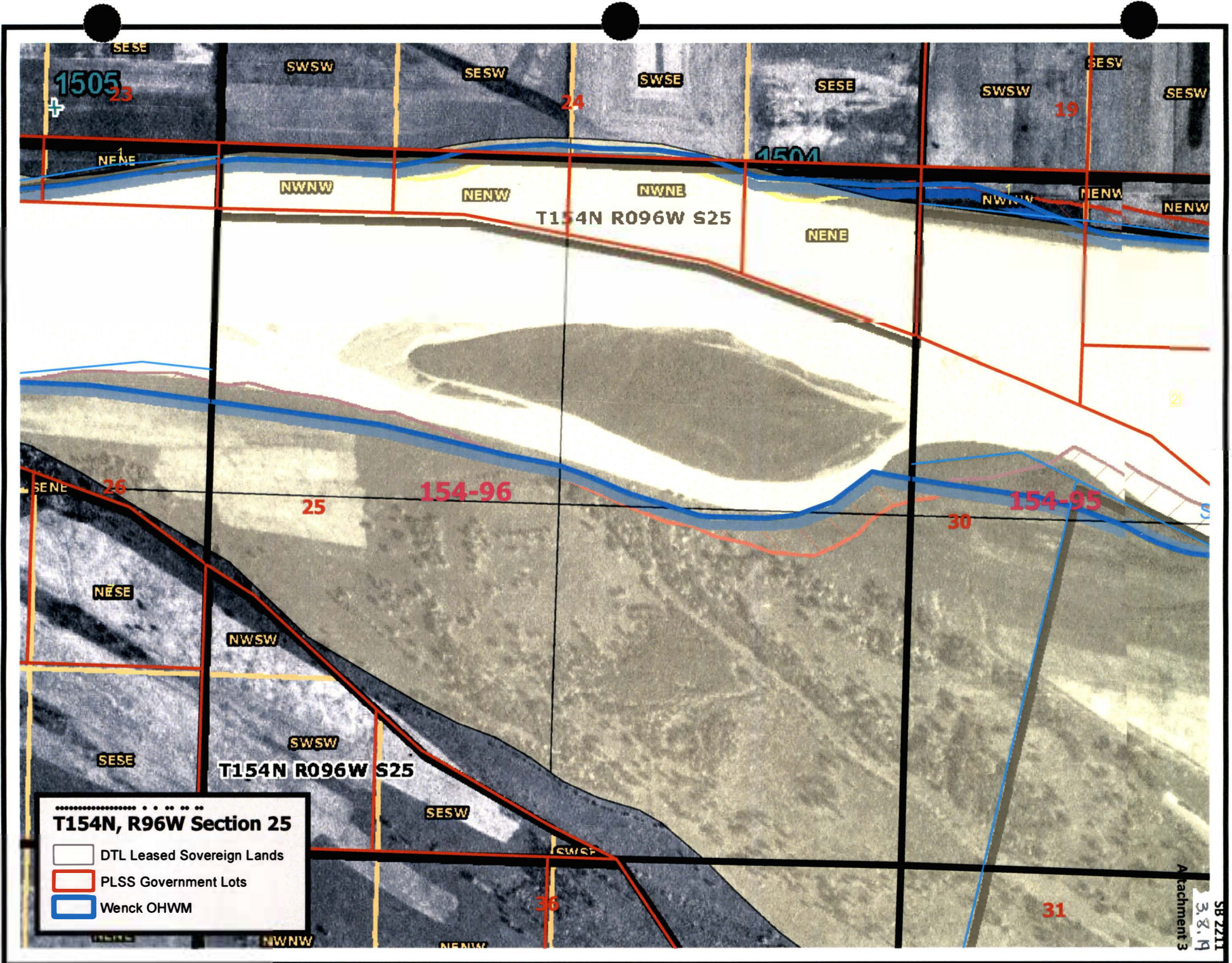


T153N, R99W Section 27

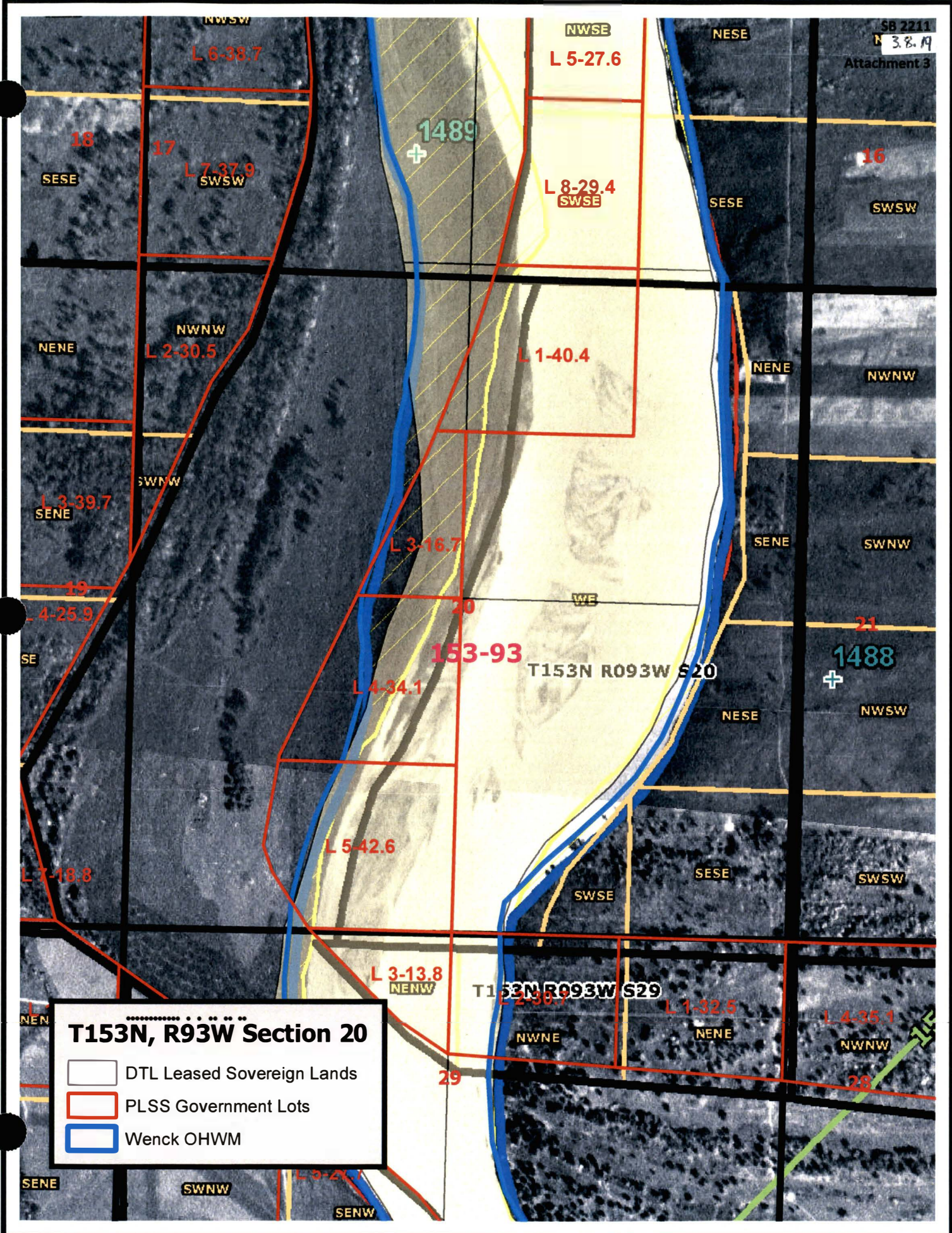
- DTL Leased Sovereign Lands
- PLSS Government Lots
- Wenck OHWM

18

Attachments
3819
SBZ211



.....
T154N, R96W Section 25
 [Dotted Line] DTL Leased Sovereign Lands
 [Red Line] PLSS Government Lots
 [Blue Line] Wenck OHWM



T153N, R93W Section 20

- DTL Leased Sovereign Lands
- PLSS Government Lots
- Wenck OHWM

SB 2211
3.8.19
Attachment 3

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1488
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153-93

T153N R093W S20

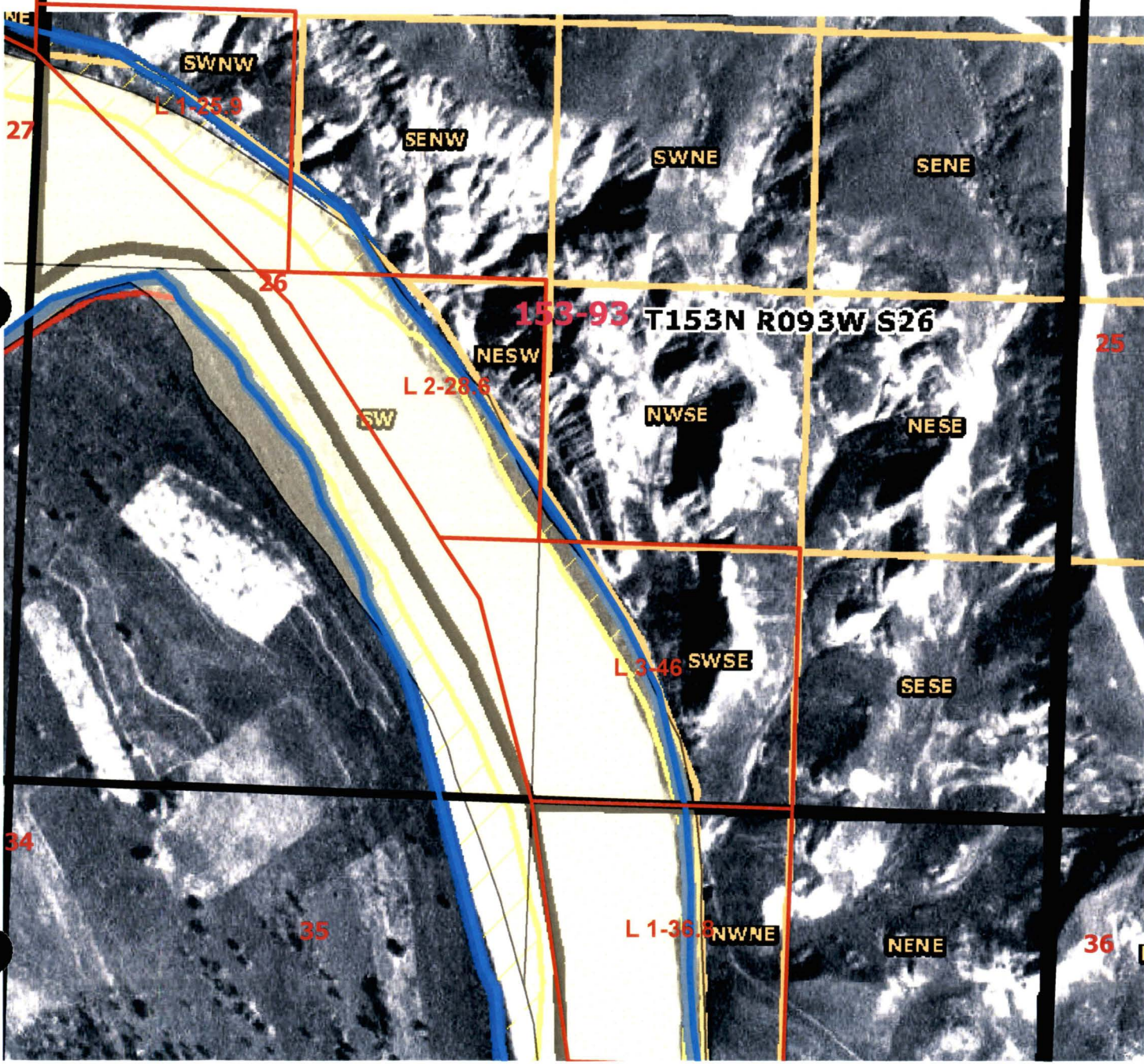
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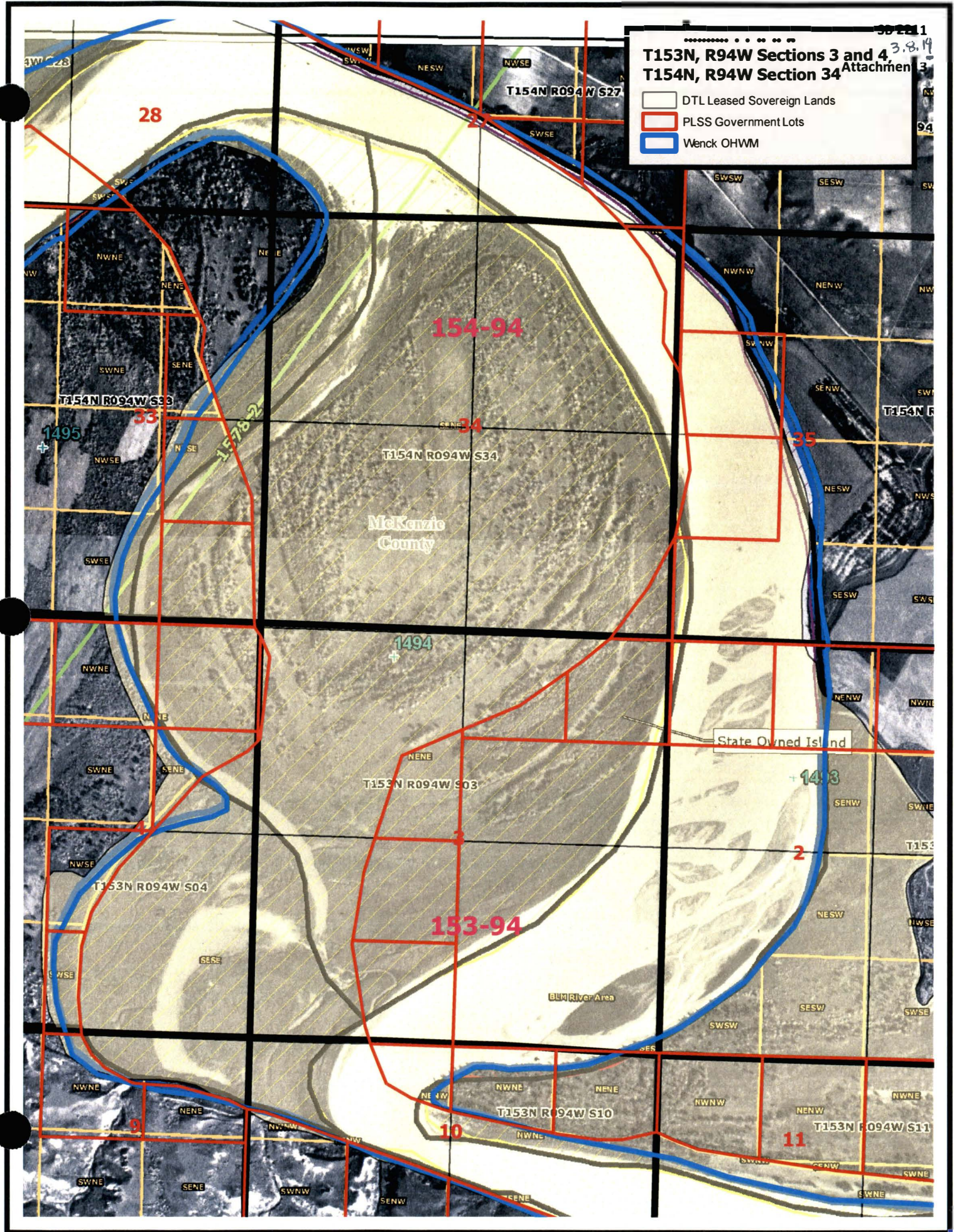
T153N, R93W Section 26

-  DTL Leased Sovereign Lands
-  PLSS Government Lots
-  Wenck OHWM






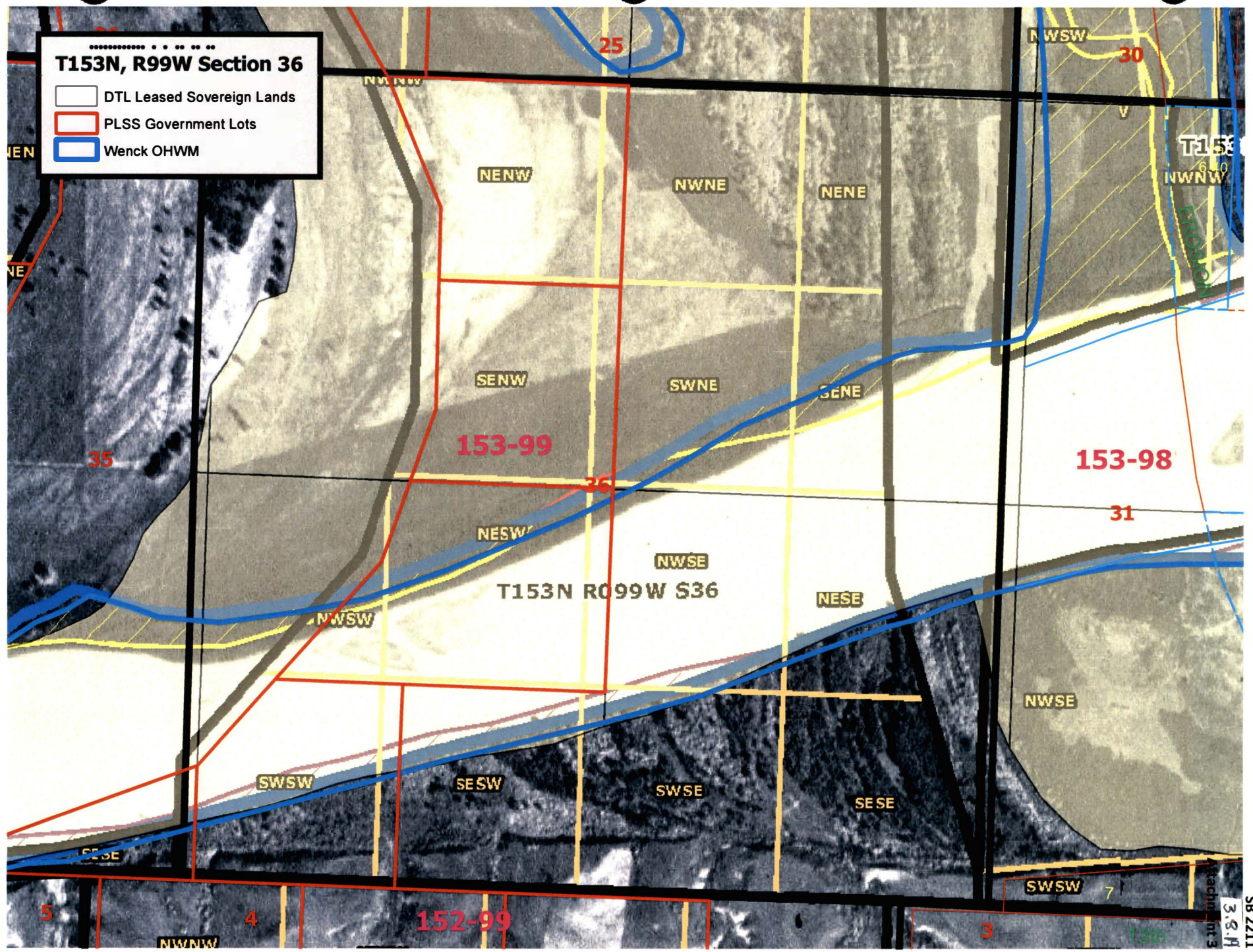
T153N, R94W Sections 3 and 4, 3.8.14
 T154N, R94W Section 34 Attachmen 3

-  DTL Leased Sovereign Lands
-  PLSS Government Lots
-  Wenck OHWM



T153N, R99W Section 36

-  DTL Leased Sovereign Lands
-  PLSS Government Lots
-  Wenck OHWM



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Attachment 3

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SENATE BILL NO. 2122—Lakebed Minerals

House Energy and Natural Resources Committee

Testimony of Craig C. Smith

March 8, 2019

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 30 years. I'm appearing today on behalf of the North Dakota Petroleum Council and in support of Senate Bill 2122.

BACKGROUND

This Bill adds certain amendments to Senate Bill 2134 enacted by the 2017 Legislative Assembly and codified as Chapter 61-33.1 of the Century Code relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project dams. Prior to discussing the specifics of this Bill, a brief summary of Senate Bill No. 2134 and the status of the Ordinary High Water Mark study may be appropriate.

As you will recall, Senate Bill 2134 was an exhaustive and dedicated effort that culminated in a comprehensive set of laws to establish the parameters and a thorough process for determining the historical Missouri riverbed Ordinary High Water Mark ("OHWM") for an 83 mile stretch of Lake Sakakawea extending from the northern boundary of the Fort Berthold Indian Reservation to a few miles west of Williston. Between January 12, 2017 and April 18, 2017, not counting actions by the full House and Senate, at least 18 separate committee hearings and subcommittee meetings were held, allowing for extensive testimony and dozens of amendments and proposed amendments to be considered. This process resulted in a Legislative history record of 699 pages.¹

The Bill adopted the Corps of Engineers survey of the historical Missouri River channel as the presumptive determination of the OHWM, however, due to some uncertainties of the Corps Survey, a new study was authorized to review the Corps survey to confirm or modify the Corps survey if clear and convincing evidence existed that the survey must be modified to conform to North Dakota law. Briefly, the Bill set forth the following parameters for determining the OHWM:

1. The Department of Mineral Resources ("DMR") is designated to oversee the review process.²
2. Required the DMR to retain an independent Engineering and Surveying Firm ("Firm") to conduct the review.

¹ The legislative history is available online at <http://www.legis.nd.gov/files/resource/65-2017/library/sb2134.pdf>

² The Legislature concluded the DMR was the most appropriate agency to oversee the review based on its own technical expertise as well as extensive experience in conducting public hearings.

3. Establishes specific parameters the Firm must consider in evaluating the OHWM, including aerial photography, Corps of Engineer historical records, elevation and flow data, and to apply existing state case law defining the OHWM.³
4. Due Process standards. Upon completion of the review, the Firm presents its findings and recommendations for any adjustments, modifications or corrections to the Corps Survey to the Department of Mineral Resources. Unlike either the Corps survey or prior State surveys, the Act provides due process safeguards by requiring the review findings to be published for a 60 day comment period followed by a public hearing. After the public hearing and consideration of comments, the DMR and Engineering Firm must prepare a final recommendation and submit the recommendation to the Industrial Commission. The Industrial Commission may adopt, amend, or reject the new survey.
5. Finally, after the Industrial Commission adopts the final review, Section 61-33.1-05 affords any interested party the right to seek judicial review directly in District Court within two years after the adoption of the new review findings.

After its enactment, the Industrial Commission awarded the study contract to Wenck Associates. In April 2018 Wenck Associates presented its preliminary finding to the NDIC at a public hearing. The preliminary finding concluded the Corps survey delineated 16,687 acres as being within the OHWM and owned by the State. The preliminary Wenck study showed 27,089 acres within the OHWM, or 10,402 more acres than the Corps survey as being owned by the State. However, the preliminary Wenck study was about 15,000 *less* acres than claimed by the State's Phase 2 survey.

Following the publication of the preliminary report, a 60 day comment period was afforded followed by a public hearing on June 26, 2018. Twenty two commenters submitted 1436 pages of written comments and 15 people provided testimony at the hearing. The public comments were reviewed and considered for three months, and on September 27, 2018, a final study proposal was submitted to the NDIC which the NDIC approved. The final study concluded an additional 900 acres or so should be excluded from the OHWM. Thus, the final study determined that the acreage within the OHWM of the historical Missouri River channel extended approximately 9,000 acres more than the Corps survey, but 16,000 acres less than the State's Phase 2 survey.

THE WENCK OHWM STUDY

The Wenck study for the NDIC essentially set the boundary line of where the ordinary high water mark is located along the historical Missouri River Channel. We can look at their graphics and have a visual understanding of where the line lays and identify minerals that lie above and below the blue line. The Wenck study set the boundary line and calculated the total acreage that lies within the riverbed for the 83 mile stretch of the study, however, the study did not break down or otherwise calculate the acreages above and below the OHWM on a tract or per section basis, or calculate the acreages lying above and below the ordinary high water mark for each individual oil well spacing unit. For both the State and oil and gas operators to implement the required ownership

³ Section 61-33.1-03(3)(d) relating to the definition of ordinary high water mark essentially codifies North Dakota judicial decisions.

adjustments for each oil and gas well, it will be necessary to calculate the acreages on a spacing unit basis.

To briefly demonstrate, Slide 5 from the PowerPoint presentation is a segment from the Wenck study. The black square represents Section 23, the pink lines show the quarter sections. Although one can easily see the OHWM designation (the blue line) a title examiner cannot determine the precise acreage of the riverbed in each of the four quarter sections, nor can we determine the acreages of the tracts of land above the blue line.

Slides 7 and 8 show, in part, what needs to be accomplished. First, a professional surveying firm will incorporate the exact location of known original government survey corners, and then will overlay the coordinates of the Wenck OHWM blue line into their survey. They will then calculate the acreages above and below the OHWM for each tract above and below the blue line, see the red 6.08 acre tract as an example, except that this will need to be done for all tracts, in addition to proportionately allocating accretions to the proper upland owners.

Therefore, to implement the study, the provision in this Bill authorizing the Land Board to retain a professional surveying and engineering firm to perform the acreage calculations is critical. To be clear, this amendment does not call for a new study of the OHWM, it is simply a necessary measure to properly complete the study by having a professional surveying firm, using well established professional surveying standards, to designate the acreages for each affected tract which will enhance the integrity of the Study and afford proper legal descriptions for future land conveyances.

EXTENSION OF TIME TO IMPLEMENT

The original provisions of Senate Bill 2134 required that operators and the State implement the necessary acreage adjustments within 6 months (for certain tracts) and two years of the adoption of the final study by the Industrial Commission. The NDIC adopted the study on September 27, 2018, meaning that the six month provision technically would take effect on March 27, 2019. This bill amends the six month and two year implementation provisions such that it will not take effect until “the board approves the acreage determination.” We support this amendment to the original provisions of SB 2134.

Thank you for your consideration.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

Page 1, line 3, after "sections" insert "61-33.1-02,"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, after line 6, insert:

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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."

Page 3, after line 26, insert:

"SECTION 5. AMENDMENT. Section 61-33.1-07 of the North Dakota Century Code is amended and reenacted as follows:

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

Renumber accordingly

2134 LAST session

■ legis.nd.gov

4 legislative assembly.

5 **SECTION 4. APPROPRIATION - STRATEGIC INVESTMENT AND IMPROVEMENTS**6 **FUND - REIMBURSEMENT OF LEGAL EXPENSES.**

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

22 **SECTION 5. RETROACTIVE APPLICATION.** Section 1 of this Act is retroactive to the date
23 of closure of the Pick-Sloan Missouri basin project dams. The ordinary high-water mark
24 determination under this Act is retroactive and applies to all oil and gas wells spud after

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Attachment 1

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

- Page 1, line 1, after "enact" insert "section 61-33-01.1 and"
- Page 1, line 2, remove "and"
- Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"
- Page 1, line 3, replace the second "and" with a comma
- Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"
- Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"
- Page 1, line 4, replace "inundated" with "subject to inundation"
- Page 1, line 5, after "dams" insert "; to provide a contingent appropriation; to provide for application; and to declare an emergency"
- Page 1, after line 6, insert:

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

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. "Ordinary high water mark" means the continuous line along the banks of navigable rivers and lakes where the presence and action of waters of the navigable river or lake are so common and usual, and so long continued in all ordinary years, as to mark upon the bank of a navigable river or lake a character distinct from that of the abutting upland. The ordinary high water mark line must be continuous in elevation or gently sloping, following the gradient of the river.
4. "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.
- 4.5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

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

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

The state engineer 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 state engineer 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.

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

61-33.1-02. Mineral ownership of land inundatedsubject to inundation by Pick-Sloan Missouri basin project dams. (Retroactive application - See note)

The state sovereign land mineral ownership of the riverbed segments inundatedsubject 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 inundatedsubject 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 inundatedsubject 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.

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

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- e. Subsection ~~34~~ 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."

Page 3, line 11, replace "acreage determinations were approved" with "payments were made"

Page 3, after line 26, insert:

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

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

SECTION 9. CONTINGENT 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, 2019, and ending June 30, 2021.
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 10. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

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

#1.
4-16-19
SP 221!

Renumber accordingly

April 22, 2019

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4.23.19
#1

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

That the House recede from its amendments as printed on pages 1677-1680 of the Senate Journal and pages 1909-1911 of the House Journal and that Engrossed Senate Bill No. 2211 be amended as follows:

Page 1, line 1, after "enact" insert "section 61-33-01.1 and"

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide for application; and to declare an emergency"

Page 1, after line 6, insert:

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

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. "Ordinary high water mark" means the continuous line along the banks of navigable rivers and lakes where the presence and action of waters of the navigable river or lake are so common and usual, and so long continued in all ordinary years, as to mark upon the bank of a navigable river or lake a character distinct from that of the abutting upland."
4. "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.
- 4.5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

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#1

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

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

The state engineer 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. Hydrological and hydraulic measurements from stream gauge data, elevation data, ordinary water flow records, high resolution light detection and ranging systems, prior elevation and survey maps, and statistical hydrological evidence may be considered when determining the ordinary high water mark. The state engineer 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 as stated 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.

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

61-33.1-02. Mineral ownership of land inundatedsubject to inundation by Pick-Sloan Missouri basin project dams. (Retroactive application - See note)

The state sovereign land mineral ownership of the riverbed segments inundatedsubject 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 inundatedsubject 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 inundatedsubject 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.

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

- e. Subsection ~~34~~ 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."

Page 3, after line 26, insert:

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

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

SECTION 9. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

SECTION 10. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly

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Article IV - Legislative Branch

Section 13. Each house shall keep a journal of its proceedings, and a recorded vote on any question shall be taken at the request of one-sixth of those members present. No bill may become law except by a recorded vote of a majority of the members elected to each house, and the lieutenant governor is considered a member-elect of the senate when the lieutenant governor votes.

No law may be enacted except by a bill passed by both houses, and no bill may be amended on its passage through either house in a manner which changes its general subject matter. No bill may embrace more than one subject, which must be expressed in its title; but a law violating this provision is invalid only to the extent the subject is not so expressed.

Every bill must be read on two separate natural days, and the readings may be by title only unless a reading at length is demanded by one-fifth of the members present.

No bill may be amended, extended, or incorporated in any other bill by reference to its title only, except in the case of definitions and procedural provisions.

The presiding officer of each house shall sign all bills passed and resolutions adopted by the legislative assembly, and the fact of signing shall be entered at once in the journal.

Every law, except as otherwise provided in this section, enacted by the legislative assembly during its eighty natural meeting days takes effect on August first after its filing with the secretary of state, or if filed on or after August first and before January first of the following year ninety days after its filing, or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the Act. Every appropriation measure for support and maintenance of state departments and institutions and every tax measure that changes tax rates enacted by the legislative assembly take effect on July first after its filing with the secretary of state or on a subsequent date if specified in the law unless, by a vote of two-thirds of the members elected to each house, the legislative assembly declares it an emergency measure and includes the declaration in the Act. An emergency measure takes effect upon its filing with the secretary of state or on a date specified in the measure. Every law enacted by a special session of the legislative assembly takes effect on a date specified in the Act.

The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution. Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.

Section 14. All sessions of the legislative assembly, including the committee of the whole and meetings of legislative committees, must be open and public.

Section 15. Members of the legislative assembly are immune from arrest during their attendance at the sessions, and in going to or returning from the sessions, except in cases of felony. Members of the legislative assembly may not be questioned in any other place for any words used in any speech or debate in legislative proceedings.

Section 16. Any amendment to this constitution may be proposed in either house of the legislative assembly, and if agreed to upon a roll call by a majority of the members elected to each house, must be submitted to the electors and if a majority of the votes cast thereon are in the affirmative, the amendment is a part of this constitution.

Article X Finance & Public Debt

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#2
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Section 16. Any city, county, township, town, school district or any other political subdivision incurring indebtedness shall, at or before the time of so doing, provide for the collection of an annual tax sufficient to pay the interest and also the principal thereof when due, and all laws or ordinances providing for the payment of the interest or principal of any debt shall be irrevocable until such debt be paid.

Section 17. No bond or evidence of indebtedness of the state is valid unless it has endorsed thereon a certificate, signed by the auditor and secretary of state showing that the bond or evidence of debt is issued pursuant to law and is within the debt limit. No bond or evidence of debt of any county, or bond of any township or other political subdivision is valid unless it has endorsed thereon a certificate signed by the officer authorized by law to sign such certificate, stating that said bond or evidence of debt is issued pursuant to law and is within the debt limit.

Section 18. The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but **neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation** except for reasonable support of the poor, nor subscribe to or become the owner of capital stock in any association or corporation.

Section 19. The legislative assembly is hereby authorized and empowered to provide by law for the erection, purchasing or leasing and operation of one or more terminal grain elevators in the states of Minnesota or Wisconsin, or both, to be maintained and operated in such manner as the legislative assembly shall prescribe, and provide for inspection, weighing and grading of all grain received in such elevator or elevators.

Section 20. The legislative assembly is hereby authorized and empowered to provide by law for the erection, purchasing or leasing and operation of one or more terminal grain elevators in the state of North Dakota, to be maintained and operated in such manner as the legislative assembly shall prescribe, and provide for inspection, weighing and grading of all grain received in such elevator or elevators.

Section 21. Not less than fifteen percent of the tax imposed for severing coal shall be placed into a permanent trust fund in the state treasury to be held in trust and administered by the board of university and school lands, which shall have full authority to invest said trust funds as provided by law, and may loan moneys from the fund to political subdivisions as provided by law. The interest earned on the moneys in said trust fund shall be used first to replace uncollectable loans made from the fund, and the balance shall be credited to the general fund of the state. Up to fifty percent of the taxes collected and deposited in the permanent trust fund during a biennium may be appropriated by the legislative assembly for lignite research, development, and marketing as provided by law. An additional twenty percent of the taxes collected and deposited in the permanent trust fund during a biennium may be appropriated by the legislative assembly for clean coal demonstration projects approved by the industrial commission.

Section 22. The legislative assembly may provide by law for a percentage of revenue from taxes imposed on the extraction or production of oil to be allocated and credited to a special trust fund, to be known as the resources trust fund. The principal and income of the resources trust fund may be expended only pursuant to legislative appropriation for:

1. Constructing water-related projects, including rural water systems; and
2. Funding of programs for energy conservation.

PROPOSED AMENDMENTS TO ENGROSSED SENATE BILL NO. 2211

That the House recede from its amendments as printed on pages 1677-1680 of the Senate Journal and pages 1909-1911 of the House Journal and that Engrossed Senate Bill No. 2211 be amended as follows:

Page 1, line 1, after "enact" insert "section 61-33-01.1 and"

Page 1, line 2, remove "and"

Page 1, line 3, after "sections" insert "61-33-01 and 61-33.1-02, subdivision e of subsection 3 of section 61-33.1-03, sections"

Page 1, line 3, replace the second "and" with a comma

Page 1, line 3, after "61-33.1-05" insert ", and 61-33.1-07"

Page 1, line 4, after "to" insert "sovereign lands, determining the ordinary high water mark, and"

Page 1, line 4, replace "inundated" with "subject to inundation"

Page 1, line 5, after "dams" insert "; to provide for application; and to declare an emergency"

Page 1, after line 6, insert:

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

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. "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.
4. "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.
- 4-5. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

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

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

The state engineer 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 state engineer 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.

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

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

The state sovereign land mineral ownership of the riverbed segments ~~inundated~~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 ~~inundated~~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 ~~inundated~~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.

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

- e. Subsection ~~34~~ 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."

Page 3, after line 26, insert:

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

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

SECTION 9. APPLICATION. Sections 1 and 2 of this Act do not apply to the ordinary high water mark study required for the historical Missouri riverbed channel in chapter 61-33.1. This Act does not affect or limit the authority of the state engineer to regulate waters of this state.

SECTION 10. EMERGENCY. This Act is declared to be an emergency measure."

Renumber accordingly