

NORTH DAKOTA LAW REVIEW
**ENERGY LAW
SYMPOSIUM**

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**CROWLEY
FLECK** PLLP
ATTORNEYS

UND SCHOOL OF LAW
UNIVERSITY OF NORTH DAKOTA



UND ENERGY LAW SYMPOSIUM

Status of Missouri Riverbed Mineral Issues

April 11, 2019

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TOPICS COVERED

- ❑ Equal Footing Doctrine—historical background
- ❑ Issues created by river movement
- ❑ State surveys and Corps survey
- ❑ Senate Bill No. 2134 (NDCC Chapter 61-33.1)
- ❑ Wenck Study
- ❑ Senate Bill No. 2211 (acreage calculations)
- ❑ Status of Litigation

Historical Background- Equal Footing Doctrine

- Original 13 colonies owned title underlying navigable tidal waters.
- 1842 U.S. Supreme Court held States retained title to bed of navigable rivers and water bodies.
- 1845 U.S. Supreme Court recognized “Equal Footing Doctrine” whereby as States entered the Union they acquired title to the beds of all navigable waters “upon equal footing, in all respects whatever...” with the original states to the Ordinary High Water Mark.”

Equal Footing Doctrine

- After joining the Union, States could elect to own up to the low or high water mark.
- At statehood, North Dakota had a statute providing the upland owner takes to the low water mark. In 2013, the North Dakota Supreme Court held the statute violated the anti-gift clause. *Reep v. State*.
- The *Reep* decision establishes North Dakota as a “high water mark” state.
- ***What is the impact of low versus high water mark??***

Low versus High Water Mark

- For some water bodies very little difference, example, many Minnesota lakes vary in elevation only a few inches throughout the year, or year to year.
- For large river systems, such as the Missouri River, the difference can be very significant.
- Example: Bismarck elevation gauge:
 - Low water at 15,000 cfs = 4.1 feet elevation
 - High water at 80,000 cfs = 15.2 feet elevation
 - Elevation level difference of 6-12 feet typical throughout the Missouri River basin between low and high water mark.

Ordinary High Water Mark

- High water mark is to be considered the mark of the bed which the water occupies sufficiently long and continuously to wrest it from vegetation, **and destroy its value for agricultural purposes.**
- In low and flat lying areas, the line of demarcation may be more difficult to determine.
- “In such cases the effect of water upon vegetation must be the principal test in determining the location of high-water mark. It is the point up to which the presence and action of the water is so continuous **as to destroy the value of the land for agricultural purposes** by preventing the growth of what may be termed an ordinary agricultural crop.

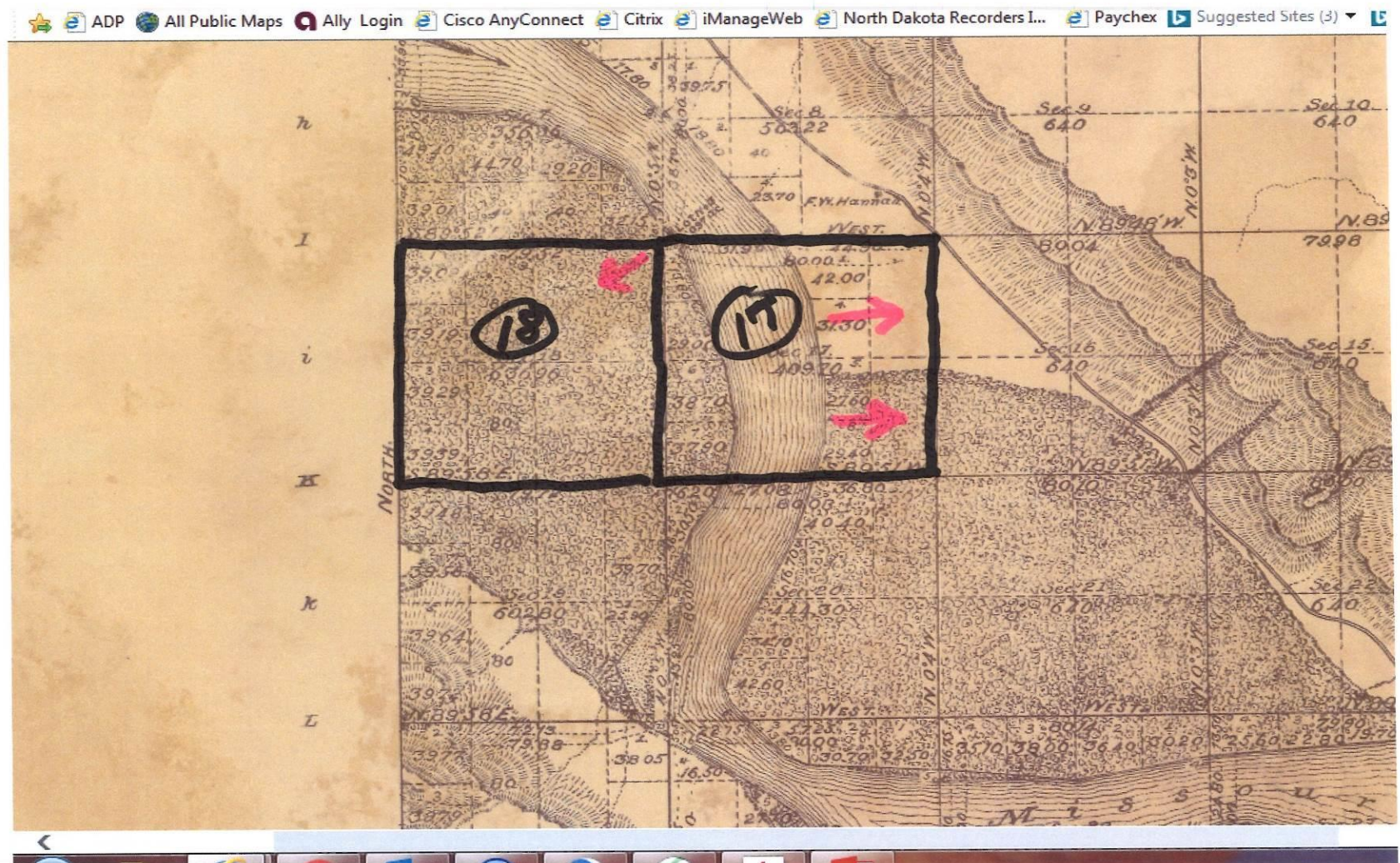
River Movement--Doctrines of Accretion, Erosion and Avulsion

- Accretions: gradual deposit and addition of soil along the bank of a river caused by gradual shift of river away from bank. Riparian owner takes title to additional land.
- Erosion: gradual loss of soil along a bank of a river caused by encroachment of water into eroding bank Riparian owner loses title by erosion.
- Avulsion: A sudden change in the river channel, typically where an oxbow is cut off and abandoned and a new channel formed. States take contrary positions on ownership rights affected by avulsion.

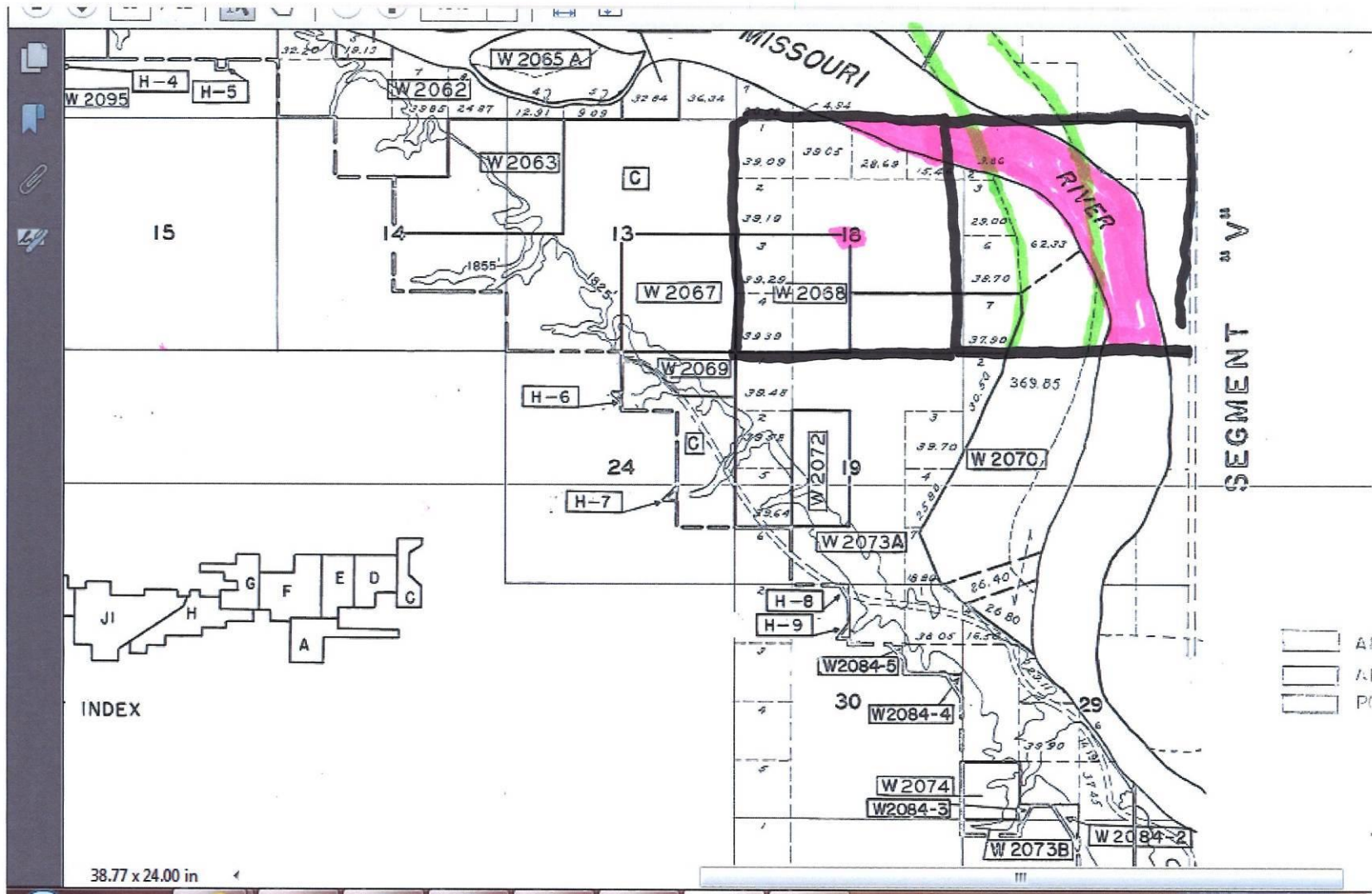
River Movement--Doctrines of Accretion, Erosion and Avulsion

- State law controls the determination of all subsequent river movement caused by accretion, erosion and avulsion.
- ISLANDS
 - If existed before statehood, owned by the USA.
 - If formed after statehood, owned by the State.

Location of River—original government survey 1896

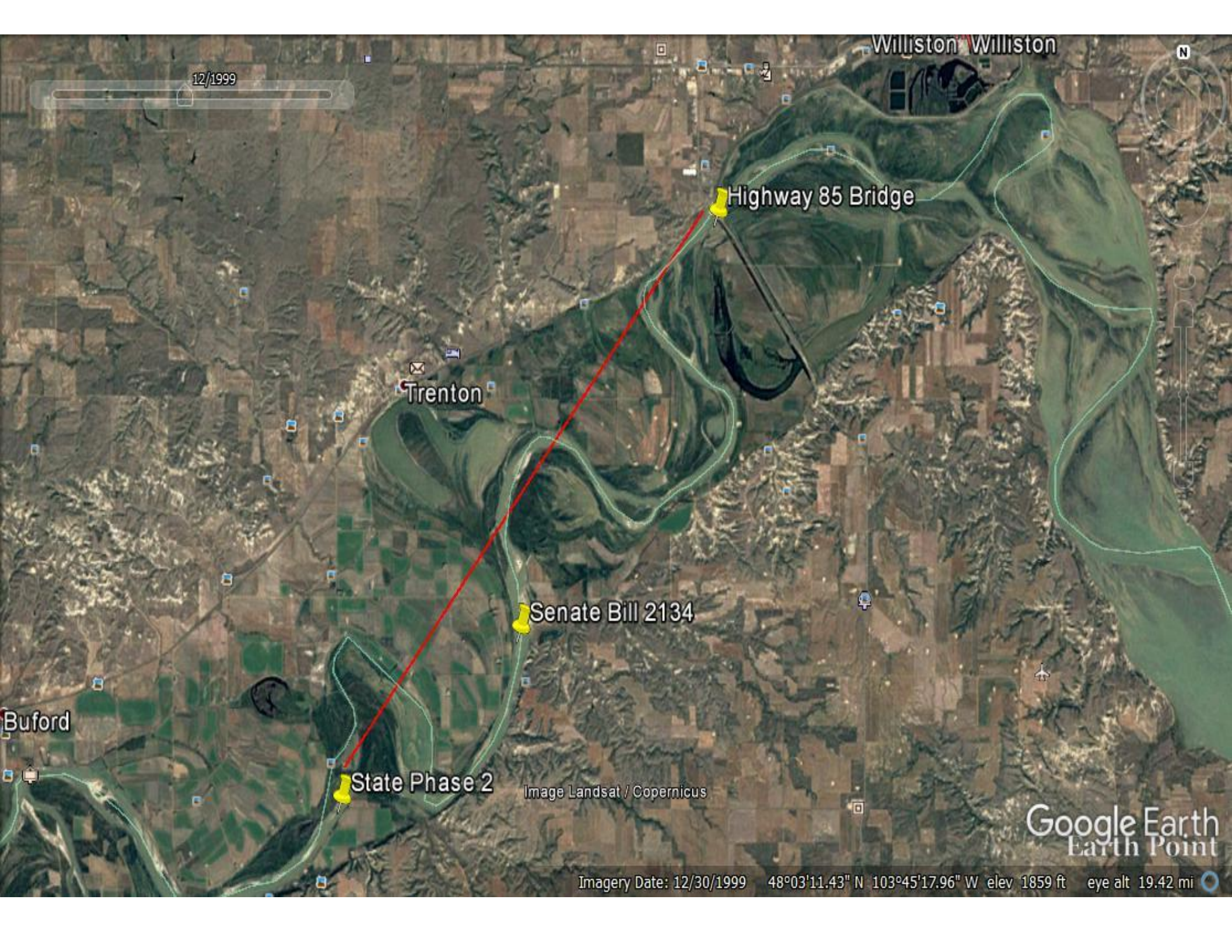


Location of River --- Corps Survey -- 1950



State OHWM Surveys

- State Land Board elected to conduct its own surveys for leasing purposes as a result of the Bakken play.
- Phase 1: Montana state line to Highway 85 bridge based on current river conditions.
- Phase 2: Furlong Loop (near Trenton) to northern boundary of Fort Berthold Indian Reservation based on “historical river channel” prior to Garrison Dam.
- The surveys overlap between Furlong Loop and Highway 85 bridge. State selected Highway 85 bridge as the boundary for distinguishing current river channel vs. Lake Sakakawea.



12/1999

Williston Williston

Highway 85 Bridge

Trenton

Senate Bill 2134

Buford

State Phase 2

Image Landsat / Copernicus

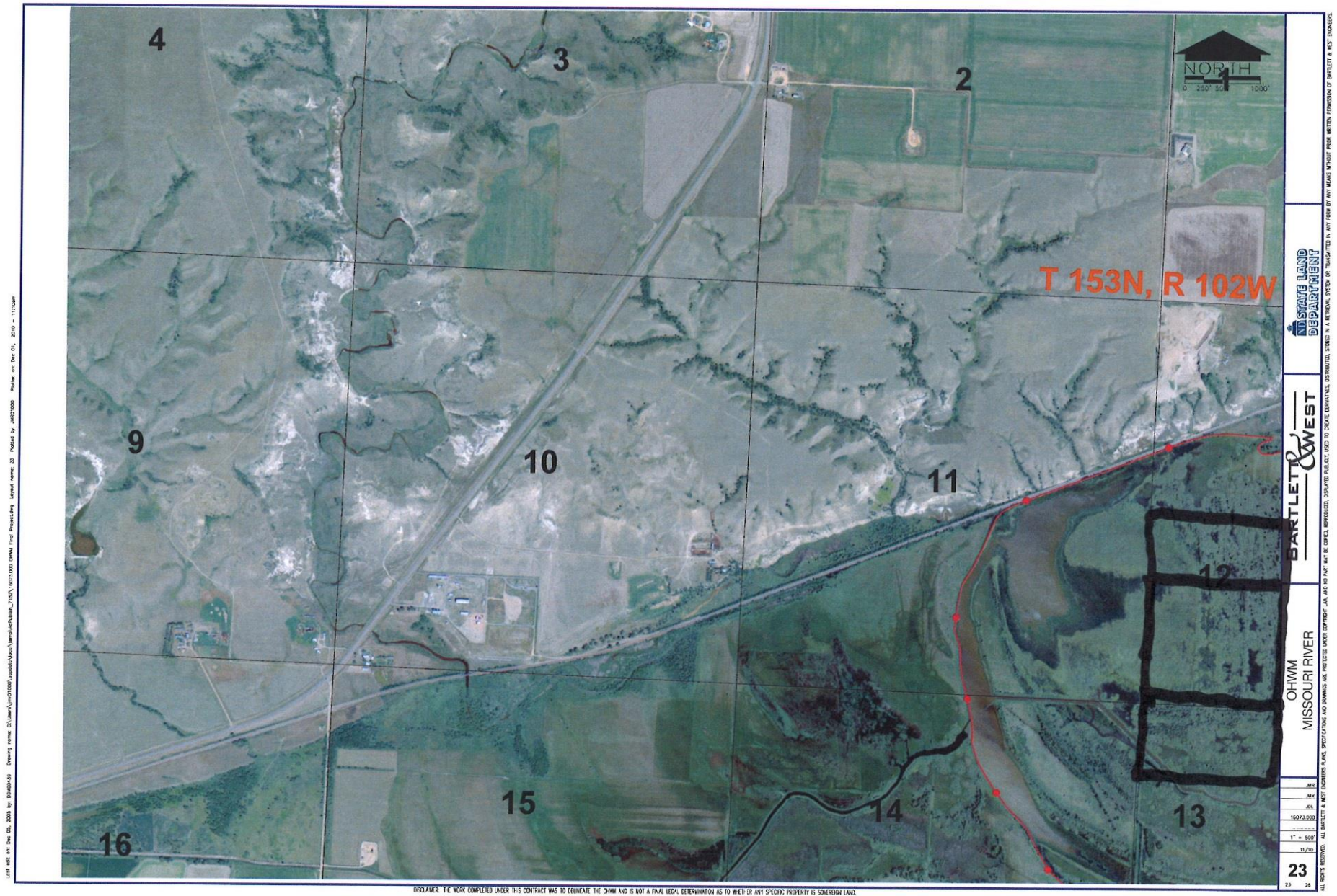
Google Earth
Earth Point

Imagery Date: 12/30/1999 48°03'11.43" N 103°45'17.96" W elev 1859 ft eye alt 19.42 mi

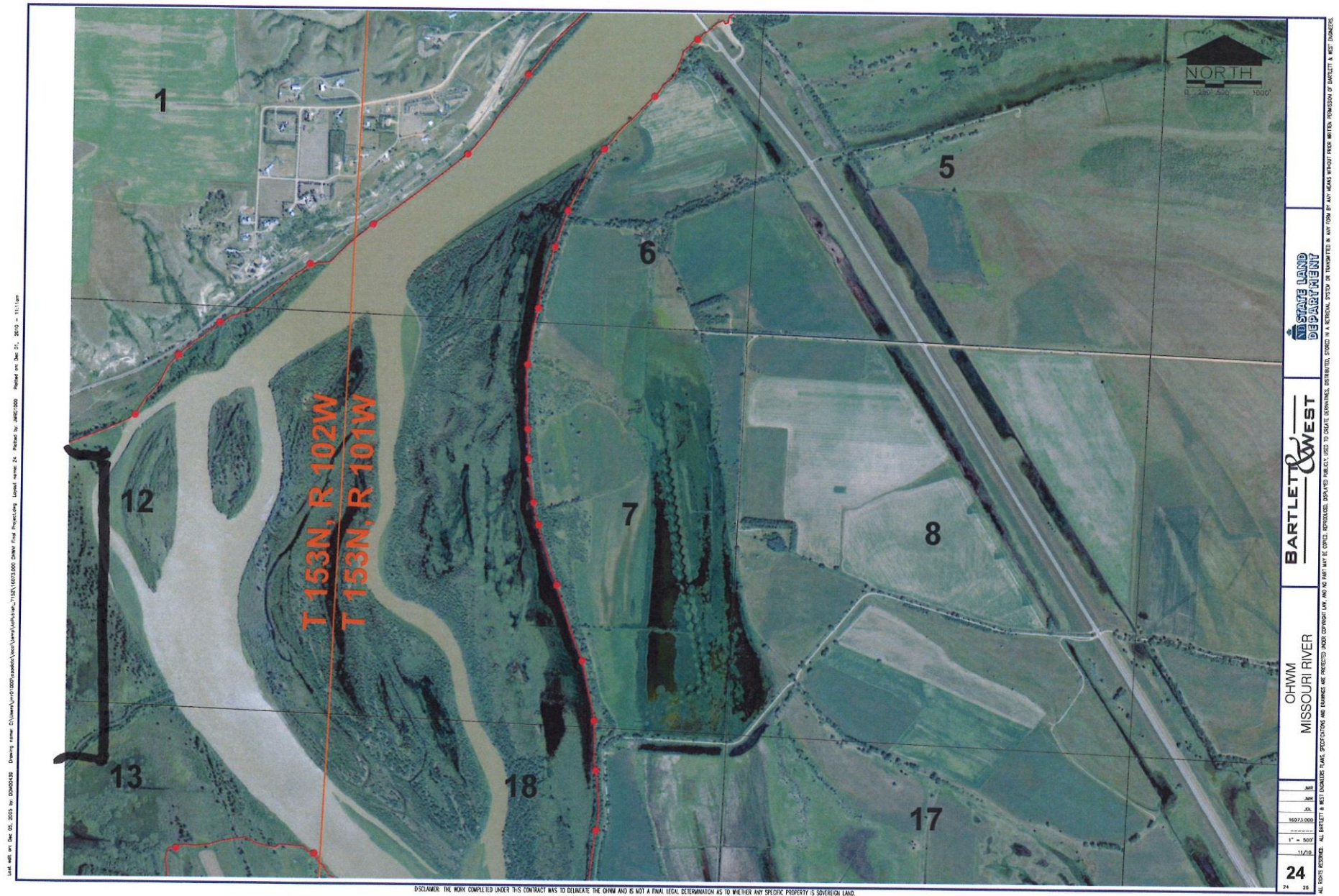
Wilkinson v. State

- *Wilkinson v. State*, 903 N.W.2d 51 (ND 2017)
- *Wilkinson* was the initial case involving the conflicting OHWM surveys, and the only case to date to be heard by the Supreme Court concerning the surveys.
- Wilkinson plaintiffs own minerals directly west of Highway 85 Bridge. Wilkinson's argued the OHWM of the "historical Missouri Riverbed channel" applies.
- State argued current river conditions and its Phase 1 survey should apply west of Bridge.
- Subsequent slides show Wilkinsons would own no interest under Phase 1 survey, but would retain all interests if OHWM of historical riverbed applies

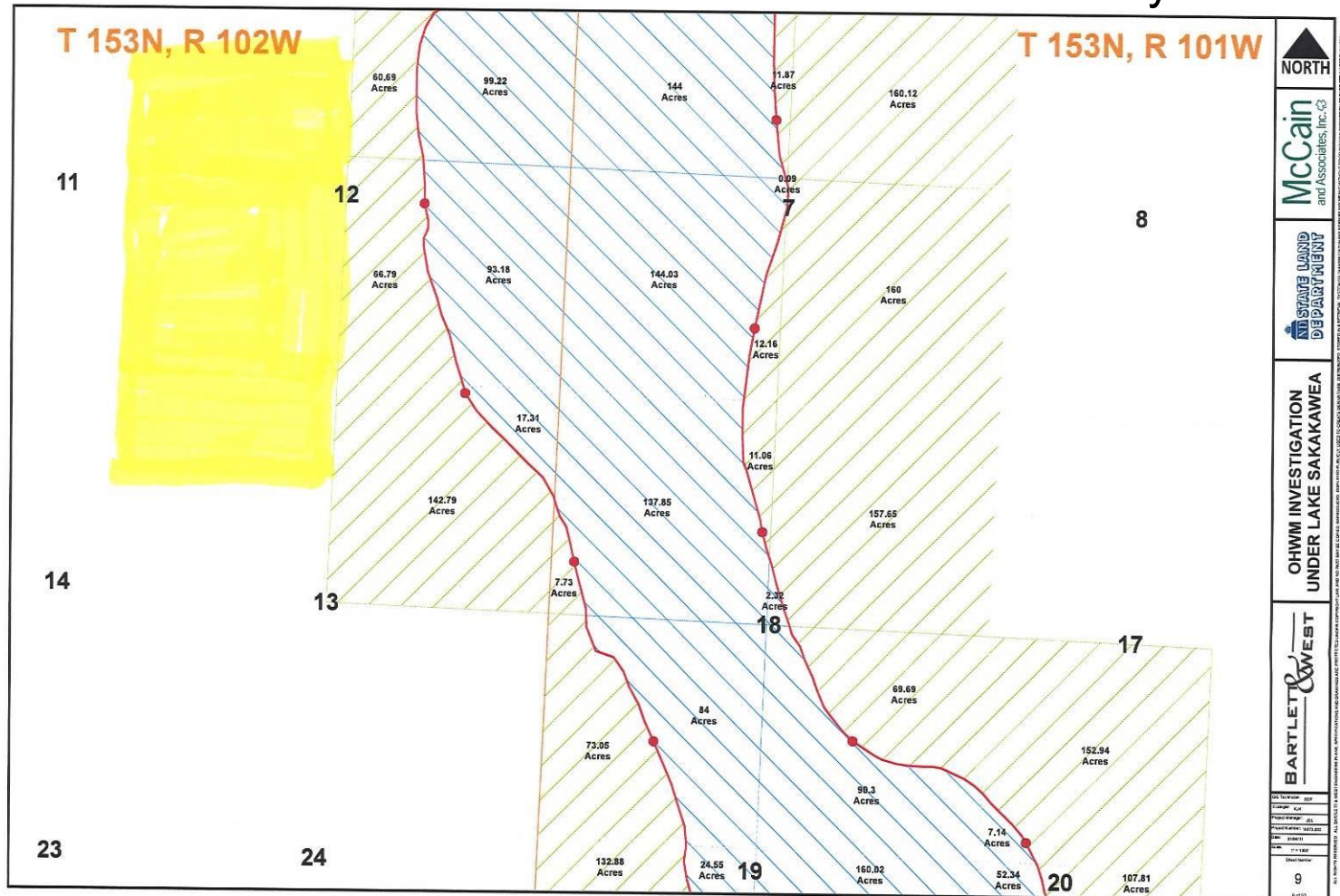
Wilkinson minerals within OHWM of Phase 1 survey (Red line OHWM)– page 1--



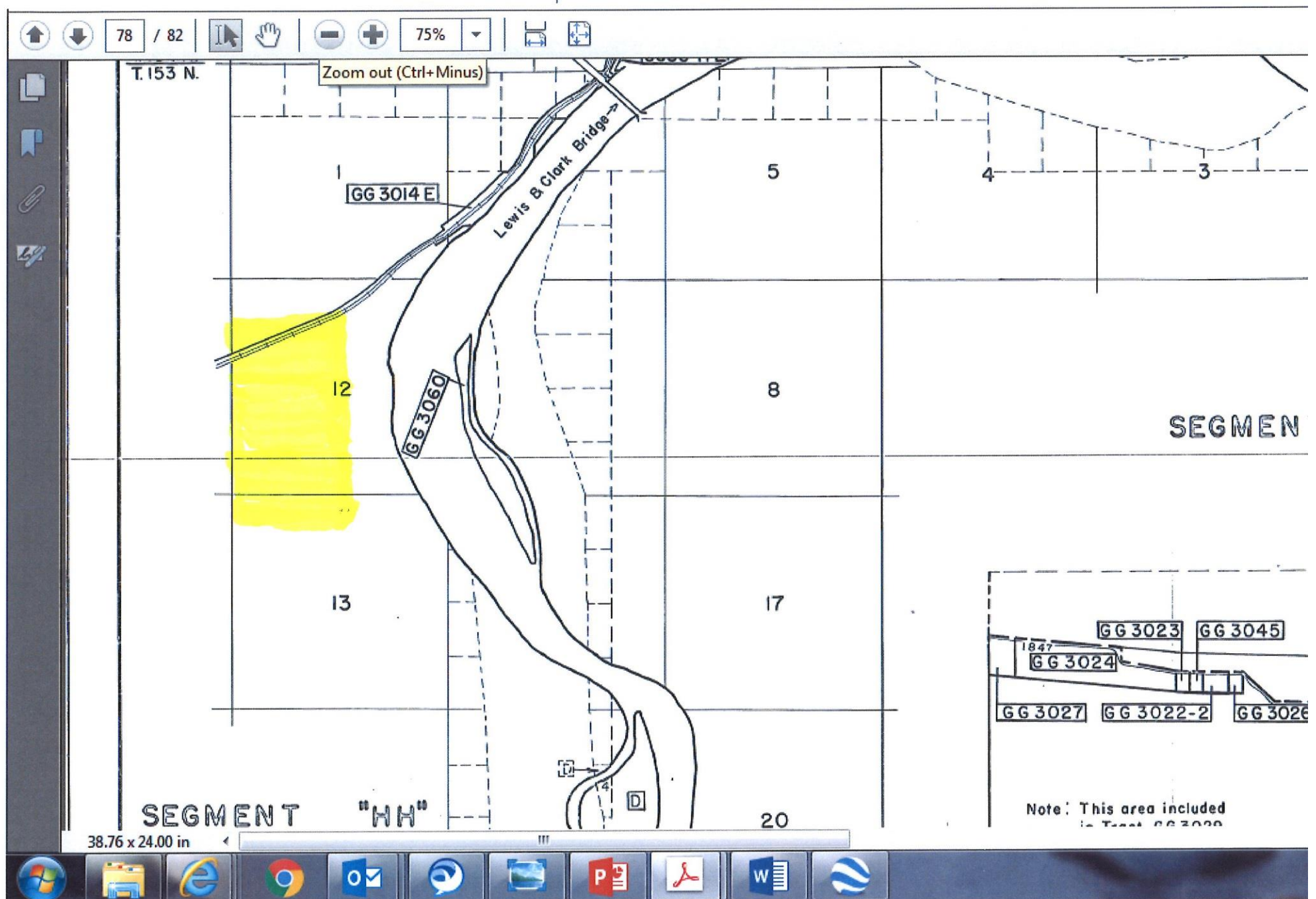
Wilkinson minerals within OHWM of Phase 1 survey – Page 2



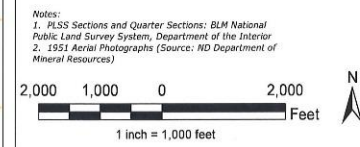
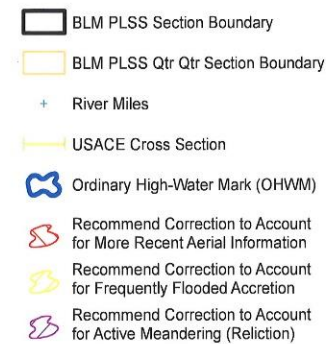
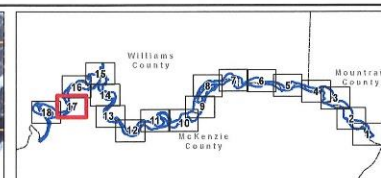
Wilkinson minerals – State Phase 2 (historical) survey— Wilkinson minerals above the Phase 2 historical survey



Wilkinson minerals --- Corps survey – Wilkinson minerals above OHWM survey



Wilkinson Minerals



NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES

OHWM Delineation



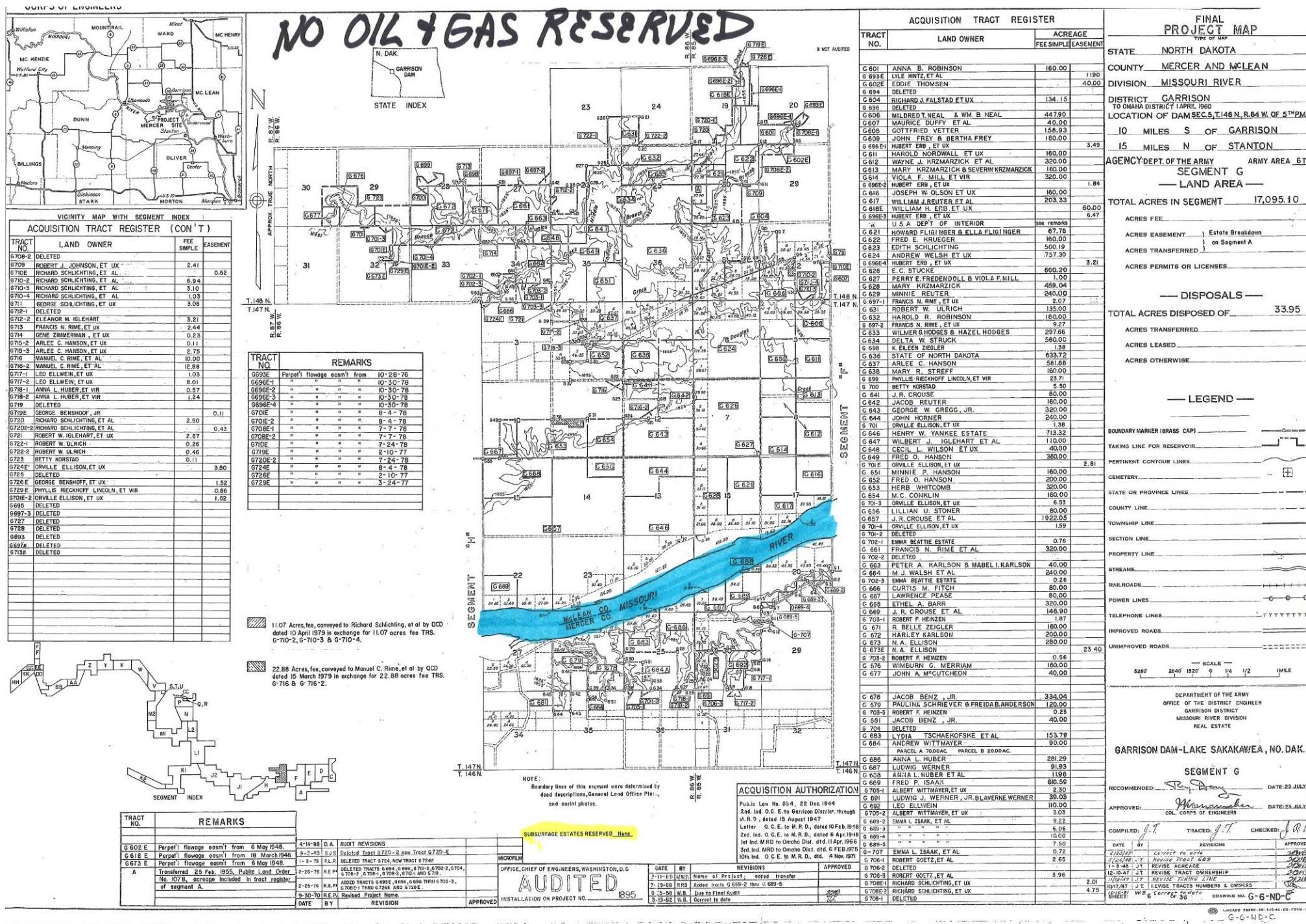
MAR 2018

Map 17 of 18

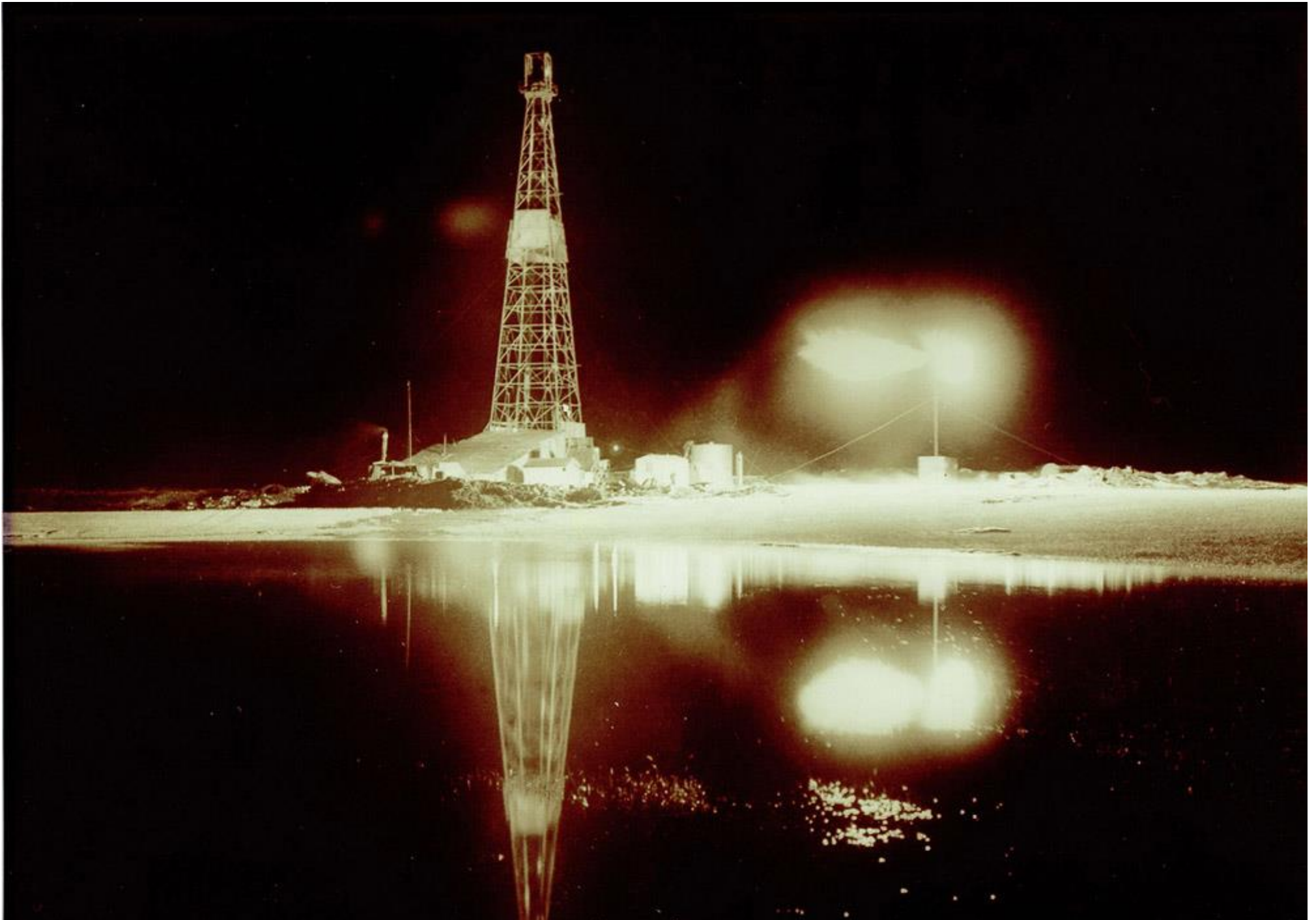
Corps Survey

- Because of river movement since original government survey, a new survey was necessary to determine landowner acreages for land acquisitions necessary for lake impoundment and Garrison Dam project.
- Survey relied primarily on aerial photography, but also included on the ground work, surface inspections for land use and appraisal purposes for lands taken or purchased.

1947 Corps Segment Map – Eastern end—All surface/minerals acquired by Corps



Clarence Iverson discovery well---April 4, 1951



Sanish Sentinel 15 Nov 1951

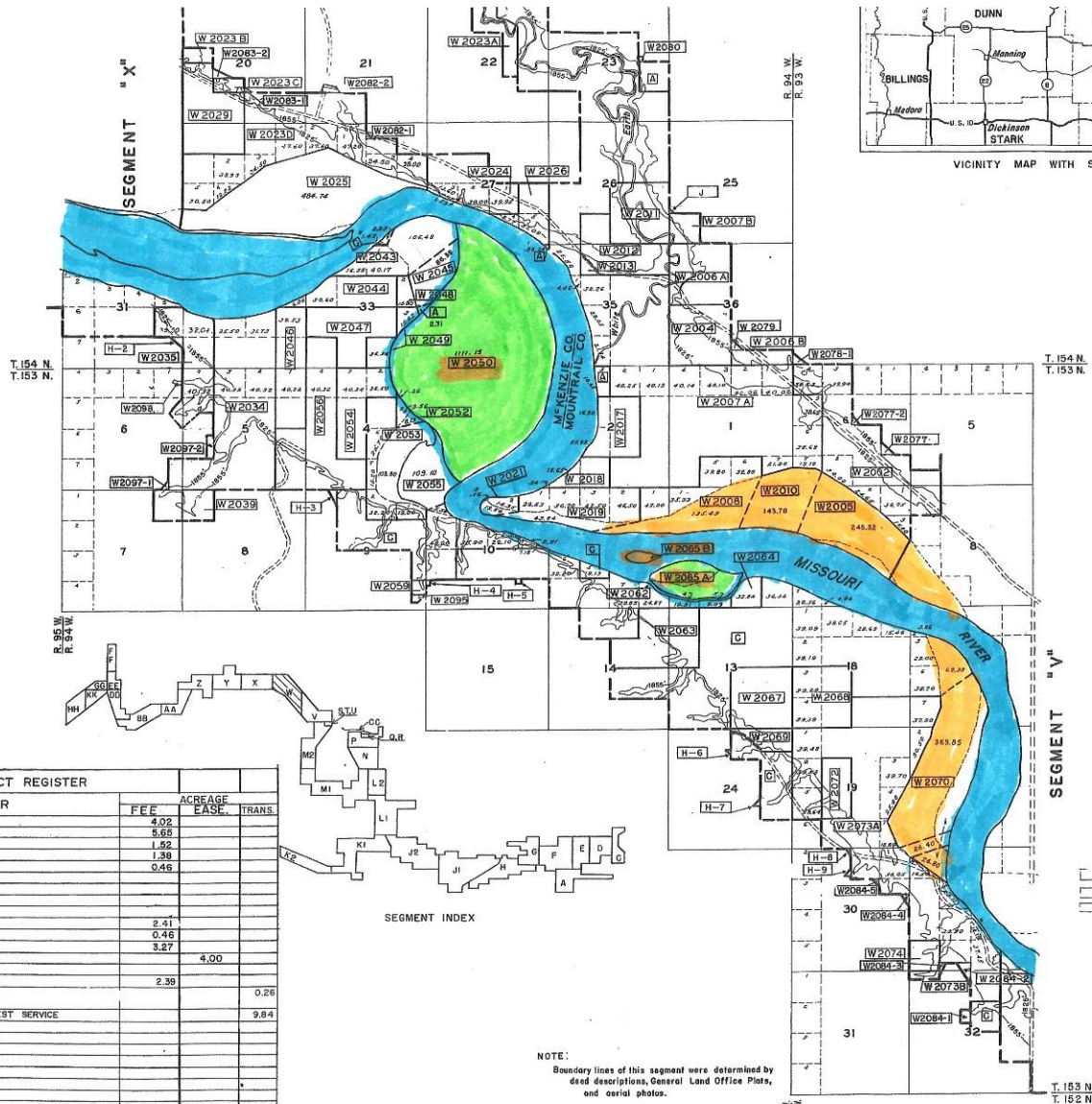
Army Engineers Explain Land Policy

At a meeting last Thursday in the Sanish school the Real Estate Division of the Corps of Army Engineers thru its representatives explained to the landowners present the policy that will be followed in the purchase of the remaining portion of the valley.

Also explained was the new ruling concerning retention of mineral rights, gas and oil only, which was recently handed down from the Chief of Army Engineers at Washington.

Here for the Real Estate Division were: G. E. Longstreth, attorney, Victor Lundeen, chief of the appraisal division, and Mr. Wright, chief of the land acquisition branch.

Disputed Accretions-overlapping state/fee leases--Islands



W2001	CHARLES E. STEWART	2144.37
W2008	MARIE CRAMER	286.42
A	U.S.A. DEPT. OF INTERIOR	see remarks
W2010	CHARLES E. STEWART	143.78
W2011	JOHN LARMER	160.00
W2012	KENNETH AUVERSON	149.85
W2013	ALFRED COLTON	10.15
W2077	NEAL BARTLESON	3.44
W2077-2	NEAL BARTLESON	0.46
W2078-1	V.P. & R. GRAZING ASSOCIATION	2.30
W2078-2	SINA B. ROGERS	122.73
W2019	ANDREW GUNDERSON	58.89
W2019	ARTHUR AUVERSON	198.07
W2078-2	DELETED	
W2021	ANDREW GUNDERSON	34.07
W2022	DELETED	
W2023	E.H. OGAIN ET UX	664.65
W2024	ALFRED THOMPSON	165.14
W2025	E.H. OGAIN ET UX	484.74
W2026	ANNE M. THOMPSON	79.65
W2078-3	DELETED	
W2079	STATE OF NORTH DAKOTA, et al	1.84
W2029	FRANK LABAR ET UX	200.00
W2080	ARVINE E. OLSON AND MARION E. OLSON	0.52
W2081	DELETED	
W2082-1	LEONA VACHAL WHELOCK, ET AL	0.48
W2082-2	LEONA VACHAL WHELOCK, ET AL	4.82

W2033	DELETED	
W2034	SARAH B. PHELPS ET AL	527.87
W2035	SARAH B. PHELPS ET AL	186.86
W2036	DELETED	
W2037	DELETED	
W2038-1	ORVILLE T. THRONSON, ET AL	0.69
W2039	AL N. NELSON	40.00
W2038-2	ORVILLE T. THRONSON, ET AL	2.41
W2041	DELETED	
W2042	DELETED	
W2043	MRS. MARY ORTLOFF ET AL	163.23
W2044	RUBY L. QUALE	116.66
W2045	RALPH O. VANGEN ET UX	86.39
W2046	ROBERT AMOS BOWTER JR. ET AL	159.85
W2047	JOHN A. ANDERSON	160.00
W2048	RALPH O. VANGEN ET UX	16.80
W2049	CLARENCE VANGEN ET UX	51.96
W2050	STATE OF NORTH DAKOTA	1111.15
W2051	DELETED	
W2052	FLORENCE POOLE HITLAND ET AL	17.95
W2053	MILDRED BANCROFT ET AL	239.90
W2054	HELGE SHERVEN	156.84
W2055	MILDRED BANCROFT ET AL	109.10
W2056	EDWIN HENDRICKSON	329.32
W2057	DELETED	
W2058	DELETED	
W2059	RUBY L. QUALE	10.00
W2061	DELETED	
W2062	BERTHA C. BENN	398.92
W2063	SIDNEY BENN	200.00
W2064	AGNES G. SKARET	32.84
W2065	STATE OF N.D. PARCEL 'A' 107.90 'B' 14.00	121.30
W2066	DELETED	
W2067	MYRON N. RULAND	160.00
W2068	DELLA M. RULAND	158.68
W2069	MARION S. RULAND ET AL	43.00
W2070	BLAINE OSBURN ET UX	396.63
W2071	DELETED	
W2072	HENRY AASTERUD ET AL	80.00
W2073	BLAINE OSBURN ET UX	107.10
W2074	OLE BREYIG ET UX	40.00

W2076	DELETED	
A	U.S.A. DEPT. OF INTERIOR	see remarks
C	U.S.A. (DEPT. OF AGR.) (see remarks)	3204.59
TRACT	REMARKS	
A	Transferred 25 Feb. 1955, Public Land Order No. 1078, acreage included in tract register of segment A.	
C	Transferred 10 March 1954, Executive Order No. 10520, acreage includes the parcels in Segments W.X.Y and Z, and pertains only to Segments	
W2010	Formerly part of Tract No. W2005	

NOTE:
Oil and gas reserved in all tracts except W2006

ACQUISITION TRACT REGISTER				
T	LANDOWNER	FEF	ACREAGE	TRANS.
-1	ARNE G. & EDITH HARMS	4.02		
-2	ARNE G. & EDITH HARMS	5.65		
-3	ARNE G. & EDITH HARMS	1.82		
-4	ARNE G. & EDITH HARMS	1.39		
-5	ARNE G. & EDITH HARMS	0.46		
-1	DELETED			
-2	DELETED			
-3	RUBY L. QUALE	2.41		
-1	JOHN A. PHELPS	0.46		
-2	JOHN A. PHELPS	3.27		
-1	AVERY AND DORIS HELLING		4.00	
-1	DELETED			
-1	SARA B. PHELPS	2.39		0.26
-1	BLM, DEPT. OF INTERIOR			
-1	DEPT. OF AGRICULTURE, FOREST SERVICE			9.84

NOTE:
Boundary lines of this segment were determined by deed descriptions, General Land Office Plans, and aerial photos.

OFFICE, CHIEF OF ENGINEERS, WASHINGTON, D.C.
AUDITED
INSTALLATION OR PROJECT NO. C2-2-1895

DATE	BY	REVISIONS	APPROVED
8-29-69	MMR	Name of Project added transfer	
9-29-70	REB	Revised Project Name	
6-17-77	PLP	Revised Tracts 2004, 2006, 2009, 2008-2, 2008-1	
10-11-77	REB	Revised Owner's Name for Tr. W2082-1B-2	
1-25-78	PLP	Revised Tr. 2001 to EASEMENT (2001)	
5-3-78	FAL	DELETED TR. 2007-3, ADDED TR. 2008	
12-7-78	R.C.L.	ADDED TRACT	
7-2-79	F.A.L.	DELETED TR. H, REDESIGNATED AS TR. J	

ACQUISITION AUTHORIZATION

Public Law No. 554, 22 Dec 1944
6th. Ind. O.C. E. to M.R.D., dated 4 May 1950

LOCATION OF DAN
10 MILES S
15 MILES N
S
L
TOTAL ACRES IN
ACRES FEE
ACRES EASEMENT
ACRES TRANSFER
ACRES PERMITS O
D
TOTAL ACRES DIS
ACRES TRANSFER
ACRES LEASED FR
ACRES OTHERWISE
THIS TO
C
BOUNDARY MARKER (BRASS C)
TAKING LINE FOR RESERV
PERTINENT CONTOUR LINE
CEMETERY
STATE OR PROVINCE LINES
COUNTY LINE
TOWNSHIP LINE
SECTION LINE
PROPERTY LINE
STREAM
RAILROADS
POWER LINES
TELEPHONE LINES
IMPROVED ROADS
UNIMPROVED ROADS
5280' 2840'
DEP
OFFICE C
MIS
GARRISON DAM
RECOMMENDED
APPROVED
LT. COL
COMPILED
DATE BY REVISIONS
10-10-51 W.B. Correct to
3-13-52 W.B. Correct to
5-8-53 W.B. Correct to
10-1-56 W.B. Correct to
5-25-62 HAZ Due to find
SHEET: 24 OF

SB 2134—How did we get here?

- Three main driving factors leading to legislative action:
 - ▣ 1. Uncertainty with pending litigation cases. Also, Operators inability to file quiet title actions and resolve title disputes due to state and federal sovereign immunity.
 - ▣ 2. The “Lake” claim. In November 2015, attorneys for the State suggested it may own title to the entirety of Lake Sakakawea, not merely historical river channel.
 - ▣ 3. Mineral owner royalty payment frustration and subsequent support for legislative action.

Senate Bill 2134- Initial version

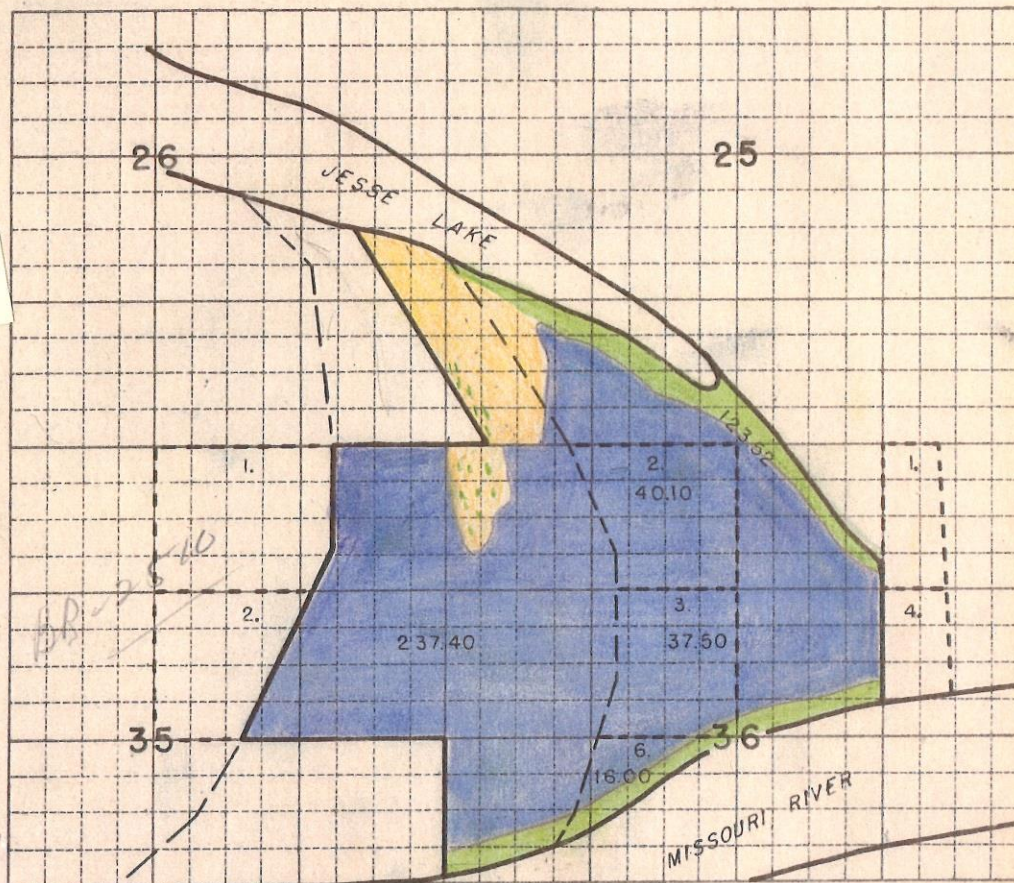
- ☐ The initial version of SB 2134 adopted the Corps survey as the “conclusive” survey of the OHWM of the historical riverbed channel underlying Lake Sakakawea.
- ☐ Concerns were raised whether there was sufficient information available as to the parameters of the survey, methodology and whether it was an OHWM survey under North Dakota law.

Review of Corps archival records

- During 2017 session, conducted review of Corps archival records including land appraisals.
- Appraisals provided evidence state survey was claiming agricultural cropland as within OHWM.
- However, archival review also found inconclusive determinations of OHWM for Corps survey tracts sufficient to warrant further review to confirm the most accurate and fair determination of the historical OHWM for the entire Missouri river channel.

TRACT MAP (WITH GRID)

Project symbol No. Garrison Dam - Reservoir Area Tract No. BB-2520D
 Name of owner R. E. Delaney
 Field work by Wesley W. Belling Date 8 October 1957
 Description of tract State - North Dakota County - Williams
See Sheets 2 and 3



CLASSES OF LAND

Crop land	
Pasture land	
Forest land	
* Willow + Bush	

Grades of each class of land must be shown on the map proper.
 * Name of any other class of land involved.

I certify that this is an accurate map of Tract BB-2520D
 based on G. L. O. Reels, Survey and Deed Desc., which
 shows this tract to contain 454.52 acres, more or less
 Name Wesley W. Belling
 Title Civil Engineer
 Date 8 October 1957

Indicate whether map is based on General Land Office records,
 aerial survey, deed description or actual survey.

Project symbol No. Garrison Dam - Reservoir Area Tract No. AA-2423

Name of owner Joseph M. Donahue, et al

Field work by Wesley W. Pelling Date 12 January 1953

Description of tract State - North Dakota County - Williams

Parcel "A" - Lot 4 of Section 21 excepting therefrom the north 40 rods thereof; South half of the Northeast quarter of the Southeast quarter (S $\frac{1}{2}$ N $\frac{1}{2}$ E $\frac{1}{4}$ SE $\frac{1}{4}$), South half of the North half of the Southeast quarter (S $\frac{1}{2}$ N $\frac{1}{2}$ SE $\frac{1}{4}$), Southwest quarter of the Southeast quarter (SW $\frac{1}{4}$ SE $\frac{1}{4}$), Lot 1 of Section 20; Northwest quarter of the Northeast quarter (NW $\frac{1}{4}$ NE $\frac{1}{4}$), Lots 1, 2, 3 and 4 of Section 29, plus accretions.

Parcel "B" - Those portions of the South half of the Southeast quarter (S $\frac{1}{2}$ SE $\frac{1}{4}$) of Section 30, Northeast quarter of the Northwest quarter (NE $\frac{1}{4}$ NW $\frac{1}{4}$), North half of the Northeast quarter (N $\frac{1}{2}$ NE $\frac{1}{4}$) of Section 31 lying North of the Missouri River.

Parcel "D" - Northeast quarter of Section 30.

Parcel "F" - South half of the Southwest quarter of the Northwest quarter (S $\frac{1}{2}$ SW $\frac{1}{4}$ NW $\frac{1}{4}$) of Section 22. All the above described lands being in Township 153 North, Range 98 West of the 5th P.M.

Remainder x
Also Acquired

Heavy Silty loam and clay level

Willow cover - billyow sand bar - willow Loamy Sand

MISSOURI RIVER

Entire Ownership 1,298.15

Area Taken 1,063.15

Parcel "A" 757.65

Parcel "B" 125.50

Parcel "D" 160.00

Parcel "F" 20.00

Remainder 235.00

CLASSES OF LAND

Crop land

Pasture land

Forest land

Grades of each class of land must be shown on the map proper.

Name of any other class of land involved.

I certify that this is an accurate map of Tract AA-2423 based on Survey, Deed Desc. & G.L.O. Records which shows this tract to contain 1,063.15 acres, more or less.

Name Mary C. Jackson

Title Draftsman (Revised 23jul54 by M.C.J.)

Date 12 January 1953 (Revised 23mar53 by M.C.J.)

This map whether made or based on General Land Office records, serial survey, deed description or plat survey.

SCALE: 4" = 1 MILE

Senate Bill 2134- Key provisions

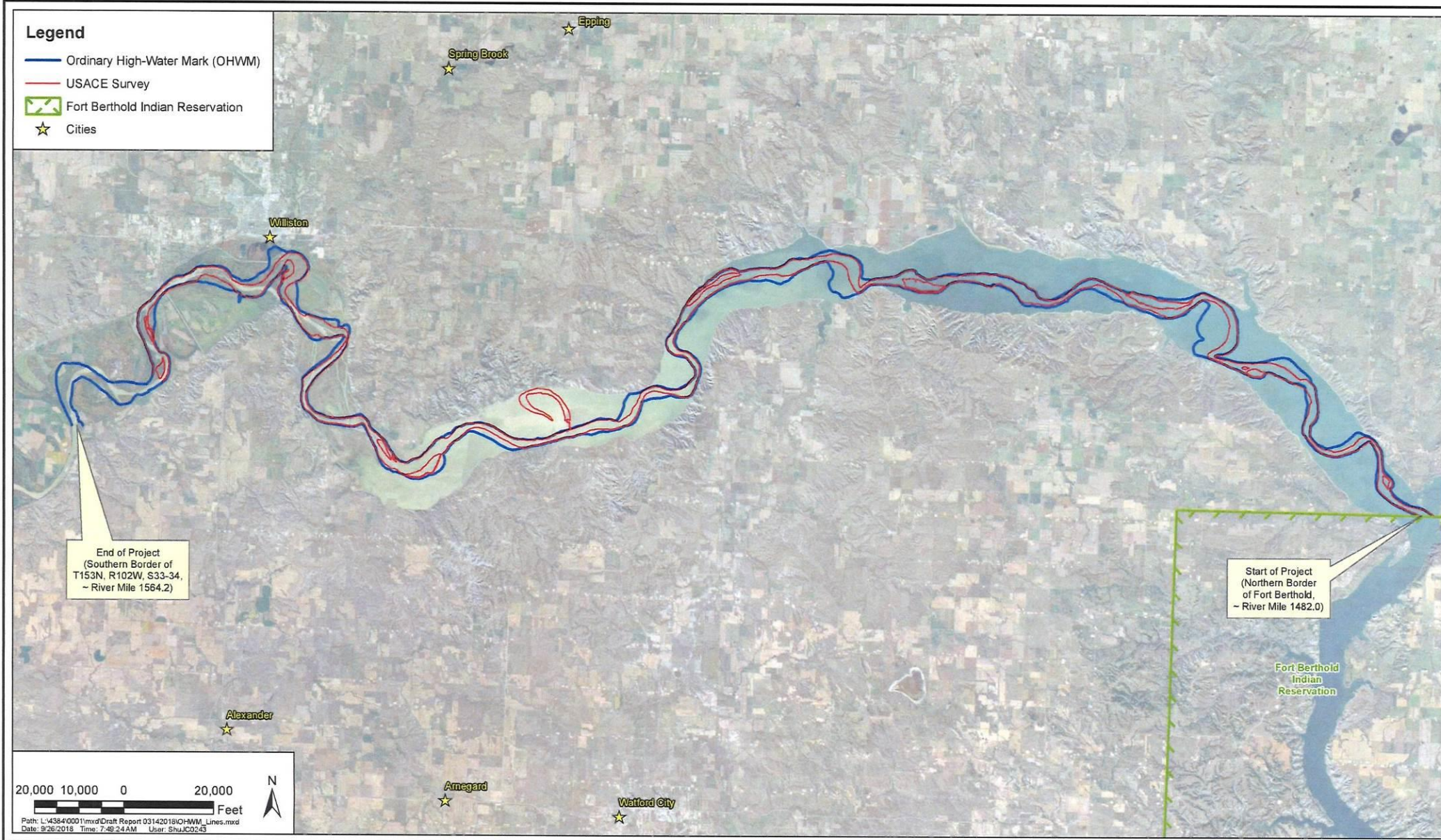
- (18 separate legislative committee and sub-committee hearings, 699 page record).
- The State's ownership under Lake Sakakawea is limited to the OHWM of the historical Missouri riverbed as it existed prior to closure of the Dam in April 1953.
- Extends the “historical riverbed channel” from FBIR to 12 river miles west of Highway 85 bridge.
- Adopts Corps survey as “presumptive determination” of the historical OHWM.
- Designates NDIC to oversee review process and retain a professional engineering and surveying firm.

Senate Bill 2134- Key provisions

- Requires the surveying firm to review the Corps survey to correct/modify survey segments if clear and convincing evidence shows adjustments are necessary under state law.
 - ▣ Factors include review of aerial photography, USGS flow data, USACE historical records, state law test (...destroy its value for agricultural purposes).
- Due Process -- Public hearing and 60 day comment period.
- Two year implementation period after review is adopted for State and Operators to make royalty payment adjustments and/or refunds.

SB 2134—Area of Review

- Area of review covers 83 river miles and 12 Corps' survey segment maps from the northern boundary of Fort Berthold Reservation to 12 river miles west of Highway 85 bridge (see following slides).
- Fort Berthold Indian Reservation is not included.
- Approximately 39 river miles of the Missouri and Yellowstone located between the Montana State line and SB 2134 western boundary are not subject to this legislation or review process, and the OHWM is determined based on current river conditions.



NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES

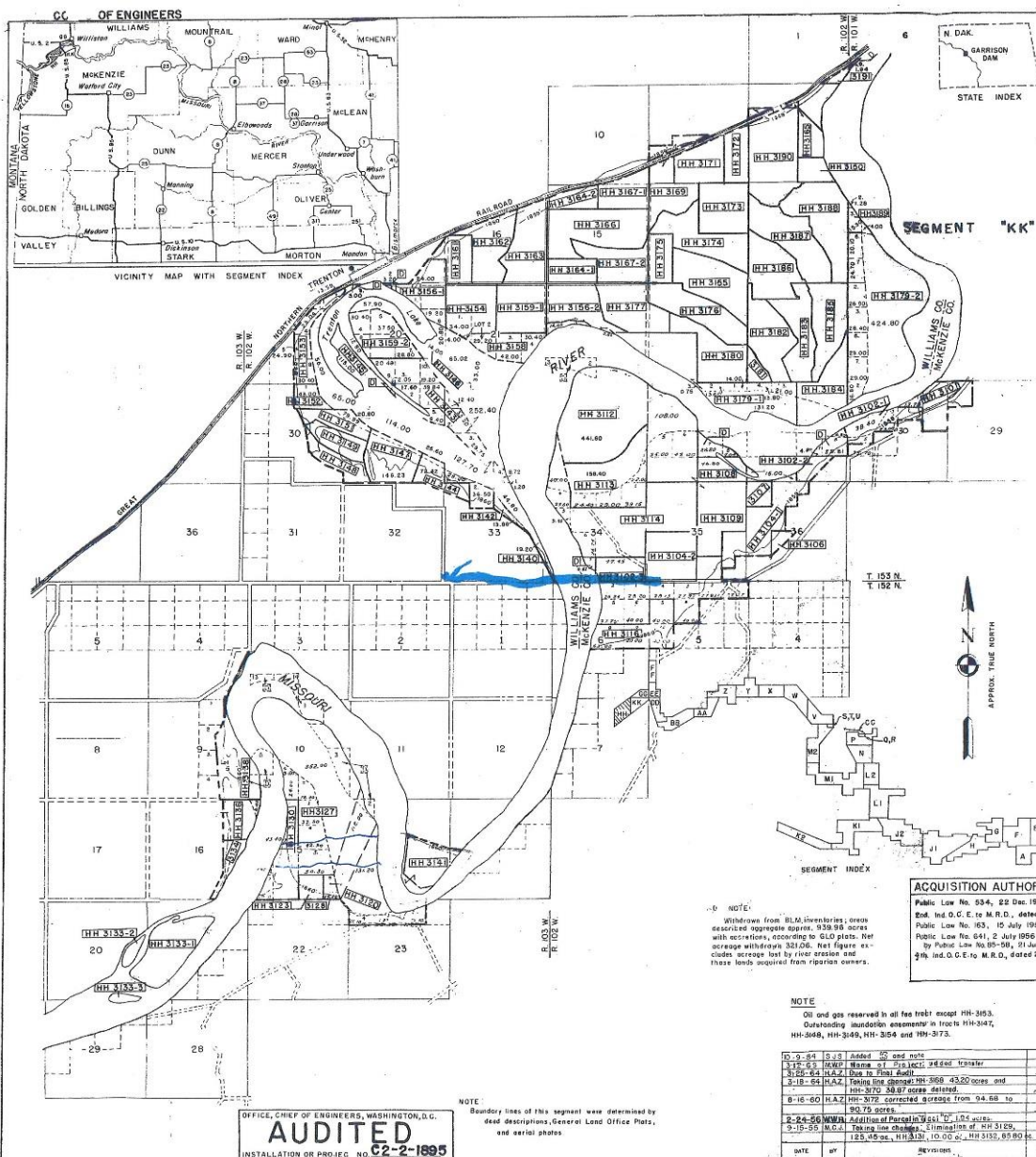
PLOT OF COORDINATES



SEP 2018

Figure F-1

SB 2134 Western boundary of historical river channel



ACQUISITION		TRACT REGISTER			REMARKS
TRACT NO	LAND OWNER	FEE	TRANS	EASMT	
MCKENZIE COUNTY					
HH 3101	MIRIAM DEN PAGE	150.90			
HH 3102	ARTHUR WOOD	97.10			
HH 3102a	ARTHUR WOOD	30.40			
HH 3102b	ARTHUR WOOD	407.25			
HH 3104	JOHN W. SLATOR ET UX	186.00			
HH 3104a	D U.S.A. DEPT. OF INTERIOR	810.00	see remote		Transferred 27 February 1959, Public Land Order No. 18029 - acreage included in tract register of segment
HH 3106	STATE OF NORTH DAKOTA	20.00			
HH 3107	HARRY C. NELSEN ET AL	75.80			
HH 3108	FRED A. NELSEN ET AL	40.00			
HH 3109	JOSEPH HACKENBERG, SR.	465.00			
HH 3111	DELETED				
HH 3112	CLINTON A. TIBBITS	441.60			
HH 3113	CLINTON A. TIBBITS	277.95			
HH 3114	MARY A. TIBBITS ET AL	461.44			
HH 3116	HENRY H. REHBERG	173.00			
HH 3117	DELETED				
HH 3118	DELETED				
HH 3119	DELETED				
HH 3120	FRANK W. ERICKSON ET AL	192.65			Formerly Tract No. HH3121-1
HH 3121	DELETED				
HH 3122	DELETED				
HH 3123	FRANK W. ERICKSON ET AL	40.00			Formerly Tract No. HH3123-2 included in Tract No. HH3127
HH 3124	DELETED				included in Tract No. HH3128
HH 3124a	DELETED				
HH 3126	DELETED				
HH 3127	EMERY N. PAPINEAU ET UX	740.72			
HH 3128	NORMAN PAPINEAU ET UX	131.20			Formerly Tract No. HH3128-2
HH 3129	DELETED				
HH 3130	NORMAN PAPINEAU ET UX	43.40			Formerly Tract No. HH3128-1
HH 3131	DELETED				
HH 3132	DELETED				
HH 3133	STATE OF NORTH DAKOTA	196.80			
HH 3133a	STATE OF NORTH DAKOTA	15.00			
HH 3133X	STATE OF NORTH DAKOTA	16.20			
WILLIAMS COUNTY					
HH 3134	JOHN OSTER ET UX	44.81			
HH 3136	ROBERT F. BACHFOLD	83.19			
HH 3137	MARGARET E. KERR	162.00			
HH 3139	DELETED				
HH 3140	EARL T. BAUSTE ET UX	19.20			
HH 3141	IVER BORLAUG ET UX	153.87			
HH 3142	ROSWOY E. HOFFMAN ET UX	56.88			
HH 3143	CARL GROETH	87.32			
HH 3144	JOHN ARVIN	912.00	see remarks		Transferred 27 February 1959, Public Land Order No. 18029 - acreage included in tract register of segment
D	U.S.A. DEPT. OF INTERIOR				
HH 3145	STATE OF NORTH DAKOTA	115.00			
HH 3146a	STATE OF NORTH DAKOTA	14.00			
HH 3147	ORRIN J. JOHNSON ET UX	260.23			Formerly known as Tract No. HH3148-1
HH 3148	JOHN TOFFE	75.54			
HH 3149	ROBERT O. BERG ET UX	43.47			
HH 3150	D. O. PIMPHRETT ESTATE ET AL	51.20			Formerly known as Tract No. HH3148-2
HH 3151	LESTER G. LARSON ET UX	100.79			
HH 3152	JOHN DEARBORN	198.00			
HH 3153	GERALD W. BERGSTROM ET UX	151.42			
HH 3154	HENRY A. BOWEN ET UX	223.05			
HH 3155	CHARLES W. PATCH ET UX	211.39			
HH 3156a	JAMES F. MARTIN ET UX	149.00			Formerly known as Tract No. HH3159-1
HH 3156b	JAMES F. MARTIN ET UX	162.43			
HH 3158	MILES C. GRODSETH ET UX	134.60			
HH 3159-1	CHARLES A. BOWEN ET UX	160.00			
HH 3159-2	CHARLES A. BOWEN ET UX	207.80			
HH 3160	AGNES MORIN GARFIELD ET AL	124.98			
HH 3162	JOHN C. GOUDY ET UX	166.17			
HH 3163	M. W. ANDERSON ET UX	195.45			
HH 3164	MAUD MARTIN	80.00			
HH 3165	MAUD MARTIN	84.30			
HH 3166	CHARLES W. BERG ET UX	66.50			

U.S. ARMY
FINAL
PROJECT MAP
TYPE OF MAP

STATE NORTH DAKOTA
COUNTY MCKENZIE AND WILLIAMS
DIVISION MISSOURI RIVER
DISTRICT GARRISON
TO OMAHA DISTRICT 1 APRIL 1963
LOCATION OF DAM SEC 5 T146N R 84W OF 5TH P.M.
10 MILES S OF GARRISON
15 MILES N OF STANTON

SEGMENT HH
LAND AREA

TOTAL ACRES IN SEGMENT 12,991.69

ACRES FEE _____
ACRES EASEMENT _____
ACRES TRANSFERRED TO W.D. _____
ACRES PERMITS OR LICENSES _____

DISPOSALS

TOTAL ACRES DISPOSED OF _____
ACRES TRANSFERRED _____
ACRES LEASED FROM W.D. _____
ACRES OTHERWISE _____

LEGEND

TAKING LINE FOR DAM SITE _____
TAKING LINE FOR RESERVOIR _____
PERTINENT CONTOUR LINES _____
CEMETERY _____
STATE OR PROVINCE LINES _____
COUNTRY LINE _____
TOWNSHIP LINE _____
SECTION LINE _____
PROPERTY LINE _____
STREAMS _____
RAILROADS _____
POWER LINES _____
TELEPHONE LINES _____
IMPROVED ROADS _____
UNIMPROVED ROADS _____

SCALE
1"=200' 1"=400' 1"=600' 1"=800' 1"=1000' 1"=1200' 1"=1400' 1"=1600' 1"=1800' 1"=2000'

DEPARTMENT OF THE ARMY
OFFICE OF THE DISTRICT ENGINEER
GARRISON DISTRICT
MISSOURI RIVER DIVISION
REAL ESTATE

GARRISON DAM & LAKE
SAKAKAWEA
SEGMENT HH

RECOMMENDED _____ DATE _____
APPROVED _____
LT COL. CORPS OF ENGINEERS
DATE _____
COMPILED 7/15/62 TRACED _____ CHECKED _____
DATE 1/67 REVISIONS APPROVED _____
6-75-5100-1 Taking line change. HH 500' 743.78' pt. to 743.78' pt.
6-75-5100-2 Taking line change. HH 510' 863' pt. to 876' 00' pt.
HH 500' 808' pt. to 808' 25' pt. HH 513' 800' pt. to 813' 800' pt.
HH 515' 800' pt. to 815' 800' pt. HH 517' 800' pt. to 817' 800' pt.
HH 519' 800' pt. to 819' 800' pt. HH 521' 800' pt. to 821' 800' pt.

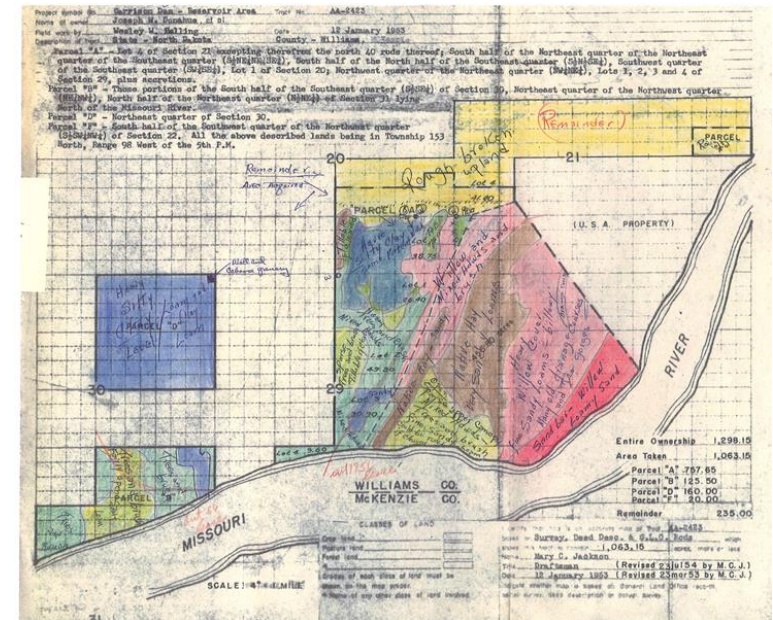
SHEET: 35 OF 36 DRAWING NO.

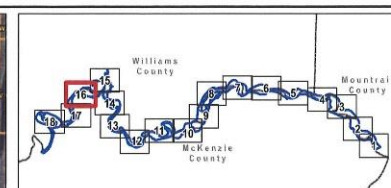
WENCK OHWM STUDY

- OHWM analysis of the ordinary high water mark of the historic Missouri River bed under what is now Lake Sakakawea.
- Preliminary report completed April 17, 2018
- Public comment period April-June 2018
- After public hearing, the Final Report, with adjustments after public comment period, was adopted by NDIC on September 27, 2018.

(Wenck)

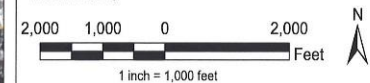
- State provided data – digital copies of aerial photography, USACE survey, and topography.
- USACE – historical records (appraisal documents- previously confidential) at Riverdale office, cross sections and details from Omaha office.
- USGS – flow records.
- Note: Appraisal documents and cross-sections were new data not considered in State Survey.





- 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)

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)



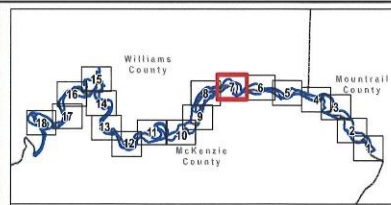
NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES

OHWM Delineation



MAR 2018

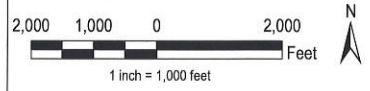
Map 16 of 18



- 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)

Phase 2

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)



NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES

OHWM Delineation

WENCK
Responsive partner. Exceptional outcomes.

MAR 2018

Map 7 of 18

FINAL OHWM ACREAGES

- The Wenck study delineates 9,507 additional acres above the Corps survey as being within the OHWM under State law.
- The Wenck study delineates approximately 15,493 acres less than the State Phase 2 survey as being within the OHWM under State law.
- Thus, of the approximate 25,000 acres difference between the Corps survey and State Phase 2 survey, Wenck allocates 9,507 to the State, and 15,493 acres to upland owners.

Wenck Study Summary

- The Wenck study for the NDIC set the boundary line of where the ordinary high water mark is located along the 83 mile historical Missouri River Channel.
- The study did **not** calculate the acreages on a per section basis, quarter-quarter basis, or calculate the acreages lying above and below the ordinary high water mark for each individual oil well spacing unit. Examples to follow....
- **Additional acreage calculations must be completed by professionally licensed land surveyors in order to implement the adjustment provisions in SB 2134.**



Notes:
1. PLSS
Public Land
2. 1951
Mineral R.

2,000

APP: L:\4940201\W
Date: 12-03-2014

NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES

OHWM Determination



Responsive partner. Exceptional outcomes.

LEGEND:

- = 90° SYMBOL
- = PROPOSED WELL HEAD
- ▲ = SECTION CORNERS LOCATED.
- △ = SECTION CORNERS RE-ESTABLISHED. (Not Set on Ground)

CERTIFICATE

I HEREBY CERTIFY THAT THIS PLAT CORRECTLY REPRESENTS WORK PERFORMED BY ME, OR UNDER MY DIRECT SUPERVISION AND IS TRUE AND CORRECT TO THE BEST OF MY KNOWLEDGE AND BELIEF.

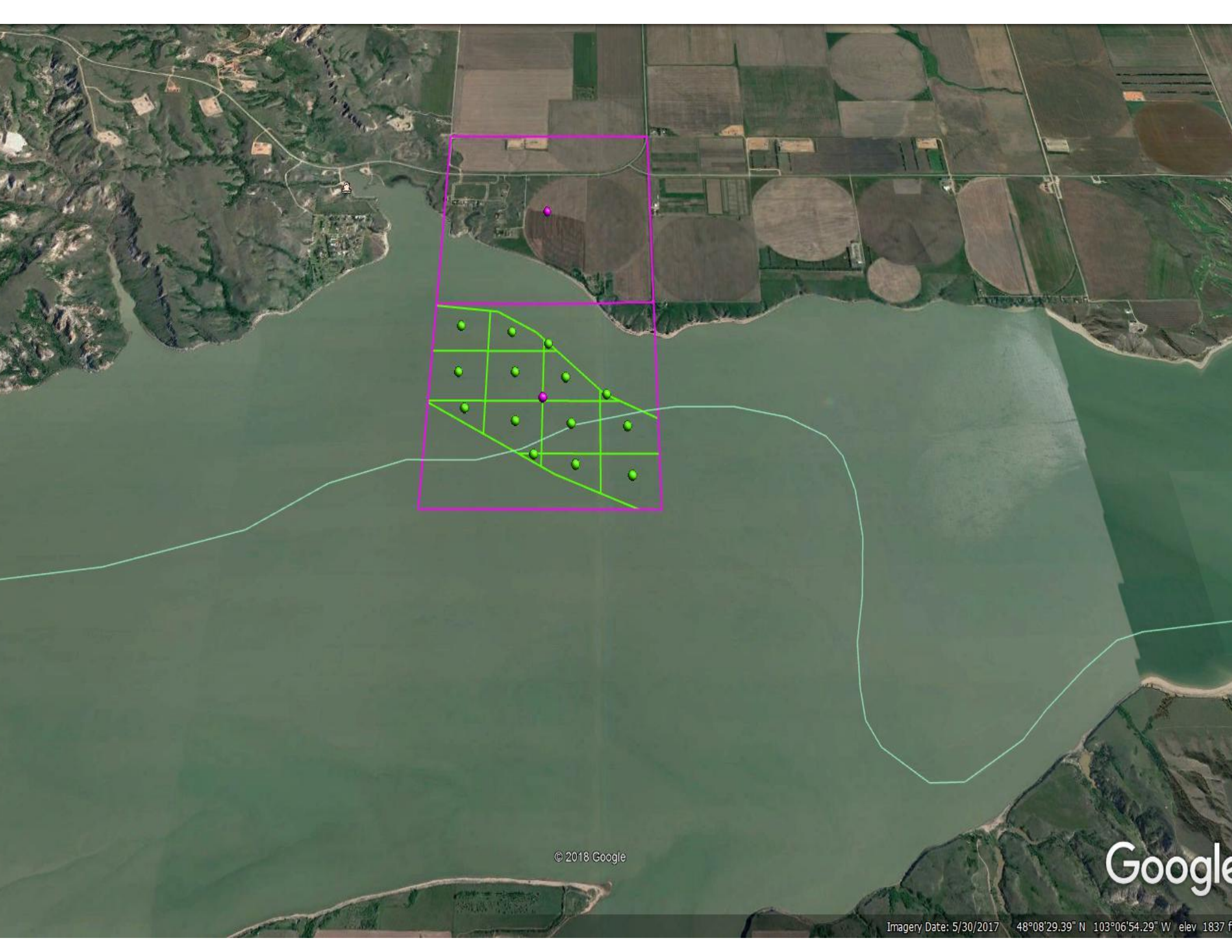
UNTAH ENGINEERING & LAND SURVEYING
 85 SOUTH 200 EAST - VERNAL, UTAH 84070
 (435) 789-1017

SCALE: 1" = 1000'

DATE SURVEYED: 06-11-12 **DATE DRAWN:** 06-15-12

PARTY: D.Z. W.C.M. **REFERENCES:** G.L.O. PLAT

WEATHER: WARM **FILE:** XTO ENERGY, INC.



© 2018 Google

Google

Imagery Date: 5/30/2017 48°08'29.39" N 103°06'54.29" W elev 1837 f

Senate Bill No. 2211 (pending- “acreage calculations”)

- Would authorize the Land Board to retain a licensed professional surveying firm to analyze and determine the necessary acreage calculations to implement to payment adjustment provisions.
- Extends the implementation period from six months or two years from the date of completion of the acreage calculations (not two years from Sept. 27, 2018).
- **This is not a new survey or study of the OHWM.**
- Land Board has already issued RFP for surveying firm.

Status of Litigation—pending OHWM State cases

- *Wilkinson v. State*, 903 N.W.2d 51 (ND 2017)
- *Wilkinson* was the initial case involving the conflicting OHWM surveys, and the only case to date to be heard by the Supreme Court.
- Wilkinson plaintiffs own minerals directly west of Highway 85 Bridge. Wilkinson's argued the OHWM of the "historical Missouri Riverbed channel" applies and the State's Phase 1 survey an unconstitutional taking.
- State argued current river conditions and its Phase 1 survey should apply west of Bridge.
- If State Phase 1 survey prevails, Wilkinsons lose all mineral interests. If historical riverbed channel survey applies, Wilkinsons retain minerals.

Status of Litigation—pending OHWM State cases

- *Wilkinson v. State*, 903 N.W.2d 51 (ND 2017)
- District court granted summary judgment in favor of the State, and also held the OHWM of the Missouri River and Lake Sakakawea are “indistinguishable.”
- On appeal the Supreme Court reversed and remanded:
 - The District Court must consider newly enacted SB 2134
 - The Supreme Court reinstated the Plaintiffs’ Takings claim, holding that if the district court determines Garrison Dam resulted in the State acquiring Plaintiffs minerals, the plaintiffs must be compensated for the taking.
- On remand, the case is pending in District Court.

Status of Litigation—pending OHWM State cases

- The State District Courts have “stayed” all other OHWM Missouri River cases pending completion of the new survey as required by SB 2134.
- January 10, 2018-- new State case – *Sorum v. State of North Dakota*, Civ. No. 09-2018-CV-00089.

Status of Litigation— *Sorum v.* State of North Dakota

- *Sorum* involves a “citizens complaint” seeking a declaratory judgment that Chapter 61-33.1 (Senate Bill 2134) is an unconstitutional “giveaway” by transferring \$1.96 billion dollars of State-owned sovereign lands to private citizens, and \$205 million in accrued bonus and royalty proceeds.
- The main premise of the lawsuit is based upon the legal assumption that the State not only owns the historical Missouri riverbed underlying Lake Sakakawea, but owns all of Lake Sakakawea up to the high water mark of the Lake.

Status of Litigation— Sorum v. State of North Dakota

- The Plaintiffs assert under the “Equal Footing Doctrine” that as Lake Sakakawea was formed by the damming of the Missouri River, the State’s title to the bed of the Lake, including minerals, became immediately vested in the State as the waters rose and formed the Lake.
- The plaintiffs, therefore, allege that SB 2134 which recognizes the State only owns title to the historical Missouri riverbed channel under the Equal Footing Doctrine, violates the State’s ‘anti-gift’ clause of the ND Constitution by “giving away” the lakebed.

Status of Litigation— Sorum v. State of North Dakota

- On February 27, 2019, the Cass County District Court issued “Order on Cross-motions for Summary Judgment”
 - ▣ Part 1: Held SB 2134 is constitutional on its face.

“Lake Sakakawea did not exist at statehood. Thus, the equal-footing doctrine does not vest the State with title to Lake Sakakawea outside the ordinary high water mark of its natural channel.”
 - ▣ “Any interpretation of State law that would divest the title of the federal government in lands that the federal government acquired would appear to run afoul of the Supremacy Clause of the United States Constitution.”

Status of Litigation— Sorum v. State of North Dakota

- Part 2 – Retroactive Refunds-unconstitutional
 - ▣ District Court held that the provisions requiring retroactive refunds “to newly adjudicated mineral owners, ...is a direct violation of Article X, Sec. 18 of the North Dakota Constitution which prohibits the State from giving away state assets without receiving like value in return.” (i.e. violates the Anti-gift clause).
 - ▣ Appeal issues: (1) the State never owned the minerals for which disputed proceeds were received and (2) State expressly contracted in its leases to refund payments.

Status of Litigation— Sorum v. State of North Dakota

- ▣ Current Status:
- ▣ District Court ordered the parties to submit a final “Judgment” pursuant to the Court’s Order for Judgment. Parties could not agree on the provisions to be included in the final judgment and have submitted briefs for the court’s consideration. The District Court has not issued a final judgment as of this date and a deadline to file an appeal to the Supreme Court has not been set.

Status of Federal Litigation

- *Continental Resources v. North Dakota Board of University and School Lands and the United States of America*, Civ. No. 1:17-cv-00014-DLH, United States District Court, District of North Dakota.
- Interpleader Action. Continental seeks to interplead disputed oil and gas royalties relating to acreages claimed and leased by both the State and United States along the Missouri River.
- United States filed a motion to dismiss asserting SB 2134 resolved that federal law determines the OHWM boundary of public domain tracts.

Status of Federal Litigation

Continental v. ND and USA

- State of North Dakota filed response opposing USA motion to dismiss, and asserted the District Court has jurisdiction to address the adverse claims between the State and United States under the Federal Quiet Title Act.
- United States sought dismissal based on sovereign immunity.
- District Court denied USA motion to dismiss.
- Case does not affect Wenck study insofar as it concerns the OHWM delineation between state sovereign lands and privately owned uplands.

Summary

- ▣ Final implementation of Wenck OHWM Study “On hold” pending:
 - Acreage calculations legislation and completion of acreage study.
 - Final outcome of judicial decisions in *Sorum*, *Wilkinson* and *Continental* cases.



NORTH DAKOTA LAW REVIEW ENERGY LAW SYMPOSIUM

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