

UND ENERGY LAW SYMPOSIUM

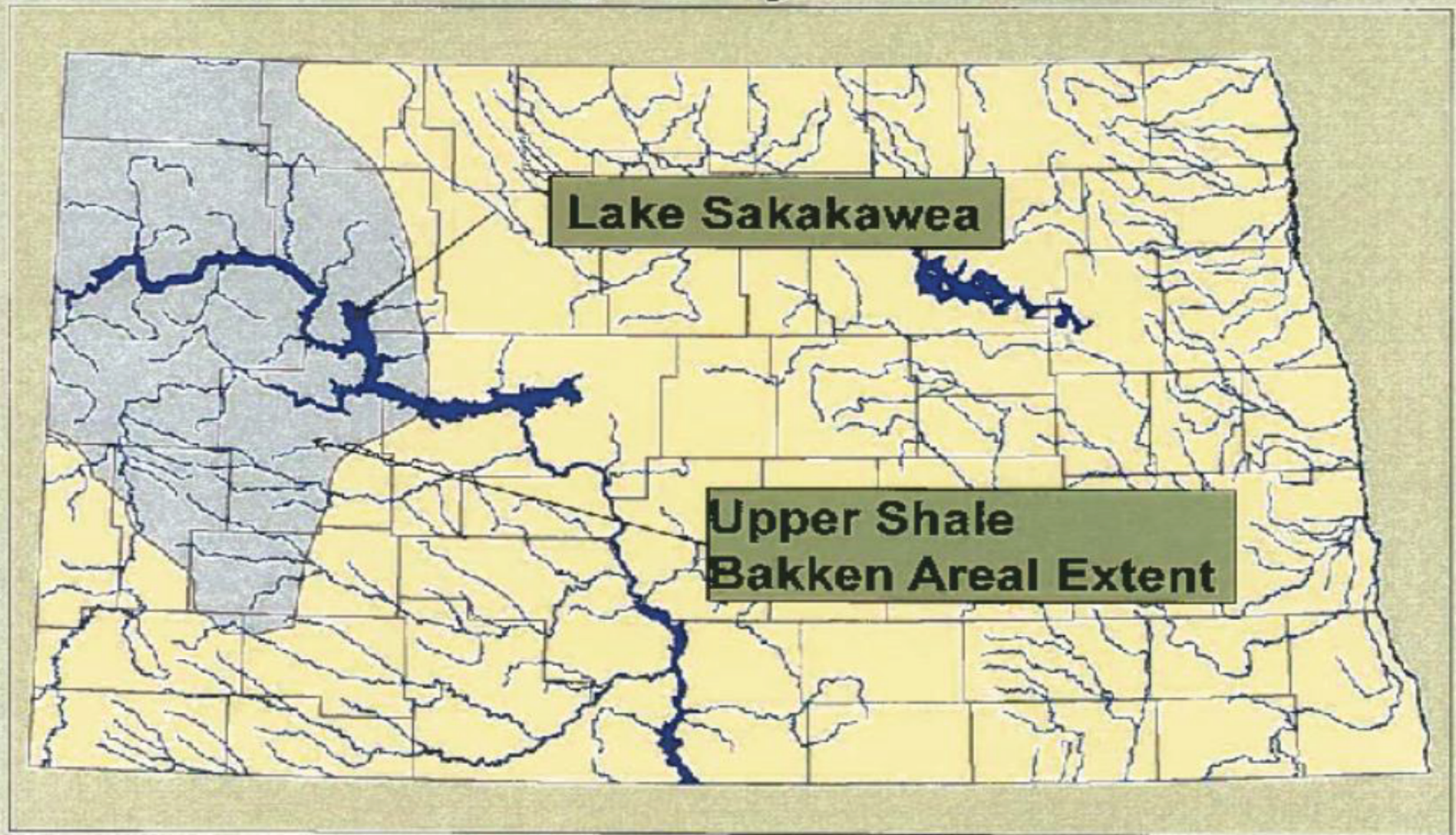
Status of Missouri Riverbed Mineral Issues

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ATTORNEYS

Missouri River/Lake Sakakawea Strategically Located



TOPICS COVERED

- Equal Footing Doctrine—historical background and ownership issues created by river movement
- Corps and State surveys
- Wenck OHWM Study (NDCC Chapter 61-33.1)
- Acreage Adjustment Survey and Implementation status.
- Status of primary litigation cases.

Historical Background- Equal Footing Doctrine

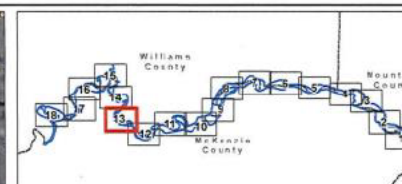
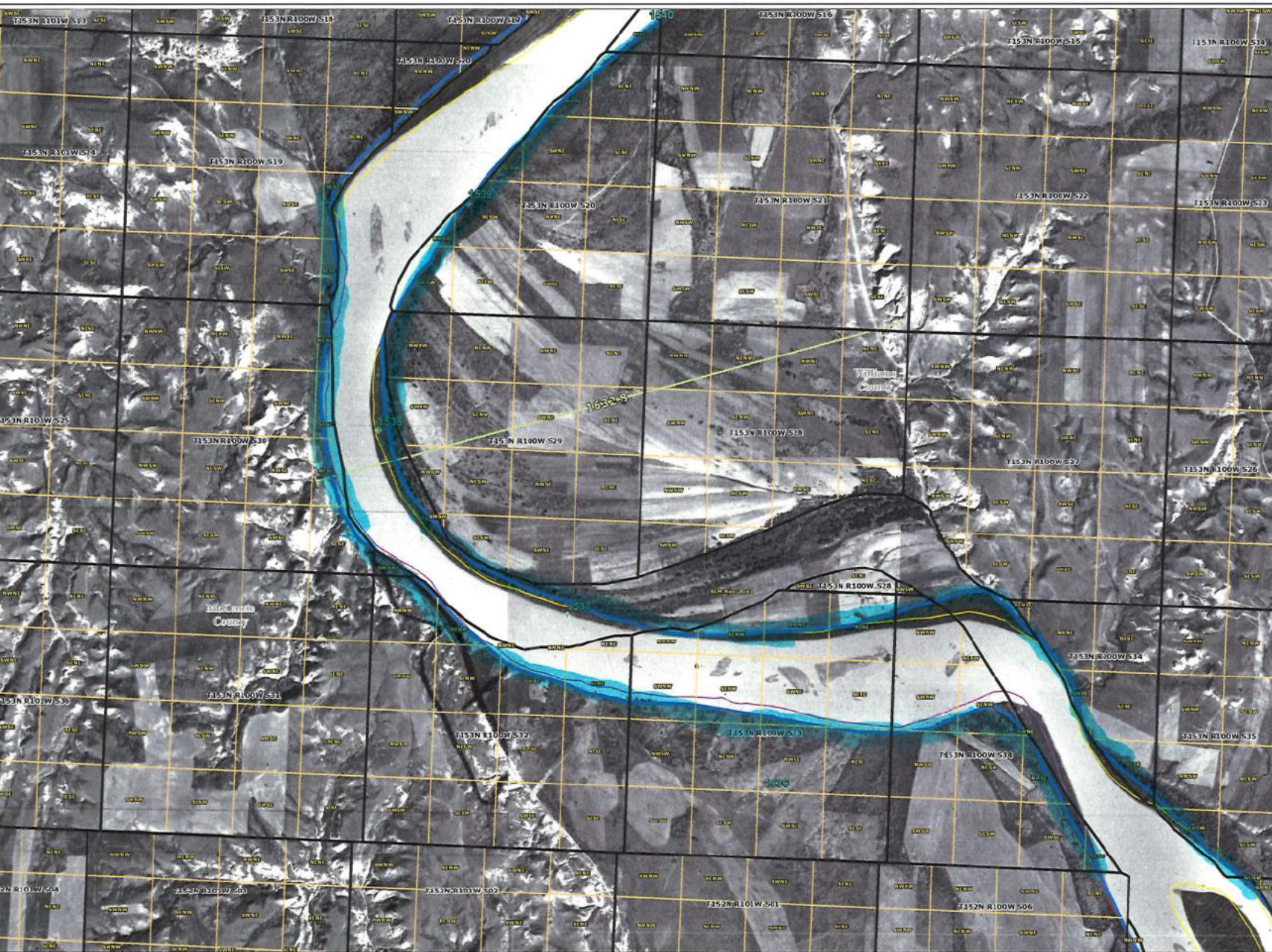
- Original 13 colonies owned title underlying navigable tidal waters.
- 1845 U.S. Supreme Court recognized “Equal Footing Doctrine” whereby as States entered the Union they acquired title to the beds of all navigable waters “upon equal footing, in all respects whatever...” with the original states to the Ordinary High Water Mark.” *Pollard v. Hagan*, 44 U.S. 212, 222 (1845).

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*, 841 N.W.2d 664 (ND 2013).
- The *Reep* decision establishes North Dakota as a “high water mark” state.
- ***What is the impact of low versus high water mark??***

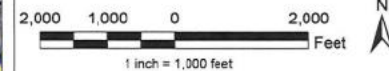
Low versus High Water Mark

- 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.
- See next two slides....



- BLM PLSS Section Boundary
- BLM PLSS Qtr Section Boundary
- + River Miles
- USACE Cross Section
- OHWM Ordinary High-Water Mark (OHWM)
- RC Recommend Correction to Account for More Recent Aerial Information
- RF Recommend Correction to Account for Frequently Flooded Accretion
- RM 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. 1931 Aerial Imagery (Source: ND Department of Mineral Resources)

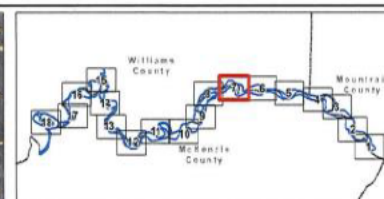
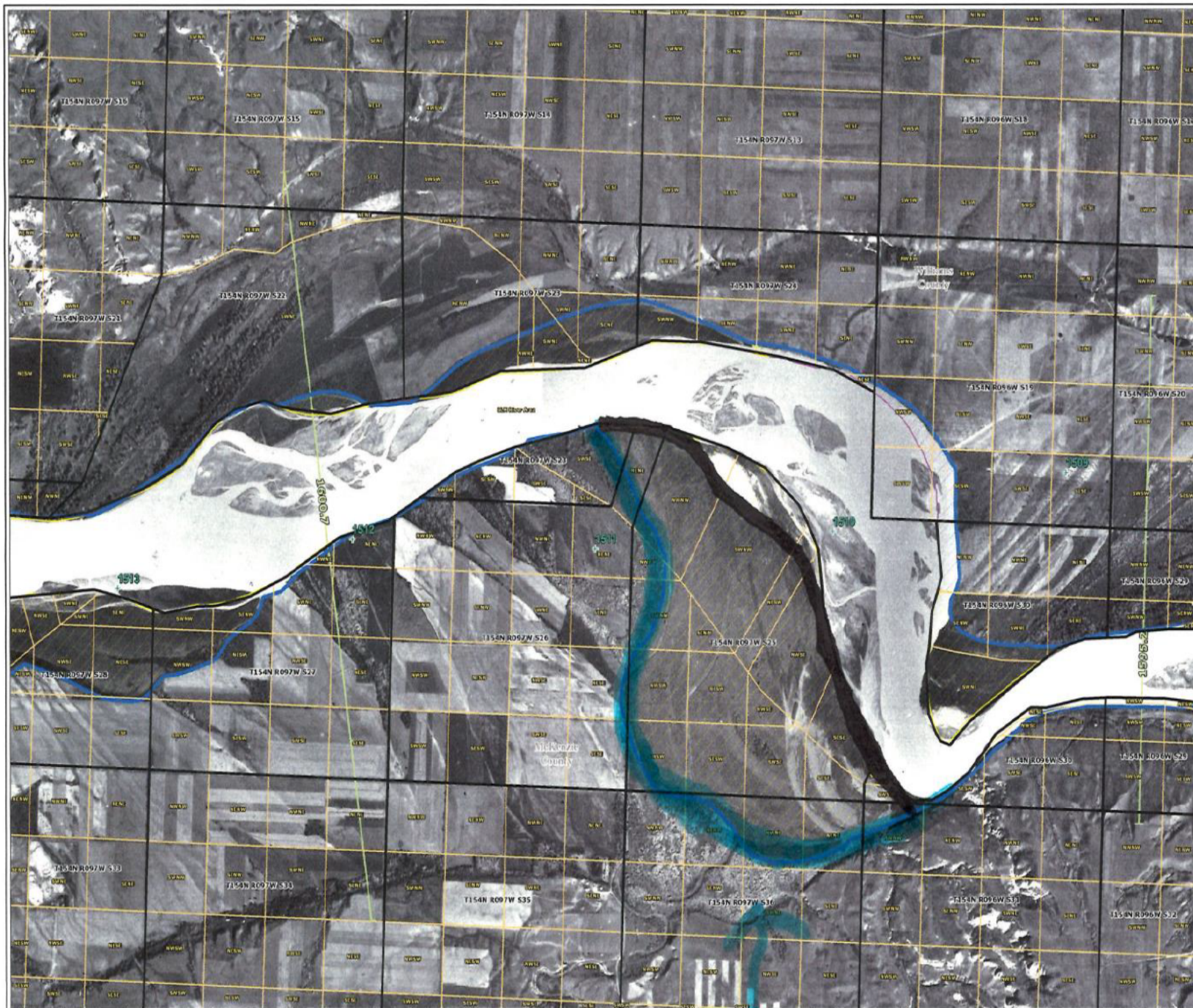


NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES
 OHWM Delineation

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 Responsive partner. Exceptional outcomes.

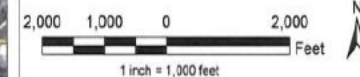
MAR 2018
 Map 13 of 18

OHWM



- BLM PLSS Section Boundary
- BLM PLSS 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 Ruble 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



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OHWM

LWM

Ordinary High Water Mark

- In determining OHWM, multiple factors may be considered including hydrology, elevation, and historical flow data.
- Judicial cases have applied the following test:
- “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.” *Rutten v. State*, 93 N.W.2d 796, 799 (ND 1958).

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. North Dakota adopted the minority rule whereby the State will acquire title to the new riverbed and lose title to the abandoned channel. Whereas, the owners whose property was taken by the new channel will take, by way of indemnity, title to the abandoned channel. See N.D.C.C. §§ 47-06-06 and -07.
- State's title to sovereign lands moves with the river.

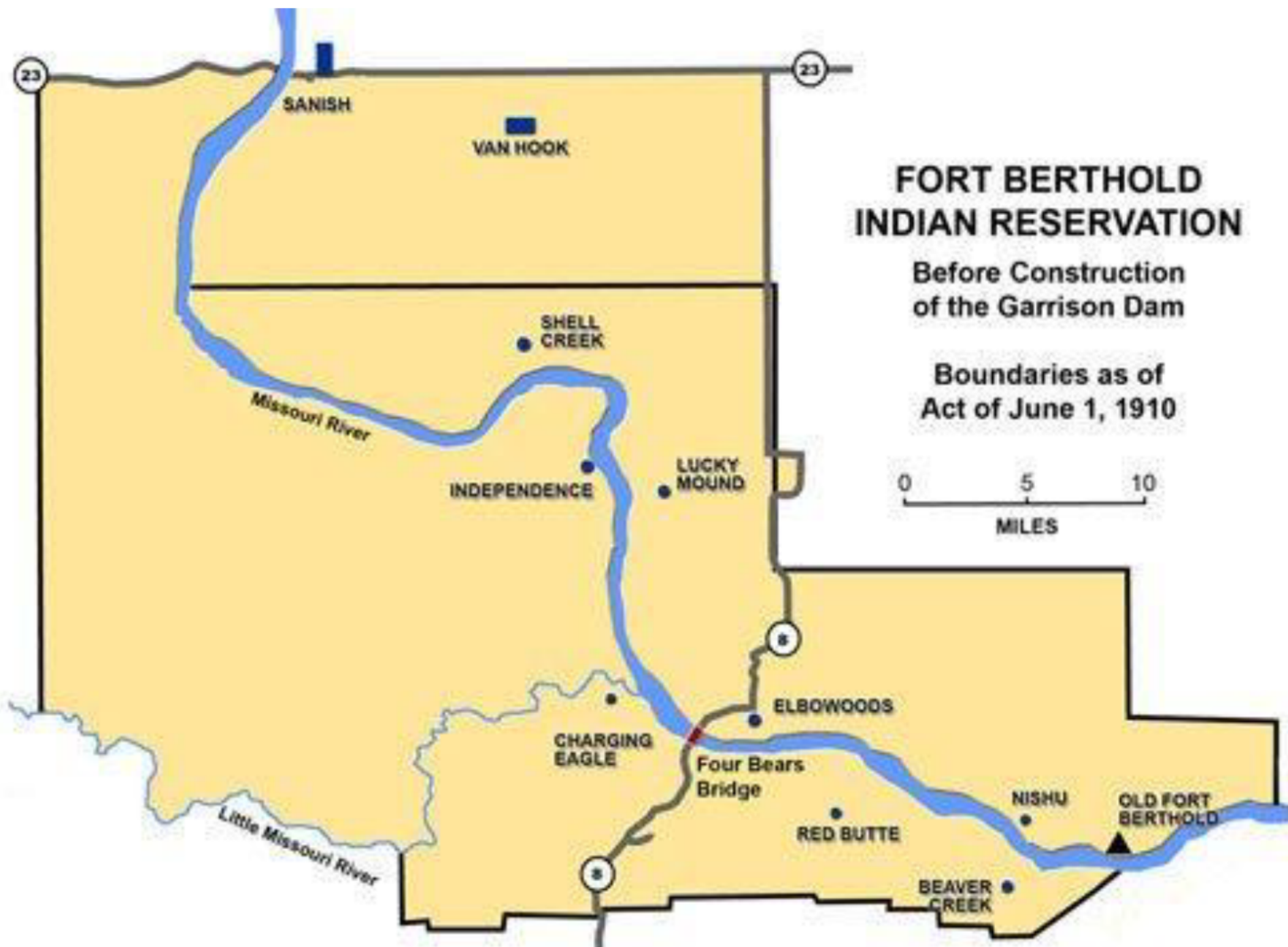
Garrison Dam/Lake Sakakawea

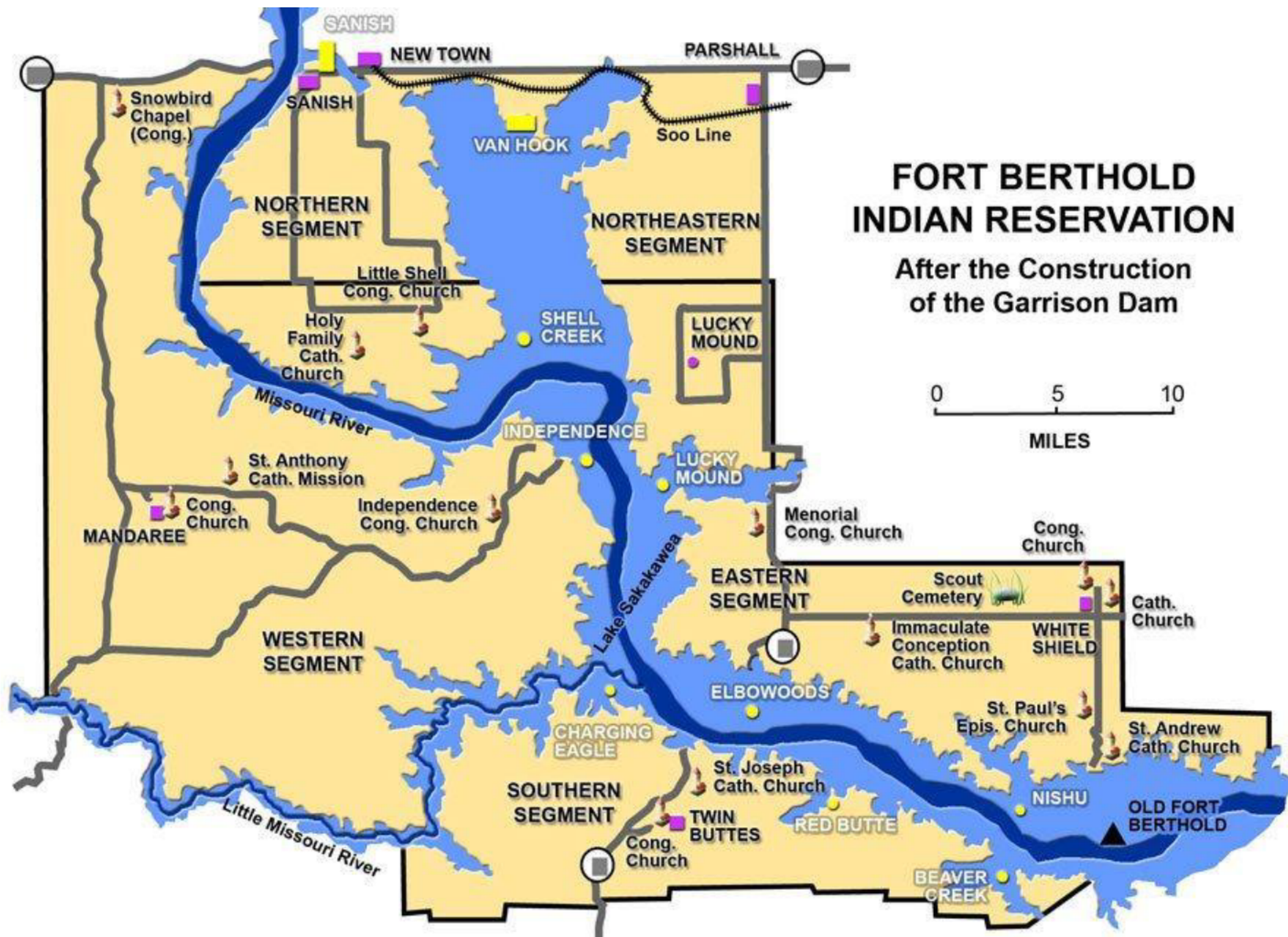
- ❑ Constructed between 1946-1954. The United States acquired 460,000 acres for the Dam project.
- ❑ The Dam formed Lake Sakakawea, the third largest manmade lake in USA--178 miles long and 364,000 acres or more depending upon Lake elevation.

Garrison Dam -----

Fort Berthold Reservation

- 156,000 acres taken including all mineral rights by Act of Congress (Taking Act 1949).
- In 1984, Congress passed Fort Berthold Reservation Mineral Restoration Act which declared that mineral interests acquired for the Garrison Project are to be held by the United States in Trust for the Three Affiliated Tribes. *Public Law 98-602* (98 Stat. 3152).
- State and Tribe dispute who owns the historical river channel within the Reservation boundary.

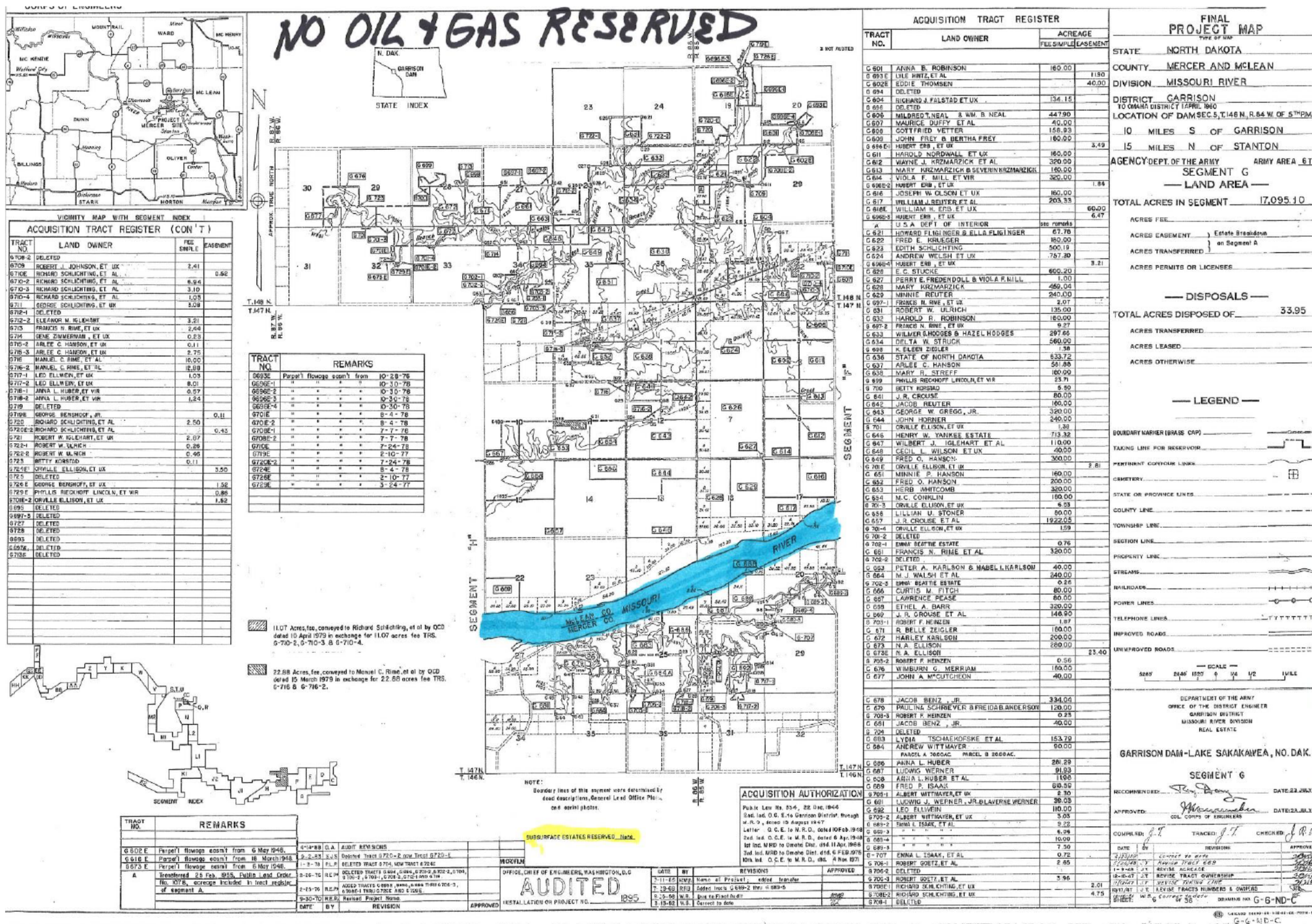




Corps Survey

- 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.
- Corps survey relied primarily on aerial photography, and property appraisals for lands taken or purchased.
- Corps survey stretches approximately 178 miles from Garrison Dam to a few miles west of Williston.
- Survey results referred to as “Corps Segment Maps”—each segment map consisting of a township.

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



Sanish Sentinel 15 Nov 1951

Army Engineers Explain Land Policy

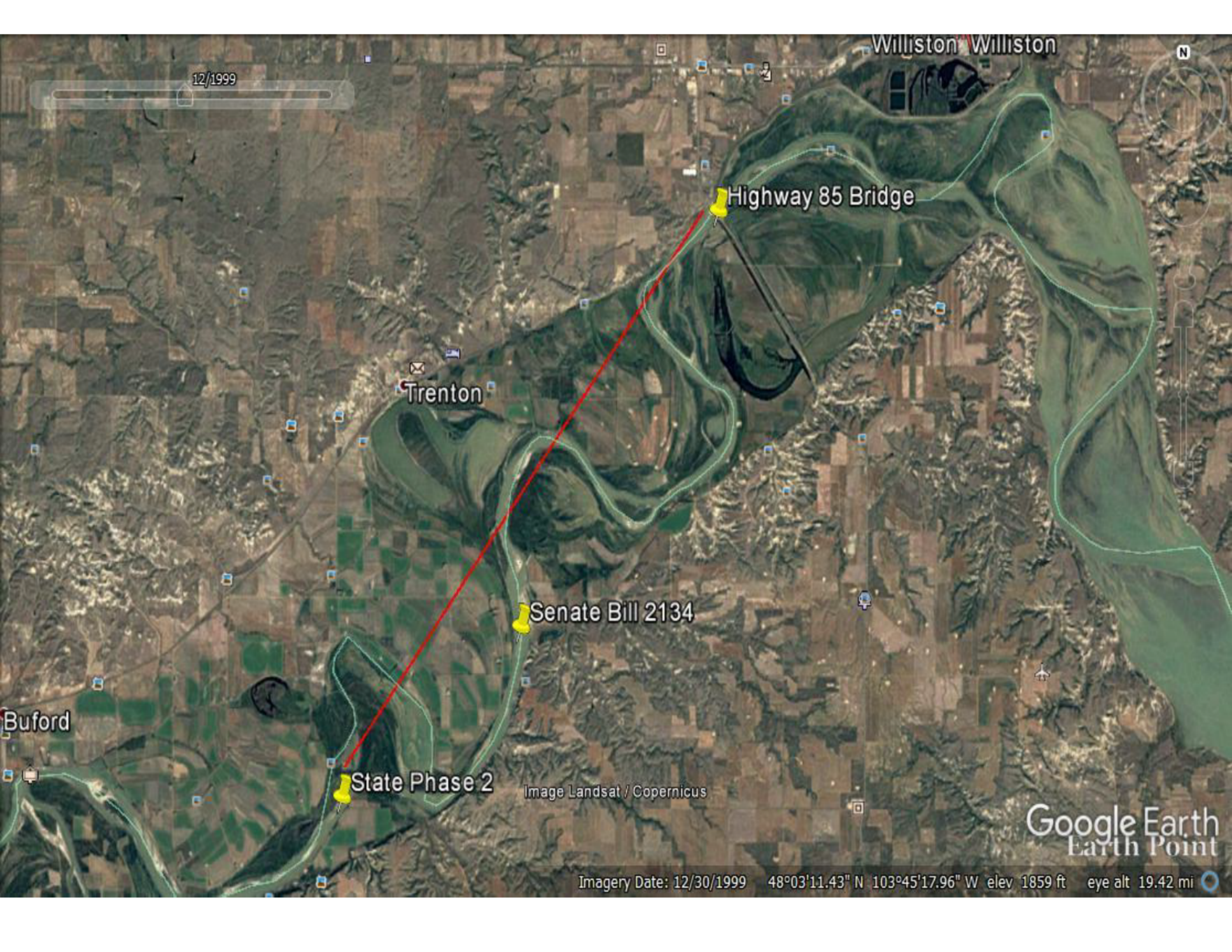
At a meeting last Thursday in the Sanish school the Real Estate Division of the Corps of Army Engineers thru its representatives explained to the landowners present the policy that will be followed in the purchase of the remaining portion of the valley.

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.

State OHWM Surveys

- In 2008-10, 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.**
- Phase 4: From the northern boundary of FBIR to Garrison Dam.



12/1999

Williston Williston

Highway 85 Bridge

Trenton

Senate Bill 2134

Buford

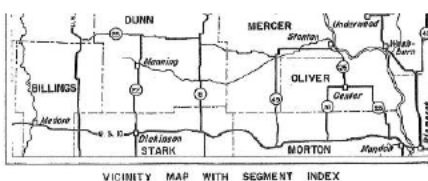
State Phase 2

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

Disputed Accretions-overlapping state/fee leases--Islands



MCKENZIE CO.			
W 2039	DELETED		
W 2094	SARAH B. PHELPS ET AL	527.67	
W 2035	SARAH B. PHELPS ET AL	166.66	
W 2036	DELETED		
W 2037	DELETED		
W 2038	CHARLES T. THOMPSON ET AL	0.00	

W2076	DELETED				
A	U.S.A. DEPT OF INTERIOR		SEC REMARKS		DEPT
G	U.S.A. (DEPT. OF AGR.) (same remarks)			3204.59	OFFICE
TRACT	REMARKS				MIS
A	Transferred 28 Feb. 1953, Public Land Order No. 1076, acreage included in tract prior to segment A.				
G	Transferred 10 March 1954, Executive Order No. 10520, acreage includes the parcels in Segments W.X.Y. and Z.				
	covered by this Audit.				
W2010	Formerly part of Tract No. W2005				

ACQUISITION AUTHORIZATION COMPILED:

COMPILED:

Public Law No. 834, 22 Dec. 1944	DATE	BY	
6th. Ind. D. C. E. to M.R.D., dated 4 May 1950	10-10-51	W.B.	Correct No.
	3-12-52	W.B.	Correct No.
	3-8-53	W.B.	Taking the one
	10-1-56	W.B.	Taking the one
	5-25-62	102	Due to Final
	SECRET:	24	of

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

2017 Legislation: SB 2134— N.D.C.C. Ch. 61-33.1

- Main driving factors leading to legislative action:
 - ▣ 1. Continuing uncertainty of mineral and lease ownership with pending litigation cases (*Wilkinson v State*) limiting ability to drill additional wells.
 - ▣ 2. Concerns by mineral owners and others the State surveys were an “overly aggressive” interpretation of the OHWM favoring the State.
 - ▣ 3. 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.
 - ▣ 4. Mineral owner royalty payment frustration.

Senate Bill 2134- Key provisions

- “The state sovereign land mineral ownership of the riverbed segments subject to inundation by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark.” N.D.C.C. Sec. 61-33.3-02
- Adopted the Corps survey as “presumptive determination” of the historical OHWM.
- Required the NDIC to select a surveying firm to review the Corps survey to correct/modify survey segments if clear and convincing evidence shows adjustments are necessary under state law
- Designated NDIC to oversee the review process.

2018 Wenck OHWM Study

- Wenck & Associates selected for OHWM study. The Wenck Study was adopted by the NDIC on September 27, 2018, after public notice and hearing.
- Of the approximate 25,000 acres difference between the Corps survey and State Phase 2 survey, Wenck allocates 9,507 acres to the State, and 15,493 acres to upland owners.
- Wenck Study only determined location of OHWM. The study did **not** calculate the acreages for accretions and erosion on a per section basis, or quarter-quarter basis, as necessary for Industry to calculate royalties for each individual oil well spacing unit.

Acreage Adjustment Survey

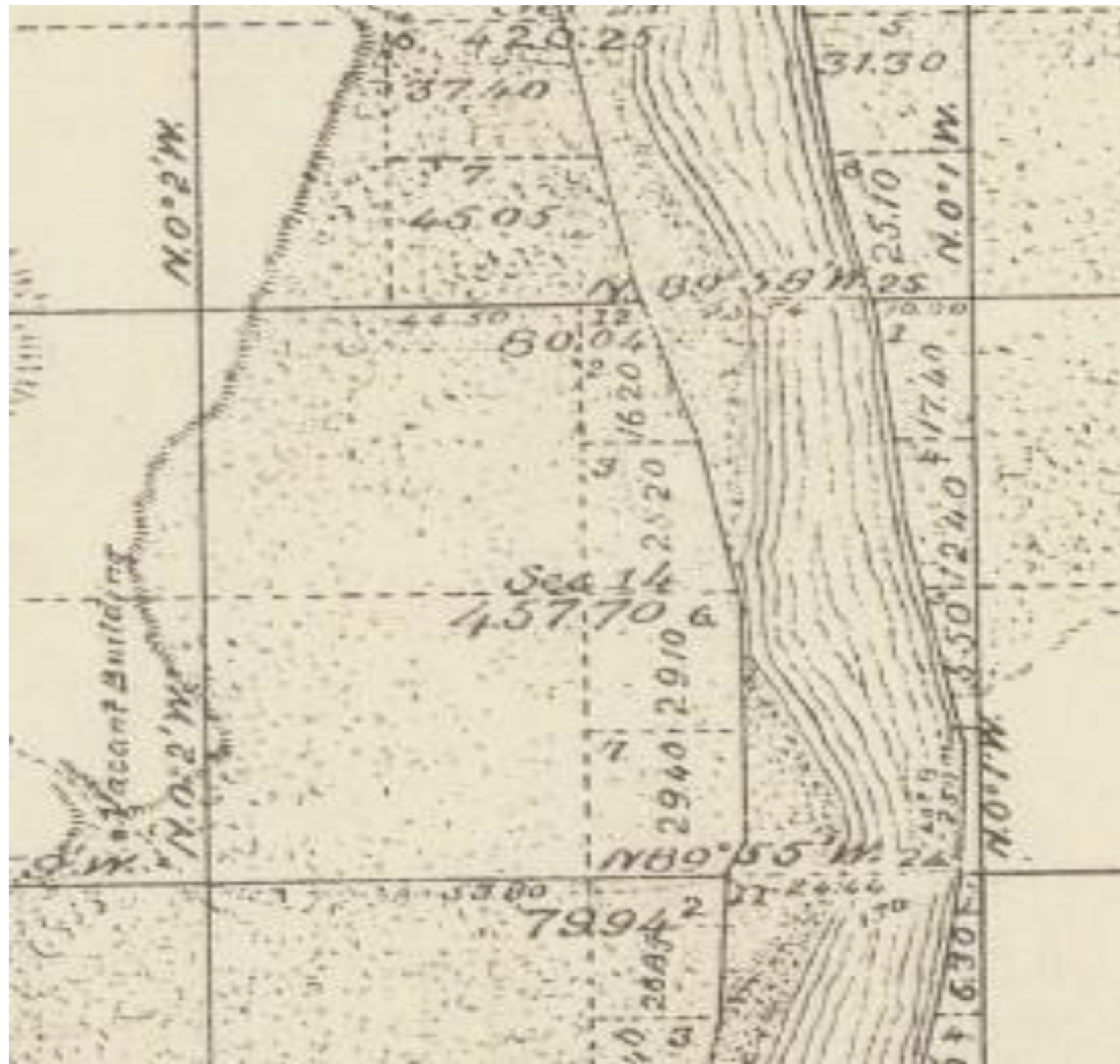
- In 2019, the Legislature authorized the Land Board to retain an engineering and surveying firm to perform acreage adjustments properly allocating accretions and erosion acreages on a quarter-quarter basis in order for the Department of Trust Lands and Operators to make proper acreage adjustment pursuant to Wenck OHWM Study. N.D.C.C. 61-33.1-03(8). See Acreage Adjustment slides, *infra*.
- The Kadrmas, Lee & Jackson Acreage Survey and Calculation was adopted by the State Land Board on June 25, 2020.

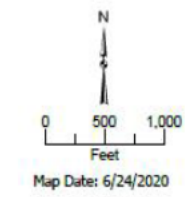
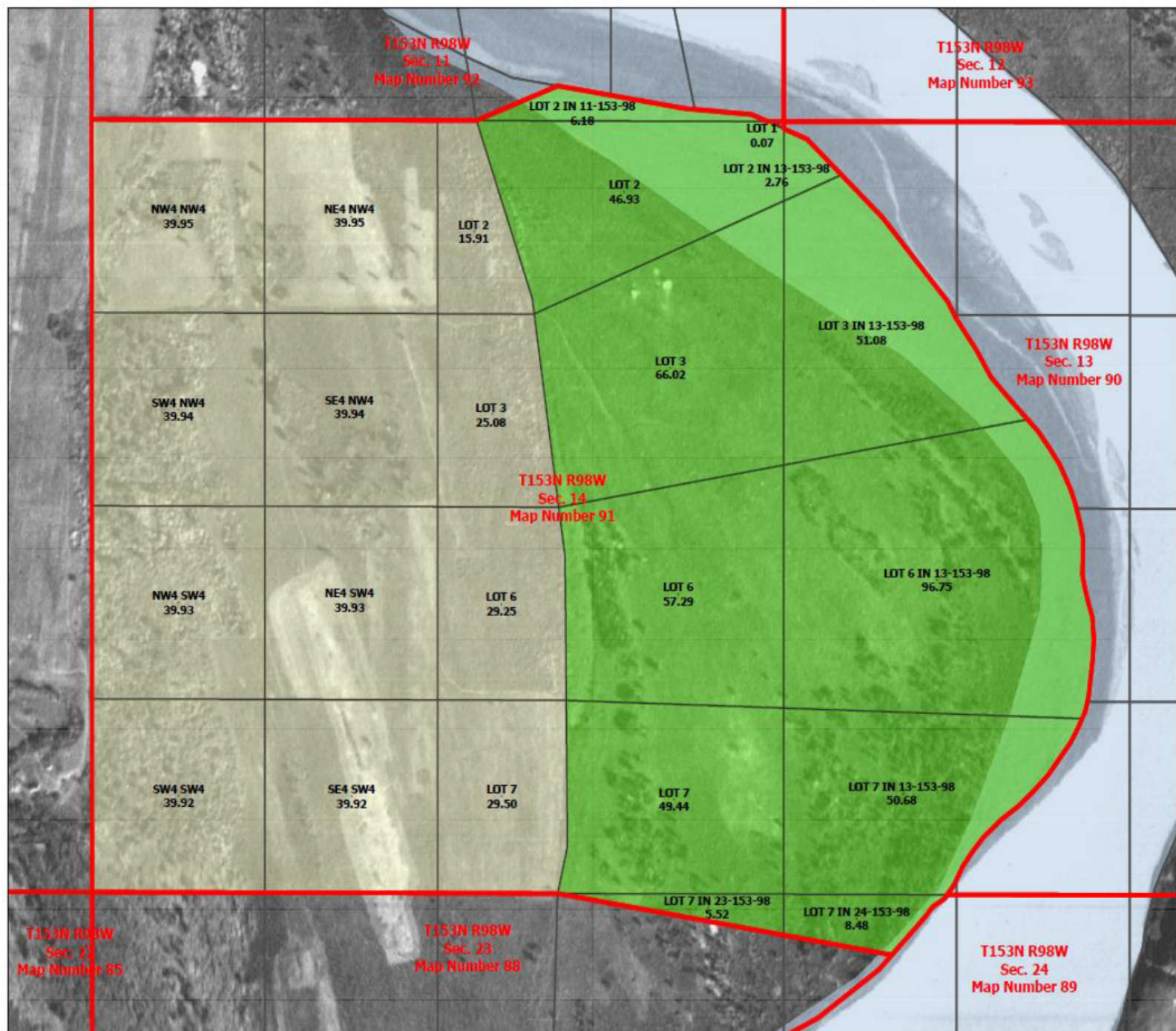
Acreage Adjustment Survey

- **NOTE!!!** The KLJ Acreage Survey is **NOT** a new determination of the OHWM. All calculations are based on the OHWM determined by the Wenck study.
- N.D.C.C. 61-33.1-05(2) provided a two-year limitations period for interested parties to challenge the KJL acreage calculations in District court, or until June 25, 2022. **However, the time to file an appeal challenging the Wenck OHWM determination expired September 27, 2020.** N.D.C.C. 61-33.1-05(1).
- Only one case, *Northern Oil and Gas v. Board of University and School Lands*, Civ. No. 31-2020-CV-00198 challenging the Wenck line. (Trial set for May 2023). There were no judicial challenges to the KLJ study.

Implementation of acreage adjustments

- Two-year provision-NDCC Sec. 61-33.1-04(2)
- The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, ...relating to state-issued oil and gas leases. **The board shall complete the adjustments, refunds, and payment demands within two years after approving the acreage determination.**
- **Operators** of oil and gas wells affected by the final acreage determination immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. **The operators shall complete the adjustments within two years after the board approves the acreage determination [i.e. June 25, 2022 deadline].**
- **Examples of acreage adjustment maps on following slides:**





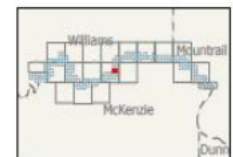
ADJUSTMENTS

- Accreted Area Above OHWM
- Area Below OHWM
- Eroded Area Below OHWM
- Upland Area Above OHWM
- WENCK OHWM

OHWM SECTION ACREAGE

BELOW	ABOVE	TOTAL
0.07	860.35	860.42

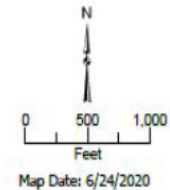
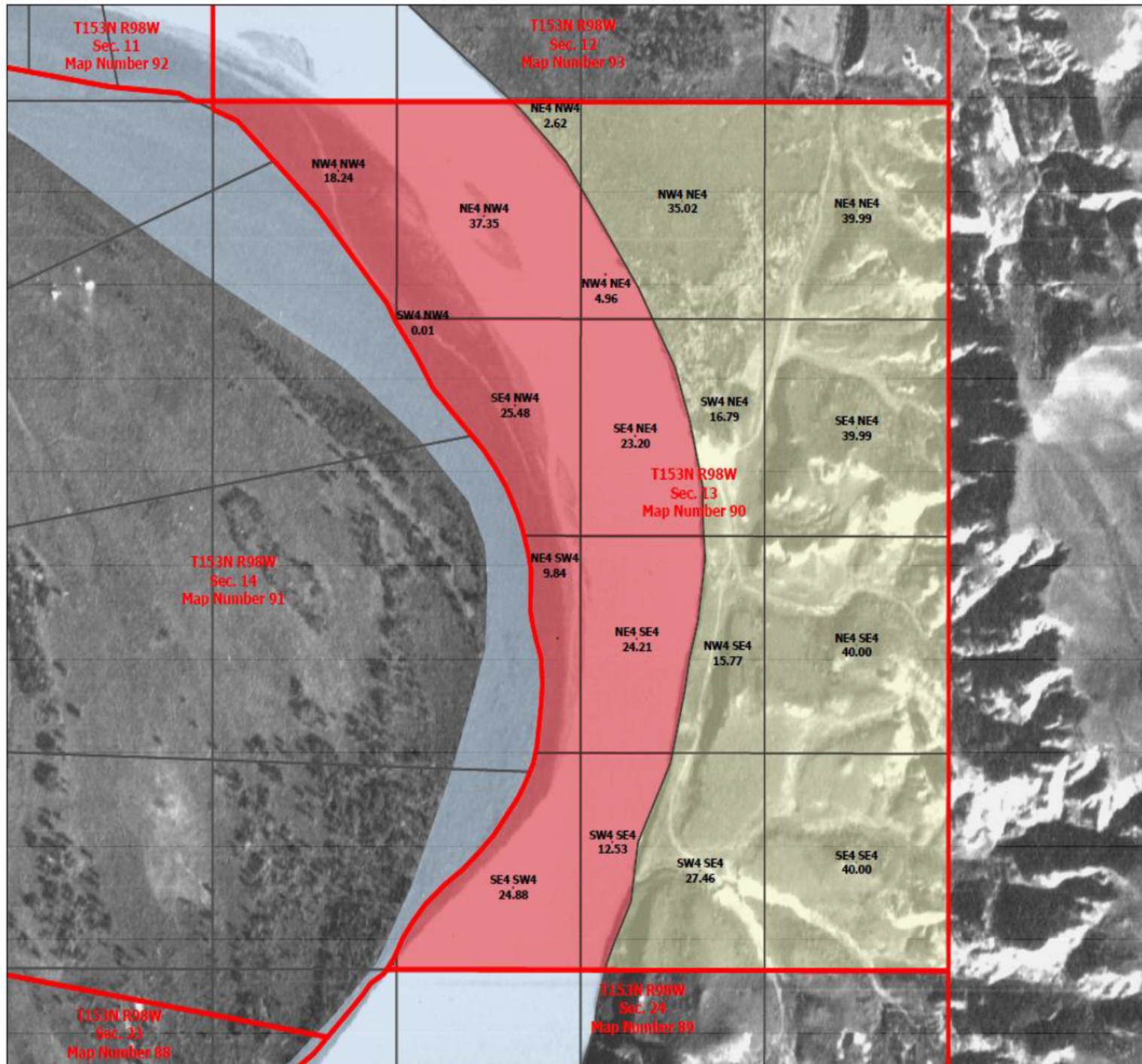
DESCRIPTION	ACRES
LOT 2	46.93
NW4 NW4	39.95
NE4 NW4	39.95
SW4 NW4	39.94
SE4 NW4	39.94
NE4 SW4	39.93
NW4 SW4	39.93
SW4 SW4	39.92
SE4 SW4	39.92
LOT 6	29.25
LOT 6	57.29
LOT 7	29.50
LOT 7	49.44
LOT 3	25.08
LOT 3	66.02
LOT 2	15.91
LOT 1	0.07
LOT 6 IN 13-153-98	96.75
LOT 3 IN 13-153-98	51.08
LOT 7 IN 13-153-98	50.68
LOT 2 IN 13-153-98	2.76
LOT 7 IN 24-153-98	8.48
LOT 7 IN 23-153-98	5.52
LOT 2 IN 11-153-98	6.18



NORTH DAKOTA DEPARTMENT OF TRUST LANDS
THE MISSOURI RIVER FROM T153N-R102W TO T152N-R93W



SECTION 14 - T153N R98W

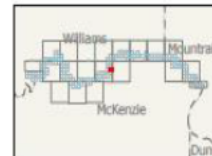


ADJUSTMENTS	
■	Accreted Area Above OHWM
■	Area Below OHWM
■	Eroded Area Below OHWM
■	Upland Area Above OHWM
■	WENCK OHWM

OHWM SECTION ACREAGE

BELOW	ABOVE	TOTAL
180.78	257.65	438.42

DESCRIPTION	ACRES
NW4 NW4	18.24
SW4 NW4	0.01
SE4 NW4	25.48
SW4 SE4	12.53
NE4 SW4	9.84
NE4 SE4	24.21
SE4 SW4	24.88
SE4 NE4	23.20
SW4 SW4	0.08
NW4 NE4	4.96
NE4 NW4	37.35
NW4 SE4	15.77
NE4 NE4	39.99
NW4 NE4	35.02
NE4 NW4	2.62
SE4 NE4	39.99
SW4 NE4	16.79
NE4 SE4	40.00
SE4 SE4	40.00
SW4 SE4	27.46



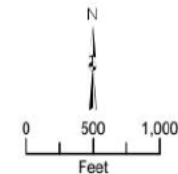
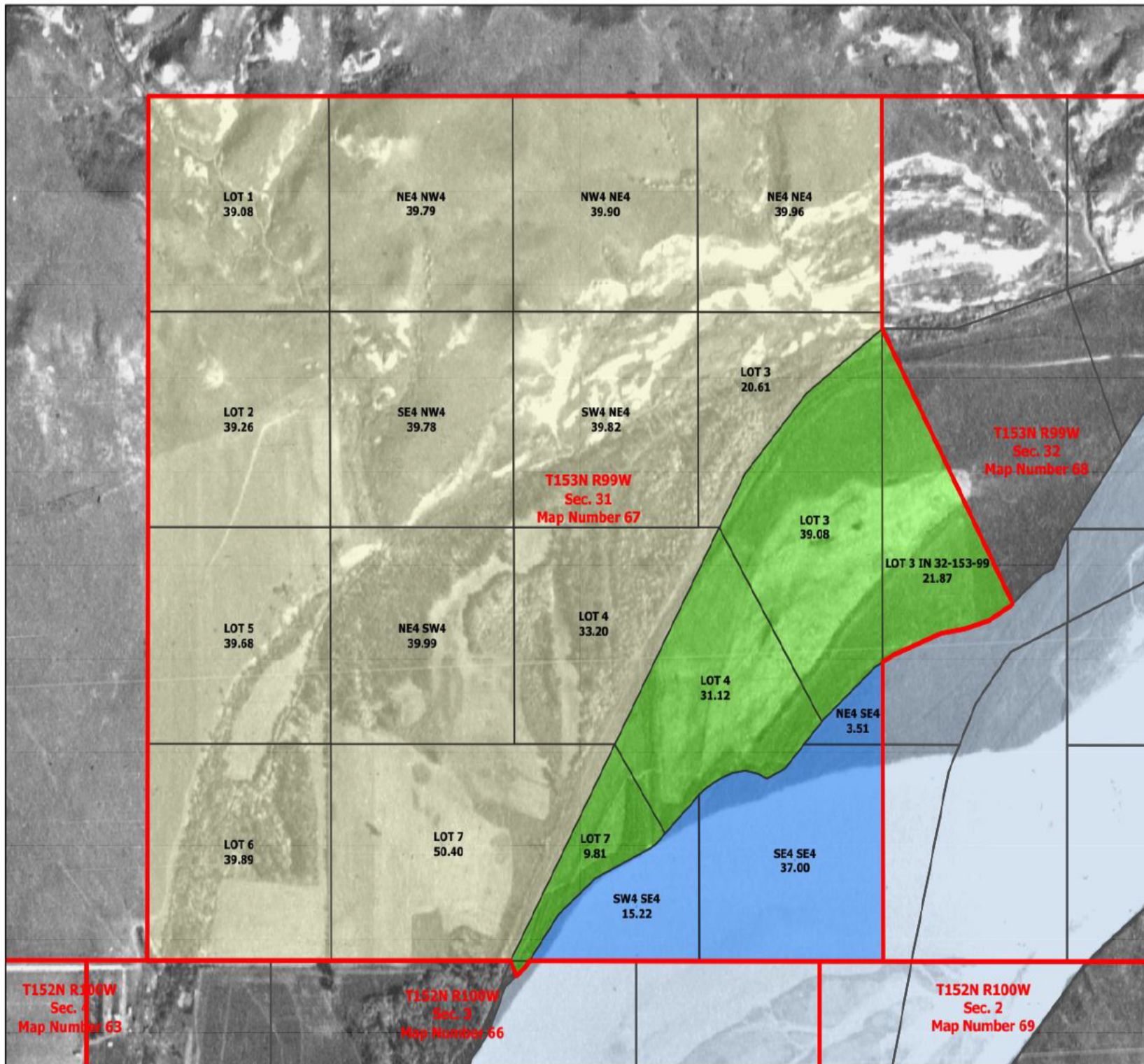
NORTH DAKOTA DEPARTMENT OF TRUST LANDS

THE MISSOURI RIVER FROM T153N-R102W TO T152N-R93W

OHWM SECTION ACREAGE ADJUSTMENTS



SECTION 13 - T153N R98W



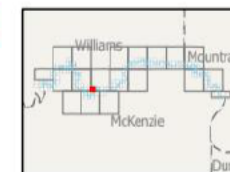
Map Date: 6/24/2020

ADJUSTMENTS	
■	Accreted Area Above OHWM
■	Area Below OHWM
■	Eroded Area Below OHWM
■	Upland Area Above OHWM
■	WENCK OHWM

OHWM SECTION ACREAGE

BELOW	ABOVE	TOTAL
55.73	603.38	659.12

DESCRIPTION	ACRES
NE4 SE4	3.51
SW4 SE4	15.22
SE4 SE4	37.00
LOT 3	20.61
LOT 4	33.20
LOT 7	9.81
LOT 5	39.68
LOT 3 IN 32-153-99	21.87
LOT 7 IN 3-152-100	0.15
LOT 4	31.12
LOT 3	39.08
LOT 7	50.40
NE4 NE4	39.96
NW4 NE4	39.90
NE4 NW4	39.79
LOT 1	39.08
LOT 2	39.26
SE4 NW4	39.78
SW4 NE4	39.82
NE4 SW4	39.99
LOT 6	39.89



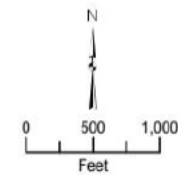
NORTH DAKOTA DEPARTMENT OF TRUST LANDS
THE MISSOURI RIVER FROM T153N-R102W TO T152N-R93W
OHWM SECTION ACREAGE ADJUSTMENTS

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SECTION 31 - T153N R99W

MAP NUMBER

67



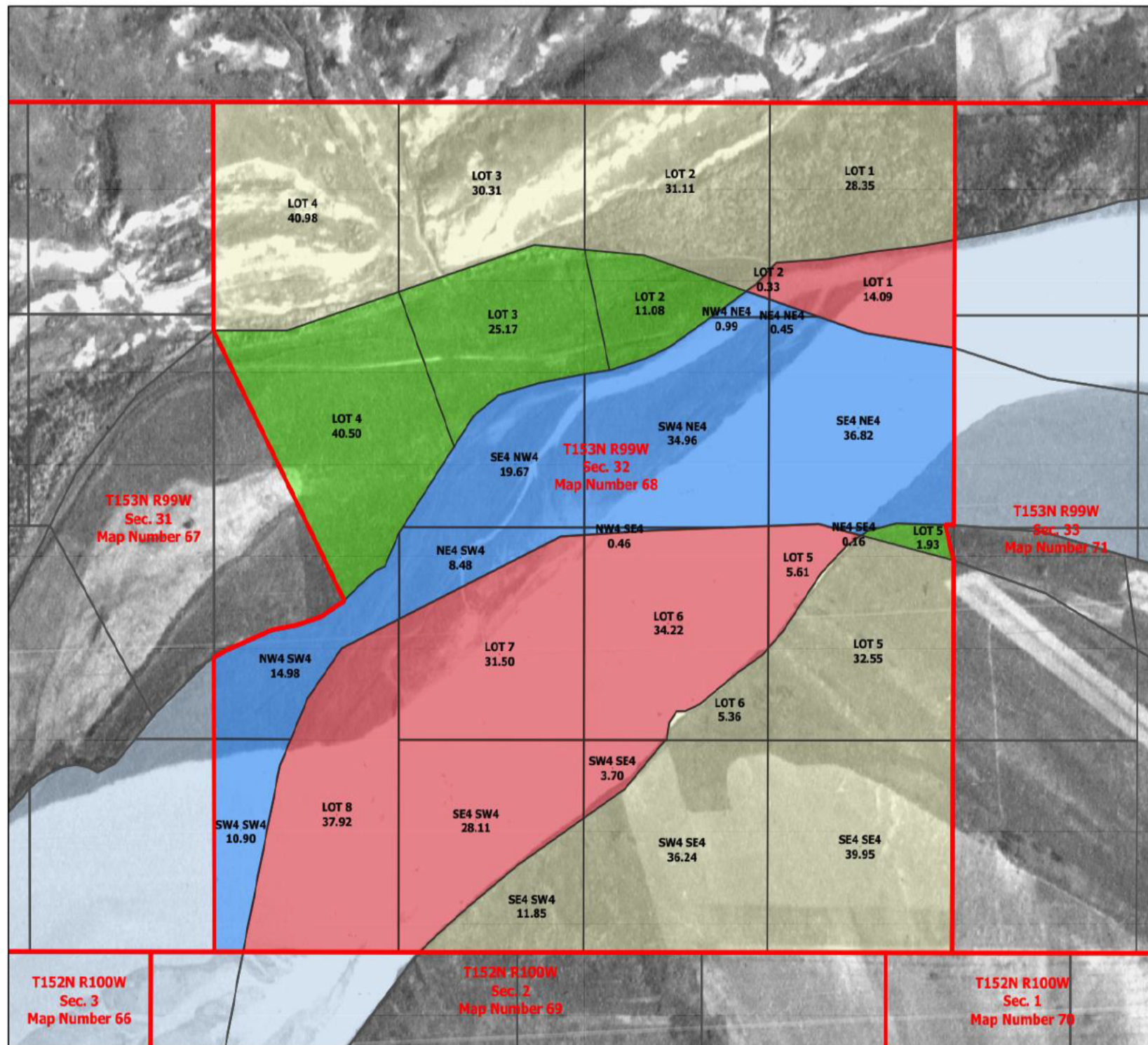
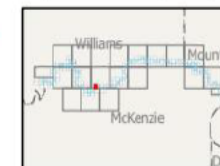
Map Date: 6/24/2020

ADJUSTMENTS	
■	Accreted Area Above OHWM
■	Area Below OHWM
■	Eroded Area Below OHWM
■	Upland Area Above OHWM
■	WENCK OHWM

OHWM SECTION ACREAGE

BELOW	ABOVE	TOTAL
283.35	335.40	618.75

DESCRIPTION	ACRES
NE4 SE4	0.16
NW4 NE4	0.99
NE4 NE4	0.45
SW4 NE4	34.96
SE4 NW4	19.67
NW4 SE4	0.46
NE4 SW4	8.48
NW4 SW4	14.98
SW4 SW4	10.90
SE4 SW4	28.11
LOT 8	37.92
SW4 SE4	3.70
LOT 6	34.22
LOT 5	5.61
LOT 1	14.09
SE4 NE4	36.82
LOT 7	31.50
LOT 5	1.93
LOT 3	30.31
LOT 2	11.08
LOT 4	40.50
SE4 SW4	11.85
SW4 SE4	36.24
SE4 SE4	39.95
LOT 6	5.36
LOT 5	32.55
LOT 1	28.35
LOT 2	31.11
LOT 3	25.17
LOT 4	40.98
LOT 2	0.33



ACREAGE ADJUSTMENT SURVEY REPORT

PROJECT TOTAL
PROJECT COMPLETE - FINAL REPORT

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TOTAL PROJECT PROGRESSION



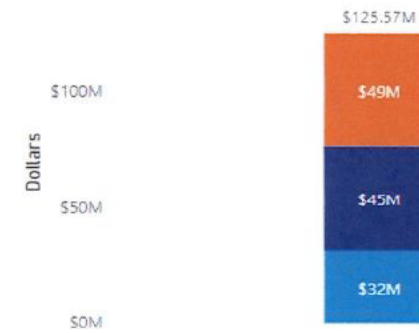
PROGRESS TO ESTIMATED \$87M BUDGET PROJECT VALUE

● Total Project Est. Remaining ● Bonus/Royalty Paid Out ● Litigation Hold



TOTAL REFUNDED/RELEASED TO OPERATOR

● Royalties Paid ● Bonus Paid ● Escrow Released



Key litigation cases

- *Wilkinson v. State*, 903 N.W.2d 51 (ND 2017), *Wilkinson II*, 947 N.W.2d 910 (ND 2020), *Wilkinson III*, 981 N.W.2d (ND 2023).
- *Sorum v. State*, 947 N.W.2d 382 (ND 2020). *Cert. denied*, (Feb. 22, 2021).
- *EEE Minerals v. State of North Dakota*, Case No. 1:20-cv-00219-CRH, U.S. Dist. Court (ND), *on appeal* U.S. Eighth Cir. (Case No. 22-2159)
- *Continental Resources v. ND Board of University and School Lands and the United States*, Civ. No. 1:17-cv-00014-DLH.
- *MHA Nation v. U.S. Dept. of Int.*, Case No. 1-20-cv-0191, U.S. Dist. Of Columbia, *on appeal* U.S. Court of Appeals for D.C. Circuit, Case No. 22-5185.

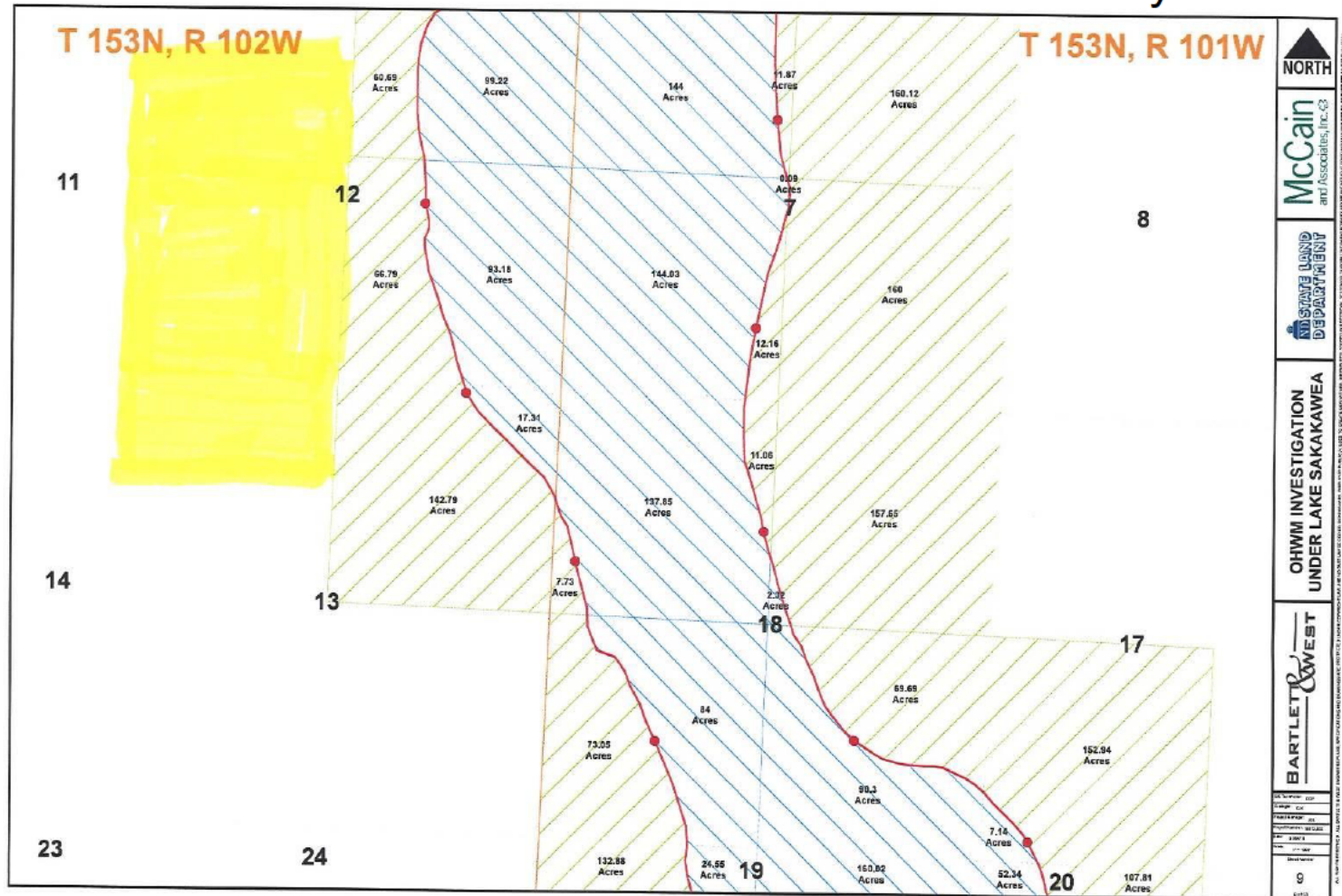
Wilkinson v. State

- *Wilkinson* was the initial case involving the conflicting OHWM surveys. *Wilkinson v. State*, 903 N.W.2d 51 (ND 2017).
- 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

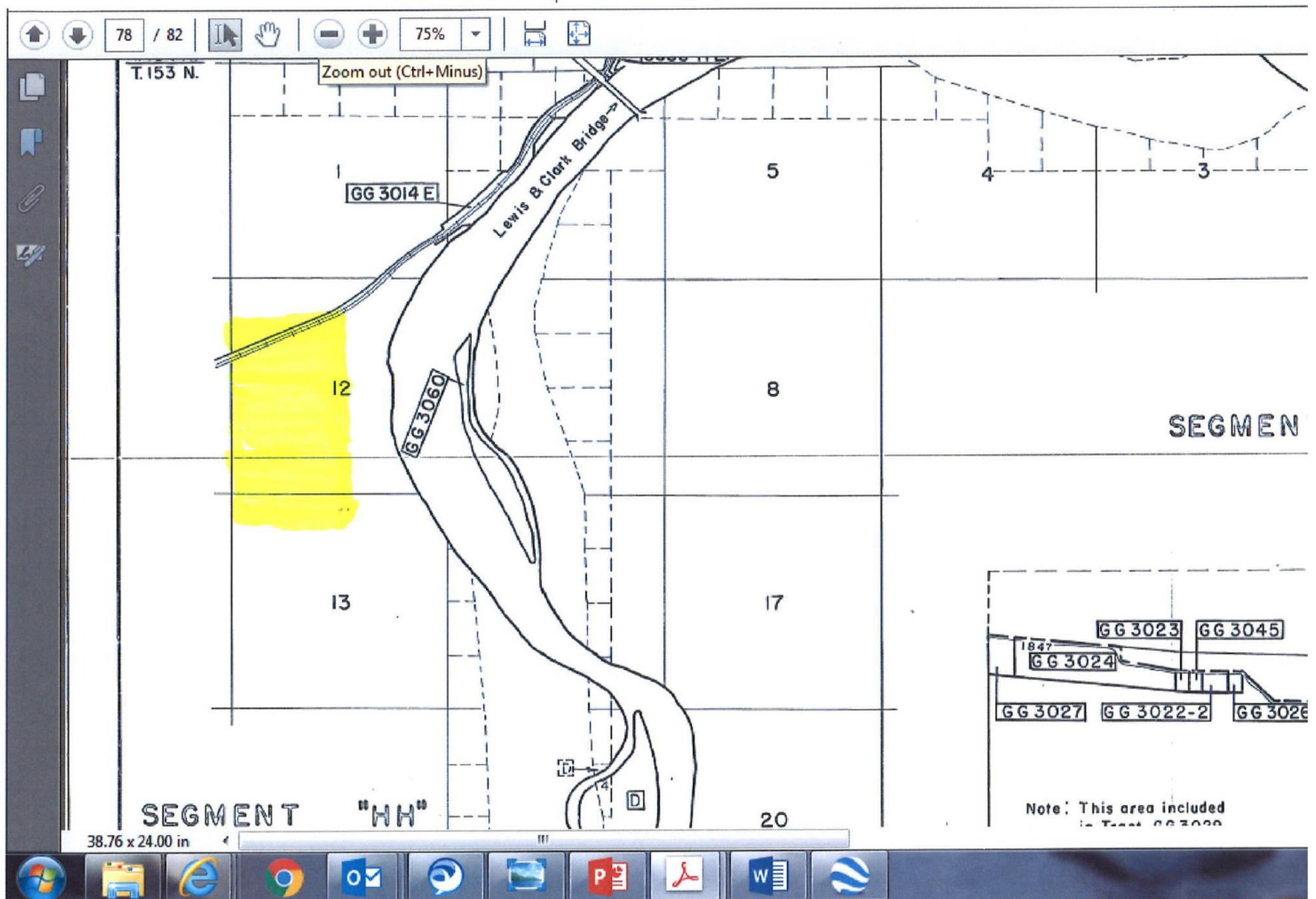
Wilkinson minerals within OHWM of Phase 1 survey (Red line OHWM)– page 1--



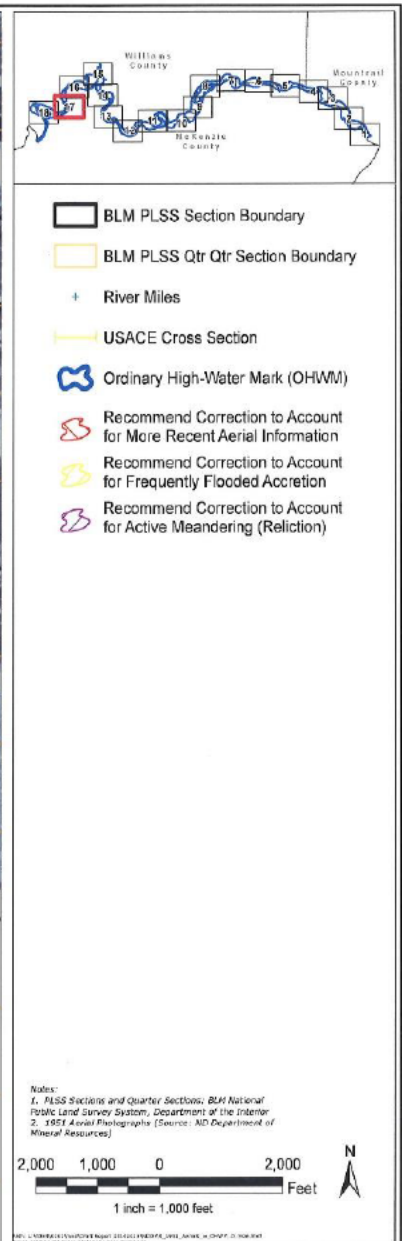
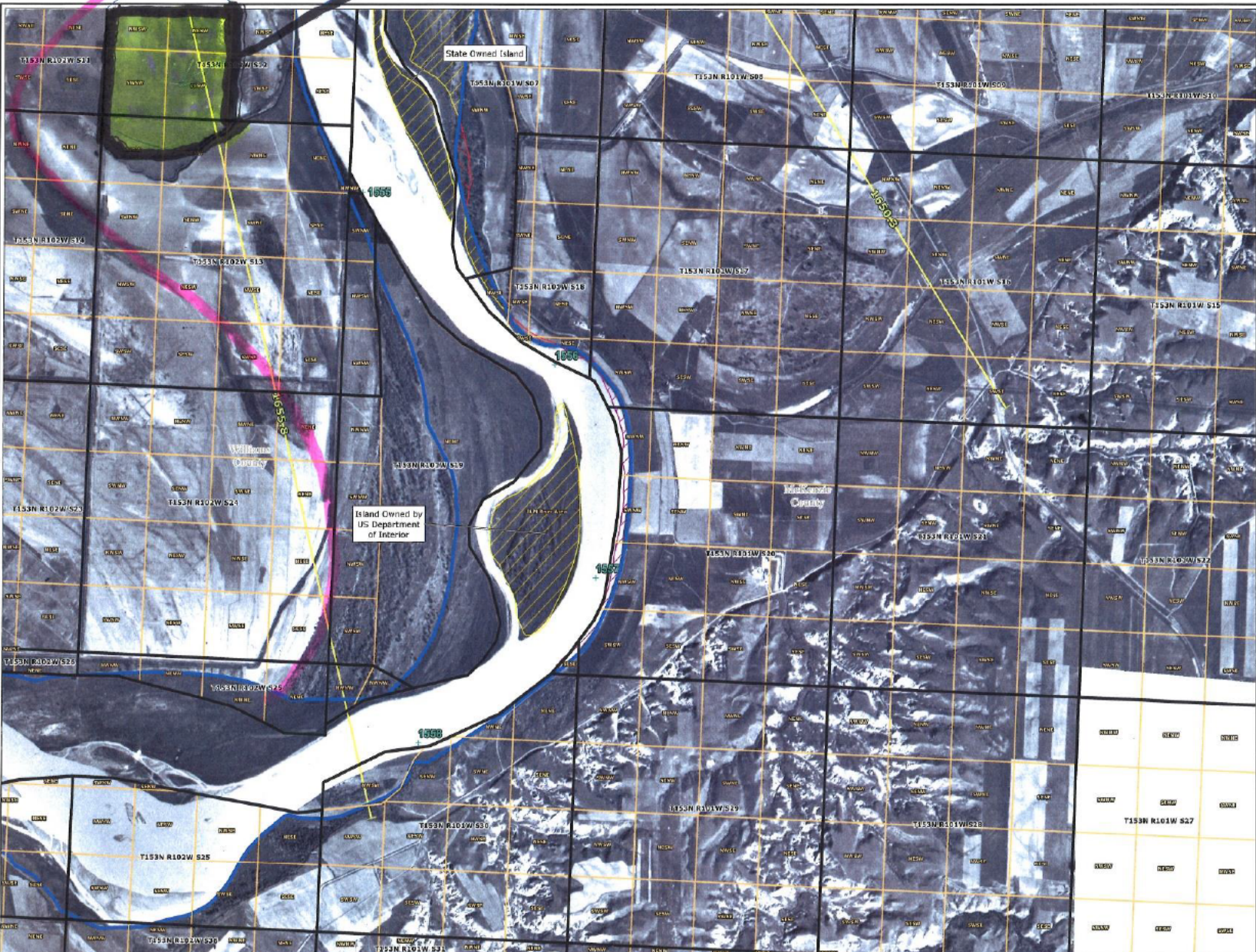
Wilkinson minerals – State Phase 2 (historical) survey— Wilkinson minerals above the Phase 2 historical survey



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



Phase 1 Wilkinson Minerals



NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES
OHWM Delineation

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Wilkinson I

- District court granted summary judgment in favor of the State, and also held the OHWM of the Missouri River and Lake Sakakawea are “indistinguishable.”
- In *Wilkinson I* the Supreme Court reversed and remanded:
 - The District Court must consider newly enacted SB 2134 and the Wenck OHWM study.
 - 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, applying the Wenck survey, the District Court granted summary judgment for the Wilkinsons. The State appealed to the Supreme Court.

Wilkinson (II)

- On the second appeal, the State Engineer argued the Wenck survey did not apply to the Wilkinson property because the lands were not “inundated” frequent enough. The State also argued the Act violated the Public Trust Doctrine.
- The court held: “The statute’s plain language provides that the State does not have sovereign land ownership of minerals above the OHWM of the “historical Missouri riverbed channel.” *Wilkinson v. Bd. of Univ. and Sch. Lands*, 2020 ND 183, ¶ 26, 947 N.W.2d 910 (“*Wilkinson II*”).
- The Court concluded “that N.D.C.C. Ch. 61-33.1 applies in this case and that the Wilkinson property is above the OHWM of the historical Missouri riverbed channel and is not State sovereign lands.”
- Supreme Court remanded to District Court to decide remaining claims of unlawful takings, conversion, unjust enrichment and civil conspiracy

Wilkinson (III)

- On remand, District Court dismissed remaining claims of takings, conversions, conspiracy against the State and the State's lessee, StatOil Company.
- Wilkinsons appealed.
- Supreme Court affirmed the dismissal of all claims and denial of attorney's fees.
- Primary reasoning: The Court viewed the case as a quiet title boundary dispute as to the location of the watermark:
- . "To protect the public interest in sovereign lands, the State may have to litigate a quiet title action to determine the extent of its sovereign lands along navigable waters when the boundaries are disputed." 981 N.W.2d at 869.
- "The State's leases were not frivolous or unsupported. They were ultimately determined to be overinclusive, but...assertion of title by the State is not by itself a taking." "The State may protect its interest in a title dispute and must do "something more" than assert title to complete a tak

Sorum v. State of North Dakota

- *Sorum v. State*, 947 N.W.2d 382 (ND 2020). *Cert. denied* (Feb. 22, 2021).
- *Sorum* involved a “citizens complaint” seeking a declaratory judgment that Chapter 61-33.1 (SB 2134) was 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.

Sorum v. State of North Dakota

- The Plaintiffs asserted under the “Equal Footing Doctrine” 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, alleged 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.

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.”

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).

Sorum v. State of North Dakota

- On appeal, the Supreme Court rejected, in full, the plaintiffs' constitutional challenge to the Act.
- Supremacy Clause— “The Flood Control Act of 1944 authorized construction of the Garrison Dam and acquisition of the land that would be subject to inundation by the reservoir. Any contrary state law, including the constitution, a statute, or the common law, which purports to vest in the State the legal ownership of the bed of Lake Sakakawea is preempted under the Supremacy Clause to that extent.” 947 N.W.2d at 397.

Sorum v. State of North Dakota

- Plaintiffs asserted the Act violated the Watercourses clause of the Constitution:
- The Court held: “We conclude the watercourses clause operated to vest in the State ownership of watercourses which existed at statehood, but does not operate to vest in the State watercourses that become navigable after statehood, such as Lake Sakakawea.” 947 N.W.2d at 398.
- The Court also ruled that returning royalty funds held by the State, “for lands it acknowledges that it does not own and should not have leased,” is not an unconstitutional gift because the funds were never the State’s to give away. 947 N.W.2d at 386.
- Plaintiffs filed a writ of certiorari with the United States Supreme Court which was denied on February 22, 2021.

EEE Minerals v. State of ND

- Filed December 20, 2020 in federal district court. Case No. 1:20-cv-00219-CRH.
- Plaintiffs claim the Wenck Study violates the federal takings clause (Fifth Amendment).
- Plaintiff's claim is based on Corps survey and legal description from a 1957 warranty deed from Plaintiff's predecessor to the United States for Garrison Dam land acquisition, and that the Wenck Study "took" a portion of their property as described in the deed.

EEE Minerals v. State of ND

- State filed motion to dismiss for failure to state a claim—
- By Order dated May 31, 2022, the federal district court granted State's motion to dismiss. 2022 WL 1814213.
- Holding: "Defendants cannot unjustly take property under the Fifth Amendment, through a physical or regulatory taking, when the State always owned the property under the equal footing doctrine. To the extent Plaintiffs disagree with Defendants' determination of the historic OHWM it is a boundary dispute, not a takings dispute. Therefore, because Plaintiffs never owned the mineral interest below the OHWM, is dismissed ...for failure to state a claim."
- Plaintiffs appealed to Eighth Circuit. Oral arguments held March 16, 2023--decision pending.

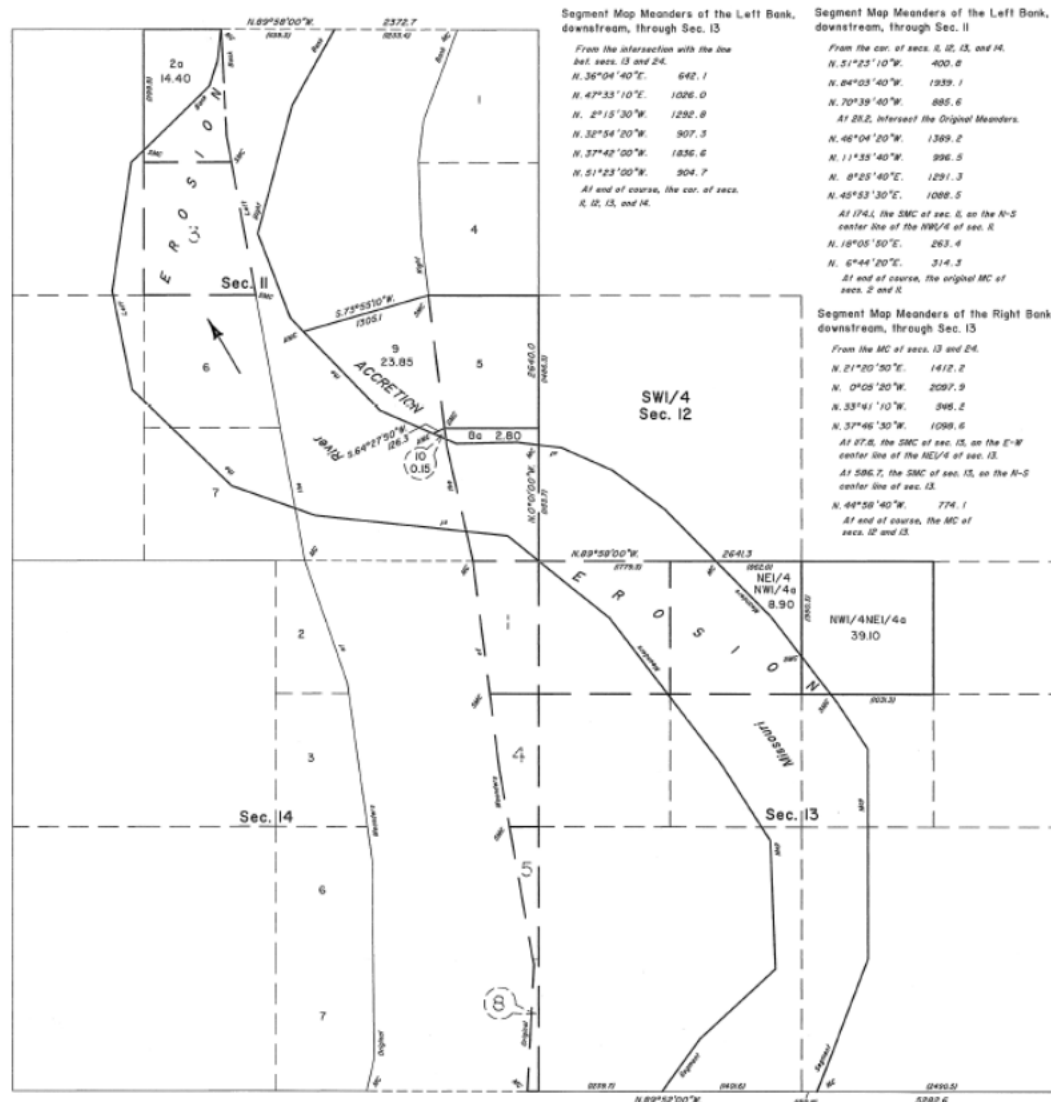
Federal vs. State minerals

- USA owns multiple small public domain (non-patented) tracts riparian to the historical Missouri River channel. (USA also owns various mineral tracts of “acquired lands”).
- BLM Cadastral Survey prepared Supplemental Plats surveying public domain lands, applying Corps survey and/or federal law in determining OHWM.
- State maintains state law governs OHWM determination of federal public domain lands.
- N.D.C.C. 61-33.1-06 defers to BLM to determine OHWM of public domain lands.

TOWNSHIP 153 NORTH, RANGE 98 WEST, OF THE FIFTH PRINCIPAL MERIDIAN, NORTH DAKOTA

SUPPLEMENTAL PLAT

Sheet 1 of 4



Segment Map Meanders of the Left Bank, downstream, through Sec. 13

From the intersection of the line bet. secs. 13 and 24.
 N. 36°04'40"E. 642.1
 N. 47°33'10"E. 1026.0
 N. 2°15'30"W. 1252.8
 N. 32°54'20"W. 907.3
 N. 37°42'00"W. 1836.6
 N. 51°23'00"W. 904.7
 At end of course, the cor. of secs. 12, 13, and 14.

Segment Map Meanders of the Left Bank, downstream, through Sec. 12

From the cor. of secs. 12, 13, and 14.
 N. 51°23'10"W. 400.8
 N. 84°03'40"W. 1939.1
 N. 70°39'40"W. 885.6
 At 28.2, intersect the Original Meanders.
 N. 46°04'20"W. 1389.2
 N. 11°33'40"W. 996.5
 N. 8°25'40"E. 1291.3
 N. 45°53'30"E. 1088.5
 At 174.1, the SMC of sec. 12, on the N-S center line of the NW1/4 of sec. 12.
 N. 18°05'50"E. 263.4
 N. 6°44'20"E. 214.3
 At end of course, the original MC of secs. 2 and 12.

Segment Map Meanders of the Right Bank, downstream, through Sec. 13

From the MC of secs. 13 and 24.
 N. 21°20'50"E. 1412.2
 N. 0°08'20"W. 2087.9
 N. 33°41'10"W. 396.2
 N. 37°46'30"W. 1089.6
 At 87.8, the SMC of sec. 13, on the E-W center line of the NE1/4 of sec. 13.
 At 586.2, the SMC of sec. 13, on the N-S center line of sec. 13.
 N. 44°58'40"W. 774.1
 At end of course, the MC of secs. 12 and 13.

Segment Map Meanders of the Right Bank, downstream, through Sec. 12

From the MC of secs. 12 and 13.
 N. 44°58'40"W. 720.5
 N. 53°15'30"W. 657.7
 N. 65°57'00"W. 558.2
 N. 83°20'10"W. 232.0
 At end of course, the MC of secs. 9 and 12.

Segment Map Meanders of the Right Bank, downstream, through Sec. 12

From the MC of secs. 9 and 12.
 N. 83°15'40"W. 219.7
 S. 88°53'10"W. 609.9
 N. 66°49'10"W. 826.0
 At 133.0, intersect the Original Meanders.
 At 251.4, the AMC of sec. 12, on a line dividing the accretion in front of lots 9 and 10 of sec. 12.
 N. 44°29'40"W. 1102.5
 At end of course, the AMC of sec. 12, on a line dividing the accretion in front of lots 9 and 10 of sec. 12.
 N. 43°33'50"W. 190.3
 N. 21°23'20"W. 894.7
 N. 15°06'20"E. 1317.3
 N. 29°14'20"E. 869.4
 At end of course, the intersection with the line bet. secs. 2 and 12.

This plat, in 4 sheets, of sections 12, 13, 14, 21, 22, 23, 24, 26, 27, 28, 29, 30, 31, and 32 showing the amended lottings, is based upon the plat approved August 18, 1897, and United States Army Corps of Engineers Segment Maps AA and BB approved August 6, 1953, Township 153 North, Range 98 West, Fifth Principal Meridian, North Dakota.

This supplemental plat was prepared for the purpose of delineating the boundaries of Public Domain oil and gas interests and determining the acreage of the areas that were affected by the movement of the Missouri River prior to the artificial flooding of Lake Sakakawea.

The bearings and distances on lines of record surveys are from the plat approved August 18, 1897. The record distances were converted from chains and reported the nearest tenth of a foot. Data shown in parentheses are derived from the United States Army Corps of Engineers Segment Maps.

The bearings and distances of the United States Army Corps of Engineers Segment Map meanders, limits of erosion, left bank of an abandoned channel, and partition lines were developed by digitizing after being georeferenced to the Geodetic Coordinate Data Base (GCD). All lots were individually georeferenced to avoid distortion and recreate the most accurate location of the Missouri River prior to the artificial flooding of Lake Sakakawea.

Public Domain Lots affected by erosion as shown on the United States Army Corps of Engineers Segment Maps are shown on this plat as two parts: Part "a" denoting land area remaining and part "b" denoting eroded area.

In areas where accretion has attached to Public Domain lots as shown on the United States Army Corps of Engineers Segment Maps, a new lot will be created by this supplemental plat. In areas where the United States Army Corps of Engineers Segment Maps did not divide the accretion between Public Domain lots, the accretion was divided by the proportionate shoreline method.

Plat prepared by Blaise J. Lodermeier, Cadastral Surveyor, beginning November 20, 2013 and completed December 10, 2013, pursuant to special instructions dated October 30, 2013 and assignment instructions dated October 30, 2013, for Group No. 92, North Dakota.

UNITED STATES DEPARTMENT OF THE INTERIOR
BUREAU OF LAND MANAGEMENT

Billings, Montana December 18, 2013

This plat, showing amended lottings, is based upon the official records and, having been correctly prepared in accordance with the requirements of law and the regulations of this Bureau, is hereby accepted.

For the Director

Joshua F. Alexander
Chief Cadastral Surveyor for North Dakota
Acting

Areas of Federal Interest Lands Completely Destroyed By Erosion		
Sec.	Subdivision	Original Acreage
12	Lot 3	25.70
13	NW1/4NW1/4	40.00
14	Lot 1	17.40
15	Lot 4	12.40
16	Lot 5	3.50
17	Lot 8	2.50

Acreage Table for Original Subdivisions			
Sec.	Subdivision	Original Acreage	Remaining Land "a"
12	Lot 3	25.70	14.40
13	NW1/4NW1/4	40.00	2.80
14	Lot 1	17.40	0.90
15	Lot 4	12.40	0.90
16	Lot 5	3.50	0.90
17	Lot 8	2.50	0.90



Federal vs. State Minerals

- *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 sought to interplead disputed oil and gas royalties relating to acreages claimed and leased by both the State and United States along the Missouri River.

Federal vs. State Minerals

- On December 8, 2020, the U.S. District Court granted the United States' motion for partial summary judgment, concluding that royalties on non-patented public domain lands must be distributed “based upon the determination of the historic OHWM as set forth in the BLM’s supplemental plats.” The court found that, while federal law applied, federal law can borrow from state law in appropriate circumstances and that “state law should be borrowed as the rule of decision in this case.” In looking to state law, the court found that N.D.C.C. § 61-33.1-06 compels the conclusion that “the OHWM determination as to the disputed non-patented public domain lands must be determined by federal law, that being the Supplemental Plats.”
- State of North Dakota filed an appeal to the Eighth Circuit. USA filed motion to dismiss for lack of jurisdiction, as the District Court did not rule on determining OHWM boundary for “acquired lands”. Issue has been briefed and district court decision pending.

Ownership of Historical Missouri Riverbed on FBIR

- ☐ Tribes claim ownership primarily based on Fort Laramie Treaty. State claims title under Equal Footing Doctrine.
- ☐ U.S. Solicitor for Department of Interior under Obama administration issued an Opinion (M-37044) in favor of Tribal ownership.
- ☐ U.S. Solicitor for Department of Interior under Trump administration issued an Opinion (M-37052) in favor of State ownership.
- ☐ MHA nation filed action challenging the Trump Solicitor Opinion. *MHA Nation v. U.S. Dept. of Int.*, Case No. 1-20-cv-01919, U.S. Dist. Of Columbia. (case pending).
- ☐ U.S. Solicitor for Department of Interior under Biden administration issued an Opinion (M-37066) withdrawing the Trump Opinion.
- ☐ State filed motion to intervene in *MHA Nation*. District Court denied. On appeal to D.C. Circuit Court of Appeals (Docket No. 22-5185). Oral arguments held February 1, 2023, decision pending.

Summary

- Full implementation of acreage and royalty payment adjustments have largely been completed and OHWM determination is final.
- Subject to Tribal issues, final resolution to most Missouri River issues has been achieved or will be shortly, providing title certainty going forward.
- I hope this is my last Missouri River presentation...
- And, final thought, what if???

Clarence Iverson discovery well---April 4, 1951

