

UND ENERGY LAW SYMPOSIUM

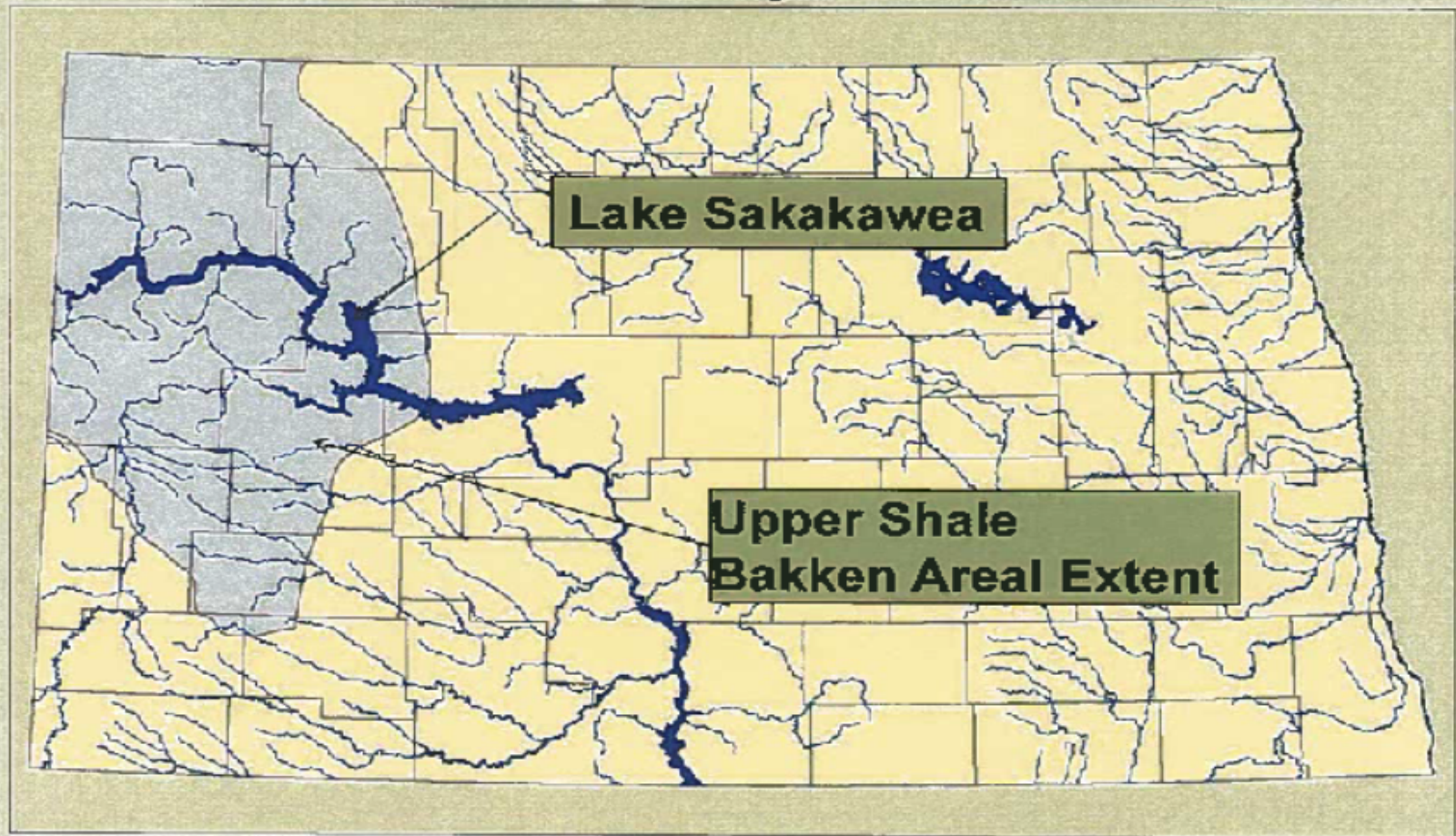
Status of Missouri Riverbed Mineral Issues

April 15, 2021

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CROWLEY | FLECK PLLP
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.
- 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.

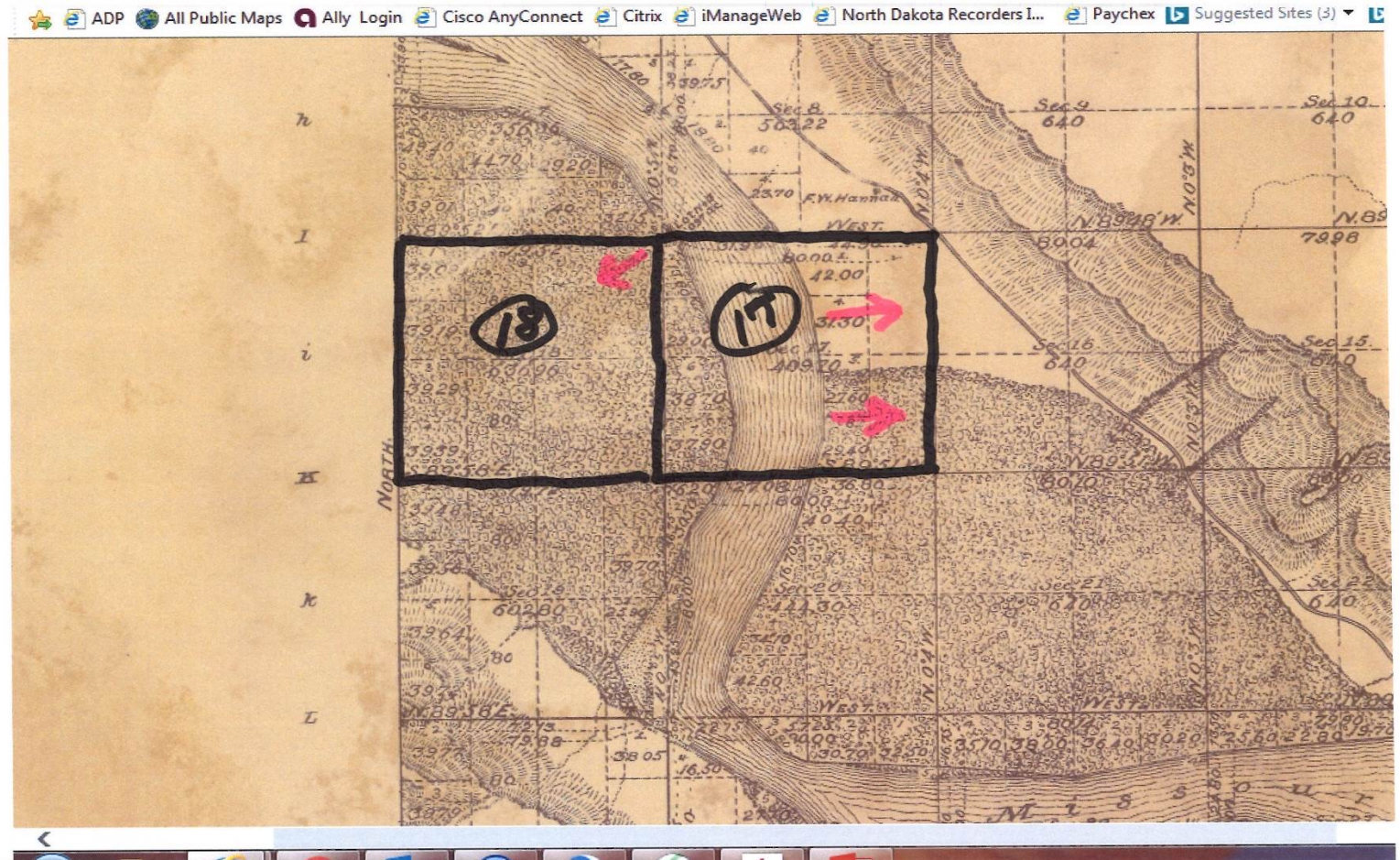
Ordinary High Water Mark

- 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).

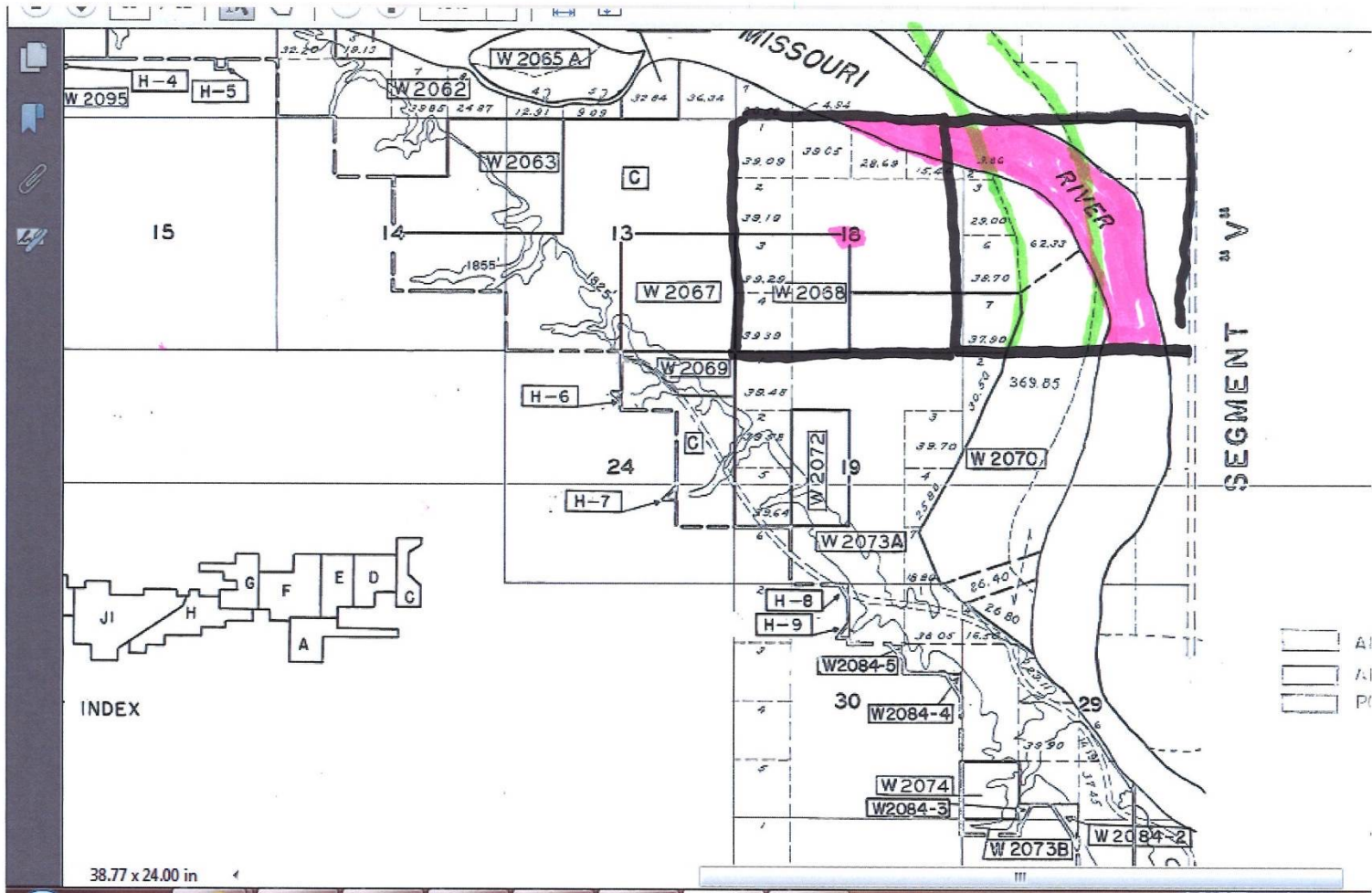
River Movement--Doctrines of Accretion, Erosion and Avulsion

- 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.

Location of River—original government survey 1896



Location of River --- Corps Survey -- 1950



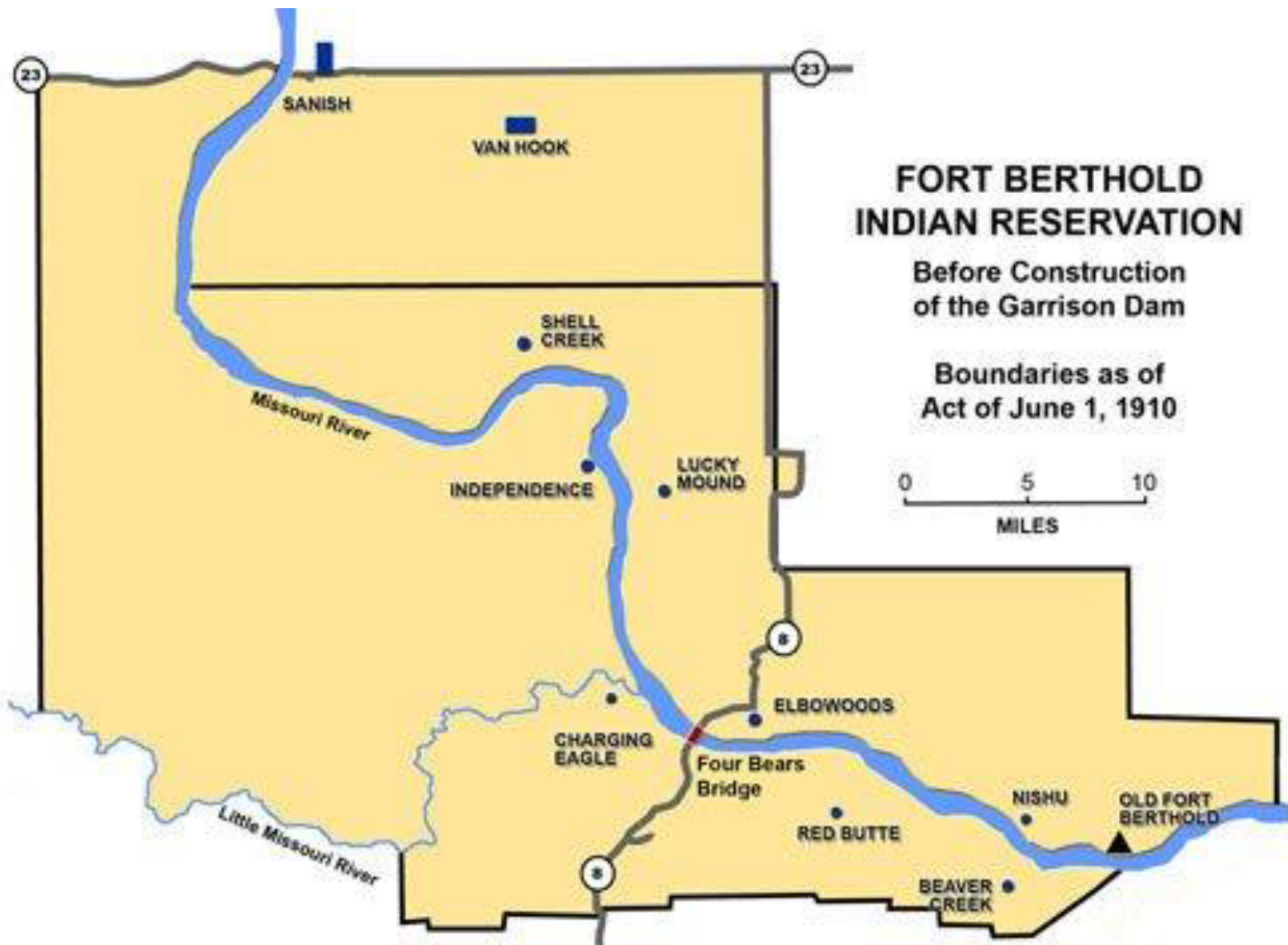
Garrison Dam/Lake Sakakawea

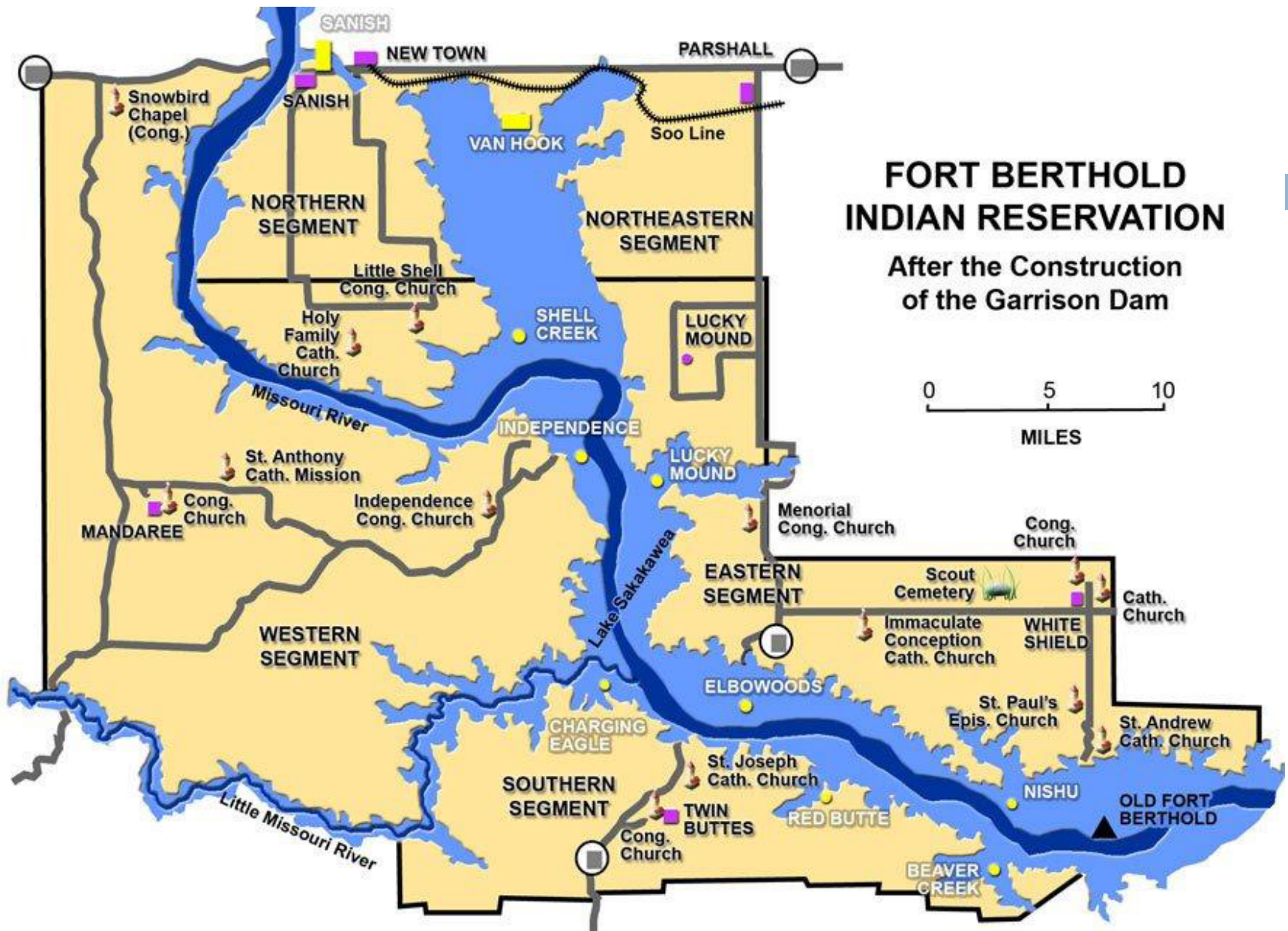
- ❑ Constructed between 1946-1954. The United States acquired 460,000 acres for the Dam project.
- ❑ The Dam formed Lake Sakakawea, the third largest manmade lake in USA--178 miles long and 364,000 acres or more depending upon Lake elevation.

Garrison Dam -----

Fort Berthold Reservation

- 156,000 acres taken including all mineral rights by Act of Congress.
- 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.





FORT BERTHOLD INDIAN RESERVATION

After the Construction
of the Garrison Dam

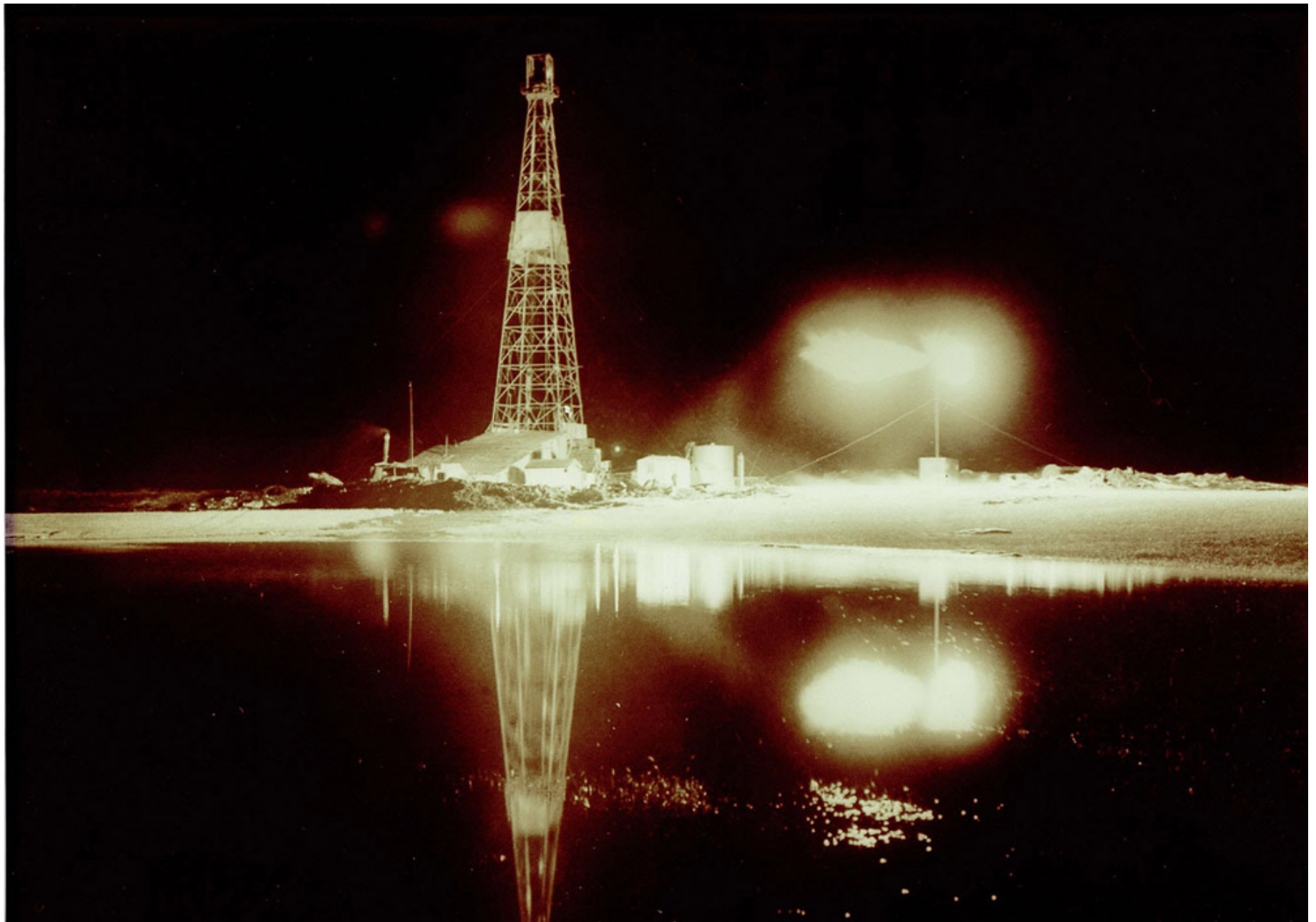
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Corps Survey

- 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, but also included on the ground work, surface inspections for land use, 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.

CHICAGO 18280-59-5-12-46-CR-707W-1
G-C-N-D-C.

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.

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

State Phase 2

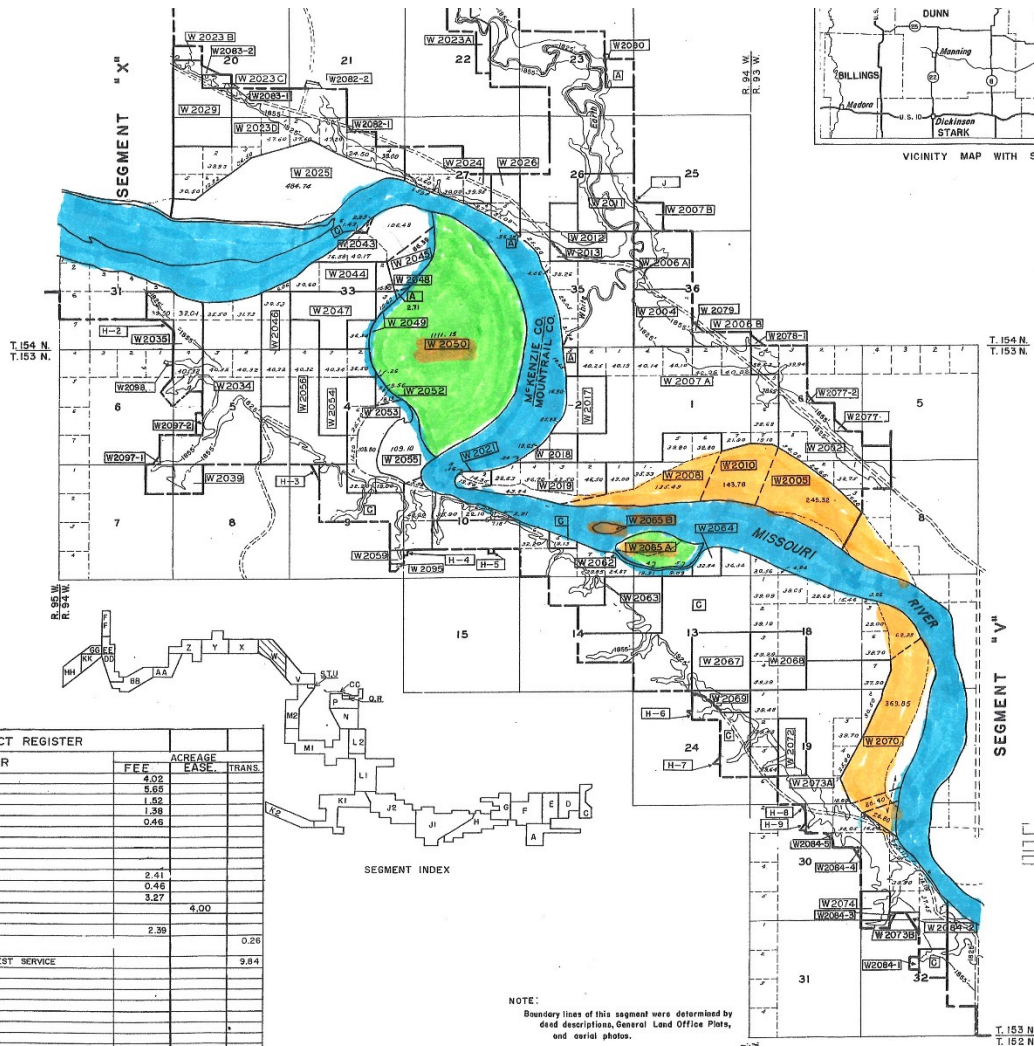
Image Landsat / Copernicus

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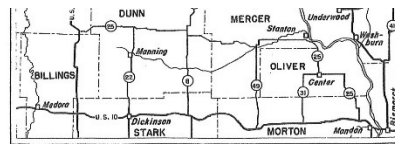
Imagery Date: 12/30/1999 48°03'11.43" N 103°45'17.96" W elev 1859 ft eye alt 19.42 mi

Disputed Accretions-overlapping state/fee leases--Islands

[illegible]

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

OFFICE, CHIEF OF ENGINEERS, WASHINGTON, D.C.
AUDITED
INSTALLATION OR PROJECT NO. C2-2-189



W 2001	CHARLES E. STEWART PARCEL 'A' 204.37 'N' 40.00	2144.37	286.62	10 MILES S
W 2002	MARIE CRAMMER			15 MILES S
A	U.S.A. DEPT. OF INTERIOR	see remarks		
W 2010	CHARLES E. STEWART	143.78		
W 2011	JOHN LARMER	160.00		
W 2012	KENNETH AUVERSON	149.85		
W 2013	ALFRED COLTON	10.15		
W 2077	NEL BARTLESON	3.44		
W 2077-1	NEAL BARTLESON	0.48		
W 2078-1	V.P. B.R. GRAZING ASSOCIATION	2.30		
W 2017	SINA B. ROGERS	122.73		
W 2018	ANDREW GUNDERSON	58.89		
W 2019	ARTHUR AUVERSON	198.07		
W 2078-2	DELETED			
W 2021	ANDREW GUNDERSON	34.07		
W 2022	DELETED			
W 2023	E.H. O'CAIN ET UX			
W 2023-1	PARCEL 'A' 62.80 'B' 20.00 'C' 20.00 'D' 886.05	664.85		
W 2024	ALFRED THOMPSON	165.14		
W 2025	E.H. O'CAIN ET UX	484.74		
W 2026	ANNE M. THOMPSON	79.85		
W 2078-3	DELETED			
W 2079	STATE OF NORTH DAKOTA, W. 1/4	1.84		
W 2089	FRANK LABAR ET UX	200.00		
W 2080	ARVINE E. OLSON AND MARION E. OLSON	0.52		
W 2081	DELETED			
W 2081-1	LEONA WACHAL WHEELLOCK ET AL	0.48		
W 2082-2	LEONA WACHAL WHEELLOCK ET AL	4.82		
MCKENZIE CO				
W 2033	DELETED			
W 2034	SARAH B. PHELPS ET AL	527.87		
W 2035	SARAH B. PHELPS ET AL	186.88		
W 2036	DELETED			
W 2083-1	ORVILLE T. THOMPSON, ET AL	0.69		
W 2039	A.L. NELSON	40.00		
W 2039-1	ORVILLE T. THOMPSON, ET AL	2.41		
W 2041	DELETED			
W 2042	DELETED			
W 2043	MRS. MARY ORTLOFF ET AL	163.23		
W 2044	RUBY L. QUALLE	116.68		
W 2045	RALPH O. VANGEN ET UX	86.39		
W 2046	ROBERT AMOS BOWYER JR. ET AL	159.85		
W 2047	JOHN A. ANDERSON	160.00		
W 2048	RALPH O. VANGEN ET UX	16.80		
W 2049	CLARENCE VANGEN ET UX	51.96		
W 2050	STATE OF NORTH DAKOTA	1111.19		
W 2051	DELETED			
W 2052	FLORENCE POOLE HITLAND ET AL	17.95		
W 2053	FLORENCE HANCOCK ET AL	236.30		
W 2054	HELGE SHEVREN	146.84		
W 2055	MILDRED HANCOCK ET AL	109.10		
W 2056	EDWIN HENDRICKSON	320.32		
W 2057	DELETED			
W 2058	DELETED			
W 2059	RUBY L. QUALLE	10.00		
W 2061	DELETED			
W 2062	BERTHA C. BENN	398.92		
W 2063	SIDNEY BENN	32.84		
W 2064	AGNES G. SKARET	200.00		
W 2065	STATE OF N.D. PARCEL 'A' 107.30 'B' 14.00	121.30		
W 2066	DELETED			
W 2067	MYRON N. RULAND	160.00		
W 2068	HELLA M. RULAND	158.09		
W 2069	MARION S. RULAND ET AL	43.00		
W 2070	BLAINE OSBURN ET UX	396.65		
W 2071	DELETED			
W 2072	HENRY AASTERUD ET AL	80.00		
W 2073	BLAINE OSBURN ET AL	107.71		
W 2074	OLE BREVIG ET UX	40.00		
W 2076	DELETED			
A	U.S.A. DEPT. OF INTERIOR	see remarks		
C	U.S.A. DEPT. OF AGR. (see remarks)		3204.59	
REMARKS				
A	Transferred 25 Feb. 1954, Public Land Order No. 1078, acreage included			
A	Under Order of signed A			
C	Transferred 10 March 1954, Executive Order No. 10520, acreage includes the parcels in Segments W.X.Y. and Z.			
	and pertain only to Segments			
covered by this Audit.				
W 2010	Formerly part of Tract No. W 2005			

DATE	BY	REVISIONS	APPROVED
5-23-69	M.M.R.	Name of Project: added transfer	
9-29-70	R.E.P.	Revised Project Name	
6-17-77	R.L.R.	Revised Tracts 2080, 2081, 2082-1, 2082-2, 2083-1	
10-11-77	R.E.B.	Revised Owner's name for Trs. W/2082-1B + 2	
1-28-78	R.L.R.	Revised Tr. 2081 to EASTMONT (HOME)	
5-3-78	F.A.L.	DELETED TR. 2087-3, ADDED TR. 2098	
12-7-78	R.G.T.	ADDED TRACT	
7-2-79	F.A.L.	DELETED TR. H. REDESIGNATED AS TR. J	

ACQUISITION AUTHORIZATION

Public Law No. 534, 22 Dec. 1944

6 th. Ind. O. C. E. to M.R.D., dated 4 May 1950

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(continued)

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DATE	BY	
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10-10-51	W.B.	Correct to
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3-13-52	W.B.	Correct to C
5-8-53	M.C.J.	Taking line etc

10-1-56	W.B.	Taking line c
		527.07 cc. @

5-25-62 HAZ. Due to Find
SECRET 24 OF

SHEET: 24

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.
- Wenck Study only determined location of OHWM. 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.
- 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.

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) provides 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 two cases were filed challenging Wenck line*



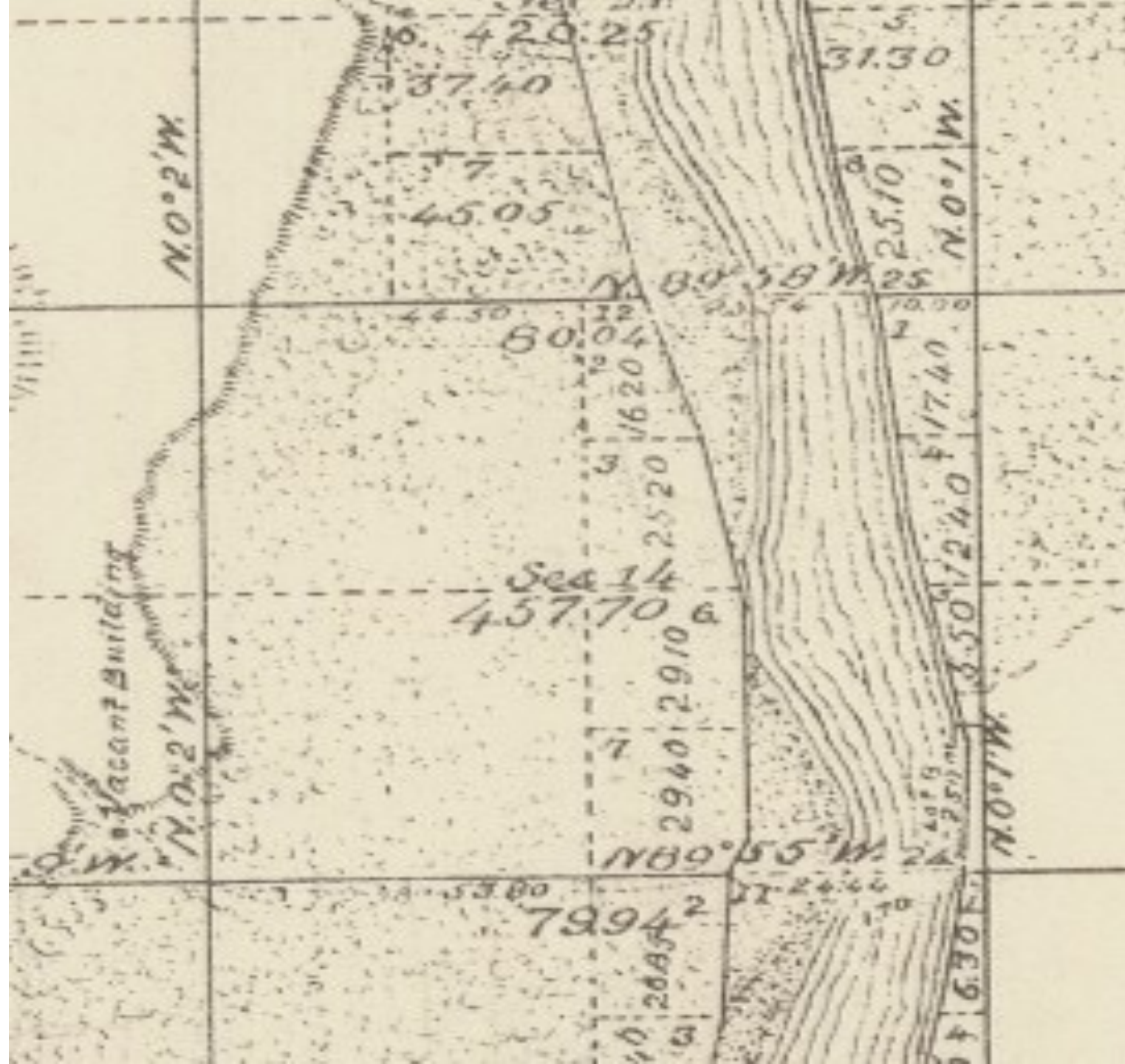
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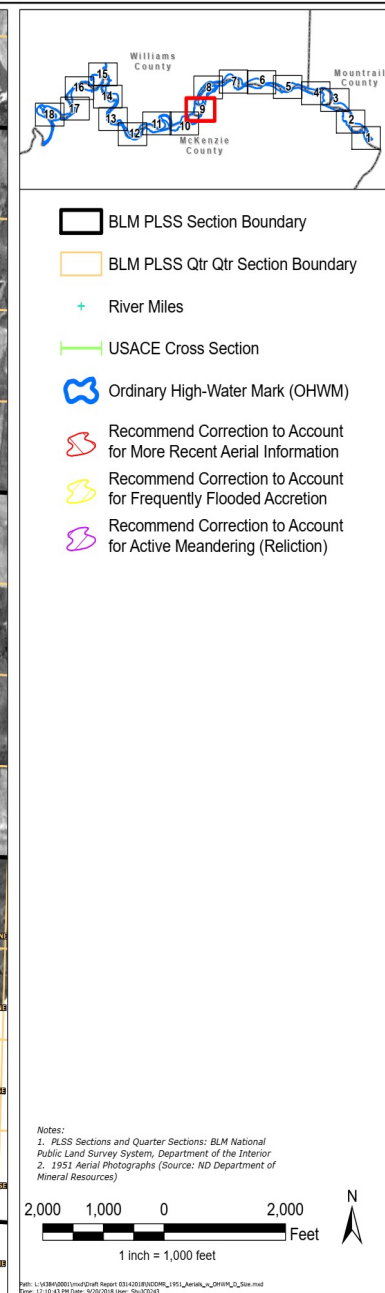
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Prepared by N.D.L.C.
Oil and Gas Division

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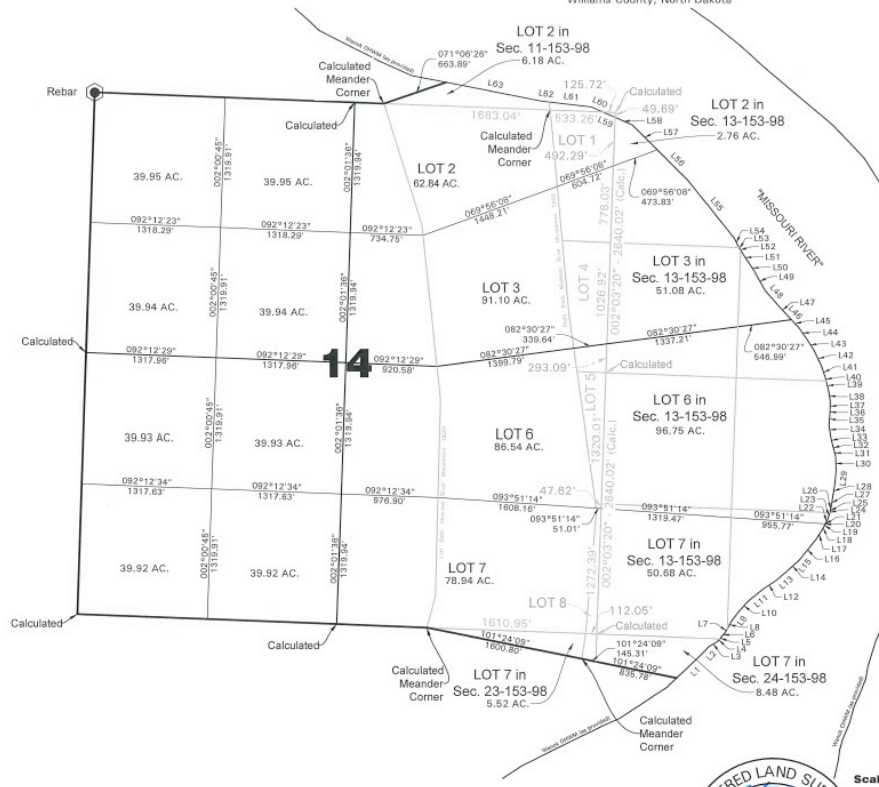






SECTION BREAKDOWN & ACREAGE CALCULATION

Section 14, T. 153 N., R. 98 W., 5th P.M.
Williams County, North Dakota

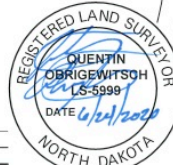


PARCEL LINE DATA			PARCEL LINE DATA		
SEGMENT	LENGTH	DIRECTION	SEGMENT	LENGTH	DIRECTION
L1	357.12'	046°29'26"	L33	109.46'	347°17'05"
L2	94.08'	041°38'01"	L34	87.37'	351°00'24"
L3	109.40'	059°45'40"	L35	129.30'	004°09'10"
L4	33.33'	039°55'14"	L36	14.44'	002°13'22"
L5	16.16'	039°55'14"	L37	102.52'	002°13'27"
L6	66.15'	039°55'15"	L38	112.33'	349°50'14"
L7	45.38'	029°26'03"	L39	97.59'	346°35'06"
L8	93.96'	029°26'03"	L40	33.81'	346°35'06"
L9	128.10'	038°05'51"	L41	113.52'	341°30'38"
L10	134.93'	042°23'08"	L42	183.61'	335°42'44"
L11	185.28'	050°59'23"	L43	145.67'	327°17'30"
L12	155.17'	056°37'35"	L44	136.66'	324°22'23"
L13	147.94'	050°27'17"	L45	108.98'	317°26'10"
L14	162.48'	047°12'50"	L46	49.32'	317°26'10"
L15	6.48'	039°33'30"	L47	169.40'	317°31'14"
L16	273.87'	039°33'46"	L48	183.72'	318°35'52"
L17	110.20'	032°00'21"	L49	211.78'	331°08'09"
L18	48.87'	027°42'29"	L50	87.65'	326°37'55"
L19	13.75'	036°18'16"	L51	172.57'	326°37'54"
L20	9.29'	014°55'56"	L52	14.10'	326°37'54"
L21	1.54'	027°42'29"	L53	21.08'	332°49'04"
L22	55.70'	027°42'29"	L54	105.82'	332°49'04"
L23	67.02'	016°21'08"	L55	754.19'	321°15'14"
L24	2.79'	016°21'08"	L56	432.65'	315°00'00"
L25	29.22'	016°21'07"	L57	356.95'	315°00'00"
L26	13.02'	016°21'12"	L58	191.21'	293°44'58"
L27	109.62'	008°14'50"	L59	135.30'	293°44'58"
L28	138.29'	009°03'31"	L60	128.71'	293°44'58"
L29	133.61'	005°48'41"	L61	433.65'	276°39'16"
L30	154.37'	358°13'36"	L62	69.75'	276°39'16"
L31	62.03'	344°34'58"	L63	987.20'	281°06'02"
L32	44.75'	344°34'54"			

NOTE:

- All corners described on this plat were found or set, if possible, in the field as shown hereon. Distances to all others are calculated. The azimuths shown on this plat are grid, based upon North Dakota State Plane, North Zone, NAD83 (2011) derived from GPS measurements. Distances shown are grid, International Feet.
- Acreage calculations for areas adjacent to the Ordinary High Water Mark are based on the line created in the "Wenck Study" pursuant to N.D.C.C. § 61-33.1-03, and adopted by the North Dakota Industrial Commission on September 27, 2018 in Order No. 29020. The determination of the OHWM from the "Wenck Study" is assumed to be correct, and is utilized as directed by ND State Trust Lands.

1/2 section line
1/2 section line
section line



Scale 1"=1000'

I, Quentin Obrigewitsch, Professional Land Surveyor, N.D. LS-5999, do hereby certify that the survey plat shown hereon was made by me, or under my direction, from notes made in the field, and the same is true and correct to the best of my knowledge and belief.

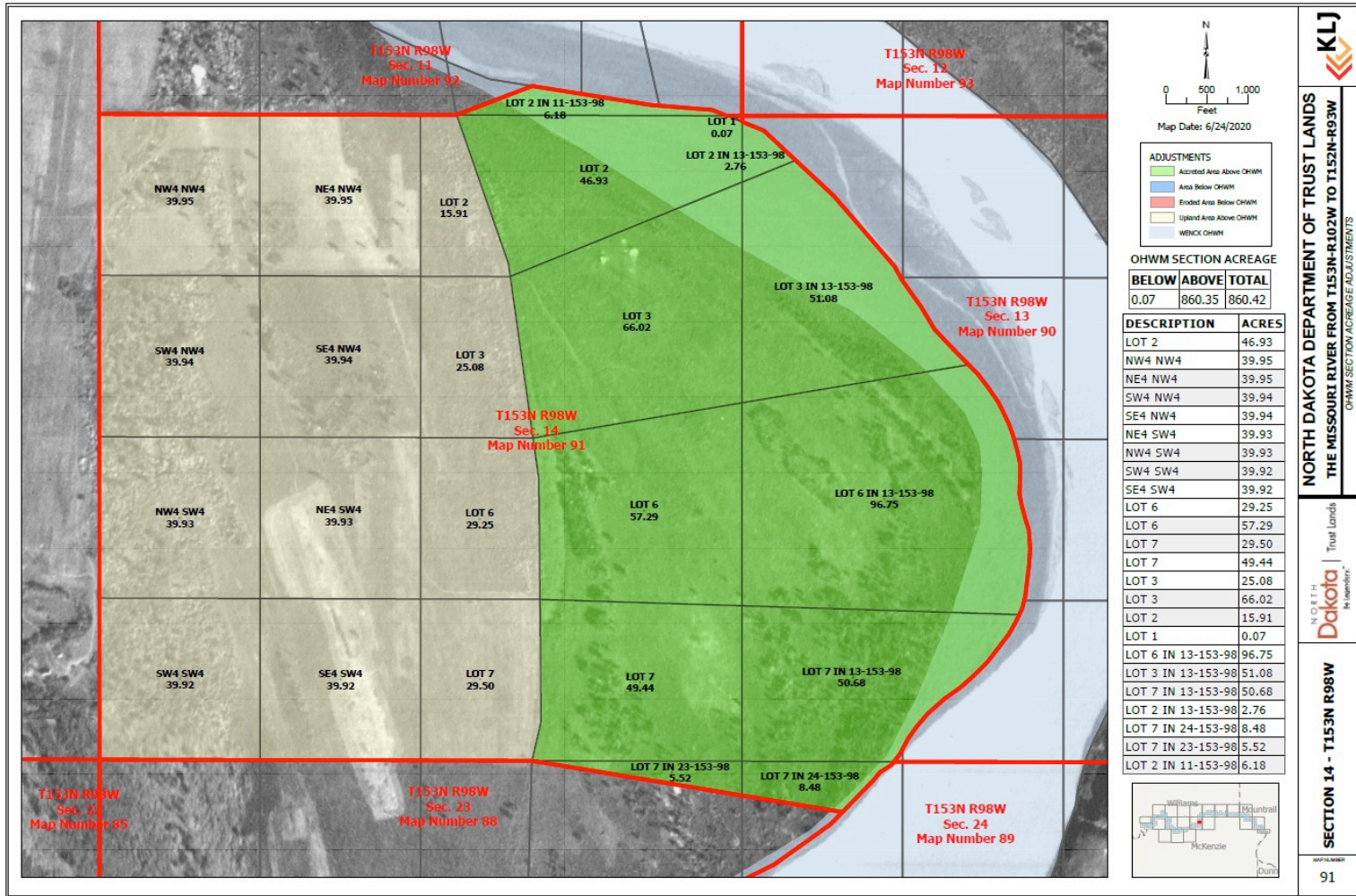
Quentin Obrigewitsch LS-5999 Date 6/24/2020

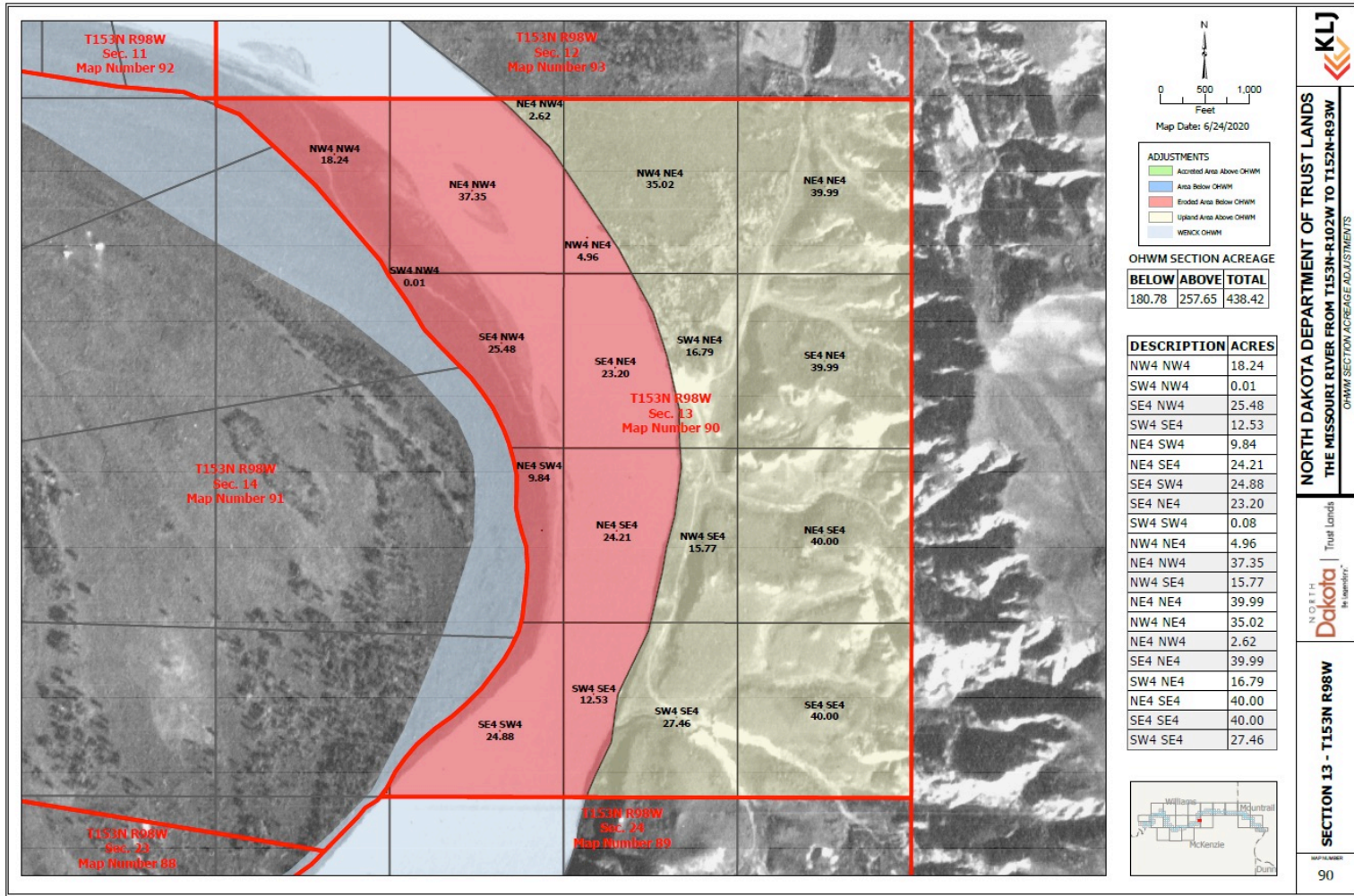


677 27th Avenue East
Dickinson, North Dakota 58601
Certificate of Authorization #C-061

Project No. 1902-00144

Date, 6/18/2020 Dr. CDW Chk'd. OO





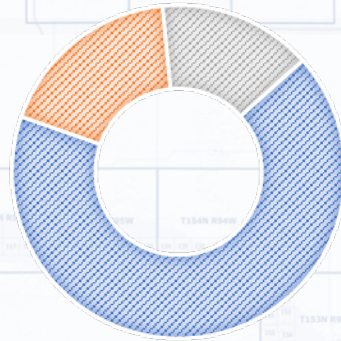
Implementation of acreage adjustments


- 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, and payment demands as may be necessary relating to state-issued oil and gas leases. **The board shall complete the adjustments, refunds, and payment demands within two years after approving the acreage determination.**
- **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].** Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline

MARCH ACREAGE ADJUSTMENT SURVEY REPORT

531

Total Leases Under Review



 Incomplete
(356)

 Reviewed (96)

STATUS OF 96 REVIEWED LEASES

64 Awaiting
Operator
Execution

9 Refund in
Process

23 Refunded
\$3,254,800 Paid
\$ 132,046 Received

Key litigation cases

- *Wilkinson v. State*, 903 N.W.2d 51 (ND 2017), *Wilkinson II*, 947 N.W.2d 910 (ND 2020).
- *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, United State District Court, Dist. of North Dakota.
- *Continental Resources v. ND Board of University and School Lands and the United States*, Civ. No. 1:17-cv-00014-DLH.
- *North Dakota v. United States Dept. of Interior*, Case No. 1:20-cv-00185, United State District Court, Dist. of North Dakota.
- *MHA Nation v. U.S. Dept. of Int.*, Case No. 1-20-cv-01919, U.S. Dist. Of Columbia.

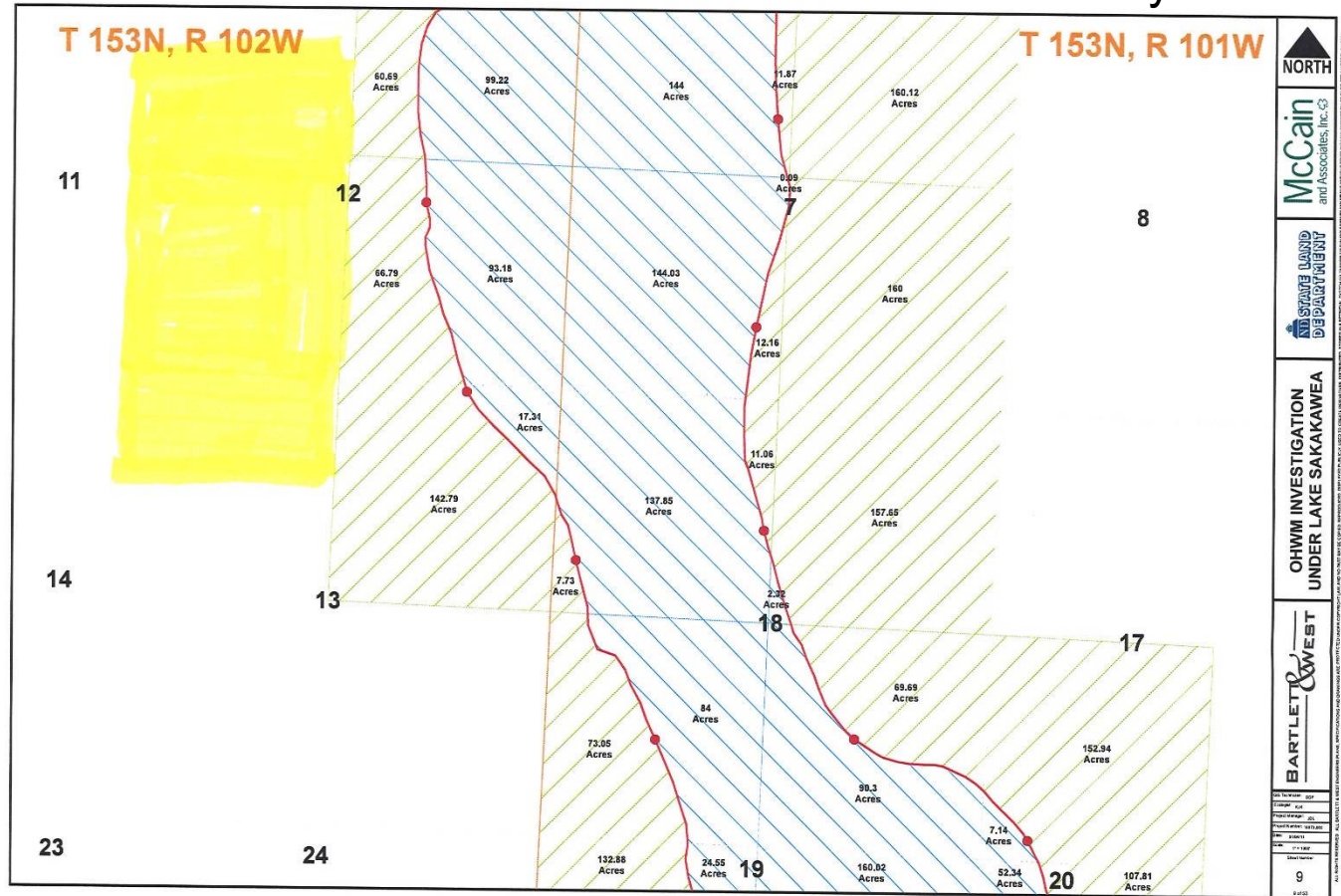
Wilkinson v. State

- *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

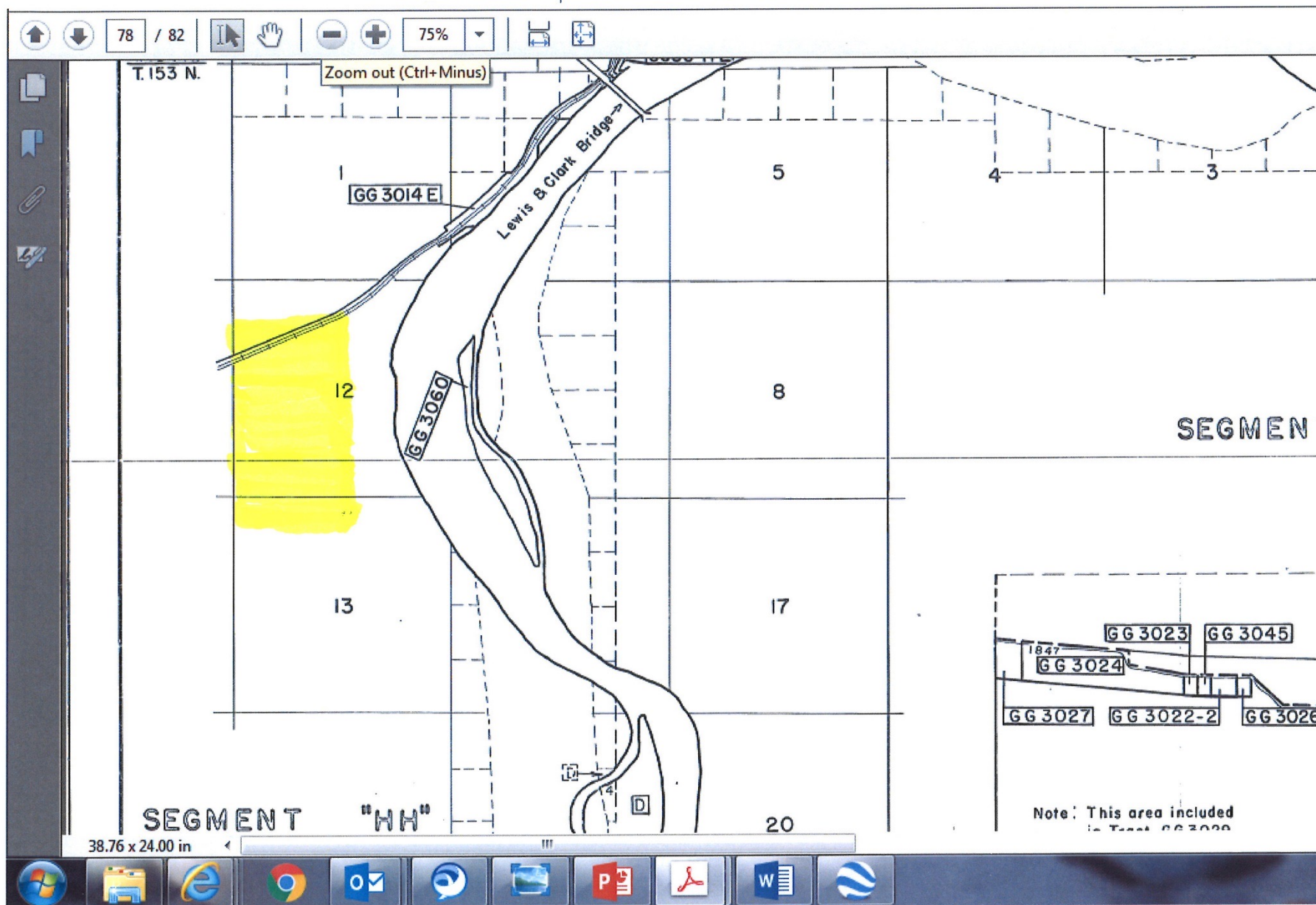
Wilkinson minerals within OHWM of Phase 1 survey (Red line OHWM)– page 1--



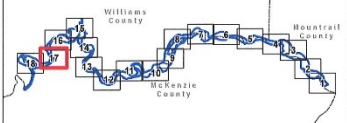
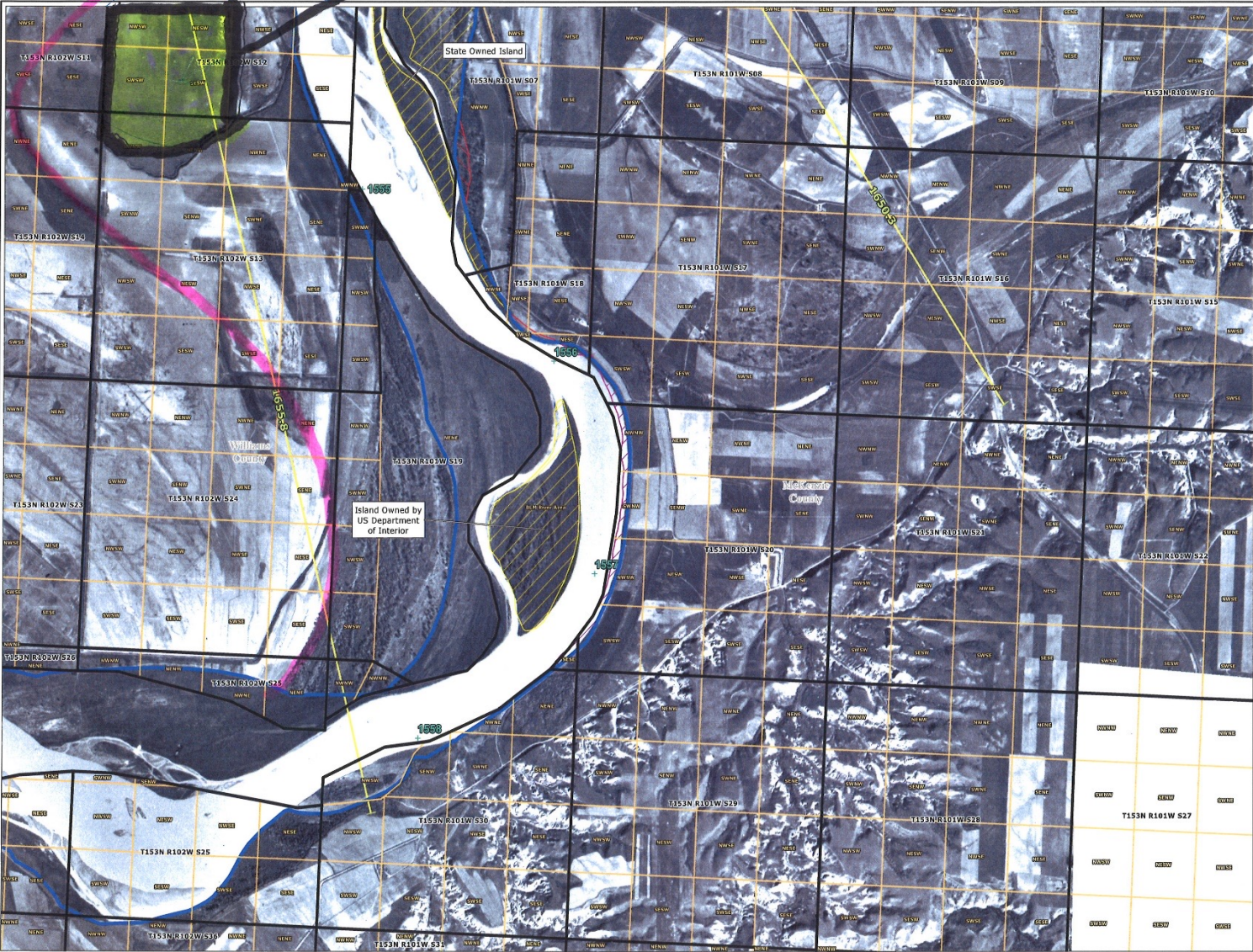
Wilkinson minerals – State Phase 2 (historical) survey— Wilkinson minerals above the Phase 2 historical survey



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

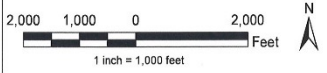


Phase 1 Wilkinson Minerals



- 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. 1551 Aerial Photographs (Source: ND Department of Mineral Resources)



NORTH DAKOTA DEPARTMENT OF MINERAL RESOURCES
 OHWM Delineation

WENCK
 Responsive partner. Exceptional outcomes.

MAR 2018
 Map 17 of 18

Wilkinson v. State

- 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 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 issues. Court trial pending to consider additional damages for takings claim.

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).
- Plaintiffs' claim is based on Corps survey and legal description from warranty deed from Plaintiff's predecessor to the United States for Garrison Dam land acquisition.
- State has filed motion to dismiss for failure to state a claim—also note Plaintiffs supported the 2017 legislation and did not appeal Wenck study as provided in Chapter 61-33.1. Motion pending.

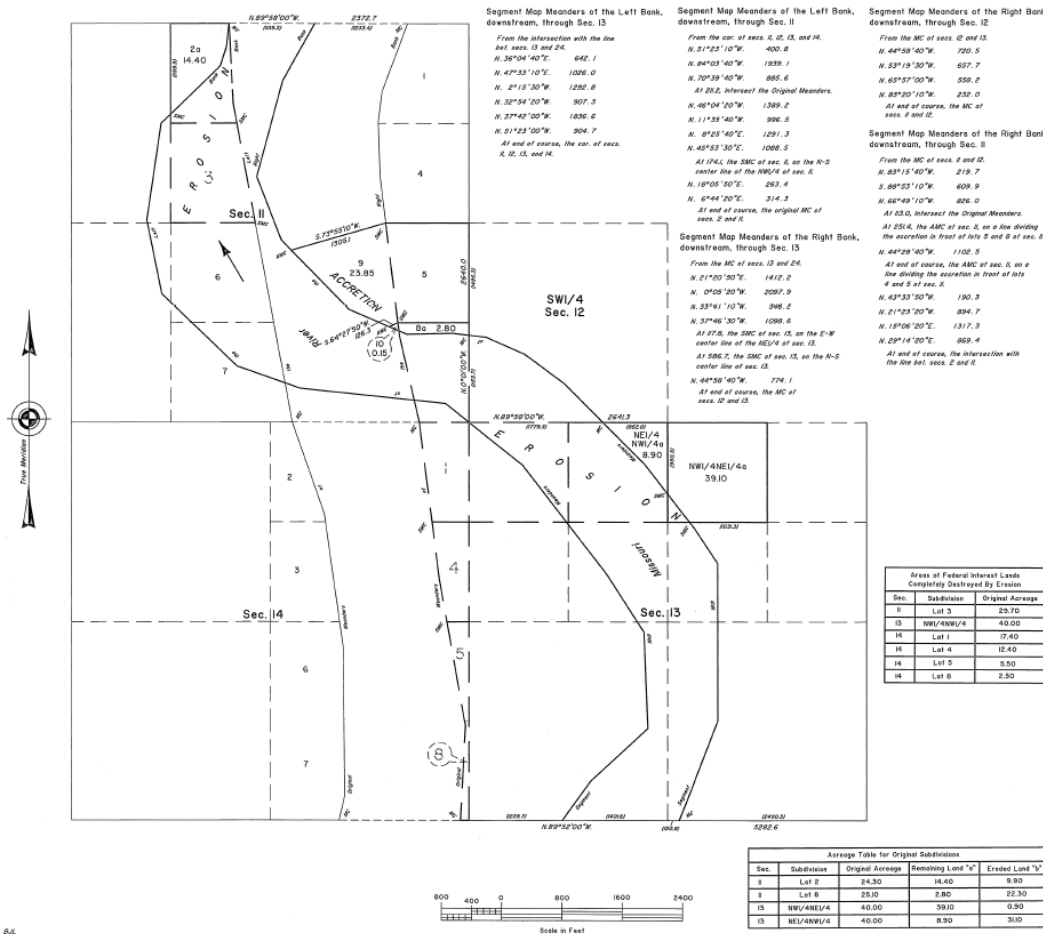
Federal vs. State minerals

- USA owns multiple small public domain (non-patented) tracts riparian to the historical Missouri River channel.
- 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



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 to 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 (GCS). 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. Kuyfender

Chief Cadastral Surveyor for North Dakota
Acting

B.L.

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 United States 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 has filed an appeal to the Eighth Circuit.
- *North Dakota v. United States Dept. of Interior*, Case No. 1:20-cv-00185, United State District Court, Dist. of North Dakota.

Ownership of Historical Missouri Riverbed on FBIR

- ☐ 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.
- ☐ U.S. Solicitor for Department of Interior under Biden administration issued an Opinion (M-37066) withdrawing the Trump Opinion.
- ☐ *MHA Nation v. U.S. Dept. of Int.*, Case No. 1-20-cv-01919, U.S. Dist. Of Columbia. (case pending).

Summary

- Full implementation of acreage and payment adjustments are complex and will take time. Not all owners will be placed in pay status at the same time and will likely extend to the full two years before all tracts are complete.
- Final resolution to most or all river issues is drawing nearer....(hopefully).

