

SPECIAL MEETING - BOARD OF UNIVERSITY AND SCHOOL LANDS

January 12, 2021 at **9:00 AM**

Microsoft Teams

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Phone Conference ID: 584 668 182#

AGENDA

➤ = **Board Action Requested**

1. **Operations – Jodi Smith**
 - A. Sorum Petition for a Writ of Certiorari – pg. 2
 - B. Energy Construction Loan Program – pg. 5
 - C. Legislative Update – pg. 7

Next Meeting Date – January 28, 2021

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

January 12, 2021

RE: Sorum Litigation
(No Action Requested)

Case: Paul Sorum, et. al. v. State of North Dakota, et. al. – Civ. No. 09-2018-CV-00089

Tribunal: Cass County District Court

Judge: John C. Irby

Attorney: Mark Hanson, Nilles Law Firm

Opposing Counsel: Terrance W. Moore, Fintan L. Dooley

Issues: The Board was named as a defendant in the above reference case which was served on January 10, 2018. Plaintiffs have filed this action to challenge the Constitutionality of S.B. 2134 passed during the last legislative session and codified as N.D.C.C. ch. 61-33.1. Under the new legislation, “[t]he state sovereign land mineral ownership of the riverbed segments inundated 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. § 61-33.1-02. S.B. 2134 established a process by which the Department of Mineral Resources is directed to procure a “qualified engineering and surveying firm” to “review the delineation of the ordinary high water mark of the corps survey segments” for the portion of the Missouri River designated as the “historical Missouri riverbed channel.” N.D.C.C. § 61-33.1-03(2), (3). Following a review process, which includes a public hearing and public comments, the North Dakota Industrial Commission must adopt final review findings which “will determine the delineation of the ordinary high water mark for the segment of the river addressed by the findings.” N.D.C.C. § 61-33.1-03(7). Plaintiffs’ complaint requests from the court a declaratory judgment finding that N.D.C.C. ch. 61-33.1 violates the Public Trust Doctrine and the Anti-Gift, Privileges and Immunities, and Local and Special Law Clauses of the North Dakota Constitution. Plaintiffs are also requesting the Court issue an injunction to prevent all state officials from further implementing and enforcing N.D.C.C. ch. 61-33.1.

History: An Answer was filed. Defendants filed a Motion to Dismiss, which was denied in April 2018. Petition for Supervisory Writ and Exercise of Original Jurisdiction was filed by Defendants and denied in May 2018. A Motion for Preliminary Injunction was brought by Plaintiffs and a hearing was held on May 21, 2018. An Order for Preliminary Injunction was filed June 26, 2018. A Scheduling Conference was held on September 6, 2018 and the following briefing deadlines were set: Summary Judgment Motions were filed October 22, 2018. Response Briefs were filed December 10, 2018. Reply Briefs were due December 21, 2018. A hearing on the Motions for Summary Judgment was held on January 4, 2019. The Order on Cross-Motions for Summary Judgment was issued on February 27, 2019, and Defendants were directed to prepare the proposed Judgment. On March 6, 2019, Defendants filed their proposed Judgment. Plaintiff’s filed a letter on March 7, 2019, advising the Court that they felt Defendants’ proposed Judgment was deficient and that they would also be submitting a proposed Judgment. Plaintiff’s proposed Judgment was filed March 8, 2019. Defendants filed a letter on March 8, 2019 advising the Court that they intended to submit a response to Plaintiffs’ proposed Judgment within 14 days. On March 19, 2019, Defendants filed an Objection to Plaintiffs’ Proposed Judgment. Thereafter, Plaintiffs filed a letter asking the Court not to rule on Defendants’

Objection until Plaintiffs have had the opportunity to be heard and further, that Plaintiffs' intend to bring a Motion for Clarification concerning retroactive royalty refunds within 14 days. Plaintiffs filed their Response to Defendants' Objection to Proposed Judgment and Request for Clarification and their Amended Proposed Order and Judgment on March 29, 2019. Defendants filed their Objection to Plaintiffs' Proposed Order and Judgment (Plaintiffs' Amended Proposed) and Reply to Plaintiffs' Response to Defendants' Objection to Proposed Judgment and Request for Clarification on April 8, 2019. On April 25, 2019, Judge Irby entered an Order for Entry of Judgment ordering the Clerk to enter Defendants' Proposed Order as the Judgment of the Court. Judgment was entered on April 26, 2019. Plaintiffs' filed a Notice of Motion for Attorney Fees, Costs, and Service Award to Plaintiffs scheduling a hearing for 1:30 p.m. June 10, 2019 in Fargo. The Notice of Entry of Order on Cross-Motions for Summary Judgment, Order for Entry of Judgment, and Judgment was filed by Defendants on May 3, 2019. On May 15, 2019, Plaintiffs filed their Motion for Attorney Fees, Costs and Service Award to Plaintiffs and the Memorandum in Support of Motion, together with supporting documents. On May 20, 2019, Plaintiffs filed their Amended Motion for Attorneys Fees, Costs and Service Award to Plaintiffs. Defendants filed an Expedited Motion for Extension of Time to Respond to Plaintiffs' Memorandum in Support of Motion for Attorney Fees, Costs and Service Award to Plaintiffs and requested the June 10, 2019 hearing be postponed. Defendants filed, with the District Court, its Response to Plaintiffs' Memorandum in Support of Motion for Attorneys Fees, Costs and Service Award to Plaintiffs on June 12, 2019. Plaintiffs' filed their Reply Memorandum in Support of Motion for Attorney Fees, Costs and Service Award to Plaintiffs on June 19, 2019. A hearing on the motion for attorneys fees was held before the District Court on July 18, 2019. The State Defendants/Appellants filed a Notice of Appeal to the North Dakota Supreme Court (Supreme Court) on June 27, 2019. Plaintiff/Appellees/Cross-Appellants filed a Notice of Cross-Appeal dated July 10, 2019. Appellants' Briefs were due to the Supreme Court on August 6, 2019. On July 18, 2019, the parties filed a Stipulation and Joint Motion for Appellate Briefing Schedule with the Supreme Court to allow for a decision to be rendered in the District Court on the issue of attorneys fees prior to the briefs being due to the Supreme Court. On July 19, 2019, the Joint Motion for Appellate Briefing Schedule was denied and an Order of Remand was entered by the Supreme Court temporarily remanding the case to the trial court for the limited purpose of consideration and disposition of Plaintiffs' Motion for Attorney Fees, Costs and Service Award to Plaintiffs. The briefing schedule for briefs before the Supreme Court is stayed pending the District Court's disposition of the attorneys fees issue. On July 24, 2019, the District Court issued its Order on Plaintiffs' Motion for Attorney Fees, awarding attorney fees to Plaintiffs' attorneys and service awards to Plaintiffs. An Amended Judgment was entered in the District Court on July 31, 2019. On August 1, 2019, State Defendants filed an Amended Notice of Appeal and the Order and Request for Transcript. Also on August 1, 2019, the Supreme Court provided its Notice of Filing Notice of Appeal. On August 7, 2019, the Amended Notice of Cross-Appeal was filed by Plaintiffs. The transcripts requested by the State Defendants of the January 4, 2019 summary judgment hearing and the July 18, 2019 hearing on attorney fees/costs/service award were filed with the North Dakota Supreme Court on October 4, 2019. In light of the filing of those transcripts, the Supreme Court's clerk has advised that the State Defendants' initial appellant brief is to be filed on November 13, 2019. Brief of Defendants, Appellants and Cross-Appellees the State of North Dakota, the Board of University and School Lands of the State of North Dakota, the North Dakota Industrial Commission, the Hon. Douglas Burgum, in his Official Capacity as Governor of the State of North Dakota, and the Hon. Wayne Stenehjem, in his Official

Capacity as Attorney General of North Dakota was filed with the Supreme Court on November 13, 2019. A Motion for Leave to File *Amicus Curiae* Brief by the North Dakota Petroleum Council in Support of the Constitutionality of N.D.C.C. ch. 61-33.1 was filed with the Supreme Court on November 13, 2019. The Supreme Court granted the North Dakota Petroleum Council's Motion for Leave to File *Amicus Curiae* Brief on November 14, 2019. Plaintiffs' brief was due to the Supreme Court on or before December 13, 2019. On December 9, 2019, Plaintiff Paul Sorum made a request to the Supreme Court for an extension to file his brief until January 29, 2020. The Supreme Court granted Plaintiff Paul Sorum's request for an extension, giving him until January 21, 2020 to file his brief. On January 29, 2020, Defendants requested an extension of time to file the reply brief until February 14, 2020, due to the amount of information that was filed in the separate briefs and appendixes. On January 30, 2020, an initial letter was issued in which the Supreme Court granted Defendants' request for an extension to file the Reply Brief until February 24, 2020. Thereafter, the Court issued a corrective letter advising reply briefs are due February 14, 2020. On February 13, 2020, Paul Sorum filed the Reply to Appellant Brief of Defense. Defendants filed the Reply Brief of Defendants, Appellants and Cross-Appellees the State of North Dakota, the Board of University and School Lands of the State of North Dakota, the North Dakota Industrial Commission, the Hon. Douglas Burgum, in his Official Capacity as Governor of the State of North Dakota, and the Hon. Wayne Stenehjem, in his Official Capacity as Attorney General of North Dakota on February 14, 2020. Oral Argument before the Supreme Court is scheduled for 1:30 p.m. on March 4, 2020. Terry Moore filed letter with the District Court on July 28, 2020, concerning issue of injunction and release of funds. On July 29, 2020, the District Court issued a Notice of Hearing scheduling a hearing on Terry Moore's July 28, 2020 letter for August 17 at 1:30 p.m. On July 30, 2020, the North Dakota Supreme Court issued its Opinion. On July 31, 2020, Mark Hanson filed a letter with the District Court advising of the issuance of the North Dakota Supreme Court Opinion and requesting cancellation of the August 17 hearing. That hearing was cancelled. The Supreme Court's Opinion was amended on August 4, 2020, and on August 18, 2020. Neither amendment was substantive. Terrance Moore filed with the Supreme Court the Plaintiffs, Appellees, and Cross-Appellants Marvin Nelson, Michael Coachman, Charles Tuttle and Lisa Omlid's Petition for Rehearing on August 12, 2020. On September 22, 2020, the North Dakota Supreme Court entered an order denying the petition for rehearing.

**Current
Status:**

- **On January 5, 2021, Plaintiffs' Petition for a Writ of Certiorari was docketed with the United States Supreme Court.**

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

January 12, 2021

**RE: Energy Construction Loan Program
(No Action Requested)**

At the October 30, 2008 meeting the Board of University and School Lands (Board) approved allocating \$20 million within the Common Schools Trust Fund (CSTF) to an oil impact area construction loan program called the Common Schools Trust Fund Loan Program. The guidelines or principles that were used to administer the program are as follows:

- The Board would participate with North Dakota financial institutions in up to 50% of a first mortgage on any property financed, with a maximum per property of \$2.0 million.
- For ease of administration, all loans made through this program would be funded by the CSTF.
- Loans would be made at current prevailing market rates, with the Board receiving terms and conditions at least as advantageous as other participating financial institutions.
- Loans would be amortized over 20 years, or less.
- Loans would be made only for new construction projects, not the purchase of existing properties.
- Normal lender credit underwriting standards such as loan-to-collateral values, full loan documentation, certified or licensed appraisals, and the requirement for personal guarantees when appropriate would apply.
- The Commissioner and staff will review each loan request with the Bank of North Dakota (BND) and must give final approval to each loan made through the program.

In 2011, the name of the program was changed from the Common Schools Trust Fund Loan Program to the Energy Construction Loan Program (ECLP) and ECLP encompassed the Common Schools Trust Fund Loan Program and loans such as the Williston hotel. All loans approved from the ECLP are funded through by the CSTF.

On June 21, 2011, the Acting Commissioner entered into a Master Participation Agreement with BND outlining the provisions of the governing and control of all loan participations subsequently entered into between BND and the Board.

Per the Department of Trust Lands' (Department) Audited Financial Statements for the year ended June 30, 2020, NOTE 10 – ENERGY CONSTRUCTION LOAN PROGRAM:

The Board approved participation in an energy construction loan program with the BND for the purpose of new construction loans in areas of North Dakota impacted by oil development. The primary focus of the loan program is for multi-family housing and commercial loans. The Board will participate in up to 50% of a first mortgage at market rates: loans must be amortized over 20 years or less. The Board authorized the Commissioner to allocate up to \$20,000,000 to this program. The Common Schools Trust Fund is the only trust participating in this program.

The loan program meets the “exclusive benefit” rule, whereby any investment decision made must be for the sole benefit of the Common School Trust fund. The loan program is administered by the BND who charges an annual fee of one-quarter percent on all outstanding loans.

As of June 30, 2020, the non-current and current portions of the loans were \$892,811 and \$30,597, respectively. As of June 30, 2019, the non-current and current portions of the loans were \$948,850 and \$30,597, respectively.

As of June 30, 2020, and 2019 the program had a net position of \$941,672 and \$1,005,399 respectively. For the same period, the program earned net income of \$46,273 and \$46,810.

Additionally, unaudited updates on the ECLP are provided in the monthly Financial Position. At the December 2020 Board meeting, the Board was provided with the September 2020 Financial Position:

| Board of University and School Lands | | |
|---|---------------------------|---------------------------|
| Comparative Financial Position (Unaudited) | | |
| Combined Permanent Trusts | | |
| | September 30, 2020 | September 30, 2019 |
| Balance Sheet | | |
| Assets: | | |
| Cash | \$69,975,624 | \$44,774,503 |
| Interest Receivable | 8,464,117 | 9,797,462 |
| Investments | 4,964,690,991 | 4,847,698,410 |
| Farm Loans | 6,912,781 | 8,959,194 |
| Energy Construction Loans | 923,408 | 956,223 |
| Due from Other Agencies | 9,169,502 | 17,474,357 |
| Office Building (Net of Depreciation) | 351,435 | 414,051 |
| Total Assets | \$5,060,487,858 | \$4,930,074,200 |
| Liabilities: | | |
| Unclaimed Property Claimant Liability | \$16,645,538 | \$16,551,604 |
| Due to Other Trusts | - | - |
| Due to Other Funds | 30,154 | 36,854 |
| Accounts Payable | - | - |
| Total Liabilities | 16,675,692 | 16,588,458 |
| Equity: | | |
| Fund Balance | 4,892,120,248 | 4,919,177,984 |
| Net Income/(Loss) | 151,691,918 | (5,692,242) |
| Total Liabilities and Equity | 5,060,487,858 | \$4,930,074,200 |

Over the history of ECLP, four loans were approved for a total funding amount of approximately \$22.3 Million. There is a 5% return on these loans since inception (as of November 30, 2020). Currently, the Board has two outstanding loans that were issued through the ECLP:

| Name | Payment Frequency | Payment Amount | Original Loan | Remaining Balance |
|--------------------------|--------------------------|-----------------------|----------------------|--------------------------|
| LSS Housing Parshall LLC | Semi-Annual | \$25,969 | \$625,000 | \$425,034 |
| Bakken Heights V LLP | Monthly | \$4,627 | \$707,477 | \$496,314 |

In December 2020, BND notified the Department that the LLS Housing Parshall LLC loan was in default. The Department is currently working with BND to monitor the loan and work with all creditors involved.

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

January 12, 2021

RE: Legislative Update
(No Action Requested)

| BILL | TITLE | FN PROVIDED | COMMITTEE | STATUS | | |
|-------------------------|--|-------------|----------------------------|------------|------------|----------|
| | | | | House | Senate | Governor |
| SB 2013 | A BILL for an Act to provide an appropriation for defraying the expenses of the commissioner of university and school lands; and to provide for distributions from permanent funds. | | Appropriations | | Introduced | |
| HB 1081 | Relating to authority of the game and fish department employees to enforce laws. | | Energy & Natural Resources | Introduced | | |
| SB 2048 | Revised Uniform Unclaimed Property Act | Yes | Industry, Business & Labor | | Introduced | |
| HB 1080 | Relating to the obligation to pay oil and gas royalties on leases owned and managed by the board of university and school lands. | Yes | Finance & Taxation | Introduced | | |
| SB 2065 | Relating to the jurisdiction of the industrial commission to regulate the permitting and amalgamation of the underground storage of oil and gas. | | Energy & Natural Resources | | Introduced | |
| SB 2070 | Relating to the regulated substance response; to amend and reenact sections 11-33-01, 40-47-01, and 58-03-11 of the North Dakota Century Code, relating to the regulated substance response; and to repeal sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century Code, relating to contaminated properties. | | Energy & Natural Resources | | Introduced | |

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

January 12, 2021

RE: Legislative Update
(No Action Requested)

| | | | | | | |
|-------------------------|---|--|--|------------|--|--|
| HB 1202 | Relating to funds managed by the state investment board and the investments of the board of university and school lands | | | Introduced | | |
|-------------------------|---|--|--|------------|--|--|