

BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021 at 9:00 AM

[Join Microsoft Teams Meeting](#)

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Conference ID: 218 429 019#

AGENDA

➤ = **Board Action Requested**

1. **Approval of Meeting Minutes – Jodi Smith**

Consideration of Approval of Land Board Meeting Minutes by voice vote.

➤ A. February 25, 2021 – pg. 2

2. **Reports – Jodi Smith**

A. February Report of Encumbrances – pg. 16

B. February Unclaimed Property Report – pg. 18

C. Energy Infrastructure and Impact Office Quarterly Report – pg. 19

D. December Financial Position – pg. 20

E. Investments Update – pg. 29

F. Acreage Adjustment Report – pg. 30

G. Legislative Update – pg. 31

3. **Litigation – Jodi Smith**

➤ A. United States Department of Interior M-37056 – pg. 35

➤ **Executive session under the authority of NDCC §§ 44-04-19.1 and 44-04-19.2 for attorney consultation with the Board's attorneys to discuss:**

- **Legislative Update**

- **United States Department of Interior M-37056**

Next Meeting Date – April 29, 2021

**Minutes of the Meeting of the
Board of University and School Lands
February 25, 2021**

The February 25, 2021 meeting of the Board of University and School Lands was called to order at 9:03 AM via Microsoft Teams by Chairman Doug Burgum. All meeting attendees were via Microsoft Teams.

Members Present:

Doug Burgum	Governor
Alvin A. Jaeger	Secretary of State
Wayne Stenehjelm	Attorney General
Thomas Beadle	State Treasurer
Kirsten Baesler	Superintendent of Public Instruction

Department of Trust Lands Personnel present:

Jodi Smith	Commissioner
Dennis Chua	Investment Analyst
Christopher Dingwall	Mineral Title Specialist
Susan Dollinger	Unclaimed Property
Scott Giere	Revenue Compliance Auditor
Peggy Gudvangen	Accounting Division Director
Roman Knudsvig	Department Intern
Kristie McCusker	Paralegal
Catelin Newell	Administrative Staff Officer
Adam Otteson	Revenue Compliance Director
Rick Owings	EIIO Grants Administrator
Michael Shackelford	Investments Director
David Shipman	Minerals Division Director
Lynn Spencer	Mineral Title Specialist
James Wald	Legal Council

Guests in Attendance:

Dave Garner	Office of the Attorney General
Leslie Bakken Oliver	Governor's Legal Counsel
Reice Haase	Office of the Governor

Additional Guests in Attendance:

Brady Pelton (NDPC)
Josh Kevan (RVK)
Louis Bennett
Robert Lukens
Ron Nesslies
Shane Goettle
Adam Willis

A P P R O V A L O F M I N U T E S

A motion to approve the minutes of the January 28, 2021 regular meeting and the February 2, 2021 special meeting was made by Secretary Alvin Jaeger and seconded by Treasurer Thomas Beadle and the motion carried unanimously on a voice vote.

R E P O R T S

Extension Report

In January 2020, North Dakota Administrative Code § 85-06-01-06 was enacted. It provides the petroleum industry the option to request an extension of their lease.

Northern Oil and Gas, Inc. of Minnetonka, Minnesota received a six-month extension on four leases in Section 28-154N-96W, McKenzie County. They have a permit to drill the Kestrel 154-96-33-28-1H Well.

Ninepoint Energy, LLC of Denver, Colorado received a six-month extension on two leases in Section 4-152N-103W, Williams County. They have a permit to drill the Missouri W 152-103-4-8-13H Well.

Summary of Oil and Gas Lease Auction

On behalf of the Board of University and School Lands (Board), the Department of Trust Lands conducted an oil and gas lease auction on www.energynet.com which concluded on February 2, 2021.

There were 6 tracts offered, and all received competitive bids (if the Board does not receive a competitive bid, the lease is awarded to the nominator). The highest bid per acre was \$130.00 (\$10,272.60 for 79.02 acres) in Burke County. Half of the tracts offered benefit the Common Schools Trust Fund, and the other half benefit the Strategic Investment and Improvements Fund (SIIF).

County	Tracts/County	Net Mineral Acres	Total Bonus	Average Bonus/Acre
Burke	3	239.02	\$27,472.60	\$115.00
McKenzie	3	480.00	\$13,280.00	\$27.67
GRAND TOTAL	6	719.02	\$ 40,752.60	\$71.33

There was a total of 7 bidders who submitted 50 bids on the 6 tracts. The bidders were from 6 states (ND, CO, MN, MT, TX and WY).

A total of \$40,752.60 of bonus was collected from the auction.

January 2021 Report of Encumbrances Issued by Land Commissioner

Granted to: ONEOK ROCKIES MIDSTREAM LLC, SIDNEY-MT
 For the Purpose of: Easement: Drop Line-Gas Gathering Pipeline
 Right-of-Way Number: RW0008793
 Trust: A – Common Schools
 Legal Description: MCK-150-98-36-SW4

Granted to: SELECT ENERGY SERVICES LLC, WILLISTON-ND
 For the Purpose of: Permit: Temporary Water Layflat Line
 Right-of-Way Number: RW0008814
 Trust: A – Common Schools
 Legal Description: MCK-152-95-16-NE4

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Granted to:	ND GAME & FISH DEPT, BISMARCK-ND
For the Purpose of:	Aggr. Lease: Borrow
Right-of-Way Number:	RW0008802
Trust:	I – Youth Correctional Center
Legal Description:	LOG-136-71-4-LOT 2

January Unclaimed Property Report

Unclaimed property is all property held, issued, or owing in the ordinary course of a holder's business that has remained unclaimed by the owner for more than the established time frame for the type of property. It can include checks, unpaid wages, stocks, amounts payable under the terms of insurance policies, contents of safe deposit boxes, etc.

An owner is a person or entity having a legal or equitable interest in property subject to the unclaimed property law. A holder can include a bank, insurance company, hospital, utility company, retailer, local government, etc.

Since 1975, the Unclaimed Property Division (Division) of the Department of Trust Lands has been responsible for reuniting individuals with property presumed abandoned. The Division acts as custodian of the unclaimed property received from holders. The property is held in trust in perpetuity by the State and funds are deposited in the Common Schools Trust Fund. The 1981 Uniform Unclaimed Property Act created by the national Uniform Law Commission was adopted by the State in 1985.

For the month of January 2021, the Division received 29 holder reports with a property value of \$432,770 and paid 510 claims with a total value of \$626,691.

Since inception in 1975, the Board has received \$183,571,178 and paid \$76,445,164 in claims. Currently, there is \$107,126,013 maintained by the Board of University and School Lands from Unclaimed Property, the revenue earned from these funds benefits the Common Schools Trust Fund.

The Financial Report (Unaudited) for period ending November 30, 2020 was presented to the Board for review and is available at the Department upon request.

Investment Updates

Portfolio Rebalancing Updates

The Department of Trust Lands (Department) staff and RVK continue to monitor the trigger points set for the remaining Harvest MLP in the Diversified Inflation Strategies (DIS) and will complete the liquidation when appropriate.

ARES Pathfinder Fund LP made an initial capital call on February 3, 2021, for \$6.2M of the \$100M commitment.

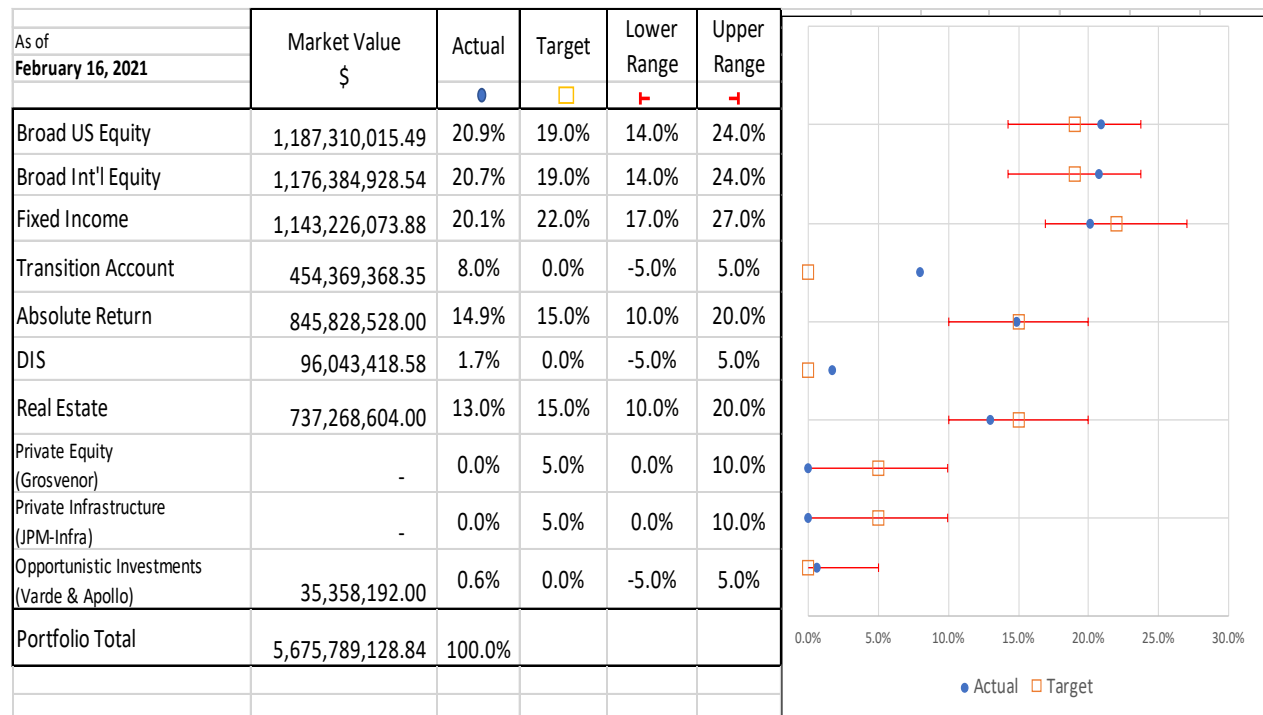
Varde Dislocation Fund IV LP, Opportunistic Investment, made a capital call on February 17, 2021, for \$12.5M. With the funding this brings the cumulative capital drawn to \$37.5M with remaining unfunded commitment is now at \$62.5M.

Apollo Accord Fund IV LP (Fund), Opportunistic Investment, has a remaining unfunded commitment totaling \$94.5M.

The Department staff have executed the agreements for GCM Grosvenor (Private Equity Manager), JP Morgan (Private Infrastructure Manager), ARES Pathfinder Fund LP (Asset-Focused Credit), Angelo Gordon, and JPM Core Bond. Still under review is the Loomis & Sayles Multi-Sector agreement.

Asset Allocation

The table below shows the status of the permanent trusts' asset allocation as of Feb. 16, 2021. The figures provided are unaudited.



Upcoming Investment Manager Meetings

There is no upcoming meeting scheduled.

Legislative Update

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
HB 1031	Relating to legislative management studies of state agency fees.	Legislative Management	Gov't & Veterans Affairs	PASSED	Introduced 02-12-2021 10:00 AM	
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.	Rep. Dockter	Finance & Taxation	PASSED	Introduced Ref – Eng and Nat Resources	

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BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
HB 1081	Relating to access to and activities on trust lands; and to provide a penalty.	Rep. Zubke	Energy & Natural Resources	PASSED		
HB 1322	Relating to the attorney general's review of proposed administrative rules and the authority of the administrative rules committee to object to or void an administrative rule.	Rep. B. Koppelman, K. Koppelman, Pyle, D. Ruby, Steiner Sen. Burckhard, Clemens, Lemm, Meyer, J. Roers	Judiciary	DEFEATED		
HB 1340	Relating to prohibiting entry onto private land without permission	Rep. Simons, Ertelt, Hoverson, Jones, Kempenich, Magrum, Skroch Sen. Heitkamp, Hogue	Judiciary	DEFEATED		
HB 1349	Relating to open record and meeting laws	Rep. Devlin, Karls Sen. Dwyer, Lee, Oban	Political Subdivisions	PASSED		
HB 1358	Relating to oil and gas tax revenue hedging	Rep. Kempenich, Christensen, Mock, Steiner, Trottier Sen. Bekkedahl, Dwyer, Schaible	Finance & Taxation	PASSED		
HB 1392	Relating to the duration of school and public land leases.	Rep. Schatz, Brandenburg, Christensen, D. Johnson, Kempenich, Longmuir, Monson, Simons Sen. Anderson, Elkin, Erbele	Government & Veterans Affairs	DEFEATED		

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	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	Appropriations	Appropriations – 03/05	PASSED	
SB 2036	A BILL for an Act to provide for a legislative management study regarding access to lands and electronic posting.	Legislative Management	Energy & Natural Resources	Received - 01/19	PASSED	
SB 2048	Revised Uniform Unclaimed Property Act	Industry, Business and Labor	Industry, Business & Labor	Judiciary – 03/03	PASSED	
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	Energy & Natural Resources	Received - 02/09	PASSED	
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	Energy & Natural Resources	Received - 02/12	PASSED	

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
SB 2144	Relating to criminal trespass and electronic posting; and to provide a penalty.	Sen. Erbele, Patten, Bell Rep. Damschen, Dobervich, Tveit	Finance & Taxation	Received - 01/19	PASSED	
SB 2191	Relating to the disposal of abandoned personal property	Sen. Holmberg	Political Subdivisions	Received - 02/02	PASSED	
SB 2217	Relating to oil and gas royalty leases, negative royalties, and arm's length transactions; and to provide a penalty	Sen. Bekkedahl, Dwyer, Kannianen Rep. Brandenburg, Kempenich, Zubke	Finance & Taxation	Received - 02/22	PASSED	
SB 2282	Relating to membership of the board of university and school lands	Sen. Schaible, Klein, Luick Rep. D. Johnson, Schmidt	Government & Veterans Affairs	Received - 02/18	PASSED	
SB 2291	Relating to social investments made by the state investment board and the boycott of energy or commodities companies	Sen. Bell	Energy & Natural Resources	Received - 02/18	PASSED	
SB 2317	Relating to a coal mine performance bonding pilot program and the authority of the Bank of North Dakota; and to provide for an energy development and transmission committee report	Sen. Bell Rep. Porter	Energy & Natural Resources	Received - 02/17	PASSED	
SB 2319	Relating to oil and gas agreements; and to provide an effective date	Sen. Kannianen	Finance & Taxation	Received = 02/23	PASSED	
HCR 3016	Relating to the membership of the board of university and school lands	Rep. Schmidt, D. Anderson, Brandenburg, D. Johnson,	Government & Veterans Affairs	DEFEATED		

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
		Kempenich, Schatz, Weisz Sen. Klein, Luick, Myrdal, Vedaa				
SCR 4007	Relating to the membership of the board of university and school lands	Sen. Schaible, Klein, Luick Rep. D. Johnson, Schmidt	Government & Veterans Affairs	Received – 02/18	PASSED	
SCR 4013	A concurrent resolution urging Congress to pass the North Dakota Trust Lands Completion Act.	Sen Marcellais, Heckaman, Kannianen, Schaible Rep. Trottier	Energy & Natural Resources	Received – 02/23	PASSED	

I N V E S T M E N T S

March Investment Reports – 4th Quarter 2020

Josh Kevan from RVK reviewed the performance of the Board of University and School Land's (Board) investment program for the period ending December 31, 2020 and discuss current market conditions.

The first report reviewed was prepared by RVK to enable the Board to monitor and evaluate the collective performance of the permanent trusts' investments and the performance of individual managers within the program. In order to provide an overview of the program and highlight critical information, an executive summary has been incorporated into the Board report.

Next, Josh presented on the performance of the Ultra-Short portfolio in which the Strategic Investment and Improvements Fund, the Coal Development Trust Fund and the Capitol Building Fund are invested.

The following items were presented to the Board and are available at the Department upon request: RVK Permanent Trust Fund Performance Analysis Report and RVK Ultra-short Performance Report.

L I T I G A T I O N

Sorum Litigation

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
(02/25/21)

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,

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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, 2019 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. On January 5, 2021, Plaintiffs’ Petition for a Writ of Certiorari was docketed with the United States Supreme Court.

Current Status:

- **On February 22, 2021, Plaintiffs’ Petition for a Writ of Certiorari was denied.**

Continental Resources, Inc. - Interpleader

Case: **Continental Resources, Inc. v. North Dakota Board of University and School Lands, et al., Case No. 1:17-cv-00014**

Date Filed: **December 23, 2016**

Court: **Federal District Court, 8th Circuit**

Judge: **Honorable Daniel Hovland**

Attorney: **Charles Carvell, David Garner, and Jen Verleger**

Opposing Counsel: **Lawrence Bender, David Ogden, Paul Wolfson, Shaun Pettigrew**

Issues: In December 2016, Continental Resources, Inc. (Continental) brought an interpleader action against the Board of University and School Lands and the United States regarding certain public domain lands underlying Continental operated wells located in McKenzie, Mountrail, and Williams Counties. This case involves a disagreement between the State and United States over the location of the ordinary high watermark—and consequently title to underlying minerals—on federally owned land along the now inundated historic Missouri River. Continental is requesting the

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Court determine title to the disputed lands so that Continental can correctly distribute the proceeds from the affected wells. Continental has claimed that there is “great doubt as to which Defendant is entitled to be paid royalties related to the Disputed Lands.” Currently, Continental is paying the United States its full royalty based on the acreage it claims. The remaining royalty, over and above what is due the United States, is being escrowed with the Bank of North Dakota.

History: The United States removed this action to federal district court on January 11, 2017. The Board filed its answer to the complaint on February 13, 2017. The United States filed its answer to the complaint on May 12, 2017. An Amended Complaint was filed by Continental Resources on September 14, 2017. The United States filed a Motion to Dismiss for Lack of Subject Matter Jurisdiction on October 18, 2017. In support of its motion, the United States alleges that it has not waived its sovereign immunity under the Quiet Title Act and that the interpleader action is moot under S.B. 2134.

The Board filed a response on December 20, 2017 opposing the motion to dismiss. Continental filed a response and the United States filed its reply. The United States filed a reply on March 16, 2018. The Board filed a Surreply to the Motion to Dismiss on April, 16, 2018. The Order Denying the United States’ Motion to Dismiss for Lack of Subject Matter Jurisdiction was entered on December 31, 2018. The Order provided that North Dakota and the United States confer and submit a proposed scheduling order to the Court no later than sixty days from the date of the order. On January 8, 2019 the United States filed its Motion to Stay Action Due to Lapse of Appropriations. On January 10, 2019, the Court granted the United States’ Motion and cancelled the January 24, 2019 scheduling conference. The Order stated the “action is stayed until [federal] appropriations are restored and Department attorneys and the Bureau of Land Management personnel are permitted to resume their usual civil litigation functions.” The United States filed a Notice of Restoration of Appropriations on January 28, 2019, which requested the Court set a new scheduling conference date. On January 30, 2019, the Court issued an order granting the motion for scheduling conference, requiring the parties submit a revised scheduling/discovery plan by March 15, 2019, and setting a telephonic scheduling conference for 10:00 a.m., March 18, 2019. The parties filed a Joint Motion for Extension of Time to File Scheduling Proposal and Participate in Scheduling Conference on March 12, 2019. The Court entered an Order granting the extension to April 12, 2019 and a scheduling conference was reset for April 15, 2019. The Scheduling Conference was held on April 15, 2019. On June 14, 2019, the Board of University and School Lands filed its Amended Answer to Amended Complaint with Statement of Claim. By August 13, 2019, the United States shall assert its claims, if any, to the disputed stake. After the August 13, 2019 filing, the proceedings will be stayed until September 19, 2019 or another date set by the Court. During the stay, the United States and the Board are to discuss whether the dispute that gave rise to the litigation can be resolved. By no later than September 19, 2019, the United States and Board shall inform the Court of the status of their discussions and the Court will consider a schedule for the case. A Status Conference was set for September 20, 2019 before Magistrate Judge Clare R. Hochhalter. On August 1, 2019, the Status Conference previously set for September 20 was reset to October 11, 2019 at 10 a.m. before Magistrate Judge Clare R. Hochhalter. On August 13, 2019, the United States filed a Motion for Extension of Time to Plead and Assert Affirmative Claims and the Motion was granted on the same day, giving the United States until August 27, 2019 to file. The United States filed their Answer to Amended Complaint on August 27, 2019. On October 3, 2019, Defendants filed a joint motion and memornadum for

postponement of the October 11, 2019 status conference by 90 days. On October 4, 2019, the Court entered an Order granting the motion to continue status conference. Status conference was reset to January 13, 2020, at 9 a.m. via telephone before Magistrate Clare R. Hochhalter. United States Department of Justice advised it will be working with the United States Department of Interior – Bureau of Land Management regarding a settlement proposal. On November 8, 2019, the Board received an email from the US DOJ in response to the Board’s request that the federal government start settlement discussions by making a proposal to the Board. The email states the federal government believes its OHWM surveys are accurate, and cited N.D.C.C. § 61-33.1-06, which states: “Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting . . . public domain lands . . . must be determined by the branch of cadastral study of the [BLM] in accordance with federal law.” Relying on this statute, US DOJ suggests that the federal surveys are presumptively accurate, and then states: “we respectfully suggest that the best and most appropriate path forward would be for representatives of North Dakota to identify the specific areas where it believes the agency erred in identifying the OHWM and proffer the evidence on which it bases that belief. BLM would then assess that evidence in good faith to ascertain if a compromise, aimed at reducing litigation risk, is possible.” Status conference was held January 13, 2020 and another status conference was set for April 7, 2020.

Current Status:

- On April 7, 2020, an Order RE: Briefing Scheduled was issued by the court setting the following deadlines: Motions for Summary Judgment due simultaneously on May 7, 2020; Responses are due June 5, 2020; and Replies are due June 12, 2020.
- On December 8, 2020, the Court issued its Order Granting the United States’ Motion for Partial Summary Judgment.
- Notice of Interlocutory Appeal as to the Order on Motion for Partial Summary Judgment filed by the North Dakota Board of University and School Lands on February 5, 2021. Transmittal of the Notice of Appeal Supplement to the 8th Circuit Court of Appeals was also on February 5, 2021.

EXECUTIVE SESSION

Under the authority of North Dakota Century Code Sections 44-04-19.1 and 44-04-19.2, the Board close the meeting to the public and go into executive session for purposes of attorney consultation relating to:

- **Continental Resources Case No. 1:17-cv-00014**

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger			X		
Superintendent Baesler		X	X		
Treasurer Beadle			X		
Attorney General Stenehjem	X		X		
Governor Burgum			X		

The Board entered into executive session in a separate Microsoft Teams meeting at 10:05 AM with members of the public remaining in the open session Microsoft Teams meeting.

EXECUTIVE SESSION**Members Present:**

Doug Burgum	Governor
Alvin A. Jaeger	Secretary of State
Wayne Stenehjem	Attorney General
Kirsten Baesler	Superintendent of Public Instruction
Thomas Beadle	State Treasurer

Department of Trust Lands Personnel present:

Jodi Smith	Commissioner
Catelin Newell	Administrative Staff Officer
Kristie McCusker	Paralegal
Adam Otteson	Revenue Compliance
David Shipman	Minerals Division Director
Christopher Dingwall	Mineral Title Specialist

Guests in Attendance:

Leslie Bakken Oliver	Governor's Legal Counsel
Dave Garner	Office of the Attorney General
Charles Carvell	Office of the Attorney General
Reice Haase	Governor's Policy Advisor

The executive session adjourned at 10:25 AM and the Board returned to the open session Teams meeting to rejoin the public. During the executive session Teams meeting, the Board was provided information and no formal action was taken.

A D J O U R N

There being no further business, the meeting was adjourned at 10:26 AM.

Doug Burgum, Chairman
Board of University and School Lands

Jodi Smith, Secretary
Board of University and School Lands

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

RE: February 2021 Report of Encumbrances Issued by Land Commissioner
No Action Requested

Granted to: **WHITING OIL AND GAS CORPORATION, DENVER-CO**
For the Purpose of: Easement: Pipeline-Oil Gathering Pipeline
Right-of-Way Number: RW0008674
Date Issued: 2/18/2021
Application Fee: \$100.00
Right-of-way Income: \$30,717.09
Damage Payment to Lessee: \$53.91
Trust: A - Common Schools
Length (Rods): 107.83 Area (Acres): 1.35
Legal Description: MOU-153-92-16-NW4

Granted to: **MCKENZIE ELECTRIC COOPERATIVE INC, WATFORD CITY-ND**
For the Purpose of: Easement: Electric-Above Ground Distribution Replacement Line
Right-of-Way Number: RW0008803
Date Issued: 2/18/2021
Application Fee: \$250.00
Right-of-way Income: N/A
Damage Payment to Lessee: N/A
Trust: A - Common Schools
Length (Rods): 348.64
Area (Acres): 4.36
Legal Description: GOL-144-104-16-NE4, NW4

Granted to: **PURITY OILFIELD SERVICES LLC, WILLISTON-ND**
For the Purpose of: Permit: Temporary Water Layflat Line
Right-of-Way Number: RW0008821
Date Issued: 2/5/2021
Application Fee: \$250.00
Right-of-way Income: \$5,900.00
Damage Payment to Lessee: N/A
Trust: A - Common Schools
Length (Rods): 357.50
Area (Acres): 0.00
Legal Description: MOU-157-90-16-NE4, MOU-158-91-16-SE4, SW4, MOU-158-91-36-NW4

Granted to: **NDSU, FARGO-ND**
For the Purpose of: Permit: Access to School Land for Vegetation Study
Right-of-Way Number: RW0008813
Date Issued: 2/18/2021
Application Fee: N/A
Right-of-way Income: N/A
Damage Payment to Lessee: N/A
Trust: A - Common Schools
Length (Rods): N/A
Area (Acres): N/A
Legal Description: BRL-137-75-16-NE4, SHE-146-77-36-SW4, WEL-145-73-16-SE4, WEL-145-73-16-SW4

Granted to: **USDA-NRCS, JAMESTOWN-ND**
For the Purpose of: Permit: Access to School Land for National Resource Inventory
Right-of-Way Number: RW0008833
Date Issued: 2/18/2021
Application Fee: N/A
Right-of-way Income: N/A
Damage Payment to Lessee: N/A
Trust: A - Common Schools
Length (Rods): N/A
Area (Acres): N/A
Legal Description: ADA-131-97-16-NE4, OLI-142-82-36-SE4

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

RE: February Unclaimed Property Report
(No Action Requested)

Unclaimed property is all property held, issued, or owing in the ordinary course of a holder's business that has remained unclaimed by the owner for more than the established time frame for the type of property. It can include checks, unpaid wages, stocks, amounts payable under the terms of insurance policies, contents of safe deposit boxes, etc.

An owner is a person or entity having a legal or equitable interest in property subject to the unclaimed property law. A holder can include a bank, insurance company, hospital, utility company, retailer, local government, etc.

Since 1975, the Unclaimed Property Division (Division) of the Department of Trust Lands has been responsible for reuniting individuals with property presumed abandoned. The Division acts as custodian of the unclaimed property received from holders. The property is held in trust in perpetuity by the State and funds are deposited in the Common Schools Trust Fund. The 1981 Uniform Unclaimed Property Act created by the national Uniform Law Commission was adopted by the State in 1985.

For the month of February 2021, the Division received 40 holder reports with a property value of \$71,212 and paid 792 claims with a total value of \$566,765.

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

**RE: Energy Infrastructure and Impact Office
Quarterly Program Report
(No Action Requested)**

The Energy Infrastructure and Impact Office (EIIO) is a division within the Department of Trust Lands (Department). EIIO provides financial assistance to local units of government that are impacted by oil and gas activity. In turn, EIIO receives a portion of the Oil and Gas Gross Production Tax. The office has been a part of the Department since 1977 and was formally known as the Energy Development Impact Office created under N.D.C.C. ch. 57-62. Over the course of the past 40 years, EIIO has dispersed over \$626 million in funding.

The Oil and Gas Impact Grant Fund currently has 12 grants with a balance of \$1,591,589.01 as of March 9, 2021. The following shows grant activity for the last seven months:

Oil and Gas Impact Grant Fund	Grants with balances	Current Balance Obligated to Grants
9/9/2020	22	\$5,282,832.07
12/1/2020	17	\$2,833,286.75
3/9/2021	12	\$1,591,589.01

The Energy Impact Fund, established within Senate Bill 2013 as enacted by the Sixty-fifth Legislative Assembly, was created to supplement the Oil and Gas Impact Grant Fund for the 2017-2019 biennium. This fund currently has three grants with a balance of \$1,434,396.94 as of March 9, 2021. House Bill 1013 of the Sixty-sixth Legislative Assembly requires the Commissioner of University and School Lands to transfer any unexpended funds remaining in the Energy Impact Fund when the fund is repealed on June 30, 2021, to the Oil and Gas Impact Grant Fund.

EIIO is working with the Williston Basin International Airport and the North Dakota Aeronautics Commission regarding the timeline to get these grants closed out by June 30, 2021. The following shows grant activity for the last seven months:

Energy Impact Fund	Grants with balances	Current Balance Obligated to Grants
9/9/2020	3	\$2,394,929.22
12/1/2020	3	\$1,752,239.48
3/9/2021	3	\$1,434,396.94

EIIO is currently managing 15 grants for a total of \$3,025,985.95. The following shows grant activity for the last seven months:

Oil and Gas Impact Grant Fund	Grants with balances	Current Balance Obligated to Grants	Energy Impact Fund	Grants with balances	Current Balance Obligated to Grants	Total between both Funds
9/9/2020	22	\$5,282,832.07	9/9/2020	3	\$2,394,929.22	\$7,677,761.29
12/1/2020	17	\$2,833,286.75	12/1/2020	3	\$1,752,239.48	\$4,585,526.23
3/9/2021	12	\$1,591,589.01	3/9/2021	3	\$1,434,396.94	\$3,025,985.95

NORTH DAKOTA
BOARD OF UNIVERSITY AND SCHOOL LANDS

Financial Position Report
(Unaudited)

For period ended December 31, 2020



Board of University and School Lands

Comparative Financial Position (Unaudited)

Schedule of Net Assets

Assets by Trust:	December 31, 2020	December 31, 2019
Common Schools	\$5,186,131,507	\$4,896,188,259
North Dakota State University	80,160,150	76,337,891
School for the Blind	14,300,967	13,522,661
School for the Deaf	23,311,006	22,518,440
State Hospital	15,704,093	15,349,141
Ellendale *	25,657,357	23,758,352
Valley City State University	14,206,204	13,680,321
Mayville State University	9,276,720	8,701,580
Youth Correctional Center	27,458,337	25,363,783
State College of Science	20,654,485	19,491,512
School of Mines **	24,736,157	23,347,602
Veterans Home	5,807,126	5,664,379
University of North Dakota	38,829,851	36,645,112
Capitol Building	4,885,599	6,039,317
Strategic Investment and Improvements	534,489,225	720,712,396
Coal Development	71,189,113	71,098,720
Indian Cultural Education Trust	1,374,708	1,339,315
Theodore Roosevelt Presidential Library	52,069,806	15,859,082
Total	\$6,150,242,411	\$5,995,617,863
Assets by Type:		
Cash	172,428,450	85,685,487
Receivables	20,989,554	12,389,537
Investments ***	5,816,021,499	5,815,701,107
Office Building (Net of Depreciation)	336,120	400,092
Farm Loans	6,158,502	9,467,138
Energy Construction Loans	921,348	948,180
Energy Development Impact Loans	10,162,461	10,905,771
School Construction Loans (Coal)	38,908,935	41,391,562
Due to/from Other Trusts and Agencies	84,315,542	18,728,989
Total	\$6,150,242,411	\$5,995,617,863

*** Ellendale Trust**

The following entities are equal beneficiaries of the Ellendale Trust:

Dickinson State University	School for the Blind
Minot State University	Veterans Home
Dakota College at Bottineau	State Hospital
	State College of Science - Wahpeton

**** School of Mines**

Benefits of the original grant to the School of Mines are distributed to the University of North Dakota.

***** Investments**

Includes available cash available for loans, investments, abandoned stock and claimant liability.

Board of University and School Lands

Comparative Financial Position (Unaudited)

Combined Permanent Trusts	December 31, 2020	December 31, 2019
Balance Sheet		
Assets:		
Cash	\$75,322,448	\$69,490,689
Interest Receivable	19,696,349	9,335,842
Investments	5,390,225,721	5,088,881,908
Farm Loans	6,158,502	9,467,138
Energy Construction Loans	921,348	948,180
Due from Other Agencies	10,256,923	18,645,624
Office Building (Net of Depreciation)	336,120	400,092
Total Assets	\$5,502,917,411	\$5,197,169,473
Liabilities:		
Unclaimed Property Claimant Liability	\$16,645,538	\$16,551,604
Due to Other Trusts	-	-
Due to Other Funds	37,915	48,838
Accounts Payable	-	-
Total Liabilities	16,683,453	16,600,442
Equity:		
Fund Balance	4,892,120,248	4,919,177,984
Net Income/(Loss)	594,113,710	261,391,047
Total Liabilities and Equity	\$5,502,917,411	\$5,197,169,473
Income Statement		
Income:		
Investment Income	\$66,462,175	\$63,827,768
Realized Gain/(Loss)	75,597,218	6,962,684
Unrealized Gain/(Loss)	465,281,588	148,132,965
Royalties - Oil and Gas	45,427,721	67,900,324
Royalties - Coal	152,512	245,866
Royalties - Aggregate	522,768	42,784
Bonuses - Oil and Gas	952,472	8,105,513
Bonuses - Coal	-	24,000
Rents - Surface	9,105,758	9,283,926
Rents - Mineral	144,747	114,792
Rents - Coal	6,100	22,732
Rents - Office Building	-	-
Gain/Loss on Sale of Land - OREO	-	-
Sale of Capital Asset	-	25,000
Oil Extraction Tax Income	27,938,930	53,976,807
Unclaimed Property Income	9,403,134	9,865,778
Total Income	700,995,123	368,530,939
Expenses and Transfers:		
Investment Expense	3,011,293	3,504,422
In-Lieu and 5% County Payments	-	-
Administrative Expense	1,921,310	1,536,969
Operating Expense - Building	73,810	223,501
Transfers to Beneficiaries	101,875,000	101,875,000
Total Expense and Transfers	106,881,413	107,139,892
Net Income/(Loss)	\$594,113,710	\$261,391,047

Board of University and School Lands

Comparative Financial Position (Unaudited)

Capitol Building Trust

	December 31, 2020	December 31, 2019
Balance Sheet		
Assets:		
Cash	\$674,971	\$415,929
Interest Receivable	22,542	32,753
Investments	4,188,086	5,590,636
Total Assets	\$4,885,599	\$6,039,318
Liabilities:		
Due to Other Trusts and Agencies	\$0	\$0
Equity:		
Fund Balance	5,535,786	6,548,608
Net Income	(650,187)	(509,290)
Total Liabilities and Equity	\$4,885,599	\$6,039,318
Income Statement		
Income:		
Investment Income	\$40,150	\$85,812
Realized Gain(Loss)	1,841	19,203
Unrealized Gain/(Loss)	(15,140)	(14,943)
Rents - Surface	131,368	125,882
Rents - Mineral	1,602	1,602
Royalties - Oil and Gas	341,152	440,509
Bonuses - Oil and Gas	2,160	802
Bonus - Coal	-	-
Royalties - Aggregate	-	-
Total Income	503,133	658,867
Expenses and Transfers:		
Investment Expense	1,561	1,888
In-Lieu and 5% County Payments	-	-
Administrative Expense	15,519	11,909
Transfers to Facility Management	1,136,240	1,100,000
Transfers to Legislative Council		54,360
Transfer to Supreme Court		
Total Expense and Transfers	1,153,320	1,168,157
Net Income/(Loss)	(\$650,187)	(\$509,290)

Board of University and School Lands

Comparative Financial Position (Unaudited)

Coal Development Trust

	<u>December 31, 2020</u>	<u>December 31, 2019</u>
<u>Balance Sheet</u>		
Assets:		
Cash	\$1,000,573	\$432,470
Interest Receivable	158,109	527,975
Investments	20,886,310	17,757,261
Coal Impact Loans	10,162,461	10,905,771
School Construction Loans	38,908,935	41,391,562
Due from other Trusts and Agencies	242,409	278,931
Total Assets	<u>\$71,358,797</u>	<u>\$71,293,970</u>
Liabilities:		
Due to Other Trusts and Agencies	\$169,686	\$195,251
Equity:		
Fund Balance	70,750,579	70,296,353
Net Income	438,532	802,366
Total Liabilities and Equity	<u>\$71,358,797</u>	<u>\$71,293,970</u>
<u>Income Statement</u>		
Income:		
Investment Income	\$178,023	\$221,334
Interest on School Construction Loans	111,090	421,844
Realized Gain/(Loss)	8,385	52,889
Unrealized Gain/(Loss)	(71,035)	(42,931)
Coal Severance Tax Income	220,847	237,791
Total Income	<u>447,310</u>	<u>890,927</u>
Expenses and Transfers:		
Investment	7,250	5,654
Administrative	1,528	429
Transfers to General Fund	-	82,478
Total Expense and Transfers	<u>8,778</u>	<u>88,561</u>
Net Income/(Loss)	<u>\$438,532</u>	<u>\$802,366</u>

Board of University and School Lands

Comparative Financial Position (Unaudited)

Strategic Investment and Improvements Fund

December 31, 2020

December 31, 2019

Balance Sheet

Assets:

Cash	\$95,293,431	\$15,169,414
Interest Receivable	1,046,709	2,492,493
Investments	364,162,874	703,050,488
Due from other Trusts or Agencies	73,986,212	-
Total Assets	\$534,489,226	\$720,712,395

Liabilities:

Accounts Payable	\$0	\$0
------------------	-----	-----

Equity:

Fund Balance	767,541,457	1,134,326,018
Net Income	(233,052,231)	(413,613,623)
Total Liabilities and Equity	\$534,489,226	\$720,712,395

Income Statement

Income:

Investment Income	\$2,914,000	\$8,709,645
Realized Gain/(Loss)	134,563	1,960,936
Unrealized Gain/(Loss)	(1,139,919)	(1,612,442)
Interest on Fuel Prod Facility	7,546	-
Royalties - Oil and Gas	27,386,728	39,926,898
Bonuses - Oil and Gas	268,475	1,160,500
Royalties - Coal	69,903	201,657
Rents - Mineral	47,793	50,550
Tax Income - Oil Extraction & Production Distribution	120,479,714	-
Total Income	150,168,803	50,397,744

Expenses and Transfers:

Administrative	632,086	762,571
Investment Expense	50,906	181,148
Transfers to General Fund	382,200,000	382,200,000
Transfer to Commerce Department		3,000,000
Transfer to Adjutant General		2,502,253
Transfer to Energy Infrastructure & Impact Office		2,000,000
Transfer to Aeronautics Commission		20,000,000
Transfer from ND Parks & Recreation		1,877,500
Transfer to Information Technology Department		25,150,000
Transfer to Industrial Commission		270,000
Transfer to Bank of North Dakota		25,137,707
Transfer to ND Department of Corrections		1,218,000
Transfer to Office of Management & Budget		
Transfer to Agencies with Litigation Pool	338,042	
Transfer to State Treasurer		
Transfer from NDSU - Vet Diag Lab (HB 1008)		
Transfer from Public Service Commission		(52,818)
Transfer from Department of Health Department		(67,310)
Transfer from Attorney General Office		(6,387)
Transfer from State Highway Patrol		(49,403)
Transfer from Commerce Department		(111,895)
Total Expense and Transfers	383,221,034	464,011,367
Net Income/(Loss)	(\$233,052,231)	(\$413,613,623)

As of December 31, 2020 the SIIF had a fund balance of \$534,489,226. The fund balance is made up of two parts. The committed fund balance is that portion of the fund that has either been set aside until potential title disputes related to certain riverbed leases have been resolved or appropriated by the legislature. The uncommitted fund balance is the portion of the fund that is unencumbered, and is thus available to be spent or dedicate to other programs as the legislature deems appropriate. The uncommitted fund balance was \$236,018,559 as of December 31, 2020.

Board of University and School Lands

Comparative Fiduciary Statements (Unaudited)

Indian Cultural Trust

	December 31, 2020	December 31, 2019
Fiduciary Net Position		
Assets:		
Cash	\$3,335	\$43,852
Interest receivable	4,176	1,499
Investments	1,367,197	1,293,964
Total Assets	1,374,708	1,339,315
Liabilities:		
Accounts payable	-	-
Total Liabilities	-	-
Net Position:		
Net position restricted	1,374,708	1,339,315
Total Net Position	\$1,374,708	\$1,339,315
Changes in Fiduciary Net Position		
Additions:		
Contributions:		
Donations	-	-
Total Contributions	\$0	\$0
Investment Income:		
Net change in fair value of investments	137,365	40,163
Interest	16,785	16,409
Less investment expense	-	(904)
Net Investment Income	154,150	55,668
Miscellaneous Income	(751)	49
Total Additions	153,399	55,717
Deductions:		
Payments in accordance with Trust agreement	-	-
Administrative expenses	-	-
Total Deductions	-	-
Change in net position held in Trust for:		
Private-Purpose	153,399	55,717
Total Change in Net Position	153,399	55,717
Net Position - Beginning FY Balance	1,221,309	1,285,265
Net Position - End of Month	\$1,374,708	\$1,340,982

Board of University and School Lands

Comparative Fiduciary Statements (Unaudited)

Theodore Roosevelt Presidential Library

	<u>December 31, 2020</u>	<u>December 31, 2019</u>
<u>Fiduciary Net Position</u>		
Assets:		
Cash	\$133,691	\$133,133
Interest receivable	61,669	(1,026)
Investments	51,874,760	15,727,290
Total Assets	52,070,121	15,859,397
Liabilities:		
Accounts payable	315	315
Total Liabilities	315	315
Net Position:		
Net position restricted	52,069,806	15,859,082
Total Net Position	\$52,070,121	\$15,859,397
<u>Changes in Fiduciary Net Position</u>		
Additions:		
Contributions:		
Donations	35,000,000	-
Total Contributions	\$35,000,000	\$0
Investment Income:		
Net change in fair value of investments	1,896,569	616,833
Interest	265,006	116,711
Less investment expense	10,641	7,280
Net Investment Income	2,150,934	726,264
Miscellaneous Income	166	82,385
Total Additions	35,010,806	89,665
Deductions:		
Payments in accordance with Trust agreement	-	-
Administrative expenses	315	315
Total Deductions	315	315
Change in net position held in Trust for:		
Private-Purpose	\$35,011,121	\$89,350
Total Change in Net Position	35,011,121	89,350
Net Position - Beginning FY Balance	14,918,706	15,050,748
Net Position - End of Month	\$49,929,827	\$15,140,098

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

RE: Investment Updates

(No Action Requested)

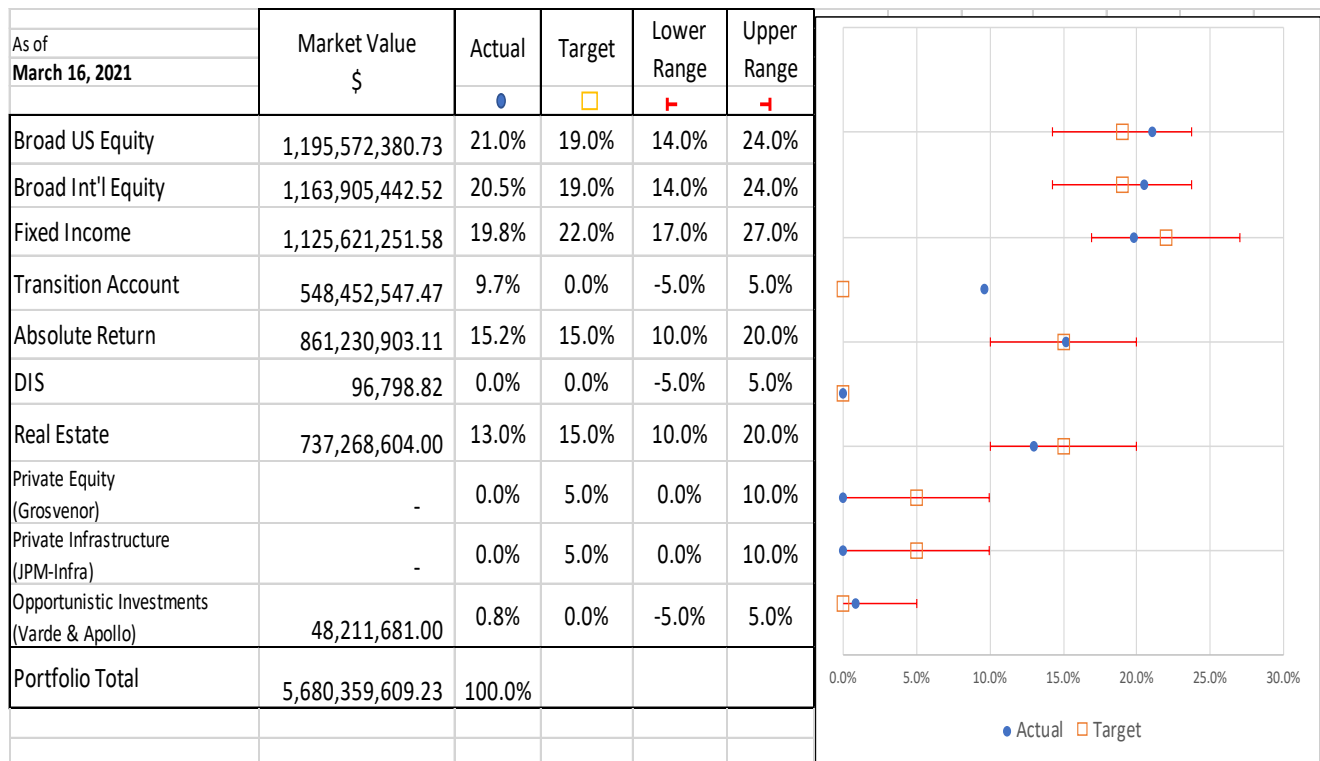
Portfolio Rebalancing Updates

The Investment Management Agreement with Loomis, Sayles & Co. Multi-Credit Strategy (Loomis) was executed and fully funded with \$100M on March 1, 2021. Funding for Loomis came from a partial redemption made on the Brandywine Global Opportunity Fixed Income Fund. JP Morgan's Intermediate Bond strategy is currently being transitioned to a Core Bond Strategy as approved by the Board.

As of March 15, 2021, Harvest MLP was fully liquidated with the majority of the proceeds from the liquidation transferred to the transition account awaiting deployment through capital calls.

Asset Allocation

The table below shows the status of the permanent trusts' asset allocation as of March. 16, 2021. The figures provided are unaudited.



Upcoming Investment Manager Meetings

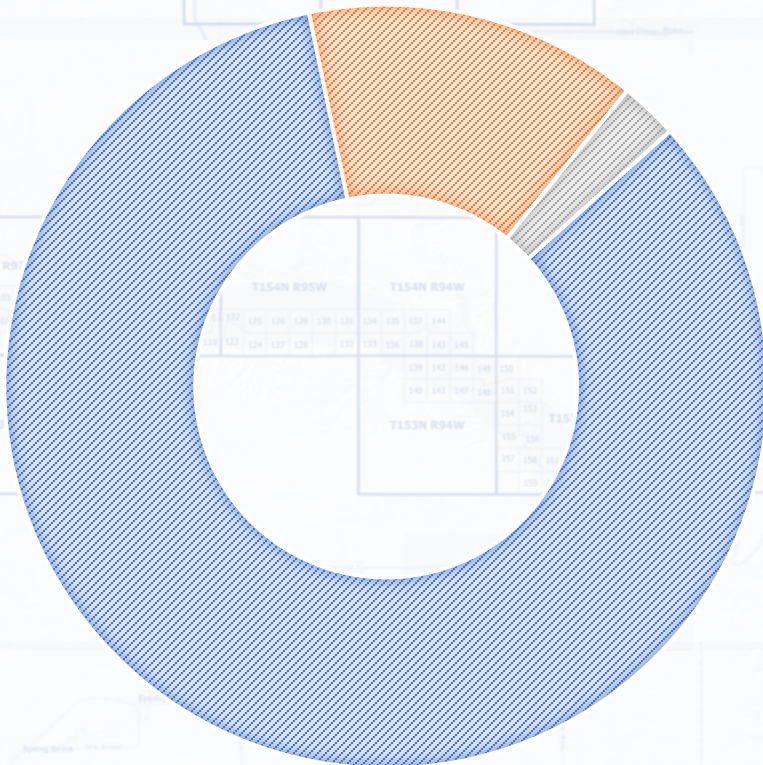
There is no upcoming meeting scheduled.

FEBRUARY ACREAGE ADJUSTMENT SURVEY REPORT

531

Total Leases Under Review

STATUS OF 75 REVIEWED LEASES



49




Awaiting
Operator
Execution

13

Refund in
Process

13

Refunded
\$2,815,601 Paid
\$132,046 Received

-  Incomplete (443)
-  Reviewed (75)
-  Litigation Hold (13)

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
HB 1031	Relating to legislative management studies of state agency fees; to provide for a legislative management study relating to establishing new state agency fees; and to declare an emergency.	Legislative Management	Gov't & Veterans Affairs	PASSED yeas 92 nays 0 RETURNED – 03/08	Passed as amended yeas 45 nays 2	
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.	Rep. Dockter	Finance & Taxation	PASSED yeas 83 nays 10	Introduced Ref – ENR 03-12-2021 10:30AM DP – 3/18	
HB 1081	Relating to access to and activities on trust lands; and to provide a penalty.	Rep. Zubke	Energy & Natural Resources	PASSED yeas 68 nays 25 RETURNED – 3/23	PASSED yeas 40 nays 7 SIGNED BY PRESIDENT	
HB 1349	Relating to open record and meeting laws; to amend and reenact subsection 9 of section 44-04-17.1, sections 44-04-18.27 and 44-04-19, subsections 1 and 2 of section 44-04-20, and section 44-04-30 of the North Dakota Century Code, relating to open record and meeting laws; and to provide a penalty.	Rep. Devlin, Karls Sen. Dwyer, Lee, Oban	Political Subdivisions	PASSED yeas 90 nays 4	Introduced 03-25-2021 08:30AM	
HB 1358	Relating to oil and gas tax revenue hedging; to provide an appropriation; to provide a continuing appropriation; to provide for a transfer; to provide a statement of legislative intent; and to declare an emergency.	Rep. Kempenich, Christensen, Mock, Steiner, Trottier Sen. Bekkedahl, Dwyer, Schaible	Finance & Taxation	PASSED yeas 80 nays 14	Introduced 03-17-2021 02:30 PM DP – 3/24	
SB 2013	A BILL for an Act to provide an appropriation for defraying the expenses of the commissioner of university and school lands; to provide for distributions from permanent funds; to provide a report; and to provide an exemption	Appropriations	Appropriations	Introduced 03-05-2021 10:30 AM 03-15-2021 10:00 AM	PASSED yeas 47 nays 0	

ITEM 2G

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
SB 2036	A BILL for an Act to provide for a legislative management study regarding access to lands and electronic posting.	Legislative Management	Energy & Natural Resources	Introduced 03-11-2021 09:00AM DP – 3/23	PASSED yeas 45 nays 2	
SB 2048	Revised Uniform Unclaimed Property Act; to amend and reenact sections 9-12-29, 10-19.1-123, 10-33-114, and 15-02-05.2, subsection 3 of section 23.1-15-07, subsections 8 and 9 of section 26.1-55-02, sections 26.1-55-04, 27-05.2-04, and 30.1-20-14, subsection 3 of section 35-20-17, sections 35-36-05, 38-13.1-03, 38-18.1-03, and 44-04-18.25, subsection 3 of section 47-16-07.1, section 54-27-15.1, subsection 6 of section 57-38-57, subsection 8 of section 57-39.2-23, and section 60-01-34 of the North Dakota Century Code, relating to abandoned and unclaimed property; to repeal chapter 47-30.1 of the North Dakota Century Code, relating to the uniform unclaimed property act; to provide for a report; to provide a penalty; and to provide a continuing appropriation.	Industry, Business and Labor	Industry, Business & Labor	PASSED as amended yeas 93 nays 0	PASSED yeas 47 nays 0	
SB 2065	Relating to the authority of the board of university and school lands to lease lands under its control for the underground storage of oil or gas and the jurisdiction of the industrial commission to regulate the permitting and amalgamation of the underground storage of oil or gas.	Energy & Natural Resources	Energy & Natural Resources	Introduced 03-04-2021 09:00 AM	PASSED yeas 40 nays 7	

ITEM 2G

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
SB 2070	Relating to the regulated substance response; to amend and reenact sections 11-33-01, 23.1-10-02, 40-47-01, and 58-03-11 of the North Dakota Century Code, relating to the regulated substance response; to repeal sections 23.1-04-04 and 23.1-10-01 of the North Dakota Century Code, relating to contaminated properties; to provide a continuing appropriation; and to provide for retroactive application.	Energy & Natural Resources	Energy & Natural Resources	PASSED yeas 82 nays 12 SIGNED BY SPEAKER	PASSED yeas 46 nays 1 SIGNED BY PRESIDENT	SIGNED BY GOVERNOR
SB 2144	Relating to criminal trespass and electronic posting; and to provide a penalty.	Sen. Erbele, Patten, Bell Rep. Damschen, Dobervich, Tveit	Finance & Taxation	Introduced Ref – ENR 03-11-2021 09:00AM DP – 3/23 Amendment adopted - 3/24	PASSED yeas 45 nays 2	
SB 2191	Relating to the disposal of abandoned personal property	Sen. Holmberg	Political Subdivisions	PASSED yeas 86 nays 6 SIGNED BY SPEAKER	PASSED yeas 46 nays 0 SIGNED BY PRESIDENT	SIGNED BY GOVERNOR
SB 2217	Relating to the deduction or recovery of losses incurred in the sale or disposition of natural gas from the proceeds of oil production; and to provide for a legislative management study.	Sen. Bekkedahl, Dwyer, Kannianen Rep. Brandenburg, Kempnich, Zubke	Finance & Taxation	PASSED as amended yeas 93 nays 0	PASSED yeas 32 nays 15	
SB 2282	Relating to membership of the board of university and school lands; and to provide a contingent effective date.	Sen. Schaible, Klein, Luick Rep. D. Johnson, Schmidt	Government & Veterans Affairs	Introduced 03-25-2021 02:30PM	PASSED yeas 30 nays 17	

ITEM 2G

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

March 25, 2021

BILL	TITLE	SPONSORS	COMMITTEE	STATUS		
				House Date of Hearing	Senate Date of Hearing	Governor
SB 2291	Relating to social investments made by the state investment board; to provide for a department of commerce study of the implications of complete divestment of companies that boycott energy or commodities; to provide for reports to legislative management; and to declare an emergency	Sen. Bell	Energy & Natural Resources	PASSED yeas 82 nays 12 SIGNED BY SPEAKER	PASSED yeas 42 nays 4 SIGNED BY PRESIDENT	SIGNED BY GOVERNOR
SB 2317	Relating to the establishment of a coal mine reclamation trust utilizing private assets; and to provide for a transfer.	Sen. Bell Rep. Porter	Energy & Natural Resources	PASSED As amended yeas 90 nays 2	PASSED yeas 42 nays 5 RETURNED – 3/19	
SB 2319	Relating to oil and gas agreements; to provide for application; and to provide a contingent effective date.	Sen. Kannianen	Finance & Taxation	Introduced 03-23-2021 09:00AM	PASSED yeas 25 nays 21	
SCR 4007	Relating to the membership of the board of university and school lands	Sen. Schaible, Klein, Luick Rep. D. Johnson, Schmidt	Government & Veterans Affairs	Introduced Ref – GVA – 03/09 03-25-2021 2:30PM	PASSED yeas 32 nays 14	
SCR 4013	A concurrent resolution urging Congress to pass the North Dakota Trust Lands Completion Act.	Sen Marcellais, Heckaman, Kannianen, Schaible Rep. Trottier	Energy & Natural Resources	Introduced 03-18-2021 09:00AM DP – 3/19	PASSED voice vote	



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, DC 20240

March 19, 2021

M-37066

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs
Assistant Secretary – Land and Minerals Management

From: Principal Deputy Solicitor

Subject: Permanent Withdrawal of M-37056, “Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Indian Reservation (North Dakota)”

To facilitate the Department’s review of actions directed by the President’s January 20, 2021 Executive Order,¹ specifically as enumerated in the January 20, 2021 “Fact Sheet: List of Agency Actions for Review,”² and pursuant to delegated authority, I hereby withdraw the May 26, 2020 Opinion issued by the Solicitor, M-37056. This withdrawal will enable the Solicitor’s Office to further review the opinion and any underlying decisions or positions to which it applies.

Regardless of this withdrawal, and as recently reaffirmed in M-37052, the Office of the Solicitor’s governing legal interpretation with respect to ownership and trust status of minerals beneath the flooded uplands remains the same. The flooded uplands are held in trust for the benefit of the Mandan, Hidatsa, and Arikara Nation.

The withdrawal of M-37056 is effective immediately.

Robert T. Anderson

¹ Exec. Order No. 13,990, 86 Fed. Reg. 7,037 (Jan. 25, 2021).

² THE WHITE HOUSE, BRIEFING ROOM, FACT SHEET: LIST OF AGENCY ACTIONS FOR REVIEW (Jan. 20, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/01/20/fact-sheet-list-of-agency-actions-for-review/> (action number 14 under DOI heading).



United States Department of the Interior
OFFICE OF THE SOLICITOR
Washington, D.C. 20240

May 26, 2020

M-37056

Memorandum

To: Secretary
Assistant Secretary – Indian Affairs
Assistant Secretary – Land and Minerals Management

From: Solicitor

Subject: Status of Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Indian Reservation (North Dakota)

On January 18, 2017, the Solicitor issued M-37044, addressing ownership of minerals located beneath the original bed of the Missouri River where it flows through the Fort Berthold Indian Reservation (“Reservation”) within the State of North Dakota (“State”), as well as ownership of minerals beneath uplands flooded by the construction of Garrison Dam and the subsequent formation of Lake Sakakawea. On June 8, 2018, the Solicitor issued M-37052, a partial suspension and temporary withdrawal of M-37044, in order to ensure a thorough legal and factual basis for M-37044 through review of the underlying historical record by a professional historian, a task not performed prior to completion of M-37044.

Since the issuance of M-37052, professional historians employed by Historical Research Associates, Inc. produced a comprehensive report on this matter titled “Historical Examination of the Missouri River within the Fort Berthold Indian Reservation, Precontact-1902” (“HRA Report”). After reviewing the HRA Report and reconsidering relevant judicial precedent and statutes in light of the historical context, I am permanently withdrawing those portions of M-37044 that address ownership of minerals located beneath the original bed of the Missouri River and replacing that analysis with this opinion. For the reasons set forth below, I have concluded that the State of North Dakota is the legal owner of submerged lands beneath the Missouri River where it flows through the Reservation.¹

This opinion alters previous Departmental decisions related to this issue and supersedes guidance provided in Solicitor’s Opinion M-28120 in 1936, and by the Interior Board of Land Appeals

¹ Those portions of M-37044 that address the ownership of minerals beneath the flooded uplands remain affirmed, as stated in M-37052.

(“IBLA”) in 1979.² These decisions were not informed by the facts provided in the HRA Report, and did not account for subsequent United States Supreme Court (“Supreme Court”) jurisprudence in *Montana v. United States*,³ *United States v. Alaska*,⁴ and *Idaho v. United States*.⁵ In these cases, the Supreme Court perfected its reasoning with regard to federal reservations of submerged lands. As such, the Department’s earlier administrative decisions must be reexamined.⁶

I. The Equal Footing Doctrine establishes a strong presumption in favor of State ownership of submerged lands, as reflected in Supreme Court decisions considering the issue.

The Equal Footing Doctrine, also referred to as “equality of the states,” is the constitutional principle that each state admitted to the Union enters on an equal footing with the original thirteen states. As early as 1845, the Supreme Court interpreted this principle to establish a default rule that the “shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively.”⁷ The original thirteen states maintained possession of submerged lands upon entrance to the Union, and all “new states have the same rights, sovereignty, and jurisdiction over this subject as the original states.”⁸ The Equal Footing Doctrine thus creates a constitutional presumption in favor of state ownership that sets the stage for the submerged lands analysis we undertake here.

Notwithstanding this presumption, Congress does possess authority to “convey land beneath navigable waters, and to reserve such land (...) for a particular national purpose such as a[n] (...) Indian reservation.”⁹ If Congress does so prior to statehood, the Equal Footing Doctrine’s presumption of state title to submerged lands may be defeated.¹⁰ However, due to the public importance of navigable waterways, ownership of the land underlying such waters is “strongly identified with the sovereign power of government,”¹¹ and the Supreme Court instructs us that the presumption in favor of state ownership is a weighty one. Generally speaking, “lands

² See Solicitor Margold, U.S. Dep’t of the Interior, M-28120, *Title to island in the Missouri River within the Fort Berthold Indian Reservation*, reprinted in 1 DEP’T OF THE INTERIOR, OPINIONS OF THE SOLICITOR OF THE DEPARTMENT OF THE INTERIOR RELATING TO INDIAN AFFAIRS 616 (Mar. 31, 1936); *Impel Energy Corp.*, 42 IBLA 105 (Aug. 16, 1979).

³ 450 U.S. 544 (1981).

⁴ 521 U.S. 1 (1997).

⁵ 533 U.S. 262 (2001).

⁶ Note, for instance, that the IBLA relied in part on *United States v. Finch*, 548 F.2d 822 (1976), as support for its ruling in favor of tribal ownership of submerged lands. See *Impel Energy Corp.*, 42 IBLA 105, 113. *Finch* was a Ninth Circuit case proceeding nearly parallel with *Montana v. United States* and was ultimately reversed. This administrative proceeding was precipitated by the Bureau of Land Management analysis applying fundamental judicial precedent regarding states’ rights to submerged land in *Lessee of Pollard v. Hagan*, 44 U.S. 212 (1845) and *Shively v. Bowlby*, 152 U.S. 1 (1894) to reject applications for oil and gas leasing beneath the Missouri River on the ground that the lands sought for leasing were owned by the State, not by the federal government. We again endorse that initial position of the Department through this opinion, and we note that the IBLA did not have the benefit of reference to later Supreme Court cases on the issue, including *Montana*, *Alaska*, and *Idaho*.

⁷ *Lessee of Pollard v. Hagan*, 44 U.S. at 212, 230 (1845).

⁸ *Ibid.*

⁹ See *Idaho v. United States*, 533 U.S. 262, 272 (2001).

¹⁰ *Id.* at 272-73.

¹¹ *Montana v. United States*, 450 U.S. 544, 552 (1981).

underlying navigable waters within territory acquired by the [federal] Government are held in trust for future States and [] title to such lands is automatically vested in the States upon admission to the Union.”¹² As the Supreme Court explained in *United States v. Holt State Bank*,

the United States early adopted and constantly has adhered to the policy of regarding lands under navigable waters in acquired territory, while under its sole dominion, as held for the ultimate benefit of future states, and so has refrained from making any disposal thereof, save in *exceptional instances* when impelled to particular disposals by some international duty or *public exigency*. It follows from this that disposals by the United States during the territorial period are not lightly to be inferred, and should not be regarded as intended unless the intention was *definitely declared or otherwise made very plain*.^{13,14}

The Supreme Court has considered several times whether an intent to reserve submerged lands has been so “definitely declared or otherwise made very plain” when the government makes an initial reservation of land prior to statehood, such as in the form of a wilderness reserve or an Indian reservation. Because the act of reserving submerged lands by the United States does not necessarily imply an intent “to defeat a future State’s title to the land,”¹⁵ the Supreme Court undertakes a two-step inquiry in such cases. That test, as expressed in the Supreme Court’s analysis in *Idaho v. United States*, asks “[1] whether Congress intended to include land under navigable waters within the federal reservation and, if so, [2] whether Congress intended to defeat the future State’s title to the submerged lands.”¹⁶

In the case of land initially reserved by the Executive Branch, the *Idaho* court explained that the “two-step test of congressional intent is satisfied when an Executive reservation *clearly* includes submerged lands, and Congress recognizes the reservation in a way that demonstrates an intent to defeat state title.”¹⁷ The *Idaho* court then inquired as to “whether Congress was on notice that the Executive reservation included submerged lands and whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State.”¹⁸ Where this purpose would have been compromised, the Supreme Court has ruled that “[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area.”¹⁹

¹² *Arizona v. California*, 373 U.S. 546, 597 (1963).

¹³ 270 U.S. 49, 55 (1926) (emphasis added), citing *Shively v. Bowlby*, 152 U.S. 1 (1894).

¹⁴ We note that the Supreme Court has not invoked the Indian canon of construction since development of its two-part test to defeat Equal Footing on Executive Order reservations. Consistent with the constitutionally-based presumption that submerged lands are conveyed to the State at the moment of statehood, the Supreme Court has instead relied exclusively on federal intent at the time of reservation establishment, Congressional notice of this intent, and whether the purpose of the reservation would have been compromised if submerged lands had passed to the State at the time of reservation establishment.

¹⁵ *Utah Div. of State Lands v. United States*, 482 U.S. 193, 202 (1987).

¹⁶ 533 U.S. 262, 273 (2001).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.* at 273-74 (internal citations omitted).

¹⁹ *United States v. Alaska*, 521 U.S. 1, 39-40 (1997).

II. The history of executive actions establishing and modifying the Reservation does not demonstrate a clear intent to include submerged lands under Step One of the Idaho test.

a. The record is silent regarding the riverbed itself.

The description and modification of the Reservation through an 1870 Executive Order,²⁰ an 1880 Executive Order,²¹ and through an 1886 Agreement (ratified by Congress in 1891, subsequent to statehood)²² is well-documented. The Executive Orders and the 1886 Agreement included language that defined the boundaries of the Reservation to include the Missouri River, and used the river as the boundary line between the Reservation and the State in certain places. For example, the boundary description in the 1870 Executive Order reads:

From a point on the Missouri River 4 miles below the Indian village (Berthold), in a northeast direction 3 miles (so as to include the wood and grazing around the village); from this point a line running so as to strike the Missouri River at the junction of Little Knife River with it; thence along the left bank of the Missouri River to the mouth of the Yellowstone River, along the south bank of the Yellowstone River to the Powder River, up the Powder River to where the Little Powder River unites with it; thence in a direct line across to the starting point 4 miles below Berthold.²³

The use of the term “left bank” meant the north and east sides of the Missouri River,²⁴ and thus this description includes the span of the river within the Reservation’s boundaries. However, the inclusion of a river within the geographic boundaries of a reservation does not of necessity mean that submerged lands underlying the river are also included. The Supreme Court made this point abundantly clear in *Montana*:

The mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.²⁵

²⁰ Exec. Order (Apr. 12, 1870), *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 881 (2d ed. 1904) (hereinafter “1870 Executive Order”).

²¹ Exec. Order (July 13, 1880), *reprinted in* 1 CHARLES J. KAPPLER, INDIAN AFFAIRS: LAWS AND TREATIES 881 (2d ed. 1904) (hereinafter “1880 Executive Order” and together with the 1870 Executive Order, “Executive Orders”).

²² Act of March 3, 1891, 26 Stat. 989 at 1032 (hereinafter “1886 Agreement”).

²³ 1870 Executive Order.

²⁴ The “left” or “right” banks of a river have, since at least 1851, been determined by public lands surveyors by looking downstream from the center of the river and then indicating the left or right side from that viewpoint. *E.g.*, U.S. DEP’T OF THE INTERIOR, GENERAL LAND OFFICE, INSTRUCTIONS TO THE SURVEYORS GENERAL OF PUBLIC LANDS OF THE UNITED STATES FOR THOSE SURVEYING DISTRICTS ESTABLISHED IN AND SINCE THE YEAR 1850, at viii, 12, https://glorerecords.blm.gov/reference/manuals/1855_Manual.pdf (Regarding meandering navigable streams, “Standing with the face looking *down* stream, the bank on the *left* hand is termed the ‘left bank’ and that on the *right* hand the ‘right bank.’ These terms are to be universally used to distinguish the two banks of [a] river or stream.”).

²⁵ 450 U.S. 544, 554 (1981).

After reviewing the HRA Report and its exhaustive analysis of the records created in conjunction with the Executive Orders and the 1886 Agreement, it is plain that the Executive never made any express reference to the riverbed itself. While the Missouri River is obviously included within the *geographic* boundaries of the Reservation, the record is silent regarding whether the Reservation was intended to *include* the riverbed. These are entirely different legal questions.

Without any express reference to the riverbed, and without any other contemporaneous evidence suggesting that the Executive intended to include the riverbed within the Reservation, we cannot find that the Reservation “*clearly* includes submerged lands” as required by the Supreme Court in *Idaho*.²⁶ Here, the Executive’s intent to include submerged lands is far from clear, falling well below the threshold necessary to overcome the strong presumption of State ownership.

b. The record does not show an intent to protect uses of the riverbed, including fishing.

1. Farming, Grazing, Hunting, and Timber

In contrast to the historical record’s silence with regard to the riverbed, there is substantial evidence that the Executive did have in mind a clear purpose in setting aside lands for the Mandan, Hidatsa, and Arikara Nation (“Nation”). The Executive was actively considering the amount of land sufficient to support the Nation with farming, livestock, and, to a lesser extent, hunting and forestry. This was the core of executive intent here, not the river and its fishing resources.

Long before the federal government’s relationship with the Nation, tribal members practiced extensive subsistence farming. “Being skilled agriculturists, the Upper Missouri tribes might grow hundreds of bushels of corn, beans, and squash in productive years.”²⁷ Bureau of Indian Affairs (“BIA”) agents sought to encourage more farming, actively urging tribal members to move away from the centralized village on the river (“Like-a-Fishhook” village) to take up individual farms.²⁸ BIA agents assisted tribal members in breaking farming ground, and in 1885, they relocated nearly a third of tribal members to farming allotments.²⁹

²⁶ 533 U.S. 262, 273 (2001).

²⁷ HRA Report at 27.

²⁸ “Bureau of Indian Affairs (BIA) agents were also encouraging the Indians to move out of Like-a-Fishhook village, which they deemed crowded and unsanitary, to take up individual farms. In 1882, Agent Jacob Kauffman persuaded some families to relocate upriver of Like-a-Fishhook, where agency officials had broken farm land for them. . . . In 1885, Agent Abram Gifford relocated about 100 Indians to allotments. This coincides with the recollection of Edward Goodbird (Hidatsa) that ‘[i]n the summer of my sixteenth year nearly a third of my tribe left to take up allotments.’” HRA Report at 19-20, citing Letter from Courtenay to Comm’r of Indian Affairs, August 19, 1879, ARCIA 1879, 30; Letter from Jacob Kauffman, Indian Agent, Fort Berthold Agency, to Comm’r of Indian Affairs, August 9, 1883, ARCIA 1883, 32-33; Letter from Abram J. Gifford, Indian Agent, Fort Berthold Agency, to Comm’r of Indian Affairs, August 18, 1885, ARCIA 1885, 30.

²⁹ See *ibid.* Note that these allotments were different from those made pursuant to the 1886 Agreement, which was ratified by the Act of March 3, 1891, 26 Stat. 989 at 1032. Allotment under the 1886 Agreement occurred between 1894 and 1895. See Roy W. Meyer, *THE VILLAGE INDIANS OF THE UPPER MISSOURI: THE MANDANS, HIDATSAS, AND ARIKARAS*, (University of Nebraska Press, 1977), 137-38.

These actions on the part of the BIA are consistent with statements made by the architects of the Reservation. In 1869, Major General Winfield Scott Hancock “instructed the Commanding Officer at [Fort] Stevenson to examine the country about Berthold and to recommend what portion should be set off for [the Nation] (...). I think they should have a reservation sufficiently large for them to cultivate, to procure fuel, and hunt on, if possible, without encroaching too much on the public lands.”³⁰

The required surveying work was accomplished by Captain S. A. Wainwright, who proposed the boundaries adopted by President Grant in the 1870 Executive Order defining the Reservation.³¹ A letter in the record from Captain Wainwright to his commanding officer, forwarded to the Commissioner of Indian Affairs, then to the Secretary of the Interior, and then to the President, described the Captain’s work and intentions in defining the boundaries of the Reservation as agreed to in the 1870 Executive Order. This letter does not list the riverbed, or fishing, as a consideration for the Reservation. Rather, Captain Wainwright writes that he has “endeavored in this proposed reservation to give [the Nation] land enough to cultivate and for hunting and grazing purposes.”³²

The military and Department staff also showed an intent to protect the Nation’s timber resources. For instance, in 1872, BIA Agent John E. Tappan wrote a letter to a “saw log and cordwood contractor,” informing the contractor that “[i]n pursuance of instructions received from Dept. of Interior I hereby furnish you with the boundaries of the reservation laid off for the Indians of this Agency, and would inform you that all persons are strictly forbidden by the War Dept. and Dept. of Interior to cut wood upon any of the land set apart for reservations for Indians unless the consent of the Indian is obtained, and they paid for their wood.”³³

The Executive’s focus on agriculture, husbandry, hunting, and forestry was again reflected in the record supporting the 1880 Executive Order. In considering a diminishment to the Reservation, Commissioner of Indian Affairs Rowland E. Trowbridge wrote to BIA Agent Alexander Gardner in April 1880, requesting information and asking Agent Gardner to “designate clearly upon the enclosed maps, what part [tribal members] occupy, and also what part they principally use for hunting purposes[.]”³⁴ In Agent Gardner’s reply, he concluded with a description of the government’s general purposes for the Reservation:

It is the policy of the Government to encourage Indians in agricultural pursuits, and assist them in becoming self supporting, and for this purpose, it is absolutely necessary that their reservation should contain *good [arable?] and grazing lands*. To diminish the reservation of these Indians west of the Missouri River, would deprive them of nearly all their *good farming lands and timber*. No compensation for this loss could be given by increasing the reservation east of the Missouri

³⁰ HRA Report at 53, quoting Letter from General Hancock to General Hartsuff, July 21, 1869, 5.

³¹ HRA Report at 53.

³² Letter from S. A. Wainwright to Bvt. Brig. Gen. O. D. Greene (Sept. 25, 1869).

³³ HRA Report at 58-59, quoting Letter from Tappan to Saw-Log and Cordwood Contractor, January 11, 1872.

³⁴ HRA Report at 66, quoting Letter from Trowbridge to Gardner, April 5, 1880.

River, as the land is poor and barren, and without water or timber—especially the latter.³⁵

Finally, the United States’ focus on agriculture and husbandry was expressed in the preamble to the Congressional bill ratifying the 1886 Agreement, which largely maintained the lands set aside through the Executive Orders. The preamble explained Congress’s purposes for the Reservation:

[I]t is the policy of the Government to reduce to proper size existing reservations when entirely out of proportion to the number of Indians existing thereon, with the consent of the Indians, and upon just and fair terms; and whereas the Indians of the several tribes, parties hereto, have vastly more land in their present reservation than they need or will ever make use of, and are desirous of disposing of a portion thereof in order to obtain the means necessary to enable them to become wholly self-supporting by the *cultivation of the soil* and other *pursuits of husbandry*[.]³⁶

Thus, repeatedly and consistently, the record demonstrates a consonant Executive and Congressional purpose for the Reservation to support the Nation’s agricultural and grazing activities, and to a lesser extent its hunting and timber resources.

The Supreme Court has instructed that “the *purpose* of a conveyance or reservation is a critical factor in determining federal intent.”³⁷ Here, the primary purpose of the Reservation was to support tribal farming and the raising of livestock. Neither activity requires the use of the riverbed, and the record supplies no evidence of federal intent to reserve the riverbed for the Nation.

2. *Fishing and Other Uses of the Riverbed*

While the HRA Report includes substantial historical evidence of the Nation’s use of the Missouri River for fishing, for capturing “float bison,” and for trade and security, there is little evidence that these uses were prominent in the Executive’s consideration of the Reservation, and no evidence that Congress was on notice or aware of these uses at all. In 1880, Agent Gardner wrote that the “character of the reservation outside of the grant to the Railroad Co. is not so well adapted to farming, grazing, fishing and hunting and other necessities of the Indians.”³⁸ This ancillary reference to fishing appears to be the only written consideration of fishing made by the Executive in connection with designing the Reservation.

Other contemporaneous evidence indicates that fishing was not the primary source of subsistence for the Nation. The HRA Report indicates that by 1890—one year after statehood—seventy

³⁵ *Ibid.*, quoting Letter from Gardner to Trowbridge, April 13, 1880 (emphasis added). Gardner included a map with his letter marked with handwritten notations indicating which parts of the reservation tribal members used for hunting.

³⁶ 1886 Agreement (emphasis added).

³⁷ *United States v. Alaska*, 521 U.S. 1, 39 (1997) (emphasis in original).

³⁸ HRA Report at 66, quoting Letter from Gardner to Trowbridge, April 13, 1880.

percent (70%) of tribal subsistence came from farming, stock raising, or wage labor; fifteen percent (15%) from government rations; and fifteen percent (15%) from the combined activities of “[h]unting, fishing, root-gathering, etc.”³⁹ Considering the evidence in the record showing the importance of hunting to the Nation, it is likely that food derived from hunting bison and other game comprised the majority of this combined subsistence category.

Ultimately, the Supreme Court, in determining whether submerged lands were reserved in such a way as to defeat the Equal Footing Doctrine, requires an inquiry as to “whether the purpose of the reservation would have been compromised if the submerged lands had passed to the State.”⁴⁰ The historical record indicates that both the Executive and Congress intended the Nation to develop further agriculture and livestock raising practices, pursuits unaffected by ownership of submerged lands in the Missouri River. As such, I conclude that the Reservation’s purpose would not have been compromised if submerged lands passed to the State.

Finally, while acknowledging that fishing—to include the use of traps and weirs affixed to the riverbed—was a traditional source of subsistence for the Nation, these uses do not require that the riverbed and all submerged lands be included in the federal reservation. Open-water fishing does not require ownership of submerged lands. The existence of fish traps located in shallow water near the banks of the river does not necessitate a finding that the riverbed was held for the Nation. This is especially so where the record does not indicate Executive and Congressional knowledge of such activities.

A reservation of submerged lands must not be lightly inferred. Here, the federal government never definitely declared its intentions regarding the submerged lands beneath the Missouri River; it is uncontested that the record is silent regarding the riverbed itself. Executive intent to deprive the State of the submerged lands has not been “made very plain” as required by *Holt State Bank*. Thus, without any statement or reference regarding the riverbed, Congress could not conceivably have been placed on notice, as the *Idaho* court instructed,⁴¹ of an Executive intent to reserve submerged lands for the beneficial use of the Nation.

III. The balance of judicial precedent favors State ownership of submerged lands beneath the Missouri River.

After considering the historical record in light of Supreme Court precedent as it relates to the Equal Footing Doctrine, I conclude that the circumstances here are most similar to those cases where the Supreme Court has held that submerged lands were *not* reserved by the federal government.

The Nation’s claim to the submerged lands beneath the Missouri River is not dissimilar to that of the Red Lake Band of Chippewa Indians’ (“Red Lake”) failed claim on Mud Lake in *Holt State Bank*. The record in *Holt State Bank* similarly reveals no express reference to the lakebed or submerged lands by the United States when establishing the reservation. The Supreme Court

³⁹ HRA Report at 21, citing “Table relating to population, dress, intelligence, dwellings, and subsistence of Indians, together with religious, vital, and criminal statistics,” ARCIA 1890, 450–51.

⁴⁰ *Idaho v. United States*, 533 U.S. 262, 274 (2001).

⁴¹ 533 U.S. 262, 273-74 (2001).

explained there “was no formal setting apart of what was not ceded, nor any affirmative declaration of the rights of the Indians therein, nor any attempted exclusion of others from the use of navigable waters.”⁴² Here, the Executive Orders and 1886 Agreement that established the Reservation contain language similar to that found in the treaty reserving land in Minnesota for Red Lake, in that it was “reserve[d] in a general way for the continued occupation of the Indians what remained of their aboriginal territory.”⁴³ The Executive Orders and the 1886 Agreement are principally boundary-setting documents, composed mostly of technical language setting the metes and bounds of the Reservation. In line with the facts at issue in *Holt State Bank*, the Executive Orders and 1886 Agreement lack any specific set aside of the riverbed or exclusion from the use of the river as a navigable water.

The conclusion that the submerged lands passed to the State is further supported by the reasoning in *Utah Division of State Lands v. United States*.⁴⁴ There, the United States Geological Survey had reserved Utah Lake and lands circling the lake in order to prevent homesteading that might interfere with future water resource projects. Because the purpose of that reservation did not require use of the lakebed (*i.e.*, the lakebed was not available for settlement), the Supreme Court concluded that “little purpose would have been served by the reservation of the bed of Utah Lake.”⁴⁵ Here, too, the purpose of the Reservation did not of necessity require the use of the riverbed. And while I recognize the historic importance of fishing to the Nation, such facts are insufficient to show a federal purpose to reserve the riverbed in the absence of support for this understanding in the Executive or Congressional record. This is particularly so considering the strong presumption in favor of State ownership.

This matter is perhaps most closely analogous to the facts in *Montana v. United States*.⁴⁶ There, the Supreme Court considered the Crow Tribe of Montana’s (“Crow Tribe”) claim to the bed and banks of the Bighorn River. While the river was clearly contained within the geographic boundaries of the Crow Indian Reservation, the “mere fact that the bed of a navigable water lies within the boundaries described in the treaty does not make the riverbed part of the conveyed land, especially when there is no express reference to the riverbed that might overcome the presumption against its conveyance.”⁴⁷ As here, the treaty conveying the land to the Crow Tribe was bare of language setting apart, referencing, or even impliedly invoking the riverbed. The *Montana* court found the riverbed passed to the State of Montana, relying on the analysis of *Holt State Bank* and characterizing that opinion as finding “nothing in the treaties ‘which even approaches a grant of rights in lands underlying navigable waters; nor anything evincing a purpose to depart from the established policy (...) of treating such lands as held for the benefit of the future State.’”⁴⁸ As in *Montana*, it is uncontested that there is no “express reference” to the Missouri riverbed in any part of the Executive or Congressional record.

The *Montana* court concluded that the lack of reference to the riverbed was sufficient to find State ownership, and then noted that “[m]oreover, even though the establishment of an Indian

⁴² *United States v. Holt State Bank*, 270 U.S. 49, 58 (1926).

⁴³ *Ibid.*

⁴⁴ 482 U.S. 193 (1987).

⁴⁵ *Id.* at 203.

⁴⁶ 450 U.S. 544 (1981).

⁴⁷ *Id.* at 554.

⁴⁸ *Id.* at 552.

reservation can be an ‘appropriate public purpose’ (...) justifying a congressional conveyance of a riverbed (...)[,] at the time of the treaty the Crows were a nomadic tribe dependent chiefly on buffalo, and fishing was not important to their diet or way of life.”⁴⁹ While unlike the Crow Tribe, there is evidence that the Nation relied in some part on fishing, it is also true that the vast majority of the Nation’s subsistence stemmed from farming, livestock, government assistance, and hunting, dwarfing the importance of fishing to tribal members.⁵⁰ Thus, the *Montana* court’s “moreover” rationale does not change the outcome vis-à-vis the Nation.

In contrast to the Crow Tribe and the Nation, the Coeur d’Alene Tribe’s (“Coeur d’Alene”) reliance on fishing and its persistent negotiation for rights over Lake Coeur d’Alene featured prominently in *Idaho v. United States*.⁵¹ In *Idaho*, Coeur d’Alene petitioned the United States to set aside its reservation, arguing that its previous boundaries were unsatisfactory, “due in part to their failure to make adequate provision for fishing and other uses of important waterways.”⁵² In a second petition to the Commissioner of Indian Affairs, Coeur d’Alene requested a reservation that included certain river valleys because “we are not as yet quite up to living on farming” and “for a while yet we need have some hunting and fishing.”⁵³ The *Idaho* court found that Coeur D’Alene relied “on submerged lands for everything from water potatoes harvested from the lake to fish weirs and traps anchored in riverbeds and banks.”⁵⁴

Notably, the United States Senate directly queried the Secretary regarding the Coeur d’Alene’s claims to the waterways, adopting a resolution that directed the Secretary to “inform the Senate as to the extent of the present area and boundaries of the Coeur d’Alene Indian Reservation in the Territory of Idaho,” including “whether such area includes any portion, and if so, about how much of the navigable waters of Lake Coeur d’Alene, and of Coeur d’Alene and St. Joseph Rivers.”⁵⁵ The Secretary replied, placing Congress on notice of the importance of the waterways to the Coeur d’Alene.

These clear references to fishing and the river valleys in *Idaho* indicate the importance of the question to the Executive and Congress. Indeed, it was a vital issue for federal consideration and addressed the fundamental purpose of the reservation. Last, and potentially dispositive to the Supreme Court’s analysis, in *Idaho* the State of Idaho conceded that the 1873 Executive Order describing the reservation did, in fact, include submerged lands in the reservation. No such concession and no such plain evidence of tribal petition and negotiation for waterways and fishing resources is present at the Fort Berthold Indian Reservation. The matter here considered is thus distinguishably weaker for the Nation than it was for the Coeur d’Alene in *Idaho*.

Other cases where tribal reliance on fishing was critical to judicial decision making on ownership of submerged lands demonstrate an even stronger necessity and reliance on fishing. In *Alaska Pacific Fisheries Co. v. United States*, a tribal reservation was established on the Annette Islands,

⁴⁹ *Id.* at 556.

⁵⁰ *See supra* note 39.

⁵¹ 533 U.S. 262 (2001).

⁵² *Id.* at 266.

⁵³ *Ibid.*

⁵⁴ *Id.* at 265.

⁵⁵ *Id.* at 268, citing Senate Misc. Doc. No. 36, 50th Cong., 1st Sess., 1 (1888).

an Alaskan island chain that offered few other means of subsistence besides fishing.⁵⁶ The islands bore timber but “only a small portion of the upland is arable,” and the tribal members “were largely fishermen and hunters” who had “looked upon the islands as a suitable location for their colony, because the fishery adjacent to the shore would afford a *primary* means of subsistence[.]”⁵⁷ In *Alaska Pacific Fisheries*, the Supreme Court held that the “Indians could not sustain themselves from the use of the upland alone. The use of the adjacent fishing grounds was equally essential.”⁵⁸ This reliance on fishing as a primary and essential source of subsistence eclipses the ancillary nature of fishing for the Nation and draws a necessary contrast to the “purpose of the reservation” inquiry articulated in *Idaho*.

This contrast is also on display in *Donnelly v. United States*.⁵⁹ There, the Supreme Court inquired as to the Klamath Indians’ reliance on fishing. The *Donnelly* majority explained that the Klamath Indians “established themselves along the river in order to gain a subsistence by fishing. The reports of the local Indian agents and superintendents to the Commissioners of Indian Affairs abound in references to fishing as their principal subsistence[.]”⁶⁰ Again, this tribe’s reliance on fishing was amply documented and demonstrably far greater than that of the Nation.

The tribes in *Alaska Pacific Fisheries* and *Donnelly* sustained themselves on the abundant anadromous and marine fisheries present in the Pacific Northwest. Neither this level of fishery biomass nor the routine annual harvest of migrating salmonids is present here. Even in the unlikely case that previously-acknowledged State ownership of submerged lands would have affected the Nation’s fishery, the federal purpose for the Reservation would not have been compromised.

Finally, in *United States v. Alaska*, the Supreme Court ruled that the federal government reserved submerged lands in both the National Petroleum Reserve and the Arctic National Wildlife Range. The Supreme Court reached this conclusion after a review of the Executive and Congressional records, which indicate clear and specific purposes for each reserve that necessarily required federal ownership of the submerged lands.⁶¹ First, the National Petroleum Reserve was set aside by Executive Order in 1923 with the goal of securing a supply of oil for the Navy as “at all times a matter of national concern.”⁶² The Executive Order “sought to retain federal ownership of land containing oil deposits,”⁶³ reciting that “there are large seepages of petroleum along the Arctic Coast of Alaska and conditions favorable to the occurrence of valuable petroleum fields on the Arctic Coast.”⁶⁴ This language plainly implied a federal purpose that demanded ownership of submerged lands, necessary to obtain the oil and gas present in subsurface deposits. “The purpose of reserving in federal ownership all oil and gas deposits within the Reserve’s boundaries would have been undermined if those deposits

⁵⁶ 248 U.S. 78 (1918).

⁵⁷ *Id.* at 88 (emphasis added).

⁵⁸ *Id.* at 89.

⁵⁹ 228 U.S. 243 (1913).

⁶⁰ *Id.* at 259.

⁶¹ *United States v. Alaska*, 521 U.S. 1 (1997).

⁶² *Id.* at 39, citing Exec. Order 3797-A (Feb. 27, 1923).

⁶³ *Ibid.*

⁶⁴ *Ibid.*

underlying lagoons and other tidally influenced waters had been excluded.”⁶⁵ Thus, the *Alaska* court concluded that “[i]t is simply not plausible that the United States sought to reserve only the upland portions of the area.”⁶⁶

This fundamental federal purpose, complemented by multiple direct statements regarding the need for subsurface mineral deposits in the National Petroleum Reserve, is supported by an entirely different and greater order of evidence in favor of federal ownership than at the Missouri River. The bare statement of boundaries expressed in the Executive Orders and 1886 Agreement fail to demonstrate the clear federal purpose necessary to overcome the State’s presumptive ownership.

Similarly, the United States’ statement of justification in *Alaska* for the Arctic National Wildlife Range expressly references “countless lakes, ponds, and marshes” as nesting grounds for migratory birds and “river bottoms with their willow thickets” furnishing habitat for moose.⁶⁷ The Supreme Court explained that this statement of justification “illustrates that the Range was intended to include submerged lands beneath bodies of water (...)[] the drafters of the application would not have thought that the habitats mentioned were only upland.”⁶⁸ Finding that the “express reference to bars and reefs and the purpose of the proposed Range” distinguished the Arctic National Wildlife Range from the circumstances in *Montana* and *Utah Division of State Lands*, the Supreme Court ruled the United States had reserved submerged lands within the Range.⁶⁹

As discussed above, the historical record at Fort Berthold is much more analogous to *Montana* and *Utah Division of State Lands* than to *Alaska Pacific Fisheries*, *Donnelly*, or *Idaho*. The express language and clear federal purpose in *Alaska* regarding the Range is strongly supportive of federal ownership of submerged lands, whereas here, the Executive Orders merely describe the boundaries of the Reservation with no stated purpose. Similarly, the ratified 1886 Agreement includes a Congressional preamble pointing only to agriculture and livestock—not fishing or riverbed use—as the key federal purpose. As the federal government desired the Nation to sustain itself on agriculture and livestock alone, I can find no express language or fundamental federal purpose in favor of tribal ownership of the submerged lands beneath the Missouri River.

IV. The United States’ taking of tribal lands for the Garrison Dam project has no bearing on State ownership of submerged lands beneath the Missouri River.

Through the Flood Control Act of 1944, Congress authorized the Pick-Sloan Missouri Basin Program (“Program”), seeking to conserve and control water resources through a series of reservoirs and dams along the Missouri River. Downstream of the Reservation, the Army Corps of Engineers built Garrison Dam to further the Program, which created the impoundment now known as Lake Sakakawea and flooded a portion of the Reservation. To effect this taking of the

⁶⁵ *Ibid.*

⁶⁶ *Id.* at 40.

⁶⁷ *Id.* at 51.

⁶⁸ *Ibid.*

⁶⁹ *Ibid.*

Nation's land, Congress enacted a statute in 1949 that included the uplands surrounding the future lake.⁷⁰

Importantly, the Takings Act applies only to the Nation, without specific reference to the State. The Takings Act's first section states that if the Nation votes in favor of the Program, "all right, title and interest of *said tribes, allottees and heirs of allottees* in and to the lands constituting the Taking Area described in section 15 (including all elements of value above or below the surface) shall vest in the United States of America," and in return the United States would monetarily compensate the Nation. The Takings Act is thus in the nature of a bargain with the Nation alone, not a general purpose civil condemnation proceeding applying to all property rights within the Taking Area. By express statutory language, Congress was entering into a bargain solely with the Nation to acquire its lands, including its subsurface rights, and not any other entity. If the United States had brought a civil condemnation action in the courts and acquired title to everything within the bounds of the Taking Area, then it might have been possible to take lands even where the United States and the courts misidentified the owner.⁷¹ However, that was not the case here. The United States received only what she bargained and paid for—tribal interests in the Taking Area, not State interests.

The Department supported the Takings Act through discussions with the Nation on appropriate compensation and through survey and appraisal of the proposed flooded lands.⁷² While the Department's appraisal meticulously catalogued the loss of each parcel of dry lands surrounding the Missouri River, there was no consideration or suggested compensation for loss of submerged lands, likely because there was no commercial value to the submerged lands at the time.⁷³ Because of this, there was no spotlight shone on ownership of the riverbed, perhaps contributing to the overall failure to consider whether the State held property interests within the Taking Area. Discussion of State property was not considered in the appraisal, the Congressional record, or the text of the Takings Act.

Because the Takings Act expressly applies only to the "right, title, and interest" of the Nation and its members, and not to any other party, I conclude that any property interests belonging to the State at the time of the taking – including its interests in submerged lands – were left undisturbed. I find it implausible that the United States would engage in a lengthy public process and technical appraisal for tribal land, yet intend to silently take State property without compensation in the same action.

⁷⁰ A Joint Resolution to vest title to certain lands of the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, in the United States, and to provide compensation therefor, Pub. L. No. 81-437, ch. 790, 63 Stat. 1026 (1949) ("Takings Act").

⁷¹ See, e.g., *Houser v. United States*, 9 Cl. Ct. 35, 39 (1985) (quoting *United States v. 416.81 Acres of Land*, 525 F.2d 450, 452 (7th Cir. 1975)) (where the United States condemned land for a dam project and paid the State of Idaho, but certain individuals later asserted that they were the true owners, the United States' title could not be altered because "there are no indispensable parties" to an eminent domain action and "[t]he failure to join a party will not defeat the condemnor's title to the land").

⁷² Bureau of Indian Affairs, MISSOURI RIVER BASIN INVESTIGATIONS, APPRAISAL: LAND, IMPROVEMENTS, SEVERANCE DAMAGES, AND TIMBER TAKING AREA OF GARRISON RESERVOIR, FORT BERTHOLD INDIAN RESERVATION, NORTH DAKOTA, Report No. 96 (June 30, 1949).

⁷³ See *id.*

This conclusion is consistent with the 1984 Fort Berthold Reservation Mineral Restoration Act (“1984 Act”), which returned to the Tribe the subsurface tribal property interests taken in 1949.⁷⁴ That Act provided:

[A]ll mineral interests in the lands located within the exterior boundaries of the Fort Berthold Indian Reservation which—

- (1) were acquired by the United States for the construction, operation, or maintenance of the Garrison Dam and Reservoir Project, and
- (2) are not described in subsection (b), are hereby declared to be held in trust by the United States for the benefit and use of the Three Affiliated Tribes of the Fort Berthold Reservation.⁷⁵

By its terms, the 1984 Act dealt only with those mineral interests acquired in 1949. Such interests included, by the express language of the 1949 Takings Act, only *tribal* mineral interests. Thus, the 1984 Act does not disrupt the conclusion that the Takings Act considered only tribal interests in the Taking Area. This view is supported by section 204(a) of the 1984 Act, which provides that “[n]othing in this title shall deprive any person (other than the United States) of any right, interest, or claim which such person may have in any minerals prior to the enactment of this Act.” Further, any argument that the United States silently took State land without compensation in 1949, then granted to the Nation mineral rights to such land in 1984, is inconsistent with the Executive’s contemporaneous actions and the Congressional record.

V. Conclusion.

In reaching the conclusion that submerged lands were not reserved for the Nation and thus passed to the State at the moment of statehood, I remain cognizant of the strong presumption in favor of this outcome, stemming from constitutional principles of the equality of the states as the Supreme Court has repeatedly instructed. The Supreme Court has explained that submerged lands are held for the benefit of the future states, and are not disposed of “save in exceptional instances” when the United States is impelled to do so by an “international duty” or “public exigency.”⁷⁶ Federal reservations of submerged lands “are not lightly to be inferred, and should not be regarded as intended unless the intention was definitely declared or otherwise made very plain.”⁷⁷

Here, unarguably, the United States never “definitely declared” an intention to reserve submerged lands, and our extensive review of the historical record shows that such an intent was not “otherwise made very plain.” To the contrary, the record shows a consistent federal intent to encourage agriculture and husbandry, not fishing or any other use of the riverbed. In such circumstances and in the face of the strong presumption in favor of the State, I find that under the first step of *Idaho*’s two-step inquiry, Congress did not intend to include land under navigable waters within the Reservation.

⁷⁴ Pub. L. No. 98-602, tit. 2, 98 Stat. 3149, 3152 (1984).

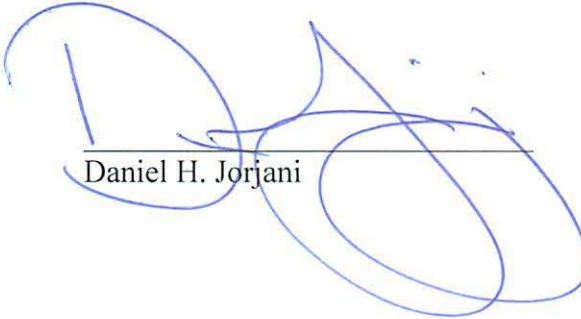
⁷⁵ *Id.* at § 202.

⁷⁶ *United States v. Holt State Bank*, 270 U.S. 49, 55 (1926).

⁷⁷ *Ibid.*

This conclusion is bolstered by our examination of the relevant judicial precedent. This is not a case where fishing was the primary and essential source of tribal subsistence, as in *Alaska Pacific Fisheries* or *Donnelly*, or a case where tribal fishing rights and interest in the waterways was repeatedly and consistently communicated to the Executive and Congress, as in *Idaho*. Nor is this a matter in which a fundamental federal purpose would be compromised by granting the riverbed to the State, as in *Alaska's* National Petroleum Reserve and Arctic National Wildlife Range.

I advise the Bureau of Indian Affairs and the Bureau of Land Management to take any actions deemed necessarily to comply with this opinion, to include the withdrawal of any existing oil and gas permits for extraction in submerged lands beneath the Missouri River.



Daniel H. Jorjani

Procedures for Executive Session regarding Attorney Consultation and Consideration of Closed Records

Overview

- 1) The governing body must first meet in open session.
- 2) During the meeting's open session the governing body must announce the topics to be discussed in executive session and the legal authority to hold it.
- 3) If the executive session's purpose is attorney consultation, the governing body must pass a motion to hold an executive session. If executive session's purpose is to review confidential records a motion is not needed, though one could be entertained and acted on. The difference is that attorney consultation is not necessarily confidential but rather has "exempt" status, giving the governing body the option to consult with its attorney either in open session or in executive session. Confidential records, on the other hand, cannot be opened to the public and so the governing body is obligated to review them in executive session.
- 4) The executive session must be recorded (electronically, audio, or video) and the recording maintained for 6 months.
- 5) Only topics announced in open session may be discussed in executive session.
- 6) When the governing body returns to open session, it is not obligated to discuss or even summarize what occurred in executive session. But if "final action" is to be taken, the motion on the decision must be made and voted on in open session. If, however, the motion would reveal "too much," then the motion can be abbreviated. A motion can be made and voted on in executive session so long as it is repeated and voted on in open session. "Final actions" DO NOT include guidance given by the governing body to its attorney or other negotiator regarding strategy, litigation, negotiation, etc. (See NDCC §44-04-19.2(2)(e) for further details.)

Recommended Motion to be made in open session:

Under the authority of North Dakota Century Code Sections 44-04-19.1 and 44-04-19.2, the Board close the meeting to the public and go into executive session for purposes of attorney consultation relating to:

- Legislative Update
- United States Department of Interior M-37056

Action Record	Motion	Second	Aye	Nay	Absent
Secretary Jaeger					
Superintendent Baesler					
Treasurer Beadle					
Attorney General Stenehjem					
Governor Burgum					

Statement:

“This executive session will be recorded and all Board members are reminded that the discussion during executive session must be limited to the announced purpose for entering into executive session, which is anticipated to last approximately one hour.

The Board is meeting in executive session to provide guidance or instructions to its attorneys regarding the identified litigation. Any formal action by the Board will occur after it reconvenes in open session.

Board members, their staff, employees of the Department of Trust Lands and counsel with the Attorney General staff will remain, but the public is asked to leave the room.

The executive session will begin at: _____AM, and will commence with a new audio recording device. When the executive session ends the Board will reconvene in open session.”

Statements upon return to open session:

State the time at which the executive session adjourned and that the public has been invited to return to the meeting room.

State that the Board is back in open session.

State that during its executive session, the Board provided its attorney with guidance regarding litigation relating to the sovereign lands' minerals claims.

[The guidance or instructions to attorney does not have to be announced or voted upon.]

State that no final action will be taken at this time as a result of the executive session discussion

-or- .

Ask for a formal motion and a vote on it.

Move to the next agenda item.