

# **BOARD OF UNIVERSITY AND SCHOOL LANDS**

**September 9, 2021 at 2:00 PM**

**Via Microsoft Teams Only**

[Click here to join the meeting](#)

**Or call in (audio only)**

[+1 701-328-0950,,746316942#](#) United States, Fargo

Phone Conference ID: 746 316 942#

## **AGENDA**

➤ = **Board Action Requested**

1. **Investments – Michael Shackelford**

- A. International Small Cap Equity Index – pg. 2

2. **Litigation – Jodi Smith**

- A. Whiting Petroleum Corporation, et al., Chapter 11, Case No. 20-32021 – pg. 3
- B. Newfield Exploration Company et al Civ. No. 27-2018-CV-00143 – pg. 4

➤ **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:**

- Whiting Petroleum Corporation, et al., Chapter 11, Case No. 20-32021
- Newfield Exploration Company et al Civ. No. 27-2018-CV-00143

**MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS**

September 9, 2021

---

**RE: International Small Cap Equity Index**

On August 26, 2021, the Board of University and School Lands' (Board) approved an investment in Northern Trust's International Small Cap Equity Index fund on behalf of the Permanent Trust Funds (PTFs). The investment in the index fund will give the PTFs a rebalancing tool for when the PTFs are waiting in Acadian's investment queue.

Due to an error by Northern Trust, the PTFs are not eligible to invest in their International Small Cap Equity Index fund. During the due diligence process staff and RVK engaged several index providers for quotes. Both Northern Trust and State Street Global Advisors (SSGA) offered the lowest fee (6 basis points).

Staff requested SSGA re-bid the mandate. SSGA agreed and re-bid at the same fee (6 basis points). SSGA has a strong track record managing index funds with low tracking error to the actual indices. SSGA is a multinational asset manager with \$3.90 Trillion in assets under management and over 40 years of history.

**Recommendation: The Board approve a \$25 Million investment with State Street Global Advisors, in place of Northern Trust, in the International Small Cap Index Fund mandate subject to final review and approval of all legal documents by the Office of the Attorney General.**

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

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

September 9, 2021

**RE: Whiting Bankruptcy**  
(No Action Requested)

**Case:** In re: Whiting Petroleum Corporation, et al., Chapter 11, Case No. 20-32021 (DRJ)

**Date Filed:** April 1, 2020

**Court:** United States Bankruptcy Court for the Southern District of Texas – Houston Division

**Attorneys:** James Wald, James A. Lodoen

**Opposing**

**Counsel:** Matthew D. Cavanaugh, Jennifer F. Wertz, and Vienna F. Anaya, Jackson Walker LLP

**Judge:** David R. Jones

**Issues:** Debtor filed for Chapter 11 Bankruptcy on April 1, 2020. The Department identified unclaimed property through a third-party audit as well as unpaid royalty liability.

**History:** Debtor filed for Chapter 11 Bankruptcy on April 1, 2020. The Board filed three separate proofs of claim on September 25, 2020: One claim pertaining to unremediated unclaimed property disbursement liability of \$11,933,098.40, and two claims pertaining to unpaid oil and gas royalties totaling \$6,399,811.63.

Documents filed can be accessed at: <https://cases.stretto.com/whitingpetroleum>.

Documents applicable to the interests of the Board include:

- 1) Document #566 Disclosure Statement and Plan
- 2) Document #733 Order Confirming Plan
- 3) Document #1081 Debtor's Objection to Claim

**Current Status:**

- On August 20, 2021, Debtor filed an objection to the Board's proof of claim pertaining to unclaimed property liability. The Board has until September 19, 2021 to respond.
- Debtor has until February 28, 2022, to respond to the outstanding proofs of claim pertaining to oil and gas royalties.

MEMORANDUM TO THE BOARD OF UNIVERSITY AND SCHOOL LANDS

September 9, 2021

**RE: Newfield Litigation**  
(No Action Requested)

**Case:** Newfield Exploration Company, Newfield Production Company, and Newfield RMI LLC v. State of North Dakota, ex rel. the North Dakota Board of University and School Lands and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands, Civ. No. 27-2018-CV-00143

**Date Filed:** March 7, 2018

**Court:** District Court/McKenzie County

**Attorneys:** David Garner

**Opposing**

**Counsel:** Lawrence Bender - Fredrikson & Byron, P.A. and Michelle P. Scheffler – Haynes and Boone, LLP

**Judge:** Robin Schmidt

**Issues:** Plaintiff is seeking a Declaratory Judgment that it is currently paying gas royalties properly under the Board's lease. Specifically, Plaintiff is asking the Court to order that gas royalty payments made by the Plaintiff be based on the gross amount received by the Plaintiff from an unaffiliated third-party purchaser, not upon the gross amount paid to a third party by a downstream purchaser, and that Plaintiff does not owe the Defendants any additional gas royalty payments based on previous payments.

- **History:** A Complaint and Answer with Counterclaims have been filed. Newfield filed an Answer to Counterclaims. A Scheduling conference was held July 27, 2018. Plaintiffs' filed a Motion for Summary Judgment on August 13, 2018 and Defendants filed a Cross-Motion for Summary Judgment. Plaintiffs' Response was filed October 19, 2018 and Defendants' Reply was filed November 9, 2018. A hearing on the Motions for Summary Judgment was held on January 4, 2019 at 1:30 p.m., McKenzie County. An Order on Cross Motions for Summary Judgment was issued on February 14, 2019, granting Plaintiff's motion for summary judgment and denying Defendants' motion for summary judgment. The Judgment was entered March 1, 2019, and the Notice of Entry of Judgment was filed March 4, 2019. Defendants have filed a Notice of Appeal to the North Dakota Supreme Court (Supreme Court). The trial scheduled in McKenzie County District Court for September 10 and 11, 2019 has been cancelled. Defendants/Appellants' Brief to the Supreme Court was filed April 29, 2019. Plaintiffs/Appellees filed their Brief of Appellees and Appendix of Appellees on June 7, 2019. Defendants/Appellants filed a reply brief on June 18, 2019. Oral Argument before the Supreme Court was held on June 20, 2019. On July 11, 2019, the Supreme Court entered its Judgment reversing the Judgment of the McKenzie County District Court. On July 25, 2019 Newfield filed Appellee's Petition for Rehearing. Also on July 25, 2019, a Motion for Leave to File Amicus Curiae Brief by Western Energy Alliance in Support of Newfield was filed with the Supreme Court. On July 26, 2019, a Motion for Leave to File Amicus Curiae Brief by North Dakota Petroleum Council in Support of Newfield was filed with the Supreme Court. On August 20, 2019, the North Dakota Supreme Court requested

Defendants file a Response to the Petition for Rehearing and the two Amicus Curiae Briefs no later than September 4, 2019. Defendants/Appellants filed their Response to Petition for Rehearing on September 4, 2019. A Corrected Opinion was filed by the North Dakota Supreme Court on September 9, 2019, changing the page number of a citation. On September 12, 2019, the North Dakota Supreme Court entered an order denying Newfield's Petition for Rehearing. On September 20, 2019, the opinion and mandate of the Supreme Court was filed with McKenzie County District Court. A Telephonic Status Conference was held October 8, 2019. On October 9, 2019, the District Court issued an Order Setting Briefing Schedule which ordered "the parties to file a brief regarding how they suggest the case proceed after the Supreme Court's decision." The parties filed briefs with the District Court on November 6, 2019. Notice of Appearance for Michelle P. Scheffler of Hayes and Boone, LLP on behalf of Plaintiffs was filed November 7, 2019. Telephonic Status Conference scheduled for March 17, 2020 before the District Court. On May 14, 2020, the Court scheduled a five-day Court Trial to start on October 4, 2021, McKenzie County Courthouse. On July 28, 2020, a Stipulated Scheduling Order was entered, setting dates for various deadlines. On April 1, 2021, the State served Defendants State of North Dakota, ex re. the North Dakota Board of University and School Lands, and the Office of the Commissioner of University and School Lands, a/k/a the North Dakota Department of Trust Lands' Interrogatories, Requests for Production of Documents, and Requests for Admissions to Plaintiff. On April 1, 2021, the Plaintiffs served the following on the State: Plaintiffs' Notice of Intention to Take Oral and Videotaped Deposition of a Representative of the North Dakota Department of Trust Lands; Plaintiffs' Notice of Intention to Take Oral and Videotaped Deposition of Lance Gaebe; Plaintiffs' Notice of Intention to Take Oral and Videotaped Deposition of Taylor K. Lee; Plaintiffs' Notice of Intention to Take Oral and Videotaped Deposition of Jodi Smith; and Plaintiffs' First Set of Interrogatories, Requests for Production, and Requests for Admission to all Defendants. On July 1, 2021, Defendants filed their Motion for Summary Judgment and Plaintiffs filed their Motion for Partial Summary Judgment. On August 2, 2021, Plaintiffs filed a Motion to Admit Garrett S. Martin Pro Hac Vice and their Response Brief in Opposition to Motion for Summary Judgment. Also on August 2, 2021, Defendants filed their Brief in Response to Plaintiffs' Motion for Partial Summary Judgment. On August 4, 2021, the parties filed an Expedited Joint Motion for Extension of Time to Reply to Briefs in Opposition/Response to Motions for Summary Judgment and the Joint Motion to Exceed Volume Limitations. On August 5, 2021, the Court issued its Order Granting Expedited Joint Motion for Extension of Time to Reply to Briefs in Opposition/Response to motions for Summary Judgment and the Order Granting Joint Motion to Exceed Volume Limitations. The parties now have until August 30, 2021 to file their opposition/response briefs and the page limit was extended from 12 pages to 30 pages for both parties. On August 9, 2021, Plaintiffs requested a hearing on Plaintiff's Motion for Partial Summary Judgment and Defendants Motion for Summary Judgment and scheduled that hearing for September 16, 2021, at 10 a.m. Also on August 9, 2021, a Pretrial Conference was scheduled for 10 a.m. on October 1, 2021.

**Current  
Status:**

- The Deposition of Adam Otteson is scheduled for August 31, 2021; Jodi Smith's deposition is scheduled for September 14, 2021; the deposition of Kelly Vandamme is scheduled for September 22, 2021; and the deposition of John Kemmerer is scheduled for September 23, 2021.
- Mediation is scheduled for September 2, 2021.

## **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:**

- **Whiting Petroleum Corporation, et al., Chapter 11, Case No. 20-32021**
- **Newfield Exploration Company et al Civ. No. 27-2018-CV-00143**

<b>Action Record</b>	<b>Motion</b>	<b>Second</b>	<b>Aye</b>	<b>Nay</b>	<b>Absent</b>
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.**