

**Minutes of the Meeting of the  
Board of University and School Lands  
January 21, 2020**

The January 21, 2020 meeting of the Board of University and School Lands was called to order at 9:00 AM in the Governor's Conference Room of the State Capitol by Chairman Doug Burgum.

**Members Present:**

Doug Burgum	Governor
Alvin A. Jaeger	Secretary of State
Wayne Stenehjem	Attorney General
Kelly Schmidt	State Treasurer

**Members Absent:**

Kirsten Baesler	Superintendent of Public Instruction
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**Department of Trust Lands Personnel Present:**

Jodi Smith	Commissioner
Kristie McCusker	Paralegal
Catelin Newell	Office Manager
Kate Schirado	Administrative Assistant
Adam Otteson	Revenue Compliance
Michael Shackelford	Investments

**Guests in Attendance:**

Dave Garner	Attorney General's Office
Leslie Bakken Oliver	Governor's Legal Counsel
Reice Haase	Governor's Office
Craig Smith	Crowley Fleck
Brady Pelton	ND Petroleum Council
Ron Ness	ND Petroleum Council
Tyler Gludt	Fredrikson & Byron, P.A.

**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 December 18, 2019 meeting was made by Attorney General Wayne Stenehjem and seconded by Secretary Alvin Jaeger and the motion carried unanimously on a voice vote.

**R E P O R T S**

**Report of Encumbrances Issued by Land Commissioner 12/11/2019 to 1/14/2020**

<b>Granted to:</b>	<b>TRUE OIL LLC, CASPER-WY</b>
For the Purpose of:	Surface Damage Agreement Amend: Well-Horizontal Oil Well
Right-of-Way Number:	RW0008273
Trust:	A-Common Schools
Legal Description:	MCK-148-101-36-NE4

**Granted to: CATES EARTH SCIENCE TECHNOLOGIES INC, BISMARCK-ND**

For the Purpose of: Permit: Temporary Water Layflat Line  
 Right-of-Way Number: RW0008629  
 Trust: A-Common Schools  
 Legal Description: MOU-151-92-36-W2NE4SW4, NW4SW4, S2SW4

**Granted to: SELECT ENERGY SERVICES LLC, WILLISTON-ND**

For the Purpose of: Permit: Temporary Water Layflat Line  
 Right-of-Way Number: RW0008634  
 Trust: A-Common Schools  
 Legal Description: WIL-158-95-36-SE4, SW4

**Granted to: EAST VALLEY INDUSTRIAL PARK LLC, DENVER-CO**

For the Purpose of: Easement Amend: Railroad Right-of-Way  
 Right-of-Way Number: RW0008638  
 Trust: A-Common Schools  
 Legal Description: WIL-154-100-16-NE4, NW4

**Granted to: TABLEROCK SURVEY, LLC, THE WOODLANDS-TX**

For the Purpose of: Permit: Planning & Preconstruction Survey  
 Right-of-Way Number: RW0008644  
 Trust: A-Common Schools  
 Legal Description: N/A

**Granted to: WEST DAKOTA WATER LLC, WILLISTON-ND**

For the Purpose of: Permit: Temporary Water Layflat Line  
 Right-of-Way Number: RW0008645  
 Trust: A-Common Schools  
 Legal Description: WIL-156-95-16-SE4, SW4

**Granted to: ND GEOLOGICAL SURVEY, BISMARCK-ND**

For the Purpose of: Permit Amend: Rare Earth Elements Exploration  
 Right-of-Way Number: RW0008646  
 Trust: A-Common Schools  
 Legal Description: SLO-136-102-16-NE4

**The Financial Position was provided to the Board and is available at the Department upon request.**

**Unclaimed Property Program 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 December 2019, the Division received 49 holder reports with a property value of \$779,445 and paid 569 claims with a total value of \$296,952.

### Energy Infrastructure and Impact Office Program Report

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 \$624 million in funding.

The Oil and Gas Impact Grant Fund currently has 30 grants with a balance of \$14,388,087.28 as of December 31, 2019. The following shows grant activity for the last four months:

Oil and Gas Impact Grant Fund	Grants with balances	Current Balance Obligated to Grants
10/11/2019	41	\$17,695,025.25
11/15/2019	40	\$17,164,734.70
12/9/2019	36	\$15,477,345.77
12/31/2019	30	\$14,388,087.28

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 four grants with a balance of \$4,108,325.39 as of December 31, 2019. 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. The following shows grant activity for the last four months:

Energy Impact Fund	Grants with balances	Current Balance Obligated to Grants
10/11/2019	4	\$4,940,103.06
11/15/2019	4	\$4,793,191.14
12/9/2019	4	\$4,793,191.14
12/31/2019	4	\$4,108,325.39

The Energy Infrastructure and Impact Office is currently managing 34 grants for a total of \$20,270,536.91. The following shows grant activity for the last four 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
10/11/2019	41	\$17,695,025.25	10/11/2019	4	\$4,940,103.06	\$22,635,128.31
11/15/2019	40	\$17,164,734.70	11/15/2019	4	\$4,793,191.14	\$21,957,925.84
12/9/2019	36	\$15,477,345.77	12/9/2019	4	\$4,793,191.14	\$20,270,536.91
12/31/2019	30	\$14,388,087.28	12/31/2019	4	\$4,108,325.39	\$18,496,412.67

### Acreage Adjustment Survey

Senate Bill 2211 of the Sixty-Sixth Legislative Assembly amended N.D.C.C. ch. 61-33.1 relating to the ownership of mineral rights of land subject to inundation by Pick-Sloan Missouri basin project dams. Under N.D.C.C. § 61-33.1-03(8), the Department executed a contract with Kadrmass, Lee & Jackson, Inc. “to analyze the final review findings and determine the acreage on a quarter-quarter

basis or government lot basis above and below the ordinary high water mark as delineated by the final review findings of the industrial commission.” The contract’s scope of work concludes twelve months from the date of execution, at a total cost of \$1,088,635.

Attachments were provided to the Board and are available upon request.

### Information Technology Project Status Update

The Department of Trust Land’s (Department) 2017-2019 biennial budget appropriation includes \$3.6 million to replace legacy information technology (IT) systems as authorized by Senate Bill 2013 of the Sixty-fifth Legislative Assembly.

Severe limitations in the current IT system, including redundant manual processes, have hampered efficiencies. Many of the Department’s core data management systems were developed in the 1980s and 1990s, using designs and tools no longer supported by vendors. Some supplemental system improvements and purchases have been implemented; however, the outdated database structure restricts many potential improvements.

There are several key IT systems related themes throughout the Department. They include:

#### Systems Limitations

- Accounting and financial systems do not have internal controls and standard reporting
- Paper-centric processes
- Document creation tools require manual editing
- Systems are not integrated with each other (e.g., Accounting and Minerals)
- Lack of up-to-date GIS capabilities

#### Automation and Efficiency

- Lack of computer systems to support and enforce process consistency
- Manual tasks require keying and re-keying inputs
- Lack of automated workflows and workflow tracking

(01/21/20)

## Reporting

- Lack of automated reports and dashboards
- Inability to provide timely financial reports and analysis
- Limited visibility into performance information

On April 29, 2019, the new system for Unclaimed Property was successfully launched.

In 2017, Department created a Request for Proposals (RFP) for the Land Management and Accounting functions; however, the number of responses were limited and those proposals did not meet the Department's requirements. Subsequently, the Department issued an RFP for the Financial Management and Accounting (FMA) system in October 2018. In December 2019, the Department awarded a contract to Ernst and Young to implement the Microsoft Dynamics 365 for Finance and Operations system with an estimated go-live date of June 2020. On December 16, 2019, the Department issued the RFP for the Land Management system with responses due February 2020.

## Energy Infrastructure and Impact Office Retirement of Grant

In August 2014, the Board of University and School Lands (Board) awarded a \$1 million grant, Grant G150012, to the City of Ross to repair its sewage lagoon system and to begin expanding the capacity on the interior and exterior walls of the current lagoon. The City of Ross did not begin the project in 2016 due to mis-communication resulting in the city believing the grant was one of the 59 suspended in February of 2016 as a result of declining tax revenue.

The City of Ross requested, and the Board approved in June 2017, an extension until December 31, 2019 to overcome obstacles including to purchase easements, design the repair, seek bids, and complete the lagoon repairs. Another extension was requested and approved by the Director of EIIO, to June 15, 2019.

In the spring of 2019, it was determined that unanticipated erosion occurred on the berms of the cells of the lagoon due to a lack of protection from wind. The original plan was to reconstruct the berms but not add riprap due to cost. With funds remaining in Grant G150012, the City of Ross added riprap, a permanent layer of large, angular stone used to protect the soil surface against erosion, so the ponds could continue to operate for many years to come with minimal if any repairs anticipated. The final project completion date was October 2019.

The City of Ross completed the project and had grant funds left in the amount of \$394,109.24.

The following recommended retirement of Grant G150012 is provided for the Board's consideration:

Political Sub	Grant	Awarded	Paid	Balance	Project
CITY OF ROSS	G150012	\$1,000,000	\$605,890.76	\$394,109.24	WASTEWATER TREATMENT FACILITY EXPANSION

**Motion: The Board retire Grant G150012 in the amount of \$394,109.24 and that the Board declare these funds within the Oil and Gas Impact Grant Fund as contingent for future unmet needs.**

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

City of Ross Memo Attachment was provided to the Board and is available upon request.

(01/21/20)

## I N V E S T M E N T S

### Investment Policy Statement Proxy Voting Second Reading

Although it is the policy of the Board of University and School Lands (Board) to review the Investment Policy Statement (IPS) at least every four years, it is the practice of the Commissioner to review the IPS annually and more frequently, as needed.

At the September 26, 2019 Board meeting the current IPS was adopted. During the following weeks the State Treasurer, Commissioner and staff have discussed modifying the proxy voting section of the IPS to ensure investment managers continue to vote shares in a manner that is to the best interest of the trusts as it relates to environmental, social and governance (ESG) issues. ESG has become a tool for some large investors who are pushing managers to use proxy votes to virtue signal, particularly on environmental issues related to oil and gas exploration and production.

As such, it is recommended the IPS's Proxy Voting section be revised. The revision makes clear that the Board expects proxy votes on behalf of the trusts to be:

1. "...in a manner consistent with the long-term interests and objectives of the investment program."
2. "...based solely on enhancing or protecting long-term value to the assets under its control and not on establishing or endorsing social policy."
3. "...only those factors that relate to the economic value of the Board's investments and shall not subordinate the interests of the Funds to unrelated objectives."

The revision also requires that:

1. "Managers shall submit written reports to the Commissioner by December 31 of each year advising of the manner in which each proxy was voted during the preceding calendar year and notify the Commissioner of controversial matters which may be subject to proxy voting."
2. "...the Commissioner [specifically the investment staff] shall regularly review related proxy votes by the Managers. Any proxy votes deemed by the Commissioner to be contrary to the interests of the Funds under the Board's responsibility, shall be fully explained by the Manager in writing and brought to the Board for its review."

If approved after this second reading, the Commissioner will transmit the new policy to all of the investment managers currently managing funds on the Board's behalf.

**Motion: That the Board approve the update to the Investment Policy Statement's Proxy Voting section.**

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

Attachments were provided to the Board and are available upon request.

## **MINERALS**

### **Mineral Valuation**

Senate Bill 1013 of the Sixty-Sixth Legislative Assembly approved one-time funding for a mineral valuation study.

The Department of Trust Lands (Department) has been tasked with conducting a study to determine the estimated value of the mineral assets, 2.6 million acres, held in trust by the Board of University and School Lands (Board).

The oil and gas mineral estate assessment (Assessment) will reflect the estimated value of oil and gas mineral assets managed by the Board. This Assessment is complicated by the mineral assets' sheer size, variance in geological aspects, and topography.

The Request for Proposal for the Assessment was released September 20, 2019. A Notice of Intent to Award was issued to MineralTracker LLC on January 2, 2020. The Department expects to execute a contract in January 2020 with MineralTracker, LLC. MineralTracker is based in Watford City, North Dakota, and is owned and operated by petroleum engineers with extensive experience in the valuation of non-operated oil and gas properties, including mineral and royalty interests in the Williston Basin of North Dakota. To execute on the mineral valuation, MineralTracker shall consider all Proved Developed Producing wells currently under the Board's management and perform decline curve analysis to project future oil, gas, and water production for each well. For any undeveloped mineral acreage in which oil and gas reserves are prospective but unproven, market rate conversions related to the recent leasing bonus payments shall be employed. Once the data is compiled and the findings completed, those findings will be presented to the Board.

The Department looks forward to the opportunity to lead the nation in this effort, as no other state agency or federal entity has embarked on such an endeavor to summarize the estimated value of their assets.

### **Repayment of Unpaid Gas Royalties**

For over a decade, the Department of Trust Lands (Department) has persistently worked with operators to collect payment or establish escrow accounts for royalties from the production of minerals, in accordance with the Board of University and School Land's lease, rules, and policies.

In 2012, the Department sent letters to operators and lessees who reported deductions for royalties paid. In July 2017, letters were sent to all operators and lessees regarding the proper method to calculate gas royalties. Companies who were audited and found to be non-complaint with the proper calculation of gas royalties, as outlined in the July 2017 letter, received audit finding letters. All companies who have continued to be non-compliant have received additional communication regarding the proper calculation of gas royalties.

The Department's 2016 performance audit found the Department was not consistently issuing penalties and interest and recommended a policy be established. The Department adopted an internal policy regarding penalties and interest. Additionally, the Board of University and School Lands (Board) adopted a policy regarding penalties and interest, which is included in our proposed Administrative Rules.

Current Department and Board policy assesses the maximum interest (18%) under N.D.C.C. § 47-16-39.1, and penalty (12%) allowed on all late royalty payments unless a request is made to the Commissioner to negotiate the interest rate. The Department's revenue compliance procedures

are configured to calculate and generate interest and penalty notices in accordance with these policies.

Under the Board's rules and policies once penalties and interest over \$25,000 are assessed for late payment of royalties, only the Board can modify the amount.

N.D.C.C. § 47-16-39.1 provides interest may not be applied on royalties that were escrowed since this statute permits the suspension of interest payments "in the event of a dispute of title existing that would affect distribution of royalty payments . . . ."

**Recommendation: The Board delegates the Commissioner to determine gas royalty repayments as discussed.**

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

**No formal action taken at this time.**

### **Oil and Gas Lease Amendment**

In House Bill 1300, the Sixty Fifth Legislative Assembly directed the Board of University and School Lands (Board) no longer be exempt from the Administrative Agencies Practice Act (Act). In Senate Bill 2264, the Sixty Sixth Legislative Assembly directed the Board be exempt from the adjudicative proceeding requirements and procedures under North Dakota Century Code §§ 28-32-21 through 28-31-51 of the Act. Those rules became effective January 1, 2020. A final version of the Administrative Rules has been posted on the Department's website.

The Board's Oil and Gas rules are long-standing. Each lease that is entered into is bound by the rules in place at the time of the lease execution. With the Board revising the rules into Board Policies, the Board's Oil and Gas Lease will need to be revised to reflect the word "rules" instead of "policies".

**Motion: The Board amended the Board Oil and Gas Lease to reflect the Administrative Rules.**

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

Attachment was provided to the Board and is available upon request.

## LITIGATION

### Vitesse

**Case:** Vitesse Oil, LLC; Vitesse Energy, LLC; and Iron Oil Operating LLC v. State of North Dakota; North Dakota Board of University and School Lands; and Jodi A. Smith, Commissioner of University and School Lands, Case No. 27-2019-CV-00266;

**Date Filed:** June 11, 2019

**Court:** McKenzie County District Court

**Judge:** Robin Schmidt

**Attorney:** David Garner

**Opposing**

**Counsel:** Lawrence Bender, Spencer Ptacek

**Issues:** On June 7, 2019, the Attorney General's Office was served with a complaint in the above referenced case. This case is requesting a judgment be entered under Chapter 32-12 of the North Dakota Century Code quieting title in Leases in favor of Plaintiffs; a judgment be entered under Chapter 32-12 of the North Dakota Century Code declaring that the Leases remain valid and in effect with respect to all of the Subject Lands based on the force majeure provision of the Board's lease; that the Court enter a temporary restraining order, preliminary injunction, and permanent injunction, prohibiting Defendants from selling or attempting to sell new leases covering the oil and gas in and under the Subject Lands or otherwise interfering with Plaintiffs exclusive right to explore for and produce the same; and that Plaintiffs be awarded their costs and reasonable attorney fees.

**History:** The Summons and Complaint were served on the State of North Dakota and the Board of University and School Lands, by service on the Attorney General's Office on June 7, 2019. The action was filed on June 11, 2019. The State's Answer was filed with the District Court June 28, 2019. A scheduling conference was held on October 2, 2019. The parties will work on a scheduling order. Lessee's Motion for Leave to Amend complaint filed October 14, 2019. Order Granting Plaintiffs' Motion for Leave to Amend was entered on October 30, 2019.

**Current Status:**

- On December 17, 2019, a Notice of Telephonic Scheduling Conference was filed by the court, setting a telephonic scheduling conference for January 22, 2020 at 11:15 a.m.

### Continental

**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, 8<sup>th</sup> Circuit

**Judge:** Honorable Daniel Hovland

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

**Opposing**

**Counsel:** Lawrence Bender, David Ogden, Paul Wolfson, John S. Most

**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 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 Court determine the property interests for 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 pursuant to the Board’s rules.

**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 appropriations are restored and Department attorneys and the Bureau of Land Management personnel are permitted to resume their usual civil litigation functions.” A January 10, 2019 docket entry provides “Deadlines and Hearings Terminated.” 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, due to appointment of Magistrate Judge Clare Hochalter, replacing Magistrate Judge Charles Miller, and the recusal of Shaun Pettigrew of the Environment and Natural Resources Division of the Department of Justice, with John S. Most as his replacement. 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 memorandandum 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.”

**Current Status:**

- Status conference was held January 13, 2020 and another status conference was set for April 7, 2020.

**Wilkinson**

**Case:** William S. Wilkinson, et. al. v. Board of University & School Lands, Brigham Oil & Gas, LLP; EOG Resources, Inc.; Case No. 53-2012-CV-00038

**Date Filed:** January, 2012

**Court:** Williams County District Court

**Judge:** Paul Jacobson

**Attorney:** Jennifer Verleger/Matthew Sagsveen/David Garner

**Opposing**

**Counsel:** Josh Swanson/Rob Stock, Lawrence Bender, Lyle Kirmis

**Issues:** The Wilkinson lawsuit was filed on January 10, 2012. The Plaintiffs assert that they own minerals in a 200 acre tract west of Williston. This suit was initially filed in state court as a quiet title action. The Attorney General’s Office filed an Answer and Counterclaim on February 27, 2012.

On July 1, 2014, the Plaintiffs filed an amended complaint in the case and added claims of unconstitutional takings, conversion, constructive trust and unjust enrichment, civil conspiracy and deprivation of rights under 42 U.S.C. § 1983. Plaintiffs assert in their amended complaint that the Board should be issuing leases

on the west side of the Highway 85 bridge pursuant to the Phase II Investigation – the estimated location of the ordinary high watermark (OHWM) prior to inundation of Lake Sakakawea – rather than the Phase I Delineation – current location of the OHWM. Plaintiffs argue that the subject property is located under Lake Sakakawea, which did not exist at statehood, and thus the state did not acquire title to it as sovereign lands. Therefore, the State’s title to the Missouri River is limited to the channel as it existed prior to inundation of Lake Sakakawea as determined by the Phase II investigation.

In January of 2016, the State Engineer sought and was granted intervention. A joint motion for summary judgment was filed by the Board and the State Engineer on March 1, 2016. On May 18, 2016, the district court granted the motion for summary judgment finding that: (1) the subject property is located along the Missouri River, which is no doubt navigable; (2) The Phase I Delineation should be used to determine the OHWM for the subject property rather than the Phase II Investigation, and therefore the property is determined to be sovereign land of the state of North Dakota; (3) to the extent Plaintiffs are aggrieved by the Phase I Delineation, they must exhaust their administrative remedies through the State Engineer before making a claim in district court; and (4) there are no grounds to support Counts II through VII. Plaintiffs filed a notice of appeal on June 1, 2016. Both EOG Resources, Inc. and Statoil Oil and Gas LP filed cross-appeals.

On September 28, 2017, the North Dakota Supreme Court reversed the district court’s decision and remanded the case back to the district court. The Supreme Court held that:

1. Surface ownership could not be determined without the United States as a party to the action;
2. N.D.C.C. ch. 61-33.1 has a retroactive clause and the district court did not have an opportunity to determine if it applies and governs ownership of the minerals at issue;
3. A “takings” analysis must be conducted if the district court determines the State owns the disputed minerals; and
4. The district court erroneously made findings of disputed fact.

**History:**

Due to the passage of S.B. 2134, the District Court ordered the case stayed and all deadlines be held in abeyance until the final review findings under S.B. 2134 are issued by the North Dakota Industrial Commission (NDIC). Plaintiff, after NDIC issued the review findings, requested a status conference with the Court to set a new trial date and other deadlines. The Board and State Engineer filed a Motion for Continued Stay of Proceedings on October 11, 2018. The telephonic status conference scheduled for November 2, 2018 was cancelled. A Hearing on the Motion for Continued Stay was held November 30, 2018. Defendants submitted a proposed Order and the Judge asked for Plaintiffs to submit a proposed Order, which was filed December 4, 2018. The Court issued its Order on December 12, 2018, denying the Motion for Continued Stay and requiring the parties confer on a scheduling order and submit a Rule 16 scheduling order by January 26, 2019. The State filed a Motion for Proposed Scheduling Order on January 28, 2019, and Plaintiffs filed a notice of hearing on January 31, 2019, and filed their Response to State’s Motion for Proposed Scheduling Order and Plaintiffs’ Request for Rule 16(F) Sanctions on February 1, 2019. State Defendants filed a Reply Brief in Support of Motion for Proposed Scheduling Order on February 8, 2019. Statoil & Gas LP filed a Response to State’s Motion for Proposed Scheduling Order and Plaintiff’s Proposed

Scheduling Order on February 11, 2019. Plaintiffs scheduled a hearing in District Court on the Motion for Scheduling Order which was held March 5, 2019, at 2:00 p.m. The District Court didn't rule on the scheduling motions but granted Plaintiffs' request to file a motion for Summary Judgment within 30 days of the hearing. On April 15, 2019, Plaintiffs' filed with the District Court a Notice of Motion, Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, Affidavit of Joshua Swanson, Notice of Hearing (requesting a hearing be held at the earliest possible date available on the Court's calendar), and proposed Order Granting Plaintiffs' Motion for Summary Judgment. On April 17, 2019, Plaintiffs' filed a Notice of Hearing scheduling a hearing for 2:00 p.m. on July 30, 2019 before the Honorable Paul W. Jacobson, at the Williams County Courthouse, Williston. The parties entered into a Stipulation Extending Time to Respond to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Time to Reply which was entered May 1, 2019. The Order Extending Time to Respond was entered May 2, 2019, extending Defendants' time to respond to June 14, 2019, and extending Plaintiffs' deadline to file reply to July 1, 2019. On June 10, 2019 Statoil & Gas LP filed its Opposition to Plaintiffs' Motion for Summary Judgment. Also, on June 10, 2019, the Stipulated Motion to Dismiss Defendant XTO Energy Inc. was filed in which Plaintiffs, Cross-claimant EOG, and Defendant XTO stipulated and requested the Court dismiss XTO from the action with prejudice and without costs and disbursements to any party, as it holds no ownership interest in, right to, claim or title to any mineral interests as alleged by Plaintiffs. The Board of University and School Lands filed its Brief in Opposition to Plaintiffs' Motion for Summary Judgment on June 14, 2019. Also filed on June 14, 2019 where the State Engineer's Response to Brief in Opposition to Plaintiffs' Motion for Summary and the Response of EOG Resources, Inc., to Plaintiffs' Motion for Summary Judgment. On June 17, 2019, the Court entered its Order Dismissing Defendant XTO Energy, Inc. from the Action. On July 1, 2019, Plaintiff's filed their Reply Brief in Support of Motion for Summary Judgment. The hearing on the Motion for Summary Judgment was held on July 30, 2019. Order Granting Plaintiffs' Motion for Summary Judgment was entered on September 6, 2019. The proposed Judgment was submitted on September 12, 2019. The Judgment and Notice of Entry of Judgment were filed with the District Court on September 16, 2019. Board of University and School Lands' Notice of Appeal to the North Dakota Supreme Court was filed on November 15, 2019. State Engineer's Notice of Appeal to the North Dakota Supreme Court was filed on November 15, 2019. Notice of Appeal to North Dakota Supreme Court filed by Statoil Oil & Gas LP f/k/a Brigham Oil & Gas, LLP on November 27, 2019. Appellant's Initial Briefs were due December 12, 2019; however, a Joint Motion for Extension of Time to File

Briefs was filed and an extension was granted on December 13, 2019, with all briefs being due to the Supreme Court as follows:

- Appellants' (including Board of University and School Lands) Initial Briefs - January 13, 2020;
- Appellees' Response Briefs – March 2, 2020; and
- Appellants' (including Board of University and School Lands) Reply Briefs – March 16, 2020.

**Current Status:**

- On January 13, 2020, the Brief of Appellant, Board of University and School Lands was filed with the Supreme Court. Appellant North Dakota State Engineer's Principal Brief was also filed on January 13, 2020.

**North Range Resources**

**Case:** North Range Resources, LLC v. State of North Dakota, North Dakota Board of University and School Lands, Jodi Smith, Commissioner of University and School Lands, Case No. 27-2020-CV-00028

**Date Filed:** January 16, 2020

**Court:** McKenzie County District Court

**Judge:** Honorable Daniel El-Dweek

**Attorney:** David Garner

**Opposing**

**Counsel:** Lawrence Bender, Spencer D. Ptacek

**Issues:** On January 15, 2020, North Range Resources served a Summons and Complaint on State of North Dakota, the North Dakota Board of University and School Lands, and the Commissioner. This case is requesting a judgment be entered under Chapter 32-12 of the North Dakota Century Code quieting title in Leases in favor of Plaintiffs; a judgment be entered under Chapter 32-23 of the North Dakota Century Code declaring that the Leases remain valid and in effect with respect to all of the Subject Lands; and that Plaintiffs be awarded their costs and reasonable attorney fees.

**History:****Current Status:**

- Summons and Complaint was served on January 15, 2020, with the Answer being due in 21 days.

The Commissioner recommends the Board consider entering executive session for consultation with legal counsel regarding pending and potential litigation. Executive session began at 9:29 AM.

EXECUTIVE SESSION
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**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:**

- William S. Wilkinson, et. al. Case No. 53-2012-CV-00038
- North Range et al. Case No. 27-2020-CV-00028
- Repayment of Unpaid Gas Royalty

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

**EXECUTIVE SESSION****Members Present:**

Doug Burgum	Governor
Alvin A. Jaeger	Secretary of State
Wayne Stenehjem	Attorney General
Kelly Schmidt	State Treasurer

**Members Absent:**

Kirsten Baesler	Superintendent of Public Instruction
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**Department of Trust Lands Personnel present:**

Jodi Smith	Commissioner
Catelin Newell	Office Manager
Kate Schirado	Administrative Assistant
Adam Otteson	Revenue Compliance
Kristie McCusker	Paralegal

**Guests in Attendance:**

Brent Sanford	Lieutenant Governor
Leslie Bakken Oliver	Governor's Legal Counsel
Reice Haase	Governor's Office
Dave Garner	Attorney General's Office

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The executive session adjourned at 11:14 AM and the Board returned to open session and the public was invited to return to the meeting. During the executive session, the Board was provided information regarding the litigation of William S. Wilkinson, et. al.; North Range et al.; and Repayment of Unpaid Gas Royalty.

**A D J O U R N**

There being no further business, the meeting was adjourned at 11:15 AM.

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Doug Burgum, Chairman  
Board of University and School Lands

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Jodi Smith, Secretary  
Board of University and School Lands