

**Minutes of the Meeting of the  
Board of University and School Lands  
October 18, 2016**

The October 18, 2016 meeting of the Board of University and School Lands was called to order at 2:30 PM in the Governor's Conference Room by Chairman Jack Dalrymple.

**Members Present:**

Jack Dalrymple	Governor
Alvin A. Jaeger	Secretary of State
Kelly Schmidt	State Treasurer
Kirsten Baesler	Superintendent of Public Instruction

**Member Absent:**

Wayne Stenehjem	Attorney General
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**Department of Trust Lands Personnel present:**

Lance D. Gaebe	Commissioner
Allisen Bement	Mineral Title Specialist
Drew Combs	Director, Minerals Division
Taylor Lee	Director, Revenue Compliance
Catelin Newell	Office Manager
Kristie McCusker	Legal Assistant

**Guests in Attendance:**

Hope Hogan	Office of the Attorney General
Jen Verleger	Office of the Attorney General
Matt Sagsveen	Office of the Attorney General
Tom Trenbeath	Office of the Attorney General
Bonnie Storbakken	Governor's Legal Counsel
Jason Nisbet	Governor's Office
Ron Rauschenberger	Governor's Office
Jerry Heiser	Office of the State Engineer/State Water Commission
John Paczkowski	Office of the State Engineer/State Water Commission
Craig Smith	Crowley Fleck
Lawrence Bender	Fredrikson & Byron
Larry L. Larson	NDSEA
Michael Cymbaluk	Self
Cary Backstrand	ND Elks Association
Rob Lindberg	Bakken Backers
Alexis Brinkman Baxley	North Dakota Petroleum Council
Ron Ness	North Dakota Petroleum Council
Mike Nowatski	Forum News Service

Chairman Jack Dalrymple opened the meeting with the following statement:

"The Land Board has been consistent in its leasing practices concerning the minerals under the Missouri River and Lake Sakakawea. For purposes of leasing sovereign minerals the Land Board has utilized the Phase I Delineation which establishes the Ordinary High Water mark of the Yellowstone and Missouri Rivers from the Montana State Line to the Highway 85 Bridge. When leasing minerals between the Highway 85 Bridge and the Four Bears Bridge the Land Board has used the Phase II study which identified the Historic River channel as it existed immediately prior to inundation by Lake Sakakawea. The Board did not initiate any of the current litigation regarding the minerals."

**Motion: The Land Board will not change any leasing practices concerning the minerals under the Missouri River and Lake Sakakawea until such time as the North Dakota Legislative Assembly has had the opportunity to consider a definition of the Ordinary High Water Mark as it is used in establishing the State's sovereign ownership of oil and gas minerals.**

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

## MINERALS MANAGEMENT

### Sovereign Lands Litigation Update

The Board reviewed a summary of litigation in which it is involved regarding sovereign lands and minerals.

In December 2013, the North Dakota Supreme Court issued a decision in *Reep v. State* and *Brigham v. State* holding that the State of North Dakota owns the mineral interests up to the ordinary high water mark (OHWM) of navigable rivers and water bodies. Notwithstanding affirmation of the State's ownership of the land and minerals to the OHWM in *Reep* and *Brigham*, litigation on specific local circumstances and river features continue.

**Whiting Oil and Gas Corp. v. Arlen A. Dean, et al.**  
**McKenzie County District Court**  
**Case No. 27-2016-CV-00040**  
**Honorable Robin Schmidt**

Whiting Oil and Gas Corporation ("Whiting") operates the Kuykendall 34-31-1H well located in McKenzie County near the Montana border. The Yellowstone River flows through the Kuykendall well spacing unit. Over time, the river has shifted westward. There are also islands within the Kuykendall well spacing unit. On January 25, 2016, Whiting filed this interpleader action to resolve alleged title questions that have arisen due to the Yellowstone River. Because of these title questions, Whiting is withholding royalty payments. In its lawsuit, Whiting essentially asks the court to require all those asserting title to the minerals in the spacing unit to set forth and prove their claims, and once the court rules on those claims, Whiting will know who to pay.

The State claims a mineral interest under the Yellowstone River, including the islands, and the Board also claims a 5% mineral interest in some of the riparian tracts in this spacing unit.

The Board and the State Engineer filed a joint response to the Complaint and several cross claims that have been made against the State. A scheduling order has not been issued.

**William S. Wilkinson v. Board of University and School Lands, et al.**  
**Williams County District Court**  
**Case No. 53-2012-CV-00038**  
**Honorable Paul Jacobson**

The Wilkinson lawsuit was filed on January 10, 2012. The Plaintiffs assert that they own minerals in about 200 acres 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. The 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 historical Missouri River – rather than the Phase I Delineation – current location of the OHWM. The 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. The Plaintiffs argue that the State’s title to the Missouri River is limited to the channel as it existed prior to inundation of Lake Sakakawea.

In January, the State Engineer filed a motion to intervene in the case, which was granted. A joint motion for summary judgment was filed by the Board and the State Engineer on March 1, 2016. This motion was opposed by the Wilkinson family. 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 the 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. The Plaintiffs filed a notice of appeal on June 1, 2016. Both EOG and Statoil Oil and Gas LP have filed cross-appeals in this case. The Appellants’ brief is due October 28, 2016.

**EEE Minerals, LLC et al. v. State of North Dakota et al.**  
**U.S. District Court – District of ND (Western)**  
**Case No. 1:16-cv-00115**  
**Honorable Daniel L. Hovland**

On July 31, 2014, the Attorney General’s Office was served with a complaint in the above referenced matter. This case is requesting class action certification and alleges identical causes of action to the *Wilkinson* case. In January 2016, the State Engineer filed a motion to intervene, which was granted on March 3, 2016. Also in March, the Plaintiffs amended their complaint to: (1) add two additional named plaintiffs, (2) expand the scope of the proposed class action property from the Montana border to the border of the Fort Berthold reservation, and (3) add as defendants all of the Board’s lessees. On May 13, 2016, several of the recently added defendants removed the case to federal court based on diversity and federal questions. On June 11, 2016, the Board and the State Engineer filed a motion to dismiss arguing that: (1) the counts of the amended complaint that address the US Constitution and US Code are not ripe; and (2) asserting the State’s right to sovereign immunity. Several other motions to dismiss have been filed by the other defendants, as well as motions to join the United States as a defendant. The Plaintiffs have requested oral arguments on the motions to dismiss. On October 3, 2016, Judge Hovland issued an order denying the request for oral arguments and granting the motions to dismiss.

In his order, Judge Hovland found that because the United States claims an interest in the lands subject to this litigation, “no court, whether a state court or a federal court, could craft an effective judgment and address the litany of claims and disputes that exist in this complex litigation, if the federal government is not bound by the judgment. There is no court that could ever craft a judgment and carve out the ownership interests of the federal government from the judgment and achieve a fair and just result. The United States is a required, necessary, and indispensable party to the litigation.”

**Statoil Oil & Gas, LP v. Abaco Energy, LLC, et al.**  
**Williams County District Court**  
**Case No. 53-2015-CV-00744**  
**Honorable Judge David Nelson**

**Statoil Oil & Gas, LP v. 1280 Royalties LLC, et al.**  
**Williams County District Court**  
**Case No. 53-2015-CV-01437**  
**Honorable Judge Paul Jacobson**

Similar to the *Whiting* case listed above, Statoil has filed these two cases as interpleaders for the lands underlying spacing units operated by Statoil which are located east of the Bridge. Statoil is requesting the Court determine the property interests for the spacing units so that Statoil can correctly distribute the proceeds from the wells. The federal government claims a mineral interest to portions of the subject lands in both cases. Statoil acknowledges in the complaint that the United States claims an interest but is not amenable to state court jurisdiction. State's claim to sovereign lands' mineral interest be restricted to those minerals located below the OHWM of the Missouri River prior to inundation by Lake Sakakawea.

An answer was filed on behalf of the Board on July 21, 2015. In January 2016, the State Engineer intervened in the case. The Court has scheduled a six-person jury trial for March 12-16, 2018. On September 20, 2016, the Plaintiffs filed a motion for partial summary judgment in which they are requesting the court determine the breach of contract claim and failure to pay royalties claim for tracts it believes are not in dispute by this litigation.

**Mary K. Starin v. Kelly Schmidt, et al.**  
**Williams County District Court**  
**Case No. 53-2015-CV-00986**  
**Honorable David Nelson**

The Plaintiff initiated this quiet title action to determine title to property located under Lake Sakakawea. In 1939, the State acquired the disputed property through a foreclosure of a Bank of North Dakota loan. The State then sold the property through a contract for deed in 1945 to the Plaintiff's predecessors in interest. Pursuant to state law, the state reserved 50% of the minerals. The Special Warranty Deed issued after satisfaction of the contract for deed was not recorded, and no one has a copy of the fully executed deed. The surface estate was later condemned as part of the Garrison Dam reservoir project. The Plaintiffs have brought this action to clear title to the 50% of the minerals that they believe to be theirs. The Board has leased the 50% mineral interest it reserved in this conveyance.

In January 2016, the State Engineer intervened in this case. The parties are currently engaged in discovery. The Court has not scheduled a trial date or issued a scheduling order.

**ND Office of State Engineer, Board of University and School Lands v. BLM**  
**US Dept. of Interior Office of Hearings and Appeals – Board of Land Appeals**  
**IBLA 2016-170**

In 2014, the Bureau of Land Management (BLM) resurveyed land along the Missouri River to locate the boundary (OHWM) between the public domain land owned by the United States and the riverbed owned by the state of North Dakota. In identifying the OHWM, the BLM applied federal law rather than state law. Specifically the BLM adopted the survey conducted by the Corps of Engineers as part of the Garrison Dam project. In certain areas, the survey overlaps with the state's claim to sovereign lands.

After the survey work was complete, the BLM published a "Notice of Filing Plats of Survey; North Dakota" in which BLM intended to formally file the survey plats as Official Plats. After the Federal Register Notice appeared, the State Engineer and the Board jointly filed a protest challenging the filing of the survey plats. The BLM rejected the State's protest and the State appealed the BLM's decision to the IBLA. The State is waiting for the decision on the appeal.

## EXECUTIVE SESSION

Motion: **Under the authority of North Dakota Century Code Sections 44-04-19.1 and 44-04-19.2, that the Board closes this meeting to the public and enters executive session for the purpose of consultation with its attorneys on pending and active litigation that challenge the State's claim to sovereign lands, including:**

- **Whiting Oil and Gas Corp. v. Arlen A. Dean et al.**
- **William S. Wilkinson v. Board of University & School Lands, et al.**
- **EEE Minerals, LLC, et al. v. State of North Dakota, et al.**
- **Statoil Oil & Gas LP v. 1280 Royalties LLC, et al.**
- **Statoil Oil & Gas LP v. Abaco Energy, LLC et al.**
- **Whitetail Wave, LLC v. XTO Energy, Inc., et al.**
- **Mary K. Starin v. Kelly Schmidt, et al.**
- **ND Office of State Engineer, Board of University & School Lands, et al. v. BLM US Dept. of Interior Office of Hearings and Appeals**

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

At 2:50 PM the Board entered executive session for the purposes outlined in its adopted motion.

### EXECUTIVE SESSION

**Members Present:**

Jack Dalrymple	Governor
Alvin A. Jaeger	Secretary of State
Kirsten Baesler	Superintendent of Public Instruction
Kelly Schmidt	State Treasurer

**Member Absent:**

Wayne Stenehjem	Attorney General
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**Department of Trust Lands Personnel present:**

Lance D. Gaebe	Commissioner
Allisen Bement	Mineral Title Specialist
Drew Combs	Minerals Manager
Taylor Lee	Director, Revenue Compliance
Kristie McCusker	Legal Assistant
Catelin Newell	Office Manager

**Authorized Guests in Attendance:**

Hope Hogan	Office of the Attorney General
Jen Verleger	Office of the Attorney General
Matt Sagsveen	Office of the Attorney General
Tom Trenbeath	Office of the Attorney General
Bonnie Storbakken	Governor's Legal Counsel
Jason Nisbet	Governor's Office
Jerry Heiser	Office of the State Engineer/State Water Commission
John Paczkowski	Office of the State Engineer/State Water Commission

No action was taken during the Executive Session which was adjourned at 3:08 PM and the Board returned to open session and the public was invited to return to the meeting.

**R E P O R T S**

**Testimony presented to the Legislative Audit and Fiscal Review Committee on October 13, 2016 was provided to the Board.**

**A D J O U R N**

There being no further business, the meeting was adjourned at 3:10 PM.

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Jack Dalrymple, Chairman  
Board of University and School Lands

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Lance D. Gaebe, Secretary  
Board of University and School Lands