

**Minutes of the Meeting of the
Board of University and School Lands
May 30, 2019**

The May 30, 2019 special meeting of the Board of University and School Lands was called to order at 8:02 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 via Telephone
Kelly Schmidt	State Treasurer
Kirsten Baesler	Superintendent of Public Instruction

Department of Trust Lands Personnel present:

Jodi Smith	Commissioner
Dennis Chua	Investment Analyst
Drew Combs	Minerals Division Director
Rob Dixon	Computer Network Specialist
Jeff Engleson	Investments Director
Kayla Graber	Land Management Specialist
Mike Humann	Surface Division Director
Kristie McCusker	Paralegal
Allisen Nagel	Mineral Title Specialist
Catelin Newell	Office Manager
Rick Owings	Grants Administrator
Kate Schirado	Administrative Assistant

Guests in Attendance:

Dave Garner	Attorney General's Office
Matt Sagsveen	Attorney General's Office
Troy Seibel	Attorney General's Office
Charles Carvell	Special Assistant Attorney General
Leslie Bakken Oliver	Governor's Legal Counsel
Reice Haase	Governor's Office
Mark Hanson	Nilles Law Office
Brady Pelton	ND Petroleum Council
Zac Weis	Marathon Oil
Ed Seymour	Marathon Oil
Brenda Selinger	Marathon Oil
Craig Smith	Crowley Fleck
Jack Dura	Bismarck Tribune
Gray Stevens	Sandy Creek Partners
Kyle Wanner	ND Aeronautics Commission
Taylor Roberts	Marathon Oil
Aaron Carranza	NDOSE
Josh Kevan	RVK

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 April 25, 2019 meetings was made by Secretary Al Jaeger and seconded by Treasurer Kelly Schmidt and the motion carried unanimously on a voice vote.
(05/30/19)

ENERGY INFRASTRUCTURE AND IMPACT OFFICE

Energy Infrastructure and Impact Office (EIO) Contingency Grant

Section 10 of Senate Bill 2013 allows the use of unexpended funds to provide for grants and administrative costs during the 2017-2019 biennium:

SECTION 10. EXEMPTION - OIL AND GAS IMPACT GRANT FUND. The amount appropriated from the oil and gas impact grant fund for the energy infrastructure and impact office line item in section 1 of chapter 13 of the 2015 Session Laws and for oil and gas impact grants in section 5 of chapter 463 of the 2015 Session Laws is not subject to section 54-44.1-11. Any money deposited in the fund for taxable events occurring through June 30, 2017, and any unexpended funds from the appropriation are available for grants and administrative costs associated with the fund during the biennium beginning July 1, 2017, and ending June 30, 2019. (Emphasis added).

The current members serving on the Contingency Grant Advisory Committee (Committee):

Dan Kalil (Williston Township Chair), Jay Elkin (Stark County Commissioner), Philip Reily (Mayor of Watford City), Marcia Lamb (Billings County Auditor), Mark Spooner (Border Township Chair), Allen Ryberg (Burke County Commissioner), David Wegner (Beach PSD Superintendent), Gary Weisenberger (Mayor of Stanley), and Reinhard Hauck (Dunn County Commissioner)

Per the Board's approved grant requirements, the grant announcement closed on April 30, 2019. EIO received and scored ten applications. The Committee reviewed and discussed each application thoroughly before finalizing its recommendations during a public meeting on May 21, 2019. The Committee recommends six of the ten applications be approved by the Board:

APPLICANT	COUNTY	APPLICATION NUMBER	SHORT DESCRIPTION	PROJECT TOTAL	AMOUNT REQUESTED	AMOUNT RECOMMENDED
CITY OF WATFORD CITY	MCKENZIE	A190027	RECONSTRUCTION AND SEWER REPAIRS	\$608,927.00	\$570,000.00	\$200,000.00
SCOTIA TOWNSHIP	BOTTINEAU	A190028	2019 GRAVELING	\$15,000.00	\$7,500.00	\$0.00
MISSOURI RIDGE TOWNSHIP	WILLIAMS	A190029	PAVING 3 MILES OF 139TH AVE, 56TH ST, AND 138TH AVE	\$1,674,532.00	\$1,674,532.00	\$0.00
MCKENZIE PSD #1	MCKENZIE	A190030	PORTABLE CLASSROOMS	\$99,588.00	\$99,588.00	\$50,000.00
BOTTINEAU COUNTY	BOTTINEAU	A190031	BOTTINEAU COUNTY ROAD IMPROVEMENTS	\$237,910.00	\$190,300.00	\$100,000.00
WILLISTON PSD #1	WILLIAMS	A190032	WHS COMMONS EXPANSION	\$3,100,000.00	\$3,100,000.00	\$1,300,000.00
CITY OF NEW ENGLAND	HETTINGER	A190033	STREET AND SEWER IMPROVEMENTS- 2019 N SIDE GROWTH AREA	\$1,442,000.00	\$1,000,000.00	\$0.00
WILLIAMS COUNTY	WILLIAMS	A190034	COUNTY ROAD 19 BRIDGE REPLACEMENT	\$1,835,505.00	\$209,000.00	\$0.00
WILLIAMS COUNTY	WILLIAMS	A190035	COUNTY ROAD 42 RECONSTRUCTION	\$6,148,427.00	\$245,700.00	\$175,000.00
NOONAN FIRE DEPARTMENT	DIVIDE	A190036	FIRE FIGHTING GEAR	\$20,400.00	\$15,300.00	\$15,300.00
				15,182,289	7,111,920	\$1,840,300.00

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Motion: **The Board awards six grants under the Contingency Grant to Williams County, Noonan Fire Department, Williston PSD #1, City of Watford City, McKenzie PSD #1, and Bottineau County for \$1,840,300.00.**

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

Airport Grants Delegation of Authority

In the 2013-2015 Biennium the Legislative Assembly appropriated the following (HB 1358):

OIL AND GAS IMPACT GRANT FUND - GRANT RECOMMENDATIONS. There is appropriated out of any moneys in the oil and gas impact grant fund in the state treasury, not otherwise appropriated, the sum of \$239,299,174, or so much of the sum as may be necessary, to the board of university and school lands for the purpose of oil and gas impact grants, for the biennium beginning July 1, 2013, and ending June 30, 2015.

\$60,000,000, or so much of the sum as may be necessary, for grants to airports impacted by oil and gas development. The director of the energy infrastructure and impact office shall adopt grant procedures and requirements necessary for distribution of grants under this subsection, which must include cost-share requirements. Cost-share requirements must H. B. NO. 1358 - PAGE 10 consider the availability of local funds to support the project. Grant funds must be distributed giving priority to projects that have been awarded or are eligible to receive federal funding.

Of the \$60,000,000 awarded to Airports, 4 grants to the Sloulin International Airport remain with a current balance of \$1,292,633.71. Federal funding has been awarded since these grants were originally granted.

During the 2015- 2017 Biennium the Legislative Assembly appropriated the following (HB 1176):

OIL AND GAS IMPACT GRANT FUND - GRANT RECOMMENDATIONS - EXEMPTION - REPORT TO BUDGET SECTION. There is appropriated out of any moneys in the oil and gas impact grant fund in the state treasury, not otherwise appropriated, the sum of \$139,300,000, or so much of the sum as may be necessary, to the board of university and school lands for the purpose of oil and gas impact grants, for the biennium beginning July 1, 2015, and ending June 30, 2017.

\$48,000,000, or so much of the sum as may be necessary, for grants to airports impacted by oil and gas development. The director of the energy infrastructure and impact office, in consultation with the aeronautics commission, shall adopt grant procedures and requirements H. B. NO. 1176 - PAGE 12 necessary for the distribution of grants under this subsection, which must include cost-share requirements. Cost-share requirements must consider the availability of local funds to support the project. Grant funds must be distributed giving priority to projects that have been awarded or are eligible to receive federal funding.

Of the \$48,000,000 awarded to Airports, 5 grants to remain with a current balance of \$533,793.91. Federal funding has been awarded since these grants were originally granted.

In the 2017- 2019 Biennium the Legislative Assembly appropriated the following (SB-2013):

OIL AND GAS IMPACT GRANT FUND - AIRPORT GRANTS. The grants line item and the total special funds line item in section 1 of this Act include the sum of \$25,000,000 from the oil and gas impact grant fund for grants to airports, for the biennium beginning July 1, 2017, and ending June 30, 2019. Of the \$25,000,000, the board of university and school lands shall award a grant of \$20,000,000 to the Williston airport and a grant of \$5,000,000 to the Dickinson airport. A grant may be awarded to the Williston airport only when any related federal funding is committed and available to be spent on the new airport construction project. Grants awarded but not yet paid under this section are not subject to section 54-44.1-11.

SECTION 14. ENERGY IMPACT FUND - WILLISTON AIRPORT GRANT. The grants line item and the total special funds line item in section 1 of this Act include the sum of \$15,000,000 from the energy impact fund for a grant to the Williston airport, for the biennium beginning July 1, 2017, and ending June 30, 2019. A grant may be awarded to the Williston airport only when any related federal funding is committed and available to be spent on the new airport construction project. Grants awarded but not yet paid under this section are not subject to section 54-44.1-11.

Of the \$40,000,000 awarded to the Sloulin International Airport and Dickinson Municipal Airports, 26 grants remain with a current balance of \$20,554,915.53. Federal funding has been awarded since these grants were originally granted.

The North Dakota Aeronautics Commission has identified numerous grants that will be complete in the upcoming months with remaining balances available. The current process for approval for a Scope of Work change can take up to three months which has the potential to delay progress on the airport projects. During the 2013-2015 biennium, 2015-2017 biennium and 2017-2019 biennium these funds were specifically designated to the airports impacted by oil and gas development; thus, the Board does not have the authority to allocate these funds to any other sector. As a means to streamline the changes in the scope of work for airport grants awarded during the 2013-2015, 2015-2017 and 2017-2019 biennium the Department of Trust is requesting the Board of University and School Lands authorize the Commissioner to approve the Scope of Work changes. The process for the Scope of Work changes will require documentation of the scope change and funds that will be spent on the new project. Additionally, it will require the Executive Director of the Aeronautics Commission to authorize the change in scope.

Motion: The Board authorizes the Commissioner to approve changes in the Scope of Work for grants awarded to airports impacted by oil and gas development.

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

MINERALS MANAGEMENT

Marathon Oil Company Request for an Additional 360 Day Lease Extension in Dunn County T148-R95W-16: All

In May of 2013, Marathon Oil Company (Marathon) entered into four leases with the Board of University and School Lands (Board) (OG13-00342, OG13-00343, OG13-00344, and OG13-00345). These leases cover 469.52 acres of common schools mineral tracts in T148N-R95W-16, Dunn County, North Dakota, and Marathon paid a total bonus to the Board of \$3,850,064. Marathon states their total expenses to date are in excess of \$4 million (bonus, surveys, archeological surveys, etc.).

Marathon experienced some challenges in developing these mineral tracts, including complex stakeholders, environmental concerns, and rough terrain, which have impeded timely development of the area. The North Dakota Department of Trust Lands (Department) has been working with Marathon since late 2015 in search of a viable solution to develop the section.

On November 20, 2017, a formal request was directed to former Commissioner Lance Gaebe requesting a 365-day extension. Due to the appointment of a new Commissioner, on January 23, 2018, Commissioner Jodi Smith received another formal request for a 365-day extension.

On February 22, 2018, Marathon's request for two 180-day extensions for all four leases, for a total extension of 360 days was presented to the Board.

Section 8 of the Board's Oil and Gas lease states:

If, at the expiration of the primary term, production of oil and/or gas has not been obtained in commercial quantities on the leased premises but drilling, testing, completion, recompletion, reworking, deepening, plugging back, or repairing operations are being conducted thereon in good faith, lessee may, on or before the expiration of the primary term, file a written application with the Commissioner of University and School Lands for a one hundred eighty (180) day extension of this lease, such application to be accompanied by a payment of ten dollars (\$10.00) per acre, and the Commissioner shall, in writing, extend this lease for a period of one hundred eighty (180) days beyond the expiration of the primary term and as long as oil and/or gas is produced in commercial quantities; lessee may, as long as such drilling, testing, or completion operations are being conducted in good faith, make written application to the Commissioner, on or before the expiration of the initial extended period of one hundred eighty (180) days for an additional extension of one hundred eighty (180) days, such application to be accompanied by a payment of twenty dollars (\$20.00) per acre, and the Commissioner shall, in writing, extend this lease for an additional one hundred eighty (180) day period from and after the expiration of the initial extended period of one hundred eighty (180) days, and as long as oil and/or gas is produced in commercial quantities; this lease shall not be extended for more than a total of three hundred sixty (360) days from and after the expiration of the primary term unless production in commercial quantities has been obtained or unless extended by some other provision hereof.

All parties recognized the initial request to the Board on February 22, 2018, for an extension did not constitute the activation of paragraph 8; however, given the circumstances, it was beneficial to all parties to come to a mutually acceptable solution in granting Marathon a 360-day amendment to the leases.

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At the February 2018 Board meeting, a Board member specifically asked Department staff and the Commissioner if an extension could be granted in lieu of paragraph 8 but Marathon could ask for another extension if they met the criteria of paragraph 8. Department staff and the Commissioner advised there would not be the opportunity for an additional extension. The Board agreed not to offer an additional extension beyond the 360-days.

The Board voted unanimously at the February 2018 Board meeting to direct the Commissioner to negotiate a one-time 360-day extension for leases OG13-00342, OG13-00343, OG13-00344, and OG13-00345 and to bring those negotiated terms to the Board's regularly scheduled meeting in March 2018.

The Commissioner and Department staff worked with Marathon to reach mutually acceptable terms.

The Board's initial terms of the leases set for a royalty rate of 3/16 (18.75%). Marathon agreed to increase the royalty to 20%. Marathon also agreed to pay \$100 per net mineral acre, for a total of \$46,952.

At the March 2018 Board meeting, the Board granted Marathon a 360-day extension of the four leases (OG13-00342, OG13-00343, OG13-00344, and OG13-00345) in exchange for \$100 per net mineral acre and an increased the royalty rate to 20%.

The Amendment of Oil and Gas leases were executed on May 4, 2018. The agreed to terms of the leases are as follows:

Lessor hereby amends the Lease by extending the leases(s) for a period of three hundred and sixty (360) days after May 6, 2018. The amended term shall commence on May 7, 2018, and terminate on May 1, 2019, but shall continue beyond the termination date of the Amended Term for as long thereafter as oil and/or gas may be produced in commercial quantities from the Leases Premises. Notwithstanding anything to the contrary in the Lease, including, but not limited to, the terms and conditions in Paragraphs 6, 8, and 11 of the Lease, the Amended Term will expire and the Lease will terminate if the Lessee has not obtained oil and/or gas production in commercial quantities from the Leased Premises as of the Termination Date.

Pursuant to paragraph 4(A) of the Lease, the royalty rate is increased from "three sixteenth" to "20%" during the Amended Term and the Secondary Term.

Section 8 is hereby deleted from the Lease during the Amended Term and the Secondary Term.

In all other respects, except as expressly provided herein, the Lease shall continue in full force and effect as originally written.

The Commissioner and Department staff met with Marathon on January 22, 2019, and were made aware of concerns regarding obtaining commercial production before expiration of the amended terms. The Commissioner and Department staff met with Marathon again on January 25, 2019, and Marathon requested permission to explore the opportunity of placing an off unit pad north of Enerplus's well pad located on State surface. Department staff contacted Enerplus and requested a formal response to Marathon's request to locate an off unit pad north of Enerplus's well pad. In a letter dated February 12, 2019, Enerplus denied the request stating that it would hamper its

ability to safely develop the unit to the north and, therefore, opposed Marathon's proposed pad location.

On March 26, 2019, the Commissioner and Department staff met with Marathon to discuss concerns whether commercial production would be obtained prior to expiration of the amended terms. On April 4, 2019, the Commissioner received a formal request for extension from Marathon. On April 16, 2019, the Commissioner responded to Marathon's request for an extension advising it was determined that the circumstances do not warrant extension of the leases per the May 4, 2018 Amendment of the Oil and Gas Lease.

Additionally, N.D.C.C § 38-09-18 provides in part as follows:

Terms of lease – Unit operation. All leases for the purposes as hereinbefore provided shall be made by the state of North Dakota and all agencies and departments and political subdivisions thereof for not less than twenty-five cents per acre [.40 hectare] per year for deferred drilling and shall be made with a royalty reservation of not less than one-eighth of all oil and gas produced from said land as long as oil and gas may be produced from said land. The term one-eighth as used herein must be construed to mean one-eighth of such interest as may be owned by the lessor. All leases hereunder must be made for a period of not less than five years and must continue in effect under the terms thereof as long as oil or gas may be produced thereon in commercial quantities.

N.D.C.C. § 38-09-14.

No lands, owned in whole or in part, or on which a reservation of oil and gas rights has been made in a conveyance thereof, by the State of North Dakota or by any department or agency thereof or by any county or other political subdivision of this state, may be leased for oil and gas exploration or production except as provided for in sections 38-09-14 through 38-09-20.

Under N.D.C.C. § 15-07-20 the Board is only authorized to lease non-grant lands without advertisement or competitive bidding; however, the four leases for which Marathon is requesting a third and fourth extension are grant lands and extensions and amendments cannot be allowed under statute.

The board of university and school lands may lease non-grant lands under reasonable rules as it may establish. The rules may provide for leasing with or without advertisement or competitive bidding. . . . A lease of non-grant lands may not extend for a period of more than five years Leases may be renewed at the discretion of the board. When non-grant lands are leased without advertisement or competitive bidding, the board shall determine the rental by taking into consideration the nature and adaptability of the lands and the improvements there on.

Id.

There are several century code sections that address mineral leasing. N.D.C.C. ch. 38-09 outlines procedures for leasing oil and gas rights for exploration and production on publicly owned lands, which applies to all departments and agencies of state government, as well as any county or political subdivision. Public notice of the time and place for leasing is required and written or oral bidding may allowed. N.D.C.C. §§ 38-09-15, 38-09-17. N.D.C.C. ch. 15-05 addresses mineral leasing specifically for lands under the control of the Board. This chapter allows these lands to be

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leased for oil and gas development. N.D.C.C. § 15-05-09. This section allows the Board to establish rules and regulations for development and drilling operations. Id. N.D.C.C. ch. 15-07 addresses sale and lease of non-grant lands. The legislature specified that leasing can be with or without advertisement and competitive bidding and directs the Board to establish reasonable rules and regulations for the leasing of non-grant lands. N.D.C.C. § 15-07-20. Leases for grant lands cannot be negotiated pursuant to the above statutes.

Marathon’s latest request was presented to the Board on April 25, 2019. At that meeting, the Department recommended the Board not honor Marathon’s request to amend the lease for an additional year. This recommendation was made due to Marathon not satisfying the terms of the amendment. The Commissioner, Department staff and the assistant attorney general took all necessary factors into consideration when making the determination to not authorize a third and fourth extension to Marathon, and concluded there was no basis to extend these leases, as it was in the best interest of the Common Schools Trust Fund to allow these leases to expire and place them on the next available lease auction.

Since the April 25, 2019 Board meeting, several companies have approached the Department with concerns of not having the opportunity to lease these tract(s). As an example, on April 30, 2019 Enerplus, the operator to the north of this unit, sent a formal “Expression of Interest” to the Commissioner for consideration. As discussed previously, Enerplus’s current location is ideally suited, with a slight expansion, to develop this unit and spare the local environment an additional well pad.

In conclusion, Marathon was unable to satisfy the terms of the amendment therefore the lease(s) will expire per the terms of the amendment on May 31, 2019. The Commissioner, Department staff and the assistant attorney general took all necessary factors into consideration when making the determination to not authorize a third and forth extension to Marathon, which is not allowed under the terms of the Board lease or the amended terms of the lease.

Recommendation: The Board authorizes the Commissioner to deny Marathon’s request for an additional 360 day extension for leases OG13-00342, OG13-00343, OG13-00344, and OG13-00345.

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

The following were provided at the board meeting and are available upon request:

- Attachment 1: April 25, 2019 Board of University and School Lands Memo Re: Marathon Oil Company Request for Lease Extension in Dunn County T148-R95W-16: All
- Attachment 2: February 22, 2018 Board of University and School Lands Memo Re: Marathon Oil Company Request for Lease Extension in Dunn County T148-R95W-16: All
- Attachment 3: March 29, 2018 Board of University and School Lands Memo Re: Marathon Oil Company Request for Lease Extension in Dunn County T148-R95W-16: All
- Attachment 4: Amendment of Oil and Gas Lease #OG-13-00342
- Attachment 5: Amendment of Oil and Gas Lease #OG-13-00343
- Attachment 6: Amendment of Oil and Gas Lease #OG-13-00345
- Attachment 7: Amendment of Oil and Gas Lease #OG-13-00344
- Attachment 8: Oil and Gas Lease #OG-13-00342
- Attachment 9: Oil and Gas Lease #OG-13-00343

Attachment 10: Oil and Gas Lease #OG-13-00344
 Attachment 11: Oil and Gas Lease #OG-13-00345
 Attachment 12: Marathon Oil Request for Extension Letter
 Attachment 13: Department of Trust Lands Response to Marathon Oil Request for Extension Letter

S U R F A C E M A N A G E M E N T

Ecosystem Services and the Potential for Mitigation Banks on North Dakota State Trust Lands

OVERVIEW

Ecosystems are biological communities of interacting organisms and their physical environment. Ecosystem improvement programs have been developed which focus on monetizing the value of specific improved natural functions provided by water, living species and carbon. Ecosystem service projects can be lucrative. Depending on their size, location and characteristics, it may be possible to generate considerable revenue for the trusts from ecosystem service projects. The most attractive ecosystem service markets have well-defined systems for evaluating impacts and a clear regulatory process for approving proposed mitigation banks. These markets include wetlands, and increasingly, streams and rivers as well as endangered species.

MITIGATION

Mitigation refers to actions completed to restore, enhance, establish, or preserve natural resources in order to offset unavoidable impacts to those resources that occur from land development projects. Through a coordinated partnership, mitigation providers provide state and county highway departments, county water resource boards, other agencies, developers, and landowners with reliable procedures to plan and efficiently develop future land development projects while ensuring that environment impacts are adequately addressed. The three mitigation mechanisms used to offset natural resource impacts from land development projects include:

1. Permittee/landowner responsible mitigation
2. In-lieu fee (ILF) mitigation programs
3. Mitigation banks

Permittee/landowner responsible mitigation is the most traditional form of mitigation and, as the name implies, the permittee/landowner retains responsibility for the successful completion of the required mitigation measures. **In-lieu fee** is a form of “compensatory mitigation” for impacts to the environment. With in-lieu fee, mitigation occurs when a permittee provides funds to an in-lieu fee sponsor which is usually a public agency or non-profit organization. Ducks Unlimited, Inc. is an in-lieu fee program provider for aquatic resources in North Dakota, like mitigation banking, in-lieu fee mitigation is often “off-site”. Mitigation for in-lieu fee programs typically occurs after the impacts are permitted. In lieu-fee programs rely on fees collected from permittees or landowners to initiate compensatory mitigation and are forbidden by law from making a profit on their projects.

Mitigation banks are another type of compensatory mitigation and operate as a system of credits and debits devised to ensure that ecological loss is compensated for by the preservation and restoration of wetlands, natural habitats, streams, endangered species, archeological site, paleontological site or historic structure in other areas so that there is no net loss to the environment. The person or entity undertaking such restoration work is referred to as a mitigation banker. Just as a commercial bank has cash as an asset that it can loan to customers, a mitigation bank has mitigation credits as its assets that it can eventually sell to those who are trying to offset unavoidable impacts. Mitigation banks are generally planned and operated by a construction agency, such as the North Dakota Department of Transportation (NDDOT), or a private entity that

plans to sell mitigation credits. Generally, the purchasers of mitigation credits are individuals or entities undertaking land development projects.

Mitigation banking is an efficient and effective method focused on monetizing the ecological value of improvements to specific natural functions provided by water, living species and carbon to meet mitigation requirements by establishing a bank of mitigation credits in advance of project impacts. Wetland mitigation banking for example, is particularly beneficial for agencies and organizations developing projects that commonly result in wetland losses such as highway projects, airport improvements, and agricultural activities. For agencies and organizations with construction programs that frequently impact wetlands or streams, mitigation banking has proven to be a more reliable, cost-effective means of compensating for unavoidable wetland losses than locating and developing an individual mitigation site for each land development project. The most common types of mitigation banks are as follows:

- **Aquatic resource banks**, which offer credits to offset ecological losses that occur in wetlands and streams. These are regulated and approved by the USACE (U.S. Army Corps of Engineers) and the USEPA (U.S. Environmental Protection Agency).
- **Conservation banks**, which offer credits to offset losses of endangered species and/or their habitats. These are regulated and approved by USFWS (U. S. Fish and Wildlife Service) and NMFS (National Marine Fisheries Service).

In-lieu fee programs and mitigation banks may be used when a government agency, corporation, nonprofit organization, or other entity undertakes these activities under a formal agreement with a regulatory agency and have four distinct components as defined by the USEPA:

- **The site:** the physical acreage that is restored, established, enhanced, or preserved;
- **The instrument:** the formal agreement between the sponsor and regulators establishing liability, performance standards, management and monitoring requirements, and the terms of credit approval;
- **The Interagency Review Team (IRT):** the interagency team that provides regulatory review, approval, and oversight; and
- **The service area:** the geographic area within which permitted impacts can be compensated for at a given bank.

The mitigation banker, after purchasing an environmentally damaged site that they wish to regenerate, works with the IRT that approves plans for building, maintaining and monitoring the bank. The primary role of the IRT is to facilitate the establishment of mitigation banks by ensuring reliable information is available to assist bank sponsors in making informed decisions. The IRT will provide guidance to interested agencies, organizations, and individuals, to plan and develop mitigation banks. The IRT also approves the number of mitigation credits that the bank may earn and sell with a particular restoration project. The role of the bank sponsor is the responsibility for the overall operation, management, monitoring, and success of the bank in accordance with the terms of the banking agreements. The sponsor either purchases the land or works with a landowner(s) to restore and protect a parcel of land containing a degraded natural resource in need restoration, enhancement or protection. These mitigation credits may then be bought by anyone who plans to undertake land development projects on or near a degraded natural resource that will in the process negatively impact the ecosystem of that region. The mitigation banker is responsible for not just the development, but also the future upkeep and maintenance of the mitigation bank.

BENEFITS OF MITIGATION BANKING

Mitigation banking has a number of advantages over traditional permittee-responsible compensatory mitigation because of the ability of mitigation banking programs to:

1. Protect and conserve the environment

Mitigation banking aids in protecting nature and its diversity. The impact of increasing industrialization and urbanization on natural habitats, streams, and wetlands is inevitable. Mitigation banks provide an opportunity to partially offset this impact. Mitigation has the potential to save and restore the most valuable environmental resources at the least cost, assuming that regulation 1) protects health and welfare as defined by the National Environmental Policy Act (NEPA) and 2) assures that a credit accurately represents measurable ecological value. Buyers are typically looking for mitigation credits that are both cheap and the most likely to meet regulatory requirements for compensatory mitigation. Regulators must therefore find a balance between protecting the long term public interest and ensuring that buyers have the proper incentives to participate in the environmental marketplace.

2. Improve efficiency

A mitigation bank is more efficient in that it ensures that a vast consolidated piece of land is recovered or conserved to offset the adverse impact of developers for many small sites. The economies of scale and technological expertise of a mitigation bank make it more efficient not just in terms of cost, but also in terms of the quality of restored acreage. Allows mitigation bankers to assemble and apply extensive financial resources, planning, and scientific expertise not always available to many permittee-responsible compensatory mitigation proposals. Mitigation banks enable the efficient use of limited agency resources in the review and compliance monitoring of compensatory mitigation projects because of consolidation. On site mitigation often becomes a burden on development sites, causing a development to be planned around the mitigation. Buying credits from a mitigation bank allows the developer to maximize his usable land and put that space to its highest and best use.

3. Decrease time lag and increase regulatory ease

It is easier for developers to buy credits from an approved bank than to get regulatory approvals that might otherwise take months to procure. As mitigation banks have already restored units of affected acreage in the process of earning credits, there is little to no time lag between the environmental impact at a service area and its restoration at a bank site. Land previously unused or impractical for development is given greater monetary value under a mitigation system. For instance, land in floodplains may be impractical for commercial or residential development but conducive for mitigation activities. Land in rural areas with very little potential for growth are more valuable when given the opportunity to be used for mitigation credits. These factors reduce permit processing time and provide more cost-effective compensatory mitigation opportunities.

4. Transfer liability

The system of mitigation banking effectively transfers the liability of ecological loss from the developer (permittee) to the mitigation banker. Once the permittee buys the required credits as per regulations, it becomes the responsibility of the mitigation banker to develop, maintain and monitor the site on a long-term basis. This also reduces uncertainty over whether the compensatory mitigation will be successful in offsetting project impacts. Mitigation systems place the environmental costs of development mostly on the individuals or entities that are impacting the environment. Without environmental mitigation, costs of alleviating environmental damage caused by development could be placed in the hands of the government which would in turn pass costs on to taxpayers not responsible for environmental impacts.

CHALLENGES OF MITIGATION

The following are the challenges of environmental mitigation and crediting systems:

1. Correctly assessing ecological loss.

One challenge of compensatory mitigation is the difficulty encountered by regulatory agencies in correctly assessing ecological loss and improvement. The credits offered to mitigation banks have to be appropriately evaluated by regulators. Although these agencies make use of a number of

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environmental assessment techniques, it is not an easy task to fully capture the ecological impact of damage caused to natural resources. To address these uncertainties regulators often assign 'coverage ratios' to compensatory mitigation agreements. Coverage ratios of, for example, 3:1 require 3 compensatory mitigation credits for every 1 unit of ecological disturbance.

It is also questionable whether the natural habitats and wetlands that took centuries to evolve can be artificially engineered in a span of just a few years. In some cases, the quality of such artificially developed wetlands in terms of floral and faunal diversity has been found to be sub-standard, compared to their natural counterparts.

It is also believed that mitigation banks, as opposed to individual mitigation where developers create their own mitigation sites in the vicinity of acreage destroyed, tend to be located far from the sites of impact, and hence cannot fully replicate the site impacted.

2. Effects on land cost and availability

Mitigation could be seen as contributing to the increasing cost of land because in some cases mitigation banks requires that large tracts (100 to 500 acres on average) of land be purchased or put into conservation easements. Mitigation can therefore compete with other rural land uses such as agriculture and residential development. This suggests that land owners must be alert to find the highest and best use for their properties given the potential market value that mitigation credits represent.

3. Permanent commitments of land

Commitment of lands to compensatory mitigation must be done permanently into the future. In North Dakota, this means for a maximum period of ninety-nine years. Otherwise, the long-term public interest could not be served via compensatory mitigation programs. This means that properties must continue to be managed with ecosystem values in mind, sometimes preventing landowners from transforming the landscape to meet changing needs. For example, future large scale development projects would not likely be permitted on previously dedicated mitigation property.

All three mitigation mechanisms utilize a permanent instrument (such as a conservation easement or deed restriction or other agreement as approved by the USACE) on the land, with a trust fund specifically dedicated to long term management of natural resources inherent to the bank. By securing mitigation credits from neighboring ecosystems many large landowners, including the government, are able to maintain a property in its current management state while retaining ecological functionality (ecosystem services), important to the public interest. This commitment must comply with North Dakota law, as easement terms are limited by N.D.C.C §47-05-02.1 to 99 years. The Corps has approved 99 year conservation easements for North Dakota mitigation banks. If conservation easements are used as the permanent protection instrument, it is important to note that they can receive public opposition because they place limitations on certain surface disturbance as well as reduce leasable land acres for certain uses.

APPLICABLE ENVIRONMENTAL REGULATIONS AND POLICY

Projects impacting aquatic and natural resources must be in compliance with existing federal, tribal, and state statutes and regulations and consistent with applicable policies, including:

- Clean Water Act {33 U.S.C. 1251 et seq.}, Section 404 and Section 401.
- Food Security Act of 1985, as amended (7 CFR Part 12).
- Compensatory Mitigation for Losses of Aquatic Resources – Final Rule (Federal Register Vol. 73, No. 70, April 10, 2008)
- National Environmental Policy Act {42 U.S.C. 4321 et seq.} and implementing regulations.
- Fish and Wildlife Coordination Act {16 U.S.C. 4321 et seq.} and implementing regulations.
- Fish and Wildlife Coordination Act {16 U.S.C. 661-666 ©}.

- U.S. Fish and Wildlife Service Mitigation Policy.
- Rivers and Harbors Act of 1899 {33 U.S.C. 403}.
- Section 404(b)(1) Guidelines {40 CFR, Part 230}; including interpretations of the Guideline in the Memorandum of Agreement between EPA and the Department of the Army Concerning the Determination of Mitigation under the Clean Water Act Section 404(b)(1) Guidelines.
- Federal Permit Regulations {33 CFR, Part 320-330} including interpretive guidance provided by the Corps.
- Endangered Species Act, as amended {16 U.S.C. 1531 – 1543}.
- Federal Guidance on the Use of the TEA-21 Preference for Mitigation Banking to fulfill mitigation requirements under Section 404 of the Clean Water Act.
- Executive Order 11990, concerning the Protection of Wetlands.
- Executive Order 11988, concerning Floodplain Management.
- 1990 Memorandum of Agreement between the Department of the Army and the Environmental Protection Agency on the Determination of Mitigation under the Clean Water Act 404(b)(1) Guidelines.
- FAA Advisory Circular 150/5200-33, Hazardous Wildlife Attractants On or Near Airports.'

The most significant of the above policies is the Clean Water Act (CWA) section 404 and other provisions of this act and the April 10, 2008 Compensatory Mitigation Rule that was jointly issued by the USACE and the EPA which made it compulsory to avoid and minimize the impact on designated water bodies and provide compensatory mitigation for unavoidable impacts. The 2008 rule also established standards for the implementation of mitigation banks, in-lieu fee programs and permittee-responsible mitigation (individual). The standards in this rule are consistent with those in the CWA Section 404.

SUMMARY

Mitigation refers to actions completed to restore, enhance, establish, or preserve natural resources in order to offset unavoidable impacts to those resources that occur from land development projects. Mitigation actions are typically completed through permittee/landowner responsible efforts, in-lieu fee (ILF) efforts, and mitigation banking efforts. Mitigation banking is a system by means of which the liability of ecological damage is transferred from the permittee to the mitigation banker through a system of credits and debits under regulatory guidelines. A mitigation banker develops, restores, preserves and manages the acreage at a bank site and earns mitigation credits, which are then sold to a permittee or developer for a fee. This system, despite some of its limitations such as the possible lack of robust environmental assessment techniques and poor quality of natural diversity in some cases, still has many advantages that could provide additional revenues to the trusts. With increasing private investment in the development of mitigation banks and research on ecosystems as well as easing regulatory controls, the future for mitigation banking is indeed bright both for investors and for the environment. Compensatory mitigation allows for the opportunity to generate revenue from ecosystem service markets and there is potential to generate revenue from these markets on trust lands.

Recommendation: The Board grant approval for the Commissioner to develop the necessary permits and easements which will allow for ecosystem improvements to be implemented on trust lands. The Department will work with other western states land offices, the Attorney General’s office, the mitigation industry and Federal agencies to develop permits and easements that will allow an ecosystem services program to be implemented on school trust lands. The easements and permits developed for the ecosystems services program will be brought to the Board for approval prior to ecosystem service program implementation.

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

LITIGATION

XTO Energy, Inc., and XTO Holdings, LLC v. North Dakota Board of University and School Lands and the United States of America

Case: XTO Energy, Inc., and XTO Holdings, LLC v. North Dakota Board of University and School Lands and the United States of America, Case No. 1:19-cv-00076
Date Filed: April 29, 2019
Court: Federal District Court, District of North Dakota
Judge: (Unassigned)
Attorney: Charles Carvell, David Garner, Jen Verleger
Opposing Counsel: XTO: Lawrence Bender, Spencer Ptacek
 USA: John Most

Issues: In April 2019, XTO Energy, Inc. and XTO Holdings, LLC (XTO), brought an interpleader action against the Board of University and School Lands and the United States regarding certain lands underlying XTO operated wells located in McKenzie and Williams Counties. This case addresses overlapping ownership claims by the State and the United States of minerals underlying the Missouri River. XTO, which has leases from both the state and the United States, is requesting the Court determine the property interests for the disputed lands so that XTO can correctly distribute the proceeds from the affected wells. XTO has claimed that there is “great doubt as to which of the Defendants is entitled to be paid royalties related to the Disputed Lands.” Currently, there are twelve wells at issue in four spacing units, though XTO could drill more wells in the disputed lands and expand the lawsuit. Based on the allegations in XTO’s complaint, XTO appears to be depositing at least a portion of the state royalty in escrow in the Bank of North Dakota, but it is also paying the United States its royalty for production from two of the wells.

Current Status: The Summons and Complaint were served on the Board and the Attorney General’s Office on April 30, 2019, with the Answer being due May 21, 2019. To the best of our knowledge, the United States was served on April 30, 2019, and its Answer is due on June 29, 2019. A request for an extension to file the Board’s Answer was made and the Answer is now due on June 29, 2019.

Whiting Oil and Gas Corporation v. Arlen A. Dean, et. al.

Case: Whiting Oil and Gas Corporation v. Arlen A. Dean, et. al., Civ. No. 27-2016-CV-00040

Date Filed: January 25, 2016
Court: McKenzie County District Court
Judge: Robin Schmidt
Attorney: David Garner/Jennifer Verleger/Charles Carvell
Opposing Counsel: Paul Forster, Shane Hanson (Whiting Oil and Gas Corp.), Kevin Chapman (multiple defendants)

Issues: 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 spacing unit. On January 25, 2016, Whiting filed this interpleader action to resolve alleged title questions that have arisen due to the movement of 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 Board 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.

Current

Status: The court trial (no jury) scheduled for August 6-10, 2018 was postponed to April 22 - 26, 2019. The initial scheduling order was amended for the State to conduct field work that could not be completed in the winter. Due to property flooding from high flows on the Yellowstone River, the State has been unable to conduct field work. Therefore, a telephonic scheduling conference was held August 16, 2018 to discuss the Court’s wishes for resetting deadlines. All deadlines and the April 2019 trial were cancelled. **A January 3, 2019 telephonic status conference was held and a trial was scheduled for April 20-24, 2020.**

William S. Wilkinson, et. al. v. Board of University & School Lands, Brigham Oil & Gas, LLP; EOG Resources, Inc.

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.

Current Status:

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

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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.**

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

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 and Spencer Ptacek/Fredrikson & Byron, P.A.**

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.

Current

Status: 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

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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. The trial scheduled in McKenzie County District Court for September 10 and 11, 2019 has been cancelled. **Defendants/Appellants' Brief to the North Dakota Supreme Court was filed April 29, 2019. Plaintiffs/Appellee' will file a brief and Defendants/Appellants will file a reply brief. Oral Argument is scheduled for June 20, 2019.**

Paul Sorum, et. al. v. State of North Dakota, et. al.

Case: Paul Sorum, et. al. v. State of North Dakota, et. al. – Civ. No. 09-2018-CV-00089
Tribunal: Cass County District Court
Judge: John C. Irby
Attorney: Mark Hanson & Peter Hvidston, 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.

Current Status:

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

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Judgment was issued on February 27, 2019, and Defendants were directed to prepare the proposed Judgment. On March 6, 2019, Defendants filed their proposed Judgment. Plaintiff's filed a letter on March 7, 2019, advising the Court that they felt Defendants' proposed Judgment was deficient and that they would also be submitting a proposed Judgment. Plaintiff's proposed Judgment was filed March 8, 2019. Defendants filed a letter on March 8, 2019 advising the Court that they intended to submit a response to Plaintiffs' proposed Judgment within 14 days. On March 19, 2019, Defendants filed an Objection to Plaintiffs' Proposed Judgment. Thereafter, Plaintiffs filed a letter asking the Court not to rule on Defendants' Objection until Plaintiffs have had the opportunity to be heard and further, that Plaintiffs' intend to bring a Motion for Clarification concerning retroactive royalty refunds within 14 days. Plaintiffs filed their Response to Defendants' Objection to Proposed Judgment and Request for Clarification and their Amended Proposed Order and Judgment on March 29, 2019. Defendants filed their Objection to Plaintiffs' Proposed Order and Judgment (Plaintiffs' Amended Proposed) and Reply to Plaintiffs' Response to Defendants' Objection to Proposed Judgment and Request for Clarification on April 8, 2019. **On April 25, 2019, Judge Irby entered an Order for Entry of Judgment ordering the Clerk to enter Defendants' Proposed Order as the Judgment of the Court. Judgment was entered on April 26, 2019. Plaintiffs' filed a Notice of Motion for Attorney Fees, Costs, and Service Award to Plaintiffs scheduling a hearing for 1:30 p.m. June 10, 2019 in Fargo. The Notice of Entry of Order on Cross-Motions for Summary Judgment, Order for Entry of Judgment, and Judgment was filed by Defendants on May 3, 2019. On May 15, 2019, Plaintiffs filed their Motion for Attorney Fees, Costs and Service Award to Plaintiffs and the Memorandum in Support of Motion, together with supporting documents. On May 20, 2019, Plaintiffs filed their Amended Motion for Attorneys Fees, Costs and Service Award to Plaintiffs. Defendants filed an Expedited Motion for Extension of Time to Respond to Plaintiffs' Memorandum in Support of Motion for Attorney Fees, Costs and Service Award to Plaintiffs and requested the June 10, 2019 hearing be postponed.**

The Commissioner recommends the Board consider entering executive session for consultation with legal counsel regarding pending and potential litigation. Executive session began at 9:08 AM.

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:

- **XTO**
- **Whiting**
- **Wilkinson**
- **Newfield**
- **Paul Sorum, et. al. v. The State of North Dakota, et al**

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

EXECUTIVE SESSION

Members Present:

Doug Burgum	Governor
Alvin A. Jaeger	Secretary of State
Wayne Stenehjem	Attorney General Via Telephone
Kelly Schmidt	State Treasurer
Kirsten Baesler	Superintendent of Public Instruction

Department of Trust Lands Personnel present:

Jodi Smith	Commissioner
Kristie McCusker	Paralegal
Catelin Newell	Office Manager
Kate Schirado	Administrative Assistant
Allie Nagel	Land Professional

Guests in Attendance:

Dave Garner	Attorney General's Office
Matt Sagsveen	Attorney General's Office
Troy Seibel	Attorney General's Office
Leslie Bakken Oliver	Governor's Legal Counsel
Reice Haase	Governor's Office
Mark Hanson	Nilles Law Office
Charles Carvell	Special Assistant Attorney General

The executive session adjourned at 10:50 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 XTO, Whiting, Wilkinson, Newfield and Paul Sorum litigation.

OPERATIONS

Legislative Bill Review

(No Action Requested)

HB 1013 Legislative appropriation and budget for the Commissioner of University and School Lands

The Department is preparing a Request for Proposal for the Minerals Assessment. The Energy Infrastructure and Impact Office will accept grant requests throughout the next biennium to award the \$4 million appropriated. The Department posted the Administrative Assistant position, with a goal to fill the position in July 2019. The Commissioner will begin working with the Attorney General to fill the Assistant Attorney General position provided in HB 1013.

SB 2081 Continuing authority for building repairs and investment due diligence

The Department is revising Department Accounting and Investment Policies to clearly define which expenses qualify for continuing authority.

SB 2082 Repeal of N.D.C.C. §§ 15-04-02 Lease of Cultivated Lands for Summer Fallow, and 15-04-04, Failure to Summer-Fallow Cultivated Lands, Use for Cancellation of Lease

The Department is working with the Attorney General's Office to modify the Board's Surface Land Lease to reflect the repealing of N.D.C.C. §§ 15-04-02 and 15-04-04.

HB 1392 Confidentiality of records received by the Board of University and School Lands

The Department will send a letter to all operators subject to Department audits notifying them of the statutory change.

SB 2211 Amend N.D.C.C. §§ 61-33.1-04 and 61-33.1-05 relating to the ownership of mineral rights of land inundated by Pick-Sloan Missouri basin project

The Department a contract with Kadrmas, 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 is being finalized. The contract's scope of work concludes twelve months from the date of execution, at a total cost of \$1,088,635.

SB 2212 Relating to authorization for the Board of University and School Lands to impose a civil penalty for failure to produce records; and to provide penalty

The Department will send a letter to all operators subject to Department audits notifying them of the statutory change. Additionally, the Department is establishing Department policies that will clearly define when the Department will submit the request to the District Court. Additionally, the Commissioner is developing a Board policy concerning allocation of the penalties collected.

SB 2264 Relating to meetings and policy approval process of the Board of University and School Lands exempt administrative agencies

The Department is preparing Administrative Rules based upon recently adopted Board policies. The Board can expect to review the proposed Administrative Rules at the June 2019 Board meeting.

R E P O R T S

Report of Easements Issued by Land Commissioner (04/17/2019 to 05/20/2019)

No Action Requested

Granted to:	EMMONS-LOGAN WIND LLC, JUNO BEACH-FL
For the Purpose of:	Easement: Wind electric transmission line
Right-of-Way Number:	RW0008246
Trust:	A - Common Schools
Legal Description:	EMM-133-76-36-SE4

Granted to:	XTO HOLDINGS, LLC, SPRING-TX
For the Purpose of:	On-lease Act. Amend: Horizontal Oil Well
Right-of-Way Number:	RW0008347
Trust:	A - Common Schools
Legal Description:	MOU-157-93-36-SE4
(12/17/18)	

<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>PETRO-HUNT LLC, DALLAS-TX Easement: Salt Water Disposal Well - Extension RW0008420 A - Common Schools WIL-154-99-16-SW4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>KRAKEN OPERATING, LLC, HOUSTON-TX Permit: Section Line Access Road RW0008475 A - Common Schools WIL-157-99-36-SE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>ND GEOLOGICAL SURVEY, BISMARCK-ND Letter of Permission: Access to School Land - Frac Proppant Sampling RW0008498 A - Common Schools Numerous tracts in 13 Central ND Counties</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>KOHLER COMMUNICATIONS INC, DICKINSON-ND Easement: Tower Site RW0008499 A - Common Schools MOU-153-91-18-SW4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>ND GEOLOGICAL SURVEY, BISMARCK-ND Letter of Permission: Access to School Land - Critical Element Sampling RW0008500 A - Common Schools Numerous tracts in 7 Western ND Counties</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>ND ENERGY SERVICES INC, DICKINSON-ND Letter of Permission: Temporary Water Layflat Line RW0008501 A - Common Schools DUN-146-93-16-NE4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>SELECT ENERGY SERVICES LLC, WILLISTON-ND Letter of Permission: Temporary Water Layflat Line RW0008502 A - Common Schools MCK-150-95-16-NW4, SW4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>SELECT ENERGY SERVICES LLC, WILLISTON-ND Letter of Permission: Temporary Water Layflat Line RW0008502 A - Common Schools MCK-150-95-16-NW4, SW4</p>
<p>Granted to: For the Purpose of: Right-of-Way Number: Trust: Legal Description:</p>	<p>RRC POWER & ENERGY LLC, ROUND ROCK-TX Permit-Amend: Soil Testing RW0008507 A - Common Schools WIL-158-96-16-SE4 WIL-158-96-36-NW4 WIL-159-97-16-SE4</p>
<p>Granted to: For the Purpose of:</p>	<p>HOUSTON ENGINEERING INC, FARGO-ND Permit: Planning & Preconstruction Survey</p>

Right-of-Way Number: RW0008508
 Trust: A - Common Schools
 Legal Description: NA

Granted to: **NDSU SCHOOL OF NAT RES SCIENCE, FARGO-ND**
 For the Purpose of: Letter of Permission: Access to School Land
 Right-of-Way Number: RW0008514
 Trust: A - Common Schools
 Legal Description: BOW-132-102-36-NE4

Summary of Oil & Gas Lease Auction

On behalf of the Board, the Department conducted an oil and gas mineral lease auction on www.energynet.com which concluded on May 7, 2019.

There were 258 tracts offered and 241 tracts listed received competitive bids. The highest bid per acre was \$300.00 for 80 net acres in Dunn County.

County	Mineral Acres	Total Bonus	Bonus/Acres
May-19			
Billings	3,895.23	\$58,474.46	\$15.01
Burke	1,081.22	\$107,244.60	\$99.19
Divide	188.09	\$14,103.02	\$74.98
Dunn	160.00	\$47,280.00	\$295.50
Golden Valley	1,280.00	\$1,280.00	\$1.00
McKenzie	732.00	\$51,228.00	\$69.98
McLean	320.00	\$1,440.00	\$4.50
Mountrail	5,532.98	\$486,063.78	\$87.85
Slope	640.00	\$1,280.00	\$2.00
Stark	160.00	\$4,560.00	\$28.50
Ward	6,315.16	\$261,154.37	\$41.35
Williams	640.00	\$66,560.00	\$104.00
GRAND TOTAL	20,944.68	\$1,100,668.23	\$52.55

There were 54 bidders registered, 32 of which submitted bids in the seven-day auction. Bidders were from 12 states (CA, CO, CT, IN, LA, MI, MT, ND, NE, TX, WA, and WY).

A total of \$1,100,668.23 of bonus was collected from the auction.

The Financial Position Report for the period ending March 31, 2019 was distributed to the Board and is available upon request.

I N V E S T M E N T S

RE: Terminate Westwood and Reallocate Assets

During the April Board meeting, Department staff, the Commissioner and RVK reported concerns with changes occurring with Westwood Holdings Group (Westwood) that will have a major impact on how this product is managed going forward. Those changes include:

(12/17/18)

- The two seasoned individuals that were expected to be co-lead portfolio managers for the strategy have both left that role, with one leaving the firm entirely.
- The individual that was brought in from the outside in early 2019 to manage the multi-asset strategies team is now a co-lead portfolio manager. The other new co-lead portfolio manager is the firm's convertible bond expert, who previously worked some with the multi-asset team. Neither of these portfolio managers has worked together before, nor do they have direct experience with this strategy.
- RVK now believes that there was a lack of transparency during the extensive discussions they had with Westwood last fall related to the transition, given the new portfolio manager team for the strategy.
- During RVK's recent on-site visit with Westwood, RVK was informed that the firm now believes the capacity for this product is \$10 billion, not the \$5 billion amount former CIO Freeman has always maintained was the capacity for this product.

In April the Board placed Westwood on formal watch status and asked the Commissioner and RVK to come back to the May meeting with a formal recommendation on the disposition of the Westwood managed portfolio.

RVK has recommended to all clients that Westwood be terminated; the Commissioner agrees with RVK's recommendation.

Westwood currently manages 1/3 of the 20% allocation the permanent trust funds have to absolute return strategies. As of April 30, 2019, the permanent trusts had a total of \$957.1 million allocated to absolute return strategies and Westwood's portfolio was valued at \$322.3 million. In initial discussions with RVK, both RVK and the Commissioner had concerns with splitting the 20% absolute return allocation between the Board's two other absolute return managers, PIMCO and GMO, as it would reduce the diversification of the overall absolute return portfolio and increase manager risk.

Over the past two months the Commissioner and staff have worked closely with RVK to determine the best way to reallocate the assets currently managed by Westwood. The initial focus of that work was to determine if there was another liquid absolute return manager that might be an obvious replacement for Westwood. Information compiled by RVK and reviewed by staff shows that there does not appear to be a long list of compelling replacement options that have provided the risk/return profile and the diversification benefits that Westwood has historically provided. Another option would be to explore illiquid absolute return strategies. However, to date the Board has been hesitant to look at illiquid strategies and doing so would require more in-depth asset allocation work and an advanced manager search.

After determining that the options described above were not viable solutions at this time, RVK and the Commissioner began exploring the idea of redeploying the assets to existing managers/strategies. The Commissioner asked RVK to determine if the current risk/return profile of the portfolio could be mirrored or replicated using existing managers in different proportions. After running various asset allocation options through their optimizers, RVK determined that the Board could essentially mirror the current risk/return profile of the existing portfolio using existing managers in different proportions. Further discussions between RVK and the Commissioner resulted in today's recommendation; that the Board adopt one of the following two revised asset allocations for the permanent trusts.

Asset Class	Current Target	Recommended Portfolio 1	Recommended Portfolio 2
Broad US Equity	17.0%	17.0%	18.5%
Broad International Equity	17.0%	17.0%	18.5%
Fixed Income	21.0%	26.0%	23.0%
Absolute Return	20.0%	15.0%	15.0%
DIS	10.0%	10.0%	10.0%
Real Estate	15.0%	15.0%	15.0%
Expected Arithmetic Return	6.28%	6.15%	6.28%
Expected Risk (Standard Deviation)	10.27%	9.83%	10.32%
Expected Compounded Return	5.79%	5.70%	5.78%
Expected Return/Risk Ratio	0.61	0.63	0.61

Josh Kevan is here today to go over the attached RVK report, which details the work done by RVK and the Commissioner to arrive at the recommended portfolios. Josh will also go over the small, but measurable differences between the two recommended portfolios. The primary difference between the portfolios is that Portfolio 2 reallocates some of the Westwood assets to equities, while Portfolio 1 reallocates those assets only to fixed income. As a result, Portfolio 1 has a slightly more conservative risk/reward profile than our current portfolio, while Portfolio 2 has a risk/reward profile essentially matching the current portfolio. The good news is that both options:

- Will not require additional manager searches/changes
- Will reduce total manager fees
- Avoid increasing manager concentration risk

Generally, the Commissioner and RVK would make a recommendation to the Board to adopt either one or the other of these portfolios. The two options above are being presented to the Board today because some concerns were expressed at the May Land Board meeting about adding to equities when stocks are at/near all-time highs. The Commissioner acknowledges that concern but wants to remind the Board that it is not a market timer. Both portfolios presented are optimal portfolios that fall on the efficient frontier; one is just slightly more risk adverse than the other. The Commissioner and RVK are fully supportive of either portfolio.

If the Board approves reallocating the funds to one of the two recommended portfolios, the Commissioner believes a transition can be completed by the end of June 2019. Funds would be allocated proportionately to current managers within each broad asset class that receives additional assets. Manager's receiving funds will be given the opportunity to take securities currently in the Westwood portfolio in lieu of cash. Those securities that cannot be transferred will be liquidated in an efficient and effective manner, with a goal of completing the transition by the end of June 2019. The Board's IPS will be revised this fall to reflect the new asset allocation adopted by the Board.

Motion: The Board directs the Commissioner to terminate Westwood as a money manager effective immediately, adopt revised Portfolio 2 as the new asset allocation for the permanent trusts, and reallocate funds to existing managers in an efficient and effective way.

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

Quarterly Investment Reports – 1st Quarter 2019

(No Action Requested)

Josh Kevan from RVK will review the performance of the Board of University and School Land's (Board) investment program for the period ending March 31, 2019.

The first report to be reviewed is 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. A more comprehensive, detailed report is also available.

After RVK's presentation, Jeff Engleson will review the report which details the activities of the Strategic Investment and Improvements Fund, the Coal Development Trust Fund and the Capitol Building Fund, as well as the performance of Northern Trust separate investment pool that holds the assets of these three funds.

The following were provided at the board meeting and are available upon request:

Attachment 1: RVK Permanent Trust Fund Performance Analysis Report

Attachment 2: Other Funds Managed by the Board Report – Distributed at Board Meeting

Attachment 3: RVK Ultra-short Performance Report

Investment Updates

(No Action Requested)

Asset Allocation

The table below shows the status of the permanent trusts' asset allocation as of April 30, 2019.

Account/Asset Class	Long-Term Asset Allocation	4/30/19 Actual Allocation \$	4/30/19 Actual Allocation %	4/30/19 % Diff.
Large Cap US Equity	13.3%	\$ 649,226,375	13.6%	0.3%
Mid/Small Cap US Equity	3.7%	\$ 178,999,346	3.7%	0.0%
International Equity	13.3%	\$ 623,621,156	13.0%	-0.3%
Emerging Market Equity	3.7%	\$ 186,276,893	3.9%	0.2%
Total Equities	34.0%	\$ 1,638,123,771	34.2%	0.2%
Core Fixed Income	12.6%	\$ 693,714,897	14.5%	1.9%
Non-Core Fixed Income	8.4%	\$ 309,344,240	6.5%	-1.9%
Total Fixed Income	21.0%	\$ 1,003,059,137	21.0%	0.0%
Total Absolute Return	20.0%	\$ 957,078,003	20.0%	0.0%
Commodities	3.0%	\$ 142,740,342	3.0%	0.0%
MLPs	3.0%	\$ 141,216,143	3.0%	0.0%
TIPS	2.0%	\$ 91,519,970	1.9%	-0.1%
Natural Resource Equities	2.0%	\$ 95,248,598	2.0%	0.0%
Total Inflation Strategies	10.0%	\$ 470,725,053	9.8%	-0.2%
Core Real Estate	8.0%	\$ 391,544,331	8.2%	0.2%
Core Plus Real Estate	7.0%	\$ 322,315,608	6.7%	-0.3%
Total Real Estate	15.0%	\$ 713,859,938	14.9%	-0.1%
Total Asset	100.0%	\$ 4,782,845,902	100.0%	

Angelo Gordon (\$57.16 million, 1.2% of PTF assets)
Direct Lending Fund

(05/30/19)

The Angelo Gordon Direct Lending Fund III portfolio was initially funded in late-August 2018. To date, a total of \$54.75 million dollars has been transferred to the fund. The Commissioner recently received a capital call for \$3.75 million that will be funded on May 29, 2019.

It is important to note that May's capital call notice of \$3.75 million was offset by a \$930,622 distribution of income from the fund. This is the first distribution of income from the fund since inception; it is expected that this fund will continue to make regular distributions going forward.

\$58.5 million, out of the total commitment of \$150 million, will have been transferred to the fund by the end of May 2019. This represents 39% of the total commitment to the fund. According to Angelo Gordon, the Board's commitment should be fully drawn by late-2020.

Upcoming Investment Manager Meetings

The following meetings with investment managers are planned to discuss strategy, compliance, and performance. They will be held in the Department's conference room. Please inform the Commissioner ahead of time if you plan to attend, so that we can make sure enough presentation materials are available.

May 30, 2019, 3:00 PM

JP Morgan

Core Fixed Income (\$304.5 million, 6.4% of PTF assets)
Jim Sakelaris and Joe Hisdorf

June 12, 2019, 8:00 AM

Payden and Rygel

Core Fixed Income (\$306.5 million, 6.4% of PTF assets)
Short-term Fixed Income (\$65.3 million, 1.4% of PTF assets)
Dave Ballantine and Mirjam Weber

June 18, 2019, 10:30 AM

Northern Trust Asset Management

Small Cap US Equities (\$96.7 million, 2.0% of PTF assets)
TIPS (\$91.5 million, 1.9% of PTF assets)
Ultra-Short Fixed Inc (\$891.2 million, Coal, Capitol & SIF)
Tamara Doi Beck, Robert Gyorgy, Patrick Quinn

A D J O U R N

There being no further business, the meeting was adjourned at 11:13 AM.

Doug Burgum, Chairman
Board of University and School Lands

Jodi Smith, Secretary
Board of University and School Lands