

**Minutes of the Meeting of the  
Board of University and School Lands  
April 8, 2020**

The April 8, 2020 meeting of the Board of University and School Lands was called to order at 11:34 AM in the Coteau Meeting Room of the State Capitol by Chairman Doug Burgum.

**Members Present:**

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

**Department of Trust Lands Personnel present:**

Jodi Smith	Commissioner
Kristie McCusker	Paralegal – via telephone
Catelin Newell	Administrative Staff Officer
Rick Owings	Administrative Officer – via telephone
Mike Shackelford	Investment Division Director

**Guests in Attendance:**

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

**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 February 27, 2020 meeting was made by Attorney General Wayne Stenehjem and seconded by Secretary Alvin Jaeger and the motion carried unanimously on a voice vote.

**R E P O R T S**

**COVID-19 Update**

The Department of Trust Lands (Department) understands the serious issue of COVID-19 confronting the nation. As a result, the Department has transitioned all non-essential staff to telecommuting. All services and programs are operational and we are informing our constituents they may experience delays in services.

Additionally, the Commissioner has cancelled the nomination and auctioning of oil and gas leases. The Department's next oil and gas lease nomination deadline is scheduled for June 19, 2020 for our August 4, 2020 Minerals Auction.

The Commissioner cancelled all surface lease auctions scheduled for March 23, 2020 thru March 27, 2020. There were 141 tracts in 30 counties available for auction. A formal request for an Executive Order allowing the Department to host surface auctions outside of the county seat was submitted to the Governor's Office. This executive order was issued the same day as the Board meeting.

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The Commissioner has also formally requested an Executive Order to extend the deadline for any life insurance company to report and provide property to Unclaimed Property.

The Commissioner issued notification of a 60-day extension for all gas royalty payors currently working to come into compliance with the Board of University and School Lands.

The Board was provided with the Formal Notification of Gas Royalty Repayment Obligations Extension letter. This letter is available at the Department upon request.

### **Report of Encumbrances Issued by Land Commissioner 2-15-202 to 3-16-2020**

**Granted to:** SLAWSON EXPLORATION COMPANY INC, DENVER-CO  
 For the Purpose of: On-lease Activity: Well-Horizontal Oil Well  
 Right-of-Way Number: RW0007600  
 Trust: A – Common Schools  
 Legal Description: MOU-152-92-23-NE4NW4, W2W2NE4NE4, NW4NE4

**Granted to:** SLAWSON EXPLORATION COMPANY INC, DENVER-CO  
 For the Purpose of: Easement: Well-Directional Wellsite Location  
 Right-of-Way Number: RW0008202  
 Trust: A – Common Schools  
 Legal Description: MOU-152-92-23-NE4NW4, W2W2NE4NE4, NW4NE4

**Granted to:** MCKENZIE ELECTRIC COOP INC, WATFORD CITY- ND  
 For the Purpose of: Easement-Amend: Drop Line-Electric  
 Right-of-Way Number: RW0008652  
 Trust: A – Common Schools  
 Legal Description: DUN-148-96-36-SW4

**Granted to:** SELECT ENERGY SERVICES LLC, WILLISTON-ND  
 For the Purpose of: Permit: Temporary Water Layflat Line  
 Right-of-Way Number: RW0008679  
 Trust: A – Common Schools  
 Legal Description: MOU-154-91-16-SE4, SW4

**The Financial Position unaudited ending January 31, 2020 report was provided to the Board for review and is available at the Department upon request.**

### **Unclaimed Property Program Report**

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

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

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

Uniform Unclaimed Property Act created by the national Uniform Law Commission was adopted by the State in 1985.

For the month of February 2020, the Division received 34 holder reports with a property value of \$69,446 and paid 507 claims with a total value of \$460,546.

## ENERGY INFRASTRUCTURE AND IMPACT OFFICE

### Energy Infrastructure and Impact Office Program Report

The Energy Infrastructure and Impact Office (EIIO) is a division within the Department of Trust Lands (Department). EIIO provides financial assistance to local units of government that are impacted by oil and gas activity. In turn, EIIO receives a portion of the Oil and Gas Gross Production Tax. The office has been a part of the Department since 1977 and was formally known as the Energy Development Impact Office created under N.D.C.C. ch. 57-62. Over the course of the past 40 years, EIIO has dispersed over \$624 million in funding.

The Oil and Gas Impact Grant Fund currently has 21 grants with a balance of \$7,090,723.31 as of March 16, 2020. The following shows grant activity for the last four months:

Oil and Gas Impact Grant Fund	Grants with balances	Current Balance Obligated to Grants
12/9/2019	36	\$15,477,345.77
12/31/2019	30	\$14,388,087.28
2/13/2020	21	\$7,207,988.75
3/16/2020	21	\$7,090,723.31

The Energy Impact Fund, established within Senate Bill 2013 as enacted by the Sixty-fifth Legislative Assembly, was created to supplement the Oil and Gas Impact Grant Fund for the 2017-2019 biennium. This fund currently has three grants with a balance of \$3,447,448.60 as of March 16, 2020. House Bill 1013 of the Sixty-sixth Legislative Assembly requires the Commissioner of University and School Lands to transfer any unexpended funds remaining in the Energy Impact Fund when the fund is repealed on June 30, 2021, to the Oil and Gas Impact Grant Fund. The following shows grant activity for the last four months:

Energy Impact Fund	Grants with balances	Current Balance Obligated to Grants
12/9/2019	4	\$4,793,191.14
12/31/2019	4	\$4,108,325.39
2/13/2020	3	\$3,447,448.60
3/16/2020	3	\$3,447,448.60

The Energy Infrastructure and Impact Office is currently managing 24 grants for a total of \$10,538,171.91. The following shows grant activity for the last four months:

Oil and Gas Impact Grant Fund	Grants with balances	Current Balance Obligated to Grants	Energy Impact Fund	Grants with balances	Current Balance Obligated to Grants	Total between both Funds
12/9/2019	36	\$15,477,345.77	12/9/2019	4	\$4,793,191.14	\$20,270,536.91
12/31/2019	30	\$14,388,087.28	12/31/2019	4	\$4,108,325.39	\$18,496,412.67
2/13/2020	21	\$7,207,988.75	2/13/2020	3	\$3,447,448.60	\$10,655,437.35
3/16/2020	21	\$7,090,723.31	3/16/2020	3	\$3,447,448.60	\$10,538,171.91

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## Contingency Grant Round Award Recommendations

### 2019-2021 Biennium Funding

The Sixty-Sixth Legislative Assembly appropriated \$2 million through House Bill 1013 for grants to political subdivisions impacted by oil and gas development activities.

N.D.C.C. § 15-01-02(6) provides the Board of University and School Lands (Board) has:

Authority to award and distribute energy infrastructure and impact grants from moneys deposited in the oil and gas impact grant fund, except that grants awarded annually may not exceed sixty percent of the biennial appropriation for energy infrastructure and impact grants. The board may create an advisory committee to assist the board in making its grant award determinations.

EIIO opened a contingency grant round in December 2019 and applications were accepted through January 31, 2020. EIIO received 60 applications requesting a total of \$15,506,192.

The summary of all applications received is available at the Department upon request.

The EIIO Director and the EIIO Administrator scored all 60 applications. The Board created the Contingency Grant Advisory Committee (Committee) on December 18, 2019. The Committee met on March 4, 2020 to complete the scoring process. The Committee includes the following:

- Williston Township Supervisor Dan Kalil
- Stark County Commissioner Jay Elkin
- Mayor of Stanley Gary Weisenberger
- Mayor of Watford City Philip Riely
- Dunn County Commissioner Reinhard Hauck
- Border Township Supervisor Mark Spooner
- Beach PSD #3 Superintendent Dave Wegner
- Billings County Auditor Marcia Lamb
- Powers Lake Ambulance Kari Enget
- Commissioner of University and School Lands Jodi Smith

Applications were scored by EIIO staff and the Committee, using the following established criteria:

- **Objective** – Does the project meets the legislative intent outlined in state law and is directly related to local infrastructure caused by damage or impact by current oil and gas development activities since January 2019?
- **Financial Need** – Demonstration of financial need, indicated by the political subdivision's commitment of local resources, coupled with a financial shortfall due to increased energy activity. The cost benefit (value for the investment) of this project compared to the other applicants was considered. Cash, outstanding grant balances, levy, revenue streams available, debt, and additional financial details are considered.
- **Result of Energy Activity** – The application clearly lays out how current oil and gas development is impacting the political subdivision.
- **Improves public health, or welfare** – Assessment of the project's contributions to economic vitality and development by removing growth restraints and obstacles from the community by enhancing the infrastructure of the political subdivision and supporting long term sustainable economic activity.
- **Public Safety** – Does the project relate to improving the safety of those receiving the award, the general public, the emergency services responders, and emergency services?
- **Project Readiness/Achievability** – Is project design, planning, cost estimates, and any

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additional preparation in place allowing the project to move forward once funding is available?

- **Complete Application Received** – Did the applicant submit a complete application with financial reports outlining the revenue, levy with calculation, liabilities detailed and budget, details of the project plans, projected cost, maps, and any additional documentation required to support the project defined in the application?

EIIO contacted the Department of Transportation (DOT), Department of Commerce, Bureau of Criminal Investigation (BCI), and Department of Public Instruction (DPI) for additional funding avenues that may be available to those applicants who are not awarded funding.

The DOT reviewed road project applications and determined DOT would need additional information in order to provide additional funding opportunities to applicants. However, DOT was able to identify some projects as possible FEMA eligible.

The Department of Commerce noted only **non-oil-producing counties** are eligible for the Municipal Infrastructure Funds (see N.D.C.C. § 57-51.1-07-7) and County and Township Infrastructure Funds (see N.D.C.C. § 57-51.1-07-8); therefore, any counties identified as oil-producing will not be eligible for those funds.

Applications from Bottineau, Renville, and Hettinger Counties are eligible for funds through the municipal infrastructure funds.

BCI will have grants available in the summer 2020 for law enforcement and applicants may apply for this funding.

All K-12 school districts that do not receive funding will be encouraged to contact DPI for other avenues of funding.

The Committee gave careful consideration when categorizing which applications should receive funding in March and which applications could wait until July 2020.

The Committee input, as well as information gathered from other state agencies, was utilized in formulating recommendations to the Board. Infrastructure needs, with impacts as a direct result of oil and gas development, were considered. The grants recommended by the Committee are dominated by suggestions to address safety issues. The Committee and EIIO staff emphasize that all the applying political subdivisions have legitimate needs and have submitted justifiable requests.

N.D.C.C. § 15-01-02(6) provides that no more than 60% of the biennial appropriation be awarded in any one fiscal year. Of the \$2,000,000 appropriated, 60% would be \$1,200,000.

The following are the Committee's recommendations for awards for the Board's consideration:

Political Sub Name	City	County	Short Description	Project Total	Amount Requested	Recommended Award
Noonan Fire Department	Noonan	Divide	Purchase A Used 1000 Gallon Pumper Apparatus	\$35,000.00	\$28,000.00	\$28,000.00
Zap Rural Fire Protection District	Zap	Mercer	Extrication Equipment	\$36,900.00	\$36,900.00	\$33,210.00
Gladstone Consolidated Fire District	Dickinson	Stark	New Pumper Fire Truck	\$375,000.00	\$375,000.00	\$187,500.00

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<b>Tolley Fire Department</b>	Tolley	Renville	50 X 50 Building Addition	\$555,000.00	\$555,000.00	\$355,172.00
<b>Billings Co. Rural Fire Protection Dist.</b>	Belfield	Billings	Fairfield Rescue Truck	\$244,529.00	\$184,529.00	\$184,529.00
<b>Billings County</b>	Medora	Billings	Ambulance Replacement	\$573,761.00	\$264,943.00	\$120,000.00
<b>City Of Belfield</b>	Belfield	Stark	Ambulance Replacement	\$255,000.00	\$100,000.00	\$100,000.00
<b>Bowman County Rural Ambulance District</b>	Bowman	Bowman	4- Wheel Drive Ambulance	\$210,000.00	\$50,000.00	\$50,000.00
<b>Columbus Rural Fire District</b>	Columbus	Burke	Acquisition Of Vehicle Chassis/Installation Of 4000-Tank And Equipment	\$162,489.00	\$141,589.00	\$141,589.00
					Total:	\$1,200,000.00

Motion #1: For fiscal year 2020, it is recommended the Board award nine grants, totaling \$1,200,000 from the Oil and Gas Impact Grant Fund to:

- NOONAN FIRE DEPARTMENT
- ZAP RURAL FIRE PROTECTION DISTRICT
- GLADSTONE CONSOLIDATED FIRE DISTRICT
- TOLLEY FIRE DEPARTMENT
- BILLINGS CO. RURAL FIRE PROTECTION DISTRICT
- BILLINGS COUNTY
- CITY OF BELFIELD
- BOWMAN COUNTY RURAL AMBULANCE DISTRICT
- COLUMBUS RURAL FIRE DISTRICT

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

If the Board approves the above recommendations, \$800,000 will remain for the Board to award in the following fiscal year as N.D.C.C. § 15-01-02(6) provides that no more than 60% of the biennial appropriation be awarded in any one fiscal year.

The Board may pledge awards for the 2021 fiscal year to allow political subdivisions to better plan for future development. The amount available for pledged awards is \$800,000 (remaining amount available from the \$2,000,000 appropriated from the Legislature) and the \$400,000 available from cancelled grants. The total amount the Board can pledge is \$1,200,000, which will not be awarded until the 2021 fiscal year.

The following is a list of the Committee's recommendations for pledged awards for the Board's consideration:

Political Sub Name	City	County	Short Description	Project Total	Amount Requested	Recommended Pledged Grant Award
City Of New England	New England	Hettinger	2020 North Side Growth Area Street & Sewer Improvements	\$1,442,000.00	\$1,000,000.00	\$348,650.00
Williston Township	Williston	Williams	52nd Street Landslide	\$1,450,000.00	\$350,000.00	\$350,000.00
Mountrail County	Stanley	Mountrail	36th St Nw- Cement Stabilization And Graveling	\$82,700.00	\$82,700.00	\$41,350.00
Williston Psd #1	Williston	Williams	Asb Innovation Academy	\$14,092,183.00	\$500,000.00	\$250,000.00
City Of Stanley	Stanley	Mountrail	Wastewater Treatment Facility Improvements And Upgrade To Pumps At Main Lift Station	\$1,675,000.00	\$837,500.00	\$210,000.00
					Total:	\$1,200,000.00

Motion #2: The Board pledge grant awards, with the intent to award in fiscal year 2021, the five grants totaling \$1,200,000 from the Oil and Gas Impact Grant fund to:

- CITY OF NEW ENGLAND
- WILLISTON TOWNSHIP
- MOUNTRAIL COUNTY
- WILLISTON PSD #1
- CITY OF STANLEY

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

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

### Investment Updates

#### Asset Allocation

The following table shows the status of the permanent trusts' asset allocation as of March 31, 2020. The figures provided are unaudited.

Account/Asset Class	Long-Term Asset Allocation	3/31/20 Actual Allocation \$	3/31/20 Actual Allocation %	3/31/20 % Diff.
Large Cap US Equity	14.5%	\$ 619,082,532	14.2%	-0.3%
Mid/Small Cap US Equity	4.0%	\$ 147,766,026	3.4%	-0.6%
International Equity	14.5%	\$ 585,817,249	13.4%	-1.1%
Emerging Market Equity	4.0%	\$ 158,840,208	3.6%	-0.4%
<b>Total Equities</b>	<b>37.0%</b>	<b>\$ 1,511,506,015</b>	<b>34.6%</b>	<b>-2.4%</b>
Core Fixed Income	13.8%	\$ 712,638,119	16.3%	2.5%
Non-Core Fixed Income	9.2%	\$ 429,018,394	9.8%	0.6%
<b>Total Fixed Income</b>	<b>23.0%</b>	<b>\$ 1,141,656,513</b>	<b>26.2%</b>	<b>3.2%</b>
<b>Total Absolute Return</b>	<b>15.0%</b>	<b>\$ 622,518,925</b>	<b>14.3%</b>	<b>-0.7%</b>
Commodities	3.0%	\$ 114,864,987	2.6%	-0.4%
MLPs	3.0%	\$ 73,217,317	1.7%	-1.3%
TIPS	2.0%	\$ 100,004,606	2.3%	0.3%
Natural Resource Equities	2.0%	\$ 62,115,146	1.4%	-0.6%
<b>Total Inflation Strategies</b>	<b>10.0%</b>	<b>\$ 350,202,056</b>	<b>8.0%</b>	<b>-2.0%</b>
Core Real Estate	8.0%	\$ 395,014,688	9.1%	1.1%
Core Plus Real Estate	7.0%	\$ 341,840,608	7.8%	0.8%
<b>Total Real Estate</b>	<b>15.0%</b>	<b>\$ 736,855,296</b>	<b>16.9%</b>	<b>1.9%</b>
<b>Total Asset</b>	<b>100.0%</b>	<b>\$ 4,362,738,805</b>	<b>100.0%</b>	

#### Angelo Gordon (\$154.99 million, 3.6% of PTF assets as of 3/31/20) Direct Lending Fund

The Angelo Gordon Direct Lending Fund III portfolio was initially funded in late-August 2018. On March 23, 2020 the remaining \$27,750,000 or 18.50% was called. After the said capital call, this would complete the total \$150 million capital commitment made to Angelo Gordon.

We have received a \$2,329,264 distribution from the Fund at the end of January 31, 2020. Including this distribution, the Fund will have distributed approximately 4.9% of total paid-in capital total.

#### Upcoming Investment Manager Meetings

There is no upcoming meeting scheduled.

#### March Investment Reports – 4th Quarter 2020

Josh Kevan from RVK reviewed the performance of the Board of University and School Land's (Board) investment program for the period ending December 31, 2019 and discuss current market conditions.

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.

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



Finally, Josh will discussed RVK's view of the possible economic implications of COVID-19, and its likely effects on the PTF portfolios.

The following reports were provided to the Board for review and are available at the Department upon request: RVK Permanent Trust Fund Performance Analysis Report, RVK Ultra-short Performance Report and RVK Economic Implications of COVID-19.

### **Strategic Asset Allocation Study and Recommended Changes**

The Board of University and School Lands' (Board) Investment Policy Statement (IPS) requires a formal asset allocation review at least once every four years, with the last study completed in 2017. At the request of the Commissioner and the Department of Trust Lands' investment staff (DTL staff), RVK conducted a formal asset allocation study for the Permanent Trust Funds (PTFs).

As part of the study, RVK used their 2020 capital market assumptions which updated their long-term expectations for investment returns and risk for major asset classes, including public equities, fixed income, real estate, inflation strategies, absolute return strategies, infrastructure, and private equities. The new assumptions deemphasized treasury inflation protected securities (TIPS) and commodities across optimal portfolios on the efficient frontier. In addition, the assumptions slightly reduced public equities. Conversely, the new assumptions favor the introduction of infrastructure and private equities in the optimal portfolios on the efficient frontier (see Attachment 1).

Further, RVK and DTL staff had several discussions regarding the advantages and disadvantages of TIPS, commodities, infrastructure, and private equities. RVK and DTL staff reached the following consensus:

- TIPS are a hedge against inflation; however, TIPS have consistently underperformed aggregate bonds over twenty years. A scenario where TIPS would outperform aggregate bonds would not persist beyond one year, due to the rapid repricing of aggregate bonds if actual inflation rises above expectations. Therefore, the model is correct to hold a zero allocation of TIPS in the optimal portfolios, and the PTFs should likewise be allocated away from TIPS. (PTFs current allocation target is 2% in TIPS.)
- Commodities are another hedge against inflation; however, like TIPS, commodities have underperformed over several cycles and have high volatility. In the three years the PTFs have held commodities, they have underperformed all other asset classes, except master limited partnerships (MLPs) and natural resource equities. Therefore, the model is correct to hold a zero allocation of commodities in the optimal portfolios, and the PTFs should likewise be allocated away from commodities. Additionally, the PTFs already have a large exposure on the revenue side, from both surface and mineral leases. (The PTFs current allocation target is 3% in commodities.)
- Public equities have had a strong runup over the past decade, despite the recent market correction. Most market observers and RVK professionals believe future return expectations for public equities should be muted. Further, if public equities show a stronger return potential, the Absolute Return strategies can add public equities quickly. Therefore, reducing the PTFs' target holdings by 6 percentage points would be prudent. (The PTFs current allocation target is 38% in public equities.)
- Infrastructure would be a replacement strategy for the reduction in the above-mentioned asset classes. Infrastructure has steady return potential with moderate risk, similar to commercial real estate. Therefore, the model is correct to add a 5% allocation to infrastructure in the optimal portfolios, and the PTFs should likewise be allocated to infrastructure.

- Private equities would be another replacement strategy for the reduction in the above-mentioned asset classes. While private equities have a higher risk profile than most other asset classes, they also have a higher return profile. Further, more firms are staying private longer and market participants and RVK professionals see private equities as an enhancement to a long-term portfolio. Therefore, the model is correct to add a 5% allocation to private equities in the optimal portfolios, and the PTFs should likewise be allocated to private equities.

Finally, the staff and RVK would like the Board to consider a zero allocation or reduced allocation to MLPs and natural resource equities. The rationale is based on viewing the assets of the PTFs in a holistic approach, as opposed to a siloed approach. Holistically, the PTFs hold surface land, mineral rights, and investment securities, and these should be viewed together. Therefore, the PTFs should not “double-down” on assets in the investment portfolio that it holds in surface and mineral rights. Specifically, the exposures to commodities, MLPs and natural resource equities which mirror the risk assets already held in the surface and minerals portfolios. Please note, RVK’s optimal portfolios would continue to hold the PTFs’ current target allocation in MLPs and natural resource equities; however, the RVK model is unaware of the exposure the PTFs hold in their non-investment portfolios.

RVK Asset Allocation Overview was provided to the Board and is available at the Department upon request.

**Motion: The Board approve the changes to the PTFs’ Strategic Asset Allocation to the Proposed Portfolio 2, as indicated on page 13 of the attached RVK Asset Allocation Overview (March 26, 2020); to authorize DTL Staff and RVK to begin investment manager searches for both infrastructure and private Equities for future Board approval; and to authorize DTL Staff to liquidate the TIPS, Commodities, MLPs, and Natural Resource Equities’ holdings in the PTFs in a manner that is consistent with the best interests of the PTFs and as market conditions allow. DTL Staff recommends this Option.**

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		

**RVK Contract Renewal**

The Board of University and School Land’s (Board) relationship with RVK began in 2013 when, through a competitive hiring process, the Board chose the firm to submit a written report addressing various investment issues, such as, investment policies and procedures, asset allocation policy, transitioning from the old asset allocation plan to the new asset allocation plan, and analysis of the cash-like funds.

In January 2014, the Board entered into another agreement with RVK to implement the recommendations that resulted from RVK’s 2013 investment study and to provide performance monitoring services to the Board. This agreement was extended six months to provide for the completion of all fund manager searches and the adoption of the Board’s Investment Policy Statement.

In July 2015, the Board directed the Commissioner to enter into an agreement with RVK for traditional investment consultant services. The fee for the initial two-year contract with RVK was \$145,000 per year and that contract concluded in August 2017. During the August 2017 Board meeting, the RVK contract was extended for one year, with a fee increase of 3%, for a total of \$149,350. This fee included four personal visits, during which RVK representatives reviewed quarterly investment performance with the Board, advised on asset allocation and asset class structure issues, reviewed investment policies, provided information and guidance for three manager searches, and provided the Board with educational presentations and summaries.

In June 2018, the Board directed the Commissioner to enter into another contract with RVK for investment consultant services. The fee for the two-year contract increased by approximately 3% per annually for a total of \$153,800 in year one and \$158,400 in year two. This contract will expire in August 2020. The contract was substantially similar to the previous one, which included four personal visits per year, a review of quarterly investment performance, advice on asset allocation and asset class structure issues, review of investment policies, information and guidance for manager searches, guidance with the dismissal of one manager, and providing the Board with educational presentations and information.

Department of Trust Lands' staff previously conducted an internal assessment of similar sized permanent trust investment consulting practices throughout the western United States. That assessment involved discussions with permanent trust investment officers in New Mexico and Oklahoma, as well as gathering data regarding other permanent trust investment programs. During that assessment, it was found that many investment programs maintain consultant relationships for extended periods of time and for as long as the consultant continues to provide the desired services in an efficient and effective manner at a reasonable price. Consultants are trusted partners and help shape programs over time. This philosophy is followed by the Oklahoma and New Mexico permanent trusts investment offices and is also followed by North Dakota's State Investment Board.

Research into other state permanent trust investment programs indicates that RVK is the consultant of choice for five of the seven largest permanent trust investment programs. In addition to North Dakota, the states that currently work with RVK are Montana, New Mexico, Oklahoma and Wyoming. The fees paid by each of those states, approximately \$325,000, is measurably more than what North Dakota has paid historically; if fees are dollar weighted to consider the amount of the assets under consultation, the fee being proposed by RVK for the Board is less than half what other states pay.

RVK has \$67.4 billion in permanent trust assets under consultation from the five states noted above. Additionally, RVK has been a Greenwich Quality Leader among large US investment consultants for the last two consecutive years. Greenwich Associates, a trusted independent investment research firm, conducted interviews with over 1,000 senior professionals of 924 large plan sponsors and ranked opinions of their investment consulting relationships on a series of key metrics, including but not limited to:

- Understanding Clients' Goals and Objectives
- Advice on Long-term Asset Allocation
- Proactive Advice and Innovative Ideas
- Credibility with the Board and/or Investment Committee
- Knowledge of Investment Managers
- Advice on DC Plan Structure and Design
- Satisfaction with Manager Recommendations
- Responsiveness to Client Requests and Needs
- Competitive Fees

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Based upon staff's assessment of other state programs and satisfaction with the services provided by RVK over the past five years, the Commissioner and staff recommend the Board continue contracting with RVK for investment consulting services.

The staff would propose a contract substantially similar to the previous contract with the following changes:

1. A three-year contract with an optional two-year extension by mutual consent of the Board and RVK, instead of a two-year contract with no optional extensions. The contract term would be from September 2020 to August 2023, with the option of extending the contract from September 2023 to August 2025.
2. A fee for each year that increases as follows: \$163,000 in FY 2020, \$168,000 in FY 2021, \$173,000 in FY 2022, and if the contract is extended, fees of: \$178,000 in FY 2024 and \$183,000 in FY 2025. Each year's fee increase is approximately 3% over the prior year.
3. RVK would make six personal visits each year, instead of four, to better communicate with the Board and Department staff.
4. The contract would provide more detail as to the services expected and provided in the annual fee and would provide more detail on the additional cost of services not provided in the annual fee. The previous contract did not list all the services included in the annual fee and was silent on the exact fee for most additional services.

**Recommendation: The Board authorizes the Commissioner to enter into a contract with RVK for comprehensive investment advisory services, including investment performance monitoring, assistance with investment manager searches, investment advice and educational efforts, with the contract subject to final approval by the Attorney General.**

A draft of the potential agreement was given to the Board for review. This agenda item will be addressed at a subsequent Board meeting. No formal action was taken.

## **MINERALS MANAGEMENT**

### **Shut-In Administrative Rule**

Due to the downturn in oil prices, the Department of Trust Lands (Department) has been advised that the petroleum industry is considering whether to abandon production, either temporarily or by permanently plugging wells, on certain state land subject to leases that cover substantial stripper wells or marginal wells. In an attempt to maintain production potential on these wells, an option is to consider allowing wells to be moved to shut-in status until such time as this downturn begins to correct itself.

The Board of University and School Lands (Board) has always recognized its fiduciary responsibility to maximize revenues from state lands. Of critical importance to the state is ensuring that currently producing wells are not permanently abandoned due to the current downturn in prices for crude oil and natural gas which could render production from these wells uneconomic. If this happens, those reservoirs have the potential to no longer produce, eliminating state revenues. It also may not be economically feasible to re-drill these minerals. Permanent abandonment of production would be of no benefit to the state or industry.

Therefore, it is reasonable for the Board to permit the temporary shut-in of petroleum and natural gas production on certain lands under its jurisdiction.

Section N.D.C.C. § 38-09-18, provides as follows:

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...

In May 1986, the Board adopted a shut-in well policy. This policy allowed marginal wells to be shut in without lease termination. This policy was adopted in response to the sharp decline in oil prices in early 1986. The rationale behind the policy was to avoid plugging wells because of difficult economic conditions facing the oil industry. The policy was extended each year for a one-year period until December 31, 2004. In 2004, the Board unanimously affirmed this policy without expiration and required a report be made to the Board annually.

In January 2020, the North Dakota Administrative Code § 85-06-01-14 was enacted. It provides as follows:

**85-06-01-14. Request for shut-in status for oil.**

1. A lessee requesting shut-in status of an oil well, without canceling the oil and gas lease, shall submit a written request to the department utilizing the form available on the department's website. The request must contain the following information:
  - a. The name and well file number assigned by the North Dakota department of mineral resources oil and gas division;
  - b. The township, range, and section of the surface location of the well;
  - c. The board's oil and gas lease number for the subject lease, the date of the oil and gas lease, the acreage covered by the oil and gas lease, and the current lessee;
  - d. The name and address of the operator of the well;
  - e. The cumulative oil production and the number of days of production for the three months immediately preceding the request;
  - f. The written approval of the request from the operator;
  - g. The grounds for the request and the anticipated length of time the well will be shut-in; and
  - h. Any additional information requested by the department.
2. An application fee, in an amount set by the department, and the shut-in royalty payment must be submitted with the application. If the application is denied, the shut-in royalty payment will be refunded by the department.

3. An application is deemed filed when the department receives the application form, application fee, shut-in royalty payment, and any additional information requested by the department.
4. Within fifteen days of receipt of an application, the commissioner shall notify the applicant in writing, as follows:
  - a. The application is approved and the terms of the shut-in approval;
  - b. The application is denied;
  - c. An additional fifteen day period is necessary to consider the application; or
  - d. The application requires board approval.
5. If an application is denied, a lessee may file with the department a written request for commissioner review, specifying the grounds for the request.
6. A shut-in approval is effective for one year from the date of approval unless the commissioner determines a shorter amount of time is appropriate.
7. The commissioner may revoke a shut-in approval if the commissioner determines the action is in the best interests of the trusts. If a shut-in approval is revoked prior to its expiration, the department shall provide notice to the lessee by certified mail. Within sixty days from the date of receipt of the notice, the lessee shall re-establish production. If the lessee fails to re-establish production, the oil and gas lease is subject to cancellation under section 85-06-01-10.

The Department anticipates an increase in shut-in requests. Operators are required to formally request a shut-in by submitting a written request to the Department, as required by North Dakota Administrative Code § 85-06-01-14.

### **Extension Administrative Rule**

Companies bid on Board of University and School Land (Board) leases at a public auction for the right to explore for oil and gas within the five-year lease term. Pursuant to the Board's lease, lessees are required to produce oil and/or gas in commercial quantities or risk lease termination. Due to travel and other restrictions resulting from by the COVID-19 crisis and depressed prices of oil and gas, however, production of oil and/or gas may not be prudent at this time.

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.

Per North Dakota Administrative Code § 85-06-01-06:

A lessee shall submit a written request to the department for an assignment, amendment, or extension of an oil and gas lease, or a portion of the oil and gas leased premises, utilizing the form available on the department's website. A request must include any documents requested by the department. The lessee shall submit a fee, in an amount set by the board, to the department with the request.

...

2. Extensions. If, at the expiration of the primary term, production of oil or gas or both 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, the lessee may, on or before the expiration of the primary term, file a written application with the department for a one hundred eighty day extension of this oil and gas lease, such application to be accompanied by a payment of ten dollars per acre, and the commissioner, in writing, shall extend this oil and gas lease for a period of one hundred eighty days beyond the expiration of the primary term and as long as oil or gas or both is produced in commercial quantities; the 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 days for an additional extension of one hundred eighty days, such application to be accompanied by a payment of twenty dollars per acre, and the commissioner, in writing, shall extend this oil and gas lease for an additional one hundred eighty day period from and after the expiration of the initial extended period of one hundred eighty days, and as long as oil or gas or both is produced in commercial quantities; this oil and gas lease must not be extended for more than a total of three hundred sixty 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.

The Department anticipates an increase in extension requests. Operators are required to formally request an extension by submitting a written request to the Department, as required by North Dakota Administrative Code § 85-06-01-06.

**LITIGATION****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:**

- BLM - Case No. IBLA 2016-170
- Continental Resources, Inc. (Interpleader) Case No. 1:17-cv-00014
- XTO Energy, Inc. et al. (Interpleader) Case No. 1:19-cv-00076
- William S. Wilkinson et al. Case No. 53-2012-CV-00038
- Newfield Exploration Company et al Civ. No. 27-2018-CV-00143

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

At 1:06 PM the Board entered executive session for the purposes outlined in its adopted motion.

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

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

**Department of Trust Lands Personnel present:**

Jodi Smith	Commissioner
Catelin Newell	Administrative Staff Officer

**Guests in Attendance:**

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

**BLM Litigation**

**Case:** ND Office of State Engineer, Board of University and School Lands v. BLM - Case No. IBLA 2016-170

**Tribunal:** US Dept. of Interior Office of Hearings and Appeals – Board of Land Appeals

**Attorney:** Charles Carvell and Jennifer Verleger

**Opposing Counsel:** Karan Dunnigan

(04/08/20)



**Issues:** In 2014, the Bureau of Land Management (BLM) resurveyed land along the Missouri River to locate the boundary, ordinary high water mark (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 intends 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 Interior Board of Land Appeals.

**History:**

**Current Status:**

**On June 24, 2019, the BLM submitted its Request to Take Judicial Notice of North Dakota Law.**

**On March 25, 2020, the Opinion by Administrative Judge Haugrud was issued by the United States Department of Interior, Office of Hearings and Appeals, Interior Board of Land Appeals (Interior Board). The Interior Board held that while it is in general proper for federal agencies and federal courts to adopt state law to decide water boundaries along federally owned land, it is inappropriate to do so in matters involving the location of an OHWM. Were the rule otherwise, the Interior Board stated, states could acquire federal land “simply by adopting an expansive OHWM definition ... whenever a State chose to [do so].” The Interior Board then stated that because it was proper for the BLM, in preparing its OHWM surveys, to apply the *BLM Survey Manual* and other federal sources, the state’s appeal is denied.**

**Continental Interpleader Litigation**

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

**Date Filed:** **December 23, 2016**

**Court:** **Federal District Court, 8<sup>th</sup> Circuit**

**Judge:** **Honorable Daniel Hovland**

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

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

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

that there is “great doubt as to which Defendant is entitled to be paid royalties related to the Disputed Lands.” Currently, Continental is paying the United States its full royalty based on the acreage it claims. The remaining royalty, over and above what is due the United States, is being escrowed with the Bank of North Dakota.

**History:**

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

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

(04/08/20)

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

**Current  
Status:**

**XTO Interpleader Litigation**

**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**

**Judge:** **Magistrate Judge Clare R. Hochhalter**

**Attorney:** **Charles Carvell, David Garner, Jennifer Verleger**

**Opposing**

**Counsel:** **Lawrence Bender, Spencer Ptacek for XTO  
Shaun Pettigrew for United States**

**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 public domain 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 Lake Sakakawea. XTO 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, XTO is paying the United States its full royalty based on the acreage it claims under two of the wells at issue and not paying the State its royalty on the acreage claimed by the State under these two wells. The State’s royalty on the remaining ten wells at issue is being escrowed with the Bank of North Dakota pursuant to the policies and rules of the Board.

**History:** 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. 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 parties entered into a Stipulation for Extension of Time to Answer Pleadings.

**Current Status:**

- The Answers of both the Board and the United States were filed on August 1, 2019.
- Order for Rule 26(f) Planning Meeting and Rule 16(b) Scheduling Conference, and Order RE Resolution of Discovery Disputes
- A scheduling conference was scheduled for December 30, 2019 but was rescheduled to January 28, 2020 as attorney John Most is leaving the employment of the Department of Justice and it is necessary to get his replacement up to speed on the case.
- On January 13, 2020, XTO filed a Motion for Leave to Deposit Funds with the Court, Memorandum of Law in Support of Plaintiffs XTO Energy Inc. and XTO Holdings, LLC Motion for Leave to Deposit Funds with the Court, and Declaration of Mary Holman.
- Status conference held January 28, 2020. A second status conference was scheduled for April 7, 2020 at 9:30 a.m. before Magistrate Clare R. Hochhalter.
- Extension of time to respond to Motion for Lease to Deposit funds. Responses due March 2, 2020.
- Court granted the Motion for Extension of Time to File Response regarding Motion to Deposit Funds. Responses are due by March 23, 2020.
- On March 23, 2020, the Court granted the Motion for Extension of Time to File Response regarding Motion to Deposit Funds (filed March 20, 2020). Responses are due by May 20, 2020.

**Wilkinson Litigation**

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

**Date Filed:** January, 2012

**Court:** Williams County District Court

**Judge:** Paul Jacobson

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

**Opposing**

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

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

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

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

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

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

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

**History:**

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

Plaintiff's Proposed Scheduling Order on February 11, 2019. Plaintiffs scheduled a hearing in District Court on the Motion for Scheduling Order which was held March 5, 2019, at 2:00 p.m. The District Court didn't rule on the scheduling motions but granted Plaintiffs' request to file a motion for Summary Judgment within 30 days of the hearing. On April 15, 2019, Plaintiffs' filed with the District Court a Notice of Motion, Motion for Summary Judgment, Brief in Support of Motion for Summary Judgment, Affidavit of Joshua Swanson, Notice of Hearing (requesting a hearing be held at the earliest possible date available on the Court's calendar), and proposed Order Granting Plaintiffs' Motion for Summary Judgment. On April 17, 2019, Plaintiffs' filed a Notice of Hearing scheduling a hearing for 2:00 p.m. on July 30, 2019 before the Honorable Paul W. Jacobson, at the Williams County Courthouse, Williston. The parties entered into a Stipulation Extending Time to Respond to Plaintiffs' Motion for Summary Judgment and Plaintiffs' Time to Reply which was entered May 1, 2019. The Order Extending Time to Respond was entered May 2, 2019, extending Defendants' time to respond to June 14, 2019, and extending Plaintiffs' deadline to file reply to July 1, 2019. On June 10, 2019 Statoil & Gas LP filed its Opposition to Plaintiffs' Motion for Summary Judgment. Also, on June 10, 2019, the Stipulated Motion to Dismiss Defendant XTO Energy Inc. was filed in which Plaintiffs, Cross-claimant EOG, and Defendant XTO stipulated and requested the Court dismiss XTO from the action with prejudice and without costs and disbursements to any party, as it holds no ownership interest in, right to, claim or title to any mineral interests as alleged by Plaintiffs. The Board of University and School Lands filed its Brief in Opposition to Plaintiffs' Motion for Summary Judgment on June 14, 2019. Also filed on June 14, 2019 where the State Engineer's Response to Brief in Opposition to Plaintiffs' Motion for Summary and the Response of EOG Resources, Inc., to Plaintiffs' Motion for Summary Judgment. On June 17, 2019, the Court entered its Order Dismissing Defendant XTO Energy, Inc. from the Action. On July 1, 2019, Plaintiff's filed their Reply Brief in Support of Motion for Summary Judgment. The hearing on the Motion for Summary Judgment was held on July 30, 2019. Order Granting Plaintiffs' Motion for Summary Judgment was entered on September 6, 2019. The proposed Judgment was submitted on September 12, 2019. The Judgment and Notice of Entry of Judgment were filed with the District Court on September 16, 2019. Board of University and School Lands' Notice of Appeal to the North Dakota Supreme Court was filed on November 15, 2019. State Engineer's Notice of Appeal to the North Dakota Supreme Court was filed on November 15, 2019. Notice of Appeal to North Dakota Supreme Court filed by Statoil Oil & Gas LP f/k/a Brigham Oil & Gas, LLP on November 27, 2019. Appellant's Initial Briefs were due December 12, 2019; however, a Joint Motion for Extension of Time to File Briefs was filed and an extension was granted on December 13, 2019, with all briefs being due to the Supreme Court as follows:

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

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

**Current  
Status:**

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- Plaintiffs/Appellees Response Brief filed with the Supreme Court on March 2, 2020.
- Reply Brief of Defendant and Appellant, Board of University and School Lands filed on March 16, 2020.
- Appellant North Dakota State Engineer's Reply Brief filed March 16, 2020.

### Newfield Litigation

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

**Date Filed:** March 7, 2018

**Court:** District Court/McKenzie County

**Attorneys:** David Garner

**Opposing**

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

**Judge:** Robin Schmidt

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

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

two Amicus Curiae Briefs no later than September 4, 2019. Defendants/Appellants filed their Response to Petition for Rehearing on September 4, 2019. A Corrected Opinion was filed by the North Dakota Supreme Court on September 9, 2019, changing the page number of a citation. On September 12, 2019, the North Dakota Supreme Court entered an order denying Newfield’s Petition for Rehearing. On September 20, 2019, the opinion and mandate of the Supreme Court was filed with McKenzie County District Court. A Telephonic Status Conference was held October 8, 2019. On October 9, 2019, the District Court issued an Order Setting Briefing Schedule which ordered “the parties to file a brief regarding how they suggest the case proceed after the Supreme Court’s decision.” The parties filed briefs with the District Court on November 6, 2019. Notice of Appearance for Michelle P. Scheffler of Hayes and Boone, LLP on behalf of Plaintiffs was filed November 7, 2019.

**Current Status:**

- **Telephonic Status Conference scheduled for March 17, 2020 before the District Court.**

During the executive session, the Board was provided information from its attorney.

The executive session adjourned at 1:40 PM and the Board reconvened in open session.

Upon reconvening in open session the following action was taken:

**Motion: The Board authorizes legal council to pursue an appeal to the Federal District Court in ND Office of State Engineer, Board of University and School Lands v. BLM - Case No. IBLA 2016.**

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

**Motion: The Board authorizes the Commissioner to extend the repayment of gas deduction royalties to September 30<sup>th</sup>, 2020, in light of the current Covid-19 pandemic resulting in a national public health declared emergency and economic turmoil. This extension to September 30, 2020, may be reviewed by the Board at any time during this state of emergency and may be amended at a subsequent Land Board meeting. Oil and Gas industry members are encouraged to communicate with the Department of Trust Lands on the status of their repayment of gas deduction royalties.**

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



**A D J O U R N**

There being no further business, the meeting was adjourned at 10:48 AM.

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Doug Burgum, Chairman  
Board of University and School Lands

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Jodi Smith, Secretary  
Board of University and School Lands