

Introduced by

Representatives Keiser, Martinson

Senator Unruh

1 A BILL for an Act to create and enact section 61-33-01.1 of the North Dakota Century Code,
2 relating to defining and delineating the ordinary high water mark of a navigable body of water;
3 and to amend and reenact section 61-33-01 and subdivision e of subsection 3 of section
4 61-33.1-03 of the North Dakota Century Code, relating to the definition and determination of
5 ordinary high water mark.

6 **BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:**

7 **SECTION 1. AMENDMENT.** Section 61-33-01 of the North Dakota Century Code is
8 amended and reenacted as follows:

9 **61-33-01. Definitions.**

10 As used in this chapter, unless the context otherwise requires:

- 11 1. "Board" means the sovereign lands advisory board.
- 12 2. "Board of university and school lands" means that entity created by section 15-01-01.
- 13 3. "Ordinary high water mark" means the continuous line along the banks of navigable
14 rivers and lakes where the presence and action of waters of the navigable river or lake
15 are so common and usual, and so long continued in all ordinary years, as to mark
16 upon the bank of a navigable river or lake a character distinct from that of the abutting
17 upland. The ordinary high water mark line must be continuous in elevation or gently
18 sloping, following the gradient of the river.
- 19 4. "Sovereign lands" means those areas, including beds and islands, lying within the
20 ordinary high water mark of navigable lakes and streams. Lands established to be
21 riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be
22 above the ordinary high water mark and are not sovereign lands.
- 23 4.5. "State engineer" means the person appointed by the state water commission pursuant
24 to section 61-03-01.

1 **SECTION 2.** Section 61-33-01.1 of the North Dakota Century Code is created and enacted
2 as follows:

3 **62-33-01.1. Ordinary high water mark determination guidelines.**

4 The state engineer shall maintain ordinary high water mark delineation guidelines
5 consistent with this section.

6 1. The ordinary high water mark line is a function of the hydrology and hydraulics of a
7 river or lake. A person determining an ordinary high water mark shall use, whenever
8 feasible, direct hydrologic and hydraulic measurement from lake and stream gauge
9 data, elevation data, flood prediction analysis, historic records of water flow, high-
10 resolution remote sensing data and methods, prior elevation and survey maps, and
11 statistical hydrological evidence. High-resolution remote sensing data and methods
12 include aerial photography and light detection and ranging.

13 2. The ordinary high water mark lines on the banks of a nonreservoired navigable lake
14 always must be the same elevation, and on a river must be the same elevation on
15 opposite banks based on points directly across from one another perpendicular to the
16 axis of flow of the river. When the elevation of the ordinary high water mark line is
17 established on only one bank of a river, the elevation and gradient of that line must be
18 transferred to the opposite bank directly across the river perpendicular to the axis of
19 flow.

20 3. When direct measurement methods are infeasible, indirect indicators of the ordinary
21 high water mark line, such as a break in slope along the banks, a change in sediment
22 texture, and a change in the vegetation characteristics, may be used to determine an
23 ordinary high water mark line. However, the interpretation of indirect indicators must
24 be constrained within elevation restrictions described in this section and otherwise
25 defensible within the known hydrologic and hydraulic characteristics of the
26 nonreservoired portion of the flow of the navigable stream, the extent of which must be
27 based on the reservoir operating at full capacity. Indirect indicators affected by influent
28 non-navigable tributaries, adjoining water bodies, or wetlands may not be used to
29 delineate the sovereign land boundary of a navigable water body.

30 **SECTION 3. AMENDMENT.** Subdivision e of subsection 3 of section 61-33.1-03 of the
31 North Dakota Century Code is amended and reenacted as follows:

- 1 e. Subsection ~~34~~ of section 61-33-01 and section 47-06-05, which provide all
2 accretions are presumed to be above the ordinary high water mark and are not
3 sovereign lands. Accreted lands may be determined to be within the ordinary high
4 water mark of the historical Missouri riverbed channel based on clear and
5 convincing evidence. Areas of low-lying and flat lands where the ordinary high
6 water mark may be impracticable to determine due to inconclusive aerial
7 photography or inconclusive vegetation analysis must be presumed to be above
8 the ordinary high water mark and owned by the riparian landowner.