

**IN THE SUPREME COURT  
STATE OF NORTH DAKOTA**


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William S. Wilkinson, et. al.,	)	Supreme Court No. 20160199
	)	
Plaintiffs/Appellants,	)	Civil No. 53-2012-CV-00038
	)	
vs.	)	
	)	
Board of University and School Lands	)	
of the State of North Dakota, et al.,	)	
	)	
Defendants/Appellees.	)	
	)	
	)	

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On Appeal from Order on Summary Judgment Motion Entered May 17, 2016,  
Amended Order on Summary Judgment Motion and Judgment Entered May 18,  
2016, District Court, Northwest Judicial District, Williams County, North Dakota

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**SUPPLEMENTAL BRIEF OF APPELLEE AND CROSS-APPELLANT  
STATOIL OIL & GAS LP**

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### **Effect of Senate Bill 2134**

[¶1] Statoil Oil & Gas LP f/k/a Brigham Oil & Gas, L.P. (“Statoil”) files this supplemental brief regarding the effect on this appeal of Senate Bill No. 2134, passed by the 65th Legislative Assembly of North Dakota, which bill enacted new N.D.C.C. Chapter 61-33.1. Senate Bill No. 2134 was passed as an emergency measure and has been signed by the Governor; accordingly, it is current law. It also has a retroactive application to the date of closure of the Pick-Sloan Missouri basin project dams (one of which was the Garrison Dam); and it applies to all oil and gas wells spud after January 1, 2006, for the purposes of oil and gas minerals and royalty ownership.

[¶2] N.D.C.C. Chapter 61-33.1 now provides the state law as to the effect of the Oahe and Garrison dams on the location of the Ordinary High Water Mark (the “OHWM”) on the portion of the Missouri River flooded by those dams. The briefing in this appeal, to date, has dealt with state law that is no longer applicable to the flooded portion of the Missouri River governed by N.D.C.C. Chapter 61-33.1. Statoil’s position is that this new statutory chapter applies, in part, to the property that is the subject matter of this lawsuit (the “Wilkinson Property”); that, when this new statutory chapter is fully implemented it should resolve all of the issues in this case applicable to the Wilkinson Property; and that this new statutory chapter makes moot the arguments that have been made in the briefs filed to date in this appeal.

[¶3] However, the record before the Supreme Court in this appeal is not such that the Supreme Court can yet apply N.D.C.C. Chapter 61-33.1; and further the

full implementation of N.D.C.C. Chapter 61-33.1, (barring a stipulation between all parties as to the Wilkinson Property), will take additional time by the terms of the statute. Accordingly, the location of the OHWM cannot be determined for the Wilkinson Property by the Supreme Court at this time; and the issues in this appeal that were related to that determination are no longer related, and should not be decided at this time. Accordingly, this matter should be remanded to the district court for further action. The further action would presumably involve either a motion to stay this matter until N.D.C.C. Chapter 61-33.1 is fully implemented, or a motion to dismiss without prejudice to allow this to occur.

[¶4] As has been previously briefed, when North Dakota became a state the equal footing doctrine resulted in North Dakota taking title to the beds of navigable rivers existing at the time of statehood. The Missouri River was such a navigable river. After statehood the bed of the Missouri River must be determined by the location of the OHWM under North Dakota state law. Accordingly, the issue in this lawsuit is the determination of the OHWM, under North Dakota statutes, for the Wilkinson Property. As hereafter discussed, N.D.C.C. Chapter 61-33.1 applies to the Wilkinson Property. This change in the applicable statutes, enacted as an emergency and retroactive measure, means the new statutes must be applied to determine the OHWM for the Wilkinson Property, rather than the old statutes which were the subject of briefing to date in this appeal; and which are applicable to property not governed by N.D.C.C. Chapter 61-33.1.

[¶5] N.D.C.C. Chapter 61-33.1 provides a new method for the determination of the OHWM of the “historical Missouri riverbed channel”, as defined in N.D.C.C. §

61-33.1-01. N.D.C.C. § 61-33.1-01(2) defines the “historical Missouri riverbed channel” to mean, in part, the Missouri riverbed channel as it is existed upon the closure of the Pick-Sloan Missouri basin project dams from the Garrison Dam to the southern border of Sections 33 and 34, Township 153 North, Range 102 West, which is the approximate location of river marker 1565. The location of mile marker 1565 is west of the Wilkinson Property. Accordingly, the oil and gas interests involved in this lawsuit are located under, and restricted to, a portion of the historic Missouri riverbed channel as defined in N.D.C.C. § 61-33.1-01(2).

[¶6] N.D.C.C. § 61-33.1-03(1) provides that the “corps survey” must be considered the presumptive determination of the OHWM of the “historic Missouri riverbed channel”, subject only to the review process set forth in N.D.C.C. § 61-33.1-03, along with judicial review provided in N.D.C.C. § 61-33.1-05. The “corps survey” is defined in N.D.C.C. § 61-33.1-01(1) to be the last known survey conducted by the army corps of engineers in connection with the corps’ determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by supplemental plats created by the branch of cadastral survey of the United States bureau of land management. This corps survey, as to the Wilkinson Property, is not part of the record in this matter, as it was not a part of previous provisions of North Dakota law.

[¶7] However, even if the record was supplemented with the corps survey, N.D.C.C. § 61-33.1-03 provides for a review process to determine if the corps survey should be used for the OHWM. The review process includes the retention by the North Dakota Department of Mineral Resources of a qualified engineering

and surveying firm to conduct a review of the corps survey under the “historical Missouri riverbed channel” considering certain prescribed review criteria, followed by public notice of the review findings, a public hearing on the findings, and eventual action/adoption by the industrial commission. Based on the timelines set out in the statute, this entire process will take a minimum of 11 to 12 months. Until this process occurs, the statute does not provide for the payout of what could otherwise be disputed royalty proceeds.

[¶8] Once the review process is complete, it is likely there will not be a dispute as to the OHWM on the Wilkinson Property. But if there is, N.D.C.C. § 61-33.1-05 provides a means for further judicial review. Before the Supreme Court could review the determination of the OHWM as to the Wilkinson Property, the judicial review process would have to be completed in the district court. Obviously the decision by the district court addressed in this appeal could not have applied a judicial review process that did not exist at the time of its decision and therefore that review should be conducted by the district court in the first instance.

[¶9] The primary issue in this case is the location of the OHWM for the Wilkinson Property. That must now be determined by applying N.D.C.C. Chapter 61-33.1. A related issue (which Statoil contends should never have been addressed by the district court) was the delineation between Lake Sakakawea and the Missouri River channel. That issue is resolved by N.D.C.C. Chapter 61-33.1. Another related issue (which Statoil again contends should never have been addressed in this case) is ownership of the oil, gas and related hydrocarbons under Lake Sakakawea. That issue is resolved by N.D.C.C. Chapter 61-33.1. A further

related issue is whether the State Engineer had the exclusive authority to determine the OHWM as it related to the ownership of oil, gas and hydrocarbons. While in theory this issue could arise in the context of a different case, N.D.C.C. Chapter 61-33.1 decides this issue as to the defined historical Missouri River channel. If it does arise in another case, it should be litigated by the parties affected; and not in this case where no party any longer has an interest in the State Engineer's position.

[¶10] The legal issues briefed to date in this appeal, in theory, may at some later time become relevant with regard to the determination of the OHWM on a navigable river or lake other than the historical Missouri River channel, as defined by N.D.C.C. § 61-33.1-01(2); but they may also never arise again. Moreover, if they are relevant to the determination of the OHWM on some body of water other than the historical Missouri River channel, as defined by N.D.C.C. § 61-33.1-01 (2), they should be litigated at that time by parties actually affected by them. The Supreme Court, obviously, should not be asked to give advisory opinions, particularly when the issues no longer are relevant to the case before it.



[¶11] This matter should be remanded back to the district court, so that the district court can determine if the lawsuit should be dismissed or stayed.

Dated this 18th day of May, 2017.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶12] This Brief contains 1642 words, excluding the part of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with N.D.R.App.P. 29(d) and the typeface requirements of N.D.R.App.P. 32 and the type style requirements of the rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Arial, 12 point font.

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[illegible]

**SUPPLEMENTAL BRIEF OF APPELLEE AND CROSS-APPELLANT  
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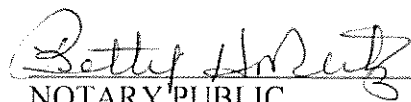
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Subscribed and sworn to before me, today, May 18th, 2017.

  
NOTARY PUBLIC  
Burleigh County, North Dakota

