Mineral Title Issues Involving Rivers, Lakes, and Riparian Lands

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- The maps, drawings and examples used in this presentation have been prepared for illustrative purposes only, and should not be relied on as being factually or legally correct representations of the lands or ownership depicted.
Plain English Disclaimers

“I have friends who are for it and friends who are against it. I’m with my friends.”
(Nameless politician responding to question about position on an issue.)

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The First Big Question
Navigable or not?

- Why it matters.
- How it is determined.
Title to the Bed of Navigable Waters Held by the Sovereign

- Thirteen colonies at independence.
- North Dakota was “admitted into the union on equal footing with the original states....”

  *Act of February 22, 1889 ch. 180, 25 Stat. 676 (1889) (commonly referred to as The Enabling Act)*

Title to the Bed of Non-Navigable Waters

- Originally retained by the United States.
- When U.S. conveys upland, it is free to dispose of or retain adjacent river or lake bed. *Oklahoma v. Texas*, 258 U.S. 574 (1926).
- Unless a treaty, statute or patent restricts the conveyance to the upland, a conveyance by the U.S. will “be construed and given effect in this particular according to the laws of the state in which the land resides.” *Id.* at 594-595.
"In all cases when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both.” N.D.C.C. § 47-01-15

As to non-navigable lakes, “boundary lines are to be fixed by extending, from the meander line on each side of the tract, lines converging to a point in the center of the lake.” *Brignall v. Hannah*, 34 N.D. 174, 157 N.W. 1042, 1045 (N.D. 1916).

As to non-navigable streams, “the owner of the bank owns the bed of the stream to its thread or center.” *Amoco Oil Co. v. State Highway Dept.*, 262 N.W.2d 726, 730 (N.D. 1978).
Determination of Navigability

- Determination is as of the date of statehood, which for North Dakota was March 2, 1889.

- Whether a river was navigable at the time of statehood is a question of federal law. State of North Dakota ex rel. Bd. of Univ. & School Lands v. United States of America, 972 F.2d 235, 237 (8th Cir. 1992), citing United States v. Oregon, 295 U.S. 1, 15 (1935).
“Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.”

“[N]avigability does not depend on the particular mode in which such use is or may be had—whether by steamboats, sailing vessels or flatboats—nor on an absence of occasional difficulties in navigation, but on the fact, if it be fact, that the stream in its natural and ordinary condition affords a channel for useful commerce.” State of North Dakota ex rel. Bd of Univ. & School Lands v. United States of America, 972 F.2d 235, 238 (8th Cir. 1992), citing United States v. Holt State Bank, 270 U.S. 49, 56 (1926).
Navigable Rivers


- Red River

- James River
Non-navigable rivers

- **Little Missouri River**
  - Suit commenced 1978
  - *State of North Dakota ex rel. Board of Univ. & School Lands v. Andrus*, 671 F.2d 271 (8th Cir.1982)
  - Unreported decision of federal district court
  - *State of North Dakota ex rel. Bd of Univ. & School Lands v. Block*, 789 F.2d 1308 (8th Cir. 1986)
  - Pub.L. No. 99-598, 100 Stat. 3351 (1986); 28 U.S.C. § 2409a(g)
  - Bench trial, federal district court, October 15 to October 18, 1990

- **Heart River** — *Conlon v. City of Dickinson*, 5 N.W.2d 411 (N.D. 1942)
- **Mouse River** — *Amoco Oil Co. v. State Highway Dept.*, 262 N.W.2d 726 (N.D. 1978)
Lakes

• Navigable

• Non-Navigable
  Fuller’s Lake – *State v. Brace*, 76 N.D. 314, 36 N.W.2d 330 (N.D. 1949)

• State Review and Disclaimers
Boundary of Riparian Lands

- Meander lines

  "The traverse of the margin of a permanent natural body of water is termed a meander line. All navigable bodies of water and other important rivers and lakes are segregated from the public lands at mean high-water elevation [through the use of meander lines]."

http://www.blm.gov/cadastral/Manual/73man/

Note: Presence of meander lines on original (GLO) survey plat does NOT establish navigability.
Meandered river
“Where an irregular tract or lot of land abuts upon a stream of water, and a meander line is run ostensibly along this shore line for the purpose of fixing the area of such tract, the real boundary of the tract is the shore line, and not the meander line.” Oberly v. Carpenter, 67 N.D. 495, 274 N.W. 509, 512 (1937), citing Heald v. Yumisko et al., 7 N.D. 422, 75 N.W. 806, 807 (1898).

“[T]he law governing riparian rights has no regard for artificial boundary lines, whether between sections or their subdivisions, or between counties, states, or nations.” Oberly, 274 N.W. 509, 513.
Descriptions
in deeds and leases

General rule:

- “Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary, and a deed describing the lot by number or name conveys the land up to such shifting line exactly as it does up to a fixed side line and conveys all accretion thereto.” Oberly v. Carpenter, 67 N.D. 495, 274 N.W. 509, 513 (1937), citing Jefferis v. East Omaha Land Company, 134 U.S. 178 (1890).
“[E]xcept when the record title establishes a prior conveyance or separation of the upland and riparian land, or a grant explicitly indicates a different intent by an explicit reservation or exception, a deed that designates a meander line as a boundary conveys the grantor's interest in the property to the ordinary high watermark, and also correlative interests vis-a-vis the State in the area between the ordinary high watermark and ordinary low watermark.” *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297, 302 (N.D. 1995) (emphasis added).

“And the patents convey, in case the waters are not navigable, the title of the land lying thereunder to their center.” *Ozark-Mahoning Co. v. State*, 76 N.D. 464, 37 N.W.2d 488, 491 (1949).
Exceptions:

- Patents from the United States
  
  “[T]he meander line will be treated as the boundary of the grant if, between the time of survey and the time of entry, a substantial amount of land was formed by accretion between the survey line and the waters of the stream.”  
  
  *DeBoer v. United States*, 653 F.2d 1313, 1315 (9th Cir. 1981); *but see United States v. 11,993.21 Acres of Land*, 116 F.Supp. 671 (D.N.D. 1953).
- Bed of meandered, non-navigable body of water, where riparian lot acquired by State under Enabling Act

- Sections 16 and 36 granted to State for support of “common schools”. If any part of such sections was unavailable, State was granted other lands “in lieu” thereof, to be selected by the State. *Enabling Act § 10*.

Potentially unique considerations involving oil and gas leases:

- Statement of specific acreage amount. (Rejected as to deeds in *Oberly v. Carpenter* and *Ozark-Mahoning Co. v. State*.)

- Payment of bonus on a net acre basis. (Also rejected in *Oberly* and *Ozark-Mahoning; but cf. Borth v. Gulf Oil Exploration & Production Co.*, 313 N.W. 2d 706 (N.D. 1981).)

- “[G]rant explicitly indicates a different intent by an explicit reservation or exception…” *North Shore*, 530 N.W.2d 297, 302.

- Mother Hubbard clause.
Second Big Question
Who owns the minerals under the “shore zone”?


- “Except when the grant under which the land is held indicates a different intent, the owner of the upland, when it borders on a navigable lake or stream, takes to the edge of the lake or stream at low watermark...” N.D.C.C. § 47-01-15 (emphasis added).
“The precise meaning of ‘takes,’ and the type of interest the upland owner ‘takes’ to the low watermark is unclear.” Mills I, 523 N.W.2d 537, 540.

“The parties' interests in the shore zone are coexistent and overlap, but in this case no specific right or claim for use of the shore zone is contested. The shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise. ... [W]e decline to speculate on the precise extent of the parties' rights and interests vis-a-vis the shore zone.” Id., at 544.
“Mills asserts the trial court erred in setting the ordinary high watermark based upon the current level of the river, which is largely regulated by operation of the dam system on the Missouri River by the United States Army Corps of Engineers. ... Mills argues the ordinary high watermark should be determined by river levels in their natural, pre-dam state, rather than upon the artificial conditions created by the Missouri River dam system. We disagree.” State ex rel. Spryniczynatyk v. Mills, 1999 ND 75, ¶ 4, 592 N.W.2d 591.
We should have the answer "soon"

Two cases pending in District Court, Williams County, North Dakota, have been consolidated for purposes of determining rights to shore zone minerals:

Case No. 53-2012-CV-00213

Brigham Oil & Gas, L.P. v. North Dakota Board of University & School Lands, et al.,
Case No. 53-2011-CV-00495
State’s Arguments

• N.D.C.C. § 47-01-15 is a “rule of construction” and not a grant of ownership, i.e. it aids in the interpretation of private conveyances, but does not actually convey property from the State to the riparian owner.
  – Statute was adopted by the State unchanged from the code of Dakota Territory, originally enacted in 1865. Laws of Dakota Terr. § 267 (1865).
  – At that time, title to the high water mark was held by the United States in trust for the future state. Territorial legislature had no authority to convey title.
  – Statute should be given same meaning after statehood.
- Initial clause of statute provides “(e)xcept when the grant under which the land is held indicates a different intent”. This shows that the statute is not itself a “grant” but rather a rule for interpreting conveyances of upland to include any associated rights.

- Interpreting 47-01-15 as a conveyance would violate the following clauses of the State’s constitution:
  - The gift clause. (Sec. 185, 1889 N.D. Const.; now Art. X, § 18.)
  - The watercourses clause. (Sec. 210, 1889 N.D. Const.; now Art. XI, § 3.)
  - The special privileges clause. (Sec. 20, 1889 N.D. Const.; now Art. I, § 21.)
• Interpreting 47-01-15 as a conveyance would violate the equal footing doctrine and the public trust doctrine.

• Any purported transfer of public assets must be strictly construed. See also N.D.C.C. § 47-09-13 (grant by public officer or body to private party must be interpreted in favor of grantor).

• Deference should be given to longstanding agency interpretation of governing statutes (Land Board, State Engineer, Garrison Conservancy District, Attorney General).
Riparian Owners’ Arguments

• Upon statehood, the State had ownership of and authority to transfer rights in sovereign lands.
  – The territorial predecessor to 47-01-15 did not violate the equal footing doctrine because it did not transfer a fee interest; rather it operated as a rule of construction to confirm that certain rights attached to conveyances of riparian land.
  – When it became a State, North Dakota had a choice in setting the boundary for riparian land. It made this choice when the 1889 constitution provided that all laws in effect at the time, including the predecessor to 47-01-15, would remain in force.
  – This choice to transfer shore zone interests was also made by other states through enactment of similar statutes or common law.
  – The State’s authority to transfer its interest in the shore zone, was limited only by the “public trust doctrine.”
• The public trust doctrine does not include a public right to subsurface minerals.
  - The “purpose of the State holding title to a navigable riverbed is to foster the public’s right of navigation.”
  - Other interests protected include “bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies.”
  - Cases from Minnesota, South Dakota and New York, cited by the North Dakota court in Mills I, all establish that rights under the public trust doctrine are limited to surface uses and do not include subsurface minerals.
• Questions regarding the proper interpretation of N.D.C.C. § 47-01-15 were resolved in *Mills I* and no further statutory interpretation is necessary.

• Because *Mills I* established the proper interpretation of 47-01-15, the State’s statutory and constitutional arguments should be ignored. All such arguments were considered and rejected in *Mills I*.

• Under *Mills I* the State abdicated its interest in the shore zone to the riparian owners, subject only to the public trust doctrine.
District Court Decision

• By Order for Partial Summary Judgment entered on January 28, 2013, the District Court granted the motion for partial summary judgment filed by the State. The Court concluded that “it is the State of North Dakota—as part of its title to the beds of navigable waterways—that owns minerals in the area between the ordinary high and low watermarks ....”


• Order for Judgment was entered by the Court on March 1, 2013.
State’s leasing of minerals under navigable rivers

- State claims to ordinary high water mark
- Historical – primarily aerial photos
- Current:
  - Task Order I – on the ground survey
    - Used for Yellowstone and Missouri from Highway 85 bridge west
      http://www.land.nd.gov/minerals/mineralapps/OHWM1/OHWM1Disclaimer.aspx
  - Task Order II – aerial photos
    - Used from Highway 85 bridge east
Accretion and Erosion

- “Accretion” refers to the gradual deposit and addition of soil along the bank of a waterbody caused by the gradual shift of the waterbody away from the accreting bank.
- “Erosion” refers to the gradual loss of soil along the bank of a waterbody caused by the gradual encroachment of water into the eroding bank.

J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Company, 423 N.W.2d 130 (N.D. 1988)
Common Law Avulsion

- Common law “Avulsion” refers to the sudden inundation or sweeping away of land resulting from a sudden change in the course of a waterbody.

J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Company, 423 N.W.2d 130 (N.D. 1988)
Statutory Avulsion

“If a stream, navigable or not navigable, forms a new course abandoning its ancient bed, the owners of the land newly occupied take by way of indemnity the ancient bed abandoned, each in proportion to the land of which the owner has been deprived.”

N.D.C.C. Section 47-06-07. The J.P. Furlong case notes that the statute does not require that the river “suddenly” abandon the former riverbed.
(Ordinary High Water Mark Survey) http://www.land.nd.gov/minerals/oilandgasleasing.aspx
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(Ordinary High Water Mark Survey) http://www.land.nd.gov/minerals/oilandgasleasing.aspx
(Ordinary High Water Mark Survey) [Link: http://www.land.nd.gov/minerals/oilandgasleasing.aspx]
(Ordinary High Water Mark Survey) http://www.land.nd.gov/minerals/oilandgasleasing.aspx
(Ordinary High Water Mark Survey) [Website Link]
“The fundamental theory underlying the ownership of accretions is that each of the several riparian owners shall have a frontage on the new shore proportionate to his frontage on the old one, connecting their respective points by straight lines. A common principle which pervades all modes of division is that no regard is paid to the direction of the side lines between contiguous owners, but reference is solely to the shore line . . . .”

Nord v. Herman, 1998 ND 91, 577 N.W.2d 782
(Ordinary High Water Mark Survey) http://www.land.nd.gov/minerals/oilandgasleasing.aspx
Fort Berthold Reservation

• Land Ownership within Reservation Boundaries
  – Trust
    • Individual
    • Tribal
  – Fee

• Mandan, Hidatsa and Arikara Nation
Fort Berthold Indian Reservation
Before Construction of the Garrison Dam
Boundaries as of Act of June 1, 1910

Courtesy of the ND Studies Program at the State Historical Society of ND
Federal Taking

- Public Law 81-437 (63 Stat. 1026)
  Title to lands owned in trust for individual Allottees and for the Tribes are vested in the United States for the Garrison Dam Project
  - No Reservation of Mineral Interests
- Approx. 154,000 acres
FORT BERTHOLD INDIAN RESERVATION
After the Construction of the Garrison Dam

Courtesy of the ND Studies Program at the State Historical Society of ND
Fort Berthold Reservation Mineral Restoration Act

- Public Law 98-602 (98 Stat. 3152)

Mineral interests within the Reservation acquired for the construction, operation or maintenance of the Garrison Dam project are declared to be held by the U.S. in trust for the Three Affiliated Tribes of the Fort Berthold Reservation

- Certain lands excluded generally in the North & Eastern portions of the reservation
Trust Minerals - Tribal and Individual

dmr.nd.gov/oilgas
**Fractionation**

**Public Law 105-188 (112 Stat. 620)**

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- 2nd Generation: 58.333%
- 3rd Generation: 52.778%
- 4th Generation: 50.694%
Along the River
Questions Presented

• Who owns the River
  – State v. Three Affiliated Tribes
  – Status of ownership (Trust or Fee)

• What is the River?
  – As it existed at the time of flooding
  – As the water flows today – Lake Sakakawea

• What line do you use?
  – Ordinary High or Ordinary Low
Possible Considerations

• History of the Reservation Boundaries

• Activities of the Tribe relative to water

• Length of time Tribe has occupied the area
  – *Yankton Sioux Tribe v. South Dakota*, 796 F.2d 241 (8th Cir. 1986)
Additional Cases

  - No Tribe involved
  - Federal Government retains ownership of submerged lands adjacent to National Petroleum Reserve

  - No Tribe involved
  - Utah determined to be the owner of Utah Lake
Thank You

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