RIPARIAN MINERAL OWNERSHIP IN NORTH DAKOTA

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Like the paths of rivers and waterways, mineral law and related jurisprudence evolve over time. North Dakota's Lake Sakakawea, which was formed from the Missouri River as part of the Garrison Dam project in 1953, has recently been the subject of two separate attempts to redefine boundaries and reallocate ownership of the minerals lying thereunder. The lake is the largest body of water in North Dakota, with more shoreline than the entire state of California, and these actions could have a massive effect on mineral ownership and oil and gas operations associated with the lake.[1]

General North Dakota Riparian Law

It is a general standard of law that a state owns the minerals underlying navigable waterways within its boundaries. A segment of a waterway is deemed to be navigable "when used or susceptible of use, in its ordinary condition . . . for the purposes of commerce or possess[es] a capacity for valuable floatage in the transportation to market of the products of the country through which it runs."[2] Generally, owners of land adjacent to a non-navigable section of a waterway own land to the centerline of the waterway, while title to minerals underlying the bed and banks up to the ordinary high water mark[3] of a navigable waterway is retained by the State of North Dakota.[4]

However, waterways are not static in shape, size, or navigability, and associated mineral ownership may change as a waterway grows, shrinks, or otherwise changes. North Dakota has

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[1] For a map depicting North Dakota waterways, see https://geology.com/lakes-rivers-water/north-dakota.shtml.

[2] The Daniel Ball, 77 U.S. 557, 563 (1871). Although navigability is a federal question, the North Dakota Supreme Court has addressed the issue in *Ozark-Mahoning Co. v. State*, 76 N.D. 464, 37 N.W.2d 488 (1949).

[3] The ordinary high water mark ("OHWM") is defined as being "the point up to which the presence and action of the water is so contiguous as to destroy the value of the land for agricultural purposes by preventing the growth of . . . an ordinary agricultural crop." *In re* Ownership of Bed of Devil's Lake, 423 N.W.2d 141, 145 (N.D. 1988). The ordinary high water mark is ambulatory and is not determined as of a fixed date. State *ex rel.* Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D. 1994).

[4] When North Dakota became a state, it acquired title to lands under most navigable waters within its border from the beds to the OHWM thereof under the "Equal Footing" Doctrine and subject to the Commerce Clause of the Constitution. By N.D.C.C. § 47-01-15, North Dakota declared owners of lands surrounding all navigable lakes and streams generally owned the mineral rights between the OHWM and the low water mark. After years of debate on its effect, the North Dakota Supreme Court in *Reep v. State*, 2013 ND 253, 841 N.W.2d 664, construed N.D.C.C. § 47-01-15 as a rule of construction rather than as a self-executing grant of absolute ownership of land to the low water mark to avoid an interpretation that would grant a private party a gift in violation of the anti-gift clause of North Dakota's Constitution.

statutorily addressed ownership in multiple circumstances where a waterway may change in form; for instance, N.D.C.C. § 47-06-05 provides:

> "Where from natural causes land forms by imperceptible degrees upon the bank of a [waterway], either by accumulation of material [accretion] or by the recession of the stream [reliction], such land belongs to the owner of the bank."

Erosion, or the gradual loss of soil by the encroachment of water, is also covered by N.D.C.C. § 47-06-05. As the changes governed by this chapter usually occur slowly, gradually, and naturally, they most likely do not necessitate continuous changes in royalty payments or create unleased portions of land in the short term. In the alternative, N.D.C.C. § 47-06-06 applies to sudden changes in a waterway, or "avulsive" changes, which can be more complicated. Such a change generally takes place when an oxbow (a U-shaped lake that forms when a wide meander of a river is severed) is suddenly cut off by a waterway forming a new channel. N.D.C.C. § 47-06-06 provides:

> "If a [waterway] carries away by sudden violence a considerable and distinguishable part of a bank and bears it to the opposite bank or to another part of the same bank, the owner of the part carried away may reclaim it within a year after the owner of the land to which it has been united takes possession thereof."

Eyewitness testimony and certain soil and vegetation studies may be submitted as evidence of avulsion, but because avulsions are much more unusual, courts usually presume an accretion occurred.[5]

A separate North Dakota statute also covers the formation of new channels by waterways. N.D.C.C. § 47-06-07 indicates that:

> "If a [waterway] 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."

In other words, the mineral owner whose property was taken by the new channel would lose title to the new channel but gain title to the abandoned oxbow; the prior owner of the minerals underlying the now-abandoned oxbow (presumably the State of North Dakota in the case of a navigable waterway) would lose title to those minerals but gain ownership of the minerals underlying the new channel.[6]

The changes covered by N.D.C.C. § 47-06-06 and N.D.C.C. § 47-06-07 could alter ownership of a more substantial amount of land than is usually affected by erosion, accretion, or reliction, potentially creating unleased lands in an operator's unit or necessitating a change in royalty payments. An operator of lands traversed or abutted by a waterway should monitor the

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[5] Woodland v. Woodland, 147 N.W.2d 590, 600 (N.D. 1966).

[6] J.P. Furlong Enterprises, Inc. v. Sun Exploration & Production Co., 423 N.W.2d 130 (N.D. 1988); Kim-Go, H.K. Minerals, Inc. v. J.P. Furlong Enterprises, Inc., 460 N.W.2d 694 (N.D. 1990); Kim-Go, H.K. Minerals, Inc. v. J.P. Furlong Enterprises, Inc., 484 N.W.2d 118 (N.D. 1992).

area for events that could lead to such changes. Additionally, leases covering such land should include Mother Hubbard-type language addressing sudden changes in waterways. If an operator suspects ownership of minerals underlying a waterway has changed due to avulsion or the like, the operator should determine the land affected, suspend related payments until the ownership changes are settled by the relevant parties, and obtain any necessary leases from new or different owners.

Minerals Underlying Lake Sakakawea, Excluding the Fort Berthold Reservation

In 1953, as part of the Pick-Sloan Missouri Basin Project, the U.S. Army Corps of Engineers (the "Corps") built the Garrison Dam on a portion of the Missouri River crossing North Dakota, creating Lake Sakakawea. The project included surveying the Missouri River (the "Corps survey"), which defined the ordinary high water mark (the "OHWM") as it existed prior to construction of the dam and establishment of the lake (the "historical OHWM"). In 2008, North Dakota commissioned additional surveys to delineate the OHWM of the Missouri River; land lying below the OHWM would be susceptible to State ownership. The 2008 surveys considered the current location of the OHWM after creation of Lake Sakakawea (the "Phase 1 survey"), and the location of the river prior to creation of the lake based on aerial photographs (the "Phase 2 survey"). The Phase 1 survey ultimately depicted the OHWM much differently than the Corps survey, due to movement of the Missouri River after the Garrison Dam was constructed. The differences in survey methodology also created disparity between the Phase 2 survey and the Corps survey. As a result of the 2008 surveys, the State claimed mineral ownership in approximately 25,000 additional acres under the lake, stirring controversy between the State and the parties previously thought to own the minerals after the Corps survey.

In *Wilkinson v. Board of University and School Lands of the State of N.D.*,[7] the State's new claim to minerals was challenged. The Wilkinson family's predecessors conveyed land to the Corps for construction and operation of the Garrison Dam, reserving ownership of the minerals. The Corps survey depicted the Wilkinsons' property above the OHWM, confirming their mineral title; however, the Phase 1 survey depicted the Wilkinsons' property below the OHWM, after which the State claimed ownership of the minerals. In 2012 the Wilkinsons sued the State, arguing its claim was invalid because there was not a navigable waterway on the Wilkinsons' property at the time North Dakota became a state, and because the property lies above the historical OHWM as defined by the Corps survey. In 2016 the trial court disagreed and relied on the Phase 1 survey to hold that the Wilkinsons' property was situated below the current OHWM and confirm the State's ownership of the minerals. The Wilkinsons appealed.

While the appeal was pending, the North Dakota legislature passed Senate Bill 2134 (later amended by Senate Bill 2211 and now codified as N.D.C.C. § 61-33.1). The statute was made effective April 21, 2017 but retroactive to the date of closure of the basin project dams. It therefore applies to all oil and gas wells spudded after January 1, 2006 for purposes of mineral and royalty ownership. N.D.C.C. § 61-33.1 limits State ownership of mineral rights in lands inundated by the dams, including the Garrison Dam, to minerals below the OHWM as it existed *prior to* construction of the dams. The statute makes clear that the Corps survey "must be considered the presumptive determination," of the OHWM contrary to the Phase 1 survey. As the

[7] 2017 ND 231, 903 N.W.2d 51.

historical OHWM was determinative, and the Phase 2 survey of the historical OHWM differed from the Corps survey, neither 2008 survey could be relied upon to establish mineral ownership. N.D.C.C. § 61-33.1 additionally ordered a new study be commissioned to correct the Corps survey in certain limited areas when clear and convincing evidence demonstrated the Corps survey did not reasonably reflect the historical OHWM (the "Wenck Study").[8] The new study would include all of Lake Sakakawea, less the portion of the lake in the Fort Berthold Reservation (see depiction below). On September 27, 2018, the North Dakota Industrial Commission (the "NDIC") adopted the Wenck Study's determination of the historical OHWM in part and amended it in part. This resulted in the allocation of approximately 15,500 more acres to upland owners than the 2008 surveys, but approximately 9,500 fewer than the Corps survey.

After the NDIC finalized and adopted the determinations of the Wenck Study, the North Dakota Supreme Court remanded the *Wilkinson* case, requiring analysis consistent with the Wenck Study, the NDIC's acreage determinations, and N.D.C.C. § 61-33.1. On remand, the trial court ruled the Wilkinson property lies above the historical OHWM as depicted in the Wenck Study, and therefore the Wilkinsons owned the underlying minerals. The ruling as to mineral ownership was affirmed by the North Dakota Supreme Court in August of 2020.[9]

N.D.C.C. § 61-33.1-03(8) also granted the State Land Board the right to have an engineering and surveying firm analyze the NDIC's findings to ultimately determine the exact acreage above and below the OHWM. The State Land Board had not completed such analysis prior to the conclusion of the *Wilkinson* case, and acreage could not be considered finalized until the Board had completed analysis and accepted the final acreage determinations; although it was confirmed that the Wilkinsons owned the minerals, it remained necessary to determine the exact acreage owned. The court remanded the case again so that any damages owed to the Wilkinsons from the State's invalid claim to their minerals, including bonus and royalty payments made on an acreage basis, could be determined. On June 25, 2020, the Board adopted the acreage adjustment survey on a quarter-quarter, or government lot, basis above and below the OWHM as delineated by the final review findings of the NDIC, except in certain township sections.[10]

Minerals Underlying the Missouri River in the Fort Berthold Reservation

Different laws govern ownership of minerals underlying navigable waterways traversing or abutting Native American reservations. Fort Berthold, the reservation granted to the Three Affiliated Tribes (a/k/a the MHA Nation), was therefore excluded from the Wenck Study, and

[8] The Wenck Study and other relevant information pertaining thereto can be found at https://www.dmr.nd.gov/OrdinaryHighWaterMark/.

[9] Wilkinson v. Bd. of Univ. & Sch. Lands of N.D., 2020 ND 179, 947 N.W.2d 910.

[10] *See* https://www.kxnet.com/news/local-news/unanimous-supreme-court-ruling-over-a-familys-mineral-royalties-may-affect-millions-of-dollars-still-in-court/.

the developments discussed above would not govern ownership of minerals underlying the portions of Lake Sakakawea and the Missouri River that lie within the reservation.[11]

As a default rule, title to land under navigable waters passes from the United States to a newly admitted state. However, Congress has the power to both convey or reserve land beneath navigable waterways located on land not yet admitted to statehood. When creating Native American reservations, Congress sometimes reserved waterways abutting or traversing the land for the benefit of the inhabiting tribe. In these instances, the eventual state would not have acquired title to these lands upon its statehood; instead, the federal government retained the associated mineral rights in trust for the tribes.

Until recently, the United States was presumed to own the mineral rights underlying waterways in the Fort Berthold Reservation in trust for the MHA Nation. In 1936, prior to the creation of Lake Sakakawea, the Solicitor of the Department of the Interior issued an M-Opinion (the "1936 M-Opinion") that determined that an island formed from the bed of the Missouri River after North Dakota's statehood belonged to the MHA Nation, because the bed of the Missouri River was part of the Reservation prior to North Dakota's statehood.[12] In 1979, the Interior Board of Land Appeals ("IBLA") similarly ruled that the entire bed of the Missouri River, insofar as it is located within the Reservation, was also owned by the MHA Nation.[13] Subsequently, the United States Supreme Court issued two decisions with the potential to alter the status quo.

In *Montana v. United States*, 450 U.S. 544 (1981), the U.S. Supreme Court found an established, strong federal presumption that beds of navigable waterways are owned by the State.[14] In *Idaho v. United States*, 533 U.S. 262, 272 (2001), the Court established a two-step test to determine whether the federal government retained ownership of waterways traversing or abutting tribal lands: (1) did Congress intend to include the land under these navigable waters as part of the reservation when created and, if so, (2) did Congress intend to defeat the state's title to the submerged lands? If both questions are answered affirmatively, the United States owns these lands as trustee for the inhabiting tribe.

Following these decisions, the State of North Dakota asserted a claim to the minerals underlying the portions of the Missouri River included in the Fort Berthold Reservation. In

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[11] For a map depicting current Native American reservations in North Dakota, see https://www.worldofmaps.net/en/north-america/maps-of-north-dakota-usa/map-of-north-dakota-map-federal-lands-and-indian-reservations.

[12] U.S. Dep't of the Interior, M-28120.

[13] 42 IBLA 105, GFS(O&G) 112(1979).

[14] In *Montana*, the U.S. Supreme Court found treaties granting land to a tribe did not overcome the established, strong presumption that the beds of navigable waters remained in trust for future states because the treaties in no way expressly referred to the riverbed nor expressed an intention to convey the riverbed in "clear and especial words." The fact the river was within the geographic boundaries of the relevant reservation was not enough. Further, in *United States v. Alaska*, 521 U.S. 1 (1997), the Court held that the fact the "Indians could not sustain themselves from the use of the upland alone" was a justifiable national purpose.

response, the Bureau of Indian Affairs and the MHA Nation requested an examination of ownership from the U.S. Department of the Interior. In January of 2017, then-Solicitor of the U.S. Department of the Interior, Hilary Tompkins, issued an M-Opinion consistent with the reasoning and findings of the 1936 M-Opinion and the 1979 IBLA case. She found the State had no claim to the minerals, because Congress had retained ownership for the MHA Nation, and because the federal government either did not acquire the minerals under the 1949 Takings Act or it returned them through the 1984 Mineral Restoration Act. Tompkins concluded *Montana* was inapplicable to this case, and the *Idaho* test was satisfied, in part because relevant executive orders and the history of reservations "evince a clear intent to include the riverbed of the Missouri River within the Reservation."[15]

On May 26, 2020, the Trump administration's Interior Solicitor Daniel H. Jorjani issued a new M-Opinion concluding that the State of North Dakota owned the minerals underlying Fort Berthold Reservation waterways. The decision was based in part on historical records that were not provided to Tompkins prior to issuance of her M-Opinion in 2017. Jorjani noted *Idaho* and *Montana* did not exist at the time of the 1979 IBLA decision and, unlike Tompkins, believed the *Montana* presumption in favor of State ownership to be applicable. He also found Congress did not intend to include land under the navigable waters within Fort Berthold, because it never showed a clear intent to include the submerged lands in the Reservation, thereby failing the first prong of the *Idaho* test.[16] As Jorjani believed North Dakota owned the minerals underlying Fort Berthold waterways since statehood, he further concluded the MHA Nation could not have acquired these minerals from the federal government via the 1984 Mineral Restoration Act. Jorjani authorized the Bureau of Indian Affairs and the Bureau of Land Management to take any actions necessary to comply with his M-Opinion, including withdrawal of oil and gas permits.

The MHA Nation challenged Jorjani's M-Opinion in federal court. In an order issued on July 31, 2020, the presiding federal district judge suspended payment of disputed mineral royalties until mineral ownership has been resolved. The MHA Nation claims damages exceeding $200 million, based on allegations that the Bureau of Indian Affairs allowed operators to extract oil and gas from the riverbed within the Reservation without the authorization required by federal law. On March 19, 2021, the Biden-Harris administration's Department of the Interior withdrew the Trump administration's M-37056 to "further review the opinion and any underlying decisions or positions to which it applies."[17] By hearing the MHA Nations' appeal, the District Court for the District of Columbia granted the Department of the Interior a stay to review the matter further.[18]

Effect on Operations

All oil or gas wells lying on Lake Sakakawea spudded after January 1, 2006 may be affected by the above-described proceedings. Further, *Wilkinson* opens the door for other owners

[15] U.S. Dep't of the Interior, M-37044.

[16] U.S. Dep't of the Interior, M-37056.

[17] U.S. Dep't of the Interior, M-37066.

[18] *See* MHA Nation v. United States, No. 1:20-cv-00859 (Fed. Cl. filed July 15, 2020); MHA Nation v U.S. Dep't of the Interior, No. 1:20-cv-01918 (D.D.C. filed July 16, 2020).

of land on the lake affected by the Wenck Study to challenge State claims to mineral ownership where such a claim violates N.D.C.C. § 61-33.1.[19] As the State Land Board adopted most of the NDIC acreage adjustments on June 25, 2020, a June 24, 2022 deadline is in place for the Board to implement necessary acreage adjustments and bonus/royalty refunds as to the lands with approved acreages. Affected operators must complete any acreage and revenue adjustments within the same period unless an action challenging the Board's acreage approval is filed before the deadline expires.[20]

Any interested party seeking to challenge the Board's final acreage must also commence an action in district court by June 24, 2022. This is the sole remedy for challenging the Board's final determinations of the OHWM and acreages, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law. The State and all owners of fee or leasehold interests affected by the final acreage determination being challenged must be joined as parties thereto. Commencement of the action extends the deadlines discussed until final determination of the suit. Operators producing in the areas affected by the Wenck Study should be aware of, monitor, and comply with the statutorily imposed deadlines discussed above, absent other reasons allowing for suspense of payments.

If you are operating on portions of Lake Sakakawea within the Fort Berthold Reservation, the case governing ownership of these minerals is ongoing, and royalty proceeds associated with this land should be held in suspense until ultimate disposition of the case or further instruction from the Department of the Interior. This article covers some, but not all, of the issues and complexities that arise from mineral ownership under and adjacent to waterways in North Dakota.

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[19] The Corps often did not purchase the minerals underlying land bought for the Garrison Dam to save on costs. As such, it is likely that many successors to grantors of the Garrison Dam land have similar legal claims as the Wilkinsons.

[20] According to www.kxnet.com, the Department of Trust Lands is releasing a website that will make this process and the documents involved public for landowners to follow.