

**LETTER OPINION
2009-L-18**

November 27, 2009

Mr. Dennis Johnson
McKenzie County State's Attorney
PO Box 1288
Watford City, ND 58854

Dear Mr. Johnson:

Thank you for your September 24, 2009, letter in which you ask about title to land bordering the Yellowstone River. You describe the facts as follows. When the North Dakota-Montana boundary was surveyed, the Yellowstone River was in Montana, but over time, in the area at issue, the river migrated, eroding its east bank and adding land to its west bank. The Yellowstone has moved so far east in this area that now it is wholly within North Dakota. Even part of the land that accreted to its west side is in North Dakota.

You ask if the accretions that formed on the west bank and that are now in North Dakota belong to the west bank's riparian landowner or whether they constitute sovereign lands belonging to the state.¹ This is ultimately a factual question upon which I cannot offer an opinion,² but I can provide some background on the governing law that would inform the factual analysis.

ANALYSIS

The state owns the land underlying waters that were navigable at statehood in 1889, taking title under the equal footing doctrine.³ Because the state owns the lands "by virtue of its sovereignty,"⁴ the beds of navigable rivers and lakes are known as "sovereign lands."⁵

¹ North Dakota's western boundary is fixed at the twenty-seventh meridian of longitude west from Washington. N.D. Const. art. XI, § 1. Thus, any movement or migration of the Yellowstone River does not affect the State's western boundary.

² N.D.A.G. 2002-L-17, N.D.A.G. 99-F-02, N.D.A.G. 97-L-71.

³ State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 539 (N.D. 1994) ("Mills I").

⁴ Id. at 540.

⁵ See, e.g., N.D.C.C. ch. 61-33 ("Sovereign Lands Management").

While the issue has not been litigated in North Dakota, the Yellowstone River, particularly in its lower reaches where it flows through North Dakota, was undoubtedly navigable at statehood. And the State Engineer has by administrative rule included the Yellowstone in a list of navigable waters.⁶

Because the Yellowstone is navigable, the State of North Dakota owns its bed. State title is not geographically static, that is, the physical location of its title is not confined to wherever the river was in 1889, but rather, state title is ambulatory, moving with the river as it changes course.⁷ Thus, the state asserts title to the bed of the Yellowstone River within the boundaries of the state wherever that bed may exist from time to time.

The "bed" is the area below the river's ordinary high watermark.⁸ The ordinary high watermark is that point on the bank where the water has acted with such regularity "as to destroy the value of the land for agricultural purposes by preventing the growth of vegetation, constituting what may be termed an ordinary agricultural crop."⁹

There is some question about the exact nature of the state's title in the area between the ordinary high watermark and the low watermark, an area known as the "shore zone." The North Dakota Supreme Court has addressed the issue but not with completeness. In considering N.D.C.C. § 47-01-15,¹⁰ the equal footing and public trust doctrines,¹¹ and the state constitution's "anti-gift clause,"¹² the Court stated that in the shore zone neither the state's interest nor the riparian landowner's interest "is absolute."¹³ The interests "are coexistent and overlap."¹⁴ It added that in the absence of a specific dispute over a shore zone use, it would not "speculate on the precise

⁶ N.D.A.C. § 89-10-01-03(4); see also Edwards v. Severin, 785 P.2d 1022, 1023 (Mont. 1990) ("the Yellowstone River, a navigable stream" that is capable of use for transportation or commerce).

⁷ State ex rel. Sprynczynatyk v. Mills, 592 N.W.2d 591, 592 (N.D. 1999) ("Mills II") (citing In re Ownership of the Bed of Devils Lake, 423 N.W.2d 141, 143-44 (N.D. 1988)).

⁸ See, e.g., N.D.C.C. § 61-33-01(3) (defining "sovereign lands" as those "lying within the ordinary high watermark").

⁹ Mills II, 592 N.W.2d at 594 (quoting Devils Lake, 423 N.W.2d at 144-45), see also N.D.A.C. § 89-10-01-03(5).

¹⁰ N.D.C.C. § 47-01-15 provides that riparian landowners "take" to the low watermark.

¹¹ Mills I, 523 N.W.2d 539-540 (explaining that these doctrines provide for state title from high watermark to high watermark and requiring that the area be managed for public benefit).

¹² N.D. Const., art. X, § 18.

¹³ Mills I, 523 N.W.2d at 544.

¹⁴ Id.

extent of the parties' rights and interests."¹⁵ However, the State Engineer, who has authority to manage the state's surface interests in the shore zone,¹⁶ asserts comprehensive management authority over surface activities,¹⁷ and the Board of University and School Lands, which has authority to manage the state's subsurface interests in the shore zone,¹⁸ regularly issues oil and gas leases to land under the shore zone.

With respect to ownership of accreted land above the high watermark, that would depend upon the facts of how the land accreted, title ownership before the river migrated, and possibly other facts. Therefore a conclusive answer cannot be provided without knowing those facts. For example, several statutes directly address ownership changes due to movement of a river:

47-06-05. Riparian accretions. Where from natural causes land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank, subject to any existing right of way over the bank.

47-06-06. Avulsion - Title - Reclamation by original owner - Limitations. If a river or stream, navigable or not navigable, 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.

47-06-07. Ancient streambed taken by owners of new course as indemnity. 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.

47-06-08. Islands and relict lands in navigable streams belong to state. Islands and accumulations of land formed in the beds of streams which are navigable belong to the state, if there is no title or prescription to the contrary. The control and management, including the power to execute surface and mineral leases, of islands, relictions, and accumulations of land owned by the state of North Dakota in navigable

¹⁵ Id.

¹⁶ N.D.C.C. § 61-33-05.

¹⁷ N.D.A.C. art. 89-10.

¹⁸ N.D.C.C. § 61-33-06.

streams and waters and the beds thereof, must be governed by chapter 61-33.

47-06-10. Island formed by dividing stream - Title. If a stream, navigable or not navigable, in forming itself a new arm divides itself and surrounds land belonging to the owner of the shore and thereby forms an island, the island belongs to such owner.

The cases interpreting these sections depend heavily upon the facts that are presented concerning the original title to the land, the interest of others who also have title to affected lands, and the general nature of the river's movement.¹⁹ The interplay of these cases, as well as these and perhaps other statutes, require an intense examination of the underlying facts in order to make a determination concerning title to the newly accreted land. While the state would not assert "sovereign lands title" to accreted land that is above the ordinary high watermark, it is possible that the state could assert some other kind of title to such land because there are different sources to state title. For example, the state would assert title to accretions if they attach to a section of state-owned school land.

Sincerely,

Wayne Stenehjem
Attorney General

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This opinion is issued pursuant to N.D.C.C. § 54-12-01. It governs the actions of public officials until such time as the question presented is decided by the courts.²⁰

¹⁹ See, for example: Perry v. Erling, 132 N.W.2d 889 (N.D. 1965) (when a riparian lot is completely lost by erosion, but the land is later rebuilt by accretion, the accreted land becomes the property of the original riparian owner or that owner's successors in interest); Peterson v. United States, 384 F.2d 664 (8th Cir. 1967) (where lots on a river island had completely eroded away and land later formed by accretion to the bank of the river, the accreted land belonged to the owners of lots on the bank even though the accreted land extended over former island lots); Hogue v. Bourgois, 71 N.W.2d 47 (N.D. 1955) (if a lot on a river bank becomes an island by the river going around the lot, title remains with the owner of the lot; but if the stream passes over the lot, obliterating it, and an island later forms in the same location, the original owner's title is lost).

²⁰ See State ex rel. Johnson v. Baker, 21 N.W.2d 355 (N.D. 1946).