N.D.A.G. Letter to Henegar (May 30, 1989)

May 30, 1989

Mr. Dale Henegar
North Dakota Game and Fish Department
100 North Bismarck Expressway
Bismarck, ND 58505-5095

RE: Ownership of and public access to Missouri River Tract in Sections 7 and 8, Township 138 North, Range 80 West, Burleigh County (Fox Island)

Dear Mr. Henegar:

Thank you for your September 20, 1988, letter in which you ask several questions concerning title to and property interests in a tract of land in Sections 7 and 8 of Township 130 North, Range 80 West, Burleigh County. This tract is depicted on the attached map. In particular, you ask what part of the tract is owned by the state, what rights the public has to use the tract, and what property interests Mr. William Mills holds in the land.

I apologize for the delay in responding to your letter. The questions posed are complex and required considerable legal analysis. Furthermore, because Mr. Mills is interested in the land at issue I gave him an opportunity to comment upon a draft of this letter. Because of Mr. Mills' comments, my staff conducted additional research, including a review of court files of past court actions -- of which there have been many -- involving some of the land in question. In addition, my staff collected and studied aerial photos of the area to help us better understand the situation.

I cannot give you a formal title opinion because I was not supplied with an abstract of title. Furthermore, some of your questions are not solely legal ones and would require factual determinations. For example, determining where the low and high watermarks lie, whether the land or any part of it is accreted land, and, if so, to whose land accretions have attached, all require factual determinations. It is the policy of this office to confine Attorney General opinions to questions of law. It is my understanding, however, that there are three legal issues concerning the property about which you would like to have my view: first, the validity of the provision of N.D.C.C. § 47-01-15 granting riparians land down to the low watermark; second, the public's right to use the area between low and high watermark if the grant contained in N.D.C.C. § 47-01-15 is valid; and, finally, the right of a riparian to take title to accreted or relicted soil created by manmade activities.

To summarize my responses:

1. The provision of N.D.C.C. § 47-01-15 granting riparians land down to the low watermark is probably void;

2. If, however, the grant is valid and the state holds title only up to the low watermark, the public may still have the right to use the area between low and high watermark, even though this area is in private ownership; and

3. Riparians take title only to accreted or relicted soil that is created by natural causes.

These issues are discussed more fully below, as are some of the issues that have been raised by Mr. Mills regarding the property.

I should note that because I do not have a definitive analysis of the characteristics of the lands at issue and of the manner in which the land was formed, it is possible that the discussion below has little or no application to the land in question. Therefore, nothing in this letter should be taken as an Attorney General's opinion concerning the amount of land, if any, between high and low water or that whatever accreted or relicted lands there may be have been created by human activities.

A. The validity of the grant contained in N.D.C.C. § 47-01-15.

Upon admission to the Union, North Dakota took absolute title to the beds of its navigable rivers. State v. Brace, 36 N.W.2d 330, 332 (N.D. 1949). This ownership extends to the high watermark. Shively v. Bowlby, 152 U.S. 1. 26-27 (1894).

For the purpose of determining title, a navigable river is defined as follows:

> 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.

Utah v. United States, 403 U.S. 9, 10 (1971) (quoting The Daniel Ball, 77 U.S. (10 Wall.) 557, 563 (1870)).

The Missouri River is a navigable river. J. P. Furlong Enterprises, Inc. v. Sun Exploration & Prod. Co., 423 N.W.2d 130, 132 (N.D. 1988). Because of N.D.C.C. § 47-01-15, a question arises about the extent of the state's ownership in the bed of that river. N.D.C.C. § 47-01-15 provides in part: "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." This statute seemingly gives up a part of what the state received at statehood, that is, the area between low and high watermark. This area is known as the shorezone. There are serious questions about the validity of this provision of N.D.C.C. § 47-01-15 granting the shorezone to riparians.

N.D.C.C. § 47-01-15 had its origin in section 266, an 1877 law of the Dakota Territorial Legislature. See Revised Codes of Dakota, Civil Code, 266 (1877). Because of the equal

footing doctrine, however, the territorial legislature may well have been without authority to make this grant and, if so, section 266 was void ab initio.

Upon obtaining their independence, the original colonies took absolute title to the beds of their navigable waterways, and the states admitted to the Union later were entitled to the same rights as those of the original states. Pollard v. Hagan, 44 U.S. (3 How.) 212, 229-30 (1844). This right is known as the equal footing doctrine. Id. at 299. Under this doctrine, new states, just as original states, own the beds of navigable rivers. It appears that to give section 266 effect would deny North Dakota its right to enter the Union on an equal footing with the other states.

Prior to a state's admission to the Union, the federal government held the beds of navigable rivers in trust for the future state. E.g., Montana v. United States, 450 U.S. 544, 551 (1981); Shively v. Bowlby, 152 U.S. 1, 57 (1894). Because of this trust, the Supreme Court has stated that "before statehood, the United States was without power to convey title to land under navigable water and deprive future States of their future ownership." Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77, 83 (1922); see also Summa Corp. v. California ex rel. State Lands Comm'n, 466 U.S. 198, 205 (1984) ("[t]he Federal Government, of course, cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution"); Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 374 (1977) (courts have established that states have absolute title to the navigable waters and this title cannot be defeated neither by "a provision in the Act admitting the State to the Union nor a grant from Congress to a third party"); Barney v. Keokuk, 94 U.S. 324, 337 (1876) ("the [federal] government cannot convey land between high and low water on the public or navigable rivers . . . [because] this space belongs to the State").

A federal court in Oklahoma has addressed the issue whether a territorial legislature could give away the shorezone. In United States v. Mackey, 214 F. 137 (E.D. Okla. 1913), rev'd, 216 F. 126 (8th Cir. 1914), the court considered the validity of an Oklahoma territorial statute that is similar to section 266 of the Dakota Territory Code. Mackey owned land adjacent to the Arkansas River and claimed title to the low watermark. The state of Oklahoma argued it owned the bed to the high watermark. Mackey's claim was based on the territorial statute that was included in Oklahoma's statutes when Oklahoma became a state. The court, however, determined the territorial legislature could not violate the federal government's trust responsibility by granting riparians the land below the high watermark and the territorial legislature's attempt to do so was void. Id. at 149.

The court also examined section 6 of the Organic Act of the Oklahoma Territory which limited the authority of the territorial legislature "'to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States.'" Id. at 148. The court stated it was "convinced that the defining of the rights of riparian owners in the beds of navigable streams is not a rightful subject of territorial legislation." Id. at 149. What makes this basis of the decision important is that section 6 of the Organic Act of the Oklahoma Territory is nearly identical to section 6 of the Organic Law of the Dakota Territory. The latter section provides: "the legislative power of the territory shall extend to all rightful subjects of legislation consistent with the Constitution of the United States and the

provisions of this act." Act of March 2, 1861, ch. 86, 6, 12 Stat. 239, 241 (1861) (repealed 1933), reprinted in 13 N.D.C.C. 55, 57 (1981).

The court also ruled that being void when adopted, the territorial statute did not become law when adopted into the code of the State of Oklahoma. Mackey, 214 F. at 149-50. This conclusion was based on section 2 of the Schedule of Oklahoma's constitution which provided: "laws in force in the territory of Oklahoma" which are not repugnant to the constitution are to remain in force in the state of Oklahoma. Id. at 148. Since the statute was void when enacted, it was not one of the "laws in force in the territory" and did not become part of Oklahoma law. Id. at 149-50. Section 2 of the Transition Schedule of North Dakota's constitution was nearly identical to section 2 of Oklahoma's Schedule. N.D. Const. Transition Schedule 1889, reprinted in 13 N.D.C.C. 267 (1981). (The transition Schedule was repealed in 1978. Id.)

Although the trial court's decision in Mackey was reversed by the court of appeals, this was because of a procedural error. See United States v. Mackey, 216 F. 126 (8th Cir. 1914). The appellate court made no comment upon the trial court's substantive analysis. Therefore, the decision remains helpful in understanding the effect of N.D.C.C. § 47-01-15.

Indeed, other courts have been guided by the Mackey analysis. A federal court has found the reasoning of Mackey "to be sound." United States v. Brewer-Elliott Oil & Gas Co., 249 F. 609, 614 (W.D. Okla. 1918), aff'd, 270 F. 100 (8th Cir. 1920), aff'd sub nom. Brewer-Elliott Oil & Gas Co. v. United States, 260 U.S. 77 (1922). Also, the Oklahoma Supreme Court adopted the Mackey analysis in State v. Nolegs, 139 P. 943 (Okla. 1914). In Nolegs, a riparian claimed title to the low watermark of the Arkansas River. His claim was based on the same statute at issue in Mackey. Id. at 947. In response, the court wrote:

> It is earnestly contended by defendants . that the act of the territorial Legislature of Oklahoma . . . which attempted to vest the title of riparian owners on navigable waters in this case at low-water mark, should control in this case. This identical question arose in U.S. v. Mackey . . . and it is therein held that the Legislature of the territory . . . had no power to enact such a law, and it is therefore void, and was not carried over, and did not become a law in the state of Oklahoma. The reasoning of the court is sound . . . and we are fully convinced that the Legislature of the territory . . . had no power to confer title to riparian owners of the land below high-water mark in navigable waters which were held in trust by the United States for the then future and now state of Oklahoma; that said territorial act was in conflict with the Constitution of the United States, and never in force as a law in Oklahoma Territory, and, when statehood intervened, said statute did not come within the adopting provisions of the state Constitution, and never became a law of this state.

Id.

This precedent casts doubt upon the validity of N.D.C.C. § 47-01-15.

Furthermore, a provision of the North Dakota Constitution also raises a question about the statute's validity. N.D. Const. art. X, § 18, prohibits the state from making gifts to private persons. The North Dakota Supreme Court has cited this provision in declaring unconstitutional a statute giving away state minerals, Solberg v. State Treasurer, 53 N.W.2d 49, 55 (N.D. 1952), and a statute requiring the state to accept fair market value for land from one purchaser when the state could receive more money from another purchaser, Herr v. Rudolf, 25 N.W.2d 916, 922 (N.D. 1947).

Neither of these cases concerned public trust land, but the state holds the beds of navigable rivers in trust for the public. See United Plainsmen Ass'n v. North Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976). Because N.D.C.C. § 47-01-15 attempts to give away trust land, a court would likely apply the constitution's prohibition of gifts even more vigorously then it did to the statute, at issue in Solberg and Herr.

Because of North Dakota's constitution and the judicial view of Oklahoma's version of N.D.C.C. § 47-01-15, the statute's grant of the shorezone is likely void.

Mr. Mills believes the North Dakota Supreme Court has upheld the validity of the grant contained in N.D.C.C. § 47-01-15. He cites Perry v. Erling, 132 N.W.2d 889 (N.D. 1965), a case that involved title to some of the land referred to in your letter requesting my advice. In Judge Teigen's concurring opinion, which was joined by Judge Strutz, there are these statements:

> The title of the State to lands below the low watermark of a navigable stream is coextensive with the bed of the stream as it existed when North Dakota was admitted to the Union as a State in 1889. . . .
>
> In other words, fractional lots bordering on a navigable stream extend to the low watermark where it is not otherwise designated and the stream constitutes a variable boundary dependent upon the vagaries of the stream.

Id. at 900.

While it is unclear, presumably Judge Teigen had in mind N.D.C.C. § 47-01-15 when he made these statements. What is clear in that case neither the state nor any other party challenged the validity of the statute's grant. Thus, the concurring opinion cannot be considered the definitive statement on the statute's validity. Recently the North Dakota Supreme Court implicitly agreed that N.D.C.C. § 47-01-15 has never been judicially examined. In J. P. Furlong Enterprises v. Sun Exploration and Production Co., 423 N.W.2d 130, 132 n.1 (N.D. 1988), the court wrote: "Whether North Dakota has limited its title to the area below the low watermark has not been decided." Furthermore, a scholarly study of the statute did not find a judicial interpretation of N.D.C.C. § 47-01-15. Note, North Dakota Century Code § 47-01-15: Determining North Dakota's Interest in the Beds of Navigable Waters, 59 N.D.L. Rev. 211 (1983).

Mr. Mills also believes Perry v. Erling specifically gives him title to low watermark and that the decision is res judicata upon the state. That decision does state that certain defendants, the Erlings -- apparently Mr. Mills' predecessors in interest -- received an injunction enjoining the plaintiff and other defendants from interfering with the Erlings' possession of the property at issue. The state was a defendant and the property at issue was described as extending to low watermark. Complaint at ¶ 1, Perry v. Erling, No. 17686 (Burleigh County Dist. Ct. Apr. 18, 1962); Amended Answer and Counterclaim at ¶ 4, Perry v. Erling, No. 17686 (Burleigh County Dist. Ct. Apr. 18 1962). There was, however, a qualification to the injunction. As the Erlings only had color of title, and as title was being litigated before the Department of Interior, the injunction lasted only "until such time as the issue of title is decided." Perry v. Erling, 132 N.W. 899. The Department of Interior made its final decision not long after Perry v. Erling was decided. See Park Dist. v. Bertsch, 152 N.W.2d 401, 406 (N.D.), cert. denied, 390 U.S. 904 (1967). Therefore, the injunction expired long ago, and reliance cannot be placed upon it today. Furthermore, the Department of Interior concluded the Erlings' had no title to or interest in the land at issue in Perry v. Erling, and our supreme court confirmed this. Park Dist. v. Bertsch, 152 N.W.2d at 414. Finally, most of the land at issue in Perry v. Erling is not the same land you describe in your letter. Under these circumstances, Perry v. Erling does not establish in Mr. Mills title down to the low watermark of the land now in question.

B. The public's right to use the shorezone.

If it is true that the state of North Dakota owns the shorezone, then the public has the right to use this area subject to government regulation. If, on the other hand, the provision of N.D.C.C. § 47-01-15 granting the riparian landowner the shorezone is valid, a question still arises whether this grant is absolute or whether the public nonetheless retains an interest in the shorezone. Indeed, Minnesota, South Dakota, Montana, and California have each ruled that although a riparian takes title to the lower watermark, it is a limited title and does not prohibit public use of the shorezone.

In Minnesota riparians own to the low watermark. State v. Korrer, 148 N.W. 617, 623 (Minn. 1914). This title, however, is absolute only to the high watermark:

> [The riparian's] title is limited or qualified by the right of the public to use the same for purpose of navigation or other public purpose. The state may use it for any such public purpose, and to that end may reclaim it during periods of low water, and protect it from any use, even by the riparian owner, that would interfere with its present or prospective public use, without compensation.

Id.

South Dakota has a statute like N.D.C.C. § 47-01-15. In Anderson v. Rav, 156 N.W. 591 (S.D. 1916), the state sought to raise the water level of a lake. This action would have destroyed a riparian's use of the shorezone for pasture and hayland. Even so, the court found that the landowner's title to this area was "subject to the superior right of the public."

Id. at 594-95; see also Flisrand v. Madson, 152 N.W. 796, 801 (S.D. 1915) (the riparian's title to the shorezone is "limited by and subject to the rights of the public").

In Montana riparian landowners take to the low watermark. Gibson v. Kelly, 39 P. 517, 159 (Mont. 1895). Nonetheless, the public still has "certain rights of navigation and fishery upon the river and upon the strip in question." Id.

California is another state that has qualified the title a riparian holds in the shorezone. Section 830 of the California Civil Code is much like N.D.C.C. § 47-01-15, and recently the California Supreme Court addressed the issue of public rights in the shorezone. The plaintiffs in State v. Superior Court, 625 P.2d 239 (Cal. 1981), cert. denied, 454 U.S. 865 (1981), the Lyons, owned land adjacent to a navigable lake. They sought to reclaim marshland that was covered by water at certain times of the year. Id. at 241. The State Fish and Game Commission would not process the Lyons' application for a permit to repair a levee because the state claimed ownership of that part of the marsh below high watermark. Id. The court agreed with the state and held that section 830 is not an absolute grant of the shorezone and the area remains subject to public use. See id. at 250. The decision has further importance because the court, although asked to do so by the Lyons, expressly refused to limit its holding to only those situations in which water covers the shorezone. After writing it found "no justification in reason or authority for the proposition advanced by Lyon," id., the court stated: "the public's interest is not confined to the water, but extends to the bed of the water," id. at 251. Contra Wilbour v. Gallagher, 462 P.2d 232, 238 (Wash. 1969), cert. denied, 400 U.S. 878 (1970). The California court said that although riparians are not deprived of the use of lands between low and high water, they may use it only in a manner "not incompatible with the public's interest in the property." 625 P.2d at 252.

The rationale for limiting a riparian's interest in the shorezone to "a bare technical title," Scranton v. Wheeler, 179 U.S. 141, 163 (1900), is typically the public trust doctrine. E.g., State v. Superior Court, 625 P.2d at 248-52. The basis of the doctrine is the protection of valuable natural resources for the public benefit. Initially, the trust protected only navigation, commerce, and fishing but today it is generally recognized as also being protective of general recreation and the natural environment. E.g., Dist. of Columbia v. Air Florida, Inc., 750 F.2d 1077, 1083 (D.C. Cir. 1984).

The traditional application of the doctrine has been to limit a state's ability to alienate public trust lands. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government . . . ." Illinois Central R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892); See also Morse v. Oregon Div. of State lands, 581 P.2d 520, 524 (Or. 1978). If N.D.C.C. § 47-01-15 is valid it would abdicate the trust in all shorezones of North Dakota rivers and lakes.

Unfortunately, there have been too few North Dakota decisions on the public trust doctrine to be able to predict with full confidence how our courts would decide the issue. But based on the public trust doctrine's recognition in North Dakota, our supreme court's view that the doctrine "is assuming an expanding role in environmental law," United Plainsmen

Ass'n v. North Dakota State Water Conservation Comm'n 457, 463 (N.D. 1976), and the judicial authority from other states, it is likely that a riparian's title under N.D.C.C. § 47-01-15 is limited and remains impressed with the public trust and, therefore, subject to various public uses.

It is also to be noted that past Attorney Generals have reached a similar conclusion. A 1966 opinion concerned Sweetwater Lake, a navigable body of water. 1964-1966 N.D. Op. Att'y Gen. 473 (L966). A water district planned to raise the level of the lake; this would have resulted in riparians losing their ability to make agricultural use of land below the meander line. Although the opinion did not mention N.D.C.C. § 47-01-15, it concluded:

> Even if we assume the owners of the land surrounding Sweetwater Lake can prove that they hold title to the ordinary low water mark, the intervening area between the low water mark and high water mark is subject to a public right or use for public purposes, particularly in connection with the use of the lake which is a navigable lake.

Id. at 476-77. This conclusion is also made in 1964-1966 N.D. Op. Att'y Gen. 459, 460-61 (1965).

C. A riparian's title to manmade accretions.

Some of the land at issue in your letter may be alluvion. Alluvion is soil created by accretion or reliction. Accretion is "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." J. P. Furlong Enterprises, Inc. v. Sun Exploration & Prod. Co., 423 N.W.2d 130, 133 n.4 (N.D. 1988). Reliction describes "the gradual receding of water resulting in the gradual baring of previously submerged land." Id.

The doctrine of title by accretion and reliction is set forth in N.D.C.C. § 47-06-05, which provides:

> 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.

The statute "is essentially a restatement of the well-established common law rule governing riparian rights." Hogue v. Bourgois, 71 N.W.2d 47, 53 (N.D. 1955). The common law rule is that the doctrine applies even if the alluvion is artificially created, unless the riparian owner is primarily responsible for the activity that caused the accretion or reliction. Furlong v. Sun, 423 N.W.2d at 133; Beck, "the Wandering Missouri River: A Study in Accretion Law," 43 N.D.L. Rev. 429, 449 (1957). The court in Hogue v. Bourgois stated N.D.C.C. § 47-06-05 "essentially" restates common law because the statue refers to only "natural causes," and this is a subtle but significant revision of the common law

rule. In another decision the court discussed the statute and its application to manmade alluvion:

N.D.C.C. § 47-06-05 begins with the phrase'[w]here from natural causes . . . .' (Emphasis added). The word "natural" tends to indicate that this provision excludes the general rule accretion and reliction resulting from artificial or man-made efforts. Thus, if a river shifts due to artificial or man-made efforts, the accreted or bared land may not belong "to the owner of the bank. . . ." See Beck II at p. 449-50.

Furlong v. Sun, 423 N.W.2d at 133; see also City of Los Angeles v. Anderson, 275 P. 789, 791 (Cal. 191) (under a statute similar to N.D.C.C. § 47-06-05, a riparian is not entitled to artificial accretions). Contra City of Missoula v. Bakke, 198 P.2d 796, 772-73 (Mont. 1948) (a riparian is entitled to artificial accretions).

The interpretation of N.D.C.C. § 47-06-05 in Furlong is dicta. Nonetheless, it gives a fair indication of the correct interpretation of N.D.C.C. § 47-06-05 and one that should guide our interpretation. Therefore, a riparian probably does not obtain ownership of manmade accretions.

D. Summary

Because of the equal footing doctrine, the provision of N.D.C.C. § 47-01-15 granting riparian landowners land down to the low watermark was probably void when enacted by the territorial legislature and is probably void today, particularly in light of the constitutional prohibition of gifts. Even if this conclusion is incorrect, it is likely the public still maintains considerable rights in the area between low and high watermark. This is primarily because of the public trust doctrine. Under N.D.C.C. § 47-06-05 a riparian does not take title to artificially created alluvion.

If you have any further questions about this matter, please contact me.

Sincerely,

Nicholas J. Spaeth

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Enclosure