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## There's oil along them thar rivers

Local lawyers  
wade into N.D.  
minerals dispute

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In 1889, when North Dakota became a state, it acquired "sovereign lands" from the federal government. Sovereign lands meant areas, including beds and islands, lying within the ordinary high water mark of lakes and streams.

When enacting a "boundary of ownership" statute, the state said that owners of property along navigable waters "take" to the edge of the low water mark. That arguably gives upland owners the right to the "shore zone," the area between the high and low waters.

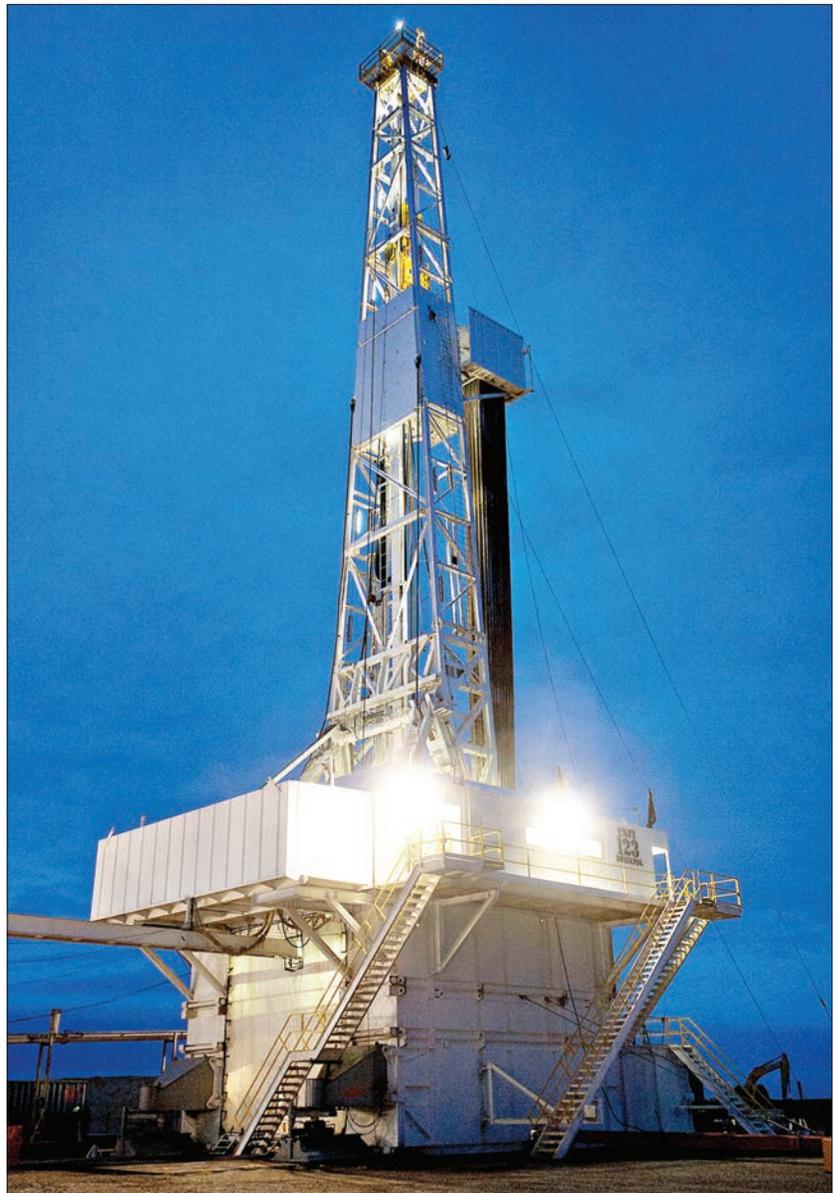
In 1994, the North Dakota Supreme Court said in *State ex. rel. Sprynczynatyk v. Mills* that the state reserved certain rights when the shore zone land was granted. Pursuant to the public trust doctrine, it preserved the shore zone for access to the water for public navigation, fishing, swimming and similar public uses.

The court didn't say the public use extended to the minerals found under the shoreline.

But that was before the current oil boom in North Dakota. The rights to the minerals under the shoreline have become very interesting.

Landowners have filed suit in Williams County, N.D., to declare that they own the mineral rights they think they do. In this civil suit, brought by Jan Conlin and other attorneys at Robins, Kaplan, Miller & Ciresi in Minneapolis, the state of North Dakota is accused of virtually confiscating those mineral rights. A motion for partial summary judgment is scheduled for hearing Dec. 17. A joint request to certify the question to the North Dakota Supreme Court will follow, Conlin said.

"In the last few years, the State Land Board has



BLOOMBERG NEWS FILE PHOTO

Oil rigs like this one in Watford City work around the clock in North Dakota, where an oil boom shows no signs of slowing. The boom has insulated the state from the nation's economic woes but also has sparked legal fights over mineral rights.

# Minerals ‘Many shades of meaning’

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proceeded with a scheme to define the boundaries of the shore zone and to lease the minerals within those boundaries,” the summary judgment brief for the plaintiffs states. The state’s Land Board has “staked its claim” to the shore zone with several surveys to delineate the ordinary high water mark, the brief alleges. The state gained over 4,000 mineral acres in the shore zone by use of the surveys, Conlin alleges. Millions of dollars are at stake, the brief continues, as well as clear title to all affected properties.

Furthermore, said Conlin, there was no due process. Apparently, she said, the state simply instructed the oil companies to send the royalties to the state, and the companies complied. No notice was given to the affected owners, and some of them found out when their checks stopped. “We get calls every week from people looking for their money.

“It’s like the Wild, Wild West,” Conlin said. “This is part of the oil boom.”

## State says, ‘whoa’

The state has been leasing shore zone minerals for decades, said Charles Carvell, of the North Dakota Attorney General’s office.

That’s because at statehood North

Dakota acquired title up to the high water mark, he explained. North Dakota Century Code sec. 47-01-15 says “the owner of the upland ... takes to the edge of the lake or stream at low watermark.” The plaintiffs argue that “takes” means ownership, Carvell said. But the state says that “takes” means that the landowner acquires common-law riparian rights such as the right to use the water, the

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right to cross the shore zone to get to the water, and the right to retain any accretions to the land, he said.

The *Mills* court said: “‘Takes’ has many shades of meaning which depend on the circumstances in which it is used, although one meaning includes: ‘To

acquire the title to an estate; to receive or be entitled to an estate in lands from another person by virtue of some species of title.’ Black’s Law Dictionary, p. 1453-1454 (6th ed. 1991). See 83 C.J.S., *Take* 938 (1953). The precise meaning of ‘takes,’ and the type of interest the upland owner ‘takes’ to the low watermark is unclear.”

## Public trust doctrine

The meaning of “take” is the essence of the lawsuit, Carvell said. Other issues include the public trust doctrine and whether it extends to mineral rights.

The court may also consider the equal footing doctrine, under which the state originally received title to navigable waters as well as the state’s constitutional authority to transfer its assets, Carvell said.

Furthermore, the plaintiff’s suit alleges a violation of civil rights under 42 U.S.C. 1983, an estoppel claim and an unconstitutional takings claim, which are not before the court on Dec. 17.

And finally, noted Carvell, he does not know what the oil companies are doing with their money. The company may hold the royalties in suspense until the dispute is resolved, he said. 