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Solicitor Opinion M-37044 Regarding Mineral Ownership Underlying the Missouri River in the Fort Berthold Indian Reservation

On January 18, 2017, Hilary Tompkin, Solicitor of the Department of the Interior (DOI), issued **Opinion M-37044**, wherein she addressed the “Status of the Mineral Ownership Underlying the Missouri River within the Boundaries of the Fort Berthold Reservation (North Dakota).” In response to a request by the Assistant Secretary of the Bureau of Indian Affairs (BIA), Solicitor Tompkin stated that it is the DOI’s position that the Three Affiliated Tribes own the mineral estate beneath the original bed of the Missouri River. This opinion was issued two days prior to the inauguration of President Trump and may be modified or overturned by a subsequent Solicitor or the Secretary of Interior.

Opinion M-37044, in thirty-seven (37) pages, and with multiple attachments, argues that the Three Affiliated Tribes hold title to the mineral estate underlying the Missouri River. The opinion attempts to refute North Dakota’s opposing claims to ownership, which are based on the Equal Footing Doctrine. Solicitor Tompkin demonstrates that she is unconvinced by the presumption favoring state ownership set forth in *Montana v. United States*, 450 U.S. 544 (1981). She openly distinguishes the present situation from Montana and argues that the Supreme Court misread and misapplied the law in that case. Instead, Solicitor Tompkin relies on an earlier 1936 Solicitor Opinion, the 1979 IBLA case of *Impel Energy Corp.*, 42 IBLA 105, 114 (Aug. 16, 1979), and the Supreme Court case of *Idaho v. United States*, 533 U.S. 262 (2001).

The immediate effect of Opinion M-37044 is unclear. Tribal leaders and the BIA are likely to cite to this opinion as a definitive determination of legal title. We must note, however, that this opinion is only binding upon the DOI. Otherwise, its legal effect is limited to being merely persuasive.

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