20130110
& 20130111

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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STATE OF NORTH DAKOTA

Supreme Court Case No. 20130110

Stanford A. Reep and Amy Reep, the Stockman Family Mineral Trust, the Charles and Ruth Patch Trust, Heidi McGillivray, Julia Streich, Mary Beth Ferguson, Florence Irwin *ex rel.* Loren Irwin, her guardian and conservator, and Loren Irwin, Individually, Thomas Selby, and Sogard Davidson Mineral LLLP, and on Behalf

of All Others Similarly Situated,

Plaintiffs/Appellants,

v.

State of North Dakota; North Dakota Board of University and School Lands; and North Dakota Trust Lands Commissioner Lance D. Gaebe, in his official and personal capacities,

Defendants/Appellees,

Appeal from Final Judgment dated March 22, 2013
Case No. 53-2012-CV-00213
County of Williams, Northwest Judicial District
The Honorable David W. Nelson

+ Addendum

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County of Williams, Northwest Judicial District
The Honorable David W. Nelson

Supreme Court Case No. 20130111

Brigham Oil & Gas, L.P.,

Plaintiff/Appellee,

v.

North Dakota Board of University and School Lands,

Defendant/Appellee,

Kerry Hoffman, City of Williston, Williams County, Harvest Oil Company, LLC, Beverly Sundet, Ricky Vance, Linda Kirkland, First National Bank & Trust Co. of Williston, Trustee of the Hilda Noe Grandchildren Trust, American State Bank and Trust Company, Trustee of the Frank W. Moran and Mary Joan Moran Family Minerals Trust, American State Bank and Trust Company, Trustee of the Harris and Louise Anderson Family Minerals Trust U/A dated February 10, 2006, Upstream Innovations, Inc., Shirley L. Schwab Trust under Trust Agreement dated March 5, 1999, Lois C. Zeigler, Trustee of the Last Will and testament of Frederick H. Zeigler, Deceased, Gary Schwab, Jerome Bakke, Curtis Bakke, and Sherrie Dee Bakke, Trustee of the Lowell G. Bakken Mineral Trust,

Defendants/Appellants,

Geraldine Loder, Virgil A. Bloechl, Teresa Sitzmann, Michaele M. Gran, Robert James McDonald, Richard R. McDonald, Mary Ellen Smith, Carole J. McDonald, Thomas T. McDonald, Rose Marie Dokken, Elaine McDonald, John C. McDonald, Jr., Josephine Swenson, Jacque N. Masog, Kay L. Dodge, William R. Mueller, Elvira C. Fulton, Doreen Fern McDonald, Georgia Carol Hausauer, Margaret Cecelia Gott, Marlyne Myrtle Loomis, Lesley Louise Neary, Virginia A. Venti, Eileen Eugenia Ehrler, BNSF Railway Company, Joseph Patrick Wodnik and Loraine Ann Wodnik, as joint tenants, Sherrill Myers, Viola DeTienne, Theresa Cogswell, Beulah Clawson, Norman Bratcher, Nancy Ann Bower-Pryor, Brian Jay Bower and Thomas Adrian Bower, as joint tenants, Stephen A. Messenger, Sandra Lee Messenger, Jacqueline Mech, Orville M. Erickson, Adrean O. Aafedt, Robert K. Torgerson, Cynthia Jo Weldon, Jane Sanders Galt, Leah Pearce Bond, Charles E. Pearce and Gabriele Pearce, as joint tenants, B.C. Harris and Ann Harris, Co-Trustees of the Harris Revocable Trust executed July 25, 1996, James R. Goins, Wayne Smith, Michael Brooks, Bill Como, Christi Breithaupt, Chris Smith, Kelly Smith, Mark Lemley, United States of America, Leroy Clapper, Energy One, LLC, Powers Energy Corporation, GeoFocus Corporation, Golden Eye Resources, LLC, Golden Eye Royalties, LLC, The Dublin Company, Petroleum Land Services, Huston Energy Corporation, and all unknown persons claiming an interest in, or lien or encumbrance upon, the proceeds from the production of the mineral estate described in the complaint herein,

Defendants.

Appeal from Partial Final Judgment dated April 2, 2013
Case No. 53-2011-CV-00495
County of Williams, Northwest Judicial District
The Honorable David W. Nelson

Brief of the Appellee State of North Dakota, North Dakota Board of University & School Lands, and North Dakota Commissioner of Trust Lands Lance Gaebe

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Statement of the Issue

¶1 Does N.D.C.C. § 47-01-15 convey to riparian landowners state title to the shorezone—the area between the ordinary high and low watermarks—or does North Dakota's undisputed title to the beds of navigable waters continue to extend, as it did at statehood, from high watermark to high watermark?

Statement of the Facts

¶2 North Dakota's title to the beds of navigable waters, up to the ordinary high watermark, arises as a matter of constitutional law, the equal footing doctrine, as confirmed by the Submerged Lands Act of 1953. 43 U.S.C. §§ 1301(1)(a), 1311(a). The state's assertion of title to the shorezone has been decades-long, consistent, and open. Title has been asserted by different state agencies and officials across numerous administrations: in litigation, Attorney General opinions, reports, and through agency action, including issuing hundreds of oil and gas leases. This history was presented in affidavits, Appx. at A468-A505, which were unchallenged. Still-on-the-books legislation from 30 years ago provides that the state owns up to the ordinary high watermark. Nonetheless, appellants assert that state interest in the shorezone is recent, fueled by a hunger for Bakken oil; a "scheme" to take private minerals. Reep Brf. at ¶ 21.

¶3 Consistent with the equal footing doctrine and Submerged Lands Act, the legislature in 1977 defined "sovereign lands" as everything "within the ordinary high watermark." 1977 N.D. Sess. L. ch. 144 § 1 (repealed 1989 N.D. Sess. L. ch. 552, § 4). In 1989, the legislature again defined state title as everything "within the ordinary high watermark." N.D.C.C. § 61-33-01. While

such legislation makes it clear that the state's shorezone claim is not recent, the claim has deeper roots.

¶4 In the 1930s, the State Engineer announced state "control of lands within ordinary high water level on meandered bodies of water." *State Engineer's Biennial Report 1935-36,* at 5; *State Engineer's Biennial Report 1937-38,* at 5. In 1950s litigation involving Devils Lake, the state asserted the right to "'maintain'" the lake "'to a level within the high water mark.'" *Rutten v. State*, 93 N.W.2d 796, 797 (N.D. 1958). In the 1960s, the Garrison Diversion Conservancy District and Attorney General requested, in a quiet title action, "'that any [title] determination'" on land below the ordinary high watermark be recognized as "'State land.'" Appx. A482 (¶ 32). A 1965 Attorney General's opinion provides that the state will continue to assert that the shorezone "belong[s] to the State." N.D.A.G. Opin. 65-459, at 3 (Oct. 7, 1965). Since the 1958 *Rutten* case, North Dakota has asserted in litigation that "the beds of navigable waters between the high and low watermarks are sovereign public trust lands of the State," and that "the State owns . . . to the high watermark." Michael G. Fiergola, 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, 229 (1983).

¶5 This is verified by Murray Sagsveen, who from the 1970s to the 1990s, represented the state on submerged land and water boundary cases. He refers to many instances in which the state asserted title to sovereign lands up to the ordinary high watermark. Appx. A476-82. Such assertions appear in the state's pleadings and briefs, *id.*, and are noted in decisions. *In re Ownership of*

Bed of Devils Lake, 423 N.W.2d 141, 142 (N.D. 1988) ("State contends that it took title to the bed . . . at statehood to the ordinary high watermark"); *North Dakota v. United States*, 770 F. Supp. 506, 508, n.4 (D.N.D. 1991), *aff'd* 972 F.2d 235 (8th Cir. 1992) (on the Little Missouri, the state asserts "'fee simple title . . . up to the ordinary high watermark'"). Throughout Mr. Sagsveen's tenure, it was "always the State's position" that its title to sovereign lands includes the shorezone. Appx. A482 (¶ 33). This claim is well known in the oil and gas industry, and has been for a long time. Appx. A485 (¶¶ 14-15), A504 (¶ 19). It is well enough known to be addressed by the State Bar, which cautions that title examiners need to be aware of the state's claim. NDMTS §§ 7-01.1, 7-01.4 (1989).

¶6 From 1977 to 1989, the Land Board had authority over both the surface and subsurface of sovereign lands, including the power to convey interests. 1977 N.D. Sess. L. ch. 144 § 1 (repealed 1989 N.D. Sess. L. ch. 552, § 4). The 1989 legislature adjusted management of sovereign lands. It gave the State Engineer's Office authority to manage the surface and the Land Board authority over the subsurface, with each agency having the power to convey interests. N.D.C.C. §§ 61-33-05, -06. In exercising the authority granted, the State Engineer's Office has always viewed sovereign lands, including the shorezone, as state-owned. Appx. A469 (¶ 6), 475 (¶ 6). Similarly, the Land Board, ever since 1977, has asserted state title up to the ordinary high watermark, and acted on that assertion. Appx. A471 (¶ 6). It has issued easements and grazing leases to the shorezone, and for decades it has issued

riverbed oil and gas leases—hundreds of them—that include the shorezone. Appx. A471 (¶¶ 6-7), A489-90 (¶¶ 19-20), A504 (¶¶ 15-16).

¶7 The width of the shorezone varies. On some tracts the shorezone can be just a couple of feet, but on others its width can be hundreds of yards. Appx. A114, A163. Photos of what shorezones can look like, narrow and wide, are in the Addendum. These photos are from the Appendix, pages A138, A140, A142, A151, and A153.

¶8 In general, the shorezone's boundary, the ordinary high watermark, is the boundary between aquatic and terrestrial vegetation. Appx. A472 (¶ 8); *see also* Appx. A086, A101-102. The Land Board identifies the ordinary high watermark, and thus the acreage in riverbed leases, with aerial photos and on-the-ground surveys. Appx. A472-473 (¶¶ 8-10, 12-13), A488 (¶ 10), A504 (¶¶ 12-13). Much of this work is done under technical guidance from the State Engineer's Office and also with outside experts. Appx. A098-159, A160-215, A216-306.

¶9 The state has in force 816 riverbed leases that include shorezone acreage. Appx. A490 (¶ 20). About 412 have been issued since 1999. *Reep v. State,* Dist. Ct. Dkt. No. 63, Exh. L at 478. Bonus payments on these 412, along with annual rentals that keep leases in force prior to drilling, total about $77,000,000. *Id.*

¶10 In sum, the state's claim is not recent; nor is it unique. "In most states" the ordinary high watermark is the boundary between riparian uplands and state sovereign lands. Frank E. Maloney, *The Ordinary High Water Mark:*

Attempts at Settling an Unsettled Boundary Line, 13 Land & Water L. Rev. 465, 465 (1978); *see also California v. Superior Court (Lyon)*, 625 P.2d 239, 245, n.9 (Cal. 1981) (listing ten states that recognize state title up to the ordinary high watermark). While some states have relinquished title to the shorezone, North Dakota has not.

¶11 The issue has come to a head because the Bakken formation, with its rich, uniform geology, coupled with horizontal drilling, makes all land—even submerged land—a candidate for oil development. Also, oil companies often "double lease," that is, they take "protective" leases from anyone making a claim to riparian lands, Appx. A485 (¶¶ 16-17), A504 (¶ 19), further igniting the dispute.

Statement on Rule 54(b) Certification

¶12 None of the adverse consequences identified to support the *Brigham Oil* Rule 54(b) certification would have occurred had certification been denied. The *Brigham Oil* case could have been put on hold until the *Reep* appeal is decided, just as another river boundary case has been informally stayed pending resolution of the 47-01-15 issue. *Wilkinson v. Bd. of Univ. & School Lands*, No. 53-2012-38 (Williams Cnty. Dist Ct.). *Wilkinson* was filed in January of 2012 and has been dormant since the initial pleadings, and likely will stay dormant until a 47-01-15 decision is issued. The *Brigham Oil* certification wasted judicial and lawyer time.

Argument

1. Introduction.

¶13 While mineral wealth triggered this litigation, the dispute isn't

confined to minerals. The Court's decision will affect the surface. It will likely decide whether the strip of land bordering North Dakota's lakes, like Metigoshe and Devils Lake, and our rivers, like the Yellowstone, James, and Red, as well as the Missouri—one of the state's "most spectacular resources"[1]—falls under private title; or whether these resources remain subject to public protection and open to public use, unfettered by the interests of riparian landowners.

¶14 "[A] river is more than an amenity; it is a treasure." *New Jersey v. New York*, 283 U.S. 336, 342 (1931) (Holmes, J.). While this case will decide whether oil checks get deposited into bank accounts around the country, or into the state treasury, it will also affect whether extraordinary natural resources remain public treasures.

¶15 Appellants argue that *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537 (N.D. 1994), makes this an easy case. But that view was rejected by the state district court below, as well as by the local federal court, which stated that *Mills* did not "decide the precise division of ownership" between the state and riparians; rather, *Mills* held "that the 'shore zone presents a complex bundle of correlative, and sometimes conflicting, rights and claims which are better suited for determination as they arise.'" *Brigham Oil & Gas, L.P. v. North Dakota Bd. of Univ. & School Lands*, 866 F. Supp. 2d 1082, 1085 (D.N.D. 2012) (quoting *Mills*, 523 N.W.2d at 544). The federal court described the title question as "novel and complex." *Id.* at 1091. Faced with precedent that provides "little guidance," *id.*,

[1] Missouri River Centennial Comm'n, *A Comprehensive Plan for Recreational Use of the Riparian Public Lands* 7 (Aug. 1986)

it remanded to let state courts address "unsettled state law issues." *Id.* at 1089.

¶16 The Bar Association also finds *Mills* unclear. It advises "caution" when examining shorezone minerals, describing title as "uncertain[ ]" and recommending "judicial determination." NDMTS § 7-01.4. Indeed, seeking just that, Brigham Oil brought its interpleader. In its assessment, *Mills* "declined" to address title and failed to provide "a definitive answer." Brigham Brf. ¶¶ 2, 6.

¶17 Even a member of the *Mills* Court would disagree with the appellants' simplistic view. Justice Levine, concurring, stated that the opinion leaves the parties to "speculate" about their interests. 523 N.W.2d at 545. She did, however, offer her understanding of *Mills*. While the trial court's ruling in favor of absolute state title was reversed, she was "not sure" that the Court's ruling was anything more than "semantics." *Id.* at 544.

> While the trial court may have overstated the breadth of the State's ownership in the shore zone to be "absolute title," I do not read the majority opinion as disagreeing with the trial court's holding that *Mills has only riparian rights to the shore zone.* Whatever those riparian rights entitle Mills to will have to await a case-by-case disclosure, but whatever it is, it must be decided in the context of the State's sovereign duty to hold the shore zone in trust for the public.

Id. at 544-45 (emphasis added).

¶18 Traditional riparian rights provide access to water for swimming, fishing, and boating, and rights to accretions, nonconsumptive water use, reclamation, and the right to build a dock. *E.g.,* 1 *Water and Water Rights* § 6.01(a) (2013). Some states recognize the right to use riparian water for irrigation, stock watering, and domestic purposes. Robert E. Beck and John C. Hart, *The Nature and Extent of Rights in Water in North Dakota*, 51 N.D. L. Rev.

249, 252, 252 n.8, 257 (1974). Such rights, however, aren't possessory or fee interests. They are "correlative and usufructuary." VI-A *American Law of Property* § 28.55 (1954); *see also* Beck & Hart, 51 N.D. L. Rev. at 252.

¶19 While Justice Levine read the majority opinion as recognizing limited riparian interests, she did express concern about its clarity:

> [W]e have dutifully counted the angels on the pin, we have left both parties in limbo to speculate over what their "correlative" rights are and probably to dream the impossible dream about the parameters of those rights.

Id. at 545.

¶20 The majority opinion itself noted that the state's dispute with Mr. Mills was theoretical, triggering the "well established" rule "that courts will not give advisory opinions if there is no actual controversy." 523 N.W.2d at 544. The Court concluded:

> In the absence of a claim or controversy regarding the specific use of the shore zone, we decline to speculate on the precise extent of the parties' rights and interests vis-à-vis the shore zone.

Id.

¶21 Despite such cautionary comments—and ignoring Justice Levine enlightening remarks—appellants see *Mills* as definitively deciding title in their favor. While the opinion contains sign posts where the Court is heading, these guides do not point where appellants contend.

2. Section 47-01-15 means today what it meant when enacted.

¶22 Because 47-01-15's origins are in territorial law, understanding it requires a look back.

¶23 At independence, each American colony became sovereign and held "'absolute right to all their navigable waters *and the soils under them*.'" *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842) (emphasis added). New states were entitled to the same rights and so entered the Union on an "equal footing" with the original states. *E.g., Mills,* 523 N.W.2d at 539. To honor the equal footing doctrine, the United States held the beds of navigable waters in trust for North Dakota, and North Dakota took title to them "by virtue of its sovereignty." *Id. at* 539-40.

¶24 Thus, the territorial version of 47-01-15—1877 Rev. Codes § 266 (reproduced in the Addendum)—could not and did not convey the shorezone. When the territorial legislature enacted the statute, it had no authority to convey the shorezone. State title to sovereign lands "is not subject to defeasance" by the federal government. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378 (1977). If the territorial 47-01-15 conveyed the shorezone or adversely affected state interest in the shorezone, it would have violated the equal footing doctrine, making it unconstitutional and therefore void. "[N]avigable waters and the soils under them . . . shall not be granted away during the period of territorial government . . . ." *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894). Federal attempts to convey sovereign lands are "invalid." *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205 (1984).

¶25 This Court has held that the territorial 47-01-15 could not convey the shorezone, stating that because of the government's trust responsibilities North Dakota acquired the beds of navigable waters "from high watermark to

high watermark." *Mills*, 523 N.W.2d at 539. The riparians accept this, stating that when "North Dakota joined the Union . . . [it] took title . . . up to the ordinary high watermark on each bank, including the shore zone." Reep Brf. ¶ 34.

¶26 When a new state adopts a territorial statute, its meaning and effect do not change unless the state legislature affirmatively acts to change it. The territorial legislature had enacted about 8,000 statutes. 1887 Dak. Terr. Comp. L. Under the state's first constitution they were automatically adopted into state law. 1889 N.D. Const. Trans. Sched. § 2 (reproduced in Addendum).

¶27 Among these statutes was the territorial 47-01-15. North Dakota's first Legislative Assembly did nothing with the statute. 1889-90 N.D. Sess. L. The second Assembly recognized that the adopted territorial statutes were "somewhat confused and inconsistent" and established a commission to review and organize them. 1891 N.D. Sess. L. ch. 82. The commission's report to the 1893 legislature was not acted on. Burke Corbet, et al., *Preface*, at vi, 1895 N.D. Rev. Codes. That legislature, however, established another commission with a broad mandate to examine statutes and report. 1893 N.D. Sess. L. ch. 74. This commission's work, with the 1895 legislature's changes to it, resulted in the 1895 Revised Codes. Corbet, *supra* at vii. These codes included Section 3373—47-01-15's forerunner—but it merely restated the territorial version. Because the legislature didn't amend the statute, its meaning didn't change.

> The statutes to which I have referred [47-01-15, et al.] . . . were first enacted by the territorial legislature. When North Dakota became a State, these statues were adopted without change in meaning by the State.

Perry v. Erling, 132 N.W.2d 889, 901 (N.D. 1965) (Teigen, J., and Strutz, J., concurring).

¶28 As *Mills* ruled, and as appellants accept, the territorial statute did not convey anything to riparian landowners. How and when the purported and dramatic change in meaning to 47-01-15 occurred, is unexplained. Indeed, statutes "substantially the same as previously existing statutes are construed as continuations thereof." *Mills*, 523 N.W.2d at 540 (citations omitted).

¶29 This rule was applied in *Wells County v. McHenry*, 74 N.W. 241, 248 (N.D. 1898), which concerned interest on unpaid taxes. The statute allowing interest originated in territorial law, but the taxpayer said the 1895 Revised Codes abrogated the interest penalty. *Id.* The Court rejected the argument that the statute meant one thing during territorial days and another after statehood. It cited Section 2683, 1895 Revised Codes: "'the provisions of this Code, so far as they are substantially the same as existing statutes, must be construed as continuations thereof and not as new enactments.'" *Id.* Thus, the interest penalty could not be regarded as abrogated, but "continued in force." *Id.*; *see also Sargent County v. Cooper*, 150 N.W. 878, 880 (N.D. 1915) ("these old statutes" didn't change meaning when incorporated into the 1895 Code).

¶30 Similarly, when the territorial version of 47-01-15 was incorporated into the 1895 Code, its meaning didn't change, as Justices Teigen and Strutz observed 50 years ago. *Perry v. Erling*, 132 N.W.2d at 901. It is presumed that codifiers do "not intend to change the law as it formerly existed." *State v.*

Kositzky, 189 N.W. 334, 337 (N.D. 1922). This presumption has not been rebutted.

¶31 Section 2683 is now N.D.C.C. § 1-02-25. It states:

> For purposes of historical reference and as an aid to interpretation, the provisions of this code, so far as they are substantially the same as previously existing statutes, must be construed as continuations thereof, and not as new enactments except that a revised version of such statutes contained in this code supersedes all previous statutes.

Section 47-01-15 is not only "substantially the same" as its territorial version, it is the same, and it means what it did during territorial days. It did not then convey state interests—that would have been unconstitutional—and has not done so at any time in North Dakota's history.

¶32 Section 1-02-25 is not a mere guideline. Courts "must" apply it, and applied here it resolves the shorezone dispute in the state's favor.

¶33 The appellants cite *Champlain & St. Lawrence RR v. Valentine*, 19 Barb. 484 (N.Y. App. Div. 1853), Reep Brf. ¶¶ 43-45, which *Mills* discussed because *Champlain* is cited by the Field Code Commission. 523 N.W.2d at 541-42. Field Code annotations, in this instance, need to be read in light of intervening events, here Dakota Territory. The territorial 47-01-15 was enacted by an arm of the government laboring under constitutional restrictions—the equal footing doctrine. The statute's meaning must be assessed, ultimately, under that doctrine. The Court recognized this in ruling that at statehood, whatever the holding in *Champlain*, North Dakota took title to the beds of navigable waters up to the ordinary high watermark, *Mills,* 523 N.W.2d. at 539; effectively rejecting the meaning appellants assign to *Champlain.*

3. Statutes involving state assets are construed in the public's favor.

¶34 Where public resources are concerned, courts "look with considerable skepticism upon *any* governmental conduct . . . calculated . . . to subject public uses to the self-interest of private parties." Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 473, 490 (1970). Thus, state grants are "construed strictly in favor of the State . . . and most strongly against the grantee." 82 *C.J.S. Statutes* § 532 (2009). Nothing is "included in the grant except what is granted expressly or by clear implication." *Id.* All doubts are "resolved in favor of the Government and against the private claimant." *N. Pac. Ry. v. United States*, 330 U.S. 248, 257 (1947) (citations omitted); *see also e.g., Bontrager v. La Plata Elec. Ass'n,* 68 P.3d 555, 560 (Colo. Ct. App. 2003); *Magnolia Petroleum Co. v. Walker*, 83 S.W.2d 929, 934-35 (Tex. 1935); *State v. Des Moines City Ry.*, 140 N.W. 437, 443 (Iowa 1913). It is a "firmly established" rule that uncertainties in conveying public assets are not to be resolved for private advantage. *Coosaw Mining Co. v. South Carolina*, 144 U.S. 550, 562 (1892) (citations omitted).

¶35 North Dakota jurisprudence is no different. Statutes that in general terms divest pre-existing rights "will not be applied to the sovereign without express words to that effect." *Smith v. Anderson*, 144 N.W.2d 530, 535 (N.D. 1966). "'[G]eneral words . . . of a statute that tend[ ] to injuriously encroach upon the affairs of the government receive a strict interpretation favorable to the public . . . .'" *City of Grafton v. Ottertail Power Co.*, 86 N.W.2d 197, 203 (N.D. 1957) (quoting *Sutherland on Statutory Construction*, § 6301 (3rd ed.). In enacting

statutes, it is presumed that the "[p]ublic interest is favored over any private interests." N.D.C.C. § 1-02-38(5). These rules are particularly applicable for sovereign lands, where title determinations "begin with a strong presumption against defeat of state[ ] title." *Defenders of Wildlife v. Hull*, 18 P.3d 722, 737 (Ariz. Ct. App. 2001).

¶36 In sum, a legislative grant is "not . . . presumed or held to be conferred in doubtful or ambiguous words." *Blair v. City of Chicago*, 201 U.S. 400, 446 (1906). And 47-01-15 is "ambiguous;" its operative word "takes" is imprecise, with "many shades of meaning." *Mills*, 523 N.W.2d at 540. The uncertainty of "takes" is pronounced because a companion statute, 47-01-16, dealing with a similar boundary issue uses the word "owns." *Id.* at 542.

4. Deference is owed consistent agency interpretation.

¶37 A statute's application by the agency administering it "is entitled to deference" if that interpretation does not contradict clear statutory language. *W. Gas Resources, Inc. v. Heitkamp*, 489 N.W.2d 869, 872 (N.D. 1992) (citations omitted). Because 47-01-15 is ambiguous, *Mills*, 523 N.W.2d at 540, the Court must, according to its own jurisprudence, defer to agency interpretation. The executive branch "is entitled to deference."

¶38 Although there may be uncertainty about exactly what interests riparians can exercise over the shorezone's surface, asserting state title to the shorezone has been the consistent and longstanding position of state agencies. The Garrison Diversion Conservancy District, the State Engineer's Office, the Land Board, and different Attorneys General have asserted title up to the high

watermark and taken action to implement and enforce this view, such as issuing rights-of-way, grazing permits, and oil and gas leases. *Supra* at ¶¶ 4-6, 9. The state has asserted state title before state and federal courts. *Id.* at ¶¶ 4-5

¶39 In addition, the legislature on two occasions has defined state title to sovereign lands as extending up the ordinary high watermark, and directed that the Land Board and State Engineer manage sovereign lands with authority to convey state interests, a kind of power exercised by an owner of land. *Id.* at ¶¶ 3, 6.

¶40 Although in *Mills* the Court said it would not consider later legislative actions, 523 N.W.2d at 543, n.7, California did so in construing its takes-to-low-watermark statute, *California v. Superior Court*, 625 P.2d at 248, and if the U.S. Supreme Court approves the practice, North Dakota might re-consider.

> Where a statutory term presented to us for the first time is ambiguous, we construe it to contain that permissible meaning which fits most logically and comfortably into the body of both previously and subsequently enacted law. (Citation omitted.) . . . . We do so . . . because it is our role to make sense rather than nonsense out of the *corpus juris*.

West Virginia Univ. Hosp. v. Casey, 499 U.S. 83, 100-01 (1991). Here, North Dakota's *corpus juris* points one way. Its territorial law did not—as all concede—convey the shorezone, state statutes place the shorezone within state ownership, state title is consistent with the federal equal footing doctrine and the state's public trust doctrine, and state officials and agencies have managed the shorezone as state-owned property.

¶41 The appellants argued below that agency deference is precluded because the Land Board set aside money for refunds if mineral disputes are not decided in the state's favor. That decision was made because, as the largest mineral owner in the state—2.5 million acres (Appx. A317)—in a prolific oil play, the state is, unsurprisingly, involved in title issues, such as title under the Ft. Berthold Reservation's portion of Lake Sakakawea, on stretches where river movement alters boundary lines, and the location of the ordinary high watermark on certain tracts. *See, e.g., Reep v. State*, Dist. Ct. Dkt. No. 63, Exh. K at 425 (referring to "many . . . potential title disputes"); Exh. L at 477; *Wilkinson v. Bd. of Univ. & School Lands*, No. 53-2012-38. In setting aside the money, the Board did so with "no expectation" it will lose any title disputes. *Id. at* Exh. K at 426; *see also id.* at Exh. L at 478. Cautious management doesn't wipe away decades of consistent agency practice.

5. Section 47-01-15 doesn't convey public resources. As a rule of construction for conveyances of riparian lots, it clarifies what land and which riparian rights the grantor conveys to the grantee.

¶42 Section 47-01-15 is a rule of construction. *Mills*, 523 N.W.2d at 542. Rules of construction, statutory or court-made, help resolve frequently reoccurring situations by adopting a uniform rule so that a court doesn't have to reason through each case. Note, *Choice-of-Law Rules for the Construction and Interpretation of Written Instruments*, 72 Harv. L. Rev. 1154, 1155-56 (1959). Rules of construction aid in determining the likely intent of the parties. *Id.* They provide certainty and uniformity, reducing litigation. When applied to instruments involving property, rules of construction presume outcomes in the absence of any

contrary expression of intent. *See id.*; *Fashion Fabrics of Iowa v. Retail Investors Corp.*, 266 N.W.2d 22, 25 (Iowa 1978).

¶43 Section 47-01-15's rule of construction interprets conveyances of riparian lots. It addresses what a lot owner as grantor is presumed to convey, and what the grantee is presumed to receive, or "take." And "[a] riparian owner who does not own the bed of the stream cannot convey it," 65 *C.J.S. Navigable Waters* § 140 (2010), for "[i]t is axiomatic that a person cannot convey a greater interest in real estate than she owns." *See v. Hennigar*, 213 P.3d 941, 944 (Wash. Ct. App. 2009). It is also axiomatic that state land is not conveyed unless the state's intent to convey is plainly stated. *Supra* at § 3.

¶44 A rule of construction is a search for presumed intent. It is not a rule of property. As a tool for divining intent, a rule of construction does not have the horsepower needed to convey, particularly without compensation, state land into private hands. That would be conveying state land by presumption or inference, violating a host of rules requiring clarity and specificity for conveying public property. *Supra* at § 3.

¶45 Rather than conveying state property, 47-01-15's function is like that of the "strip and gore" doctrine. (A "gore" is "a small, narrow strip of ground." *Black's Law Dictionary* 824 (3rd rev. ed. 1968)). The doctrine is applied to construe conveyances of land bordered by a narrow right-of-way. Similarly, riparian lots are bordered by a strip known as the shorezone.

¶46 The strip and gore doctrine "creates a presumption against a grantor" retaining small strips of land. *Estate of Smith v. Spinelli*, 216 P.3d 524,

526 (Alas. 2009). It prevents disputes "over detached strips and gores." *Prewitt v. Whittaker*, 432 S.W.2d 240, 243 (Mo. 1968). Landowners tend to overlook their interests in abutting rights-of-way, which are often long, narrow strips and of no value when separated from the adjoining land. *Cottonwood/Verde Valley Chamber of Commerce, Inc. v. Cottonwood Prof'l Plaza I*, 901 P.2d 1151, 1154 (Ariz. Ct. App. 1994). The rule presumes that if grantors had been thinking about such interests they would have included them in the conveyance, rather than retain them. *Id.; see also Rio Bravo Oil Co. v. Weed*, 50 S.W.2d 1080, 1085 (Tex. 1932).

¶47 Riparian landowners likely received their lots in conveyances from private individuals. *See* Bakke Brf. at 8; Appx. A354. Section 47-01-15 provides that—unless the conveying document "indicates a different intent"—grantors convey all they own in the riparian lot and whatever rights they have across the shorezone. The statute provides a presumption that the grantee takes whatever the grantor had.

¶48 In general, riparians can sever their riparian rights by conveyance or reservation. *See* 2 *Tiffany on Real Property* § 667 (2012); 1 *Water and Water Rights* § 7.04(a) (2013). For example, a riparian owner can reserve to himself the right to access the water. If he doesn't make that reservation clear, 47-01-15 provides, as a rule of construction, that access rights pass to the grantee. A more frequently occurring example concerns accretions. Along wandering river channels land may have accreted to a riparian lot since the original survey, and even during the time the grantor held title. *See generally* Robert E. Beck, *The*

Wandering Missouri River: A Study in Accretion Law, 43 N.D. L. Rev. 429 (1967). Upon sale of the lot, the deed may describe the property as it was described in earlier deeds or in the original survey, creating questions whether the sale included accreted land. If a dispute arises over what was included, 47-01-15 provides resolution, and in a logical way that likely reflects the parties' intent.

¶49 A rule of construction developed that, when a riparian owner conveys his lot, he does not customarily intend to retain title to accretions or other riparian rights. The common law developed to provide a presumption that the riparian grantor intends to convey his entire interest. *E.g., Public Beach, Borough of Brooklyn v. W. Tenth St. Realty Corp.*, 176 N.E. 173, 174 (Ct. App. N.Y. 1931); 2 *Tiffany on Real Property* § 667 (2012) (conveyance of a riparian lot "presumptively carries with it the grantor's riparian rights"). This is how *Mills* interpreted the *Champlain* decision, that is, *Champlain* holds that grants of riparian land "convey the granted interest to the low watermark," *Mills*, 523 N.W.2d at 542, and whatever that "granted interest" is depends, of course, on what the grantor owns. Section 47-01-15 codifies a common law rule.

¶50 Appellants assert that, under *Mills,* riparians own the shorezone's "full interest." Reep Brf. ¶ 47. The Court didn't quite say that. It stated that a riparian "'takes' the interest granted . . . to the low watermark." *Mills*, 523 N.W.2d at 542. What that interest is begs the question. In the next sentence the Court stated that this ruling avoids violating the gift clause, *id*, and added that with this interpretation, "absent a contrary intent," the grant "includes a riparian grantee's full interest in the shore zone . . ." *Id.* at 543. Again, what that interest is begs

the question. What *Mills* did was to hold that under 47-01-15 riparians take the full interest held by their grantor, unless the grantor reserves some riparian interests. The Court's statement about a riparian's "full interest" is consistent with the state's position, that is, 47-01-15 ensures that the grantee takes all the grantor's interests, the "full interest," unless the grantor specifically reserves aspects of it. In other words, a riparian grantor can't convey more than he owns, but he can convey his full interests in access rights and to accretions, and is presumed to do so "absent a contrary intent."

¶51 This interpretation of 47-01-15 doesn't render it meaningless, as appellants argued below. The statute governs conveyances along North Dakota's navigable waters. Should the grantor and grantee disagree about the scope of the conveyance, 47-01-15 resolves the dispute with a presumption that the grantor conveys all that he owns to the low watermark.

6. Oklahoma dealt with the same statute and ruled in the state's favor.

¶52 Oklahoma interpreted a territorial statute with the same takes-to-low-watermark language. *State v. Nolegs*, 139 P. 943, 944 (Okla. 1914). Oklahoma landowners argued that they owned down to the low watermark, relying on a territorial statute, Section 4173. *Id.* at 947. Rejecting the claim, the Oklahoma Supreme Court cited *United States v. Mackey*, 214 F. 137 (E.D. Okla. 1913), *rev'd on other grounds*, 216 F. 126 (8th Cir. 1914), which fully addressed the issue.

¶53 When Oklahoma became a state in 1907, its Constitution included a Schedule to govern the transition from territory to state. Under Section 2

Oklahoma adopted "'[a]ll laws in force in the territory.'" *Id.* at 148. Any territorial statute inconsistent with the U.S. Constitution could not be "in force" and thus was not adopted. *Id.* at 149. Further, Section 6 of Oklahoma's Organic Law limited territorial legislation to subjects "'not inconsistent with the Constitution . . .'" *Id.* at 148.

¶54 Because a territorial government had no authority to dispose of soil under navigable waters, Section 4173 does not convey "title . . . below high-water mark." *Id.* The territorial statute was "void," and as such it was not "in force" and did not become Oklahoma law. *Id.* at 149-50.

¶55 The Oklahoma Supreme Court adopted *Mackey's* reasoning, stating that the territorial legislature "had no power to enact such a law, and it is therefore void, and . . . did not become a law in the state of Oklahoma." *Nolegs,* 139 P. at 947. A federal court describes *Mackey* as "sound." *United States v. Brewer-Elliott Oil & Gas Co.*, 249 F. 609, 614 (D.C. Okla. 1918), *aff'd on other grounds*, 260 U.S. 77 (1922).

¶56 The Oklahoma statute had the same takes-to-low-watermark language as did the Dakota territorial statute. *Mackey,* 214 F. at 148; Terr. Dak. Civ. Code § 266 (1877). Sections 6 in Oklahoma's and North Dakota's Organic Law have the same language limiting the authority of territorial legislatures. *See* Addendum. Section 2 of each state's Transition Schedule provides that only those territorial laws "in force" and "which are not repugnant to this Constitution" become part of the states' first laws. *See* Addendum. The Oklahoma analysis is on point, and since Oklahoma's territorial statute was adopted from Dakota

Territory, *Mackey*, 214 F. at 148, the analysis is even more apt.

¶57 *Mills* states that it did not assess the Oklahoma analysis "[b]ecause of our interpretation of 47-01-15." 523 N.W.2d at 542, n.6. The Court said this because either it had already concluded that 47-01-15 didn't compromise state interests and so there was no need to address additional issues, or it wasn't reaching the substance of shorezone title, leaving acceptance or rejection of the Oklahoma analysis for another day.

¶58 North Dakota does not believe that the Court needs to go as far as Oklahoma did and declare the statute void. That result is required only if the territorial 47-01-15 cannot be interpreted in a way that preserves its constitutionality, and there is a way, as discussed above in Section 5.

7. Constitutional provisions prohibit conveying the shorezone into private hands.

¶59 Section 2 of the Transition Schedule in North Dakota's first constitution limited adoption of territorial laws not only to those "in force," but also to those "not repugnant to this Constitution." Thus, two conditions had to be satisfied before territorial statutes became state statutes.

¶60 As explained, if the territorial 47-01-15 gave private landowners title to the shorezone, the statute would have violated the equal footing doctrine and would not have been "in force." In addition, the statute would have been repugnant to the constitution's prohibition on gifts, which provided that the state cannot "loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor . . . ." 1889 N.D. Const. § 185.

¶61 Two cases in which the gift clause prevented legislative giveaways are *Solberg v. State Treasurer*, 53 N.W.2d 49, 50 (N.D. 1952), and *Herr v. Rudolf*, 25 N.W.2d 916 (N.D. 1947). Solberg defaulted on a state mortgage and quitclaimed the land to the state. 53 N.W.2d at 50. He later reacquired the land, though the state reserved 50% of the minerals. The legislature then passed a law requiring that the state release minerals it had reserved where former mortgagors repurchased. *Id.* When Solberg requested a release, the state treasurer refused, claiming that the 1951 law violated the constitution by giving away state-owned minerals. *Id.* at 51.

¶62 The Court declared the statute unconstitutional. *Id.* at 55. It "has the effect of transferring to certain designated classes or individuals property of the state . . . as a gift." *Id.* at 53. Such a result would make the transfer a donation to or in aid of an individual "in violation of . . . section 185." *Id.* at 53-54. Among the authorities cited was *Winters v. Myers*, 140 P. 1033 (Kan. 1914), in which the court ruled that the Kansas legislature could not give islands to riparian landowners.

¶63 In *Herr v. Rudolf*, land was transferred to North Dakota after Rudolf defaulted on a loan. 25 N.W.2d at 918. The state intended to resell the land to Rudolf's son under a statute giving prior owners and their families a preferential right to repurchase, which could be exercised by paying fair market value. *Id.* at 918-19. Rudolf's son tendered fair market value, $2,500. *Id.* at 918. Herr offered $2,600. *Id.* at 922. The Court found that the statute required the state to make an unconstitutional gift. *Id.* at 922. A potential loss of $100 triggered the

gift clause. *See also State v. Murphy*, 210 N.W. 53, 55 (N.D. 1926) (the legislature sought to give Williams County land the state was holding in trust for education, but the land was "not theirs to give").

¶64 Arizona's constitution has a gift clause that was applied to prevent the legislature from giving riparian landowners state interests in navigable rivers. *Arizona Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 161-62 (Ariz. Ct. App. 1991). The statute violated Arizona's gift clause, which prohibits gifts "'to any individual, association, or corporation.'" *Id.* at 169.

¶65 The appellants assert that the gift clause is inapplicable. Reep Brf. ¶¶ 78-80. We don't follow the argument, but we do know that the gift clause is clear in its simplicity: it prohibits gifts. All agree that the shorezone was owned by North Dakota at statehood. If the state no longer owns it, and since the state hasn't received compensation for a single acre, a gift occurred. Appellants like Mr. Reep are individuals who will benefit from the gift. If it stands, he and other individual members of a privileged group, riparian landowners, have the exclusive benefit of state assets.

¶66 In *Mills,* the Court stated that it must construe 47-01-15 "in harmony with the constitution." 523 N.W.2d at 540. More particularly, it had to construe the statute "to avoid an interpretation that would grant a private party a gift in violation of the anti-gift clause . . . ." *Id.* at 542. That can only be done by preserving state title.

¶67 The territorial 47-01-15—if read to convey state title—was not only repugnant to the gift clause, it also conflicted with other constitutional provisions,

the watercourses-forever clause and the special privileges clause.

¶68 The constitution affirmatively required that the state retain riverbeds. "All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes." 1889 N.D. Const. § 210. A watercourse includes the beds and banks, and there is no doubt that the "[h]igh-water mark bounds the bed of the river." *United States v. Willow River Power Co.*, 324 U.S. 499, 509 (1945).

¶69 Although the watercourses-forever clause does not "divest the rights of riparian owners," *Bigelow v. Draper*, 69 N.W.2d 570, 573 (N.D. 1896), this begs the question, what are those riparian rights? Further, the Court stated:

> On the other hand, we do not wish to be understood as expressing such a view as to its proper interpretation as would utterly emasculate [the provision]. So far as it can have constitutional effect, it should be construed as placing the integrity of our water courses beyond the control of individual owners.

Id. The appellants' position does emasculate the provision. It vitiates the requirement that "the integrity" of our rivers be kept "beyond the control of individual owners." *Id.*

¶70 In addition, Section 20 of the state's first constitution stated:

> No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislative Assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

This is the state's equal protection clause. *Bouchard v. Johnson,* 555 N.W.2d 81, 87 (N.D. 1996). It is triggered when a statute selects a "citizen or class of citizens" for special treatment. While the usual purpose of equal protection is to

protect "'the few against the many, no reason is perceived why it may not be invoked on behalf of the people at large against legislation which would bestow their property upon the few.'" *Solberg*, 53 N.W.2d at 55 (quoting *Winters v. Myers*, 140 P. at 1034).

¶71 A classification is upheld if it is "not arbitrary." *MCI Telecomms. Corp. v. Heitkamp*, 523 N.W.2d 548, 553 (N.D. 1994). It is arbitrary to give away public resources to one group. To pass muster, a classification "must be based upon such differences in situation or purposes between the persons included in the class and those excluded therefrom as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation . . . ." *State v. E.W. Wylie Co.*, 58 N.W.2d 76, 84 (N.D. 1953). In sum, the classification must be "reasonable." *MCI Telecomms.*, 523 N.W.2d at 553. The reasonableness, the propriety and necessity of conveying exceptional public resources to a few cannot be defended.

¶72 Resolution of the equal protection cases can turn on the standard of review. Under the lightest standard, rational basis, the classification drawn survives unless it is patently arbitrary and bears no rational relationship to a legitimate government interest. *Bouchard*, 555 N.W.2d at 87. "Legitimate government interests" are not promoted in giving away every acre of shorezone on every navigable river and lake.

¶73 Application of the special privileges clause is especially appropriate. Provisions like it were adopted to end "'the flood of privileged legislation . . . for private purpose'" that was common in the late nineteenth

century. *Teigen v. State*, 2008 ND 88, ¶ 11, 749 N.W.2d 505 (quoting *Harrisburg Sch. Dist. v. Hickok*, 761 A.2d 1132, 1135-36 (Pa. 2000)).

¶74 Although the state raised the watercourses-forever and special privileges clauses in its briefs in *Mills*, the Court did not address them. This may have been because the Court had already found the gift clause applicable, making discussion of other constitutional provisions unnecessary.

8. 47-01-15 jurisprudence from other states supports North Dakota.

¶75 Other states have statutes almost identical to 47-01-15. Oklahoma is one and, as explained, its courts reject the view that the statute conveys state title. California has a 47-01-15 statute. Its Supreme Court found the statute ambiguous, and after citing evidence that state officials had historically taken the position that state title ended at the low watermark, coupled with evidence that the legislature accepted that position, the court could not "ignore these long-continued and frequently expressed views," and found in favor of riparians. *California v. Superior Court*, 625 P.2d at 247-48. This reasoning supports North Dakota's title to the shorezone, deferring as it does to agency practice coupled with legislative support. *See supra* at ¶¶ 3-10 (discussing the practice of North Dakota state agencies and the 1977 and 1989 legislation).

¶76 South Dakota and Montana have held that their version of 47-01-15 gives riparians title to the low watermark. *Flisrand v. Madson*, 153 N.W. 796 (S.D. 1915); *Herrin v. Sutherland*, 241 P. 328 (Mont. 1925). Each case concerned disputes between private parties. In neither case was the state a party, and in neither were issues presented like those now before this Court.

Further, it appears that South Dakota and Montana officials have never challenged the decisions. They still could. States are not barred by such doctrines as estoppel and laches in pursuing public rights to sovereign lands. "[T]here is no unfairness . . . in a state's pursuit of ownership claims based on the equal footing doctrine, even claims that have lain dormant for decades." *Hassell*, 837 P.2d at 171 (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 482 (1988)); *see also Abbey v. State*, 202 N.W.2d 844, 851 (N.D. 1972) (equitable doctrines generally inapplicable against the state).

¶77 *Flisrand* and *Herrin* are examples of courts not limiting opinions to the case and controversy. Since the states, the real parties in interest, did not participate in either case, the "holdings" are dicta.

¶78 This Court, in early decisions, also remarked that riparians own to low water. *E.g., Gardner v. Green*, 271 N.W. 774, 780 (N.D. 1937). But, like *Flisrand* and *Herrin*, none of the cases were decided "in the context of competing" state-private interests, *Mills*, 523 N.W.2d at 540, and thus they do not help resolve the shorezone issue. *Id.*; *J.P. Furlong Enters., Inc.* v. *Sun Explor. & Prod. Co.*, 423 N.W.2d 130, 132 n.1 (N.D. 1988). Since these North Dakota cases aren't useful, neither are *Flisrand* and *Herrin*.

¶79 There is, however, case law that should guide the Court. Arizona courts have turned back legislative efforts to give riparians the beds of navigable rivers. *Defenders of Wildlife*, 18 P.3d at 731; *Hassell*, 837 P.2d at 173. Kansas has not allowed the legislature to give islands to riparian landowners. *Winters v.*

Myers, 140 P. 1033 (Kan. 1914). Similar case law is cited in the next section. All in all, courts protect state title to sovereign lands.

9. The Public Trust Doctrine protects public interests in the shorezone.

¶80 North Dakota holds "navigable waters, *as well as the lands beneath them*, in trust for the public." *United Plainsmen Ass'n v. State Water Comm'n,* 247 N.W.2d 457, 461 (N.D. 1976) (emphasis added). The public trust doctrine applies to lakes and rivers because of their unique values. It requires that the state manage trust resources as a "steward." *State v. Sorensen*, 436 N.W.2d 358, 361 (Iowa 1989).

¶81 The trust is not limited to waters, but applies to "'soils under'" and "'lands under'" navigable waters. *United Plainsmen*, 247 N.W.2d at 461 (quoting *Illinois Cent. RR v. Illinois*, 146 U.S. 387, 453 (1892)). "Land" includes the underlying minerals. *Kim-Go HK Minerals, Inc. v. J.P. Furlong Enterprises, Inc.*, 484 N.W.2d 118, 121 (N.D. 1992) (Section 47-06-07, dealing with abandoned river channels, "must apply to both the surface and mineral estates"); *Furlong*, 423 N.W.2d at 132 (state title to sovereign lands includes oil and gas).

¶82 Appellants describe traditional interests protected by the public trust doctrine. Reep Brf. ¶¶ 50-51. The doctrine, however, is not "fixed or static," *Neptune City v. Avon-by-the-Sea*, 294 A.2d 47, 54 (N.J. 1972), it is dynamic, and public interests in trust resources can include "mineral development." *Phillips Petroleum*, 484 U.S. at 482. For example, Mississippi's "laundry list" of public purposes to which the public trust applies includes developing minerals. *Secretary of State v. Wiesenberg,* 633 So.2d 983, 988 (Miss. 1994).

¶83 The suggestion by appellants that states lack an economic interest in sovereign lands would astound any state official. "[I]t cannot be seriously doubted" that states have the power and the duty to use sovereign lands "for the greatest public good." *State v. Longyear Holding Co.*, 29 N.W.2d 657, 670 (Minn. 1947). "[M]any states" recognize a state's "right to remove" from sovereign land "minerals, oil, and other like products." *Id.* at 671 (citations omitted). Indeed, Congress, in reaffirming state title to sovereign lands, provided that state title includes "'the natural resources within such lands and waters.'" *Furlong*, 423 N.W.2d at 132 (citing 43 U.S.C. § 1311(a)). It is often to protect mineral interests that states litigate sovereign lands. *E.g., Phillips Petroleum*, 484 U.S. at 472; *Utah Div. of State Lands v. United States*, 482 U.S. 193, 200 (1987); *Oregon v. Corvallis Sand & Gravel*, 429 U.S. at 365.

¶84 An economics discussion, however, is too limited. This case is not solely about minerals. It implicates the surface; public use of the surface and the state's ability to protect that use.

¶85 Public values in lands along our rivers and lakes—fishing, boating, hunting, and other kinds of recreation, as well as aesthetics, viewsheds, environmental protection, conservation, protecting dwindling natural areas from development—will be compromised if the shorezone is in private fee, or, to use Professor Sax's language, if the shorezone becomes subject to "the self-interest of private parties." 68 Mich. L. Rev. at 490. Transfers of public land "substantially impair the public interest by creating private property rights which in turn unavoidably compete with public rights." Eric Pearson, *Property Rights in*

Streambeds in Nebraska, 19 Creighton L. Rev. 169, 188 (1986) (citing 1 R. Powell, *Powell on Real Property* 160, at 655-56 (1985)). While the state can try to protect public trust values by regulation, that is diluted authority subject to limitations under state and federal constitutions. Further, there is "overwhelming anecdotal evidence that the threat of successful takings claims is a strong deterrence to the government's exercise of its regulatory powers." Michael W. Graf, *The Determination of Property Rights in Public Contracts after Winstar v. United States: Where has the Supreme Court Left Us?*, 38 Nat. Res. J. 197, 232 (1998).

¶86 As Professor Sax puts it in his affidavit, if a state is able to retain title up to the high watermark, that "no doubt" can facilitate state control over uses that might impair the public trust. Appx. A417 (¶ 29). If, on the other hand, the boundary line is the low watermark and the shorezone is private property, it is there that public interests will encounter the private "right to exclude," and where a citizen "may be subject to a civil or criminal trespass claim." Sidney F. Ansbacher, et al., *Stop the Beach Renourishment Stops Beachowners' Right to Exclude*, 12 Vt. J. Envtl. L. 43, 51 (2010). States that recognize riparian title down to the low water, Professor Sax notes, can encounter "contentious issues" of public access and private property rights, as has been litigated in the Great Lakes states. Appx. A411 (¶ 19). Indeed, access to rivers, lakes, and seashores is fought all over the country between landowners and the public. For example, as water recreation grows in the Columbia River Basin, so too has conflict between property owners and recreationists. Stephen D. Osborne, et al., *Laws*

Governing Recreational Access to Waters of the Columbia Basin: A Survey and Analysis, 33 Envt'l L. 399, 399 (2003). In other parts of the country, examples of recent litigation on the issue are, *Severance v. Patterson*, 370 S.W.3d 705, 710 (Tex. 2012), and *Trepanier v. County of Volusia*, 965 So.2d 276 (Fla. Ct. App. 2007).

¶87 Such conflicts are the sort of thing that require consideration before trust assets are conveyed. This is the rule of *United Plainsmen*. In it, an injunction was sought to stop state officials from issuing water permits for power production. 247 N.W.2d at 459. The Court held that as a steward of trust resources, state officials must engage in careful deliberation before conveying them. Deliberation "is essential to effective allocation of resources 'without detriment to the public interest in the lands and waters remaining.'" *Id.* at 462 (quoting *Illinois Central*, 146 U.S. at 455-456). Trust resources can be alienated "only after an analysis of present supply and future need." *Id.* at 463. This requirement isn't limited to North Dakota. "The most meaningful construction the courts have given the . . . doctrine has been to require the government to consider the adverse impacts of a proposed action on trust resources." Richard J. Lazarus, *Changing Conceptions of Property and Sovereignty in Natural Resources: Questioning the Public Trust Doctrine*, 71 Iowa L. Rev. 631, 652 (1986). For example, an Arizona court held a giveaway of navigable rivers void in part because the legislation did not provide for a "particularized assessment ... to assure that public interests remain protected." *Hassell*, 837 P.2d at 173.

¶88 Interpreting 47-01-15 as conveying the shorezone is unsupported

by any analysis that assessed the wisdom of the alleged disposal. For just such a failure, *United Plainsmen* held that the state-issued water permits could not take effect. If the conveyance of water, a renewable resource, was improper without prior analysis, a gift of land and minerals—nonrenewable resources—cannot be valid.

¶89 *United Plainsmen* gives sovereign lands even greater protection.

> "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 . . . ."

247 N.W.2d at 461 (quoting *Illinois Cent.*, 146 U.S. at 453) (emphasis added)). "A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power . . . ." *Illinois Cent.*, 146 U.S. at 453. The transfer would abdicate the state's duty to regulate and secure riverbeds for the benefit of every citizen.

¶90 "American courts have long used the public trust doctrine to limit the power of state[s] . . . to transfer state-owned land under navigable waters into private ownership." Douglas L. Grant, *Western Water Rights and the Public Trust Doctrine: Some Realism about the Takings Issue*, 27 Ariz. St. L.J. 423, 423 (1995). A legislative conveyance was undone in *Illinois Central*, the case that guided this Court in *United Plainsmen*. In fact, "the heart of the public trust doctrine lies in its original formulation as a restraint on state alienation of public trust lands . . . ." Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 Hastings W.-Nw. J. Envtl. L. & Pol'y 113, 114 (2010).

¶91 It is often left to the judiciary to protect "against improvident dissipation of an irreplaceable resource." *Hassell*, 837 P.2d at 169. Many courts have done so. *E.g.*, *In re Wai'ola O Moloka'i, Inc.*, 83 P.3d 664, 692 (Hawaii 2004) ("the trust protects public waters and submerged lands against irrevocable transfer to private parties . . . or 'substantial impairment.'"); *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 831 (N.C. 1988) ("no title in fee can be granted to land submerged beneath navigable waters"); *Idaho Forest Indus., Inc. v. Hayden Lake Watershed Imp. Dist.*, 733 P.2d 733, 737 (Idaho 1987) ("trust . . . restricts the state's ability to alienate any of its public trust land"); *State v. Zimring*, 566 P.2d 725, 735 (Hawaii 1977) ("State as trustee has the duty to protect and maintain the trust property"); *Priewe v. Wisconsin State Land & Imp. Co.*, 79 N.W. 780, 781 (Wis. 1899) (legislature must "preserve for the benefit of all the people forever the enjoyment of the navigable waters . . . ."). *United Plainsmen* is consistent with this jurisprudence.

¶92 In sum, sovereign lands, because of their "exhaustible and irreplaceable nature" and their "fundamental importance to our society and to our environment," are entitled to the "highest degree of protection." *Morse v. Oregon Div. of State Lands*, 581 P.2d 520, 524 (Or. Ct. App. 1978). Citizens "ought not . . . to be deprived of those blessings which nature's bounty has provided." *Ne-Bo-Shone Ass'n. v. Hogarth*, 7 F. Supp. 885, 889 (W.D. Mich. 1934). After all, "a river is more than an amenity; it is a treasure." *New Jersey v. New York*, 283 U.S. at 342.

Conclusion

¶93 Section 47-01-15 does not convey state interests. It construes conveyances of riparian lots to avoid disputes over the scope of what the grantor conveyed. When given this, its plain meaning, the statute is consistent with the public trust doctrine, the equal footing doctrine, deference to state agencies, and rules governing public assets. It is consistent with constitutional provisions protecting watercourses and prohibiting special privileges, and with the provision that prohibits giving away public resources.

¶94 The District Court should be affirmed.

Dated this 26th day of June, 2013.

State of North Dakota
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Addendum

Versions of Section 47-01-15

1877 Dak. Terr. Rev. Codes § 266:

Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark, and all navigable rivers shall remain and be deemed public highways. In all cases where the opposite banks of any streams not navigable belong to different person, the stream and the bed-thereof shall become common to both.

1887 Dak. Terr. Compiled L. § 2782:

Except where the grant under which the land is held indicates a different intent, the owner of the upland, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark, and all navigable rivers shall remain and be deemed public highways. In all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

1895 N.D. Rev. Code § 3373:

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 water mark, and all navigable rivers shall remain and be deemed public highways. In all cases when the opposite banks of any stream not navigable belong to different persons the stream and the bed thereof shall become common to both.

N.D.C.C. § 47-01-15 (current version):

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. All navigable rivers shall remain and be deemed public highways. In all cases when the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both.

North Dakota - Oklahoma Laws

Oklahoma Organic Law § 6:

That the legislative power of the territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil.
Source: *United States v. Mackey*, 214 F. 137, 148 (E.D. Okla. 1913)

North Dakota Organic Law § 6:

And be it further enacted, that 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; but no law shall be passed interfering with the primary disposal of the soil . . . .
Source: 13A N.D. Century Code 57-58 (2009)

Oklahoma Transition Schedule § 2:

All laws in force in the territory of Oklahoma at the time of the admission of the state into the Union, which are not repugnant to this Constitution, and which are not locally inapplicable, shall be extended to and remain in force in the state of Oklahoma until they expire by their own limitation or are altered or repealed by law.
Source: *United States v. Mackey*, 214 F. 137, 148 (E.D. Okla. 1913)

North Dakota Transition Schedule § 2:

All laws now in force in the territory of Dakota, which are not repugnant to this Constitution, shall remain in force until they expire by their own limitations or be altered or repealed.
Source: 13A N.D. Century Code 347 (2009)

Provisions of the 1889 North Dakota Constitution

Art. 1, Sec. 20:

No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the Legislative Assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.
(Current version is at N.D. Const., art. I, § 21.)

Art. 12, Sec. 185:

Neither the State nor any county, city, township, town, school district or any other political subdivision shall loan or give its credit or make donations to or in aid of any individual, association or corporation, except for necessary support of the poor, nor subscribe to or become the owner of the capital stock of any association or corporation, nor shall the State engage in any work of internal improvement unless authorized by a two-thirds vote of the people.
(Current version is at N.D. Const., art. 10, § 18.)

Art. 17, Sec. 210:

All flowing streams and natural water courses shall forever remain the property of the State for mining, irrigating and manufacturing purposes.
(Current version is at N.D. Const., art. XI, § 3.)

Dashed red line in lower left illustrates OHWM as determined through litigation. Line to the right illustrates probable OHWM location on the opposite bank.

Dashed red line illustrates probable location of OHWM along Missouri River. Note mature cottonwoods above OHWM and predominate willow growth below.

Dashed red line illustrates probable OHWM location along Missouri River. The OHWM is likely just stream side of the mature cottonwoods. The willowy sandbar area being used by recreators is likely below the OHWM.

The impact of the water on vegetation will be more obvious in some areas than in others.

The Red River at a relatively high stage. The OHWM is likely located along the tree line.

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

JUN 26 2013

STATE OF NORTH DAKOT

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20130110

Stanford A. Reep and Amy Reep, the Stockman Family Mineral Trust, the Charles and Ruth Patch Trust, Heidi McGillivray, Julia Streich, Mary Beth Ferguson, Florence Irwin *ex rel.* Loren Irwin, her guardian and conservator, and Loren Irwin, Individually, Thomas Selby, and Sogard Davidson Mineral LLLP, and on Behalf

of All Others Similarly Situated,

Plaintiffs/Appellants,

v.

State of North Dakota; North Dakota Board of University and School Lands; and North Dakota Trust Lands Commissioner Lance D. Gaebe, in his official and personal capacities,

Defendants/Appellees,

Appeal from Final Judgment dated March 22, 2013
Case No. 53-2012-CV-00213
County of Williams, Northwest Judicial District
The Honorable David W. Nelson

Brigham Oil & Gas, L.P.,

Plaintiff/Appellee,

v.

North Dakota Board of University and School Lands,

Defendant/Appellee,

Kerry Hoffman, City of Williston, Williams County, Harvest Oil Company, LLC, Beverly Sundet, Ricky Vance, Linda Kirkland, First National Bank & Trust Co. of Williston, Trustee of the Hilda Noe Grandchildren Trust, American State Bank and Trust Company, Trustee of the Frank W. Moran and Mary Joan Moran Family Minerals Trust, American State Bank and Trust Company, Trustee of the Harris and Louise Anderson Family Minerals Trust U/A dated February 10, 2006, Upstream Innovations, Inc., Shirley L. Schwab Trust under Trust Agreement dated March 5, 1999, Lois C. Zeigler, Trustee of the Last Will and testament of Frederick H. Zeigler, Deceased, Gary Schwab, Jerome Bakke, Curtis Bakke, and Sherrie Dee Bakke, Trustee of the Lowell G. Bakken Mineral Trust,

Defendants/Appellants,

Geraldine Loder, Virgil A. Bloechl, Teresa Sitzmann, Michaele M. Gran, Robert James McDonald, Richard R. McDonald, Mary Ellen Smith, Carole J. McDonald, Thomas T. McDonald, Rose Marie Dokken, Elaine McDonald, John C. McDonald, Jr., Josephine Swenson, Jacque N. Masog, Kay L. Dodge, William R. Mueller, Elvira C. Fulton, Doreen Fern McDonald, Georgia Carol Hausauer, Margaret Cecelia Gott, Marlyne Myrtle Loomis, Lesley Louise Neary, Virginia A. Venti, Eileen Eugenia Ehrler, BNSF Railway Company, Joseph Patrick Wodnik and Loraine Ann Wodnik, as joint tenants, Sherrill Myers, Viola DeTienne, Theresa Cogswell, Beulah Clawson, Norman Bratcher, Nancy Ann Bower-Pryor, Brian Jay Bower and Thomas Adrian Bower, as joint tenants, Stephen A. Messenger, Sandra Lee Messenger, Jacqueline Mech, Orville M. Erickson, Adrean O. Aafedt, Robert K. Torgerson, Cynthia Jo Weldon, Jane Sanders Galt, Leah Pearce Bond, Charles E. Pearce and Gabriele Pearce, as joint tenants, B.C. Harris and Ann Harris, Co-Trustees of the Harris Revocable Trust executed July 25, 1996, James R. Goins, Wayne Smith, Michael Brooks, Bill Como, Christi Breithaupt, Chris Smith, Kelly Smith, Mark Lemley, United States of America, Leroy Clapper, Energy One, LLC, Powers Energy Corporation, GeoFocus Corporation, Golden Eye Resources, LLC, Golden Eye Royalties, LLC, The Dublin Company, Petroleum Land Services, Huston Energy Corporation, and all unknown persons claiming an interest in, or lien or encumbrance upon, the proceeds from the production of the mineral estate described in the complaint herein,

Defendants.

Appeal from Partial Final Judgment dated April 2, 2013
Case No. 53-2011-CV-00495
County of Williams, Northwest Judicial District
The Honorable David W. Nelson

AFFIDAVIT OF SERVICE BY E-MAIL AND MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Melissa Castillo states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 26th day of June, 2013, I served the following **BRIEF OF APPELLEE STATE OF NORTH DAKOTA, NORTH DAKOTA BOARD OF UNIVERSITY & SCHOOL LANDS, and NORTH DAKOTA COMMISSIONER OF TRUST LANDS LANCE GAEBE** upon the following by emailing a true and correct copy thereof as follows:

David Bossart
david@bossartlaw.com
Thomas Conlin
tom@conlinlawfirm.com
Randall (R.T.) Cox
rt@coxhorning.com
Peter H. Furuseth
pete@furusethlaw.com
Greg W. Hennessy
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Dennis E. Johnson
dennis@dakotalawdogs.com
Scott M. Knudsvig
sknudsvig@srt.com
Jan M. Conlin
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Charles Neff
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John W. Morrison
jmorrison@crowleyfleck.com
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tom@conlinlawfirm.com

and by placing a true and correct copy thereof in envelopes addressed as follows:

Jerome Bakke
1314 Cottonwood St.
Grand Forks, ND 58201

Curtis Bakke
8936 S. Quail Run Dr.
Sandy, UT 84093

Sherrie Bakke, Trustee
8936 S. Quail Run Dr.
Sandy, UT 84093

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Melissa Castillo

Subscribed and sworn to before me
this 20th day of June, 2013.

Notary Public

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JOLENE J. THIEL
Notary Public
State of North Dakota
My Commission Expires June 14, 2017

20130110
&
20130111
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JUL 09 2013
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20130110

Stanford A. Reep and Amy Reep, the Stockman Family Mineral Trust, the Charles and Ruth Patch Trust, Heidi McGillivray, Julia Streich, Mary Beth Ferguson, Florence Irwin *ex rel.* Loren Irwin, her guardian and conservator, and Loren Irwin, Individually, Thomas Selby, and Sogard Davidson Mineral LLLP, and on Behalf

of All Others Similarly Situated,

Plaintiffs/Appellants,

v.

State of North Dakota; North Dakota Board of University and School Lands; and North Dakota Trust Lands Commissioner Lance D. Gaebe, in his official and personal capacities,

Defendants/Appellees,

Appeal from Final Judgment dated March 22, 2013
Case No. 53-2012-CV-00213
County of Williams, Northwest Judicial District
The Honorable David W. Nelson

Supreme Court Case No. 20130111

Brigham Oil & Gas, L.P.,

Plaintiff/Appellee,

v.

North Dakota Board of University and School Lands,

Defendant/Appellee,

Kerry Hoffman, City of Williston, Williams County, Harvest Oil Company, LLC, Beverly Sundet, Ricky Vance, Linda Kirkland, First National Bank & Trust Co. of Williston, Trustee of the Hilda Noe Grandchildren Trust, American State Bank and Trust Company, Trustee of the Frank W. Moran and Mary Joan Moran Family Minerals Trust, American State Bank and Trust Company, Trustee of the Harris and Louise Anderson Family Minerals Trust U/A dated February 10, 2006, Upstream Innovations, Inc., Shirley L. Schwab Trust under Trust Agreement dated March 5, 1999, Lois C. Zeigler, Trustee of the Last Will and testament of Frederick H. Zeigler, Deceased, Gary Schwab, Jerome Bakke, Curtis Bakke, and Sherrie Dee Bakke, Trustee of the Lowell G. Bakken Mineral Trust,

Defendants/Appellants,

Geraldine Loder, Virgil A. Bloechl, Teresa Sitzmann, Michaele M. Gran, Robert James McDonald, Richard R. McDonald, Mary Ellen Smith, Carole J. McDonald, Thomas T. McDonald, Rose Marie Dokken, Elaine McDonald, John C. McDonald, Jr., Josephine Swenson, Jacque N. Masog, Kay L. Dodge, William R. Mueller, Elvira C. Fulton, Doreen Fern McDonald, Georgia Carol Hausauer, Margaret Cecelia Gott, Marlyne Myrtle Loomis, Lesley Louise Neary, Virginia A. Venti, Eileen Eugenia Ehrler, BNSF Railway Company, Joseph Patrick Wodnik and Loraine Ann Wodnik, as joint tenants, Sherrill Myers, Viola DeTienne, Theresa Cogswell, Beulah Clawson, Norman Bratcher, Nancy Ann Bower-Pryor, Brian Jay Bower and Thomas Adrian Bower, as joint tenants, Stephen A. Messenger, Sandra Lee Messenger, Jacqueline Mech, Orville M. Erickson, Adrean O. Aafedt, Robert K. Torgerson, Cynthia Jo Weldon, Jane Sanders Galt, Leah Pearce Bond, Charles E. Pearce and Gabriele Pearce, as joint tenants, B.C. Harris and Ann Harris, Co-Trustees of the Harris Revocable Trust executed July 25, 1996, James R. Goins, Wayne Smith, Michael Brooks, Bill Como, Christi Breithaupt, Chris Smith, Kelly Smith, Mark Lemley, United States of America, Leroy Clapper, Energy One, LLC, Powers Energy Corporation, GeoFocus Corporation, Golden Eye Resources, LLC, Golden Eye Royalties, LLC, The Dublin Company, Petroleum Land Services, Huston Energy Corporation, and all unknown persons claiming an interest in, or lien or encumbrance upon, the proceeds from the production of the mineral estate described in the complaint herein,

Defendants.

Appeal from Partial Final Judgment dated April 2, 2013
Case No. 53-2011-CV-00495
County of Williams, Northwest Judicial District
The Honorable David W. Nelson

AFFIDAVIT OF SERVICE BY E-MAIL

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Melissa Castillo states under oath as follows:

1. I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

2. I am of legal age and on the 9th day of July, 2013, I served the following **BRIEF OF APPELLEE STATE OF NORTH DAKOTA, NORTH DAKOTA BOARD OF UNIVERSITY & SCHOOL LANDS, and NORTH DAKOTA COMMISSIONER OF TRUST LANDS LANCE GAEBE** upon the following by emailing a true and correct copy thereof as follows:

Lawrence Bender
lbender@fredlaw.com

Melissa Castillo
Melissa Castillo

Subscribed and sworn to before me
this 9th day of July, 2013.

Jenney J. Schatz
Notary Public

JENNEY J. SCHATZ
Notary Public
State of North Dakota
My Commission Expires April 18, 2015