

**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, Presiding

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, and Gary Schwab,

Defendants/Appellants,

Geraldine Loder, Virgil A. Bloechl, Teresa Sitzmann, Michael 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, Jerome Bakke, Curtis Bakke, Sherrie Dee Bakke, Trustee of the Lowell G. Bakken Mineral Trust, 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, Presiding

Brief of the Plaintiff/Appellee Statoil Oil & Gas LP¹ & Addendum

FREDRIKSON & BYRON, P.A.

Lawrence Bender, ND Bar #03908
Michael D. Schoepf, ND Bar #07076
200 North 3rd Street, Suite 150
P. O. Box 1855
Bismarck, ND 58502-1855
Phone: (701) 221-4020
**Attorneys for Plaintiff/Appellee
Statoil Oil & Gas LP**

¹ Brigham Oil & Gas, L.P., recently changed its name to Statoil Oil & Gas LP and will be referred to by its current name throughout this Brief.

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

STATEMENT OF ISSUES PRESENTED FOR REVIEW1

Paragraph

LAW AND ARGUMENT1

I. Ownership of the Shore Zone Minerals Remains Uncertain Under North Dakota Law and Must Be Resolved.4

II. The District Court Did Not Abuse its Discretion by Certifying the Question for Immediate Appeal and Entering a Partial Final Judgment9

CONCLUSION.....12

Page

ADDENDUM i

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Paragraph

STATE CASES

North Dakota Supreme Court Cases

Bulman v. Hulstrand Constr. Co, Inc., 503 N.W.2d 240 (N.D. 1993)9

Citizens State Bank v. Symington, 2010 ND 56, 780 N.W.2d 676 8 n.3

Gissel v. Kenmare Twp., 479 N.W.2d 876 (N.D. 1992)9

Hystad v. Indus. Comm’n, 389 N.W.2d 590 (N.D. 1986)6

J.P. Furlong Enters., Inc. v. Sun Exploration & Prod. Co., 423 N.W.2d 130 (N.D. 1988)4, 5

Ozark-Mahoning Co. v. State, 76 N.D. 464, 37 N.W.2d 488 (1949)4

Pifer v. McDermott, 2012 ND 90, 816 N.W.2d 88 8 n.3, 9, 11

State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D. 1994).....1, 4, 6, 7

FEDERAL CASES

U.S. Supreme Court Cases

Montana v. United States, 450 U.S. 544 (1980)4

Pollard’s Lessee v. Hagan, 44 U.S. (3 How.) 212 (1845).....4

United States v. Oregon, 295 U.S. 1 (1935)4

STATE CONSTITUTION, STATUTES AND RULES

North Dakota Constitution

N.D. Const. of 1889, Schedule, § 2 (1889) 5 n.2

North Dakota Statutes

N.D.C.C. § 38-08-017

N.D.C.C. § 47-01-15	1, 5 & n.2
N.D.C.C. § 47-16-39.1	7
Annotated Revised Codes of the Territory of Dakota, Civil Code § 266 (1885)	5 n.2
<u>North Dakota Rules of Civil Procedure</u>	
N.D.R.Civ.P. 54(b)	3, 11, 12

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

- I. Whether the State of North Dakota or the riparian landowner owns the oil, gas, and other minerals in and under the shore of navigable lakes and rivers between the low watermark and ordinary high watermark.
- II. Whether the district court abused its discretion in certifying Issue I for immediate appeal under Rule 54(b) of the North Dakota Rules of Civil Procedure.

LAW AND ARGUMENT

[¶ 1] This case requires the Court to address the apparent conflict between the public trust and equal footing doctrines, on the one hand, and a North Dakota statute that predates statehood, on the other. Under the public trust and equal footing doctrines, when North Dakota became a state it acquired title to the beds of all navigable waterways located within the state up to the ordinary high watermark. *See State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 539 (N.D. 1994) (citations omitted). The statute, by contrast, provides that “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.” N.D.C.C. § 47-01-15. The question that must be answered, then, is whether the State or the riparian owner of the upland owns the land between the low watermark and the ordinary high watermark—the so-called shore zone. In particular, the Court must delve into the “complex bundle” of property rights it identified in *Mills*, and determine whether the State or the

riparian landowner has the right to explore for and produce the oil and gas in and under the shore zone. 523 N.W.2d at 544.

[¶ 2] Plaintiff/Appellee Statoil Oil & Gas LP (“Statoil”) has not taken a position on the merits of the question and will not do so here. Rather, Statoil initiated this action, and submits this brief, to emphasize of the importance of the question and the need to obtain a definitive and final answer to it. Millions of barrels of oil and gas are recoverable from various geological formations underlying the shore zone of the Missouri River and other navigable waterways in western North Dakota. Until this Court provides a definitive answer as to who owns those resources, the risk and cost of developing the oil and gas in and under the shore zone will remain unnecessarily inflated and the proper mineral owners will not be promptly compensated for their share of production.

[¶ 3] Accordingly, the Court should accept the district court’s Rule 54(b) certification, and enter an opinion and order determining whether the State or the riparian property owners own the oil and gas in and under the shore zone of navigable waterways is North Dakota.

I. Ownership of the Shore Zone Minerals Remains Uncertain Under North Dakota Law and Must Be Resolved.

[¶ 4] The question presented by this case is as old as the State itself. On November 2, 1889, North Dakota entered the union on “equal footing” with the states that came before it. As such, the United States’ title to land underlying navigable waters passed to the new state, “as incident to the transfer to the state of local sovereignty.” *Ozark-Mahoning Co. v. State*, 76 N.D. 464, 37 N.W.2d 488, 490

(1949) (quoting *United States v. Oregon*, 295 U.S. 1, 14 (1935)); see also *J.P. Furlong Enters., Inc. v. Sun Exploration & Prod. Co.*, 423 N.W.2d 130, 132 (N.D. 1988) (citing *Montana v. United States*, 450 U.S. 544, 551 (1980); *Pollard's Lessee v. Hagan*, 44 U.S. (3 How.) 212, 225 (1845)) (explaining the transfer of ownership of the bed of navigable waters under the equal footing doctrine). The interest North Dakota acquired extended from ordinary high watermark to ordinary high watermark. See *Mills*, 523 N.W.2d at 539 (citations omitted). The State contends in this proceeding that it continues to hold title to the bed of navigable waterways up to the ordinary high watermark pursuant to the equal footing doctrine.

[¶ 5] The riparian landowners contend otherwise. Although the public trust doctrine prevents North Dakota from completely abdicating its title to the bed of navigable waterways, this Court has recognized the State's authority to define the limits of that interest. See *J.P. Furlong Enters., Inc.*, 423 N.W.2d at 132 n.1. At the time North Dakota became a state, a statute adopted from the Revised Code of the Territory of Dakota, which continues to exist largely unchanged today, arguably limited the State's title to the low watermark. See N.D.C.C. § 47-01-15.² Section

² The statute was initially enacted by the Territorial Legislature in 1877, and it has remained essentially unchanged since that date. Compare Annotated Revised Codes of the Territory of Dakota, Civil Code § 266 (1885) with N.D.C.C. § 47-01-15 (2013). The statute remained in force following statehood pursuant to North Dakota's first Constitution. N.D. Const. of 1889, Schedule, § 2 (1889) ("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.").

41-01-15 provides that the riparian 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.”

[¶ 6] For the first 100 years or so of statehood, it appears that no one paid much attention to the issue. Then, in 1994, this Court entered an opinion in *Mills*, holding that “no interest in the shore zone is absolute.” 523 N.W.2d at 544. Rather, “[b]oth parties have correlative interests in the shore zone.” *Id.* (citing *Hystad v. Indus. Comm’n*, 389 N.W.2d 590 (N.D. 1986)). The Court specifically declined, however, to delineate how, exactly, that “complex bundle of correlative, and sometimes conflicting, rights and claims” should be divided between the riparian landowner and the State. *Id.* Instead, delineation of the respective rights of the State and private landowners was reserved for future cases.

[¶ 7] As Justice Levine predicted in a brief concurrence, the *Mills* opinion left parties with potential interests in the shore zone “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 (Levine, J., concurring). It is time to end the uncertainty and speculation with respect to the oil, gas, and other minerals in and under the shore zone. A definitive answer to the question will encourage development of North Dakota’s oil and gas resources and ensure that the proper mineral owners are promptly paid royalties for their share of production. See N.D.C.C. § 38-08-01 (noting that it is “in the public interest to foster, to encourage, and to promote the development, production, and utilization” of North Dakota’s oil

and gas resources); N.D.C.C. § 47-16-39.1 (emphasizing the importance of royalty payments to an oil and gas lessor).

[¶ 8] In this particular case, for example, Statoil drilled the Williston 25-36 1-H well only after taking leases from the State of North Dakota and many of the approximately 80 individuals and entities with claims to the shore zone. Statoil then initiated this interpleader action to determine who owns the shore zone and where, exactly, the shore zone is located. Because of the location of the well's spacing unit—just south of the City of Williston at the western end of Lake Sakakawea—a substantial part of the spacing unit may be located within the shore zone. As a result, Statoil has been forced to hold a significant portion of the proceeds of production from the well in suspense pending resolution of this case. Thus, because of the dispute as to the ownership of the oil and gas in and under the shore zone, Statoil was forced to take two sets of leases for the same lands and initiate this lawsuit in an effort to determine which set of leases is valid. Those efforts increased the costs associated with Statoil's oil and gas exploration and production operations on the property. It has also delayed payment of royalties to the proper mineral owners.

II. The District Court Did Not Abuse its Discretion by Certifying the Question for Immediate Appeal and Entering a Partial Final Judgment.³

[¶ 9] The district court properly entered a partial final judgment, and certified the question of whether the State or the riparian landowners own the oil and gas in and under the shore zone for immediate appeal. This case presents exactly the type of “ ‘infrequent harsh case’ warranting the extraordinary remedy of an otherwise interlocutory appeal.” *Pifer v. McDermott*, 2012 ND 90, ¶ 8, 816 N.W.2d 88 (quoting *Bulman v. Hulstrand Constr. Co, Inc.*, 503 N.W.2d 240, 241 (N.D. 1993) (quoting *Gissel v. Kenmare Twp.*, 479 N.W.2d 876, 877 (N.D. 1992))) (one set of quotation marks removed). Had the district court refused to certify the question for immediate appeal, it would have run the risk of substantially increasing the time and expense required to resolve this case.

[¶ 10] Notably, determining the ownership of the shore zone minerals is purely a question of law. Although the case has a somewhat lengthy procedural history, no discovery has been exchanged. No witnesses have been deposed. By contrast, the remaining issues—principally, the location of the relevant watermark—are fact intensive. Discovery will be exchanged, experts will be retained and deposed, surveys will be conducted, and testimony will be offered.

³ Statoil adopts the analysis of the relevant factors set forth in the Appellants Brief (Br. of Appellant’s at 14–19) and the district court’s Order (Appendix at 512–18), and writes separately only to emphasize the “prejudice” and “hardship” refusing to permit an immediate appeal would cause. *See Pifer v. McDermott*, 2012 ND 90, ¶ 8, 816 N.W.2d 88 (quoting *Citizens State Bank v. Symington*, 2010 ND 56, ¶ 9, 780 N.W.2d 676).

[¶ 11] All of the evidence to be offered will relate to the location of the relevant watermark. It would cause unreasonable hardship to force the parties to try the case without first confirming whether or not the district court chose the correct watermark. *Pifer*, 2012 ND 90, ¶ 8, 816 N.W.2d 88. It could also unreasonably delay the completion of this proceeding. The Court should take up the purely legal question now to ensure that when the case is tried it is tried with reference to the correct watermark. Accordingly, the district court's Rule 54(b) certification should be affirmed.

CONCLUSION

[¶ 12] For the reasons set forth above, Statoil respectfully requests that the Court accept the district court's Rule 54(b) certification, and enter a judgment that provides a definitive answer as to whether the State of North Dakota or the riparian landowners hold title to the oil, gas, and other minerals in and under the shore zone of navigable waterways in North Dakota.

DATED this 20th day of June, 2013.

FREDRIKSON & BYRON, P.A.

/s/ Lawrence Bender

Lawrence Bender, ND Bar #03908

Michael D. Schoepf, ND Bar #07076

200 North 3rd Street, Suite 150

P. O. Box 1855

Bismarck, ND 58502-1855

Phone: (701) 221-4020

Attorneys for Plaintiff/Appellee

Statoil Oil & Gas LP

ADDENDUM

N.D. Const. of 1889, Schedule, § 2 (1889)

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.

N.D.C.C. § 38-08-01. Declaration of policy.

It is hereby declared to be in the public interest to foster, to encourage, and to promote the development, production, and utilization of natural resources of oil and gas in the state in such a manner as will prevent waste; to authorize and to provide for the operation and development of oil and gas properties in such a manner that a greater ultimate recovery of oil and gas be had and that the correlative rights of all owners be fully protected; and to encourage and to authorize cycling, recycling, pressure maintenance, and secondary recovery operations in order that the greatest possible economic recovery of oil and gas be obtained within the state to the end that the landowners, the royalty owners, the producers, and the general public realize and enjoy the greatest possible good from these vital natural resources.

N.D.C.C. § 47-01-15. Banks and beds of streams - Boundary of ownership.

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.

N.D.C.C. § 47-16-39.1. Obligation to pay royalties - Breach.

The obligation arising under an oil and gas lease to pay oil or gas royalties to the mineral owner or the mineral owner's assignee, or to deliver oil or gas to a purchaser to the credit of the mineral owner or the mineral owner's assignee, or to pay the market value thereof is of the essence in the lease contract, and breach of the obligation may constitute grounds for the cancellation of the lease in cases where it is determined by the court that the equities of the case require cancellation. If the operator under an oil and gas lease fails to pay oil or gas royalties to the mineral owner or the mineral owner's assignee within one hundred fifty days after oil or gas produced under the lease is marketed and cancellation of the lease is not sought or if the operator fails to pay oil or gas royalties to an unleased mineral interest owner within one hundred fifty days after oil or gas production is marketed from the unleased mineral interest owner's mineral interest, the operator thereafter shall pay interest on the unpaid royalties, without the requirement that the mineral owner or the mineral owner's assignee request the payment of interest, at the rate of eighteen percent per annum until paid, except that the commissioner of university and school lands may negotiate a rate to be no less than the prime rate as established by the Bank of North Dakota plus four percent per annum with a maximum of eighteen percent per annum, for unpaid

royalties on minerals owned or managed by the board of university and school lands. Provided, that the operator may remit semiannually to a person entitled to royalties the aggregate of six months' monthly royalties where the aggregate amount is less than fifty dollars. The district court for the county in which the oil or gas well is located has jurisdiction over all proceedings brought pursuant to this section. The prevailing party in any proceeding brought pursuant to this section is entitled to recover any court costs and reasonable attorney's fees. This section does not apply when mineral owners or their assignees elect to take their proportionate share of production in kind, in the event of a dispute of title existing that would affect distribution of royalty payments, or when a mineral owner cannot be located after reasonable inquiry by the operator; however, the operator shall make royalty payments to those mineral owners whose title and ownership interest is not in dispute.

Annotated Revised Codes of the Territory of Dakota, Civil Code § 266 (1885)

Banks and beds of streams. 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.

N.D.R.Civ.P. 54(b) Judgment on Multiple Claims or Involving Multiple Parties.

If an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim, or if multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

CERTIFICATE OF SERVICE

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

I hereby certify that on June 20th, 2013, I electronically filed with the Clerk of the North Dakota Supreme Court the foregoing Brief of Plaintiff/Appellee Statoil Oil & Gas LP and served the same electronically as follows:

Jan M. Conlin	jmconlin@rkmc.com
Richard B. Allyn	rballyn@rkmc.com
Sara A. Poulos	sapoulos@rkmc.com
Aaron R. Fahrenkrog	arfahrenkrog@rkmc.com
Andrew J. Pieper	ajpieper@rkmc.com
David Bossart	david@bossartlaw.com
Malcolm H. Brown	mhblaw@btinet.net
Charles M. Carvell	cmc@pearce-durick.com
Thomas Conlin	tom@conlinlawfirm.com
Randall (R.T.) Cox	rt@coxhorning.com
Peter H. Furuseth	pete@furusethlaw.com
Greg W. Hennessy	integrated@nemontel.net
Hope L. Hogan	hhogan@nd.gov
Dennis E. Johnson	dennis@dakotalawdogs.com
Scott M. Knudsvig	sknudsvig@srt.com
Carolyn A. Kvislen	ckvislen@nd.gov
Charles Neff	cneff@nefflawnd.com
Kent A. Reiersen	kreiersen@crowleyfleck.com
Jennifer L. Verleger	jverleger@nd.gov
Marlyce A. Wilder	marlycew@co.williams.nd.us
Gary Schwab	gschwab@heyloyster.com
Shirly Schwab	rschwab@aol.com
Lois Zeigler	loiszg123@comcast.net

John W. Morrison

jmorrison@crowleyfleck.com

Harry Malcolm Pippin

malcolm@pippinlawfirm.com

Kent Rockstad

kent.rockstad@usdoj.gov

and by U.S. Mail as follows:

Jerome Bakke

Curtis Bakke and Sherrie Dee Bakke

1314 Cottonwood St

8936 S. Quail Run Drive

Grand Forks, ND 58201-5520

Sandy, UT 84093-1710

/s/ Lawrence Bender

LAWRENCE BENDER

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