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No. 20130110

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**State of North Dakota**  
**In the Supreme Court**

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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.

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APPEAL FROM FINAL JUDGMENT IN THE DISTRICT COURT  
NORTHWEST JUDICIAL DISTRICT  
Williams County Case No. 53-2012-CV-00213  
Honorable David W. Nelson

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**State of North Dakota**  
**In the Supreme Court**

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Brigham Oil & Gas, L.P. n/k/a Statoil 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,

and 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, 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, 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 JUDGMENT IN THE DISTRICT COURT  
NORTHWEST JUDICIAL DISTRICT  
Williams County Case No. 53-2011-CV-00495  
Honorable David W. Nelson

---

**Joint Reply Brief of the Reep Plaintiffs-Appellants  
and Certain Brigham Defendants-Appellants**

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[¶1] As this Court held nearly twenty years ago, under § 47-01-15 riparian grantees receive their “full interest” in the shore zone, subject to the State’s obligations under the public trust doctrine. This doctrine protects public uses like navigation and fishing but leaves intact for the riparian owner proprietary privileges such as the right to use the land for private purposes.

[¶2] The State ignores these simple key holdings from Mills and instead asks this Court to:

- eviscerate riparian landowner rights recognized by statute and at common law for decades;
- render § 47-01-15 meaningless;
- overlook Mills’ holding that riparian owners take more than mere access to the water and have more than riparian rights;
- disregard Mills’ discussion of Flisrand v. Madson, 152 N.W. 796, 801 (S.D. 1915) and ignore completely its analysis of State v. Korrer, 148 N.W. 617, 623 (Minn. 1914); and
- make North Dakota an outlier among low watermark states, with a holding contrary to the well-reasoned decisions of neighboring jurisdictions.

[¶3] The State’s brief is astonishing not only for what it says, but for what it does not say. The State has no answer for what this Court meant when it held that under § 47-01-15 riparian owners take more than mere access to the water and have more than riparian rights. Nor does the State attempt to explain why this Court found the Korrer case instructive.

[¶4] On these salient points, despite receiving a word count extension, the State is simply silent.

**I. [¶5] The State Has Long Recognized Riparian Ownership of Shore Zone Minerals.**

[¶6] The State opens its brief with a self-serving “agency interpretation” of § 47-01-15. This interpretation is irrelevant in light of Mills, as well as inappropriate, given that there was no discovery below – at the State’s insistence – and thus no opportunity to challenge the State’s affiants. But, most significantly, the State’s claim is inaccurate on its face.

[¶7] Contrary to the State’s current post hoc allegations, for nearly 70 years after § 47-01-15 was enacted, the State did not assert any interest in the shore zone. Instead, it actively participated in cases that expressly limited its ownership to the ordinary low water mark. For example, in State v. Loy, this Court noted “[t]he State of North Dakota recognizes that the boundaries of lands bordering on navigable streams extend to the low water mark.” 74 N.D. 182, 190, 20 N.W.2d 668, 671 (1945). Ten years later,

this Court again articulated, with the State as Intervenor, “the rule that the owner of lands riparian to a navigable stream owns title to the low water mark.” Hogue v. Bourgois, 71 N.W.2d 47, 52 (N.D. 1955).<sup>1</sup> Consistent with this acquiescence by the State, with respect to the Reeps’ mineral interests, the State has a long history of levying estate taxes on as though these minerals were privately, not publicly, owned. Just four years ago, the Attorney General recognized the uncertainty regarding the State’s assertion of title to the shore zone: “[t]here is some question about the exact nature of the state’s title in the area between the ordinary high watermark and the low watermark, an area known as the ‘shore zone.’”

N.D. Atty. Gen. Op. 2009-L-18 at 2.

## II. [¶8] The State’s Interpretation of § 47-01-15 Renders the Statute Meaningless.

[¶9] The State concedes that Mills held § 47-01-15 is a rule of construction that “governs conveyances along North Dakota’s navigable waters” and provides the “presumption that the grantor conveys all that he owns to the low watermark.” (St. Br. ¶51). But under the State’s view, only the State – and not private grantors – “owns to the low watermark.”

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<sup>1</sup> Although Mills declared these statements to be dicta, they reflect that the State did not assert an interest to the high water mark in these cases, and instead assented to the low water mark as the boundary of its ownership.

So, despite the State's rabbit trail discussion of accretions and the "strip and gore" doctrine, what the State is really saying is § 47-01-15 presumes that the grantor has conveyed to the grantee what he owns to the low watermark – which, according to the State, is nothing, because only the State has rights to the shore zone.

[¶10] That is not what Mills held, and indeed, such an interpretation renders § 47-01-15 meaningless. Meier v. N.D. Dep't of Human Servs., 2012 ND 134, ¶ 10, 818 N.W.2d 774 ("We construe statutes in a way which does not render them meaningless because we presume the Legislature acts with purpose and does not perform idle acts."). If private landowners have no rights "to the low watermark" (other than, presumably, common law access rights) then § 47-01-15 would be superfluous.

### **III. [¶11] The State Disregards Mills' Discussion of the Common Law and Relies Instead upon a Distorted View of the Public Trust Doctrine.**

[¶12] Mills looked not only to § 47-01-15, but also to the common law as a basis for its holding. The State does not even make an attempt to reconcile the common law with its position. Its brief is devoid of any mention of State v. Korrer, in which the Minnesota Supreme Court held that under the common law the riparian owner has "proprietary privileges" in the shore zone, among which is the right to use land for

private purposes, including mining, “qualified by the right of the public to use the same for purpose of navigation or other public purpose.” 148 N.W. at 623 (Minn. 1914). Mills cited and relied upon Korrer. The State ignored the case altogether. Mills’ holding would stand on the independent basis of the common law as applied in Korrer, even without § 47-01-15.

[¶13] As in Minnesota and surrounding states, the public trust doctrine is a well-established part of North Dakota’s jurisprudence that recognizes that the reason the State holds title to navigable riverbeds is “to foster the public’s right of navigation” and to protect specific public uses, such as “bathing, swimming, recreation and fishing[.]” J.P. Furlong Enters., Inc. v. Sun Exploration & Production Co., 423 N.W.2d 130, 140 (N.D. 1988). The State employs desperate scare tactics warning this Court that if it rules that riparian owners have shore zone mineral interests, such a holding will compromise the State’s ability to protect “fishing, boating, hunting, and other kinds of recreation.” (St. Br. ¶85). But the right to protect such public uses in the shore zone remains squarely within the State’s purview under the public trust doctrine, and no one has ever argued to the contrary. Of course, the State by its own conduct has conceded that extracting oil does not impact the public’s use of the shore zone, since the State itself has permitted extraction from the shore zone.

[¶14] This case will not interfere with the public's rights to use the 'treasures' that are the state's navigable waterways. This case is about who has the rights to the minerals far beneath the surface – whether the rights to extract subsurface minerals are part of the rights riparian grantees such as Plaintiffs received as part of their “full interest in the shore zone” – an interest that “necessarily precludes the State's claim of absolute ownership to the high watermark.” Mills, 523 N.W.2d at 543. As Mills noted, through the citations of Flisrand and Korrer, the public trust doctrine protects public uses such as “navigating, boating, fishing, fowling, and like public uses” but it leaves intact for the riparian owner “proprietary privileges, among which is the right to use the land for private purposes.” 523 N.W.2d at 543-44.

[¶15] Although a grantor cannot convey more than he owns, a state has authority to adopt a rule of construction providing that riparian conveyances include both the grantor's interest and the state's rights below the high water mark. Packer v. Bird, 137 U.S. 661, 669-71 (1891) (recognizing that state rule of construction can extend U.S. land patent to the low water mark, noting “whatever incidents or rights attach to the ownership of property conveyed by the [U.S.] government will be determined by the States” and states may “choose to resign to the riparian

proprietor rights which properly belong to them in their sovereign capacity”). That is precisely what North Dakota has done. By adopting § 47-01-15, North Dakota determined that riparian grants should be construed to provide the grantee a “full interest” in the shore zone – including both the grantor’s interest and State shore zone rights – subject always to the State’s obligations under the public trust and equal footing doctrines. Mills, 523 N.W.2d at 542-44.

#### **IV. [¶16] The Meaning of § 47-01-15 Did Not Change upon Statehood.**

[¶17] The meaning and effect of § 47-01-15 did not change upon statehood. Under § 47-01-15 and its predecessors, riparian conveyances are construed to include all shore zone rights the government has the power to allocate. Mills, 523 N.W.2d at 542-44. Dakota Territory did not have proprietary rights in the shore zone, but statehood conferred ownership of shore zone rights upon North Dakota under the equal footing doctrine. That change in ownership allowed the State to transfer additional rights to riparian owners under the predecessors to § 47-01-15. Shore zone ownership changed; the law remained the same.

[¶18] Mills already considered and applied the principles of interpretation advocated by the State, including the requirement that

current statutes be construed as continuations of previous statutes.<sup>2</sup> 523 N.W.2d at 540-43. Mills addressed the authorities now cited again by the State. Id. (citing N.D.C.C. § 1-02-25; Sargent County v. Cooper, 29 N.D. 281, 150 N.W. 878 (1915); Wells County v. McHenry, 7 N.D. 246, 74 N.W. 241 (1898)). The State has not justified re-opening the precedent set by Mills on these issues.

**V. [¶19] The State Is Advocating that North Dakota Reject Well-Reasoned Law Followed by Its Neighbor States.**

[¶20] If this Court adopts the State’s reasoning and renders § 47-01-15 meaningless, North Dakota would be a true outlier – the only state with a contemporary “low water mark” statute on its books to hold that riparian owners (contrary to Mills) take nothing other than riparian rights. As noted in Plaintiffs’ opening brief, a number of states have statutes similar to § 47-01-15, such as South Dakota, Montana and California. Mills looked to the case law of these states in reaching the conclusion that under North Dakota’s statute, “a riparian owner ‘takes’ more than the mere right of access to the water.” 523 N.W.2d at 544. The State wants to dismiss certain of these cases – such as Flisrand – as “dicta” (despite their obvious relevance to Mills as well as to the issues before this Court). With respect

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<sup>2</sup> Thus, Mills already resolved the application of the anti-gift clause and other constitutional provisions.



to California, the State attempts to distinguish California v. Superior Court (Lyon), 625 P.2d 239, 247-48 (Cal. 1981). There, however, the California Supreme Court considered that state's low water mark statute (nearly identical to § 47-01-15) and found that the state's initial and long-standing acquiescence to the low water mark, before later changing position, supported an interpretation that riparian owners owned the shore zone. Lyon thus supports reversal of the trial court's decision, since – as noted above – like California, the State's acquiescence in cases such as Loy and Hogue supports riparian ownership of shore zone mineral rights.

[¶21] Instead of following the well-reasoned case law of Montana, South Dakota and Minnesota – as Mills did – the State once more suggests, in a roundabout way, that this Court may want to follow instead an old line of Oklahoma cases that held one hundred years ago that Oklahoma's low water mark statute was void. (St. Br. ¶¶52-58). This Court rejected those arguments twenty years ago. As a rule for interpreting conveyances of riparian land, § 47-01-15 is not “void” for any of the reasons outlined in the line of federal Oklahoma cases discussed by the State. Mills, 523 N.W.2d at 542, n.6. There is no basis to alter the careful analysis and holding from this Court's decision in Mills.

Dated: July 10, 2013

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*Appellant Sherrie Dee Bakke (pro se)* as  
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### **Certification of Compliance on Word Count**

[¶22] The above-signed counsel certify that this brief complied with Rule 32(a)(7)(A); the word count is 1,994.

### **Certification of Word Processing Program**

[¶23] The above-signed counsel certify that the word processing program used to prepare this brief is Microsoft Word 2010.

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

---

Stanford A. Reep and Amy Reep, the Stockman Family 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,

**Supreme Court No. 20130110**

Plaintiffs and 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 and Appellees

---

Brigham Oil & Gas, L.P. n/k/a Statoil Oil & Gas, L.P.,

**Supreme Court No. 20130111**

Plaintiff and Appellee

v.

North Dakota Board of University & School Lands; City of Williston; Williams County, North Dakota; Geraldine Loder; Virgil A. Bloechl; Theresa 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; Goergia Carol Hausauer; Margaret Cecelia Gott; Marlyne Myrtle Loomis;

Lesley Louise Neary; Virginia A. Venti; Eileen Eugenia Ehrlar; 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; Kerry P. Hoffman; 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; Beverly Sundet; Ricky Vance; Linda Kirkland; First National Bank and Trust Co. of Williston, Trustee of Hilda Noe Grandchildren Trust; Lois C. Zeigler, Trustee under the Last Will and Testament of Frederick H. Zeigler, Deceased; Shirley L. Schwab Trustee under trust Agreement dated March 5, 1999; Gary S. Schwab; American State Bank & Trust Company of Williston, Trustee of Frank W. Moran and Mary Joan Moran Family Minerals Trust; American State Bank and Trust Company of Williston, Trustee of the Harris and Louise Anderson Family Minerals Trust U/A dated February 10, 2006; United States of America; Leroy Clapper; Energy One, LLC; Powers Energy Corporation; GeoFocus Corporation; Golden Eye Resources, LLC; Golden Eye Royalties, LLC; Upstream Innovations, Inc.; The Dublin Company; Petroleum Land Services; Huston Energy Corporation; Harvest Oil Company, LLC; 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

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,

Appellants

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**PROOF OF SERVICE**

I hereby certify that on July 10, 2013, the Joint Reply Brief of the Reep Plaintiffs-Appellants and Certain Brigham Defendants-Appellants was electronically filed with the Clerk of the North Dakota Supreme Court via e-mail to SupClerkofCourt@ndcourts.gov, pursuant to Rule 25 of the North Dakota Rules of Appellate Procedure and Supreme Court Administrative Order 14. A copy of these documents was sent via e-mail to the following:

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DATED: July 10, 2013

By: /s/ Aaron R. Fahrenkrog  
Aaron R. Fahrenkrog