

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.

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

---

**Joint Petition for Rehearing of the Reep Plaintiffs-Appellants  
and Certain Brigham Defendants-Appellants**

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## Table of Contents

	<b><u>Page No.</u></b>
Table of Authorities.....	vii
	<b><u>Para. No.</u></b>
Argument.....	1
Conclusion.....	14
Certification of Compliance on Word Count .....	15
Certification of Word Processing Program .....	16
Certificate of Service.....	17

## Table of Authorities

	<u>Para. No.</u>
<b>Cases</b>	
<u>Gardner v. Green</u> , 67 N.D. 268, 271 N.W. 775 .....	11
<u>Hogue v. Bourgois</u> , 71 N.W.2d 47 (N.D. 1955) .....	11
<u>Oberly v. Carpenter</u> , 67 N.D. 495, 274 N.W. 509 .....	11
<u>Solberg v. State Treasurer</u> , 78 N.D. 806, 53 N.W.2d 49 (1952) .....	5
<u>State ex rel. Sprynczynatyk v. Mills</u> , 523 N.W.2d 537 (N.D. 1994) .....	passim
<u>State v. Korrer</u> , 148 N.W. 617 (Minn. 1914) .....	8, 9, 10
<u>State v. Loy</u> , 74 N.D. 182, 20 N.W.2d 668 (1945) .....	11
<b>Statutes</b>	
N.D.C.C. § 47-01-15 .....	4, 5, 6, 10
<b>Constitutional Provisions</b>	
MINN. CONST. ART. XI, § 2 .....	8

## ARGUMENT

[¶1] The Court’s holding in this matter contradicts its holding in State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D.1994). Mills held that “no interest in the shore zone is absolute” and “[b]oth parties [a riparian landowner and the State] have correlative interests in the shore zone.” 523 N.W.2d 537, 544 (N.D. 1994). Indeed, the Court’s opinion here reconfirmed the Mills holding: “Mills stands for the proposition there is not absolute ownership of the shore zone.” Slip Op. at ¶13. Here, however, the Court held that the State owns an absolute interest in the shore zone unless it has expressly granted that interest:

We conclude N.D.C.C. § 47-01-15 does not convey or allocate the State’s equal footing interest in minerals under the shore zone, which the State owned at the moment of statehood in 1889, to upland landowners on navigable waters in North Dakota. Under the rule of construction for determining boundaries in N.D.C.C. § 47-01-15, however, if the State contractually grants or conveys parts of its equal footing interests to upland owners by deed, subject to the restrictions of the public trust doctrine, and except when the deed provides otherwise, the grantee takes the State’s full interest to the low watermark.”

Slip Op. at ¶26.

[¶2] The Court therefore has now held that the State holds absolute title to the shore zone except where it has granted a portion of its title to



upland owners. This conclusion cannot be reconciled with the Mills holding that the State does not hold absolute title to the shore zone. Mills did not limit its holding to the plaintiff in that case and instead set forth the law of North Dakota for all upland owners. 523 N.W.2d at 544 (stating “no interest in the shore zone is absolute” and describing the correlative rights shared by “a riparian owner” – not merely the plaintiff – and the State). Thus, the Mills holding controls this matter.

[¶3] The undersigned Reep Plaintiffs-Appellants and Brigham (n/k/a Statoi) Defendants-Appellants (together, “Petitioners”) therefore request that the Court grant rehearing of this matter. Petitioners base their request on the following points of law the Court has overlooked or misapprehended:

1. Under Mills, the State does not have absolute title to any portion of the shore zone. 523 N.W.2d at 544. The Court here concluded that the State has absolute title to the shore zone except those adjacent to riparian tracts it has expressly conveyed.
2. Under Mills, all riparian owners have correlative rights in the shore zone. Id. The Court here concluded that riparian

owners have no rights in the shore zone unless they took an express grant from the State.

3. Under Mills, North Dakota's anti-gift clause did not preclude the transfer of shore zone rights from the State to riparian owners even absent an express grant. The Court here concluded that the anti-gift clause prevented the transfer of shore zone rights from the State to riparian owners except where the State made an express grant.

[¶4] The Court here has explained the anti-gift analysis it applied in Mills and concluded that § 47-01-15 could not have allocated or granted State shore zone property interests to upland owners. Slip Op. at ¶24. That analysis, however, does not account for the full scope of the Mills holding. Mills applied the anti-gift analysis yet concluded that the State does not have absolute title to the shore zone and that riparian owners have correlative rights in the shore zone. 523 N.W.2d at 542-44. Under Mills, therefore, riparian owners have rights in the shore zone that are not subject to the anti-gift analysis the Court has applied here to § 47-01-15.

[¶5] The Court explained here that, upon statehood, North Dakota received absolute title to the shore zone. Slip Op. at ¶14. The Court further explained that a transfer of the State's property interest to an individual

would constitute a gift and therefore violate the anti-gift clause, citing Solberg v. State Treasurer. Slip Op. at ¶23. The Court's opinion provides no basis to distinguish a mineral interest from any other kind of property interest with respect to the application of the anti-gift clause. Mills also analyzed the anti-gift clause, including the Solberg case, as the Court recognized here. Slip Op. at ¶¶19-20, 23. But Mills concluded that the State did *not* have absolute title, and a riparian owner has correlative rights in the shore zone. 523 N.W.2d at 544. Therefore, a portion of the State's shore zone title transferred to riparian owners without violating the anti-gift clause, whether by application of § 47-01-15 or by some other mechanism. That is, the State began with absolute title, but it no longer has absolute title, and the anti-gift clause was not violated. Mills, 523 N.W.2d at 542-44.

[¶6] The Court's holding here does not reconcile or address this aspect of the Mills holding. Instead, its holding here conflicts with Mills by applying the anti-gift clause to find that the State has absolute title absent an express grant. Specifically, if this Court applies the holdings in Mills, the Court's holding here is in error for one or both of two reasons: either (1) the Court's anti-gift analysis here is incorrect because Mills concluded that under § 47-01-15, upland owners held interests in the shore zone that did not violate the anti-gift clause; or (2) Mills provides an alternate basis

other than § 47-01-15 under which riparian owners hold shore zone interests, and the Court has not addressed that alternate basis in its opinion.

[¶7] Petitioners therefore request that the Court grant rehearing to address the conflict between its holdings here and in Mills. Petitioners request that the Court determine whether upland owners have mineral rights in the shore zone under the correlative rights that, under Mills, are not precluded by an anti-gift analysis. Under the public trust framework articulated in Mills and analyzed in Petitioners' briefs here, those mineral rights belong to the upland owners and their transfer was not precluded by the anti-gift clause.

[¶8] The out-of-state authorities cited in Mills provide a basis for concluding that riparian owners have correlative rights in the shore zone despite North Dakota's anti-gift clause. State v. Korrer, a Minnesota case, held that a riparian owner has title to the shore zone, subject to the public trust. 148 N.W. 617, 623 (Minn. 1914). Minnesota does not have a low water mark statute like § 47-01-15. Korrer, therefore, defined riparian owners' shore zone rights under another basis: "established Minnesota law," as this Court recognized. Slip Op. at ¶25. This basis arises from Minnesota's courts, and not its legislature, and thus does not run afoul of

Minnesota's anti-gift clause, which is substantially similar to North Dakota's. MINN. CONST. ART. XI, § 2 ("The credit of the state shall not be given or loaned in aid of any individual . . .").

[¶9] Mills linked its holding to its discussion of Korrer. Following a quote from Korrer, Mills held that "no interest in the shore zone is absolute." 523 N.W.2d at 544. The Court's opinion here reaffirms that holding, a "principle" of North Dakota law: "[t]his Court cited those cases [including Korrer] to support the principle that the parties have correlative rights in the shore zone." Slip Op. at ¶25 (citing Mills at 543-44).

[¶10] If § 47-01-15 cannot have transferred any shore zone rights to riparian owners absent an express State grant, as the Court has expressed here, then the Mills holding must have rested upon another basis not subject to the anti-gift clause: common law as developed by this Court. This basis is consistent with the Court's citation of Korrer and reliance upon it for the holding in Mills. It also is consistent with the historical development of water-boundary law in North Dakota.

[¶11] In 1937, the cases of Gardner v. Green, 67 N.D. 268, 281, 271 N.W. 775, 782, and Oberly v. Carpenter, 67 N.D. 495, 501, 274 N.W. 509, 512, explained that upland owners owned down to the water line of the river – that is, the low water mark. In 1945, State v. Loy declared that "[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). In 1955, Hogue v. Bourgois again articulated “the rule that the owner of lands riparian to a navigable stream owns title to the low water mark.” 71 N.W.2d 47, 52 (N.D. 1955). This “rule” formed the basis for the ruling that “[t]he title of the State of North Dakota to lands below low water mark of a navigable stream is coextensive with the bed of the stream as it may exist from time to time.” Id.

[¶12] Mills declared “[a]ny statements in our prior decisions that ‘the owner of lands riparian to a navigable stream owns title to the low water mark’ are dicta.” 523 N.W.2d at 540. However, its holding – that a riparian owner has correlative rights in the shore zone to the low water mark – is consistent with these prior rulings. Mills clarified that upland owners do not have *absolute* title to the shore zone, but followed the decades-old precedent that upland owners have rights in the shore zone under North Dakota law.

[¶13] Whether under § 47-01-15 or under common law of North Dakota, Mills held that riparian owners hold correlative rights in the shore zone. 523 N.W.2d at 544. Those rights extend beyond “riparian rights.” Id. Those rights transferred from the State to the riparian owner without

violating the anti-gift clause. Id. at 542-43. Mills indicates that the scope of those rights extends to the rights that do not implicate the State's public trust obligations. As discussed in Petitioners' briefs in this matter, mineral rights do not implicate the State's public trust obligations and thus, under Mills, properly belong to riparian owners.

### CONCLUSION

[¶14] The Court's opinion in this matter conflicts with these holdings from Mills by holding that the State has absolute title to the shore zone absent an express grant to an upland owner. Petitioners therefore respectfully request that the Court grant rehearing of this matter to address the conflict between these holdings. Mineral interests are properly within those correlative rights owned by upland owners under Mills. Petitioners therefore request that, upon further consideration, the Court reverse the trial court's grant of summary judgment to the State and remand to the trial court for further proceedings.

Dated: January 9, 2014

Respectfully submitted,

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### **Certification of Compliance on Word Count**

[¶15] The above-signed counsel certify that this brief complied with Rule 32(a)(7)(A); the word count is 1,741.

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

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

## CERTIFICATE OF SERVICE

¶17 I hereby certify that a true and correct copy of the foregoing **JOINT PETITION FOR REHEARING OF THE REEP PLAINTIFFS-APPELLANTS AND CERTAIN BRIGHAM DEFENDANTS-APPELLANTS** was on the 9<sup>th</sup> day of January, 2014, served electronically to the following:

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