

No. 20130111

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

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Brigham Oil & Gas, L.P.,

Plaintiff,

v.

North Dakota Board of University and School Lands,

Appellee, and

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

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**Brief of the Appellants**

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### **[¶3] Issues Presented for Review**

- I. [¶4] Is the trial court's decision holding that riparian landowners do not own the minerals (or "any proprietary interest") between the ordinary high and low watermarks on North Dakota's navigable waterways contrary to this Court's decision in State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537 (N.D. 1994), which held that the State does *not* have absolute title to the shore zone but rather that riparian landowners have full shore zone interests, subject only to the State's obligations under the equal footing and public trust doctrines?
  
- II. [¶5] Does the State's interest in the "shore zone" between the ordinary high and low watermarks under the public trust and equal footing doctrines extend to mineral interests far beneath the ground, or does it instead extend only to those interests necessary to carry out the public's rights to navigation, fishing, swimming and related uses of the water and surface?
  
- III. [¶6] Did the trial court err in denying summary judgment to the owners of mineral interests between the ordinary high and low watermarks on North Dakota's navigable waterways?

- IV. [¶7] Did the trial court err in holding that the State of North Dakota – as part of its title to the beds of navigable waterways – owns the minerals in the area between the ordinary high and low watermarks along navigable waterways and that this public title excludes ownership and any proprietary interest by riparian landowners?
- V. [¶8] Did the trial court err in holding that riparian landowners do not have a proprietary interest or ownership interest in the areas between the ordinary high and low watermarks along navigable waterways?

## [¶9] Statement of the Case

[¶10] Plaintiff Brigham Oil & Gas L.P. (“Brigham”), the operator of wells on lands in Sections 25 and 36 in Township 154 North, Range 101 West, originally filed this interpleader action because of “a dispute as to who owns the mineral interests between the ordinary high water mark and ordinary low water mark of the Missouri River” in those sections. (Appendix (“App.”) at A042-A047). The dispute arose between riparian landowners, such as the Appellants City of Williston, Williams County, and many individuals and private entities, on one side, and the North Dakota Board of University and School Lands (“Land Board”) on the other side, from competing claims to minerals beneath the land in the area between the ordinary high and low watermarks along the Missouri River, commonly referred to as the “shore zone.” (Id.). Brigham suspended royalty payments for all those claiming an interest in those subject lands as a result of this dispute. (App. at A047). Brigham also requested, *inter alia*, that the riparian landowners and the Land Board interplead and state their claims; that the district court determine the claimants’ respective interests to the suspended funds; and that the district court discharge Brigham of all liabilities with respect to distribution of the suspended funds. (App. at A048).

¶11 On July 14, 2011, at the request of the United States government, which was then a party, this action was removed to the U.S. District Court for the District of North Dakota. The United States government was subsequently dismissed as a party, and on June 5, 2012, U.S. District Court Judge Daniel Hovland remanded this action back to the Northwest Judicial District, Williams County.

¶12 Upon remand, the district court consolidated this action with the case captioned Stanford Reep, et al. v. State of North Dakota, et al., N.D. Appeal No. 20130110, Williams County Case No. 53-2012-CV-00213, for the purposes of resolving the question of ownership of shore zone mineral interests presented by, for example, crossclaims against Defendant North Dakota Board of University and School Lands (“Land Board”) filed by Appellants City of Williston, Harvest Oil Company, LLC, First National Bank & Trust Co., American State Bank and Trust Company, Kerry Hoffman, Beverly Sundet, Ricky Vance, and Linda Kirkland. The City of Williston, for example, asserted a crossclaim against the Land Board, alleging “[t]he City is entitled to a decree quieting title in and to the mineral interests between the ordinary high water mark and the ordinary low water mark of the Missouri River on those lands the City owns, and



declaring the City's interests are superior to any interests claimed by Defendant North Dakota Board of University and School Lands." (App. at A084).

¶13 The Reep plaintiffs moved for partial summary judgment on Count I of their Amended Complaint, seeking a judgment declaring that the individual named plaintiffs own title to their recorded mineral interests in lands between the ordinary high watermark and ordinary low watermark and declaring that all upland mineral owners of record own title to minerals beneath lands in the shore zone along navigable waters within North Dakota. Several Brigham defendants – including the City of Williston, Williams County, Harvest Oil Company, LLC, First National Bank & Trust Co., American State Bank and Trust Company, Kerry Hoffman, Beverly Sundet, Ricky Vance, and Linda Kirkland – likewise submitted a Motion for Partial Summary Judgment Regarding Ownership of Mineral Interests in the Shore Zone, which adopted the briefing, documentation, and affidavit testimony submitted by the Reep plaintiffs in support of their partial summary judgment motion on the same issue. In addition, Defendants Upstream Innovations, Shirley Schwab Trust, Lois C.

Zeigler, and Gary Schwab submitted separate briefing for a Partial Summary Judgment motion on that issue.

[¶14] The Land Board responded with its own cross-motion, requesting the district court to find that the title held by the State of North Dakota in the shore zone (including the title to subsurface minerals) was absolute, in direct contravention to this Court’s opinion in Mills. As a result, the Land Board submitted, riparian landowners along navigable waterways in North Dakota hold no title to subsurface minerals in the shore zone.

[¶15] On January 29, 2013, the district court issued a brief Order for Partial Summary Judgment (“January 29 Order”) in favor of the Land Board and the State, which addressed the motions and cross-motions in both the Brigham and Reep matters. The only basis provided by the district court for its ruling was its conclusion that “it is the State of North Dakota – as part of its title to the beds of navigable waterways – that owns the minerals in the area between the ordinary high and low watermarks on these waterways, and that this public title excludes ownership and any proprietary interest by riparian landowners.” (App. at A510).

[¶16] Following the district court’s order for partial summary judgment, the City, County, and private riparian landowners who had

moved for summary judgment against the Land Board, and Plaintiff Brigham Oil, filed a Joint Motion to Enter Partial Final Judgment Pursuant to N.D. Rule 54(b). On April 2, 2013, the district court filed its order granting the joint motion and its partial final judgment and Rule 54(b) certification. (App. at A512-A518). The riparian landowners filed a Joint Notice of Appeal on April 11, 2013. (App. at A520-A522). On its own motion on April 18, 2013, this Court consolidated this appeal with the appeal in Reep et al. v. State of North Dakota et al., N.D. Appeal No. 20130110, Williams County Case No. 53-2012-CV-00213.

### **[¶17] Statement of Relevant Facts**

[¶18] This interpleader action arose out of competing claims to mineral interests in Sections 25 and 36 in Township 154 North, Range 101 West, which include land in the shore zone. (App. at A042-A047). The Appellants – “riparian landowners” including the City of Williston (“City”), Williams County (“County”), individuals, and private entities – claim ownership of shore zone mineral interests in the sections at issue. (App. at A042-A046; see App. at A049; A051; A053; A055; A062-A063; A081-A082; A087; A433; A455; A477; A486). Conversely, the Land Board has claimed ownership of all minerals below the ordinary high water mark in the sections at issue, over and above its own recorded ownership of certain state lands. (App. at A058). Brigham, which operates wells on those sections, suspended royalty payments to all of the affected mineral interest owners and filed this action in order to obtain judicial determination of who is entitled to those payments. (App. at A047).

[¶19] The dispute that precipitated Brigham’s decision to file this interpleader action resulted from the Land Board’s leasing of minerals in the shore zone that belong to the City, County, and private riparian landowners. (App. at A047; see, e.g., App. at A083-A084; A108-A112; A457-A458). The Land Board’s scheme ultimately caused the interruption

in royalty payments to the rightful shore zone mineral interest owners – the riparian landowners – and an unlawful taking of the riparian landowners’ interests. (App. at A047; see, e.g., A083-A084; App. at A108-A112; A457-A458).

## [¶20] Arguments

### I. [¶21] The district court did not abuse its discretion in granting Rule 54(B) certification.

[¶22] Under Rule 54(b) of the North Dakota Rules of Civil Procedure, a district court may enter final judgment on one but fewer than all claims in pending litigation if it “expressly determines that there is no just reason for delay.” When considering a motion for Rule 54(b) certification, a district court must “weigh the policy against piecemeal appeals with whatever exigencies the case may present . . . .” Peterson v. Zerr, 443 N.W.2d 293, 297 (N.D. 1989). A district court may also consider several factors in making its determination, including the relationship between adjudicated and unadjudicated claims, and delay, economic considerations, and expenses.<sup>1</sup>

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<sup>1</sup> The factors that district courts consider when certifying an issue for immediate appeal include: “(1) the relationship between the adjudicated and unadjudicated claims; (2) the possibility that the need for review might or might not be mooted by future developments in the district court; (3) the possibility that the reviewing court might be obliged to consider the same issue a second time; (4) the presence or absence of a claim or counterclaim which could result in setoff against the judgment sought to be made final; [and] (5) miscellaneous factors such as delay, economic and solvency considerations, shortening the time of trial, frivolity of competing claims, expense, and the like.” Citizens State Bank-Midwest v. Symington, 2010 ND 56, ¶ 9, 780 N.W.2d 676, 681 (internal citation omitted).

[¶23] Here, the district court entered an Order Granting Joint Motion to Enter Partial Final Judgment and Rule 54(b) Certification, finding that “this matter presents one of those unique issues that will result in infrequent and harsh consequences – for the parties, for the Court, and for many others across North Dakota – without immediate review by the North Dakota Supreme Court.” (App. at A516-A517). The district court’s findings, as well as this Court’s prior case law, demonstrate that the district court did not abuse its discretion<sup>2</sup> in certifying the issue of ownership of shore zone mineral interests for appeal.

**A. [¶24] This Court accepted Rule 54(b) certification in a similar case involving a similar issue.**

[¶25] This Court has previously accepted review from a Rule 54(b) certification in a case involving a similar dispute over ownership of the shore zone. In State ex rel. Sprynczynatyk v. Mills, as in this matter, the State litigated title to the shore zone, and the Court accepted review under Rule 54(b). Mills, 523 N.W.2d 537, 539 (N.D. 1994). Just as in this matter, once the district court addressed the question of title to the shore zone, the

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<sup>2</sup> A district court’s Rule 54(b) certification is reviewed under the abuse of discretion standard, and “a district court abuses its discretion if it acts in an unreasonable, arbitrary, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law.” Citizens State Bank-Midwest, 2010 ND 56, ¶ 8, 780 N.W.2d at 680-81.

adjudication of remaining issues depended on this Court's review of the threshold title issue. After initial appellate review of that issue, the parties litigated the remaining issues in the district court. See State ex rel. Sprynczynatyk v. Mills, 1999 ND 75, 592 N.W.2d 591.

**B. [¶26] The district court found that factors such as delay, economic considerations, and expenses counsel strongly in favor of immediate review.**

[¶27] Further, the district court recognized that factors such as delay, economic considerations, and expenses justified immediate appeal in this instance. First, the district court found that the issue of ownership of shore zone mineral interests is a matter of statewide importance, and “[b]ecause of conflicting assertions of title to mineral interests in the shore zone, the decision-making and operations of private mineral owners – and mineral owners similarly situated to them – and the Land Board, as well as oil and gas companies, have been complicated.” (App. at A514). As such, “[a]llowing uncertainty to continue now will negatively impact operations in the oil patch.” (Id.). Indeed, in remanding this matter, the United States District Court for the District of North Dakota recognized the need for certainty in determining ownership of shore zone mineral interests.<sup>3</sup> (Id.).

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<sup>3</sup> The United States District Court found: “The dispute presents important and unsettled questions of law which potentially impact numerous riparian landowners throughout North Dakota. Similar lawsuits have been



[¶28] Second, Brigham named about 80 defendants in its interpleader complaint because it does not know who is entitled to receive royalties based on the competing claims to shore zone mineral interests. (App. at A042-A047). Based on the district court’s January 29 Order, the relief sought by Brigham would require a delineation of the rights owned by each of those defendants to the ordinary high watermark. (App. at A 514-A515). But that delineation “could be rendered moot . . . if the January 29 Order is reversed,” and the low watermark is determined to be the operative boundary. (Id.).

[¶29] In addition, to litigate the location of the ordinary high water mark “will require all parties to commit significant expenditures of time and money to gather, interpret, and present data and information on soil characteristics, vegetation, land elevations, water flows, aerial photography, and geomorphology.” (App. at A516). But if this Court later holds that the low water mark is the operative boundary, that fact discovery and expert analysis will need to be reopened and redone. (Id.).

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filed in other state district courts, and remanding the case promotes certainty and uniformity in the interpretation of state law.” Brigham Oil & Gas, L.P. v. N.D. Board of Univ. & School Lands, No. 4:11-cv-058, Dkt. #99 (D.N.D. June 5, 2012).

[¶30] As the district court found, these factors demonstrate delay and expense related to an issue that – if reversed by this Court – would result in a harsh prejudice upon the parties, and counsel strongly in favor of certification under Rule 54(b).

**C. [¶31] The district court found there is a close relationship between the adjudicated and unadjudicated claims.**

[¶32] The district court also found “a strong relationship between the adjudicated claim – *e.g.* Count I of Mr. Hoffman’s crossclaim against the Land Board – and the unadjudicated claims – quiet-title crossclaims filed against the Land Board by numerous Defendants – that counsels toward entry of partial judgment and immediate appeal.” (App. at A515). As noted above, if the issue of ownership of shore zone mineral interests is not decided with finality by this Court at this time, the City, County, and private riparian landowners will proceed to litigate their quiet-title crossclaims by delineating the ordinary high watermark, requiring extensive fact and expert discovery, as well as significant judicial resources. (App. at A516). If this Court later reverses the district court, “[t]he parties will need to reassess the property delineation of the low watermark . . . .” (App. at A515). As a result, the adjudicated issue presented here – whether the high or low watermark is the operative boundary for shore zone mineral interests – is directly tied to the

unadjudicated interpleader action and quiet-title crossclaims. (App. at A515).

¶33 Therefore, for all these reasons, the riparian landowners respectfully request that the Court find that the district court did not abuse its discretion in issuing its Rule 54(b) certification and accept review of the question presented here.

**II. ¶34 The riparian landowners incorporate by reference the Reep Appellants' arguments.**

¶35 The City, County, and private riparian landowners hereby incorporate, pursuant to N.D.R.App.P. 28(j), the arguments and authorities cited in the Brief of the Appellants in Reep v. State of North Dakota, North Dakota Appeal No. 20130110. For all the reasons set forth in the Brief of the Appellants in Reep v. State of North Dakota, the riparian landowners request that this Court reverse the trial court's grant of partial summary judgment to the State and to remand to the trial court with a direction that judgment instead be entered for the riparian landowners and for further proceedings in accordance therein.

[¶36] Dated this 21st day of May, 2013.

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**[¶37] Certificate of Compliance on Word Count**

[¶38] The above-signed counsel certify that this brief complies with N.D.R.App.P. 32(a)(7)(A) and 32(a)(7)(C). The word count for arguments incorporated by reference in its brief pursuant to N.D.R.App.P. 28(j) is 6,284. The word count for the additional words in this brief is 1,550 words. Therefore, for purposes of N.D.R.App. P. 32(a)(7)(A), the total count of words in this brief and words incorporated by reference is 7,834 words. For purposes of N.D. R. App. P. 32(a)(7)(C), the word count for arguments on the appropriateness of N.C.R. Civ. P. 54(b) certification is 1,223 words.

**[¶39] Certificate of Word Processing Program**

[¶40] The above-signed counsel certify that the word processing program is Microsoft Word 2010.

**[¶41] Request for Oral Argument**

[¶42] On account of the statewide importance of the issues presented in this appeal, the Appellants request that oral arguments be permitted in this case, pursuant to Rule 34 of the North Dakota Rules of Appellate Procedure.

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

---

Brigham Oil & Gas, L.P.,

**Supreme Court No. 20130111**

Plaintiff,

vs.

North Dakota Board of University and School  
Lands,

Appellee, and

Kerry Hoffman, City of Williston, Williams  
County, Harvest Oil Company, LLC, Beverly  
Sundet, Ricky Vance, Linda Kirkland, First  
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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  
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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,

**CERTIFICATE OF SERVICE**

Appellants.

---

On May 21, 2013, the Brief of the Appellants was electronically filed with the Clerk of the North Dakota Supreme Court via e-mail from Sara A. Poulos to SupClerkofCourt@ndcourts.gov, pursuant to Rule 25 of the North Dakota Rules of Appellate Procedure and Supreme Court Administrative Order 14, and sent by Sara A. Poulos via e-mail to the following:

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On May 21, 2013, a copy of this document was sent by Andrew J. Pieper via e-mail to the following:

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On May 21, 2013, a copy of this Certificate of Service was electronically filed with the Clerk of the North Dakota Supreme Court via e-mail from Andrew J. Pieper to SupClerkofCourt@ndcourts.gov, and sent by Andrew J. Pieper via e-mail to all of the above-identified recipients.

DATED: May 21, 2013

By: /s/ Sara A. Poulos  
Sara A. Poulos

By: /s/ Andrew J. Pieper  
Andrew J. Pieper

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

---

Brigham Oil & Gas, L.P.,

Supreme Court No. 20130111

Plaintiff,

vs.

North Dakota Board of University and School  
Lands,

Appellee, and

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,

**CERTIFICATE OF SERVICE**

Appellants.

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I hereby certify that on May 28, 2013, a copy of the Appendix was sent via e-mail  
to the following:

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**Malcolm H. Brown**  
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DATED: May 28, 2013

By: /s/ Andrew J. Pieper  
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