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Reep v. State, 2013 841 N.W.2d 664 (N.D. 2013)

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duties, rights, or procedures. Further, the APA defines an interested person as one who is or could be adversely affected in a legally cognizable way. Justice Connolly found both the NRDs and Higgins to have alleged sufficient facts to show that they would be adversely affected by DNR's approval of the NPPD application. Thus, both the NRDs and Higgins have standing.

Sarah Cassinis

NORTH DAKOTA

Reep v. State, 2013 841 N.W.2d 664 (N.D. 2013) (holding the anti-gift clause of North Dakota's constitution precludes construing a state statute as a grant of the State's equal footing mineral interests under the shore zone to private upland landowners).

Eleven named owners of land next to navigable waters in North Dakota ("upland owners") sued the State of North Dakota ("State"), seeking declaratory judgment that they, not the State, owned the minerals under the shore zone. The landowners appealed to the Supreme Court of North Dakota ("Court") from the district court's grant of summary judgment in favor of the State.

When North Dakota joined the Union in 1889, the equal footing doctrine conferred onto the State constitutional rights to the land and mineral interests under its navigable waters from high watermark to high watermark. Although this conferral included the right to allocate its property interests, the equal footing doctrine required North Dakota, by virtue of its sovereignty, to hold its shore zone interests in trust for the public. The anti-gift clause found in N.D. Const. art. X, § 18 further protected the public trust by precluding the State from gifting its mineral interests to any private entity.

At issue in this case was N.D.C.C. § 47-01-15, which provides that private landowners next to navigable waters "take to the edge of the lake or stream at low watermark."

The upland owners argued the district court's holding was contrary to the Court's decision in *State ex rel. Sprynczynatyk v. Mills*, which they construed as holding upland owners next to navigable waters have full interests in the shore zone under N.D.C.C. § 47-01-15. The upland owners further contended the State's public trust and equal footing obligations did not relate to the proprietary privileges of ownership of subsurface mineral interests under the shore zone. The upland owners further contended that the statute did not violate the anti-gift clause.

Conversely, the State argued that its rights to shore zone mineral interests extended from high watermark to high watermark under the equal footing doctrine. The State claimed N.D.C.C. § 47-01-15 was a rule for construction, clarifying the extent of a grantor's conveyance to the grantee, rather than granting public mineral interests to private entities. The State further contended that a construction of the statute as a grant of the mineral interests to private entities would violate the equal footing doctrine and the anti-gift clause of N.D. Const. art. X, § 18.

The Court first examined *Mills* to determine whether N.D.C.C. § 47-01-15 is, as the upland owners contended, an absolute grant of shore zone interests to private landowners next to navigable waters. In so doing, it reiterated the statutory interpretation in *Mills*, wherein the Court determined the word “takes” in N.D.C.C. § 47-01-15 was ambiguous statutory language for a rule of construction, and not a grant of ownership. Examining the more specific use of the word “ownership” in *Champlain v. Valentine*, coupled with the introductory clause in N.D.C.C. § 47-01-15, the Court found a legislative intent that the statute does not grant a riparian landowner absolute ownership of the shore zone. Rather, the Court agreed with the district court that N.D.C.C. § 47-01-15 is a rule of construction for determining the boundary for grants of riparian land. The Court emphasized that its construction avoided an interpretation that would grant a private party a gift in violation of the state constitution’s anti-gift clause.

Having concluded that the upland owners’ reliance on *Mills* was misplaced, the Court turned to the law governing the State’s ownership of mineral interests under the shore zone. Examining the public trust doctrine, the Court acknowledged a newly admitted state’s power to allocate its mineral interests but emphasized that power as subject to the public trust doctrine. The Court discussed some states’ allocation of ownership of the shore zone to the upland owner to the ordinary low watermark, and other states’ decisions to extend an upland owner’s title only to the ordinary high watermark. The State in this case claimed its mineral interests extended to the ordinary high watermark under the equal footing doctrine, and that State law thereafter governed its ownership, including the anti-gift clause of N.D. Const. art. X, § 18.

The Court turned next to the adoption of the anti-gift clause in 1889 and its development through subsequent case law. It determined that unlike previous cases, this case did not raise an issue about the State engaging in an industry, enterprise, or business. The Court proceeded to examine a holding in *Arizona Ctr. For Law v. Hassell*, which determined statutory provisions substantially relinquishing Arizona’s equal footing interest in navigable riverbeds violated Arizona’s anti-gift clause. It also cited *Solberg v. State Treasurer*, which held a statute directing the State to release a reserved mineral interest to a prior owner violated the anti-gift clause because the statute had the effect of transferring State property as a gift.

The Court found that the precedent in *Hassell* and *Solberg* favors a determination that N.D.C.C. § 47-01-15 did not allocate the State’s equal footing mineral interests in the shore zone to upland owners. The Court noted this construction was in keeping with the Court’s presumption that statutes are written in compliance with state constitutions and in favor of public interests over private interests. The Court further concluded, however, that N.D.C.C. § 47-01-15 would allow an upland owner to take the State’s full interest to the low watermark if the State contractually grants or conveys parts of its equal footing interests to upland owners by deed. The Court underscored that receipt of grants or conveyances from the State is subject to the restrictions of the public trust doctrine and is invalid where the deed provides otherwise.

The Court finally examined whether the upland landowners presented any factual support to show a grant of mineral interests by the State or a successor to the State, and found that they had not. It therefore concluded the district

court did not err in concluding the State owns the mineral interests under the shore zone.

Consequently, the Court affirmed summary judgment for the State. However, the Court stressed that its decision does not preclude an upland owner from taking to the low watermark if it can establish a chain of title wherein the State granted its equal footing interest to the upland owner.

Ashley Basta

UTAH

Delta Canal Co. v. Frank Vincent Fam. Ranch, LC, 321 P.3d 1027 (Utah 2013) (holding (i) partial forfeiture was available before statutory amendment specifically providing for such forfeiture became effective when forfeiture was inherent in the principle of beneficial use; and (ii) statutory exemption for time periods when water was insufficient to satisfy a water allowance did not prevent forfeiture of available but unused water).

Delta Canal Company, Melville Irrigation Company, Abraham Irrigation Company, and Central Utah Water Company (collectively, "Irrigation Companies") and Frank Vincent Family Ranch ("Vincent") were water rights holders on the Sevier River system. Vincent purchased the water right at issue from the Samuel McIntyre Investment Company (McIntyre) in 1998. McIntyre originally obtained the water right in 1936 as part of the general adjudication of the Sevier River system. A district court at the time issued the "Cox Decree," awarding McIntyre twenty-two cubic feet of water per second (c.f.s.) from March 1 through October 1 of each year and a storage component from April 16 to October 1. The Irrigation Companies filed a complaint alleging that Vincent partially forfeited and partially abandoned its water right.

The Irrigation Companies alleged that during the twenty-two year period leading up to the filing of their 2008 complaint, Vincent and McIntyre forfeited and abandoned a portion of their water right. They claimed that from 1988 to 1998 McIntyre irrigated only 830 of its 1,051.5 acres, and that Vincent cultivated less than 900 acres after 1998. Vincent countered that it did not cultivate the full acreage for several reasons: first, the Sevier River Commissioner reduced Vincent's diversion right during water shortages; next, Vincent could not use the land beneficially due to frozen and unprepared ground; and finally, no storage right was available at that time.

The district court held Utah law did not provide for partial forfeiture or partial abandonment before 2002, and an exception in Utah Code section 73-1-4(3)(f)(i) shielded Vincent from the same after 2002. The exception provided that partial forfeiture and partial abandonment provisions did not apply in times when surface water sources did not yield sufficient water to satisfy the water right, or when groundwater was unavailable due to sustained drought. The district court found that because Vincent had not received an uninterrupted flow of twenty-two c.f.s. between 2002 and the filing of the complaint, the Irrigation Companies could not claim partial forfeiture or abandonment. Accordingly, the district court granted summary judgment in favor of Vincent. The Irrigation Companies appealed to the Utah Supreme Court ("Court").