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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Whitetail Wave LLC, a Montana Limited Liability Company, Plaintiff and Appellant, vs. XTO Energy, Inc., a Delaware corporation, The Board of University and School Lands of the State of North Dakota, and the State of North Dakota; Department of Water Resources and Director, Defendants and Appellees.	**SUPREME COURT NO. 20220061** Civil No. 27-2015-cv-00164

ON APPEAL FROM ORDER DENYING MOTION FOR SUMMARY JUDGMENT, ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT, ORDER ON MOTION FOR SUMMARY JUDGMENT, AND JUDGMENTS

BRIEF OF APPELLANT

ORAL ARGUMENT REQUESTED

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[¶2] Whether the district court erred in dismissing Whitetail's claim that the State committed an unconstitutional taking of its property in violation of Art. I, § 16, of the North Dakota Constitution and N.D.C.C. § 32-15 *et seq*.

[¶3] Whether the district court erred in holding that Whitetail's property at issue and claimed by the State was limited to the minerals in Section 27.

[¶4] Whether the district court erred in holding that, as to Whitetail's property, the "Wenck line" applied and was not preempted by the Flood Control Act of 1944 by virtue of the Supremacy Clause at Art. VI, cl. 2, of the United States Constitution.

[¶5] Whether the district court erred by quieting title in the State to that portion of the minerals in Section 27 that Whitetail's predecessor reserved when the United States acquired the surface lands in that section for Lake Sakakawea.

[¶6] Whether the district court erred in summarily granting the State's motion for summary judgment as to Whitetail's trespass, slander of title, and unjust enrichment and constructive trust claims without any analysis supporting its decision.

[¶7] Whether the district court erred in holding that XTO Energy ("XTO") did not breach its lease with Whitetail when XTO failed to pay royalties owed to Whitetail for those portions of the property the district court held were not in dispute.

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[¶9] Whether the district court erred in dismissing Whitetail's constructive fraud claim against XTO.

ORAL ARGUMENT REQUESTED

[¶10] Whitetail requests oral argument. Oral argument would be helpful to address the district court's erroneous holding that the State claiming it had an interest in Whitetail's property since 2009 was not an unconstitutional taking under the United States and North Dakota Constitutions. Similarly, oral argument would be helpful to address the district court's erroneous holding that the "Wenck line" deprived Whitetail of its takings claim and the state law used by the State to claim an interest in Whitetail's minerals was not preempted by the Flood Control Act of 1944 by virtue of the Supremacy Clause.

STATEMENT OF THE CASE

[¶11] For the last decade, the State claimed an interest in Whitetail's minerals in McKenzie County despite Whitetail's predecessor retaining the minerals when the United States acquired the surface lands for Lake Sakakawea in the late 1950s.

[¶12] Whitetail acquired the minerals through Mineral Deeds in 1988. In 2004, Whitetail entered into an oil and gas lease for the property with XTO's predecessor, Headington Oil. Notwithstanding, in 2009, the State claimed it owned Whitetail's minerals by virtue of the Phase II Study and entered into leases with XTO. In 2010, when minerals were produced, XTO refused to pay Whitetail its royalties because the State claimed it owned the property.

[¶13] The Fifth Amendment of the United States Constitution and Art. I, § 16, of the North Dakota Constitution protect against the State claiming any interest in Whitetail's minerals and interfering in the exercise of its ownership rights. As the Court held in *Sorum v. State*, the laws of the United States are the supreme law of the land. Under the Flood

Control Act of 1944, the United States "acquired through purchase or eminent domain both the surface and mineral estate to much of the affected area, but it allowed some landowners to reserve their mineral interests during the acquisition phase." *Sorum*, 2020 ND 175, ¶ 46, 947 N.W.2d 382. Whitetail's minerals fall under this category.

[¶14] Since the United States acquired the surface of the minerals at issue, "the prior landowners' reservation of mineral interests has remained in the chain of title." *Id*. No state law, whether the Phase II Study or Chpt. 61-33.1, could serve as a basis for the State to claim it had an interest in Whitetail's minerals. *Cf*. *Sorum* at ¶¶ 44 – 46. The State lacked the constitutional authority to claim an interest in these minerals.

[¶15] Whitetail brought this lawsuit in June 2015 after several years of trying to get XTO to pay its royalties. *See* R1 – 5. Whitetail's claims against the State center on the unconstitutional taking of its minerals and seeking to quiet title. Whitetail's claims against XTO center on the breach of its lease with Whitetail, and its failure to pay royalties for production from Whitetail's minerals under N.D.C.C. § 47-16-39.1.

[¶16] In October 2021, the parties each moved for summary judgment. In the State's motion, *see* R223 – 230, it argued there was no unconstitutional taking because "a title dispute is not a taking," and it was free to claim Whitetail's minerals without offending the Takings clauses of the Fifth Amendment or Art. I, § 16 *Id*. at ¶¶ 40 – 46. In XTO's motion, *see* R216 – 222, it argued they could withhold Whitetail's royalties because the State claimed it had an interest in all of Whitetail's property. XTO also argued that despite *Sorum*, Whitetail's claims were "precluded" by Chpt. 61-33.1.

[¶17] Whitetail moved for summary judgment on its claims for declaratory relief and quiet title that the State did not have any interest in its minerals, and that the State

committed an unconstitutional takings. *See* R231 – 237.

[¶18] The parties filed responses to each other's motions in November 2021. *See* State's Response Brief at R243 – 244; XTO's Response Briefs at R246, 247; and Whitetail's Response Brief at R249. The parties also filed replies in support of their own motions. *See* State's Reply Brief at R251; XTO's Reply Brief at R253; and Whitetail's Reply Brief at R255 – 261. On December 3, 2021, the parties argued their motions to the district court.

[¶19] On December 17, 2021, the district court issued its Order on Cross Motions for Summary Judgment ("State Order") granting the State's motion and dismissing Whitetail's claims against the State. R267. The court erroneously held in conclusory fashion, and despite the record to the contrary, that, "In this case, the State has never taken any action to claim the minerals outside the boundaries of the historical Missouri River channel and above the ordinary high water mark." *Id*. at ¶ 49. Even though the State claimed an interest in, and interfered with, Whitetail's minerals for a decade, the court accepted the State's argument that its unconstitutional taking was excused by Chpt. 61-33.1. *Id*. Even though the district court held only Section 27 was in dispute, the district court failed to quiet title in Whitetail for its minerals at issue in Sections 25, 26, 34, and 35.

[¶20] On January 26, 2022, the district court issued its Order on Motion for Summary Judgment ("XTO Order") granting XTO's motion and dismissing Whitetail's claims against XTO. *See* R273. The court held XTO was justified in not paying Whitetail its royalties because there was a dispute as to who owned Whitetail's minerals. *Id*. at ¶ 46.

[¶21] The XTO Order does not square with the State Order. If there was a title dispute, that means the State *claimed* an interest in Whitetail's minerals, which the State could never possibly own per *Sorum* because they were reserved when the United States acquired the

surface for Lake Sakakawea. The State and XTO admitted in their Answers to the Complaint that there *was a dispute*. For a decade, the State denied Whitetail owned the minerals, instead claiming the State did. This resulted in XTO refusing to pay Whitetail its royalties because the State claimed an interest in the minerals. Whitetail filed its Notice of Appeal on February 24, 2022. *See* R280.

STATEMENT OF THE FACTS

[¶22] Whitetail owns the McKenzie County minerals that are subject of this lawsuit:

Township 154 North, Range 96 West
Section 25: Lot 5 (49.20)
Section 26: Lot 7 (33.60), SW/4SW/4, S/2SE/4
Section 27: Lot 8 (35.10), SE/4SW/4, SW/4SE/4
Section 34: NW/4NE/4, S/2NE/4, W/2SE/4, SE/4SE/4
Section 35: N/2, N/2S/2, SW/4SW/4

(the "Property"). Whitetail's interest in the Property and chain of title have been of record since October 1988 when its owner, Lonney White, Jr., received a Mineral Deed for them from Thomas and Mildred Tipton ("Tipton Deed"). The Tipton Deed was recorded in October 1988 at Document No. 516103. *See* R259. White also received an interest in the Property from Hazel Humble through a Mineral Deed recorded in December 1988 at Document No. 517192 ("Humble Deed"). *See* R260. The Tiptons and Humble received their interest in the Property from the Estate of Carrie E. Mendenhall in April 1981 by virtue of a Personal Representative Deed of Distribution recorded in May 1981 at Document No. 425571. *See* R258 ("Mendenhall Deed").

[¶23] The Property is shown in Segment Map Y at Tract Y-2282. *See* R235. Segment Map Y identifies Mendenhall as owning 1,200.51 acres, including the above-identified acres in Sections 25, 26, 27, 34, and 35. There is a "NOTE" on Segment Map Y above the "Revisions" table stating, "Oil and gas reserved in all fee tracts except Y2251." The legal

description for the Property is identified in Schedule "A" to the United States' Declaration of Taking under Tract No. Y-2282. *See* R257. Schedule "A" identified the owner of the Property as Carrie E. Mendenhall and Harry B. Mendenhall.

[¶24] The United States acquired the surface of the Property, Tract Y-2282, in a condemnation proceeding, *United States of America v. 3,059.56 acres of land, more or less, situated in McKenzie County, State of North Dakota, and Harry B. Mendenhall, et al.*, Civil No. 2639 in 1958. R257 at p. 4 – 5. The March 1958 letter from U.S. Attorney General William P. Rogers to the Hon. Wilber M. Brucker, Secretary of the Army, states the United States acquired title to the surface subject to the owners, including Mendenhall, "reserving all oil and gas rights therein, … ." *Id*. Neither the State or XTO offered evidence challenging or rebutting the fact Mendenhall's interest at Tract Y-2282, part of which was acquired by Whitetail, consisted of 1,200.51 acres.

[¶25] The United States' legal description for Tract No. Y-2282, identified in R257, is:

> Tract No. Y-2282
>
> Lot 5 of Section 25, Lot 7, South half of the Southeast quarter (S½SE¼), Southwest quarter of the Southwest quarter (SW¼SW¼) of Section 26, Lot 8 and those portions of the Southwest quarter of the Southeast quarter (SW¼SE¼), and the Southeast quarter of the Southwest quarter (SE¼SW¼) of Section 27 lying South of the Missouri River, Southeast quarter (SE¼), South half of the Northeast quarter (S½NE¼), Northwest quarter of the Northeast quarter (NW¼NE¼) of Section 34, North half (N½), North half of the South half (N½S½), Southwest quarter of the Southwest quarter (SW¼SW¼) of Section 35 all in Township 154 North, Range 96 West of the 5th P.M., plus accretions, Lot 4 of Section 2, Lots 1 and 2 of Section 3 in Township 153 North, Range 96 West of the 5th P.M., situate in McKenzie County, North Dakota, consisting of 1200.51 acres, more or less.

The Mendenhall Deed conveyed the same interest reserved as stated in Segment Map Y, Tract Y-2282, and identified in Schedule "A," in Section 25: Lot 5 to Humble and Tipton, who later conveyed it to White. Similarly, the Mendenhall Deed conveyed Section 26: Lot 7, SW/4SW/4, S/2SE/4; Section 27: Lot 8, SE/4SW/4, and SW/4SE/4; Section 34:

W/2SE/4, SE/4SE/4, S/2NE/4, and NW/4NE/4; and Section 35: N/2, N/2S/2, and SW/4SW/4, to Humble and Tipton, who later conveyed it to White.

[¶26] In other words, the *exact same minerals* identified in Segment Map Y, Tract Y-2282, and Schedule "A", reserved by Mendenhall when the United States acquired the surface, were conveyed to Tipton and Humble in the 1981 Mendenhall Deed. Tipton and Humble then conveyed these *same minerals* to White in 1988 as evidenced by the Tipton and Humble Deeds. This is the *same Property* claimed by Whitetail in the Complaint. *Cf.* R1 (Complaint), R235 (Segment Map Y), R257 (Schedule "A" to Tract Y-2282), R258 (Mendenhall Deed); R259 (Tipton Deed); and R260 (Humble Deed).

[¶27] The State admitted it never received a "condemnation deed or other recorded conveyance" where it acquired an interest in the Property. *See* R95:p.16 (State Responses)

[¶28] In June 2004, White leased the Property to Headington Oil. *See* R2 (White Lease). In February 2008, White conveyed his interest in the Property to Whitetail, which was recorded in April 2008 at Document No. 377592. *See* R3 (Mineral Deed). In March 2009, Whitetail and XTO ratified White's lease with Headington Oil. *See* R4 (Ratification of Lease). The ratification identified XTO as successor to Headington Oil, and Whitetail as successor to White. The ratification extended Whitetail's lease with XTO until June 9, 2012. XTO claims Whitetail's lease is held by production from the McPete Federal 34X-34 well ("McPete Well"). R16:¶12 (XTO Answer). The McPete Well began producing in November 2010. *See* R69 (NDIC Data for McPete Well). *See also* R49:p.6–7 (XTO Responses, Answer No. 9). Whitetail's minerals in Sections 27 and 34 are in the spacing unit for the McPete Well. *Id*. Whitetail has never been paid royalties for the Property despite its lease with XTO. *See* R58:¶9 (White Affidavit). Whitetail has not been paid its

royalties despite the fact other minerals owners told White they were been paid by XTO for their interests in the McPete Well. *See id*.:¶¶ 8–18.

[¶29] In May 2009, the State entered into leases with XTO for Whitetail's minerals in Section 27 ("State Leases"). The State Leases are recorded at OG-09-00234 and OG-09-00235. *See* R179. The State claimed it owned Whitetail's minerals in Section 27 per the Phase II Study. In April 2014, the State entered into agreements with XTO "correcting" its State Leases and claiming more acres in Section 27. *See* R180. While it only leased Whitetail's minerals in Section 27, in its Answer, the State denied Whitetail owned any of the Property, instead claiming the State had an interest in all of the minerals. *See* R22:¶4. The State identified the entirety of Whitetail's Property as "the Disputed Property." *Id*.

[¶30] In January 2016, the State Engineer moved to intervene claiming it owned the Property, describing it as "property that the SE [State Engineer] claims as its own."

> The Complaint asks that "the Defendants be required to set forth all their adverse claims to Whitetail's Mineral Interests." Such a request will determine title to all the minerals underlying Whitetail's Mineral Interests, not just the oil, gas, and related hydrocarbons. As the owner of all minerals, other than oil, gas and related hydrocarbons, the SE [State Engineer] has claims adverse to Whitetail's Mineral Interests that are separate from the Land Board's claims; thus, the SE should properly be allowed to intervene as a Defendant.
>
> The Complaint [] asks for declaratory relief that title be quieted as to Whitetail's Mineral Interests (*Id*., ¶¶ 132-33), property that the SE claims as its own.

R29:¶¶ 9–10 (State Brief). The State did not say its interest was only in Section 27. It stated "Whitetail's Mineral Interests" was "property that the SE claims as its own."

[¶31] The basis for the State claiming it owned Whitetail's minerals was the Phase II Study. *See* R81:¶¶ 15–17 (Combs Affidavit). In an April 2013 e-mail, XTO explained:

> The State has taken quite an "aggressive" position with its recent Missouri River high water marks surveys. Thus the riverbed acreage now claimed by the State is in many cases significantly larger than the riverbed acreage shown in the GLO

> surveys from the early 1900s. This is the cause of a significant amount of complaint from landowners and some current litigation to determine the respective interests.

R54. The e-mail notes the State claimed 46.2 acres in Section 27 that Whitetail owned. "So this is where the 46.2 acres went that Whitetail Wave is concerned about. It now belongs to the State of North Dakota and is under the State lease [with XTO]." *Id.*

[¶32] In September 2016, Whitetail filed its first motion for summary judgment. Whitetail argued it appeared the State's claim was limited to only part of Section 27 based on the Phase II Study. As such, Whitetail argued title should be quieted in its favor outside of the limited portion of Section 27 subject to the study. *See* R48:¶¶ 7–8 (Whitetail's Brief). The State disagreed, arguing in October 2016 that Whitetail's ownership beyond Section 27 was disputed, and the State was not limiting its claim to just Section 27.

> The State disputes many of the Plaintiff's claims of "undisputed" facts, specifically including those referenced. Further, just because the [Land] Board does not currently lease particular minerals does not mean that ownership is undisputed or that the State does not own them.

R79:¶24 (State's Brief). The State's position was that it could interfere with Whitetail's property interests, and then later make "adjustments" on what the State claimed without consequences. "The Board has, on many occasions, adjusted the acreage it claims for sovereign lands and made refunds accordingly. Because the Board does not currently lease particular minerals does not mean the State does not own them." R81:¶¶ 19 – 20 (Combs Affidavit). The State's position was that just because it hadn't leased all of Whitetail's minerals yet, "does not mean the State does not own them."

[¶33] In June 2017, the State again argued its claim was not limited to Section 27. In a motion to stay proceedings, the State argued the ownership of *all* the Property was disputed. R128:¶¶2–3. The State indicated, "Along with other relief, Plaintiff requests

determination of ownership interests" of the Property. *Id*. at ¶ 2. The State did not then argue its interest was limited to Section 27. It argued, "The property disputed in this case falls within the area designated as the 'historical Missouri riverbed channel' and for which the ordinary high water mark will be subject to further review by DMR." *Id*. at ¶ 3.

[¶34] Whitetail opposed the motion, arguing "all mineral acreage owned by Whitetail and subject to this lawsuit is now clearly established by the army corps survey [the Segment Maps] and should move forward to be decided on the merits." R135:¶2 (Whitetail's Brief). Whitetail made the same argument then it makes now, that the Flood Control Act of 1944, Segment Map Y and Schedule "A" control. "Whitetail's mineral interests are largely unaffected by even a possibility of State ownership, and thus, such determination of ownership is not dependent on the N.D.C.C. § 61-33.1-03 review." *See id.* at ¶¶ 2–3.

[¶35] In its reply, the State had opportunity to clarify it wasn't claiming any interest beyond Section 27. It did not, instead arguing it would be prejudiced if the court quieted title to *any of the Property* in Whitetail. "However, to proceed with this litigation presents a much greater risk of prejudice to State Defendants as Plaintiff seeks to have ownership finally determined and prevent any further adjudication of ownership." R138:¶4. The State argued for a stay as to *all of the Property* despite the fact it could never have any interest in minerals reserved to owners like Whitetail when the United States acquired the surface for Lake Sakakawea. If the State could somehow acquire these minerals, it means the State would also get the surface above those minerals acquired by the United States through purchase or eminent domain pursuant to the Flood Control Act of 1944.

[¶36] The State admits the Property was acquired by the United States from Whitetail's predecessor for Lake Sakakawea. "The State still admits to the fact that the property at

issue in this case is submerged by Lake Sakakawea and that Lake Sakakawea is a man-made reservoir created by Garrison Dam on the Missouri River." R243:¶3 (State's Brief). There can be no dispute the Property was acquired for Lake Sakakawea per the Flood Control Act of 1944. It was such property when Whitetail acquired it and entered its lease, when the State claimed it, and when Whitetail filed its Complaint.

[¶37] Whitetail was not paid –*and has not been paid*– any of its royalties by XTO for production from the McPete Well because of the State's actions. *See* R49:pp. 5 – 6 (Answer No. 7); and R16:¶17. In a March 2013 e-mail, XTO told White it was not releasing his royalties because the State claimed an interest in the Property.

> I have been in discussion with our title advisors and we have concluded the following regarding your interest. Because of the river issues and the State potentially claiming some of this interest, it has been recommended that we not release payment without a signed division order.

R51 (March 12, 2013, XTO e-mail). XTO admits the State interfered with Whitetail's ownership rights, including the right to receive its royalties. "Whitetail's claims against XTO for non-payment of royalties have always been contingent upon resolution of its dispute with the State Defendants." R218:¶ 1 (XTO Brief).

LAW AND ARGUMENT

I. The State committed an unconstitutional taking of Whitetail's Property under the United States and North Dakota Constitutions, and Whitetail is entitled to just compensation including interest.

[¶38] The State's actions in claiming an interest in Whitetail's minerals, leasing them to XTO, and interfering in Whitetail's exercise of its interests, resulted in an unconstitutional taking of the Property violating the Fifth Amendment and Art. I, § 16.

> As John Adams tersely put it, "[p]roperty must be secured, or liberty cannot exist." Discourses on Davila, in 6 Works of John Adams 280 (C. Adams ed. 1851). This Court agrees, having noted that protection of property rights is "necessary to

> preserve freedom" and "empowers persons to shape and to plan their own destiny in a world where governments are always eager to do so for them."

Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2071 (2021). Once the State claimed it had an interest in the Property and interfered with Whitetail's ownership, it was a taking.

[¶39] The United States and North Dakota Constitutions require just compensation when the government takes private property. Although the North Dakota Constitution's protections are broader in some respects, Whitetail analyzes its federal and state takings claims together. *See Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶ 16, 705 N.W.2d 850. Property owners like Whitetail are guaranteed just compensation from the time of a taking, which "generally consist[s] of the total value of the property when taken, plus interest, from that time." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019).

[¶40] The district court erred as a matter of law in holding the State did not commit an unconstitutional taking. That decision is subject to de novo review. *See Irwin v. City of Minot*, 2015 ND 60, ¶ 6, 860 N.W.2d 849 (whether a taking has occurred "is a question of law which is fully reviewable on appeal.") The Court should reverse the district court and hold an unconstitutional taking occurred because (1) Whitetail owned the Property, (2) this is not a mere "title dispute," (3) the State took and interfered with the Property, and (4) no subsequent action by the State can undo or moot a takings claim. As such, Whitetail is entitled to just compensation, including interest.

A. Whitetail owned the Property.

[¶41] To prevail on a takings claim, Whitetail must have possessed a property interest. *See, e.g., Pettro v. United States*, 47 Fed. Cl. 136, 144 (Fed. Cl. 2000). It is indisputable that Whitetail owns the Property. Indeed, the United States acquired the surface from Whitetail's predecessor, Mendenhall, who retained the minerals under the Flood Control

Act of 1944. Whitetail's interest was of record before the State claimed any interest, and before it entered the State Leases. The State failed to produce any document evidencing an interest in the Property. From the outset, whether in the Land Board's Answer, State Engineer's motion to intervene, or subsequent filings, the State claimed it had an interest in the Property and interfered with Whitetail's ownership rights. Whitetail did not receive its royalties from XTO because of the State's actions.

[¶42] Neither the Phase II Study, Wenck line, or Chpt. 61-33.1 could deprive Whitetail of the minerals its predecessor reserved when the United States acquired the surface. The district court erred as a matter of law in holding the Supremacy Clause did not apply, and that the Wenck line justified the State's claim–the Wenck line *did not* exist until 2018. The district court's holding cannot be squared with *Sorum*, where the Court held no state law can preempt federal law to override the rights secured to property owners like Whitetail.

> The Submerged Lands Act, 43 U.S.C. § 1301 – 1356b, generally confirms state ownership of the title to the beds of navigable waters as against any claim of the United States. 43 U.S.C. § 1311. But from this broad confirmation of state authority, it excepts "all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity." 43 U.S.C. § 1313(a). The federal government acquired the bed of Lake Sakakawea above the historical OHWM by purchase or eminent domain so that it could be inundated by the Garrison Dam. Under § 1313 of the Submerged Lands Act, the land taken by the federal government for the Garrison Dam project is owned by the United States.
>
> Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the laws of the United States are the supreme law of the land, and any state law that conflicts with federal law is without effect. *Home of Economy v. Burlington N. Santa Fe R.R.*, 2005 ND 74, ¶ 5, 694 N.W.2d 840. The Plaintiffs present several arguments as to how the State obtained ownership of the disputed minerals, including by implication of the watercourses clause of the state constitution, by self-executing transfer under the Sovereign Lands Act, N.D.C.C. § 61-33-03, and the common law public trust doctrine first recognized in United Plainsmen. The Flood Control Act of 1944 authorized construction of the Garrison Dam and acquisition of the land that would be subject to inundation by the reservoir. Any contrary state law, including the

> constitution, a statute, or the common law, which purports to vest in the State the legal ownership of the bed of Lake Sakakawea is preempted under the Supremacy Clause to that extent.
>
> The federal government acquired through purchase or eminent domain both the surface and mineral estate to much of the affected area, but it allowed some landowners to reserve their mineral interests during the acquisition phase. Since the federal government's acquisition under authority of the Flood Control Act of 1944, the prior landowners' reservation of mineral interests has remained in the chain of title. The Submerged Lands Act expressly excepts from an otherwise broad assignment to states of the lands beneath navigable waters those lands acquired by the United States by eminent domain or purchase. 43 U.S.C. §§ 1311, 1313. These federal laws preempt operation of any state law that would otherwise vest ownership in the state, including chapter 61-33 and the public trust doctrine.

Id. at ¶¶ 44 – 46 (emphasis added). *See also United States v. Alaska*, 521 U.S. 1, 33-34 (1997) (discussing these principles). Thus, any state law, including the Phase II Study, Wenck line, or any part of Chpt. 61-33.1, attempting to vest ownership in the State of minerals like those Whitetail's predecessor reserved during the United States' acquisition of land for Lake Sakakawea would always be preempted.

[¶43] There could never be a constitutional legal claim that the State owned any part of the Property. The State could never change the boundary of the lands acquired by the United States for Lake Sakakawea as established by the Segment Maps like Segment Map Y, United States District Court condemnation proceedings like the one against Mendenhall, or deeds like the Wilkinson's received from the United States.

B. The State cannot excuse its unconstitutional conduct by cloaking its actions under the guise of a mere "title dispute."

[¶44] The State's characterization of this case as a mere "title dispute" is deeply disturbing and offends the Takings clause and its prohibitions against government claiming or interfering with private property rights. When the State interfered with and disturbed Whitetail's rights in its Property—by leasing it, claiming ownership and some overarching

interest outside of the minerals it leased in Section 27—an unconstitutional taking occurred. Neither this Court nor the United States Supreme Court has ever held that a taking does not occur simply because the government takes property under the auspice of a title dispute. The Court should reject that position outright. A taking is a taking no matter the label the State slaps on it. The Court must hold steadfast with Fifth Amendment law that an unconstitutional taking occurs when the government, in addition to asserting title, takes action that interferes with property rights as happened here.

[¶45] Whitetail recognizes that some courts have held the mere assertion of title, *standing alone*, does not amount to an actionable taking. However, those cases also recognize that an assertion of title *is a taking* when coupled with other government action that interferes with the property interest. *See Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983); *Central Pines Land Co. v. United States*, 107 Fed. Cl. 310 (Fed. Cl. 2010) ("*Central Pines II*"); *Central Pines Land Co. v. United States*, No. 98-314L, 2008 WL 8958319 (Fed. Cl. Sept. 30, 2008) ("*Central Pines I*"); *Pettro*, 47 Fed. Cl. 136; and *Petro-Hunt, LLC v. United States*, 90 Fed. Cl. 51 (Fed. Cl. 2009).

[¶46] In other words, the government's "assertion of title plus something more" is an unconstitutional taking. *Central Pines II*, 107 Fed. Cl. at 325. What's more, as recognized by *Sorum*, no state law, including the Wenck line, could serve as a legal basis for the State to constitutionally claim an interest in the Property.

[¶47] The State's baseless assertion of title together with issuing leases for the Whitetail's minerals and continuing to claim an interest in the Property outside of the State Leases despite the lack of any legal basis to do so was an unlawful taking. Numerous cases have found issuing mineral leases is "'something more' than the mere assertion of title." *Central*

Pines II at 325. Similarly, in *Central Pines*, a property owner sold the surface of the land to the United States but reserved the minerals. *Central Pines I*, 2008 WL 8958319, at *1. Some sixty years after the conveyance, the federal government circulated a memorandum stating they owned the minerals. *Id.* at *3. The government subsequently leased the minerals. *Id.* The mineral owner filed a quiet title action along with a takings claim. *Id.* at *4. The government argued that a mere incorrect assertion of ownership, or a title dispute, was not a taking. *Id.* at *4-5. The court rejected the government's argument, explaining that any good-faith belief by the government that it owned the minerals was of little matter where the government unlawfully issued leases for minerals it did not own. *Id.* at *11-12.

[¶48] Other cases have reached the same conclusion in similar contexts. *See, e.g.*, *Yuba*, 723 F.2d 884 (reversing summary judgment to the government where the government asserted a good-faith claim to title but nonetheless interfered with private mineral rights); *Pettro*, 47 Fed. Cl. 136 (finding the government's assertion of title cannot excuse interference with private mineral rights). As these cases hold, the State's position that this was merely a title dispute "is of little, if any, use in the Fifth Amendment just compensation analysis." *Yuba*, 723 F.2d at 889. Instead,

> The purpose and function of the Amendment being to secure citizens against governmental expropriation, and to guarantee just compensation for the property taken, what counts is not what government said it was doing, or what it later says its intent was, or whether it may have used the language of a proprietor. What counts is what the government *did*.

Id. (emphasis added). What the State "did" was make a baseless claim to Whitetail's property, enter leases with XTO, and interfered with Whitetail's right to receive its royalties for more than a decade when the State could never have owned these minerals under any state law in the first place without violating the Fifth Amendment and running

afoul of the Supremacy Clause. The State's "words—its claim of being the true holder of title to the mineral rights—cannot excuse its actions." *Pettro* at 149.

[¶49] The State cannot claim an interest in Whitetail's minerals for a decade then walk away without consequence. The State did not file a quiet title action or even conduct title research. *Accord Yuba*, 723 F.2d at 888-89 (noting the government's failure to bring a legal action was evidence that it did not act in good faith). Instead, the State abused its sovereign power to lease Whitetail's property and claim an interest in it without any right to do so. The State is also not a private citizen, *it is* the government. There is no "title dispute" or "good faith" defense for the State's unconstitutional taking. The language in 42 U.S.C. §1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Indep.*, 445 U.S. 662, 635 (1980). Section 1983 "contains no independent state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 329 (1986). The Court must reject the State's theory that it can escape liability for its taking by calling this a "title dispute." *Cf. Sauvageau v. Bailey*, 2022 ND 86, ¶ 27 (rejecting the District's attempt to label the property interest at issue to "evade the requirements and property owner protections of N.D.C.C. § 61-16.1-09(2)(a).") No characterization by the State changes the fact it claimed an interest in, and interfered with, Whitetail's property.

C. The State committed an unconstitutional taking.

[¶50] The district court erred as a matter of law in holding that no taking occurred. A physical taking is the classical taking occurring when the government directly appropriates property for its own use or physically takes possession of an interest in property. *See Horne v. Dep't of Ag.*, 576 U.S. 350, 357 (2015); and *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (just compensation is due if the government physically occupies or takes title to property). Temporary physical takings are "not different in kind from permanent takings,

for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 318 (1987).

[¶51] The State committed a temporary physical taking of Whitetail's minerals for the decade it claimed an interest in, and leased, the Property. In doing so, the State directly appropriated Whitetail's property for that period. *See Horne*, 576 U.S. at 357.

[¶52] North Dakota law is clear that "oil and gas leases are interests in real property. As such, the working interest—the interest conveyed to the lessee under an oil and gas lease—and the royalty interest—the interest retained by the lessor—are both interests in real property." *Slawson Expl. Co. v. Nine Point Energy, LLC*, 966 F.3d 775, 780 (8th Cir. 2020); and *Kittleson v. Grynberg Petro. Co.*, 2016 ND 44, ¶ 34, 876 N.W.2d 443 ("Oil and gas leases are interests in real property in North Dakota. A real property lease is considered a contract and a conveyance of an interest in land.")

[¶53] Consistent with these principles, numerous cases have recognized the government commits a temporary physical taking by issuing mineral leases. *See Central Pines II*, 107 Fed. Cl. at 327 ("[T]he court is persuaded that there was a temporary taking of the plaintiff's Group C mineral interests that were leased by the government."); *Pettro* at 147 (physical taking); *Petro-Hunt*, 90 Fed. Cl. at 65 (agreeing that mineral "leases made by the United States effectuated physical takings"); *accord Mat. Serv. Corp. v. Rogers Cnty. Bd.*, 273 P.3d 880, 883 (Okla. 2011) ("A [mineral] leasehold interest may be subject to a taking.") Cases have further explained the government commits a physical taking by asserting ownership over minerals, even if the government's conduct "falls short of a formal, physical invasion." *Pettro* at 147 (finding a physical taking where the government claimed the plaintiff's mineral rights as its own).

[¶54] The Supreme Court has repeatedly held the government commits a physical taking if it appropriates or circumvents natural resources for its own use. *See Dugan v. Rank,* 372 U.S. 609, 614-16 (1963) (diverting water for another's use as a physical taking); *Int'l Paper Co. v. United States*, 282 U.S. 399, 404-06 (1931) (finding a physical taking due to appropriation of water when government ordered a power company to stop diverting water to plaintiff); *see also Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1290 (Fed. Cir. 2008) (finding diversion of natural resources for another's use is a *per se* taking).

[¶55] The same is true here. The State claimed an interest in, then leased, Whitetail's minerals, and interfered with its ownership rights, including the right to receive royalties from the McPete Well, for over a decade. In *Pettro*, the Court held the "plaintiff's ability to make use of his property interest [minerals] effectively has been destroyed" by the government interfering with his right to profit from their extraction. *Id*. at 147. "In the instant case, the Forest Service abruptly prevented plaintiff from exercising a property right which his family had held without interference for several decades." *Id*. at 149. That is no different than what the State did. The Court went on, concluding that whether the State thought it may have an interest in the Property – the "title dispute" defense – was irrelevant. "[W]hether the Forest Service was acting in good faith or believed it held a legitimate claim of ownership is not dispositive on the issue of whether or not a taking occurred." *Id*. It is clear from the State's conduct it baselessly "saw itself as the owner of" Whitetail's minerals and appropriated those interests for itself. *Id*. (citing *Yuba,* 723 F.2d at 887).

[¶56] Alternatively, the State committed a regulatory taking when it deprived Whitetail of all economically beneficial use of its property by leasing the minerals and interfering with Whitetail's right to receive its royalties. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S.

528, 538 (2005). "In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, [] (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). In *Mahon*, the Court held much like oil and gas interests, "'For practical purposes, the right to coal consists in the right to mine it.' What makes the right to mine coal valuable is that it can be exercised with profit." *Id.*

[¶57] The State unquestionably interfered and disturbed Whitetail's rights in its Property.

> A taking under the fifth amendment occurs when the Government acts in a manner that directly interferes with or disturbs a claimant's rights in his private property. *Widen v. United States*, 174 Ct. Cl. 1020, 1027, 357 F.2d 988, 993 (1966), citing *United States v. Cress*, 243 U.S. 316 (1917), and others. Formal acquisition of title by the Government is not prerequisite to a taking where appropriation or destruction of property results directly from Government actions. []

Stockton v. United States, 214 Ct. Cl. 506, 514 (1977). Thus, whether viewed as a physical or regulatory taking, Whitetail is entitled to just compensation. The right to exclude others, especially the government, from property is described by the Supreme Court as one of the most valued rights that accompanies ownership. "In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession – the right to exclude strangers, or for that matter friends, but especially the Government." *Hendler v. United States*, 952 F.2d 1364, 1374–75 (Fed. Cir. 1991). *See also Sauvageau* at ¶ 24 (stating, "Property law has long protected an owner's expectation that he will be relatively undisturbed at least in the possession of his property.")

[¶58] When the State claimed an interest in the Property adverse to Whitetail and interfered with Whitetail's rights to the Property, including its right to royalties, a taking occurred. As *Knick* tells us, "A bank robber might give the loot back, but he still robbed the bank." *Id*. at 2172. *Cf. Res. Invs., Inc. v. United States*, 85 Fed. Cl. 447 (2009) (holding

the government's interference with a property owner's ability to enjoy their property resulted in economic harm giving rise to a taking.) When a mineral owner is deprived royalty income because of government action, a taking has occurred and "the just compensation to which the owner is entitled is the value of the use of the property during the temporary taking, i.e., the amount which the owner lost as a result of the taking." *Yuba Nat. Res., Inc. v. United States*, 904 F.2d 1577, 1578 (Fed. Cir. 1990).

[¶59] Whitetail's takings claim was irrevocable once the State claimed an interest in its Property.

> In holding that a property owner acquires an irrevocable right to just compensation immediately upon a taking, *First English* adopted a position Justice Brennan had taken in an earlier dissent. See *id*., at 315, 318, 107 S.Ct. 2378 [] In that opinion, Justice Brennan explained that "once there is a 'taking,' compensation *must* be awarded" because "[a]s soon as private property has been taken, whether through formal condemnation proceedings, occupancy, physical invasion, or regulation, the landowner has *already* suffered a constitutional violation." [].

Knick at 2172. The unconstitutional taking goes back to 2009, when the State first claimed an interest in Whitetail's minerals.

> "Because of the self-executing character" of the Takings Clause "with respect to compensation," a property owner has a constitutional claim for just compensation at the time of the taking. [] The government's post-taking actions (there, repeal of the challenged ordinance) cannot nullify the property owner's existing Fifth Amendment right: "[W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation." [*First English*] 482 U.S. at 321 [].

Id. at 2171. Because of the self-executing character of the Takings Clause, Whitetail had a claim for just compensation the moment the State claimed an interest in its minerals.

D. No subsequent action by the State can undo or moot its unconstitutional taking.

[¶60] The district court erred as a matter of law when it held the Wenck line and Chpt. 61-33.1 absolved the State of a taking. The State argues Chpt. 61-33.1 effectively rendered

Whitetail's takings claim moot. It's black-letter law that a takings claim is not mooted by subsequent government action. Government conduct that "works a taking of property rights necessarily implicates the constitutional right to pay just compensation." *Knick* at 2171. Post-taking actions by the government "cannot nullify the property owner's existing Fifth Amendment right: [W]here the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation." *Id.* The Supreme Court has made it clear that once the State's actions have worked a taking, nothing done by the State—whether passing legislation like Chpt. 61-33.1 or releasing its claim to the property—negates the fact that a taking occurred for which the State is liable. *Id*. at 2171-72; *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012); *First English* at 321. *Cf. Sorum* at ¶ 45 (holding any state law conflicting with the Flood Control Act of 1944, by which the United States acquired the Property from Whitetail's predecessor, was preempted by the Supremacy Clause.)

[¶61] The passage of Chpt. 61-33.1 does not—and *could never*—render Whitetail's takings claim moot. It does not change the fact Whitetail acquired the Property by virtue of the Humble and Tipton Deeds. It does not change the fact the State leased Whitetail's minerals in 2009. It does not change the fact the State interfered with Whitetail's use of its property *for eight years* before the Wenck line even existed. It does not change the fact XTO has not paid Whitetail any royalties from the McPete Well because of the State's claim. Whitetail's takings claim against the State is "irrevocable." *Knick* at 2172.

[¶62] Just compensation including interest must now be paid as a result. *See id*. (holding just compensation is the value of the property "plus interest from" the time of the taking); and *Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411, 413 (Fed. Cl. 1994) (stating

that a party like Whitetail must "be put in good as a position pecuniarily as [they] would have occupied if [their] property had not been taken." *See also Sauvageau* at ¶ 12 (stating, "Under N.D. Const. art. I, § 16 and N.D.C.C. § 32-15-01(2), private property may not be taken without just compensation.") Because the State committed an unconstitutional taking in violation of the Fifth Amendment, Whitetail is entitled to its fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988. *See e.g., Wyatt v. Cole*, 504 U.S. 158 (1992); and *Goss v. City of Little Rock*, 151 F.3d 861 (8th Cir. 1998). Whitetail is also entitled to its attorney's fees and costs under Chpt. 32-15, N.D.C.C. *See Cass Cnty. Joint Water Res. Dist. v. Erickson*, 2018 ND 228, 918 N.W.2d 371. If this Court holds an unconstitutional takings occurred, it should remand the case to the district court for trial to determine Whitetail's damages, and with instructions to award attorney's fees.

II. The district court erred in holding that, as a matter of law, XTO did not breach its lease with Whitetail when it failed to pay royalties.

[¶63] If the Court agrees with the district court that only a portion of Whitetail's interest was disputed (which Whitetail disagrees with), then XTO breached its lease with Whitetail as to the remaining portion of the White Lease the district court held was not in dispute.

[¶64] The district court held, "It is undisputed payment is conditioned upon determining Whitetail's interest in the land covered by the lease. Whitetail's title to a portion of the interest covered by the lease was disputed by this litigation." XTO Order at ¶ 46. The district court erroneously held only a "portion of the interest covered by the lease" was disputed. As the record shows, the State claimed an interest in all of the Property, thus the unconstitutional taking. However, if the Court agrees that only a "portion of the interest covered by the lease was disputed by this litigation," then XTO was required to pay Whitetail its royalties for all portions of the lease where its interest was not in dispute.

[¶65] The district court ignored the plain language in N.D.C.C. § 47-16-39.1 that required XTO to pay Whitetail its royalties for any portion of the lease where title was not disputed. Whether the safe harbor provision allowed XTO to withhold Whitetail's royalties for the portion of the lease the district court held was not in dispute is a question of law. "Statutory interpretation is a question of law fully reviewable on appeal, and we interpret statutes to give words their plain, ordinary and commonly understood meaning." *Krueger v. N. Dakota Dep't of Transportation*, 2018 ND 108, ¶ 14, 910 N.W.2d 850. As a matter of law, the district court erred in holding the safe harbor provision applied to excuse XTO's failure to timely pay Whitetail its royalties for the undisputed portion of the lease.

[¶66] The safe harbor language provides: "This section does not apply … , in the event of a dispute of title existing that would affect distribution of royalty payments, … ; however, the operator shall make royalty payments to those mineral owners whose title and ownership interest is not in dispute." N.D.C.C. § 47-16-39.1. If the Court decides only a portion of Whitetail's interest was disputed, the statute required XTO to pay Whitetail its royalties for the undisputed minerals under the lease.

[¶67] If portions of Whitetail's interest was undisputed, what basis did XTO have to withhold royalties from the McPete Well for more than ten years. The obligation to pay royalties was the essence of the White Lease. "The obligation arising under an oil and gas lease to pay oil or gas royalties to the mineral owner … is of the essence in the lease contract, and breach of the obligation may constitute grounds for cancellation of the lease in cases where it is determined by the court that the equities requires cancellation." *Id*. The statute's purpose was to protect mineral owners like Whitetail.

> A number of land owners reported at times there appeared to be an unreasonable lag in the payment of royalties and since their only apparent remedy was to sue in

> the courts for a recovery of the royalties due, they felt this was not sufficient penalty to ensure conscientious efforts to make prompt payments. In the Committee's opinion, the proposed bill would make the failure to promptly pay royalties a more serious matter. [B]ut since cancellation would be on the discretion of the courts, it would not unduly penalize a lease operator if he has reasonable grounds for failing to make prompt payment.

Imperial Oil of N. Dakota, Inc. v. Consol. Crude Oil Co., 851 F.2d 206, 211 (8th Cir. 1988) (quoting Legislative Research Comm., Report to the Legislature, at 42 (1961)). XTO had a statutory obligation to pay Whitetail its royalties for any acres of the lease that were not disputed or risk lease cancellation or the imposition of 18 percent interest.

[¶68] The decision in *Borth v. Gulf Oil Expl. & Prod. Co.*, 313 N.W.2d 706 (N.D. 1981) is instructive. In *Borth*, only 20 acres of an 80-acre lease was disputed. *Borth* at 708. The mineral owner, Borth, maintained they owned all 80 acres. The lessee, Batts, agreed the Borths owned at least 60 acres, but disagreed they owned the full 80 acres. Batts assigned the Borths' lease to Gulf Oil, who paid Borths for only 60 acres. *Id*. The Borths brought an action to cancel the lease based on the lessee's failure to timely pay for the additional 20 acres. The district court terminated the lease as to the 20 acres based on nonpayment, but held the lease was valid as to the remaining 60 acres where royalties were paid. *Id*. at 709.

[¶69] The Court affirmed the district court's decision, holding that cancelling that portion of the lease where Borth was not paid their royalties was appropriate based on the equities. While not a N.D.C.C. § 47-16-39.1 decision per se, *Borth* shows the balancing of the equities required when payment is not made on a portion of a lease. XTO should have paid Whitetail for those portions of the White Lease the district court held were not disputed (like Gulf Oil did in Borth) as there was no basis to withhold royalties on those acres.

[¶70] The fact Whitetail refused to sign XTO's division order is not a basis to withhold royalties. XTO cannot withhold royalties based on Whitetail's refusal to sign a division

order. North Dakota law prohibits conditioning the payment of royalties on signing a division order, providing that "royalty payments may not be withheld because an interest owner has not executed a division order." N.D.C.C. § 47-16-39.3.

[¶71] The district court misconstrued the holding in *Vic Christensen Min. Tr. v. Enerplus Res. (USA) Corp.*, 2022 ND 8, 969 N.W.2d 175. Relying on *Vic Christensen*, the court held that, "N.D.C.C. § 47-16-39.1 does not require an operator to pay royalty payments to an owner's undisputed share if part of the interest is subject to a dispute of title." XTO Order at ¶37 (citing *Vic Christensen* at ¶ 12). This ignores the language in the statute stating "the operator shall make royalty payments to those mineral owners whose title and ownership interest is not in dispute." *Vic Christensen* does not stand for the proposition that an operator may withhold all royalties if only a small portion of the leased acres are in dispute. This would lead to absurd results. For example, under the district court's interpretation, a mineral owner could own 5,000 acres subject to a lease, but a dispute as to only 50 of those acres would justify the operator withholding payment on all 5,000 acres.

[¶72] In *Vic Christensen*, the title issue was Enerplus' "title examiner's determination that the Trust Defendants' 1/5 mineral interest was burden by VCMT's royalty interest, and that burden was more than 5/128 interest due to the acreage discrepancy." *Id*. at ¶ 10. The title issue affected all of the Trust Defendants' interest. "The Trust Defendants collectively own the 1/5 mineral interest previously conveyed to the Reeds." *Id*. at ¶ 4. *See also id*. at ¶ 6 (stating, "In January 2019, VCMT sued the Trust Defendants to quiet title, alleging it owns the royalty interest on the Trust Defendants' 1/5 mineral interest in the W/2, … .") The title issue was whether VCMT's royalty interest burdened the *entirety* of

the Trust Defendants' 1/5 interest. *Id*. at ¶ 5. It was not a situation like the present case where the district court held only a portion of the title under the lease was in dispute.

[¶73] The Trust Defendants claimed their entire interest had no royalty burden. *See id*. at ¶ 6. Thus, the title dispute affected the entirety of their interest, which allowed Enerplus to suspend all the royalties. And, unlike the title attorney in *Vic Christensen*, XTO admitted to Whitetail in 2013 that it should be paid royalties for a portion of its interest. *See* R54.

III. The district court erred in holding that, as a matter of law, XTO did not violate N.D.C.C. § 47-16-39.1 when it failed to timely pay Whitetail its royalties owed under the White Lease.

[¶74] There is no dispute that XTO has not paid Whitetail its royalties from the McPete Well. If the Court affirms the district court's decision that the title dispute only impacted a portion of the Property, N.D.C.C. § 47-16-39.1 requires the district court be reversed with respect to that part of its Order holding XTO did not breach the White Lease. The question, then, is the remedy for XTO's failure to pay Whitetail its royalties.

[¶75] XTO's ten-year delay in failing to pay Whitetail its royalties justifies cancellation of the White Lease. In *Imperial Oil of N. Dakota*, the Court held that cancelling a lease for failing to pay approximately $12,000 in royalties while harsh, was justified by statute.

> The district court estimated the loss to Flying J caused by the cancellation to be approximately $691,463.00. Slip op. at 12. The cancellation, and accordingly, the loss, was caused by Flying J's failure to pay Imperial slightly more than $12,000.00 in royalties. This remedy is undoubtedly harsh and one that may not obtain under common law principles of equity considered alone. But Flying J's equity argument overlooks the critical element of this case: the applicable North Dakota statute.
>
> Section 47–16–39.1 represents a judgment by the North Dakota legislature that traditional damage remedies are simply inadequate to protect mineral owners' royalty interests. Accordingly, traditional principles of equity do not apply here; the legislature has supplanted common law equity with its own weighing of equitable principles and has determined that the nonpayment of royalties may be grounds for cancellation of a mineral lease. This conclusion is clear from a review of the legislative history of § 47–16–39.1, which reveals that the statute was enacted as a

> means of increasing the bargaining power of landowners in their dealings with major oil companies concerning rights under oil and gas leases.

Imperial Oil of N. Dakota at 210–11. Cancelling the White Lease is justified because XTO admitted back in April 2013 that it owed Whitetail royalties, stating:

> In the interim, XTO is crediting your client [Whitetail] with 56.1854550 acres and would like to place your client in "pay" status immediately. Additionally, I know XTO owes statutory interest to your client from the time in which we were provided the affidavit of identity until the funds are received by your client. The statutory interest portion cannot be included with the first payment because we will not know the exact amount of the first check until it is actually processed through our system. However, we will expeditiously process the statutory interest payment the month following the release of current funds.

R54:p.3 (April 18, 2013, XTO e-mail). It took several years to get XTO to reach even this point. *See* R50–60 (Whitetail's correspondence with XTO, and White Affidavit). In a May 2013 accounting, XTO indicated it was holding $34,234.10 in royalties belonging to Whitetail. *See* R56:pp. 15 – 25. Despite XTO's admission in 2013, it has never paid Whitetail any of its royalties for production from the McPete Well on the Property. Additionally, XTO refused to pay Whitetail even though it paid other mineral owners in the same spacing unit as the McPete Well. *See* R58:¶¶ 8–18 (White Affidavit).

[¶76] Alternatively, at a minimum, the district court should have awarded Whitetail 18 percent interest on all payments more than 150 days after production was marketed in accordance with N.D.C.C. § 47-16-39.1. The district court has discretion of which remedy to exercise under N.D.C.C. § 47-16-39.1 – cancelling the lease or awarding 18 percent interest per statute. *See Imperial Oil of N. Dakota* at 212; and *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 492 (N.D. 1980). Whether XTO's nonpayment of royalties justifies cancelling the White Lease, or imposing the 18 percent interest, is a question of fact as the

district court must weigh the equities both for and against cancellation as the Court explained in *Imperial Oil of N. Dakota*.

IV. The district court erred, as a matter of law, in dismissing Whitetail's constructive fraud claim against XTO.

[¶77] XTO's motion for summary judgment on Whitetail's constructive fraud claim should have been denied as XTO knowingly entered into the State Leases in 2009 – only two months after the White Lease was ratified – for the same minerals owned by Whitetail, despite the State being a stranger to title and the Phase II Study not being public for nearly two years. The determination of fraud involves questions of fact. In *N. Am. Bullion Exch., LLC v. CC Trading, LLC*, 412 F.Supp.3d 1119 (D.N.D. 2019), the Court denied a seller's motion for summary judgment, holding that genuine issues of fact existed as to the buyer's constructive fraud claim. *See also Holcomb v. Zinke*, 365 N.W.2d 507, 511 n. 4 (1985) (stating, "However, the existence of fraud is ordinarily a question of fact.") When reviewing a claim for constructive fraud, the Court must necessarily view the facts leading up to the contract in question. "Thus, in analyzing a claim of constructive fraud, a court must review 'the circumstances leading to the formation of the contract and determine if one party breached a duty – that is, they were misled, by representations of another." *N. Am. Bullion Exch.*, 412 F.Supp.3d at 1131.

[¶78] When the communications between Whitetail and XTO are viewed with respect to the events and timeline leading up to the parties ratification of the White Lease in March 2009, there is a question of fact as to whether XTO misled Whitetail into renewing the lease. "A district court may not weigh the evidence, determine credibility or attempt to discern the truth of the matter when ruling on a summary judgment motion." *SWMO LLC v. Eagle Rigid Spans Inc.*, 2019 ND 207, ¶ 8, 932 N.W.2d 120. XTO entered its leases with

the State for Section 27 only two months after it entered the lease extension with Whitetail. However, the Phase II Study was not completed until March 2011, nearly two years after XTO entered into its leases with the State. R218:¶ 4 (XTO Brief). *See also id*. at ¶ 6 (stating, "The completion of the Phase 2 Survey, and the State Defendants' assertion of ownership based on the results of the Phase 2 Survey, resulted in Whitetail and the State Defendants claiming competing interests in minerals in the McPete Federal Unit.") There was nothing of record evidencing the State had any interest in the Property, and Whitetail's interests in the Property had been of record for over 30 years. This begs the question, why was XTO leasing Whitetail's minerals in Section 27 already subject to the White Lease, to the State in May 2009, two years prior to the Phase II Study being publically released in 2011.

[¶79] XTO did not identify any basis other than Phase II Study for leasing Whitetail's minerals to the State in May 2009. Despite XTO promising to pay Whitetail royalties for the production from its minerals by virtue of the White Lease, it failed to pay those royalties and also entered into leases with the State two years prior to the State claiming an interest in the Property by virtue of the Phase II Study. Viewing these facts in the light most favorable to Whitetail, there's a question of fact whether XTO misled Whitetail into entering the lease extension in March 2009 knowing that it was going to lease the very same minerals to the State and then refuse to pay Whitetail its royalties, thus tying up Whitetail's ability to lease its minerals to another party.

V. The district court erred, as a matter of law, in summarily granting the State's motion for summary judgment on Whitetail's claims for trespass, slander of title, and unjust enrichment and constructive trust without any analysis.

[¶80] The district court did not perform any analysis in granting the State's motion for summary judgment on Whitetail's claims for trespass, slander of title, and unjust enrichment and constructive trust. "In determining whether summary judgment was

appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. … Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record." *Forsman v. Blues, Brews & Bar-B-Ques, Inc.*, 2017 ND 266, ¶ 9, 903 N.W.2d 524. The district court's analysis of these claims is confined to two conclusory sentences. "There are no longer any disputed material facts in this case. All remaining issues are legal, not factual, and summary judgment is appropriate." State Order at ¶ 47.

[¶81] There is no analysis or reasoning for the Court to review as related to the district court summarily dismissing Whitetail's claims for trespass, slander of title, and unjust enrichment and constructive trust.

> The district court provided no analysis of the documents in its summary judgment orders. By not addressing the evidence submitted by SWMO, the district court in effect found Mon-Dak's and RK Electric's evidence was more persuasive. In viewing the evidence in a light most favorable to SWMO at the time of the motions, SWMO raised a genuine issue of material fact, and Mon-Dak and RK Electric were not entitled to judgment as a matter of law.

SWMO at ¶ 20. *See also Abell v. GADECO, LLC*, 2017 ND 163, ¶ 8, 897 N.W.2d 914 (stating, "The district court's decision granting summary judgment is cryptic, providing no analysis or rationale.") Because there is no analysis of Whitetail's claims against the State for trespass, slander of title, and unjust enrichment and constructive trust, summary judgment on those claims should be reversed.

CONCLUSION

[¶82] Whitetail respectfully asks the Court to reverse the district court's orders and judgments granting summary judgment for the State and XTO. The district court erroneously held the State did not commit an unconstitutional taking by claiming an interest

in, and interfering with, Whitetail's minerals for the last decade. The Court should reverse and hold that as a matter of law the State committed an unconstitutional taking and remand for a trial on Whitetail's damages with instructions to award attorney's fees. The Court should also reverse and remand as to Whitetail's claims against the State for trespass, slander of title, and unjust enrichment and constructive trust.

[¶83] Finally, the Court should reverse the district court's erroneous holding that XTO did not breach its lease with Whitetail by failing to pay any royalties for the last decade. The Court should further hold that Whitetail is entitled to cancellation of its lease based on XTO's failure to pay Whitetail any royalties since production began on the McPete Well in 2010 and reverse the district court's decision granting summary judgment as to Whitetail's constructive fraud claim.

Respectfully submitted this 4th of May 2022.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32 of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 38 pages.

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CERTIFICATE OF SERVICE

[¶1] I hereby certify that on May 4th, 2022, I served the following documents:

Plaintiff/Appellant's Appellant Brief

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