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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Paul Sorum, Marvin Nelson, Michael Coachman, Charles Tuttle and Lisa Marie Omlid, each on behalf of themselves and all similarly situated tax payers of the State of North Dakota, Plaintiffs, Appellees and Cross-Appellants, -vs- The State of North Dakota, The Board of University and School Lands of the State of North Dakota, The North Dakota Industrial Commission, The Hon. Douglas Burgum, in his official capacity as Governor of the State of North Dakota, and The Hon. Wayne Stenehjem, in his official capacity as Attorney General of North Dakota, Defendants, Appellants and Cross-Appellees.	**SUPREME COURT NO. 20190203** CASS COUNTY DISTRICT COURT No. 09-2018-CV-00089

APPEAL FROM THE APRIL 24, 2018 ORDER DENYING DEFENDANTS' MOTION TO DISMISS, JUNE 26, 2018 ORDER FOR PRELIMINARY INJUNCTION, FEBUARY 27, 2019 ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT, JULY 24, 2019 ORDER ON PLAINTIFFS' MOTION FOR ATTORNEY FEES, JUDGMENT, AND JULY 31, 2019 AMENDED JUDGMENT

THE HONORABLE JOHN C. IRBY

EAST CENTRAL JUDICIAL DISTRICT

CASS COUNTY, NORTH DAKOTA

BRIEF OF DEFENDANTS, APPELLANTS AND CROSS-APPELLEES THE STATE OF NORTH DAKOTA, THE BOARD OF UNIVERSITY AND SCHOOL LANDS OF THE STATE OF NORTH DAKOTA, THE NORTH DAKOTA INDUSTRIAL COMMISSION, THE HON. DOUGLAS BURGUM, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NORTH DAKOTA, AND THE HON. WAYNE STENEHJEM, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF NORTH DAKOTA

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES PRESENTED

[¶1] Whether the district court was required to dismiss this action because Plaintiffs failed to join indispensable parties under N.D.R. Civ. P. 19?

[¶2] Whether Plaintiffs satisfied the heavy burden to declare any part of N.D.C.C. ch. 61-33.1 unconstitutional?

[¶3] Whether the district court improperly held N.D.C.C. § 61-33.1-04(1)(b) violates N.D. Const. art. X, § 18 (the anti-gift clause)?

[¶4] Whether the district court improperly awarded attorney's fees, costs and a service award, under general equitable principals?

STANDARD OF REVIEW

[¶5] A motion to dismiss for failure to join an indispensable party is subject to the abuse of discretion standard. Matter of Estate of Murphy, 554 N.W.2d 432, 438 (N.D. 1996).

[¶6] The constitutionality of a statute is fully reviewable on appeal. Ferguson v. City of Fargo, 2016 ND 194, ¶8, 886 N.W.2d 557. For equal protection claims, rational basis applies. Haney v. N.D. Workers Comp. Bureau, 518 N.W.2d 195, 198 (N.D. 1994).

[¶7] Whether a party is entitled to an award of attorney's fees, costs and service award in a non-class action lawsuit is a question of law fully reviewable on appeal. See Strand v. Cass Cty., 2008 ND 149, ¶12, 753 N.W.2d 872; Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc., 2007 ND 163, ¶21, 740 N.W.2d 67. The amount and reasonableness of attorney's fees, costs and a service award are subject to the abuse of discretion standard. Id. at ¶28.

STATEMENT OF THE CASE

[¶8] Plaintiffs commenced this action to declare N.D.C.C. ch. 61-33.1 unconstitutional. D App[1] 29-49, ¶1(b). Defendants moved to dismiss because Plaintiffs failed to join indispensable parties, which was denied. Court Docs. 23-28; D App 56-57. Plaintiffs moved for a preliminary injunction to enjoin implementation of N.D.C.C. ch. 61-33.1, which Defendants resisted. Court Docs. 32-54; 120-365; 368-374. Plaintiffs' preliminary injunction motion was partially granted by enjoining the distribution of certain revenues collected before the April 21, 2017 effective date of N.D.C.C. ch. 61-33.1. D App 58-60, ¶4. The balance of Plaintiffs' preliminary injunction motion was denied. Id., ¶6.

[¶9] The parties filed a joint stipulation of facts and respective motions for summary judgment. D App 129-201; Court Docs. 506-610. After a hearing, the district court found N.D.C.C. ch. 61-33.1, on its face, to be a constitutional act of the North Dakota Legislature, except for N.D.C.C. §61-33.1-04(1)(b), which it found violated the anti-gift clause (N.D. Const. Article X, §18). D App 61-85, ¶¶51-57.

[¶10] Plaintiffs, relying solely on the common fund doctrine, moved for an award of $62,271,000.00 in attorney's fees, $18,145.21 in costs and $750,000.00 as a service award, which Defendants opposed. Court Docs. 633-646, 664. Despite finding no common fund existed for application of the common fund doctrine, Plaintiffs were "[t]o a very limited extent . . . the prevailing party," and pursued an untenable theory, the district court awarded $723,200 in attorney's fees, $18,145.20 in costs and $69,050 as a service award based upon unspecified "equitable principles." D App 105-111.

[1] Reference to "D App" is to the Defendants Appendix filed herewith.

STATEMENT OF FACTS

[¶11] The Missouri River was a navigable body of water at the time of North Dakota's statehood. D App 129-136, ¶7. By virtue of its navigability, the State[2] received absolute right to the bed of the Missouri River through the Equal Footing Doctrine. Id. The State's absolute right to the bed of the Missouri River includes the minerals located within the bed of the Missouri River. Id. Under the Equal Footing Doctrine, the boundary of the State's title to the bed of the Missouri River extended to the ordinary high water mark ("OHWM") of the Missouri River at the time of statehood. State ex rel. Sprynczynatyk v. Mills, 1999 ND 75, ¶5, 592 N.W.2d 591 ("Mills II").

[¶12] The United States Congress authorized the construction of Garrison Dam and the Army Corps of Engineers ("the Corps") acquired, by purchase or condemnation, property rights to allow for impounding water and the operation of Garrison Dam. D App 129-136, ¶¶8 & 9. The impounded water is known as Lake Sakakawea.

[¶13] The Corps determined how much property it would need to acquire for impounding of water and operation of Garrison Dam. Id., ¶10. This determination is defined in N.D.C.C. § 61-33.1-01(1) and referred to herein as the "Corps Survey." Id., ¶10. The Corps Survey was used to acquire property bounded by the banks of the Missouri River up to an elevation of 1854' mean sea level and extending from Garrison Dam to the southern border of sections 33 and 34, Township 153 North, Range 102 West, Williams County, North Dakota ("Total Garrison Take Area"). Id., ¶11. The part of the Total Garrison Take Area, subject to review under N.D.C.C. §61-33.1-03(2),

[2] Use of the term "State" in this brief will generally refer to the State of North Dakota in the context of ownership of sovereign lands.

between the northern boundary of the Fort Berthold Indian reservation and the southern border of sections 33 and 34, Township 153 North, Range 102 West, Williams County, North Dakota, contains approximately 123,000 acres ("Affected Area"). Id., ¶12.

[¶14] In some instances, the Corps acquired both surface and mineral rights, while in other instances private landowners reserved an interest in minerals. Id., ¶13; Court Doc. 93. Historical records indicate that the discovery of oil in April 1951 prompted the Corps to acquire only the surface rights and allow for reservation of interests in minerals. D App 202-210, ¶6; D App 220-227, ¶5. The Corps did not acquire unpatented public domain lands, that have been owned by the federal government since the Louisiana Purchase.[3] D App 202-210, ¶7; D App 220-227, ¶¶6 & 20.

[¶15] A vast majority the Affected Area and other portions of the Total Garrison Take Area were non-navigable, or not within a navigable body of water, at the time of statehood. Id., ¶7. Records show the Corps acquired riparian parcels, bounded by the Missouri River, and non-riparian/upland parcels, such as parcels far from the River and bounded on all sides by a government survey line. D App 217-19; D App 220-227, ¶8.

[¶16] The Board of University and School Lands of the State of North Dakota (the "Land Board") has the authority to manage sovereign land minerals. See N.D. Const. art. IX. The provisions that govern the Land Board's leasing of sovereign land minerals include N.D.C.C. ch. 15-01, 15-05, 38-11, 61-33, and 61-33.1. The Land Board manages, operates, and supervises oil, gas and related hydrocarbons under N.D.C.C. ch. 61-33. D App 129-136, ¶15. The Land Board is authorized to enter into any agreements regarding

[3] Unpatented public domain lands are referred to herein for ease of reference as "Federal Public Domain Lands."

such minerals, and may enforce subsurface rights. Id., ¶15. The Land Board does not have authority to lease minerals over which it is determined the State does not have any ownership. See N.D.C.C. § 15-05-09. Thus, the Land Board, at its May 28, 2015 meeting, recognized its long-standing commitment to reimburse bonus, rentals or royalties if it is determined the State did not own all of the purported interest that was the subject of the lease. D App 251-253, ¶4; D App 363-377, p.8-9.

[¶17] Significantly, in 2006, 21st century technology ushered in unprecedented oil and gas expansion within the Affected Area and other areas of the Bakken Oil formation. D App 220-227, ¶9. Thereafter, disputes between the State, private parties and the federal government arose regarding areas in which the Land Board claimed ownership of sovereign land minerals, with some disputes in the form of civil lawsuits where private parties asserted superior ownership in minerals. D App 202-210, ¶12.

[¶18] In its effort to determine the boundary of the sovereign land minerals owned by the State, the Land Board relied on reports, studies, investigations and delineations. D App 129-136, ¶18. The Land Board contracted with an engineering firm to complete the Technical Report for the Ordinary High Water Mark Delineation of the Yellowstone River and Missouri River, dated November, 2010 ("Phase 1") and the Technical Report for the Ordinary High Water Mark Investigation for the Missouri River Under Lake Sakakawea, dated March, 2011 ("Phase 2"). Id., ¶¶18, 22. The Phase 1 report was to delineate the current OHWM along the Yellowstone and the Missouri Rivers to the Montana border to an area south and west of, and near, Williston. D App 140-173. The Phase 2 report was to identify the OHWM of the historic Missouri River under Lake Sakakawea from river mile marker 1574 near the Furlong Loop to mile marker 1482 at the

northern border of the Fort Berthold Indian Reservation. D App 174-195. However, the disputes regarding the Land Board's claim to sovereign land minerals continued, including the federal government claiming the Phase 2 report did not accurately reflect the OHWM of the historic Missouri River and asserting the Land Board was making claims to minerals that the United States claimed to own. D App 202-210, ¶12-13.

[¶19] At the October 18, 2016 Land Board meeting, then Governor Dalrymple made a statement regarding the Land Board's leasing practices of minerals under the Missouri River and Lake Sakakawea – using Phase 1 from the Montana State Line to the Highway 85 Bridge, and using Phase 2 from the Highway 85 Bridge to the Four Bears Bridge. D App 196-201, p.1. The Land Board then approved a motion that it would not change leasing practices until the Legislature had the opportunity to consider the definition of the OHWM as used to establish sovereign ownership of oil and gas minerals. Id., p. 2.

[¶20] The ongoing disputes regarding the boundary of the State's ownership of sovereign land minerals within the Affected Area prompted the North Dakota Legislature to introduce SB 2134, the purpose of which was to clarify the State's ownership and resolve these mineral ownership disputes. D App 202-210, ¶14; D App 129-136, ¶¶23-24. Ultimately, SB 2134 was passed by an overwhelming majority of the Legislature, and codified as N.D.C.C. ch. 61-33.1. 2017 North Dakota Laws Ch. 426, (S.B.2134).

[¶21] Relevant to the present litigation, N.D.C.C. ch. 61-33.1 provides that within the Affected Area, the State holds no claim or title to any minerals above the OHWM of the historical Missouri riverbed channel, "except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or

other written conveyance." N.D.C.C. §§ 61-33.1-01(2) and 61-33.1-02.[4] Further, certain repayments and refunds along with acreage adjustments for tracts above the OHWM of the historical Missouri riverbed channel were required. N.D.C.C. § 61-33.1-04.[5] The historical Missouri riverbed channel is defined as the channel as it existed upon closure of the Pick-Sloan Missouri basin project dams, which included Garrison Dam. N.D.C.C. § 61-33.1-01(2). N.D.C.C. ch. 61-33.1 has an extensive process to determine the OHWM of the historical Missouri riverbed channel. N.D.C.C. §§ 61-33.1-01(1), -03 and -05.

[¶22] During the consideration of SB 2134, a fiscal note was provided which included a chart labelled "Projected Revenue Based Upon 25,000 Impacted Acres." D App 129-136, ¶26. Yet, the fiscal impact, if any, from N.D.C.C. ch. 61-33.1 is unknown until all statutory processes are exhausted. D App 220-227, ¶10; D App 251-253, ¶5.

[¶23] As part of the administrative process under N.D.C.C. ch. 61-33.1, the North Dakota Industrial Commission, acting through the Department of Mineral Resources ("DMR"), hired Wenck Associates, Inc. ("Wenck") to perform a review of the "delineation of the ordinary high water mark of the corps survey segments." D App 129-136, ¶28. Wenck's analysis showed the OHWM of the historical Missouri riverbed channel differed from the Corps Survey. Id., ¶30. Wenck determined the OHWM of the historical Missouri riverbed channel was approximately 27,089 acres, 10,042 more than the Corps Survey. Id.

[¶24] A public hearing, required by N.D.C.C. § 61-33.1-03(6) was held. Id., ¶31. Following the public hearing, DMR and Wenck developed and delivered a final

[4] Likewise, the State retains sovereign ownership of minerals located within the boundary of the OHWM of the historical Missouri riverbed channel.

[5] During the 2019 legislative session, the timing of these refunds and acreage adjustments was changed and are to be made after the process for an acreage determination is completed. See N.D.C.C. §§ 61-33.1-03(8) and 61-33.1-04 (2019).

recommendation to the Industrial Commission. N.D.C.C. § 61-33.1-03(7); D App 220-227, ¶¶11-12. The Industrial Commission issued Order No. 29129 adopting the final recommendations of Wenck and DMR to delineate the OHWM of the historical Missouri riverbed channel.[6] D App 220-227, ¶13; D App 229-242. The Legislature provided a mechanism for judicial review of this delineation. N.D.C.C. § 61-33.1-05.

[¶25] Plaintiffs erroneously claim N.D.C.C. ch. 61-33.1 gives away sovereign land minerals between OHWM of the historical Missouri River and the water's edge of Lake Sakakawea, which Plaintiffs declare is the OHWM of the Lake ("Disputed Area").[7]

LAW AND ARGUMENT

I. INTRODUCTION

[¶26] Plaintiffs' case is based on an expansive and legally unprecedented argument that the State owns all of the minerals under Lake Sakakawea because they underlie land that became inundated with water after closure of Garrison Dam. Plaintiffs make this argument more than a half century after the federal government acquired the land, and some of the associated minerals, for the Lake.[8] Plaintiffs' tenuous position fails to consider this point, and does not consider the federal government has owned some of the parcels since the Louisiana Purchase. Equally problematic is private parties who reserved minerals under Lake Sakakawea had no say in the outcome of this case. This is an untenable result.

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[6] The final recommendation resulted in the acres within the OHWM of the historical Missouri riverbed channel reduced from 27,089 acres to 26,194. D App 220-227, ¶12.

[7] Plaintiffs claimed the Disputed Area contains 108,000 acres, (123,000 acres within the Affected Area less 15,000 they asserted was within the OHWM of the historical Missouri riverbed). D App 29-49, ¶ 2(e), n.7. The Industrial Commission found there are 26,194 acres within the OHWM of the historical Missouri riverbed channel. D App 220-227, ¶12. Thus, the Disputed Area contains 96,806 acres (123,000 acres less 26,194 acres).

[8] Plaintiffs' claims only concern the ownership of the oil and gas minerals. Accordingly, nothing in the Defendants' briefs or arguments of their counsel in this matter concern or relate to the State's regulatory authority or ownership of waters or minerals.

[¶27] The district court correctly rejected Plaintiffs' facial constitutional challenge to Chapter 61-33.1 and held that the State did not own all of the minerals under the bed of Lake Sakakawea. D App 61-85, ¶37. Yet, the district court found it unconstitutional to enact a law to repay royalties the district court presumed had been received more than three years before N.D.C.C. ch. 61-33.1 was enacted because such claims would be *per se* prohibited based on the statute of limitations in N.D.C.C. § 28-01-22.1. Id., ¶49-50.

[¶28] Any ruling that adjustments to boundaries of mineral leases and repayment of lease royalties or other bonus monies can never be made, is contrary to the law and the Land Board's long-standing practice. The conclusion that repayment of royalties is unconstitutional because of a statute of limitations fails to consider numerous issues, such as applicable accrual dates and the discovery rule, is contrary to the law, and requires joinder of parties whose payments are barred under the district court's analysis.

[¶29] Finally, the district court granting Plaintiffs attorney's fee, costs and a service award was without legal authority or precedent. This Court has not abandoned the American Rule for awarding attorney's fees and should not do so in this case.

II. THE DISTRICT COURT WAS REQUIRED TO DISMISS THE COMPLAINT FOR FAILURE TO JOIN INDISPENSABLE PARTIES.

[¶30] "Rule 19, N.D.R. Civ. P., provides for the joinder of persons needed for just adjudication." Stonewood Hotel Corp. v. Davis Dev., Inc., 447 N.W.2d 286, 289 (N.D. 1989). Rule 19 provides a two-step process to determine whether a complaint should be dismissed for failure to join an indispensable party. Davis ex rel. Davis v. United States, 343 F.3d 1282, 1289 (10th Cir. 2003). Rule 19(a) provides a person is an indispensable party if complete relief cannot be accorded in that person's absence, or resolving the claims without that person may impair the absent party's interest or subject an existing party to

the risk of double, multiple or otherwise inconsistent obligations. EEE Minerals, LLC v. State, 318 F.R.D. 118, 124 (D.N.D. 2016). If joinder is feasible, then that person must be joined. N.D.R. Civ. P. 19(a)(2). If joinder is not feasible, Rule 19(b) directs a court to "determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." N.D.R. Civ. P. 19(b).

[¶31] Rule 19 "requires the joinder of all parties who are materially interested in the subject matter of the action so that the court may grant full relief and adjust the rights of all parties interested." Wacker Oil, Inc. v. LoneTree Energy, Inc., 459 N.W.2d 381, 383 (N.D. 1990). The purpose of Rule 19 "is to protect an absent party from prejudice, protect parties from harassment by successive suits, and protect the courts from being imposed upon by multiple litigation." Cudworth v. Cudworth, 312 N.W.2d 331, 333 (N.D. 1981).[9] The district court abused its discretion in denying the Defendants' Rule 19 motion. Hanisch v. Kroshus, 2013 ND 37, ¶9, 827 N.W.2d 528.

[¶32] Plaintiffs' recognize the existence of interested parties that claim interests in the minerals at issue and will be affected by the district court's ruling. D App 29-49, ¶1(c). The interested parties are indispensable because, in their absence, complete relief cannot be achieved, and proceeding without them exposes the State to substantial risk of incurring double, multiple or otherwise inconsistent obligations, N.D.R. Civ. P. 19(a)(1)(A) and (B)(ii). Yet, the district court denied the Rule 19 motion, even though Plaintiffs' entire argument is the State owns all minerals to the water's edge of Lake Sakakawea, a position that affects minerals rights of the Federal Government and other non-parties who claim to

[9] Although the text of Rule 19 has changed since this decision, the changes were technical in nature and not intended to change the substance of the rule. See Explanatory Note, N.D.R. Civ. P. 19.

have reserved mineral interests when the Corps acquired lands for Garrison Dam. Finstrom v. First State Bank of Buxton, 525 N.W.2d 675, 677 (N.D. 1994). The district court's decision on the merits highlights the effects on non-parties when it found that, by operation of a statute of limitations, claims by non-parties for revenue generated more than three years ago are time barred. D App 61-85, ¶50. The district court's ruling affects non-parties. Cudworth, 312 N.W.2d at 333.

[¶33] The district court failed to consider that its ruling in this case will affect interests of non-parties. Indeed, through its statute of limitations analysis, the district court affected the interests claimed by individuals who had never participated in this matter. N.D.R. Civ. P. 19(a)(1)(A). The district court's decision exposes the State to a substantial risk of double, multiple or otherwise inconsistent obligations, and continued litigation that Rule 19 and its joinder requirement intends to prevent. N.D.R. Civ. P. 19(a)(1)(B)(ii). Denying Defendants' Rule 19 motion misapplied and misinterpreted the law, and requires reversal.

III. THE DISTRICT COURT ERRONEOUSLY FOUND N.D.C.C. § 61-33.1-04(1)(b) VIOLATED THE ANTI-GIFT CLAUSE.

A. Plaintiffs failed to meet the heavy burden to overcome the strong presumption N.D.C.C. ch. 61-33.1 is a constitutional legislative act.

[¶34] Plaintiffs brought a facial constitutional challenge[10] to N.D.C.C. ch. 61-33.1, which is an attack on the statute itself, rather than to a particular application. City of Los Angeles, Calif. v. Patel, 135 S. Ct. 2443, 2449 (2015); Court Doc. 436, ¶12. Under a facial challenge the "challenger must establish no set of circumstances exists under which the [legislation]

[10] Plaintiffs attempted to incorporate an "as applied" challenge. Court Doc. 454, p.11, ln. 18 to p. 12, ln. 5. Yet, Plaintiffs' label is "not what matters" because their claims and the relief that would follow extends beyond these Plaintiffs and therefore, the standards for a facial challenge must be satisfied. John Doe No. 1 v. Reed, 561 U.S. 186, 194 (2010). Plaintiffs attempt to bring an "as applied" challenge raises issues of standing. Olson v. Bismarck Parks & Recreation Dist., 2002 ND 61, ¶10, 642 N.W.2d 864.

would be valid." United States v. Salerno, 481 U.S. 739, 745 (1987). This Court has adopted the "no set of circumstances" burden for facial constitutional challenges. Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 2018 ND 71, ¶ 38, 908 N.W.2d 442. Given the remedy in a facial challenge is "injunctive and declaratory; a successful facial attack means the statute is wholly invalid and cannot be applied to anyone." Ezell v. City of Chicago, 651 F.3d 684, 698 (7th Cir. 2011) (emphasis in original); Barrett v. Claycomb, 705 F.3d 315, 321 (8th Cir. 2013). Plaintiffs' facial challenge required they show there are no set of circumstances under which N.D.C.C. ch. 61-33.1 is valid. Salerno, 481 U.S. at 745.

[¶35] In addition, an overarching principal of law provides a statute be upheld unless its challenger clearly demonstrates the unconstitutionality of the statute. State v. Burr, 1999 ND 143, ¶9, 598 N.W.2d 147. The burden of proving a statute's constitutional infirmity lies solely with the challenger. Simons v. State, Dep't of Human Servs., 2011 ND 190, ¶23, 803 N.W.2d 587. A challenger must bring the "heavy artillery," because a legislative act is presumed valid and any doubt is resolved in favor of validity. Burr, 1999 ND 143, ¶9.

[¶36] This presumption is so strong that courts will not declare a statute void unless its invalidity is "beyond a reasonable doubt." MKB Mgmt. Corp. v. Burdick, 2014 ND 197, ¶45, 855 N.W.2d 31. Upholding the constitutionality of a statute is so compelling that four Supreme Court justices must find a statute is unconstitutional. N.D. Const. art. VI, § 4. The stringent burden for establishing unconstitutionality is mandated by the roles of the three branches of our government. Verry v. Trenbeath, 148 N.W.2d 567, 570 (N.D. 1967). As such, this Court's inquiry is limited to whether the statute is in violation of the constitution. Rosedale Sch. Dist. No. 5 v. Towner Cty., 216 N.W. 212, 214 (N.D. 1927).

[¶37] Any contention by Plaintiffs that their public trust doctrine claim is unhindered by the burden outlined for constitutional challenges is erroneous. Because the public trust doctrine is a common law principal, a constitutional anomaly and a separation of powers issue would arise if a statute, not prohibited by the Constitution, is invalidated based on a common law principal. Verry, 148 N.W.2d at 571; Rosedale Sch. Dist., 216 N.W. at 214.

[¶38] Here, Plaintiffs have not met the heavy burden for a facial constitutional challenge.

B. Plaintiffs' misapply the Equal Footing Doctrine and State Law.

[¶39] Plaintiffs allege N.D.C.C. ch. 61-33.1 is unconstitutional and violates the public trust doctrine. D App 29-49, ¶1(e). The foundation of Plaintiffs' challenge is the Equal Footing Doctrine. Id., ¶2(a)-(f). Plaintiffs argued the minerals within the Disputed Area are State sovereign land minerals by virtue of their inundation by water after Garrison Dam was closed. Yet, the vast majority of these minerals are located in areas that did not constitute a navigable body of water at the time of statehood and were far removed and not riparian to the Missouri River. D App 220-227, ¶¶7-8. Furthermore, the minerals within the Disputed Area (1) were reserved by landowners when surface rights were acquired by the Corps, (2) were acquired by the Corps, or (3) are Federal Public Domain Lands.[11] D App 129-136, ¶13; D App 220-227, ¶¶ 4, 6, 16-20. Plaintiffs' contention that minerals within the Disputed Area automatically vested in the State with the inundation of waters from the closure of Garrison Dam misapplies the Equal Footing Doctrine and state law.

[¶40] The Equal Footing Doctrine vested title in the beds of navigable bodies of water with the State. PPL Montana, LLC v. Montana, 565 U.S. 576, 590–91 (2012); State ex rel.

[11] There may be parcels, and minerals underlying such parcels, within the Disputed Area that are original grant lands acquired by the State under federal law or acquired by the State through purchase, foreclosure or other written conveyance that are unaffected by N.D.C.C. ch. 61-33.1. See N.D.C.C. § 61-33.1-02.

Sprynczynatyk v. Mills, 523 N.W.2d 537, 539 (N.D. 1994) (Mills I). The State's ownership includes both the bed of such navigable waters and the underlying minerals. J.P. Furlong Enterprises, Inc. v. Sun Expl. & Prod. Co., 423 N.W.2d 130, 132 (N.D. 1988).

[¶41] Navigability for purposes of the Equal Footing Doctrine title "is determined at the time of statehood." PPL Montana, LLC, 565 U.S. at 592. Navigability under the Equal Footing Doctrine applies the "navigability in fact" test. Id. at 591–92. The Equal Footing Doctrine is not a continuing principal of law but exhausted upon a state entering the Union. Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 371 (1977). Thus, the extent of the State's Equal Footing Doctrine ownership is fixed at statehood. Id. at 370; Reep v. State, 2013 ND 253, ¶14, 841 N.W.2d 664.

[¶42] This Court has explained Equal Footing Doctrine ownership does not attach to lands that were dry at the time of statehood. State v. Loy, 20 N.W.2d 668 (N.D. 1945); Hogue v. Bourgois, 71 N.W.2d 47 (N.D. 1955). In Loy, this Court noted there was not sufficient evidence to show the island at issue was, at time of statehood, "fast and dry" with "a degree of stability" so as to except it from the Equal Footing Doctrine title. Id. at 669; Hogue, 71 N.W.2d at 52-53 (same). In sum, Equal Footing Doctrine title does not attach to land that was "fast and dry" at the time of statehood.

[¶43] Water bodies, and their boundaries, are not stationary. Mills II, 1999 ND 75, ¶5. Likewise, the OHWM of a navigable body of water is ambulatory. Id. Forces of accretion, erosion, and reliction can cause shifts in navigable bodies of water, its attendant OHWM, and in turn the boundary line. J.P. Furlong Enterprises, 423 N.W.2d at 132-33, n.4. When a water line fixes a boundary line of a parcel of land, the shifting water line remains the

boundary. Mills II, 1999 ND 75, ¶5. However, the shifting boundary line is evaluated under North Dakota's law on riparian land rights. Corvallis, 429 U.S. at 371, 377.

[¶44] Riparian land is a parcel of land that has a boundary line fixed by a body of water. See J.P. Furlong Enterprises, 423 N.W.2d at 132. With respect to lands riparian to bodies of water that were navigable at the time of statehood, the State's sovereign ownership goes up to the OHWM of such body of water. Mills II, 1999 ND 75, ¶5. Accordingly, for these riparian parcels, the principals of accretion and erosion may shift the State's sovereign ownership boundary. Id.; J.P. Furlong Enterprises, 423 N.W.2d at 136; Perry v. Erling, 132 N.W.2d 889, 900 (N.D. 1965) (Teigen, J, concurring opinion).

[¶45] In contrast, non-riparian parcels (also referred to as "upland parcels") have been described by this Court as being bounded on all four sides by government survey lines. See Norby v. Estate of Kuykendall, 2015 ND 232, ¶11, 869 N.W.2d 405. Plaintiffs offer no support or authority for the argument that the rules of shifting ownership relating to riparian ownership apply to parcels under Lake Sakakawea originally surveyed to be non-riparian or upland parcels. Perry, 132 N.W.2d at 897, 901-02 (Teigen, J. concurring). Yet, Plaintiffs seek to extend the limits of the Equal Footing Doctrine and state riparian laws to assert all minerals under Lake Sakakawea are sovereign land minerals.

[¶46] As previously noted, Plaintiffs have the burden of presenting "heavy artillery" in a facial challenge to establish no set of circumstances exist under which N.D.C.C. ch. 61-33.1 is valid. Salerno, 481 U.S. at 745. Plaintiffs were required to show the entire Disputed Area was under a navigable body of water at the time of statehood, because if any portion was not, the Equal Footing Doctrine is not applicable. Plaintiffs provided no evidence to establish any portion of the Disputed Area was within a navigable body of water at the time

North Dakota became a state. Simons, 2011 ND 190, ¶23; Burr, 1999 ND 143, ¶9; North Dakota v. United States, 972 F.2d 235, 238 (8th Cir. 1992); see also D App 220-227, ¶7.

[¶47] Plaintiffs have provided no authority or evidence, let alone the "heavy artillery" needed, to demonstrate that under state law the Missouri River's OWHM "shifted" with the closure of Garrison Dam and the shoreline of Lake Sakakawea now marks the boundary of the State's sovereign ownership. This is not surprising when considering this Court has explained that shifts in ownership because of the movement of a body of water do not apply to lands that are non-riparian or upland parcels. See Perry, 132 N.W.2d at 897.[12] The evidence in this case shows vast swaths of property within the Disputed Area were non-riparian/upland parcels far removed from and not even adjacent to the Missouri River when Garrison Dam was closed. D App 220-227, ¶8.

[¶48] Plaintiffs' argument leads to absurd results. It is undisputed the United States acquired surface rights and some mineral rights for construction of Garrison Dam. Nevertheless, Plaintiffs claim the State owns the bed of Lake Sakakawea and all of the minerals within the Disputed Area. This results in an improper nullification of federal ownership and directly contravenes the Supremacy Clause of the United States Constitution. United States v. 32.42 Acres of Land, More or Less, Located in San Diego

[12] There may be parcels situated next to the Missouri River where the originating federal survey description would appear to show the parcel as being designated non-riparian, but due to an error in the survey; an error in creating the legal description; a failure to properly consider the State's ownership; or for other reasons (such as in Norby or Perry), the parcel should be viewed as riparian. Nothing herein waives or should be interpreted to constitute a waiver on whether such parcels that are adjacent to the Missouri River constitute non-riparian parcels. Nonetheless, there can be no argument that those original federally surveyed and described parcels as being bounded on all four sides by government survey lines that were nowhere near the Missouri River or located miles away from the Missouri River were non-riparian, (for example parcels near or abutting the 1854 msl elevation Upper Garrison Acquisition Line).

Cty., Cal., 683 F.3d 1030, 1034 (9th Cir. 2012). In fact, under Plaintiffs' theory even Federal Public Domain Lands and underlying minerals, owned by the federal government since the Louisiana Purchase in 1803, are now State owned. Id., ¶20. Embracing Plaintiffs' argument requires a finding that the Corps' allowing landowners to reserve the mineral interests was a total facade because such reservations were an utter nullity, *ab initio*, once Garrison Dam was closed and formed Lake Sakakawea. See Id., ¶¶18-20; D App 378-392.

[¶49] If Plaintiffs' contention was correct, then constructing a dam of a sufficient magnitude at Pembina, North Dakota, could lead to the Red River Valley located within North Dakota becoming State sovereign land once inundated with water. Plaintiffs' view of the law renders the Constitutional takings clauses seemingly inapplicable since there would be no need to compensate landowners or proceed with eminent domain actions because the mineral interests automatically become State property upon flooding the surface. These absurd results follow from Plaintiffs' contention that by the construction of Garrison Dam all minerals in the Disputed Area are subject to State sovereign ownership.

[¶50] Plaintiffs have not proven that by application of the Equal Footing Doctrine and state riparian laws the State's sovereign ownership attached to the entire Disputed Area, and cannot prove an improper "give away" of sovereign interests. Since this "give away" is the foundation of Plaintiffs' challenge, they cannot prove in all application N.D.C.C. ch. 61-33.1 is an invalid "give away" of State sovereign land minerals. Salerno, 481 U.S. at 745.

C. There exists no evidence in the record to support a finding that N.D.C.C. § 61-33.1-04(1)(b) violates the Anti-Gift Clause.

[¶51] Plaintiffs claim N.D.C.C. ch. 61-33.1 constitutes a gift of the State's sovereign land minerals within the Disputed Area in violation of the North Dakota Constitution's anti-gift clause. N.D. Const. art. X, § 18. It is self-evident that for there to be an unconstitutional

gift, the State must have ownership of the particular asset that is allegedly being "given away." E.g., Solberg v. State Treasurer, 53 N.W.2d 49 (N.D. 1952); Herr v. Rudolf, 25 N.W.2d 916 (N.D. 1947). Plaintiffs have not met the burden of their facial challenge because there is no evidence to prove and the law does not support a finding that the entire Disputed Area contains only the State's sovereign land minerals.

[¶52] Plaintiffs cited a fiscal note that was part of the legislative history of N.D.C.C. ch. 61-33.1 to support an alleged "gift." D App 50-55. The fiscal note estimated the difference between the Corps Survey and the investigation under the Phase 2 report. Id. The Wenck report, not the Corps Survey, became the foundation for the delineation of the OHWM. D App 220-227, ¶13. Thus, the fiscal note is of no value for Plaintiffs' challenge.

[¶53] Furthermore, return of funds, if any, for which the State does not have mineral interests, was the longstanding commitment of the Land Board prior to the passage of N.D.C.C. ch. 61-33.1. The Land Board, at the May 28, 2015 meeting, affirmed its longstanding commitment of returning bonus, rentals and royalties received by the State if it is determined the State owns less than what is purported on an oil and gas lease. Court D App 251-253, ¶4. Thus, affirmation of the Land Board's practice was recognized almost two years before enactment of N.D.C.C. ch. 61-33.1. This commitment is wholly consistent with N.D.C.C. ch. 61-33.1, already existing state statutes, and the Land Board's applications of its oil and gas leases. N.D.C.C. §§ 15-05-09; 38-11-02; 38-11-02.1; D App 251-253, ¶4. The Land Board leased mineral interests based on Phase 1 and Phase 2 reports. Yet, disputes regarding mineral ownership within the Disputed Area continued. It is not surprising, nor unconstitutional, for the North Dakota Legislature to have enacted N.D.C.C. ch. 61-33.1 to clarify the State's ownership and resolve these disputes.

[¶54] By enacting N.D.C.C. 61-33.1, the North Dakota Legislature provided for an extensive process to locate the OHWM of the historical Missouri riverbed channel that required public comment, a public hearing and allows for judicial review. See N.D.C.C. § 61-33.1-03(6)-(7). The Mississippi case of Sec'y of State v. Wiesenberg, 633 So.2d 983 (Miss. 1994) is persuasive. In Wiesenberg, land disputes and uncertainty of land titles arose regarding the lands along the tideland of the Mississippi Sound that resulted in the Mississippi Legislature adopting legislation to establish "a procedure for determining the line of demarcation between public trust lands [originally acquired through the Equal Footing Doctrine] and that of private property owners." Wiesenberg, 633 So.2d at 986-87. The Mississippi statute required a line be established to delineate public and private lands on the applicable high water line as of July 1, 1973. Id. at 990. Similar to N.D.C.C. ch. 61-33.1, the process under the Mississippi statutes included public comments, an administrative procedure to resolve differences, and judicial review. Id. at 991-92. The statute was challenged as an unconstitutional gift. Id.

[¶55] The Mississippi Supreme Court rejected this argument, finding that "the intent of the legislation was to finally put to rest the confusion and chaos surrounding Mississippi's shoreline property." Id. The Mississippi Court stated that although using the high water line as of July 1, 1973 "will not produce a perfect line," the legislation is for a "higher purpose" because it "protects the public's interest as well as private ownership and hopefully puts to rest the chaos that has plagued this subject matter and this geographical area for many years." Id. at 991. Like the Mississippi legislation in Wiesenberg, N.D.C.C. ch. 61-33.1 serves a "higher purpose" because it provides clarity to "put to rest the chaos that has plagued this subject matter and this geographical area." Id. at 991-92.

[¶56] Plaintiffs' anti-gift clause claim fails as they have not shown in all applications N.D.C.C. ch. 61-33.1 is an unconstitutional "give away." Salerno, 481 U.S. at 745.

D. There is no violation Public Trust Doctrine or Watercourses Forever Clause.

[¶57] This Court has recognized and explained the public trust doctrine as one where the state owns title to lands under navigable bodies of water "in trust for the people of the State [so] that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties." United Plainsmen Ass'n v. N. Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 461 (N.D. 1976). Accordingly, such sovereign interests are not to be abdicated because they are to be held in trust for the public. Mills I, 523 N.W.2d at 540. However, the State was not vested with title or sovereign ownership in lands not within navigable bodies of water. State v. Brace, 36 N.W.2d 330, 332 (N.D. 1949). Such lands remained with the federal government, or those persons to whom the federal government transferred title and in turn the public trust doctrine has no application. Id..

[¶58] As explained above, Plaintiffs have not proven the entire Disputed Area is within the State's public trust sovereign ownership. Simply, the law and facts do not support a finding the State has been afforded sovereign ownership of all minerals within the entire Disputed Area – a proof required for Plaintiffs' facial challenge. Plaintiffs failed their facial challenge burden because they did not prove all minerals in the Disputed Area are State sovereign land minerals and did not then prove N.D.C.C. ch. 61-33.1, in all applications, improperly "gives away" sovereign property. Salerno, 481 U.S. at 745.

[¶59] Even when setting aside Plaintiffs' failure to prove the public trust doctrine applies to the entire Disputed Area, this doctrine still does not render N.D.C.C. ch. 61-33.1 unconstitutional. This Court has noted N.D.C.C. § 61-01-01 expresses the public trust

doctrine in North Dakota—that all waters within the limits of the state from the sources described in such statute belong to the public. United Plainsmen Ass'n, 247 N.W.2d at 462; N.D.C.C. § 61-01-01. However, "[t]he ownership of beds of streams and lakes is quite a different matter from the right to control waters." N. Dakota State Water Comm'n v. Bd. of Managers, 332 N.W.2d 254, 258 (N.D. 1983). Thus, the public trust doctrine "confirms the State's role as trustee of the public waters." Id. at 463. "[T]he purpose of a state holding title to a navigable riverbed is to foster the public's right of navigation, traditionally the most important feature of the public trust doctrine," but includes other important aspects – being bathing, swimming, recreation, fishing, irrigation, industrial and other water supplies – most closely associated with where the water is in the riverbed. J.P. Furlong Enterprises, 423 N.W.2d at 140.

[¶60] Nothing in N.D.C.C. ch. 61-33.1 interferes with or otherwise hinders the full enjoyment by the public of the most important features of the public trust doctrine – navigation upon the waters of Lake Sakakawea. Id. Likewise, nothing in N.D.C.C. ch. 61-33.1 interferes with or hinders the full enjoyment by the public of the other important features of the public trust doctrine – bathing, swimming, recreation, fishing, irrigation, and industrial or other water supplies on or with the waters of Lake Sakakawea. Id. Finally, Plaintiffs provided no evidence that any of these important features of the public trust doctrine are interfered with or otherwise hindered by N.D.C.C. ch. 61-33.1. Simply, Plaintiffs have not shown N.D.C.C. ch. 61-33.1 violates the public trust doctrine.

[¶61] Plaintiffs also rely upon the "Watercourse Forever Clause". N.D. Const. art. XI, § 3. This Court has explained that the Watercourse Forever Clause "applies only to the waters of flowing streams and natural watercourses." BNSF v. Benson Cty. WRD, 2000

ND 182, ¶ 11, 618 N.W.2d 155. Plaintiffs attempt to apply this constitutional provision, not to waters, but minerals. Even if one gets past Plaintiffs' incorrect application, this Court has been equally clear that this provision has no application to areas that were non-navigable under the Equal Footing Doctrine. Ozark-Mahoning Co. v. State, 37 N.W.2d 488, 493 (N.D. 1949). Plaintiffs' Watercourse Forever Clause claim fails because the vast majority of the Disputed Area was not subject to Equal Footing Doctrine principles.

[¶62] Plaintiffs fell short of showing N.D.C.C. ch. 61-33.1, in all applications, violates the public trust doctrine or the Watercourses Forever Clause. Salerno, 481 U.S. at 745.

E. N.D.C.C. ch. 61-33.1 does not violate the Equal Protection Clause.

[¶63] Plaintiffs' claim that N.D.C.C. ch. 61-33.1 violates the equal protection clause of the North Dakota Constitution because (1) the minerals within the Disputed Area are the State's sovereign land minerals and N.D.C.C. ch. 61-33.1 is an improper "give away" and (2) this "give away" conflicts with equal protection by treating those within the Disputed Area more favorably than parties who own mineral interests abutting other navigable bodies of water (a "geographical" equal protection challenge). As explained, Plaintiffs' argument the minerals within the Disputed Area are the State's sovereign land minerals is incorrect. Thus, the very underpinning of Plaintiffs' equal protection claim fails.

[¶64] Even ignoring that the "give away" foundation fails, Plaintiff's "geographical" equal protection challenge lacks merit. "The equal protection clauses of the state and federal constitutions do not prohibit legislative classifications or require identical treatment of different groups of people." State v. Leppert, 2003 ND 15, ¶7, 656 N.W.2d 718. Plaintiffs' equal protection claim is tested against the deferential rational basis standard of review – that upholds legislation when any set of facts could be conceived to support it and when the legislation operates alike upon all persons and things. Asbury Hosp. v. Cass Cty.,

N. D., 326 U.S. 207, 215 (1945); Best Prod. Co. v. Spaeth, 461 N.W.2d 91, 99 (N.D. 1990); Gange v. Clerk of Burleigh Cty Dist. Ct, 429 N.W.2d 429, 433 (N.D.1988). It is evident the provisions of N.D.C.C. ch. 61-33.1 operate equally upon all lands within the scope of the statute, and the effect of the statute is the same upon all persons who have lands described therein. Thus, Plaintiff's "geographic" equal protection claim fails.

[¶65] Plaintiffs' equal protection claim also takes aim at the static nature of the OHWM delineation under in N.D.C.C. ch. 61-33.1. Court Doc. 54, ¶41. Use of a static OHWM delineation as of the time Garrison Dam was closed is certainly reasonable because the Corps Survey, in conjunction with other data and evidence, was used as the basis to establish the OHWM of the historical Missouri riverbed channel. D App 220-227, ¶¶11-12. This satisfies the equal protection rational basis standard because it was a reasonable and legitimate legislative judgment. It would be pure speculation to predict the shift, if any, in the OHWM of the historical Missouri riverbed channel from accretion or erosion after the riverbed was inundated with the closure of Garrison Dam.

[¶66] Plaintiffs' further allege an equal protection violation because N.D.C.C. ch. 61-33.1 is applicable to wells spud after January 1, 2006, *i.e.* a retroactively applied statute is unconstitutional. Court Doc. 54, ¶41. Plaintiffs have provided no explanation or analysis as to why application of N.D.C.C. ch. 61-33.1 to wells spud after January 1, 2006 is unconstitutional. See D App 29-49. Plaintiffs failed to meet their burden of showing the retroactive application of N.D.C.C. ch. 61-33.1 is unconstitutional, particularly when the record shows a rational basis for the Legislature's application to January 1, 2006.

[¶67] Recognizing rules of interpretation provide "[n]o part of this code is retroactive unless it is expressly declared to be so," this Court has made clear that not all retroactive

statutes are unconstitutional. N.D.C.C. § 1-02-10; Thompson v. Thompson, 78 N.W.2d 395 (N.D. 1956). A statute is only "unconstitutional if [it] impair[s] the obligation of a contract or violate[s] a constitutional due process clause." Thompson, 78 N.W.2d at 399. Even a statute that readjusts rights and burdens is not unconstitutional simply because it otherwise upsets settled expectations or imposes a new duty/liability on past acts. Serv. Oil, Inc. v. State, 479 N.W.2d 815, 818, n.3 (N.D. 1992).

[¶68] Nothing in the retroactive application of N.D.C.C. ch. 61-33.1 violates a contractual obligation or the due process clause and Plaintiffs provided no evidence to the contrary. The record shows the selection of January 1, 2006 was a rational decision by the North Dakota Legislature because that is when new technology ushered in unprecedented oil and gas development in the Affected Area and other areas of the Bakken Oil formation. D App 220-227, ¶9. Under the deferential rational basis standard of review, a January 1, 2006 date does not violate the equal protection clause. Asbury Hosp., 326 U.S. at 215.

[¶69] Plaintiffs' equal protection claim can best be described as a challenge to question "the justice, wisdom, necessity, utility and expediency of legislation." Larimore Pub. Sch. Dist. No. 44, 2018 ND 71, ¶7. Those questions are matters properly vested in the North Dakota Legislature. Id. Moreover, Plaintiffs have not contended or explained how N.D.C.C. ch. 61-33.1 falls below the deferential standard of review for their equal protection claim to show there is not a single conceivable set of facts that could support these legislative determinations. Asbury Hosp., 326 U.S. at 215. Plaintiffs' equal protection claims fail.

F. N.D.C.C. ch. 61-33.1 is not a special law under the North Dakota Constitution.

[¶70] Plaintiffs claim N.D.C.C. ch. 61-33.1 constitutes a special law in violation of Article IV, § 13 of the North Dakota Constitution. D App 29-49, ¶ 59. "A statute relating

to persons or things as a class is a general law; one relating to particular persons or things of a class is special." MCI Tele. Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994).

[¶71] The controlling decision in this area of the law is Bouchard v. Johnson, 555 N.W.2d 81 (N.D. 1996). The plaintiffs in Bouchard claimed N.D.C.C ch. 53-09 was an unconstitutional special law. Id. at 88. This Court disagreed, explaining that N.D.C.C. ch. 53-09 operated alike on all similarly situated persons. Id. If the statute only applied to the ski resort named in the litigation then, and only then, would N.D.C.C. ch. 53-09 be an unconstitutional special law. Id. This Court noted that "Bouchard's interpretation would, in effect, prohibit all legislative classifications." Id.

[¶72] Applying Bouchard, N.D.C.C. ch. 61-33.1 is not a special law, but rather is general because it operates equally upon all persons within its scope, *i.e*. all persons who own minerals in the Disputed Area. Id.; State v. Lawler, 205 N.W. 880, 884 (N.D. 1925). Under Plaintiffs' erroneous interpretation, the North Dakota Legislature would be prohibited from ever making any classifications. Id. That is not the current state of the law.

G. The District Court's *sua sponte* decision to hold N.D.C.C. § 61-33.1-04(1)(b) violates the Anti-Gift Clause was erroneous.

[¶73] Notwithstanding the district court's rejection of Plaintiffs' arguments, N.D.C.C. § 61-33.1-04(1)(b) was held to violate the anti-gift clause. D App 61-85, ¶¶54-57. The district court incorrectly reasoned "money already collected and in the bank [is] indisputably owned by the State [and] would have to be refunded to various claimants" through application of N.D.C.C. § 61-33.1-04(1)(b). Id., ¶49. However, money collected by the State, including "various sums from rent, royalties, and bonuses," is not "indisputably owned by the State" as the Land Board has a longstanding commitment of returning bonus, rentals and royalties if it is later determined the State owns less than what

is purported on an oil and gas lease. D App 251-253, ¶4. The district court ignored the record and the law in finding N.D.C.C. §61-33.1-04(1)(b) was unconstitutional.

[¶74] The district court's decision does not account for the fact statutes of limitations are creatures of a legislature expressing public policy. Harding v. K.C. Wall Prod., Inc., 831 P.2d 958, 967 (Kan. 1992). The district court failed to recognize that, as creatures of statute and the North Dakota Legislature, a statute of limitations can be modified without violating due process, even after the cause of the action arose or after the statute itself has expired. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 229 (1995).

[¶75] The district court's concern for the retroactive application of N.D.C.C. §61-33.1-04(1)(b) is inconsistent with its finding that the balance of N.D.C.C. ch. 61-33.1, including the rest of N.D.C.C. §61-33.1-04, is constitutional. Some of the provisions the district court found constitutional, such as N.D.C.C. §61-33.1-04(2)(a), are also applied retroactively. 2017 North Dakota Laws ch. 426, §4 (S.B. 2134). The determination that only a portion N.D.C.C. ch. 61-33.1 is unconstitutional was not reconciled.

[¶76] Aside from these inconsistencies, the district court found N.D.C.C. § 61-33.1-04(1)(b) unconstitutional by applying N.D.C.C. §28-01-22.1, a three-year statute of limitations for actions against the State. D App 61-85, ¶49. With reference to this statute of limitation, the district court concluded any money to be refunded under N.D.C.C. § 61-33.1-04(1)(b) that had been collected by the State more than three years ago, and for which no action had been commenced, could no longer be claimed because such claim is time barred under N.D.C.C. § 28-01-22.1. Id., ¶49. On this reasoning, the district court held N.D.C.C. § 61-33.1-04(1)(b) violated the anti-gift clause. Id., ¶¶50-57.

[¶77] The district court improperly applied one legislative enactment, here N.D.C.C. §28-01-22.1, to declare another legislative enactment, N.D.C.C. ch. 61-33.1, unconstitutional. Yet, had the Legislature either adopted a three year retroactive period for N.D.C.C. §61-33.1-04(1)(b), or specifically removed N.D.C.C. §61-33.1-04(1)(b) from application of the statute of limitations, or amended N.D.C.C. §28-01-22.1 to allow claims against the State to January 1, 2006, there would be no constitutional infirmity. See D App 61-85, ¶¶49-50, 54-56. This shows that the constitutionality of a statute cannot be determined by having one statute take precedence over another. Rather, the district court was to determine whether the Legislature's retroactive application of 61-33.1 violated the North Dakota Constitution. As this Court has explained, the North Dakota Legislature cannot enact a law that "violates a limitation found, either expressly or impliedly, in the Constitution" but beyond these limitations, the Legislature is not prohibited from enacting legislation. Verry, 148 N.W.2d at 571. The district court's use of N.D.C.C. §28-01-22.1 to find N.D.C.C. §61-33.1-04(1)(b) unconstitutional was in error.

[¶78] Finally, there is nothing in the record that any statute of limitations has expired, or for that matter even commenced. Ayling v. Sens, 2019 ND 114, ¶11, 926 N.W.2d 147. It is at least debatable as to whether any statute of limitations expired or started. Such a debatable question cannot lead to a finding of unconstitutionality of a legislative enactment.

[¶79] The district court's finding N.D.C.C. § 61-33.1-04(1)(b) invalid was erroneous.

IV. THE DISTRICT COURT ERRONEOUSLY AWARDED ATTORNEY'S FEES, COSTS AND A SERVICE AWARD.

[¶80] Plaintiffs filed a motion seeking an award of $62,271,000 as reasonable attorney's fees, $18,145.21 for costs and $750,000 as a service award. Court Doc. 648, ¶2. Plaintiffs argued below that they recovered $187 million for the benefit of the State, which serves as

the basis for their claim for an award of attorney's fees of over $62,000,000. Court Doc. 634, ¶1. Plaintiffs did not recover or preserve $187 million and nothing in the record supports any finding otherwise.

[¶81] The district court correctly found no common fund exists. D App 105-111, ¶9. The district court also noted that while Plaintiffs pled in their complaint another theory for attorney's fees – private attorney general action – they failed to argue or flesh this theory out in any meaningful way. Id., ¶12. In fact, at the hearing on this motion, Plaintiffs never mentioned "private attorney general" as a basis for the fees. See Transcript – Motion Hearing for Plaintiffs' Attorneys Fees, Costs and Services Awards. The district court admitted it found little legal precedent in North Dakota for a service award, and concluded "much of the litigation involved the [Plaintiffs'] untenable theory that as Lake Sakakawea was being formed the newly submerged minerals became the property of the State of the North Dakota, and the Court cannot award fees for efforts to pursue such a specious claim." D App 105-111, ¶¶13, 17. Notwithstanding, the district court granted attorney's fees, costs and the service award because "it's the right thing to do." Id., ¶17. Granting attorney's fees, costs and a service award on such a basis was erroneous. Hanisch, 2013 ND 37, ¶9.

A. Awarding attorney's fees under common fund doctrine lacks legal support.

[¶82] The only theory of recovery proffered by Plaintiffs for attorney's fees was the common fund doctrine. Court Doc. 634, ¶1. American courts follow the "American Rule" when assessing whether to award attorney's fees, which generally assumes parties will bear their own attorney fees absent a statutory exception. Pennsylvania v. Del. Valley Citizens' Council for Clean Air, 478 U.S. 546 (1986). North Dakota follows the American Rule, as this Court has "consistently held that, absent statutory or contractual authority, the American Rule assumes each party to a lawsuit bears its own attorney fees." Danzl v.

Heidinger, 2004 ND 74, ¶6, 677 N.W.2d 924. The common fund doctrine is a narrow exception to the American Rule that does not apply in this case.

[¶83] First, the common fund doctrine provides that a litigant who recovers a common fund for the benefit of others is entitled to recover reasonable attorney's fees from that fund. Mann v. N. Dakota Tax Com'r, 2007 ND 119, ¶38, 736 N.W.2d 464. The district court correctly found there was no "common fund." D App 105-111, ¶9. Without a common fund, the district court's award becomes one where the State pays attorney's fees – a result this Court has rejected. Mann, 2007 ND 119, ¶40. Second, "if the benefit reaped by the representative plaintiff[s] merely vindicates a general social grievance, or redounds to the benefit of the public at large, then the common-fund doctrine will not apply." 7A C.J.S. Attorney & Client § 490 (2018); see also Boeing Co. v. Van Gemert, 444 U.S. 472, 478-79 (1980). Here, at best, any benefit that may be obtained (an increase in the State's public coffer) would redound to the public at large. Third, under the common fund doctrine, the classes of persons benefited by the lawsuit must be small in number and easily identifiable. Boeing Co., 444 U.S. at 478-79. The class of persons benefited, if any, by any common fund Plaintiffs claim exists are the citizens of North Dakota – a large and nearly impossible group to identify. Fourth, there must be "reason for confidence that the costs [of litigation] could indeed be shifted with some exactitude to those benefiting." Id. Unlike a class action where a party proves their claim against the fund, persons benefited under Plaintiffs' theory are citizens of North Dakota. There is no way to decide what benefit any citizen received, if any – even the district court found any benefit is unknown. D App 105-111, ¶9. Finally, the common fund doctrine does not apply when the State is being asked to make the payment of attorney's fees or costs. In Mann, this Court discussed

the common fund doctrine and its application to litigation involving a State entity. Mann, 2007 ND 119, ¶¶38-40. The award of attorneys' fees defeats the purpose of the common fund – to spread such costs among those that benefit from the litigation – because here the payment is improperly imposed upon the State. Id., ¶40. The award of attorney's fees to Plaintiff was erroneous.

B. A service award to Plaintiffs lacks legal support.

[¶84] Plaintiffs claimed entitlement to a service award because service awards are routinely awarded in common fund cases. Yet, the district court found "there [was] no common fund" See D App 105-111, ¶9. Thus, the common fund doctrine does not apply and, therefore, the district court could not order a service award to Plaintiffs. Further, Plaintiffs primarily relied upon Ritter, Laber & Assocs., Inc. v. Hoch Oil, Inc., 2007 ND 163, 740 N.W.2d 67, to support their service award claim, but ignore that Ritter was a class action. Additional cases relied upon by Plaintiffs - Sauby v. City of Fargo, 2009 WL 2168942 (D.N.D. July 16, 2009), In re Xcel Energy, Inc., Sec., Derivative & "Erisa" Litig., 364 F.Supp.2d 980 (D. Minn. 2005), White v. Nat'l Football League, 822 F.Supp. 1389 (D. Minn. 1993) are all class actions. This is not a class action case. Moreover, in the cases relied on by Plaintiffs, a fund existed from which a service award could be paid, yet here no common fund exists. Further, the district court's "service award" is equivalent to an award of damages without a statutory authorization in contravention of N.D.C.C. § 32-12.2-02(3)(c). The granting of a service award was unwarranted and was in error.

C. Plaintiffs' claims for costs are limited by North Dakota Law.

[¶85] Plaintiffs are not the prevailing party entitled to costs because the Defendants prevailed in showing that all but one subsection of N.D.C.C. ch. 61-33.1 was constitutional.

Lemer v. Campbell, 1999 ND 223, ¶9, 602 N.W.2d 686. Furthermore, the award of costs and disbursements is not supported by the law. Costs and disbursements are governed by N.D.C.C. §§ 28-26-02 and 28-26-06. The disbursements granted by the district court were not permitted by statute and Plaintiffs failed to provide an explanation as to why they are entitled to those costs. Court Doc. 636, p. 49-50. Plaintiffs sought $11,984 of expert fees for an expert to opine on the reasonableness of Plaintiffs' attorney's fees amount, not the constitutionality of N.D.C.C. ch. 61-33.1. Court Doc. 638. Plaintiffs' expert fees are unreasonable and without legal basis. The award of $18,145.21 in costs was erroneous.

CONCLUSION

[¶86] Defendants request reversal of the denial of its Rule 19 motion to dismiss. Alternatively, Defendants request reversal of that part of the district court's order and judgment finding N.D.C.C. § 61-33.1-04(1)(b) violates the anti-gift clause and affirm the balance, so as to declare N.D.C.C. ch. 61-33.1 to be constitutional. Finally, Defendants request the award of attorney's fees, cost and a service award be reversed in total.

ORAL ARGUMENT REQUESTED

[¶87] Oral argument will be helpful as this is a constitutional challenge.

[¶88] Dated this 20th day of November, 2019.

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CERTIFICATE OF COMPLIANCE

[¶89] This Brief contains 38 pages, excluding any addendum. I certify this Brief complies with the typeface requirements of N.D.R. App. P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

[¶90] Dated this 20th day of November, 2019.

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