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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 other 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

District Court No. 09-2018-CV-00089

BRIEF OF PLAINTIFFS, APPELLEES, AND CROSS-APPELLANTS MARVIN NELSON, *et al.*

APPEAL FROM FEBRUARY 27, 2019 ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT, JULY 24, 2019 ORDER ON PLAINTIFFS' MOTION FOR ATTORNEY FEES, SERVICE AWARD AND COSTS, APRIL 26, 2019 JUDGMENT AND JULY 31, 2019 AMENDED JUDGMENT THE HONORABLE JOHN C. IRBY EAST CENTRAL JUDICIAL DISTRICT CASS COUNTY, NORTH DAKOTA

ORAL ARGUMENT REQUESTED - THIS WILL ASSIST THE COURT IN UNDERSTANDING THE ISSUES PRESENTED

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ISSUES PRESENTED FOR REVIEW ON PLAINTIFFS' CROSS-APPEAL

[¶1.] Does N.D.C.C. 61-33.1 ("the Act") violate the North Dakota State Constitution?

[¶2.] Does the Act alienate Public Trust property from the Public Trust Corpus ("PTC")?

[¶3.] Did the District Court abuse its discretion in denying Defendants' Rule 19 Motion?

[¶4.] Should Attorneys' Fees be calculated on a percentage of fund basis?

STATEMENT OF THE CASE

[¶5.] N.D.C.C. 61-33.1 ("the Act") "would sever the public ownership of the Missouri River from its ownership of the minerals beneath it." (P. App 137). The Legislature's relinquishment of nearly $2 billion of the State's sovereign lands and its funds, without receiving return consideration, violates the Public Trust Doctrine ("PTD") and the North Dakota State Constitution, including the Anti-Gift clause (Art. X., § 18), the Flowing Waters Clause (Art. XI, § 3), and the Equal Protection clauses (Art. XI, § 13 and Art. I, § 21). Plaintiff taxpayers bring this action to prevent the unlawful transfer of State assets by the Act.

[¶6.] In 1989, N.D.C.C. 61.33 (the "Sovereign Lands Act," D. App 369, *et seq.*) codified the transfer of all mineral rights (both past and future) to the State in "those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams" in lands "owned or controlled by the State." (P App 369-70, N.D.C.C. § 61-33-01, -03). In 2017, the Act, however, unlawfully gave away $187 million from the Strategic Investments and Improvements Fund ("SIIF"), 710 State-owned leases on 25,000 mineral acres, and abdicated the State's "claim or title" to minerals in 71,000

acres submerged by the Pick-Sloan dams and $18 million in disputed funds. These transfers violate the North Dakota State Constitution and the PTD.

[¶7.] On Plaintiffs' motion, the District Court enjoined the gifting of the SIIF's $187 million to private interests. The Court ruled that the $187 million appropriation was an unconstitutional violation of the Anti-Gift clause but did not address the constitutionality of giving away 710 State-owned leases and 25,000 Leased Acres.

[¶8.] The District Court agreed with Defendants that the Act's gift of minerals interests did not violate the PTD or the Constitution. The Court found that though it is navigable, Lake Sakakawea is "substantially different" from the Missouri River—a finding contrary to the evidence and for which no party argued. The trial court thus erred in holding that Sec. 02 of the Act does not violate the PTD or the Constitution.

[¶9.] The District Court awarded attorney fees, but erroneously failed to apply the "percentage of fund" method employed by this Court. Further, the District Court drastically reduced Plaintiffs' hourly attorney fees, contrary to applicable law.

[¶10.] The Constitution, State statutes, and binding precedent mandate this Court reverse the grant of partial summary judgment to the State by declaring the Act invalid; affirm that the $187 million gift is unconstitutional; affirm the injunction; and remand to the District Court with an instruction to award Plaintiffs attorneys' fee based on a percentage of the fund preserved for the State.

STATEMENT OF MATERIAL UNDISPUTED FACTS

I. The Bed includes Sovereign Land of the State of North Dakota.

[¶11.] The Act applies to a particular part of the Missouri River.[1] The area affected by the Act includes approximately 123,000 acres up to the current OHWM of the Missouri River. (D App 132, ¶ 12). These 123,000 acres of riverbed are "owned or controlled by the State" under the Sovereign Lands Act, because they are administered by the State Engineer and Land Board. (N.D.C.C. 61-33-02, -03). Approximately 96,000 acres are above the Wenck Line[2] (the "Bed") and 27,089 mineral acres are below. (D App 135, ¶ 30).

[¶12.] In leasing riverbed minerals, the State leases up to the Ordinary High Water Mark ("OHWM"). (P App 13).

[¶13.] In the Bed, the State owns approximately 710 mineral leases covering 25,000 Leased Mineral Acres ("LMA"); which produce $30 million in royalties per biennium. (P App 137, ¶ 2(B)). 71,000 mineral acres in the Bed are submerged but not leased by the State ("UMA").

[¶14.] The Missouri River is navigable. (D App 130, ¶ 7) Lake Sakakawea is part of the Missouri River. "[A]ll evidence of the historic OHWM of the Missouri River in the [area studied] is under Lake Sakakawea." (P App 159). It is legally immaterial whether the Bed is part of a river or lake. N.D.C.C. § 61-33-01, Subd. (5).

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[1] Described as "from the Garrison Dam to the southern border of sections 33 and 34, township 153 north, range 102 west which is the approximate location of river mile marker 1,565, and from the South Dakota border to river mile marker 1,303."(Act, § 01(2).

[2] The "Wenck Line is the estimate of the 1953 OHWM, as determined by Wenck Engineering pursuant to the Act.

[¶15.] The Bed was submerged over 19 years beginning in 1953. (P App 85). The current OHWM of both the Missouri River and Lake Sakakawea is at 1854 feet elevation. (D App 214, ¶ 13; 219).

[¶16.] The 96,000 mineral acres in the Bed are generally State sovereign lands. All 96,000 acres are "areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams." N.D.C.C. 61-33-01.5. The mineral rights in the Bed were transferred to the State by 1989 (except for any land subject to state-sanctioned encumbrances that existed in 1989) (N.D.C.C. 61-33-03 and 04).[3]

II. The Four Categories of State Assets Given Away by The Act.

[¶17.] The Act alienates four categories of State assets: (1) 710 mineral leases ("Leases") covering 25,000 Leased Mineral Acres owned by the State ("LMA") (P App 137; D App 51); (2) approximately 71,000 Unleased Mineral Acres("UMA") which are generally State sovereign lands; (3) $187 Million from SIIF; and (4) $18 million escrowed due to royalty disputes.

a. Leases and Leased Acres ("LMA"): The Act requires the State to forfeit its interest in and future royalties from 710 existing State-owned mineral leases and the related 25,000 State-owned mineral acres. (P App 137; D App 51).[4] The State has owned the Leases for decades, "with the oldest of these leases having been issued in 1965." (P App 171; P App 13-14, ¶¶ 4, 7). The Act forfeits a projected $30 million every two years in future income from the Leases. (D App 51). §§

[3] There is no evidence in the record of such encumbrances.

[4] The original Fiscal Note stated that the Act abdicates approximately 710 State-issued leases covering 40,000 acres. (P App 79). The final Fiscal Note revised the acreage to 25,000 acres, but did not change the number of leases. (D App 51). The acreage difference is not a material fact, because the State is prohibited from relinquishing the Leases and Leased Acres, regardless of how many acres are involved.

04(2)(a) and (b) of the Act mandate forfeiture of the Leases, LMA and future revenue.

b. Unleased Mineral Acres ("UMA"): About 71,000 acres between the Wenck Line and the current OHWM of the Missouri River are not yet leased. This is sovereign land, subject to exceptions set forth in the Sovereign Lands Act (61-33-01, Subd. 5). Section 02 of the Act disclaims the State's "claim or title" to these UMA.

c. $187 Million from SIIF: The Act appropriates $187 million from SIIF. (P App 130, ¶ 21; 190-91, D App 51). These are vested State funds, collected since 2006. This gift was ruled unconstitutional and enjoined by the District Court. Sec. 04(1)(b) of the Act gives away these funds.

d. $18 Million in Escrow for Disputed Claims: The Act waives the State's claims to $18 million escrowed because of title disputes. (D App 52). The State previously asserted claims for these royalties as owner of each lease at issue. (P App 13-14). Sec 04(1) of the Act requires this forfeiture.

[¶18.] The Fiscal Note accompanying the Act accurately estimates $205 million is given away by the State under the Act.[5] The Act appropriates the following from the SIIF: **$800,000** for purposes of contracting with a qualified engineering firm; **$100 million** for retroactive mineral revenue payments; and an $**87 million** line of credit from the Bank of

[5] **$87,663,214** in bonus collected and held in the SIIF, to be returned to lessees; **$69,316,160** in royalties collected through the end of fiscal year 2017; **$29,406,007** in royalties projected to be collected in the 2015-2017 biennium, after April 21, 2017, the effective date of the Act; and **$18,657,701** held in escrow due to title disputes. (D App. 55). These payments total $205,043,082.00.

North Dakota. (P App 190-91).[6] The $187 million appropriation was declared unconstitutional and enjoined by the District Court. (D App 58-59).

STANDARD OF REVIEW

[¶19.] This Court reviews *de novo* the trial court's grant or denial of summary judgment, based upon the entire record before it. *Ramsey Cty. Farm Bureau v. Ramsey Cty.*, 2008 ND 175, ¶ 6, 755 N.W.2d 920, 922. The question of how to interpret and apply a statute is a question of law. *Wheeler v. Gardner,* 2006 ND 24, ¶ 10, 708 N.W.2d 908. A trial court commits reversible error when it errs in its interpretation or application of the law, *Johnson v. Taliaferro*, 2011 ND 34, ¶ 9, 793 N.W.2d 804, 806.

ARGUMENT

[¶20.] The Act is a legislative attempt to gift nearly $2 billion of State assets to private interests. The Act violates three Constitutional principles (Anti-Gift, Flowing Waters ("FWC") and Equal Protection) and the Public Trust Doctrine ("PTD") in mandating transfer of these State assets. The discussion below examines, in turn, each violated constitutional principle and the PTD. Within the discussion of each principle is examination of each provision of the Act that violates that principle and the assets affected by each violation.

[¶21.] The issues can be summarized as follows:

Asset	**Invalid Act Sec.**	**Est. Value**	**Principles Violated**
Leases & LMA	04(2)(a)&(b)	$400 million + $30m/Biennium	Anti-gift; Pub Trust; Eq. Prot; Flowing Water Clause
$187m from SIIF	04(1)(b)	$187 million	Anti-gift; Eq. Prot.
Disputed Claims	04(1)	$ 18 million	Anti-gift; Eq. Prot.
Leased Acres	02	$1.1 billion	Anti-gift; Pub Trust; Eq. Prot; Flowing Water Clause

[6] The $18 million difference is the escrow for the Disputed Claims.

I. The Act Violates the Anti-Gift Clause of the State Constitution.

A. Summary of Law Regarding Anti-Gift Clause

[¶22.] Article X, § 18 of the Constitution ("The Anti-Gift clause") prohibits gifts of State assets, stating "…[n]either the state nor any political subdivision . . . shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor." N.D. Const., art. X, § 18." The Act gives away, without return consideration, $187 million, 710 State issued leases on 25,000 State-owned acres, 71,000 UMA and $18 million in claims made by the State. These transfers are barred by the Anti-Gift clause.

[¶23.] The Anti-Gift clause prohibits the State from transferring any public assets into private hands without receiving like value in return. *Gripentrog v. City of Wahpeton*, 126 N.W.2d 230, 237-38 (N.D. 1964); *Petters & Co v. Nelson County*, 281 N.W. 61, 64-65 (N.D. 1938). This prohibition applies to any assets, including property interests, funds from trust land, and other tangible assets. *Solberg v. State Treasurer*, 78 N.D. 806, 814, 53 N.W.2d 49, 53-55 (1952). (state mineral rights); *Herr v. Rudolf*, 25 N.W.2d 916, 922 (N.D. 1947) (state land); N.D.A.G. 2000-F-13 (books); N.D.A.G 2014-L-09 (royalties from trust land).

[¶24.] The Anti-Gift clause specifically prohibits the transfer of sovereign riverbed and mineral interests to private parties without consideration. *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 539 (N.D. 1994); *Solberg*, 78 N.D. at 817, 53 N.W.2d at 55; *see also Reep v. State*, 2013 ND 253, ¶ 24, 841 N.W.2d 664.

B. Assets Given Away Are Owned By The State.

[¶25.] Following statehood, the boundary of the State's mineral interest in the bed of navigable waters is determined by State law. It is undisputed that, since statehood under North Dakota law, the State's mineral interest in the beds of navigable waters extends to the current OHWM, a right and power "derived from Napoleonic and Roman law through the Field Code." *J.P. Furlong Enter., Inc. v. Sun Explor. & Prod. Co.*, 423 N.W.2d 130, 131 (N.D. 1988)[7]. By 1989, the mineral rights in "all areas, including beds and islands, lying within the ordinary high water mark" in lands "owned or controlled by the State" were transferred to the State, to conclusively affirm the State's title to the beds of "navigable lakes and streams" up to the OHWM. N.D.C.C. § 61-33-01 and § 61-33-03. This title includes mineral title. *Reep*, 2013 ND 253, 841 N.W.2d 664.

[¶26.] This Court's formative opinions confirm the State's ownership to the current OHWM, even as affected by the Garrison Dam. *See Reep,* 2013 ND 253, ¶ 24, 841 N.W.2d 664, 675, *State ex rel. Sprynczynatyk v. Mills*, 1999 ND 75, ¶ 1, 592 N.W.2d 591, 592 ("*Mills II*"), *Furlong*, 423 N.W.2d 130, 132 and *In re Ownership of Bed of Devils Lake*, 423 N.W.2d 141, 145 (N.D. 1988) ("*Devils Lake*"). To find in favor of Defendants, this Court would have to overturn this entire line of precedent.

[¶27.] Chief Justice VandeWalle succinctly summarized the law regarding State ownership in *Mills II,* 1999 N.D. 75, ¶ 5, 592 N.W.2d. at 593:

> The state owns the beds of all navigable waters within the state. *E.g., J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co.*, 423 N.W.2d 130, 132 (N.D. 1988). As established in *Mills I*, the state has rights in the property up to the ordinary high watermark. The ordinary high watermark is ambulatory, and is not determined as of a fixed date.

[7] The State set forth its agreement with this principle in the *Wilkinson* case. (P App 54-62).

> *See In re Ownership of the Bed of Devils Lake*, 423 N.W.2d 141, 143-44 (N.D. 1988). Thus, the state's ownership of land along the Missouri River is determined by 'the bed of the stream as it may exist from time to time.' *Hogue v. Bourgois*, 71 N.W.2d 47, 52 (N.D. 1955); see also *Devils Lake*, 423 N.W.2d at 144; *Jennings v. Shipp*, 115 N.W.2d 12, 13 (N.D. 1962).

[¶28.] In *Mills II*, this Court rejected the argument Defendants make here, i.e., that the OHWM of navigable water bodies should be "determined by river levels in their natural, pre-dam state, rather than on the artificial conditions created by the Missouri River dam system." 523 N.W.2d at 593. The Court ruled that the OHWM "is ambulatory, and is not determined as of a fixed date," and the State owns the bed "as it may exist from time to time." *Id*.

[¶29.] The same principles apply to navigable lakes, so it is legally immaterial whether Lake Sakakawea is a part of the Missouri River or a lake. *Devils Lake* decided that the current OHWM defines the boundary of State ownership of a navigable lake; that the OHWM is not fixed, but ambulatory; and that title to submerged lands reverts to the State. 423 N.W.2d 141, 145. Just as with a river, the State's title to the beds of navigable lakes fluctuates as the OHWM changes. *Id.* at 143-44.

[¶30.] Under a plain application of law, the State owns assets given away by the Act. These assets include the $187 million appropriation, the Leases and 25,000 LMA, at least some of the 71,000 UMA and the $18 million of disputed claims.

[¶31.] It is undisputed that the State owns the $187 million appropriated from SIIF. Likewise, there is no dispute that the State owns the Leases on 25,000 LMA (P App 137; D App 51) and the Disputed Claims. (D App 370).

[¶32.] The UMA and the LMA are sovereign lands of the State. Minerals below the OHWM of navigable lakes and streams became sovereign lands of the State by 1989,

except where the State had sanctioned an existing encumbrance at that time. (N.D.C.C. 61-33-03; -04). This includes the mineral rights "lying within the ordinary high water mark of navigable lakes and streams." (N.D.C.C. § 61-33-01). The Sovereign Lands Act states:

> All such possessory interests in oil, gas, and related hydrocarbons in the sovereign lands of the state are transferred to the state of North Dakota, acting by and through the board of university and school lands. These transfers are self-executing. No evidence other than the provisions of this chapter is required to establish the fact of transfer of title to the state of North Dakota, acting by and through the state engineer and board of university and school lands. Proper and sufficient delivery of all title documents is conclusively presumed.

(N.D.C.C. 61-33-03). This transfer applies to all Sovereign Lands and "No evidence other than the provisions of this chapter is required to establish the fact of transfer of title to the state of North Dakota." *Id*. This Court has upheld the State's ownership of these minerals on multiple occasions. See *Furlong*, 423 N.W.2d at 140; *Reep*, 2013 ND 253, ¶ 26, 841 N.W.2d at 675; *Mills I*, 523 N.W.2d at 543; *Mills II*, 1999 ND 75, ¶¶ 5, 10, 592 N.W.2d at 593.

[¶33.] No party disputes the Bed is among the State's navigable lakes and streams. As an incident of statehood, North Dakota took title to the bed of the Missouri River. *See Reep*, 2013 ND 253, ¶ 24, 841 N.W.2d at 675. As discussed, after Statehood, the State's ownership boundary is determined by the current OHWM, as it changes from time to time. (*Supra*, ¶¶ 25-29). Beginning in 1953, Garrison Dam expanded and diverted the course of the then-existing Missouri River, and gradually inundated adjacent, formerly dry land. Some of this land was riparian pre-dam and some was not. (Def. Brief. ¶ 15). The Bed is part of the Missouri River, a navigable water body. (P App 159; D App 214, ¶ 13; 219). The Phase 1 Report and the Wenck report confirm this, as do the undisputed

facts in the District Court record. (D App 140-172, Index # 523-557; P App 12). The mineral rights in the Bed are therefore sovereign lands of the State (except for any State-sanctioned encumbrances existing in 1989).

[¶34.] Contrary to its own previous positions (P App 54-62) and this Court's holdings in *Furlong, Mills I, Mills II,* and *Reep*—the State argues that the portions of the Missouri riverbed at issue in the Act were somehow excepted from the 1989 statute defining "sovereign lands" to mean "those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams." N.D.C.C. § 61-33-01. The State's contention is that some (not all) of the Bed was dry at statehood. (Def. Brief, ¶ 15). The condition at statehood is not a material fact. It is undisputed that by 1989 the Bed was "lying within the ordinary high water mark" and so the related mineral rights were transferred to the State under the Sovereign Lands Act. Until the effective date of the Act, both the State and Federal government agreed that this portion of the Missouri River, including Lake Sakakawea, was a navigable water body in which the State held a sovereign interest. *Hogue*, 71 N.W.2d at 49; *see also Reep*, 841 N.W.2d at 667; (P App 12).

[¶35.] The District Court erroneously ignored that some of the submerged land was riparian pre-dam. Defendants admit that the State's sovereign ownership boundary shifted when these riparian lands were submerged. (Defs' Brief, ¶ 44). Thus, it is undisputed that this now-submerged portion of the 71,000 UMA is owned by the State.

[¶36.] Regarding lands that were non-riparian pre-dam, the District Court's decision contradicts existing precedent and application of the doctrine of submergence to lands

that were formerly dry or non-riparian.[8] North Dakota law has long recognized that land surveyed as non-riparian becomes riparian through submergence. *Furlong*, 423 N.W.2d at 133; *see also Perry v. Erling*, 132 N.W.2d 889, 897 (N.D. 1965). Under *Mills II*, when land is submerged under navigable waters—specifically including land inundated by Garrison Dam—it becomes the State's sovereign property. *See Mills II*, 592 N.W.2d at 593-94; N.D.C.C. 61-33.

C. Section 04(1)(b) of the Act is unconstitutional because it gives away $187 million from the SIIF.

[¶37.] Section 04 (1)(b) of the Act requires the State to make a gift from the SIIF to oil producers in tracts lying entirely in the Bed, stating: "Any royalty proceeds held by the board of university and school lands … must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title."[9] The Act appropriates $187 million to make these payments.

[¶38.] This is the portion of the Act that the District Court correctly found unconstitutional and enjoined because "in this case, there are certainly funds going back to 2006 that the State owns. The statute of limitations would bar any claim made to those funds by a claimant. The Act removes the statute of limitations, retroactively, resulting in a transfer of money for no value…Giving money to newly-adjudicated mineral owners

[8] As noted in *Furlong:* "Reliction" is commonly used to describe the gradual receding of water resulting in the gradual baring of previously submerged land. *Furlong*, 423 N.W.2d 130, 133 n. 4. "Submergence is the converse of reliction[.]". *101 Ranch*, 714 F. Supp. 1005, 1014.

[9] To the extent the oil producers do not determine the owners of any tract, the oil producers keep the money. There is no provision for return to the State of unclaimed funds.

who had no legal basis to make a claim for that money, is a direct violation of Article X, Sec. 18." (D App 82).

[¶39.] The Act appropriates $187 million to give away. (P App 190-91). Defendants' circular argument is that the Act retroactively forfeits the State's interest in the Leases and LMA, so the $187 million payment is required. This is no defense. The State cannot justify a refund just because the Act also unconstitutionally forfeits its LMA. The effect is the same – the State pays $187 million, and gets nothing in return. This is an unconstitutional gift. *Solberg*, 78 N.D. at 814, 53 N.W.2d at 53.

[¶40.] The District Court correctly decided that the Act's requirement to transfer funds acquired through undisputed oil leases violates the Anti-Gift clause. The State has a vested right in personal property that is subject to the three-year statute of limitations. "[A]n unaccrued oil and gas royalty is an interest in real property." *Finstrom v. First State Bank of Buxton*, 525 N.W.2d 675, 677 (N.D. 1994). "[A]n interest or right in accrued [mined] oil and gas royalties is personal property." *Id*. (citing *Corbett v. La Bere*, 68 N.W.2d 211, 214 (N.D. 1955). The State cannot give away the royalties it received from undisputed leases to newly-declared mineral owners after the statute of limitations has expired.

[¶41.] Defendants' argument about a non-existent modification of the statute of limitations is a red herring and unsupported by law. Defendants' cases actually support the District Court's finding. Both *Harding v. K.C. Wall Prod, Inc.* and *Plaut v. Spendthrift Farm, Inc*., 514 U.S. 211, 229 (1995) held that the legislature cannot change statutes of limitations to revive "causes of action affecting title to real estate or personal

property because such actions involve substantive vested rights..." *Harding*, 831 P.2d 958, 968 (Kan. 1992).

[¶42.] The $187 million is in the SIIF and no one can make a viable claim disputing that these funds belong to the State. There is no basis for the State to give away the $187 million. Doing so violates the Anti-Gift clause. The District Court's finding that § 04 (1)(b) is unconstitutional must be affirmed.

D. Sections 04 (2) (a) and (b) of the Act violate the Anti-Gift Clause by giving away the State's interest in the Leases and the LMA.

[¶43.] In conjunction with § 02 of the Act, § 04(2) directs the Land Board (02(a)) and the operators (02 (b)) to transfer away the Leases and the 25,000 LMA. This alienation of State Property is prohibited by the Anti-Gift Clause.

[¶44.] Section 04(2) of the Act gives away the Leases by requiring that, upon adoption of the acreage determination by the Land Board (completed in September of 2018), (a) the Land Board "shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as relating to state-issued oil and gas leases" and (b) "operators of oil and gas wells affected shall immediately begin to implement the acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests." (emphasis added).

[¶45.] Defendants do not dispute that the Leases and 25,000 LMA are State-owned. Under 04(2)(a), the Land Board is required to adjust (i.e. give up) the LMA and issue payments to operators (from the $187 million appropriation). Section 04(2)(b) requires operators to forfeit the LMA and future revenues "immediately."[10]

[10] The Fiscal Note projects that this provision forfeits $30 million per biennium in future royalty revenues.

[¶46.] The Leases and underlying 25,000 acres are owned by the State and given away by the Act with no return consideration. Thus, Secs. 04(2)(a) and 04(2)(b) of the Act violate the Anti-Gift clause, and should be declared unconstitutional.

E. Section 02 Violates the Anti-Gift Clause by Giving Away the UMA.

[¶47.] The State may not legislate the giveaway of its mineral rights. *Solberg* controls the instant case: There, the plaintiff conveyed land to the State, and later repurchased the land "subject to a reservation to the state of 50% of all oil, natural gas and minerals." *Solberg*, 78 N.D. at 814, 53 N.W.2d at 52. The legislature subsequently passed a law requiring the State to release these reserved mineral rights to plaintiff. *Id.* at 813. As here, the *Solberg* statute required the State to give up its mineral rights in return for no consideration. The Court struck down that statute, ruling it violated the Anti-Gift clause.

[¶48.] The UMA include sovereign land of the State. Section 02 of the Act gives away all the mineral rights the State owns within the UMA, disclaiming all title thereto. The State receives no return consideration for these mineral rights. Therefore, giving away these mineral rights is an unconstitutional gift.

[¶49.] Defendants argue that the Act that gives away State-owned mineral rights is valid because the State does not own <u>all</u> of the mineral rights in the Bed. The State's position is wrong and illogical. The fallacy lies in the false presumption that the State must own all of the 96,000 acres in the Bed in order to give away the part it does own. Plaintiffs are not claiming the State owns all of the Bed (there are exceptions in the Sovereign Lands Act), only that the State owns at least some of the 71,000 UMA (and the $187 million SIIF funds; Leases on 25,000 LMA; and its Disputed Claims). To the extent the State gives away any State-owned UMA, it is an unconstitutional gift and the Act must be invalidated.

[¶50.] Of course, the State need not own the entire Bed to unconstitutionally give away that part it does own. For example, a law disclaiming State title to all mineral rights on dry land in Williams County would not be constitutional just because the State does not own all of the mineral rights on dry land in Williams County. It would be invalid because the State would be giving away the mineral rights that it does own. The unconstitutionality of the statute is determined by those assets it does affect (i.e. gives away) not those that it doesn't affect (i.e. does not own). Because the Act gives away that part of the 71,000 UMA it does own, it violates the Anti-Gift clause.

F. Section 04 (1) is unconstitutional because it abandons and waives valuable state-owned claims the State has asserted in good faith.

[¶51.] Section 04 (1) of the Act requires the State to abandon $18 million of disputed claims in tracts lying entirely above the OHWM of the historical Missouri riverbed channel on both the corps survey and the state phase two survey, stating "Any royalty proceeds held by operators … must be released to the owners of the tracts, absent a showing of other defects affecting mineral title." These claims relate to tracts in which the State claims ownership and another party has disputed the title. (*See* P App 172). As of the effective date of the Act, $18 million was being held in escrow pending outcome of such disputes. (D App 53, ¶ 3(A)). This provision decides all these disputes in favor of the non-State party. Section 04 (1) of the Act violates the Anti-gift clause because it gives away the State's claims without return consideration.

[¶52.] These claims have value. The Land Board asserted in 2015, in public minutes, that the State owns all the minerals up to the current OHWM and demanded the oil producers give these disputed funds to the State. (D App 370-71). The claims asserted by the State are assets of the State, so the giveaway violates the Anti-Gift clause.

II. The Act Violates the Flowing Waters Clause.

[¶53.] The Act also violates North Dakota's constitutional "Flowing Waters Clause," which provides: "All flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation and manufacturing purposes." N.D. Const. art. XI, § 3. The provision protects economic interests of the State in its rivers and lakes. *See Mills I*, 523 N.W.2d at 543 (citing N.D. Const. art. XI, § 3). In conformity with this clause, the Legislature has confirmed that sovereign lands include "those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams." N.D.C.C. § 61-33-01 (emphasis added).[11] Sections 04 (2)(a) and (b) of the Act violate the Flowing Waters Clause abdicating the State's ownership of minerals in the bed of a state water course-the Missouri River-thus depriving the State of its benefits.

III. The Act Violates the Equal Protection Clauses of the Constitution.

[¶54.] "A statute which has the effect of thus transferring the property of all the people, without compensation or public advantage, to a few, denies that equal protection and benefit to the people for which government is instituted." *Solberg*, 78 N.D. at 816-17, 53 N.W.2d at 55. The Act transfers the State's property to a few—treating riparian landowners of the remainder of the Missouri River and navigable waters differently than the landowners in the area designated by the Act. The current OHWM defines the boundary of the States mineral interest in all other areas of the Missouri River and in all other navigable lakes and streams of the State. N.D.C.C. 61-33-01.3; *see also Mills II*, 1999 ND 75, ¶ 10, 523 N.W.2d at 594; *Devils Lake*, 423 N.W.2d at 143. The treatment of the owners of this particular section of the Missouri River differently than owners of all

[11] The cases cited by Defendants' cases are inapplicable, because they deal only with non-navigable waters.

other submerged land violates Art. I, § 21 and Art. IV, § 13 of the North Dakota Constitution.

[¶55.] The Note attached to the Act also creates an unconstitutional time classification by arbitrarily segregating wells spud before 2006. The Act "is retroactive and applies to oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership." N.D.C.C. 61.1-33-04. "[T]he reason for the classification, time, [bears] no relationship to the statutory purpose." *Best Prod. Co. v. Spaeth*, 461 N.W.2d at 99 (N.D. 1990) (citing *Edmonds v. Herbrandson*, 50 N.W. 970 (N.D. 1891)). *Edmonds* establishes that a time cutoff may not be arbitrarily used to establish classifications. The wells go back to 1965. There is no existing situation or purpose why wells spud after 2006 should benefit while those spud before 2006 are left out. There was no event which would prevent the State from going back to the spudding of each well to make payments. These arbitrary classifications violate the Equal Protection clauses of the Constitution.

[¶56.] A statutory classification will be upheld only if it is "natural, not arbitrary," and rests on a reason related to the character of the statute of which it is a part. *MCI Telecomms. Corp v. Heitkamp*, 523 N.W.2d 548,553 (N.D. 1994). "Classification must be based upon such differences in situation or purposes between the persons included in the class and those excluded therefrom as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation in the line of the statute in which the classification appears." *State v. EW Wylie Co.*, 58 N.W.2d 76, 84 (N.D. 1953). It is arbitrary, not natural, to give public resources to one group with no reasonable necessity. Defendants offer no evidence or argument showing how the advance of "21st century technology" creates any current difference in "situation or purpose" from wells spud

before 2006. The Act must be invalidated because it violates North Dakota's Equal Protection clauses.

IV. The Act Violates the PTD by Severing the Public's Ownership of the Bed of the Missouri River from its Ownership of the Minerals Beneath it.

A. Summary of the Public Trust Doctrine

[¶57.] The North Dakota Supreme Court makes it clear that the discretionary authority of all State officials is "circumscribed by what has been called the Public Trust Doctrine." *United Plainsmen v. N.D. State Water Cons.*, 247 N.W.2d 457, 461 (N.D. 1976). The PTD estops legislation where: (1) an asset is part of the sovereign trust corpus; and (2) legislation alienates the public's interest in the corpus. *United Plainsmen*, 247 N.W.2d at 460-61 (citing *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)). "The State holds the navigable waters, as well as the lands beneath them, in trust for the public." *Id*. Conveyance of sovereign river bed is subject to the Public Trust Doctrine. *Reep*, 841 N.W.2d at 667, 669, 670, 673; *Mills I*, 523 N.W.2d at 539-40.

[¶58.] Setting the OHWM at pre-Garrison dam levels—as the Act does—"subvert[s] the public's trust interest." *Mills II*, 1999 ND 75, ¶ 9, 592 N.W.2d at 594. This Court has stated that the PTD protects public interests in commerce and industry, such as "irrigation, industrial and other water supplies." *Furlong*, 423 N.W.2d at 140. North Dakota's expanded scope of the PTD includes minerals. N.D.C.C. § 61-33 establishes that the minerals in the Bed are sovereign land of the State.

[¶59.] Sovereign land is indisputably part of the PTC. *Mills I,* 523 N.W.2d at 540; *see Illinois Cent. R. Co.*, 146 U.S. at 453. Here, the UMA and the LMA are part of the Public Trust Corpus (the "PTC"), because "'Sovereign Land' includes beds… lying within the

[OHWM] of navigable lakes and streams." (N.D.C.C. § 61-33-01). Thus, the State must manage the UMA and the LMA in trust for its citizens.

B. Giving Away Mineral Acres Violates the Public Trust Doctrine.

[¶60.] The Act severs the public's ownership of minerals from the PTC. The Bed is sovereign land of the State. The 25,000 LMA (including Leases) and the 71,000 UMA are State sovereign property, and thus part of the PTC. Sections 04(2)(a) and (b) violate the PTD by separating this sovereign property from the PTC.

[¶61.] Under the Sovereign Land Act, the 25,000 acres of State-owned riverbed are plainly included in the sovereign land of the State. The Leases of the bed of navigable water are proceeds of sovereign land and are part of the PTC that cannot be alienated from the public trust. N.D.A.G 2014-L-09. *See, Mallon v. City of Long Beach*, 282 P.2d 481, 484-85, 44 Cal.2d 199, 205 (1955).

[¶62.] The mineral rights to much of the UMA were transferred to the State by 1989. It is undisputed that some of these acres were riparian pre-dam and that this portion of the Bed therefore became State sovereign land when submerged after closing of Garrison Dam. (Defs' Brief, ¶ 44). This sovereign land is part of the PTC. The Act is thus invalid because § 02 separates this portion of the UMA from the PTC.

[¶63.] It is undisputed that the entire Bed is submerged. The Attorney General of North Dakota has made it clear that "when land is submerged its title reverts to the State and that loss is uncompensated." (P App 222; *101 Ranch v. United States*, 714 F. Supp. 1005 (D.N.D. 1988)). Thus, all of the 25,000 LMA and some of the 71,000 UMA are sovereign lands of the State, and part of the PTC.

1. Sections 02 and 04(2) Violate the Public Trust Doctrine.

[¶64.] Because all of the 25,000 LMA and some of the 71,000 UMA are part of the PTC, § 02 alienates them by disclaiming that title. Section 02 states "The State holds no claim or title to any minerals above the [Wenck Line]" and § 04(2)(a) and (b), requires the Land Board (§ 04(2)(a)) and the operators (§ 04 (2)(b)) to make "acreage adjustments." These guillotine provisions sever approximately 96,000 acres of sovereign land from the PTC. (P App 137).

[¶65.] Section 04(02) of the Act alienates the Leases from the PTC. The adjustments under § 2(2)(a) and (b) plainly alienate "State-owned oil and gas leases." (§ 04(02)(a)) and State-owned "oil and gas interests." (§ 4(2)(b)).

C. Like all State officials, Legislators must uphold the Public Trust.

[¶66.] Defendants argue that the legislature is not subject to the PTD and is free to give away the State's PTC. This is not the law. The PTD applies to legislation. *Reep*, 841 N.W.2d 669 (Statute cannot abdicate State's interest to OHWM); *Mills I*, 523 N.W.2d at 539-40. *Mills II*, 1999 ND 75, 592 N.W.2d 594. "The Public Trust Doctrine was first clearly defined in *Illinois Central Railroad*, … a case in which the State of Illinois attempted to convey, by legislative grant, a portion of Chicago's harbor on Lake Michigan ..." *United Plainsmen*, 247 N.W.2d at 460. The North Dakota Supreme Court adopted this restriction. *Id.* No authority exempts legislators from the Public Trust. The PTD prohibits all branches of State government from alienating the State's interest in its Public Trust property.

[¶67.] The District Court held, in effect, that the surface of Lake Sakakawea, but not the minerals in its banks, is protected by the PTD. This was an error of law, disregarding this Court's interpretation and application of the PTD as extending to all public interests,

"such as "irrigation, industrial and other water supplies." (*Furlong I*, 423 N.W.2d at 140) and the Sovereign Lands Act, which defines these beds as sovereign. (N.D.C.C. §61-33-01). Because the Act violates the PTD, the District Court's determination must be reversed.

V. The District Court Properly Enjoined the Transfer of SIIF Funds.

[¶68.] The District Court correctly concluded that the Act's implementation procedure violates the Anti-Gift clause. N.D. Const., art. X, § 18. The court found that the Act would transfer funds the State has collected from oil and gas rent, royalties, and bonuses, which had been collected by the State more than three years before the Act, and which could not legally be claimed under the statute of limitations. (D App 81-83). This portion of the District Court's judgment should be affirmed. Further, the injunction should be extended to the entire Act and be made permanent to preserve nearly $2 billion of State assets given away by the Act.

VI. The District Court Did Not Abuse Its Discretion in Denying Defendants' Motion to Dismiss.

[¶69.] "Dismissal of an action for non-joinder of a party is an extreme remedy which should only be granted where a party is truly 'indispensable.'" *Kouba v. Great Plains Pelleting, Inc.*, 372 N.W.2d 884, 887 (N.D. 1985). In denying the State's Rule 19 Motion to Dismiss, the District Court correctly applied the two-step analysis: *first*, the court must determine whether an absent party belongs in the suit; and *second*, if yes, the court must then determine, using the four factors set forth in the rule, whether the party is so indispensable that the action cannot proceed "in equity and good conscience." *Viacom Int'l, Inc. v. Kearney*, 212 F.3d 721, 724 (2d Cir. 2000). The State does not examine these factors in its argument.

[¶70.] When challenging constitutionality, it is enough to join the State and its agents responsible for enforcement and implementation of the statute. *Ceballos v. Shaughnessy*, 352 U.S. 599, 604 (1957); *Northern Pacific Ry. Co v. Warner*, 45 N.W.2d 196 (N.D. 1950); *Harman v. Forssenius*, 380 U.S. 528, f.n. 14 (1965). The well-settled law of North Dakota and the United States Supreme Court addressing constitutional challenges in the Rule 19 context establishes that it is not necessary to join all who might be indirectly affected. *Northern Pacific Ry.*, 45 N.W.2d 196; *Harman v. Forssenius*, 380 U.S. 528, f.n. 14. To require all parties affected by a statute is "obviously absurd." *N. Pacific Rwy.*, 45 N.W.2d at 200.

[¶71.] A necessary party is one whose presence is essential for a determination of the controversy at issue. *R.O. Smith v. Amerada Petroleum Corp.*, 136 N.W.2d 483, 487 (N.D. 1965). A necessary party is only indispensable "where the ability of the court to make an equitable adjudication in the absence of that party is seriously impaired and where joinder of that party cannot be obtained because of a jurisdictional or other limitation." *Id*. (emphasis in original); *Stonewood Hotel Corp. v. Davis Development, Inc.*, 447 N.W.2d 286, 289 (N.D. 1989). Here, the constitutionality of the Act can be adjudicated with the State and its agents. No other party can offer any argument not available to these Defendants.

[¶72.] Defendants have the burden of showing that the District Court abused its discretion. *Anderson v. Baker*, 2015 ND 269, ¶ 11, 871 N.W.2d 830, 833. This would, at a minimum, require conducting the analysis under the four Rule 19 factors. Defendants have not conducted this analysis, and thus have waived this issue. *Darby v. Swenson Inc.*, 2009 ND 103, ¶ 23, 767 N.W.2d 147, 154 (failure to adequately brief waives issue on

appeal). The District Court did not abuse its discretion and its Rule 19 Order must be affirmed.

VII. The District Court Correctly Held that Plaintiffs Are a Prevailing Party Entitled to Attorneys' Fees, But Erred in Its Application of the Law.

A. Summary

[¶73.] Attorney fee awards are reviewed for abuse of discretion. *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.*, 2007 ND 163, ¶ 28, 740 N.W.2d 67, 76. Plaintiffs materially prevailed in the District Court. Transfer of $187 million appropriated by the Act was first enjoined and then ruled unconstitutional, thus directly creating a benefit of $187 million to the State's SIIF fund. In light of this clear benefit, the court correctly held that Plaintiff Taxpayers were entitled to an award of attorneys' fees, costs and a service award. The Court could have made the award under either the Common Fund Doctrine or the Private Attorney General Doctrine. However, the District Court abused its discretion by not applying the percentage of the fund method, instead using its own "modified lodestar" approach. Thus, even if the underlying decision on the merits is affirmed, this Court should remand with an instruction to calculate the award using the percentage-of-the fund approach.[12]

B. The Common Fund Doctrine Applies to the $187 Million Preserved for the State.

[¶74.] The common fund doctrine is a "well-recognized exception" to the American rule that each party should bear its own attorneys' fees and costs in litigation. *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980). The common fund doctrine applies where, as here, funds are preserved for others. In *Horst v. Guy*, this Court held:

[12] Of course, if reversed to the benefit of Plaintiffs, this case should be remanded for calculation of a new fee award.

> Where one has gone into a court of equity, and, taking the risk of litigation on himself, has created **or preserved or protected a fund** in which others are entitled to share, such others will be required to contribute their share to the reasonable cost and expenses of the litigation, including reasonable fees to the litigant's counsel.

211 N.W.2d 723, 732 (ND 1973) (emphasis added). An attorney fee award paid from proceeds preserved or protected prevents unjust enrichment and inequity because it shifts fees proportionally among those benefited by the suit. *Boeing*, 444 U.S. at 478.

[¶75.] Defendants make much of the fact that this is not a Rule 23 class action, but this is a distinction without a difference. Common fund awards do not require a Rule 23-certified class. *Sprague v. Ticonic Nat. Bank*, 307 U.S. 161, 167 (1939) (certified class is not necessary for application of common fund doctrine); *see also Mills v. Elec. Auto-Lite Co.,* 396 U.S. 375, 396-97 (1970) (shareholder action); *Matter of Estate of Rohrich*, 496 N.W.2d 566, 572 (N.D. 1993) (benefit to an estate); *Regan v. Babcock*, 196 Minn. 243, 250, 264 N.W. 803, 807 (1936) (funds preserved for State).

[¶76.] Where, as here, Plaintiff has preserved or protected a fund for others, the Court will apply the Common Fund Doctrine when: (1) the beneficiaries of the preserved fund are small and readily identifiable; (2) the fund preserved is traceable to the lawsuit; and (3) the costs can be shifted to those benefitting with a modicum of precision. *Boeing*, 444 U.S. at 478-79; *Horst*, 211 N.W.2d at 732. Here, all three elements are satisfied.

[¶77.] *First*, there is a single beneficiary – the State's SIIF fund. That taxpayers and citizens of the State are incidental beneficiaries has no impact on this analysis. The primary beneficiary – the SIIF – is small in number and readily identifiable.

[¶78.] *Second*, the benefit can be traced to the work in this case—specifically the injunction and the grant of summary judgment obtained by Plaintiffs. S*ee Boeing*, 444 U.S. at 478-79. Plaintiffs' lawsuit nullified an unconstitutional appropriation of $187

million. This benefit to the SIIF traces directly to this case. Disbursement of the preserved $187 million would have begun in March 2019, but was prevented by the work of Plaintiffs in this case.

[¶79.] *Third*, because the SIIF is the direct beneficiary of Plaintiffs' suit, the payment of attorneys' fees can be precisely shifted to the SIIF. As stated in *Mann v. N.D. Tax Comm'r*, 2007 ND 119, 736 N.W.2d 464 and other North Dakota cases, "[t]he purpose of the common fund doctrine is to spread out the attorney's fees proportionately among those who benefit from suit, recognizing 'that persons who obtain the benefit of a lawsuit without contributing to its cost are unjustly enriched at the successful litigant's expense.'" *Id.* at ¶ 38 (quoting *Boeing*); *Horst*, 211 N.W.2d at 732; *Rohrich*, 496 N.W.2d at 572. By applying the percentage-of-fund method, this award will come from the $187 million fund preserved and thus the fees are perfectly shifted to the beneficiary of the lawsuit.

[¶80.] Defendants misapply *Mann*. Nothing in *Mann* exempts the State from common fund fees when the State is the beneficiary. In *Mann,* attorneys' fees were requested *in addition to* the common fund, not *from* the fund. The State was required to refund certain fuel taxes. Because the State was not a beneficiary of the common fund created, it was not required to pay attorney fees. The *Mann* court explained: "The purpose of the common fund doctrine would not be fulfilled in [that] case because the costs of the litigation would not be spread out equally among those who will benefit from the litigation…" *Id.* at ¶ 40. Here, however, the State's SIIF fund is the beneficiary. The attorneys' fees would come directly out of the common fund, from the beneficiary of the fund–the SIIF.

[¶81.] The SIIF obtained a monetary benefit, so this is not a "general social grievance" case. A "general social grievance case" involves only a non-monetary benefit to the public at large. *See, e.g. Boeing,* 444 U.S. at 479 (more than mere general social grievance at issue when small number of beneficiaries, benefits traceable, and costs can be shifted with some exactitude to beneficiaries).

[¶82.] Defendants erroneously argue that "no public funds based in this action ever came into the care or custody of this Court." (Court Doc # 664, ¶ 43-44). However, there is no requirement that an identifiable fund be within the care or custody of the court. This Court has made it clear that fees should be awarded under the Common Fund Doctrine when a fund is "preserved or protected." *Horst*, 211 N.W.2d at 732. *See also Regan*, 264 N.W 803 (awarding attorney fees out of funds preserved from unlawful distribution from state where state received the benefit of the litigation); *see Shillito v. City of Spartanburg*, 51 S.E.2d 95 (S.C. 1948) (awarding attorney fees out of appropriated public funds preserved from unlawful distribution); *Weiss v. Bruno,* 83 Wash.2d 911, 914, 523 P.2d 915, 917 (Wash. 1974) (taxpayers that prevented the unconstitutional disbursement of appropriated state funds awarded fees); *Arizona Center for Law in Public Interest v. Hassell*, 172 Ariz. 356, 371, 837 P.2d 158, 173 (1991) (awarding attorney fees when plaintiffs established statute violated anti-gift clause). Here, it is undisputed that an unconstitutional appropriation of $187 million was preserved for the SIIF. This is the common fund.

C. Alternatively, the Private Attorney General Doctrine Applies.

[¶83.] The District Court found equity favored a fee award, specifically the Private Attorney General doctrine. The Private Attorney General doctrine is also an equitable exception to the American rule. *Montanans for the Responsible Use of the School Trust v.*

State, 989 P.2d 800, 811-12 (Mt. 1999); *see also Duchscherer v. W.W. Wallwork, Inc*., 534 N.W.2d 13, 18 (N.D. 1995). Many courts have adopted the doctrine and awarded reasonable attorneys' fees, including constitutional challenges to statutes.[13] The Court was within its discretion to apply it here.

D. The District Court Should Have Applied the Percentage of the Fund Approach.

[¶84.] This Court and courts in the Eighth Circuit have long recognized that the "percentage of the fund" methodology is favored in cases where no fee-shifting statute exists, approving between 24-36% of the benefit obtained or preserved. *Horst*, 211 N.W.2d 732 (N.D. 1973); *see also Huyer v. Buckley*, 849 F.3d 395, 399 (8th Cir. 2017); *Johnston v. Comerica Mortg. Corp.,* 83 F.3d 241, 245 (8th Cir. 1996); *In re Xcel Energy, Inc., Sec., Der. & "ERISA" Litig*., 364 F.Supp.2d 980, 998 (D. Minn. 2005) (Eighth Circuit Courts "have frequently awarded attorney fees between twenty-five and thirty-six percent of a common fund[.]"). Applying the percentage of the fund approach encourages "plaintiff's attorneys to act as private attorneys general and [discourages] wrongdoing." *Michels v. Phoenix Home Life Mut. Ins.*, No. 95/5318, 1997 WL 1161145, at *31 (N.Y. Sup. Ct. Jan. 7, 1997) (citing cases from multiple jurisdictions). Here, the District Court committed an error of law by not using the percentage approach. If the District Court's decision is allowed to stand, future parties will be discouraged from challenging unconstitutional laws and a central aspect of the checks and balances system between the courts and legislature will be undermined.

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[13] *See, e.g*., *Montanans*, 989 P.2d at 811-12 (applying doctrine in constitutional challenge to statutes concerning Montana school trust lands); *see also Miotke v. City of Spokane*, 678 P.2d 803 (Wash. 1984) (adopting private attorney general theory for attorney fees); *Arnold v. Arizona Dept. of Health Services* (1989), 160 Ariz. 593, 775 P.2d 521 (Az. 1989) (same); *Serrano v. Priest* 569 P.2d 1303 (Cal. 1977) (same).

E. The Court's Method of Reducing Counsel's Lodestar is Not Supported by Law.

[¶85.] Even if this Court decides the lodestar approach is appropriate, it must remand for a recalculation of the reasonable attorneys' fee. Under prevailing law, if a lodestar approach is to be used, the unmodified fee (here, before appeal, $2.5 million) is "presumptively reasonable." *Duchscherer*, 534 N.W.2d at 20, *abrogated on other grounds by Blanchard v. Bergeron*, 489 U.S. 87, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989)). It may only be adjusted upward or downward after a thorough consideration of multiple factors. *Id*. (listing 12 factors). These factors include the "novelty and difficulty of the questions" involved, "the customary fee," "the amount involved and the results obtained." *Id*. A court that "drastically reduces" a party's lodestar in conclusory fashion misapplies the law. *Duchscherer*, 534 N.W.2d at 17.

[¶86.] Here, the District Court did not consider these factors and erred by arbitrarily halving the number of hours in Plaintiffs' lodestar. Plaintiffs not only prevailed on their Motion for Summary Judgment, they also succeeded in enjoining the distribution of $187 million of State funds. Plaintiffs also successfully defended non-meritorious motions brought by Defendants, including but not limited to a Motion to Dismiss. Plaintiffs' challenge to the Act's constitutionality was inextricably intertwined with and wholly-related to their prevention of the unlawful transfer of State assets.

[¶87.] A reduction in lodestar based on "results obtained" is only appropriate where "…counsel's work on one claim is unrelated to his work on another claim." *Duchscherer*, 534 N.W.2d at 17 (internal citations omitted). Conversely, where the claims for relief have a "common core of facts"... counsel's time will be devoted generally to the litigation as a whole…" *Id.* Here, there is a common core of facts around the Act. Giving away

assets was prevented by the injunction and Summary Judgment Order. Because all work was related to the Act, the District Court misapplied the law in halving the attorneys' hours.

[¶88.] The court further erred when it reduced Plaintiffs' counsel's customary hourly rates and created a blended rate of $400 for attorneys at the Twin Cities law firm of Hellmuth & Johnson. Under the lodestar approach, out of town counsel are not "limited to lower local rates," because "it may not always be possible to find counsel in or near the locality of the case who are able and willing to undertake difficult and controversial civil-rights litigation." *Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 140–41 (8th Cir. 1982). In these circumstances, "the court should make the allowance on the basis of the chosen attorney's billing rate[.]" *Chrapliwy v. Uniroyal, Inc.*, 670 F.2d 760, 769 (7th Cir. 1982).

[¶89.] In this case, Plaintiffs presented unrefuted affidavit testimony that in light of the highly public constitutional challenge, they were not able to hire skilled, competent counsel within the State of North Dakota. (*See* P App 359, ¶4). Accordingly, they looked to the Twin Cities law firm of Hellmuth & Johnson. Plaintiffs submitted, as support for the requested fee, the unrebutted Affidavit of Eric Magnuson, former Chief Judge of the Minnesota Supreme Court, who opined that the hourly rates of Hellmuth & Johnson attorneys were well within range of hourly rates charged in the Twin Cities. (P App 331, ¶¶ 13-14). Plaintiffs' lead counsel, Mr. Terrance Moore testified, by affidavit, that he has been paid his requested rate as an hourly fee in other cases, including in North Dakota. (P App 253, ¶ 12). Further, Plaintiffs' counsel established that it had expended over $2.5 Million in attorney fees in achieving its result. (P App 252) The District Court failed to

credit these undisputed affidavits and thus improperly adjusted Plaintiffs' counsel's fee downward.

F. Service Award

[¶90.] Plaintiffs were correctly awarded for their service—not for damages. This is authorized under the Private Attorney General Doctrine, as well as the Common Fund Doctrine. *Sauby v. City of Fargo*, 2009 WL 2168942, at *1 (D.N.D. July 16, 2009). Service awards are routinely awarded, even for Plaintiffs who seek injunctive and declaratory relief but not damages.

[¶91.] In *Ritter, Laber and Associates, Inc.,* 740 N.W.2d at ¶ 22, the North Dakota Supreme Court laid out four factors in determining the amount of a service award: Risk; Added Value; Other Burdens and "the ultimate recovery." In *Ritter*, this Court found that the plaintiffs essentially scored zero on the Risk; Added Value and Other Burdens factors. Then, based on "the ultimate recovery" this Court awarded them $75,000 on an $18 million recovery. *Id*. at ¶ 25. This proper analysis should be a comparison of the *Ritter* plaintiffs to Plaintiffs here. In such comparison, a fair award is $750,000, or ten times the award in *Ritter*. This conclusion is reached because Plaintiffs here compare favorably to the *Ritter* plaintiffs on the first three factors and preserved $187 Million or ten times as much as the *Ritter* plaintiffs did.

[¶92.] Plaintiffs knowingly accepted risks in seeking to protect the State Constitution. (P App. 356-368). The Supreme Court found in *Ritter* that the plaintiffs there took no risk. Plaintiffs added value to this case, collectively spending hundreds of hours (1) providing counsel with factual background and insight regarding the Act and past litigation involving Lake Sakakawea, (2) creating exhibits, addressing OHWM locations, (3) researching historic data and archives, (4) providing affidavit testimony (5) reviewing

and commenting on various motions, (6) attending meetings of the Land Board and other agencies who were tasked with implementing SB 2134, and (7) reviewing pleadings and case documents. (P. App 355-368). The value added to Plaintiffs' Summary Judgment motion alone, via Marvin Nelson's maps and affidavit, (P App 227-249) is more value than the *Ritter* plaintiffs added. Plaintiffs also suffered other burdens as a result of taking on this case, including reputational attacks, a burden higher than the burden sustained by the plaintiffs in *Ritter*. (P App 356-368). Thus, Plaintiffs compare favorably on all three of these factors.

[¶93.] The fourth and final factor, the "ultimate recovery" also falls squarely in Plaintiffs' favor. Defendants tacitly concede that, if Plaintiffs recovered ten times the amount recovered by the *Ritter* plaintiffs, this factor would support an award ten times higher than the $75,000 awarded in *Ritter*. Thus, if the Court finds that the amount preserved is $187 million, which is ten times more than the $18 million recovered in *Ritter*, then this factor would recommend an award of $750,000. The Court should grant Plaintiffs a service award of $750,000 for their service in preserving $187 million for the SIIF.

G. Plaintiffs are Entitled to Costs from the Common Fund.

[¶94.] Reasonable costs and expenses incurred by an attorney who preserves a common fund are reimbursed through the fund. *Horst*, 211 N.W.2d at 732. Plaintiffs requested costs were necessarily incurred to advance the litigation and reasonable in amount. *See Hanson v. Acceleration Life Ins. Co.*, 2000 WL 33340298, at *6 (D.N.D. June 21, 2000); *Ritter*, 2007 ND 163, ¶¶ 29, 37. (App. 43). Plaintiffs are not asking that any costs be paid directly out of public funds that are not part of the common fund.

[¶95.] Here, Counsel seeks reimbursement of costs and expenses totaling only $18,145.21. *Id*. This is certainly a reasonable amount of costs to incur in a case of this magnitude. The expenses include the type of expenses that are routinely charged to hourly clients and, therefore, the full requested amount should be reimbursed. (P App 253, ¶ 15). "The Supreme Court has noted that reasonable attorneys' fees include litigation expenses when it is 'the prevailing practice in a given community' for lawyers to bill those costs separately from their hourly rates." *In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 631 F.3d 913, 918 (8th Cir. 2011). The District Court's award of costs to Plaintiffs should be affirmed.

CONCLUSION

[¶96.] For all the foregoing reasons, the taxpayers of North Dakota respectively request that this Court declare the Act invalid in total, and award Cross-Appellees attorney fees to be calculated using the percentage of fund method.

Respectfully submitted,

HELLMUTH & JOHNSON

Dated: January 21, 2020

/s/ Terrance W. Moore

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CERTIFICATE OF COMPLIANCE

[¶97.] 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.

[¶98.] Dated this 21th day of January, 2020.

/s/Terrance W. Moore

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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 other 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 **AFFIDAVIT OF SERVICE**

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

[¶1.] Angela N. Skistad, being first duly sworn upon oath, deposes and states: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter.

[¶2.] That on the 21st day of January, 2020, in accordance with the provisions of the North Dakota Rules of Civil Procedure, this affiant served through the North Dakota Supreme Court E-Filing Portal and first class U.S. Mail, as indicated, upon the persons hereinafter named a true and correct copy of the following document(s) in said matter:

1. Brief of Plaintiffs, Appellees, and Cross-Appellants Marvin Nelson, *et al.*

2. Appendix of Plaintiffs, Appellees, and Cross-Appellants Marvin Nelson, *et al.*

3. Affidavit of Service.

[¶3.] by causing the same to be served electronically as follows:

Matthew Arnold Sagsveen at masagve@nd.gov
Daniel Lee Gaustad at dan@grandforkslaw.com
Ronald F. Fischer at rfischer@grandforkslaw.com
Joseph Elmer Quinn at jquinn@grandforkslaw.com
Mark Richard Hanson at mhanson@nilleslaw.com
Paul Sorum at paul.sorum61@gmail.com

[¶4.] and by serving all parties via U.S. Mail by mailing a copy thereof, enclosed in an envelope, postage prepaid, and by depositing the same in the post office at Edina, Minnesota, directed to said persons, at the addresses below:

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Paul Sorum
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Fargo, ND 58104

Dated: January 21, 2020

Angela N. Skistad

Subscribed and sworn to before me
This 21st day of January, 2020

Notary Public

WENDY A LONG
Notary Public
Minnesota
My Commission Expires January 31, 2025

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
JANUARY 27, 2020
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 other 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 **AFFIDAVIT OF SERVICE**

STATE OF MINNESOTA)
)SS
COUNTY OF HENNEPIN)

[¶1.] Angela N. Skistad, being first duly sworn upon oath, deposes and states: That she is a citizen of the United States, of legal age, and not a party to nor interested in the above-entitled matter.

[¶2.] That on the 27th day of January, 2020, in accordance with the provisions of the North Dakota Rules of Civil Procedure, this affiant served via e-mail, as indicated, upon the persons hereinafter named a true and correct copy of the following document(s) in said matter:

1. Brief of Plaintiffs, Appellees, and Cross-Appellants Marvin Nelson, *et al.*

2. Appendix of Plaintiffs, Appellees, and Cross-Appellants Marvin Nelson, *et al.*

3. Affidavit of Service.

[¶3.] by causing the same to be served electronically as follows:

Craig Cordell Smith at csmith@crowleyfleck.com
Paul Jonathan Forster at pforster@crowleyfleck.com
Fintan L. Dooley at findooley@gmail.com

Dated: January 27, 2020

Angela N. Skistad

Subscribed and sworn to before me
This 27th day of January, 2020

Notary Public

AMANDA M KUNKEL
Notary Public
Minnesota
My Commission Expires January 31, 2023