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FILED
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FEBRUARY 14, 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 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

REPLY 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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LAW AND ARGUMENT

[¶1] Plaintiffs ignore, and fail to meet, their heavy burden in bringing their facial constitutional challenge to have this Court find N.D.C.C. ch. 61-33.1 ("the Act") unconstitutional. Moreover, the foundation of Plaintiffs' case is that upon land being flooded by Garrison Dam, the State[1] became the fortuitous owner of all minerals within the Disputed Area[2] up to the water's edge of Lake Sakakawea. This foundational argument falls apart for a number of reasons. No legal support exists for such an argument. Furthermore, Plaintiffs' foundational premise ignores that the Federal government acquired both surface and mineral rights in the Disputed Area, and in some instances allowed private parties to reserve mineral interests. D App 61-85, ¶¶9-14; D App 129-136, ¶¶8-13.[3] Thus, Plaintiffs' facial constitutional challenge to the Act must be denied in total.

I. Plaintiffs cannot meet the heavy burden for their facial constitutional challenge.

[¶2] Plaintiffs do not dispute this is a facial constitutional challenge, but in their appeal briefs do not mention the heavy burden placed on them in bringing such a challenge. D Brief, ¶¶34-38. For example, Plaintiffs do not dispute that a super-majority of this Court must declare the Act unconstitutional. N.D. Const. art. VI, § 4. Moreover, to be successful on their facial challenge, Plaintiffs must prove that no set of circumstances exist under which the Act would be valid. United States v. Salerno, 481 U.S. 739, 745

[1] "State" has same meaning as in Defendants' opening brief. D Brief, ¶11, n.2.
[2] The "Disputed Area," described by Plaintiffs as the "Bed," is between the Ordinary High Water Mark ("OHWM") of the historical Missouri River and the water's edge of Lake Sakakawea. D Brief, ¶25, n.7; Moore Brief, ¶11.
[3] "D Brief" and "D App" is Defendants' opening brief and appendix. "Moore Brief" and "Moore App" is the brief and appendix of Plaintiffs represented by Terrance Moore. "Sorum Brief" and "Sorum App" is the brief and appendix of Paul Sorum.

(1987); Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 2018 ND 71, ¶38, 908 N.W.2d 442. Plaintiffs have not met that very high burden.

II. The Act is a constitutional enactment of the North Dakota Legislature.

A. Plaintiffs' argument contradicts the Supremacy Clause and North Dakota law.

[¶3] The parties stipulated below that within the Disputed Area the Federal Government acquired both surface and mineral interests, and private parties reserved mineral interests. D App 61-85, ¶¶9-14, ¶36; D App 129-136, ¶¶8-13. Plaintiffs fail to address the State's arguments with respect to the Federal Supremacy Clause and, significantly, failed to appeal the district court's legal conclusion that the United States owns land in the Disputed Area. D Brief, ¶48, D App 61-85, ¶¶ 10-14 & 35-36. Ignoring the Supremacy Clause, Plaintiffs argue that with the enactment of N.D.C.C. ch. 61-33, a statute addressing "management" of state land, all Disputed Area minerals became State sovereign property. Moore Brief, ¶¶16, 25, 34, 62[4] (citing N.D.C.C. §§ 61-33-03, 04). Plaintiffs' argument is wrong.

[¶4] First, N.D.C.C. ch. 61-33 was not enacted to declare the State's sovereign ownership to the Disputed Area, but to designate which state agency was to manage the various types of sovereign property. 1989 North Dakota Laws Ch. 552, §3 (S.B. 2328). Second, Plaintiffs argue that by enacting N.D.C.C. ch. 61-33, the Legislature had the constitutional authority to declare the State's sovereign ownership of all flooded minerals in the Disputed Area, yet cite nothing in the record to support this unfounded conclusion. Third, Plaintiffs' argument obliterates the Supremacy Clause because, under their theory, all property acquired by the Federal Government to construct Garrison Dam and Federal

[4] Plaintiffs state the Federal Government agreed to the State's sovereign ownership over the Disputed Area, but none of the cases Plaintiffs cited describe such an agreement. Moore Brief, ¶34. This also conflicts with the stipulated facts. D App 129-135, ¶23.

Public Domain Lands were lost by the passage of N.D.C.C. ch. 61-33. United States v. 32.42 Acres of Land, More or Less, Located in San Diego Cty., Cal., 683 F.3d 1030, 1034 (9th Cir. 2012). Sorum advocates this unreasonable result as the chart in his brief shows the Federal Government owned the Disputed Area until flooding, at which point Sorum claims the Federal Government's ownership ceased. Sorum Brief, ¶53.

[¶5] Furthermore, to be successful in their facial challenge, Plaintiffs must show that ***all*** of the Disputed Area minerals are the State's sovereign property under the Equal Footing Doctrine and North Dakota's riparian laws. D Brief, ¶¶39-50. Yet, Plaintiffs presented nothing in the record to dispute that the vast majority of the Disputed Area was not subject to the Equal Footing Doctrine – stating this is not even material – and that vast swaths of the Disputed Area were non-riparian/upland parcels far removed from the Missouri River. Id.; D App 220-227, ¶¶7-8; Moore Brief, ¶34.[5]

[¶6] Plaintiffs incorrectly argue that upholding the Act requires overturning Reep v. State, 2013 ND 253, 841 N.W.2d 664, State ex rel. Sprynczynatyk v. Mills, 1999 ND 75, 592 N.W.2d 591 ("Mills II"), J.P. Furlong Enterprises v. Sun Expl. & Prod., 423 N.W.2d 130 (N.D. 1988) and Matter of Ownership of Bed of Devils Lake, 423 N.W.2d 141 (N.D. 1988) ("Devils Lake"). Moore Brief, ¶26; see generally Sorum Brief. Plaintiffs' belief that this Court has to overturn its decisions going back 30 years is incorrect.

[¶7] None of these cases were facial challenges or involved land intentionally flooded for Garrison Dam. Further, Mills II only involved riparian land along the Missouri River downstream of Garrison Dam. Mills II, 1999 ND 75, ¶ 2. Also, in Mills II, this Court

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[5] Plaintiffs contend the OHWM of Lake Sakakawea and the Missouri River is 1854' and cite Lynn Helms' affidavit. Plaintiffs misrepresent Mr. Helms' affidavit as he was only describing the extent of Plaintiffs' claims. D App 211-16, ¶13; D App 220-27, ¶¶14-16.

principally relied upon two cases – State of California v. Superior Court (Fogerty), 625 P.2d 256 (Cal. 1981) and State ex rel. O'Connor v. Sorenson, 271 N.W. 234 (Iowa 1937). Id. at ¶7. In both cases, the state's ownership was premised on prescription or adverse possession, arguments not raised by Plaintiffs. Fogerty, 625 P.2d at 261; Sorenson, 271 N.W. at 238. Also, Reep concerned land adjacent to navigable waters and the holding was confined to an interpretation of N.D.C.C. § 47-01-15 for minerals within the "shore zone." Reep, 2013 ND 253, ¶1. The Disputed Area is not a "shore zone." The Furlong case was decided in large part on N.D.C.C. §47-06-07 that has no application here. Also, in Furlong, this Court did not decide title to the new channel bed, in part, because the United States was not a party. Furlong, 423 N.W.2d at 140, n.30. Finally, in Devils Lake, the land at issue was adjacent to the meander line, thus had a navigable body as a border. Devils Lake, 423 N.W.2d at 141-43.

B. The Act does not violate the Anti-Gift Clause.

[¶8] Plaintiffs have not shown that in all applications the Act violates the Anti-Gift Clause. D Brief, ¶¶39-56. For example, Plaintiffs' reliance on Solberg v. State Treasurer, 53 N.W.2d 49 (N.D. 1952) reveals their misunderstanding of a facial challenge. Moore Brief, ¶47. The Solberg case involved statutes mandating the State to relinquish mineral interests that were already, undeniably and in all cases owned by the State. Solberg, 53 N.W.2d at 807-09. In contrast, Plaintiffs have not proven that all minerals in the Disputed Area are the State's sovereign land minerals. Defendants' Brief, ¶¶39-56. Plaintiffs even concede that the State does not own all minerals in the Disputed Area. Moore Brief, ¶50; Sorum Brief, ¶21.

[¶9] In making their Anti-Gift Clause argument, Plaintiffs cite a fiscal note to assert the Disputed Area contains 710 unidentified leases and 25,000 "LMA"[6] improperly gifted by the Act. Moore Brief, ¶13, Moore App 137, ¶2(B). The fiscal note cited by Plaintiffs is dated January 5, 2017, which is when the draft of the Act provided that only the Corps Survey established the OHWM of the historic Missouri riverbed. Court Doc. 121, ¶4; 123. Amendments thereafter during the 2017 legislative session resulted in the Wenck report, not the Corps Survey, delineating the OHWM. D App 220-227, ¶13. Thus, Plaintiffs' assertion that 710 leases and 25,000 acres are given away is incorrect, unreliable and without merit.[7]

C. No violation of Public Trust Doctrine or Watercourses Forever Clause exists.

[¶10] Plaintiffs' arguments that the Act violates the Public Trust Doctrine and the Watercourse Forever Clause are also based on their erroneous foundational argument – that once the Disputed Area became flooded by Garrison Dam all of the minerals up to Lake Sakakawea's water edge became the State's sovereign property. As explained, this foundational premise fails and renders Plaintiffs' claims meritless. D Brief, ¶¶57-62. Also, as explained by Defendants, nothing in Plaintiffs' limited Watercourses Forever Clause argument shows a violation of that Clause. D Brief, ¶¶61-62.

D. The Act does not violate the Equal Protection Clause.

[¶11] Plaintiffs incorrectly argue the Act violates the Equal Protection Clause. Plaintiffs' ignore that an Equal Protection challenge is subject to a rational basis review and that equal protection does not prohibit classifications. Asbury Hosp. v. Cass Cty., N.

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[6] The Plaintiffs brief references "LMA" as being purported Leased Mineral Acres.

[7] 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 oil and gas lease. D App 251-53, ¶4; D App 370-71.

D., 326 U.S. 207, 215 (1945); State v. Leppert, 2003 ND 15, ¶7, 656 N.W.2d 718. Moreover, the Act operates equally upon all lands within the scope of the statute, and the effect of the statute is precisely the same upon all persons who have lands described therein. Thus, Plaintiffs' "geographic area" argument also falls far short of proving an equal protection violation. Moore Brief, ¶54; Sec'y of State v. Wiesenberg, 633 So.2d 983, 995 (Miss. 1994).[8]

E. Plaintiffs' special laws claim is precluded.

[¶12] Plaintiffs alleged below that the Act is a "special law" in violation of N.D. Const. Art. IV, §13. Plaintiffs, however, do not discuss this claim, nor challenge Defendants' assertion the Act is not a special law. Plaintiffs' special laws claim is therefore precluded. Smestad v. Harris, 2011 ND 91, ¶5, 796 N.W.2d 662.

F. Error to hold N.D.C.C. §61-33.1-04(1)(b) violates the Anti-Gift Clause.

[¶13] The district court found only one provision of the Act, N.D.C.C. §61-33.1-04(1)(b), to be unconstitutional. This provision only addresses reimbursement of royalties that may be held and attributable to oil and gas mineral tracts above both the Corps survey and the state phase two survey lines. N.D.C.C. §61-33.1-04(1)(b). In finding this provision unconstitutional, the district court, *sua sponte,* determined that some unknown owners' claims for funds received by the State may be barred by a statute of limitations. D App 61-85, ¶¶49-50; 54-56. The district court concluded that such funds are "owned" by the State, and refunding them violates the Anti-Gift Clause. Id. Plaintiffs argue the district court's statute of limitation decision was correct. Moore

[8] Moreover, "the [United States] Supreme Court has long held that when the state chooses to regulate differentially, with the laws falling unequally on different geographic areas of the state, the Equal Protection Clause is not violated so long as there is no underlying discrimination against particular persons or groups." Reeder v. Kansas City Bd. of Police Comm'rs, 796 F.2d 1050, 1053 (8th Cir. 1986).

Brief, ¶40-41. Yet, there exists no proof showing any claims are barred by a statute of limitations. Ayling v. Sens, 2019 ND 114, ¶11, 926 N.W.2d 147. Plaintiffs and the district court also ignored that a statute of limitations can be modified by a legislature without violating due process, even after the claim arose or after the prior statute of limitations expired. Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 229 (1995). Thus, even assuming the Act modified or changed a statute of limitations for a claim against the State, which is not proven, such action by the Legislature did not violate the Anti-Gift Clause.

III. The District Court erred in awarding attorneys' fees, costs and service award.

[¶14] Plaintiffs' request this Court award attorneys' fees exceeding $62,000,000 and over $18,000 in costs. Court Doc. 633, ¶2. Plaintiffs ignore the following:

(a) Attorney fees cannot be shifted and imposed upon the State under the Common Fund Doctrine. Mann v. N. Dakota Tax Com'r, 2007 ND 119, ¶38-40, 736 N.W.2d 464.

(b) Any benefit Plaintiffs claim they obtained "redounds to the public at large," further precluding application of the Common Fund Doctrine. Boeing Co. v. Van Gemert, 444 U.S. 472, 478-79 (1980).

(c) Plaintiffs did not recover or preserve $187 million in any "common fund," and nothing in the record supports any such finding. D App 105-111, ¶9. Even if there was a specific amount of money "preserved" in the SIIF, which there was not, the SIIF is simply an account where the "beneficiaries" are North Dakota's citizens – a large and ever-changing group of individuals that is nearly impossible to identify. Boeing Co., 444 U.S. at 478-79.

(d) The award was not, and could not be, based on a private attorney general theory. D App 105-111, ¶12.

[¶15] With respect to the service award, nothing Plaintiffs present shows this award has legal support. D Brief, ¶84. Sorum, however, for the first time on appeal, requests this Court award him a new amount. Sorum Brief, ¶¶91-93. Yet, no appeal of the service award was taken by any Plaintiff, including Sorum. Thus, Sorum is precluded from seeking an unprecedented multi-million dollar increase. In re T.H., 2012 ND 38, ¶20,

812 N.W.2d 373. Further, Sorum recites no law or evidence to support his argument that a service award is to be based on an individual's regular employment rate of pay. Finally, Plaintiffs failed to show their cost request was justified. D Brief, ¶85.

CONCLUSION

[¶16] Defendants request the relief set out in their opening brief. D Brief, ¶86.

[¶17] Dated this 14th day of February, 2020.

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CERTIFICATE OF COMPLIANCE

[¶18] This brief contains 12 pages, excluding any addendum. I certify this brief complies with the typeface and type style requirements of N.D.R. App. P. 32.

[¶19] Dated this 14th day of February, 2020.

/s/ Daniel L. Gaustad
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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 similarly situated tax payers of the State of North Dakota,

Plaintiffs, Appellees, and Cross-Appellants

-vs-

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Defendants, Appellants, and Cross-Appellees.

SUPREME COURT NO. 20190203

CASS COUNTY DISTRICT COURT
No. 09-2018-CV-00089

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
: SS.
COUNTY OF GRAND FORKS)

[¶1] Jen O'Hara, being first duly sworn on oath, deposes and says that she is of legal age and is a resident of Grand Forks, North Dakota; that on the 14th day of February, 2020, she served through North Dakota Supreme Court E-Filing portal and first class U.S. Mail, as indicated, a copy of the following documents in the above-entitled matter:

<u>**Served through the North Dakota Supreme Court E-Filing Portal:**</u>

1. **Replay 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.**

and further, that said documents, indicated below as mailed, were sent by first class U.S. Mail, with postage duly prepaid, mailed from the Grand Forks, North Dakota, Post Office addressed as shown:

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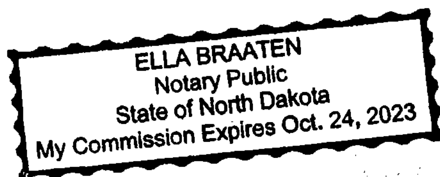
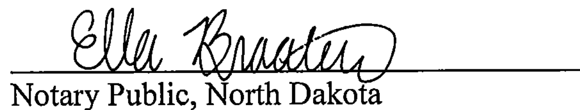
[¶4] Subscribed and sworn to before me in Grand Forks County, North Dakota, this 14th day of February, 2020.





Notary Public, North Dakota