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FEBRUARY 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

District Court No. 09-2018-CV-00089

REPLY 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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

ANALYSIS

[¶1.] N.D.C.C. 61-33.1 ("the Act") gives away the State's sovereign ownership of minerals in the bed of the Missouri River (61-33.1-02), gives away approximately 710 State-owned Leases and 25,000 Leased Mineral Acres ("LMA") *(*61-33.1-04(2)), directs the distribution of funds from the SIIF (61-33.1-04(1)(b), 61-33.1-04(2)(a)), and forfeits the State's Disputed Claims (61-32.1-04(1)). This Court should enjoin these unconstitutional provisions of the Act.

[¶2.] Defendants desperately cling to a fallacious argument that the entire Act must be upheld unless the State owns all of the 96,000 acres between the Wenck Line and the current OHWM[1] (the "Bed"). In other words, even if the Act's §§ 02 and 04 violate the Constitution, Defendants erroneously propose that the Court should uphold these unconstitutional provisions unless the State owns the entire Bed. This disjointed argument does not stand up.

I. Plaintiffs' burden is to show that certain provisions of the Act violate the Constitution, not to show that the State owns all 96,000 acres of the Bed.

[¶3.] Acts of the Legislative Assembly are subject to judicial review. *City of Los Angeles, Calif. v. Patel,* 135 S. Ct. 2443, 2449 (2015). The applicable standard here is "If the claim is a facial challenge, we examine whether a statute has both constitutional and unconstitutional applications. Ordinarily, facial invalidation is unnecessary when the Court can enjoin only the unconstitutional applications." *Schoon v. North Dakota Department of Trans.*, 2018 ND 210, ¶16; 917 N.W.2d 199, 204. Partial invalidation is the "normal rule." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 504 (1985).

[1] "OHWM" means Ordinary High Water Mark.

[¶4.] Defendants here rely on a fictional[2] burden, seeking a strained extension of the "no set of circumstances" dicta in *United States v. Salerno*, 481 U.S. 739, 745 (1987). However, *Salerno* "does not accurately characterize the standard for deciding facial challenges." *Janklow v. Planned Parenthood, Sioux Falls Clinic*, 517 U.S. 1174, 1175 (1996). Although the wrong standard, the Act fails even *Salerno's* test, because no set of circumstances makes this giveaway constitutional.

[¶5.] The Supreme Court and other courts have rejected the "no set of circumstances" test when taxpayers challenge constitutionality. In *Kraft Gen. Foods v. Iowa Dep't of Revenue,* 505 U.S. 71, 112 S.Ct. 2365 (1992), the majority declined to apply *Salerno* and struck down Iowa's tax scheme. *Kraft,* 505 U.S. at 82-87, 112 S.Ct. at 2371-74. *See Robinson v. City of Seattle*, 10 P.3d 452, 458-59 (App. 2000); (*Salerno* "inappropriate for a taxpayer challenge under the state constitution"); *Caterpillar, Inc. v. C.I.R.*, 568 N.W.2d 695, 700 n.8 (Minn. 1997); *Conoco, Inc. v. Taxation & Revenue Dep't of State of N.M.*, 122 N.M. 736, 742 (1997).

[¶6.] Defendants stretch the discredited *Salerno* dicta to the breaking point by claiming that the Act's unlawful gifts, even if unconstitutional, will be upheld unless the State owns every acre in the Bed. An unconstitutional statutory provision is not saved just because another provision of the same statute might be constitutional. Under *Schoon*, the Court will look at each provision and enjoin those parts of the Act that are unconstitutional. Here, §§ 02 and 04 of the Act must be enjoined.

[2] *Doe v. City of Albuquerque*, 667 F.3d 1111, 1124–25 (10th Cir. 2012)

II. Sections 02 and 04 of the Act must be enjoined, because they unlawfully transfer away four categories of State-owned assets.

[¶7.] 1. The State owns Leases and Leased Mineral Acres ("LMA") that are given away by § 04(2)(a) and (b) of the Act. (P Brief ¶¶ 11, 13, 17-18). This fact is established by fiscal notes (P App 137: D App 51); testimony from Land Board Commissioner Lance Gaebe (P App 171; P App 13-14) and the 1989 Sovereign Lands Act ("SLA") (N.D.C.C. 61-33) (P Brief ¶¶ 30-33). "Once a moving party meets its burden of establishing facts that support its claim, an opposing party must provide relevant evidence creating an issue of fact." *Jordet v. Jordet*, 2015 ND 76, ¶ 11, 861 N.W.2d 147, 151; (N.D.R.Civ.P. 56(e)(2)). Defendants submit no evidence on this point. Defendants only question whether 710 Leases covering 25,000 LMA is the precise amount owned by the State. The record establishes Plaintiffs' showing that the State owns Leases and LMA in the Bed. Approximating the Leases and LMA does not create an issue of material fact sufficient to avoid summary judgment. The Act is unconstitutional if § 04(2) gives away any Leases or LMA. (P Brief ¶¶ 30-33). It is undisputed that ¶¶ 04(2)(a) and (b) of the Act require State-owned Leases and LMA be given away, violating the Anti-Gift Clause and Public Trust Doctrine ("PTD").

[¶8.] 2. The Act appropriates $187 million from SIIF. The Act unconstitutionally appropriates $187 million to be "released to the relevant operators." (Act, § 04(1)(b) and P App 190-91). Defendants do not dispute State ownership of these funds and admit that there are no claims against them. Defendants' argue, hypothetically, that the legislature could have modified the statute of limitations to allow claims. This argument fails because (1) the Act did not make this change; (2) the legislature could not have made this change because it would affect a vested property right (P Brief, ¶ 41) and (3) no claims

have been made. Sections 04(1)(b) and 04(2)(a) unconstitutionally give away $187 million and must be enjoined.

[¶9.] 3. The State owns at least part of the 71,000 Unleased Mineral Acres ("UMA"). The UMA are sovereign lands of the State under the SLA (with exceptions therein). (N.D.C.C. 61-33-01.3, -03). (P Brief ¶ 17). Defendants assert that the SLA is only about "management" but this is wrong. (D Reply Brief ¶ 4). The SLA expressly declares that the State has present and future "possessory interest" in minerals under sovereign State lands and includes "self-executing" transfer of these rights. (N.D.C.C. 61-33-03).

[¶10.] The State owns some of the UMA, including at least those UMA that were riparian pre-dam. (P Brief ¶¶ 62-63). Section 02 of the Act violates the Anti-Gift Clause and the PTD by giving away that part of the UMA that the State does own.

[¶11.] 4. The Act forfeits the State's Disputed Claims to $18 million currently held by operators. This forfeiture occurs under § 04(1)(a) of the Act. (P Brief ¶17). The Defendants make no opposing argument so this provision must be enjoined.

III. Upholding the Act would require overruling well-established precedent.

[¶12.] Upholding the Act requires finding that the State does not own minerals up to the current OHWM, thus overturning *Reep, Mills I, Mills II, Furlong,* and *Matter of Ownership Bed of Devils Lake*[3]. Defendants assert that none of these cases involve "land intentionally flooded for Garrison Dam" (D Reply Brief, ¶ 7). This assertion is factually wrong and legally irrelevant. Factually, *Mills I, Mills II, and Reep* all involve the land flooded by Garrison Dam. (e.g. land covered "by controlled releases from Garrison Dam"

[3] *Reep v. State,* 2013 ND 253, 841 N.W.2d 664; *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537 (N.D. 1994); *State ex rel. Sprynczynatyk v. Mills*, 1999 ND 75, 592 N.W.2d 591; *J.P. Furlong Enter, Inc. v. Sun Explor. & Prod. Co,* 423 N.W.2d 130 (N.D. 1988); *In re Ownership of Bed of Devils Lake*, 423 N.W.2d 141 (N.D.1988).

Mills II, 1999 ND 75, ¶ 4; 592 N.W.2d 591, 592). Legally, the current OHWM determines State ownership, whether the cause of the change is "natural or artificial," (e.g. *Id*. ¶¶ 5, 9). The location of the current OHWM, not the cause of it, determines State mineral ownership.

[¶13.] In each of these cases, this Court determined the boundary of State ownership of minerals in the bed of navigable waters, thus establishing the substantive law that controls a key issue in this case—does the State own any of the assets given away by the Act? At bottom, the only way to uphold the Act would be for this Court to overrule the following well-established precedent:

RULE	CITATION
The State owns mineral rights up to current OHWM of navigable waters in the State.	Sovereign Lands Act (N.D.C.C 61-33-03) *Mills II*, 1999 ND 75, ¶ 5; 592 N.W.2d at 592 *Furlong*, 423 N.W.2d at 132 *Mills I*, 523 N.W.2d at 539 *Reep*, 2013 ND 253, ¶ 9; 841 N.W.2d at 669
The State owns minerals in shore zone.	*Reep*, 2013 ND 253, ¶ 24; 841 N.W.2d 664
Setting OHWM at pre-Garrison Dam levels violates PTD.	*Mills II*, 1999 ND 75, ¶¶ 6-9; 592 N.W.2d at 592- 94
OHWM is ambulatory and not determined as of a fixed date. State's ownership of land along Missouri River is determined by OHWM as it may exist from time to time, as affected by the Garrison Dam.	*Hogue*, 71 N.W.2d at 52 *Furlong*, 423 N.W.2d at 140 *Mills I*, 523 N.W.2d at 539 *Mills II*, 1999 ND 75, ¶ 5; 592 N.W.2d at 592 *Reep*, 2013 ND 253, ¶ 24; 841 N.W.2d 664 *Devil's Lake*, 423 N.W.2d at 144

IV. Plaintiffs' Public Trust Doctrine claims are not subject to a constitutional standard of review.

[¶14.] Plaintiffs' claim under the PTD is not dependent upon the State Constitution. "[T]he contours of [the PTD] do not depend upon the Constitution." *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603–04 (2012). The PTD claim is governed by the fiduciary standard articulated by the United States Supreme Court in *Illinois Central R. Co. v. Illinois*, 146 U.S. 387 (1892), adopted by this Court in *United Plainsmen Ass'n v. N.*

Dakota State Water Conservation Comm'n, 247 N.W.2d 457, 460–61 (N.D. 1976): "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, … than it can abdicate its police powers in the administration of government and the preservation of the peace." Thus, a simple majority of this Court can enjoin the Act under the PTD.

V. Flowing Waters Clause

[¶15.] Defendants cite inapplicable authority to argue that the Flowing Waters Clause ("FWC") (N.D. Const. Art. XI, § 3,), does not protect State minerals. Both *Burlington N. & Santa Fe Ry. Co. v. Benson Cty. Water Res. Dist.*, 2000 ND 182, ¶ 11, 618 N.W.2d 155, 160 in ¶ 61 (diffuse surface water) and *Ozark-Mahoning v. State,* 76 N.D. 464, 466, 37 N.W.2d 488, 489 (non-navigable Lake Grenora) involved non-navigable waters. This Court has established that the FWC protects the State's mineral resources in the beds of navigable waters. *Mills I*, 523 N.W.2d at 543 (*see ¶¶ 12-13, supra*).

VI. Equal Protection

[¶16.] Defendants make no new equal protection arguments, except erroneously claiming that Plaintiffs did not address special laws in their brief. In fact, Plaintiffs did argue that the Act applies only to a particular area of the State. (Act, 61-33.1-01(2)) (P Brief ¶ 54). Plaintiffs stand by the equal protection arguments in their principal brief.

VII. The District Court properly denied Defendants' Rule 19 Motion.

[¶17.] Plaintiffs argued in their principal brief that Defendants' have waived their Rule 19 argument. Defendants did not respond in their reply, conceding this issue.

VIII. Attorneys' Fees

[¶18.] Defendants incorrectly assert that Plaintiffs ignored *Mann v. N. Dakota Tax Com'r*, 2007 ND 119, 736 N.W.2d 464. (D Reply, ¶ 14). Actually, Plaintiffs specifically

argued against this case. (P Brief, ¶ 80). *Mann* does not apply here. In that case, the State was not a beneficiary of Plaintiffs' work. Plaintiffs there requested the State pay fees in addition to their recovery, not to be paid out of the fund preserved. Here, the State is the beneficiary of Plaintiffs' work and Plaintiffs request fees paid from the $187 million benefit provided to the State.[4] Nothing in *Mann* exempts the State paying its share of fees under the Common Fund Doctrine when, as here, the State is the beneficiary.

[¶19.] A "general social grievance case" is one that involves only a non-monetary benefit to the public at large, which is not true here. *See, e.g. Boeing,* 444 U.S. at 479[5]. Here, Plaintiffs produced a monetary benefit to the State, preventing $187 million of unconstitutionally appropriated funds from being disbursed.

[¶20.] Defendants also mistakenly argue that because all North Dakota citizens secondarily benefit, the number of beneficiaries is too large. Secondary beneficiaries are not relevant (P Brief ¶¶ 76-77). That said, the population of North Dakota is far less than many groups awarded common fund fees. *See e.g.*, *In re Prudential Ins. Co. Am. Sales Practice Litig. Agent Actions*, 148 F.3d 283, 289 (3d Cir. 1998) (8 million in class).

[¶21.] Defendants do not explain why the Private Attorney General Doctrine would not apply. Both the Common Fund and Private Attorney General (P Brief ¶ 83) doctrines would support a fee award to Plaintiffs. (P Brief ¶¶ 73-83). "Even when lacking statutory authority, state courts have awarded private attorney general fees, reasoning that these awards, like common–fund and substantial benefit awards, were within the inherent

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[4] *See Horst v. Guy,* 211 N.W.2d 723, 732 (ND 1973); *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980); *Regan v. Babcock*, 250, 264 N.W. 803, 807 (1936); *Shillito v. City of Spartanburg*, 51 S.E.2d 95 (S.C. 1948); *Weiss v. Bruno,* 523 P.2d 915, 917 (Wash. 1974); *Ariz. Ctr. for Law in Pub. Interest v. Hassell*, 837 P.2d 158, 173 (1991).

[5] *Compare Hoke Cty. Bd. of Educ. v. State*, 679 S.E.2d 512, 518-19 (N.C. Ct. App. 2009).

equitable powers of the court." 106 A.L.R. 5th 523*; Hassell, 837 P.2d* at 173[6]. *Hassel* is particularly instructive. There, the court awarded attorney fees in a similar case involving the state attempting to give away sovereign riverbed. The North Dakota Attorney General supported those plaintiffs as *amicus*. *Id.* 837 P.2d at 163. Plaintiffs are entitled to attorney fees for preserving assets for the State.

[¶22.] Defendants do not contest that the proper method for calculating the amount of fees is the percentage-of-benefit method. As this Court did in *Horst*, 211 N.W.2d at 732, the attorney fee calculation should be remanded to the District Court with instructions to award attorney fees using the percentage-of-benefit method at a rate between 25% and 33 1/3% of the benefit provided to the State.

CONCLUSION

[¶23.] Plaintiffs respectfully request that this Court enjoin §§ 02 and 04 of the Act and remand this case to determine attorneys' fees based on a percentage of the benefit provided to the State.

HELLMUTH & JOHNSON

Dated: February 27, 2020

/s/ Terrance W. Moore

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[6] *See also*, *Am. Cancer Soc'y v. State*, 103 P.3d 1085 (Mont. 2004); *Miotke v. City of Spokane*, 678 P.2d 803 (Wash. 1984); *Serrano v. Priest* 569 P.2d 1303 (Cal. 1977); *Taggart v. Highway Bd. for N. Latah Cty. Highway Dist.*, 771 P.2d 37, 39 (Idaho 1988); *Utahns For Better Dental Health-Davis, Inc. v. Davis Cty. Clerk*, 175 P.3d 1036, 1041 (Utah 2007).

CERTIFICATE OF COMPLIANCE

[¶1.] This Brief contains 12 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.

[¶2.] Dated this 27th day of February, 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 27th day of February, 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. Reply Brief of Plaintiffs, Appellees, and Cross-Appellants Marvin Nelson, *et al.*

2. Affidavit of Service.

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

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[¶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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Dated: February 27, 2020

Angela N. Skistad

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

Notary Public

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