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IN THE OFFICE OF THE
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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

PLAINTIFFS, APPELLEES, AND CROSS-APPELLANTS MARVIN NELSON, MICHAEL COACHMAN, CHARLES TUTTLE AND LISA MARIE OMLID'S PETITION FOR REHEARING

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

HELLMUTH & JOHNSON, PLLC

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STATEMENT OF THE CASE

[¶1.] On July 30, 2020, the Supreme Court of North Dakota issued its decision in this case (the "Decision") finding N.D.C.C. 66-33-1 (the "Act") constitutional.

[¶2.] The core questions are (1) Did the State own the mineral rights above the 1953 ordinary high water mark ("OHWM") established by the Act (the "Wenck Line") and (2) Did the Act modify the N.D.C.C. § 28-01-22.1 statute of limitations ("SOL") so as to revive past claims against the State. The Court erred by holding that the exception to the broad grant under the Federal Submerged Lands Act (42 U.S.C. §1313) ("SLA") for lands acquired in the Federal Government's "proprietary" capacity applies here and in holding that the Act revives potential claims against the State. Further, if the Act is held to modify the SOL, the Court erred because the modification would be an unconstitutional special law.

I. THE STATE OWNS THE LAND ABOVE THE WENCK LINE.

[¶3.] The Court erred in finding "The state does not violate the gift clause by [giving away] property that it does not own in the first instance" because of the §1313 exception in the SLA. (Decision ¶ 46). The §1313 exception to the SLA does not apply because the subject land was not obtained in a "proprietary capacity." (SLA, §1314(a)). The State owns the bed of Lake Sakakawea up to the current OHWM, as affected by the Garrison Dam. The Act's refunds and giveaway of sovereign lands violates the Anti-Gift clause (N.D. Const. Art. X, § 18) and Public Trust Doctrine.

A. The Court Erred in Applying the §1313 Exception of the Submerged Lands Act Because the Land was not Acquired in a Proprietary Capacity.

[¶4.] The Court recognized that all beds of navigable lakes and streams, including "the natural resources . . ." were granted to the State by the SLA (43 U.S.C. §1311) (Decision

¶ 46), except "lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity (43 U.S.C. §1313(a))." (Decision ¶ 44). The Court misapplied this exception, because the subject mineral rights were not acquired in a "proprietary capacity."

[¶5.] In 43 U.S.C. §1314, the SLA distinguishes between those rights which are "paramount" and those which are "proprietary":

> The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States . . . .

[¶6.] The Court erred in finding that the mineral rights here were excepted from the SLA grant because they were acquired through eminent domain (Decision, ¶ 46). This is the wrong test. The correct test is whether the mineral rights were acquired in a "proprietary capacity" under §1314(a) of the SLA. In §1314(a), the Federal Government defined its "paramount capacity" and its "proprietary" capacity. "Paramount rights" include "navigational servitude and rights in and powers of regulation and control of said lands and navigable waters . . . ." "Proprietary rights" include "the rights of management, administration, leasing, use, and development of the lands and natural resources …" *Id.* Because the Federal Government undertook the Garrison Dam project in its "paramount," not "proprietary," capacity, the §1313 exception does not apply.

[¶7.] The key question is whether the Federal Government undertook the Garrison Dam project to control navigation and flooding (Paramount) or to develop the mineral rights at issue (Proprietary). The intent of the SLA was to foster management more adapted to the

prevailing needs of the local area. *See Murphy v. Dep't of Nat. Res.*, 837 F. Supp. 1217, 1221 (S.D. Fla. 1993), *aff'd,* 56 F.3d 1389 (11th Cir. 1995).[1]

[¶8.] The Federal Government undertook the Garrison Dam project to control navigation and flooding, not to develop minerals. When the Garrison Dam project was authorized in 1944, there was no technology available to develop submerged minerals. Bakken oil had not even been discovered. In acquiring the land, the government stopped acquiring mineral rights when oil was discovered. (Ct. Doc. 458, P. App 126, ¶10). The absence of any mineral development possibility means the land could not have been acquired in a proprietary capacity.

[¶9.] The land was acquired in the State's "paramount capacity"—to control navigation and flooding. The Garrison Dam project was authorized by The Flood Control Act of 1944, which declares its purpose to be "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control, . . . " (33 U.S.C.A. § 701-1). This purpose is the government's "paramount" capacity, not its "proprietary" capacity. (See 43 U.S.C. §1314(a)). Because the land was not acquired in a proprietary capacity, the §1313 exception should not have been applied. Likewise, the North Dakota Attorney General did not apply the exception in its own analysis. (Ct. Doc. 469, P. App 193).

[¶10.] In the SLA, The Federal Government transferred all submerged minerals to the States except those acquired in a "proprietary capacity" (§1313(a)). The mineral rights

[1] Citing *Submerged Lands Act*, H.R.Rep. No. 215, 83d Cong., 1st Sess. (1953), *reprinted in* 1953 U.S.C.C.A.N. 1385, 1436–37 "(indicating that States should control submerged lands because their interests are "so intimately connected with local activities"; and stating that, "[a]ny conflict of interest arising from the use of the submerged lands should be and can best be solved by local authorities")." *Id*.

at issue here were not acquired in a "proprietary capacity," so the §1313 exception does not apply and the SLA granted the subject lands to the State. Therefore, the Court erred in ¶ 46, in applying the exception to determine that the State never owned the subject mineral rights. The case should be reheard on this issue.

B. Under State Law, the State Owns the SIIF Funds and Mineral Rights

[¶11.] North Dakota law is clear that lands under navigable waters, including Lake Sakakawea (which was navigable in 1989), belong to the State, up to the current OHWM. This is affirmed by the 1989 Sovereign Lands Act and this Court's long precedent.

[¶12.] 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." This Court's subsequent rulings confirm the State's ownership to the current OHWM, even as affected by the Garrison Dam. *See Reep v. State,* 2013 ND 253, ¶ 24, 841 N.W.2d 664, 675; *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537 (N.D. 1994) ("*Mills I*"); *State ex rel. Sprynczynatyk v. Mills*, 1999 ND 75, ¶ 1, 529 N.W.2d 591, 592 ("*Mills II*"); *J.P. Furlong Enter., Inc. v. Sun Explor. & Prod. Co.*, 423 N.W.2d 130, 132 (N.D. 1988) and *In re Ownership of Bed of Devils Lake*, 423 N.W.2d 141, 145 (N.D. 1988) ("*Devils Lake*").

[¶13.] Chief Justice VandeWalle succinctly summarized the State law 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. 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. 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.' (Citations omitted).

The Court held that this body of law was preempted by the SLA. However, because the SLA §1313 exception does not apply, both the SLA and this body of law dictates State ownership of the subject mineral rights.

[¶14.] Even if §1313 applies, the State would still own the mineral rights not acquired by the Government. The SLA and the Supremacy Clause do not apply to these non-federal mineral rights. Under North Dakota State law, these mineral rights belong to the State up to the current OHWM as affected by the Garrison Dam.

[¶15.] Under the 1989 Sovereign Lands Act and the Furlong-Mills-Reep line of cases, the State holds title to the bed of Lake Sakakawea. The holding in ¶ 46 that the State "cannot give away what it does not own" is not applicable. The State owns the resources, so the Act violates the Anti-Gift clause and Public Trust Doctrine.

II. THE ACT DID NOT WAIVE OR EXTEND THE LIMITATION PERIOD.

A. The Act Did Not Modify the SOL for Claims Against the State.

[¶16.] The SOL for claims against the State of North Dakota is three years (N.D.C.C. 28-01-22.1). The Act does not contain any express modification of this SOL. Modification of the SOL only exists if it is an "implied modification."

[¶17.] It is well established that "amending a piece of legislation by implication is disfavored in North Dakota and there is an established presumption against it." *Birst v. Sanstead*, 493 N.W.2d 690 (N.D. 1992). To overcome this presumption, it must be shown that "the conflict between the two statutes is irreconcilable." *Id*, citing *Walsvik v. Brandel*, 298 N.W.2d 375, 377 (N.D. 1980). Amendments by implication are not favored and will not be upheld in doubtful cases." *Rodgers v. Freborg*, 240 N.W.2d 63 (1976). The three-year limitation period is intact. The Act and the SOL can be reconciled.

B. The SOL and the Act can be Reconciled.

[¶18.] The Act, in Section -05 only provides time to bring "Actions Challenging Review Finding or Final Acreage Determinations."[2] The Act does not modify the three-year limitation for other claims against the State. There is no mention of extending the time under N.D.C.C. 28-01-22-1 for claims for royalty refunds, leases or title disputes.

[¶19.] The Act and the SOL can be reconciled. Reading these two statutes together, the result would be that a party must generally bring a claim against the State within three years and if challenging the review findings or final acreage determination under the Act, has only two years from final determination. This makes effective a two-year limitation period for the challenges identified in the Act, and leaves intact the general period of limitations for other claims.

[¶20.] The Act did not modify N.D.C.C. 28-01-22.1. No claims were revived. Recognizing the Court's statement in ¶ 41 that the State "has a moral obligation to pay its just debts and deal fairly with the people," the unrevived claims are not "just debts." Any refunds would be unconstitutional donations.

III. THE ACT IS AN UNCONSTITUTIONAL SPECIAL LAW.

[¶21.] A statute relating only to particular persons or things within a class is an unconstitutional "special law." (N.D. State Const. Art. IV.13). Here, a modified SOL would apply only to claims against the state in a particular area, so it is unconstitutional.

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[2] The Act states "an interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter" or "challenging the final acreage determination under this chapter" must commence an action in district court within two years of adoption of the final review findings. (N.D.C.C. 61-33.1-05.1-05.2).

§ 01-3 of the Act creates an unconstitutional geographic classification[3]. (Act, § 01-3). The Act is therefore an unconstitutional "local or special law" that grants special privileges to a select group.

[¶22.] If the Act extends the SOL only for claims arising within the designated area of the Missouri River, it is an unconstitutional special law. The unequal treatment of potential claimants in this particular section of the Missouri River compared to owners of all other submerged land violates Article I, Section 21 and Article IV, Section 13 of the North Dakota Constitution.

CONCLUSION

[¶23.] For all these reasons, Plaintiffs respectfully request that this Court grant this petition and set this matter for rehearing.

HELLMUTH & JOHNSON

Dated: August 13, 2020

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[3] The Act applies only "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." (N.D.C.C. 61-33.1-01.2)

CERTIFICATE OF COMPLIANCE

[¶24.] This Brief contains 10 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.

[¶25.] Dated this 13th day of August, 2020.

/s/Terrance W. Moore
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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 12th day of August, 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. Plaintiffs, Appellees, and Cross-Appellants Marvin Nelson, Michael Coachman, Charles Tuttle and Lisa Marie Omlid's Petition for Rehearing; and

2. Affidavit of Service.

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

Matthew Arnold Sagsveen at masagsve@nd.gov
Daniel Lee Gaustad at dan@grandforkslaw.com
Ronald F. Fischer at rfischer@grandforkslaw.com
Joseph Elmer Quinn at jquinn@grandforkslaw.com
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Fintan L. Dooley at findooley@gmail.com
Craig Cordell Smith at csmith@crowleyfleck.com
Paul Jonathan Forster at pforster@crowleyfleck.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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Dated: August 12, 2020

Angela N. Skistad

Subscribed and sworn to before me
This 12th day of August, 2020

Notary Public

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Dated: August 13, 2020

Angela N. Skistad

Subscribed and sworn to before me
This 13th day of August, 2020

Notary Public

DENELLE J JENSEN
Notary Public
Minnesota
My Commission Expires January 31, 2025