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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

William S. Wilkinson, Ann L. Nevins, and Amy Perkins as Personal Representatives for the Estate of Dorothy A. Wilkinson; Barbara Caryl Materne, Trustee of the Petty Living Trust; Charlie R. Blaine and Vanessa E. Blaine, as Co-Trustees of the Charlie R. Blaine and Vanessa E. Blaine Revocable Trust; Lois Jean Patch, life tenant; and Lana J. Sundahl, Linda Joy Weigel, Deborah J. Goetz, Marva J. Will, Ronald J. Patch, Michael Larry Patch, and Jon Charles Patch, Remaindermen, Plaintiffs and Appellants, vs. The Board of University and School Lands of the State of North Dakota, Brigham Oil & Gas, LLP; Statoil Oil & Gas LP, EOG Resources, Inc.; XTO Energy Inc.; Petrogulf Corporation; North Dakota State Engineer; and all other persons unknown who have or claim an interest in the property described in the Complaint, Defendants and Appellees.	**SUPREME COURT NO. 20220037** Civil No. 53-2012-CV-00038

ON APPEAL FROM ORDER FOR JUDGMENT AND JUDGMENT

BRIEF OF APPELLANTS

ORAL ARGUMENT REQUESTED

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the district court erred in dismissing the Wilkinsons' claim that the State of North Dakota defendants ("State") committed an unconstitutional taking of their property in violation of the Fifth Amendment of the United States Constitution.

[¶2] Whether the district court erred in dismissing the Wilkinsons' claim that the State committed an unconstitutional taking of their property in violation of Art. I, § 16, of the North Dakota Constitution and N.D.C.C. § 32-15 *et seq.*

[¶3] Whether the district court erred in dismissing the Wilkinsons' 42 U.S.C. § 1983 claim against the State for deprivation of their constitutional rights, including the Wilkinsons' claim for attorney's fees.

[¶4] Whether the district court erred in dismissing the Wilkinsons' claim that the State converted their personal property.

[¶5] Whether the district court erred in dismissing the Wilkinsons' claim that the State was unjustly enriched at the Wilkinsons' expense.

[¶6] Whether the district court erred in dismissing the Wilkinsons' civil conspiracy claim against the State and Statoil.

[¶7] Whether the district court erred in holding the Wilkinsons' request for attorney's fees was untimely.

[¶8] Whether the district court erred in denying the Wilkinsons' claims for damages based on the State's unconstitutional takings under the United States Constitution, 42 U.S.C. § 1983, and North Dakota law, including attorney's fees, just compensation under the Fifth Amendment, for conversion of their property, and for the State's unjust enrichment at the Wilkinson's expense.

[¶9] Whether the district court erred in denying the Wilkinsons' request for costs.

ORAL ARGUMENT REQUESTED

[¶10] Plaintiffs, collectively, the Wilkinsons, request oral argument. Oral argument would be helpful to address the district court's erroneous holding that the State claiming it owned the Wilkinsons' property for a decade was not an unconstitutional taking under the United States and North Dakota Constitutions. Similarly, oral argument would be helpful to address the district court's erroneous holding that the Wilkinsons were not entitled to just compensation under the Fifth Amendment and their attorney's fees under 42 U.S.C. § 1983 and N.D.C.C. Chpt. 32-15 *et seq* for the State's unconstitutional taking.

STATEMENT OF THE CASE

[¶11] We are here because the State of North Dakota committed an unconstitutional taking of the Wilkinsons' property in violation of the Fifth Amendment of the United States Constitution and Art. I, § 16 of the North Dakota Constitution. The Fifth Amendment of the United States Constitution requires that the State pay just compensation for the ten years it claimed ownership of the Wilkinsons' property. Both federal and state law require the State pay the Wilkinsons' attorney's fees and costs for the unconstitutional taking and deprivation of the family's constitutional rights.

[¶12] In 2010, the State claimed that it owned the Wilkinsons' minerals despite the irrefutable fact the Wilkinsons reserved their minerals, of record, when the United States acquired the surface in 1958 for Lake Sakakawea pursuant to the Flood Control Act of 1944. Acting on its baseless claim, in 2010 and 2011, the State entered into leases for the Wilkinsons' minerals with three oil companies, including Statoil's predecessor, Bowie Oil Partners. As a result of the State's claim, the Wilkinsons were not paid any royalties for their minerals for the ten years between November 2010 – October 2020. Tr., Vol. 1, 23:17-20; 57:6-19; 58-60:10-13, 60-61:14-11; and 97:5-19, 98:4-7, and 98:12-20. Statoil's

expert, Amy Becker, testified that in November 2020, Equinor (Statoil's successor) finally paid the Wilkinsons their royalties for the time between November 2010 and October 2020, which totaled $571,094.69. *See* Statoil's Expert Report at R812:¶9. The State Land Commissioner, Jodi Smith, testified that during these ten years, Statoil instead paid the State, who possessed and controlled the Wilkinsons' royalties in the State's escrow account at the Bank of North Dakota, a State-owned bank. Tr., Vol. 1, 144:19-25.

[¶13] In *Wilkinson II*, the Court affirmed the district court's holding that the State did not own the Wilkinsons' minerals. *See Wilkinson v. Bd. of Univ.*, 2020 ND 179, 947 N.W.2d 910. *Cf. Sorum v. State*, 2020 ND 175, ¶ 45 – 46, 947 N.W.2d 382 (stating, "The Flood Control Act of 1944 authorized construction of the Garrison Dam and acquisition of the land that would be subject to inundation by the reservoir. Any contrary state law, including the constitution, a statute, or the common law, which purports to vest in the State the legal ownership of the bed of Lake Sakakawea is preempted under the Supremacy Clause to that extent.") This, too, is irrefutable. There was never an outcome with respect to the Wilkinsons' property, acquired by the United States pursuant to the Flood Control Act of 1944, where the State could own an interest in it. Rightfully, in *Wilkinson II,* the Court remanded for a determination of the Wilkinsons' remaining claims and damages.

[¶14] While the Wilkinsons finally received their royalties in November 2020, the family was never – *and has never been* – compensated for their damages, including just compensation under the Fifth Amendment, attorney's fees, or costs, for the State's taking.

[¶15] On remand, after a bench trial in July 2022, the district court dismissed the Wilkinsons' remaining claims and denied all damages, including any just compensation and attorney's fees and costs. By copying the State's 63-page Proposed Order verbatim,

the district court erred in refusing to hold the State responsible for its unconstitutional and unlawful conduct. Justice demands the district court be overturned.

[¶16] For these reasons, and those below, as a matter of law, the State committed an unconstitutional taking of the Wilkinsons' minerals and royalties in violation of the United States and North Dakota Constitutions. The State converted the Wilkinsons' royalties for ten years when it exercised control over and possessed the royalties. The State was unjustly enriched at the Wilkinsons' expense by receiving payments for leasing the Wilkinsons' minerals in Section 13 and keeping those payments. The State conspired with Statoil as they acted in concert to claim the Wilkinsons' minerals and convert their royalties. Finally, the State deprived the Wilkinsons of their civil rights by virtue of the unconstitutional takings under the color of state law in violation of 42 U.S.C. § 1983.

[¶17] The Wilkinsons ask this Court to reverse the district court's findings to the contrary, order the entry of judgment in their favor on all counts, and order the award of damages, including just compensation in the form of interest for the ten years the State claimed it owned the Wilkinsons' minerals, and attorney's fees and costs.

STATEMENT OF THE FACTS

[¶18] As the Court is well-versed with both the factual and procedural history of this case, the facts are only restated here as necessary for the appeal.

[¶19] The Wilkinsons' property consists of the mineral interests in Sections 12 and 13, Township 153 North, Range 102 West, in Williams County. *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, ¶¶ 2, 13, 903 N.W.2d 51 ("*Wilkinson I*"); and the 1958 Warranty Deed with the United States at R697. As noted on the top right corner of the deed, it was for Tract HH-3190 of United States Segment Map HH. *See* R495 (United States Segment Map HH). This is the same Segment Map from the bench trial at R708. It is well-established

and indisputable that the Wilkinsons owned the minerals and the State neither owned or had any interest in them. In 1958, the Wilkinsons sold the surface to the United States for the Garrison Dam project and Lake Sakakawea. *See id*.; and *Wilkinson II* at ¶ 2. In the deed, the Wilkinsons reserved the minerals claimed by the State. *See* R697; *Wilkinson I* at ¶¶ 2, 13; and *Wilkinson II* at ¶ 2. It is undisputed the Wilkinsons "have leased the minerals numerous times since they conveyed the property to the United States." *Id.* at ¶ 24.

[¶20] Despite the Wilkinsons' longstanding ownership of the minerals going back at least half a century, the State, a stranger to title, claimed ownership of them in 2010 under the dubious Phase I Study. *See* Smith Testimony at Tr., Vol. 1, 115:11-13; 121-122:16-1; and 125:9-11. The State conducted no title research or due diligence of any kind in asserting its claim. *Id*., 128:12-17. The State then entered into leases for the Wilkinsons' minerals with Bowie Oil Partners, Statoil's predecessor, in August 2010, Petrogulf Corp. in November 2010, and XTO Energy in May 2011. *See* R678, 679, 686, 687, and R724 (State leases with Bowie, Petrogulf Corp., and XTO Energy). As a result of these leases, the State received royalties for production from the Wilkinsons' property in Section 12 in an escrow account at the Bank of North Dakota for ten years, and bonus payments for Section 13. Smith Testimony at Tr., Vol. 1, 144:19-25 and 145:2-4; and Otteson Testimony, *Id*. at 171:18-25; 180:1-15; and 181:15-18. Statoil's expert confirmed this. *See* Becker Testimony, Tr. Vol. 2, 7-8:20-22; and 19:9-13; and R812 (Statoil Expert Report).

[¶21] Accordingly, there is no dispute that the State unlawfully asserted it owned the Wilkinsons' minerals, entered into leases for those minerals, and usurped the Wilkinsons' royalties and bonus payments from the leases of their property. The issue now is damages,

which is informed by the Wilkinsons' remaining claims. The district court erred in ruling on these remaining claims.

[¶22] On remand for the second time, a bench trial was held in July 2022 to decide the Wilkinsons' remaining claims and damages. *See* Order for Judgment at R813:¶14. The Wilkinsons moved for attorney's fees and costs, which included supporting affidavits and invoices for legal fees. *See* Wilkinsons' Motion for Attorney's Fees and Costs at R540 – 555, and 586. At trial, the district court received evidence on the Wilkinsons' attorney's fees and costs. *See* Wilkinson Post Trial Brief at R653:¶¶ 24 – 28. The district court also received evidence of the Wilkinsons' damages under their Fifth Amendment claim and other claims against the State. *See* R653:¶¶ 20 – 28; 29 – 32; 38 – 42; 69 – 70; and 71 – 76. After the bench trial, the district court once again recognized the State did not own the Wilkinsons' minerals. *See* R813:62:¶153. Contrary to the record evidence and law, though, the district court dismissed the Wilkinsons' remaining claims, denied damages and interest, and denied attorney's fees and costs. Thus, while the Wilkinsons finally received their royalties after fighting the State for over a decade, they have not been compensated for their damages, including interest, costs, and attorney's fees. For the reasons herein, the district court erred and must be reversed.

LAW AND ARGUMENT

I. The State committed an unconstitutional taking of the Wilkinsons' minerals and royalties under the United States and North Dakota Constitutions, and the Wilkinsons are entitled to just compensation including interest.

[¶23] The United States and North Dakota Constitutions require just compensation when the government takes private property. *See* U.S. CONST. amend. V; N.D. CONST., art. I, § 16. Although the North Dakota Constitution's protections are broader in some respects, the Wilkinsons analyze their federal and state takings claims together. *See Wild Rice River*

Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 16, 705 N.W.2d 850, 856. Property owners like the Wilkinsons are guaranteed just compensation from the time of a taking, which "generally consist[s] of the total value of the property when taken, *plus interest*, from that time." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2170 (2019) (emphasis added).

[¶24] The district court erred as a matter of law in finding the State committed no unconstitutional taking. That decision is subject to de novo review. *See Irwin v. City of Minot*, 2015 ND 60, ¶ 6, 860 N.W.2d 849 (instructing that whether a taking has occurred "is a question of law which is fully reviewable on appeal"); and *McCrothers Corp. v. City of Mandan*, 2007 ND 28, ¶ 34, 728 N.W.2d 124 (same).

[¶25] As explained below, the Court should reverse the district court and hold an unconstitutional taking occurred because (1) the Wilkinsons owned the minerals, (2) this is not a mere "title dispute," (3) the government took the Wilkinsons' property, and (4) no subsequent action by the State can undo or moot a takings claim. As such, the Wilkinsons are entitled to just compensation, which includes interest.

A. The Wilkinsons owned the minerals.

[¶26] Of course, to prevail on a takings claims, the Wilkinsons must have possessed a property interest. *See, e.g.*, *Pettro v. United States*, 47 Fed. Cl. 136, 144 (Fed. Cl. 2000). As noted above, it is indisputable that the Wilkinsons owned the minerals here. Indeed, the Wilkinsons sold the surface to the United State as evidenced by the 1958 Warranty Deed and expressly reserved the minerals. *See also Wilkinson II* at ¶ 32.

[¶27] From the outset of this case, the State claimed it owned the Wilkinsons' property. *See Wilkinson I* at ¶ 12. Commissioner Smith testified the State commissioned the Phase I Study in 2009, and it was controlling for the property. *See* Tr., Vol. 1, 121:16-23. When asked how the Wilkinsons' minerals were available for leasing by the State, Smith testified,

"The minerals that would've been deemed to be sovereign minerals, also within the boundaries of the ordinary high water mark per Phase I, would have been placed for leasing on the Land Board's website, available for nomination." *Id*., 136:12-20. Adam Otteson, the Director of Revenue Compliance for the Department of Trust Lands, testified the Wilkinsons' minerals "were listed [on the State's auction website] in conjunction with the completion of the Phase I Study that was performed." *Id*., 164:14-17.

[¶28] Neither the State's Phase I Study or Chpt. 61-33.1, N.D.C.C., could ever deprive the Wilkinsons of their minerals reserved under the 1958 Warranty Deed. In *Sorum*, the Court recognized that no state law or study can preempt federal law to override the rights secured to landowners like the Wilkinsons.

> The Submerged Lands Act, 43 U.S.C. § 1301 – 1356b, generally confirms state ownership of the title to the beds of navigable waters as against any claim of the United States. 43 U.S.C. § 1311. But from this broad confirmation of state authority, it excepts "all 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). The federal government acquired the bed of Lake Sakakawea above the historical OHWM by purchase or eminent domain so that it could be inundated by the Garrison Dam. Under § 1313 of the Submerged Lands Act, the land taken by the federal government for the Garrison Dam project is owned by the United States.
>
> Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the laws of the United States are the supreme law of the land, and any state law that conflicts with federal law is without effect. *Home of Economy v. Burlington N. Santa Fe R.R.*, 2005 ND 74, ¶ 5, 694 N.W.2d 840. The Plaintiffs present several arguments as to how the State obtained ownership of the disputed minerals, including by implication of the watercourses clause of the state constitution, by self-executing transfer under the Sovereign Lands Act, N.D.C.C. § 61-33-03, and the common law public trust doctrine first recognized in United Plainsmen. The Flood Control Act of 1944 authorized construction of the Garrison Dam and acquisition of the land that would be subject to inundation by the reservoir. Any contrary state law, including the constitution, a statute, or the common law, which purports to vest in the State the legal ownership of the bed of Lake Sakakawea is preempted under the Supremacy Clause to that extent.

> The federal government acquired through purchase or eminent domain both the surface and mineral estate to much of the affected area, but it allowed some landowners to reserve their mineral interests during the acquisition phase. Since the federal government's acquisition under authority of the Flood Control Act of 1944, the prior landowners' reservation of mineral interests has remained in the chain of title. The Submerged Lands Act expressly excepts from an otherwise broad assignment to states of the lands beneath navigable waters those lands acquired by the United States by eminent domain or purchase. 43 U.S.C. §§ 1311, 1313. These federal laws preempt operation of any state law that would otherwise vest ownership in the state, including chapter 61-33 and the public trust doctrine.

Id. at ¶¶ 44 – 46 (emphasis added). *See also United States v. Alaska*, 521 U.S. 1, 33-34 (1997) (discussing these principles). Thus, any state law, including the Phase I Study and Chpt. 61-33.1, N.D.C.C., attempting to vest ownership in the State of minerals like the Wilkinsons' reserved during the government's acquisition of land for the Garrison project would be preempted. There could never be a factual or legal dispute that the State owned the Wilkinsons' minerals. The State could never change the boundary of the lands acquired for the Garrison Project as established by deeds like the Wilkinsons and the Segment Maps. *See also* March 2016 Letter Decision by Department of Interior rejecting the State's attempt to redraw the OHWM and boundary of Lake Sakakawea at R792:9 (stating, "The Segment Maps were the basis for millions of dollars of appropriated funds being spent to acquire displaced uplands … .," and the State's OHWM definition in conflict with the Segment Maps, "does not comply with the federal definition of the OHWM.")

B. The State cannot excuse its unconstitutional conduct by cloaking it under the guise of a mere title dispute.

[¶29] The district court characterized this matter as a mere "title dispute" rather than an unconstitutional taking. This characterization is deeply misguided.

[¶30] This is not a mere title dispute. When the State interfered with and disturbed the Wilkinsons' rights in their property—by leasing it and claiming the State owned it—that

was an unconstitutional taking. Neither this Court nor the United States Supreme Court has ever held that a taking does not occur simply because the government takes property under the auspice of a title dispute. The Court should reject that position outright. A taking is a taking no matter the label the State gives it. Even if the Court were to find that in certain cases a title dispute will not amount to a taking, such is not the case here. Instead, the Court must hold steadfast with Fifth Amendment jurisprudence that an unconstitutional taking occurs when the government, in addition to asserting title, takes action that interferes with property rights. That happened here, and just compensation is due.

[¶31] The Wilkinsons recognize that some courts have held the mere assertion of title, *standing alone*, does not amount to an actionable taking. However, those same cases also recognize that such an assertion of title *is a taking* when coupled with other government conduct that interferes with a private property interest. *See generally Yuba Goldfields, Inc. v. United States*, 723 F.2d 884 (Fed. Cir. 1983); *Central Pines Land Co. v. United States*, 107 Fed. Cl. 310 (Fed. Cl. 2010) ("*Central Pines II*"); *Central Pines Land Co. v. United States*, No. 98-314L, 2008 WL 8958319 (Fed. Cl. Sept. 30, 2008) ("*Central Pines I*") *Pettro v. United States*, 47 Fed. Cl. 136 (Fed. Cl. 2000); *see also Petro-Hunt, LLC v. United States*, 90 Fed. Cl. 51 (Fed. Cl. 2009). In other words, the government's "assertion of title plus something more" is an unconstitutional taking. *Central Pines II*, 107 Fed. Cl. at 325. What's more, as recognized by *Sorum*, no state law, including Chpt. 61-33.1, could ever serve as the basis for the State to claim that it owned the minerals the Wilkinsons reserved by virtue of the 1958 Warranty Deed with the United States.

[¶32] Here, the State's baseless assertion of title together with issuing leases for the Wilkinsons' minerals constituted an unlawful taking. Numerous cases have found the

issuance of mineral leases is "'something more' than the mere assertion of title." *Central Pines II*, 107 Fed. Cl. at 325. For example, similar to this case, in *Central Pines*, a property owner sold the surface of the land to the United States but reserved ownership of the minerals. *Central Pines I*, 2008 WL 8958319, at *1. Some sixty years after the conveyance, the federal government circulated an internal memorandum determining they actually owned the minerals. *Id.* at *3. The government subsequently leased the minerals. *Id.* The mineral owner filed a quiet title action along with a takings claim. *Id.* at *4. The government argued that a mere incorrect assertion of ownership, or a title dispute, is not a taking. *Id.* at *4-5. The court rejected the government's argument, explaining that any good-faith belief by the government that it owned the minerals was of little matter where the government unlawfully issued leases for minerals it did not own. *Id.* at *11-12.

[¶33] Other cases have reached the same conclusion in similar contexts. *See, e.g.*, *Yuba*, 723 F.2d 884 (reversing summary judgment to the government where the government asserted a good-faith claim to title but nonetheless interfered with private mineral rights); *Pettro*, 47 Fed. Cl. 136 (finding the government's assertion of title cannot excuse interference with private mineral rights). As these cases explain, the State's position that this was merely a title dispute "is of little, if any, use in the Fifth Amendment just compensation analysis." *Yuba*, 723 F.2d at 889. Instead,

> The purpose and function of the Amendment being to secure citizens against governmental expropriation, and to guarantee just compensation for the property taken, what counts is not what government said it was doing, or what it later says its intent was, or whether it may have used the language of a proprietor. What counts is what the government *did*.

Id. (emphasis added).

[¶34] What the State "did" was make a baseless assertion to the Wilkinsons' property, list their property on the State's mineral lease auction website, and then leased and received

royalties and bonuses for the Wilkinsons' minerals for a decade when the State could never have owned these minerals under any state law. The State's "words—its claim of being the true holder of title to the mineral rights—cannot excuse its actions." *Pettro*, 47 Fed. Cl. at 149. The State cannot claim that it owned the Wilkinsons' minerals for a decade then simply walk away once the courts decided the State was wrong without consequence.

[¶35] The cases relied on by the State and parroted verbatim in the district court's order prepared by the State are inapposite. In those cases, the government filed quiet title actions but took no other action. *See Mackin v. City of Couer D'Alene*, 551 F. Supp. 2d 1205 (D. Idaho 2008); *Doenz v. Sheridan Cnty.*, Case No. 98-CV-76-D (D. Wyo. June 25, 1999) (Index #561). That is, the only offending government conduct was the filing of a title action itself. Here, the State did not even file a title action. It just gratuitously claimed it owned the Wilkinsons' property – a position the State's own briefing in *Sorum* described as "not supported by any authority." State Defendants' Brief in *Sorum et al. v. State* at Case No. 09-2018-cv-00089 (R515:¶2). Unlike the cases relied on by the State, the State did "something more" here than simply assert claim to title. It leased the Wilkinsons' minerals on multiple occasions, and accepted royalties and bonus payments for their minerals.

[¶36] The district court compares this to a boundary dispute between private parties. But the State did not act like a "private party asserting a claim of ownership to certain property rights." *Pettro*, 47 Fed. Cl. at 150. The State did not file a quiet title action or even conduct title research. *Accord Yuba*, 723 F.2d at 888-89 (noting government's failure to bring a legal action was evidence that the government did not act in good faith). Instead, the State abused its sovereign power to lease the Wilkinsons' property without any right to do so. The State is also not a private citizen, *it is* the government. There is no "title dispute" or

"good faith" defense available for an unconstitutional taking. The statutory language in 42 U.S.C. §1983 "is absolute and unqualified; no mention is made of any privileges, immunities, or defenses that may be asserted." *Owen v. City of Indep.*, 445 U.S. 662, 635 (1980). Section 1983 "contains no independent state-of-mind requirement." *Daniels v. Williams*, 474 U.S. 327, 329 (1986). The Court should reject the State's theory, adopted by the district court, that it can escape liability for its unconstitutional taking by labeling it a title dispute. No characterization by the State can change the fact it claimed ownership of, and leased, the Wilkinsons' property for a decade, depriving them of their royalties.

C. The State committed an unconstitutional taking.

[¶37] The district court rejected the Wilkinsons' takings claim by concluding no physical or regulatory taking occurred. The district court was wrong as a matter of law. A physical taking is the classical taking that occurs when the government directly appropriates private property for its own use or physically takes possession of an interest in property. *See Horne v. Dep't of Ag.*, 576 U.S. 350, 357 (2015); *see also Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) (noting just compensation is due when the government physically occupies or takes title to property). Temporary physical takings are "not different in kind from permanent takings, for which the Constitution clearly requires compensation." *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 318 (1987).

[¶38] The State committed a temporary physical taking of the Wilkinsons' minerals for the decade it claimed ownership of, and leased, their property. In doing so, the State directly appropriated the Wilkinsons' property for that period. *See Horne*, 576 U.S. at 357.

[¶39] The district court found that no physical taking could have occurred because "the State never physically occupied" the Wilkinsons' minerals. *See* R813:¶8. This superficial conclusion shows the district court's misapplication of both North Dakota law and the

Wilkinsons' constitutional rights. North Dakota law is clear that "[o]il and gas leases are interests in real property. As such, the working interest—the interest conveyed to the lessee under an oil and gas lease—and the royalty interest—the interest retained by the lessor—are both interests in real property." *Slawson Expl. Co. v. Nine Point Energy, LLC*, 966 F.3d 775, 780 (8th Cir. 2020); *see also Kittleson v. Grynberg Petro. Co.*, 2016 ND 44, ¶ 34, 876 N.W.2d 443 ("Oil and gas leases are interests in real property in North Dakota. A real property lease is generally considered a contract and a conveyance of an interest in land.")

[¶40] Consistent with these principles, numerous cases have recognized that the government commits a temporary physical taking by issuing mineral leases. *See Central Pines II*, 107 Fed. Cl. at 327 ("[T]he court is persuaded that there was a temporary taking of the plaintiff's Group C mineral interests that were leased by the government."); *Pettro*, 47 Fed. Cl. at 147 (physical taking); *Petro-Hunt*, 90 Fed. Cl. at 65 (agreeing that minerals leased by the United States "effectuated physical takings"); *accord Mat. Serv. Corp. v. Rogers Cnty. Bd.*, 273 P.3d 880, 883 (Okla. 2011) ("A [mineral] leasehold interest may be subject to a taking.") Cases have further explained that the government commits a physical taking by asserting ownership over minerals, even if the government's conduct "falls short of a formal, physical invasion." *Pettro*, 47 Fed. Cl. at 147 (finding a physical taking where the government attempted to take the plaintiff's mineral rights as its own).

[¶41] Similarly, the United States Supreme Court has repeatedly held that the government commits a physical taking if it appropriates or circumvents natural resources for its own use. *See, e.g.*, *Dugan v. Rank*, 372 U.S. 609, 614-16 (1963) (analyzing diversion of water for another's use as a physical taking); *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 728-30 (1960) (same); *Int'l Paper Co. v. United States*, 282 U.S. 399, 404-06 (1931)

(finding a physical taking due to direct appropriation of water when the government ordered a hydroelectric power company to stop diverting water to the plaintiff); *see also Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1290 (Fed. Cir. 2008) (finding diversion of natural resources for another's use is a *per se* taking). The same is true here.

[¶42] While the Wilkinsons thwarted the State's baseless ownership claim, the fact remains the State claimed it owned, then leased and collected royalties on, the Wilkinsons' property for a decade. It is clear from the State's conduct that it "saw itself as the owner of the" Wilkinsons' minerals and appropriated those interests – and royalty and bonus payments – for itself. *Pettro*, 74 Fed. Cl. at 149 (citing *Yuba*, 723 F.2d at 887). The State cannot claim that no taking occurred when it indisputably claimed title to the Wilkinsons' minerals through the Phase I Study and then proceeded to enter into four leases where they purported to convey an interest in the Wilkinsons' property to Statoil, Petrogulf, and XTO. The State's actions constituted a temporary physical taking of the Wilkinsons' property.

[¶43] Alternatively, the State committed a regulatory taking when it completely deprived the Wilkinsons of all economically beneficial uses of their property by leasing the minerals and usurping the royalties. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538 (2005). "In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, [] (1922), the Court recognized that there will be instances when government actions do not encroach upon or occupy the property yet still affect and limit its use to such an extent that a taking occurs." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). In *Mahon*, the Court held that much like oil and gas interests, "'For practical purposes, the right to coal consists in the right to mine it.' What makes the right to mine coal valuable is that it can be exercised with profit." *Id. Cf.*

Wilkinson I at ¶ 24 (stating, "Mineral interests in Williams County, in the oil-producing Bakken formation, have value.")

[¶44] The State interfered with and disturbed the Wilkinsons' rights in their property by leasing the minerals and claiming ownership. Whether viewed as a physical or regulatory taking, the Wilkinsons are entitled to just compensation. Statoil's expert testified the Wilkinsons did not receive their royalties from 2010 to 2020 because of the State's claim. Tr., Vol. 2, 7-8:20-22; 19:9-13; and R812:¶9. Even if the Wilkinsons were able to lease their property and receive royalties, it would not bar their takings claim. *Central Pines I*, 2008 WL 8958319, at *13 ("However, the [government's] leasing activities could still have constituted a taking even though Plaintiffs were still able to lease some mineral rights.")

[¶45] Finally, the district court found no taking could have occurred by remarkably and erroneously concluding "the State has never received royalty payments for the Disputed Property." R813:37:¶93. The record plainly establishes the State exercised control over and possessed the royalties paid for the Wilkinsons' minerals. Commissioner Smith and Otteson testified that while the State claimed ownership of the Wilkinsons' minerals, the State held their royalties in escrow at the State-owned Bank of North Dakota. Tr., Vol. 1, 144:19-25; 171:18-25; 180:1-15; 181:15-18. The Bank of North Dakota was acting as the agent for the Land Board in possessing and controlling the Wilkinsons' royalties. *See id.; and* R760 (Escrow Agreement between State and the Bank of North Dakota); *accord Horne*, 576 U.S. at 361 (finding a government taking even where some of the property was simply "held 'for the account' of the Government"). Similarly, Statoil's expert testified that Statoil paid the Wilkinsons' royalties to the State to hold in escrow because of the State claiming ownership of their minerals. The evidence at trial unequivocally established that

instead of paying the Wilkinsons their royalties, Statoil paid the State. Thus, it is dubious to say the State did not work a taking on the Wilkinsons' property when it usurped the royalties and claimed ownership of their minerals for over a decade.

D. No subsequent action by the State can undo or moot its unconstitutional taking.

[¶46] Finally, the district court erred as a matter of law when it found that the Wilkinsons' takings claims were "mooted by the passage of Chapter 61-33.1 and its application to the Disputed Property." R813:34:¶87. It is black-letter law that a takings claim cannot be mooted by subsequent government action or legislation.

[¶47] Government conduct that "works a taking of property rights necessarily implicates the constitutional right to pay just compensation." *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171 (2019). Post-taking actions by the government "cannot nullify the property owner's existing Fifth Amendment right: [W]here the government's activities have already worked a taking of all use of property, *no subsequent action by the government can relieve it of the duty to provide compensation*." *Id.* (emphasis added). The United States Supreme Court has made it clear that once the State's actions have worked a taking, nothing done by the State—whether passing legislation like N.D.C.C. ch. 61-33.1 or releasing its claim to the impacted property—negates the fact that a taking occurred for which the State is liable. *See Knick*, 139 S. Ct. at 2171-72; *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 33 (2012); *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty.*, 482 U.S. 304, 321 (1987).

[¶48] The passage of N.D.C.C. ch. 61-33.1 does not—and *cannot*—render the Wilkinsons' takings claim moot. It does not change the fact the State used the Phase I Study to claim it owned the Wilkinsons' minerals. Nor does it change the fact nothing in Chpt.

61-33.1 could ever change or effect the Wilkinsons' ownership of the minerals reserved in the 1958 Warranty Deed. It does not change the fact that the State leased the Wilkinsons' minerals, which required the Wilkinsons to file this lawsuit and fight an expensive, protracted battel against the State to get their minerals and royalties back. The Wilkinsons' takings claim against the State is "irrevocable." *Knick*, 139 S. Ct. at 2172. Just compensation including interest must now be paid as a result. *See id.*

E. Just compensation includes interest.

[¶49] It is "axiomatic that 'the Fifth Amendment's reference to 'just compensation' entitles the property owner to receive interest from the date of the taking to the date of payment as part of his just compensation." *Otay Mesa Prop., L.P. v. United States*, 779 F.3d 1315, 1328 (Fed. Cir. 2015) (quoting *United States v. Thayer-W. Point Hotel Co.*, 329 U.S. 585, 588 (1947)). That the Wilkinsons were finally paid their royalties in November 2020 after a decade is not enough. Just compensation demands they receive interest from the date of the taking for those ten years. Yet, in analyzing the Wilkinsons' damages requests, the district court dismissively rejected any interest by finding that no statutory interest provisions applied. R813:¶115. This error must be reversed.

[¶50] Interest is a necessary component of "just compensation" under the Fifth Amendment. *See Whitney Benefits, Inc. v. United States*, 30 Fed. Cl. 411, 413 (Fed. Cl. 1994) (citing *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 10 (1984)); *see also Knick* (noting just compensation is the value of the property "plus interest from" the time of the taking). The Wilkinsons must "be put in good as a position pecuniarily as [they] would have occupied if [their] property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1943). Consistent with this, numerous cases have recognized that "compound interest may be necessary 'to accomplish complete justice' under the just

compensation clause of the Fifth Amendment." *Pettro*, 47 Fed. Cl. at 155 (quoting *Dynamic Corp. of Am. v. United States*, 766 F.2d 518, 520 (Fed. Cir. 1985)); *see also Whitney Benefits*, 30 Fed. Cl. 413-14 (collecting cases finding that compound interest is appropriate). The district court was wrong to withhold compound interest here.

[¶51] Jon Patch testified that had the Wilkinsons been paid royalties, but for the State's actions, and invested the money in the conservative S&P-500 over the last ten years, they would have received $1,441,096.73. Tr., Vol. 1, 103:17-21; 104-105:15-6; and R747 (Wilkinsons' interest calculations). An owner of property may testify as to its value. *See Wald v. Wald*, 2020 ND 174, ¶ 13, 947 N.W.2d 359 ("An owner of real property may testify as to the value of the land without any further qualifications or special knowledge."); *McCaffery v. N. Pac. Ry. Co.*, 134 N.W. 749 (N.D. 1912). Pursuant to Patch's testimony, the S&P-500 is a fair measure of damages here.

[¶52] The district court rejected Patch's calculations partially because it found Statoil's calculation of royalty payments ($571,094.69) more credible than the Wilkinsons' calculation ($583,359). The difference in royalties does not somehow wipe out the Wilkinsons' damages claim. Even if Statoil's calculations are relied upon, interest may be easily computed and awarded. The district court itself noted that "no particular training or education is required to calculate interest rates beyond basic math skills and a common understanding of interest rates." R813:¶138. Thus, the Court may order the award of compound interest, relying on either Statoil or the Wilkinsons' calculation of royalties. While the district court may have discretion to determine an appropriate interest rate, it did not have discretion under the Fifth Amendment to deny the Wilkinsons their just

compensation – and compound interest – for the State's unconstitutional taking. Just compensation required that interest be awarded, as damages, as a matter of law.

[¶53] In sum, the State worked an unconstitutional taking when it claimed it owned the Wilkinsons' minerals, then leased and usurped their royalties for those minerals for a decade. All of that is undisputed and was established by the testimony and evidence at trial. This is not a mere title dispute. The State entered into leases for minerals it did not own. It was a taking, which no subsequent government action can nullify. Thus, just compensation, which necessarily includes interest, must be paid.

II. The State converted the Wilkinsons' royalties.

[¶54] Conversion occurs when a party wrongfully exercises "control over the property inconsistent with or in defiance of the rights of the owner." *Buri v. Ramsey*, 2005 ND 65, ¶ 14, 693 N.W.2d 619. "The gist of a conversion is not in acquiring the complainant's property, but in wrongfully depriving him of it, whether temporarily or permanently, and it is of little relevance that the converter received no benefit from such deprivation." *Id.* (citations omitted). Conversion does not require bad intent, only an intent to control or interfere with an owner's rights. *See id.*

[¶55] A party commits a wrongful conversion by leasing mineral rights and retaining the royalties if that party has no valid interest in the property. *See Nelson v. Mattson*, 2018 ND 99, ¶¶ 24-25, 910 N.W.2d 171. That is what happened here. The State converted the Wilkinsons' royalties by exercising control over them, and possessing them, in the State's own escrow account. The district court clearly erred in concluding otherwise. *See Vig v. Swenson*, 2017 ND 285, ¶ 20, 904 N.W.2d 489 (standard of review).

[¶56] The State possessed and controlled the Wilkinsons' royalties before they were released to the family in November 2020. As noted above, Otteson testified that the

Wilkinsons' royalties were being held at the State's behest. Tr., Vol. 1, 180:1-15; 104-105:15-6. Otteson agreed R760 and R790 showed the Bank of North Dakota was acting as the Land Board's agent with Statoil and the Wilkinsons' royalties. *Id*., 181:15-18. Smith testified the Wilkinsons' royalties were being held at the behest of the State of North Dakota. *Id*., 145:2-4. The Escrow Agreement between the Land Board and Bank of North Dakota states that the Land Board appointed the Bank of North Dakota as its agent, and authorized the Bank of North Dakota "to … act as custodian for retaining possession of royalty payments in accordance with the provisions of this Escrow Agreement and the Deposit Agreement(s)." *See* R760:1 (Section 2). Statoil's expert testified they paid the Wilkinsons' royalties to the State because the State claimed it owned their minerals. Tr., Vol. 2, 7-8:20-22; 19:9-13; and R812:¶ 9. Accordingly, there can be no doubt that the State exercised control over and possessed, and thereby converted, the Wilkinsons' royalties. *See Nelson*, at ¶¶ 24-25.

[¶57] Because the State unlawfully converted the Wilkinsons' royalties, the State owes damages under N.D.C.C. § 32-03-23. The conversion statute provides that damages include interest from the time of conversion as well as compensation for the time and money expended by the owner to get their property back. *See id.*; *see also Case Credit Corp. v. Oppergard's Inc.*, 2005 ND 141, ¶¶ 15-16, 701 N.W.2d 891 (holding that interest is mandatory at a rate of the court's discretion). The Wilkinsons should have been—and now should be—awarded both. In particular, the Wilkinsons should be awarded interest, as outlined above and in their briefing to the district court. The Wilkinsons should also be awarded the value Jon Patch's time in recovering the royalties—that is, $180,000. Patch testified he spent 1,800 hours working to get the family's property back. Tr., Vol. 1, 91:9-

2; and R653:¶¶ 69 – 70. Patch also testified as to how he arrived at the value of his time. *Id*. The State and Statoil did not offer any evidence challenging Patch's testimony.

III. The State was unjustly enriched by keeping the bonus payments it received for claiming it owned, and leasing, the Wilkinsons' minerals in Section 13, and the State must pay restitution to the Wilkinsons.

[¶58] "The determination of unjust enrichment is a conclusion of law and is fully reviewable on appeal." *BTA Oil Prods. v. MDU Res. Gr., Inc.*, 2002 ND 55, ¶ 37, 642 N.W.2d 873. It is undisputed that the State does not, and never had, any interest in the Wilkinsons' 57.09 mineral acres in Section 13. Yet, the State entered into leases with Petrogulf and XTO for these minerals, *see* R686 – 687 (leases), and profited $207,336.61 from leasing the Wilkinsons' minerals in Section 13. *See* R653:¶¶ 72 – 73. [1] Smith and Otteson testified the State has kept all the payments it received for leasing the Wilkinsons' minerals in Section 13 – minerals the State did not own. Tr., Vol. 1, 135:3-6 and 179:3-11.

[¶59] The district court concluded the State was not enriched and did not receive benefits at the expense of the Wilkinsons. Both of those findings are unsupported by the evidence.

[¶60] The "essential element in recovering under a theory of unjust enrichment is the receipt of a benefit by the defendant from the plaintiff which would be inequitable to retain without paying for its value." *Schroeder v. Buccholz*, 2001 ND 36, ¶ 14, 622 N.W.2d 202. That is exactly what happened here. The State received $207,336.61 in payments as a result of claiming it owned the Wilkinsons' minerals in Section 13 and then leasing them.

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[1] The State received $1,019,834.50 for its two leases in Section 13, including $363,034.05 for its lease to Petrogulf, and $656,800 for its lease to XTO. *See* State Pre-Trial Brief, R590:9:Table 1. If you take the payments received by the State for Section 13 and divide by the mineral acres the State claimed in these leases, it averages $3,631.75 per acre. $1,019,834.50 in payments in Section 13 divided by 280.81 acres = $3,631.75. Thus, for claiming it owned the Wilkinsons' 57.09 mineral acres in Section 13 and leasing it, the State received $207,336.61. 57.09 mineral acres x $3,631.75 per acre bonus = $207,336.61.

[¶61] Because the State was unjustly enriched at the Wilkinsons' expense, equity demands the State disgorge those payments in the amount of $207,336.61 to the Wilkinsons. *See Apache Corp. v. MDU Res. Gr., Inc.*, 1999 ND 247, ¶ 14, 603 N.W.2d 891.

IV. The State and Statoil conspired to deprive the Wilkinsons of their minerals and royalties.

[¶62] A civil conspiracy involves two or more persons "acting in concert to commit an unlawful act or to commit a lawful act by unlawful means, the principal element of which is an agreement between the parties to inflict a wrong against or injury upon another and an overt act that results in damages." *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 42, 785 N.W.2d 164; *see also Higgins v. Trauger*, 2203 ND 3, ¶ 9, 656 N.W.2d 9 (noting a conspiracy "may be implicit"). The district court rejected a conspiracy claim, in part, because it held the Wilkinsons' relied on the takings claims as the underlying torts. The district court ignored that the pleadings embraced the conversion claim as well.

[¶63] The State and Statoil knew the Wilkinsons owned the minerals when they entered into leases in August 2010 as the 1958 Warranty Deed was of record for 52 years at that point. In a June 2010 letter, Statoil noted the State had never claimed these minerals before. *See* R711 (June 2010 letter). After entering the leases, the State and Statoil entered into an escrow agreement for the Wilkinsons' royalties, as well as other agreements since December 2010 concerning the Wilkinsons' property. *See* R790 (Receipt of Escrow Funds); R812:¶¶ 6, 9 (Statoil Expert Report describing the agreement between the State and Statoil to deposit the Wilkinsons' royalties with the State); and R682 (agreements between Equinor and the State dealing with the Wilkinsons' property). The State and Statoil's witnesses—Smith, Otteson, and Becker—testified as to these agreements. See Tr., Vol. 1, 124:14-17; 131-133:23-22; 180:1-15; and Tr. Vol. 2, 7-8:20-22; and 19:9-13.

Brigham's assignment of leases in 2006, *see* R801:5-6, to Statoil recognized that the Wilkinsons owned 286.04 mineral acres in Sections 12 and 13. The State and Statoil conspired to deprive the Wilkinsons of their property. As such, they are jointly liable for the Wilkinsons' damages. *See Persons acting in concert*, 1 Am. Law of Torts § 3:4 (citing *Tibert v. Nodak Mut. Ins. Co.*, 2012 ND 81, 816 N.W.2d 31); and N.D.C.C. § 32-03.2-02.

V. The Wilkinsons are entitled to attorney's fees and costs under federal and North Dakota law.

[¶64] The Wilkinsons should have been awarded their attorney's fees and costs. Anticipating this appeal, the district court ruled on attorney's fees and costs as if the Wilkinsons were the prevailing party. In doing so, the district court made numerous errors.

A. The Wilkinsons' Full Fees and Costs Request was Timely

[¶65] North Dakota Rule of Civil Procedure 54 requires a party to move for attorney's fees "within 21 days after notice of judgment." N.D. R. Civ. P. 54(e)(2)(A); *see also* N.D. R. Civ. P. 54(e)(1)(A) (costs within 30 days). A judgment is defined as "any order from which an appeal lies." N.D.R.Civ. P. 54(a). Here, the final judgment triggering the deadline occurred on January 10, 2022. *See* R818 (Judgment). Thus, the Wilkinsons' motion for fees and costs in April 2021 was well timely. *See* R539 – 555 (Wilkinsons' motion).

[¶66] The Court made clear in *Wilkinson II* that the district court's summary judgment order was not a final, appealable order because it did not dispose of all claims. *See Wilkinson II*, 2020 ND 179, ¶¶ 12-16. *See also Schaff v. Kennelly*, 69 N.W.2d 777, 779 (N.D. 1955) (holding, "In North Dakota there are no judgments other than final judgments."); and Explanatory Note to Rule 54 (stating, "If the district court does not enter judgment under Rule 54(b), a partial summary judgment adjudicating fewer than all of the claims of all of the parties is not a final judgment and is not immediately appealable."); and

Wilkinson II at ¶ 1 (stating, "Although the judgment is not appealable because it did not dispose of all claims against all parties, we exercise our supervisory jurisdiction to review the summary judgment.") Therefore, under Rule 54's plain language, the district court's previous summary judgment order did not start the clock for the Wilkinsons' fees motion. The Court should reject the State's argument that it can jump the gun by filing an appeal before all claims are resolved and then use its own premature appeal as the benchmark for the timeliness of the Wilkinsons' fees motion.

B. The Wilkinsons are entitled to fees and costs under 42 U.S.C. §§ 1983 and 1988.

[¶67] Because the State committed an unconstitutional taking in violation of the Fifth Amendment, the Wilkinsons are entitled to their fees and costs pursuant to 42 U.S.C. §§ 1983 and 1988. Under this framework, the Wilkinsons are entitled not only to attorney's fees, *see* 42 U.S.C. § 1988(b), but also all "reasonable out-of-pocket litigation expenses that would normally be charged to a fee paying client." *Tr. of Constr. Indus. & Lab. Health & Welfare Tr. v. Redland Ins. Co.*, 460 F.3d 1253, 1257 (9th Cir. 2006).

[¶68] "The purpose of § 1983 is to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole*, 504 U.S. 158, 161 (1992). This allows parties to hire counsel to pursue violations of their constitutional rights, "encourag[ing] the bringing of meritorious civil rights claims which might otherwise be abandoned because of the financial imperatives surrounding the hiring of counsel." *Goss v. City of Little Rock*, 151 F.3d 861, 865 (8th Cir. 1998). Here, the Wilkinsons have successfully shown the State "violated [their] constitutional right to not have [their] property taken without just compensation. Section 1983 therefore afforded [them] a remedy." *Id.*

[¶69] The district court inexplicably determined "§ 1983 is simply inapplicable to this case" "even if there were a valid takings claim" because N.D.C.C. ch. 32-15 "provides a general framework for damages" and N.D.C.C. ch. 61-33 applies to this case. This determination is spurious.

[¶70] It is well-established that § 1983 is the appropriate vehicle for bringing takings claims. *See Carajeski ex rel. Carajeski v. Zoeller*, 794 F.3d 828, 832 (7th Cir. 2015) (noting a takings claim "invoke[s] § 1983"); *see also Hacienda Valley Mobile Estates v. City of Morgan Hill*, 353 F.3d 651, 655 (9th Cir. 2003) (noting that § 1983 is the proper vehicle); *Honchariw v. Cnty. of Stanislaus*, 530 F. Supp. 3d 939, 945-46 (E.D. Cal. 2021) (collecting cases). Thus, any finding that the State violated the Fifth Amendment necessarily is a conclusion that the State violated § 1983. The fact the North Dakota Constitution and statutes also provide the Wilkinsons relief is immaterial as to their federal constitutional claims. The United States Supreme Court has made clear the availability of a remedy under State law "cannot infringe or restrict the property owner's federal constitutional claim." *Knick*, 139 U.S. at 2171 (analyzing a claim brought under § 1983). Therefore, any suggestion that § 1983 does not apply is meritless, and the Wilkinsons are entitled fees and costs under § 1988 as a matter of law.

C. The Wilkinsons are entitled costs and fees under N.D.C.C. Ch. 32-15.

[¶71] Like federal law, North Dakota law also provides for the recovery of attorney's fees and costs when the State commits an unconstitutional taking, "which may include interest." *See* N.D.C.C. § 32-15-32. Thus, the Wilkinsons are similarly entitled fees and costs under North Dakota law. *See Cass Cty. Joint Water Res. Dist. v. Erickson*, 2018 ND 228, 918 N.W.2d 371 (and cases cited therein) (awarding attorney's fees when State takes private property). During hearings on Chpt. 61-33.1, Rep. Bob Martinson testified, "We feel pretty

strongly that the state stole these people's [the Wilkinsons] minerals. How would you feel if someone stole your property and you had to go to court to get it back and you paid as much money in court fees as you got returned?" Hearings on SB 2134 Before the House and Senate Energy and Nat. Res. Comms., 65th Legis. Assemb., Reg. Sess. 131-32 (N.D. 2017) at 131. In 2019, Rep. Todd Porter described it this way: "We've caught them twice, taking stuff that wasn't theirs." *Wilkinson II* at ¶ 19. Like the Fifth Amendment, the Wilkinsons' right to damages under state law began in 2010, the date of the State's taking. "For the purpose of assessing compensation and damages, the right thereto shall be deemed to have accrued at the date of the taking … ." N.D.C.C. § 32-15-23.

D. The Wilkinsons' specific fees and costs requests were reasonable and should be granted.

[¶72] In *Erickson*, the Court explained the standard for determining attorney's fees. *Id*. at ¶¶ 28 – 29. For the reasons stated in its briefing and supporting materials below addressing the factors described in *Erickson*, see R541:¶¶ 7 – 12; 20 – 40, the Wilkinsons maintain they should be awarded $1,047,700 in attorney's fees and $53,221.53 in costs on their takings' claims and pursuant to 42 U.S.C. § 1983. Members of the Wilkinson family provided undisputed testimony at trial supporting their claim for attorney's fees. Tr., Vol. 1, 62:23-25; 89-90:23-15; 92-94:20-21. The Wilkinsons offered affidavits from counsel and hundreds of pages of contemporaneous billing statements detailing their attorney's fees. *See* R544, 631, 655, 670, 784, and 787 (billing statements); and affidavits from counsel (R542, 630, 654, and 669).

[¶73] Attorney's fees are warranted when considering the case's complexity, novelty, and history, the vigorous opposition of the State, and the degree of skill and success displayed by Wilkinsons' counsel. *See Wilkinson II*, 2020 ND 179, ¶¶ 18-20 (describing

the case). The Wilkinsons' position with respect to attorney's fees was well-briefed in its motion for the same at R540 – 555, and 586, including the rationale for a lodestar rate of $500 per hour. It was reiterated and again argued in its post-trial briefing at R653 and 668, and submitted in the Wilkinson's proposed order to the district court at R671. Under the *Erickson* factors, the Wilkinsons satisfied the requirements for an award of attorney's fees.

[¶74] Even though the Wilkinsons strongly maintain that their full request should be granted for the reasons stated in their brief to the district court, *see* R653, at a minimum, fees should be awarded for the 1,760 hours the district court found would have been reimbursable if it ruled in the Wilkinsons' favor. At the $500 lodestar rate, this results in a fee award of $567,450. [2] As evidenced by their billing statement at R784, and as argued in their motion for attorney's fees, *see* R541 and 586, through March 31, 2021, the Wilkinsons' counsel spent 1,774.40 hours on this case. As evidenced by their billing statement at R787, from April 1 to June 30, 2021, counsel spent 91.70 hours on this case. As stated in the affidavit filed with their Post-Trial Brief, from July 1 through September 19, 2021, counsel spent 241.90 hours on this case. *See* R669-670. That is a total of 2,107.6 hours spent on this case by the counsel through September 19, 2021. 2,107.60 hours x $500.00 lodestar rate = $1,054,000, plus an additional $53,221.53 in the Wilkinsons' costs, for a total award of fees and costs of $1,107,221.53.

[¶75] The State "cannot litigate tenaciously and then be heard to complain about the time necessarily spent overcoming its vigorous defense." *Thompson v. Schmitz*, 2011 ND 70, ¶¶

[2] Using the district court's lodestar rate of $325, this results in a fee award of $467,788.50. The Wilkinsons request the higher lodestar of $500 per hour as detailed in their briefs in support of their motion for attorney's fees. It's worth noting the same district court awarded Minneapolis counsel a lodestar of $400 per hour in a similar case, N. Dakota of Transportation v. Schmitz, 2018 ND 113, ¶ 7, 910 N.W.2d 874.

20-21, 795 N.W.2d 913. This is particularly true when the State refused to answer discovery requests from the Wilkinsons regarding the amount of time the State spent on this case. *See* R548:6-9, and 549:6-8 (State's discovery responses). At least 30 lawyers, staff, and other employees from the State worked on this, including eight lawyers. *Id*. "To hold that the owner must pay his own costs in resisting attempts to take his land against his consent, without first paying adequate and just compensation thereof, would nullify to a certain extent this constitutional guaranty, and result in giving him less than just compensation for his property." *Petersburg Sch. Dist. of Nelson Cty. v. Peterson*, 103 N.W. 756, 759 (N.D. 1905). The Wilkinsons' constitutional protection against an unlawful taking is eviscerated if they must spend as much on attorney's fees fighting the State's claiming ownership of their property than what they ultimately got back in royalties.

[¶76] As for costs, the family's expert and non-expert costs should be awarded. To be sure, the expert costs and non-expert costs trimmed by the district court are the "reasonable out-of-pocket litigation expenses that would normally be charged to a fee paying client" for which § 1988 requires reimbursement. *Redland Ins.*, 460 F.3d at 1257. Thus, for these reasons and for the reasons stated in the briefing to the district court, costs should be awarded. The Wilkinsons introduced testimony as to their costs, *see* Tr., Vol. 1, 87-88:21-22; 94-95:22-9, and the invoices and statements with respect to both expert and non-expert costs. *See* R785 and 786 (invoices from Houston Engineering and Dr. David Jones). The Wilkinsons' costs totaled $53,221.53.

CONCLUSION

[¶77] The district court should be reversed and ordered to enter judgment in favor of the Wilkinsons on all claims with an award of interest, costs, and fees. The State committed an unconstitutional taking and must pay compound interest as part of the Fifth

Amendment's just compensation requirement. The State unlawfully converted the Wilkinsons' royalties, which demands damages with interest and reimbursement for the Wilkinsons' efforts in recovering their property. The State was unjustly enriched at the Wilkinsons' expense by receiving bonus payments on leases for the Wilkinsons' minerals, and equity demands the State disgorge those amounts to the Wilkinsons. The State and Statoil conspired to deprive the Wilkinsons of their property, meaning the parties are jointly liable for the Wilkinsons' damages. Finally, the entirety of the Wilkinsons' motion for fees and costs was timely, and the Wilkinsons should be awarded the full amounts requested.

Respectfully submitted this 14th of March, 2022.

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[¶1] Pursuant to Rule 32 of the North Dakota Rules of Appellate Procedure, this brief complies with the page limitation and consists of 38 pages.

Dated this 14th day of March, 2022.

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[¶1] I hereby certify that on March 14, 2022, I served the following documents:

Plaintiffs/Appellants' Appellant Brief

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