20220037
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
APRIL 25, 2022
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20220037
Williams County District Court Case No. 53-2012-CV-00038

William S. Wilkinson; Ann L. Nevins and Amy L. 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,

v.

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, and all other persons unknown who have or claim an interest in the property described in the Complaint,

Defendants and Appellees,

and

North Dakota State Engineer

Intervenor and Appellee.

APPEAL FROM JUDGMENT DATED JANUARY 10, 2022
WILLIAMS COUNTY, NORTHWEST JUDICIAL DISTRICT
HONORABLE PAUL JACOBSON, PRESIDING

STATE APPELLEES' PRINCIPAL BRIEF
(ORAL ARGUMENT REQUESTED)

State of North Dakota

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STATEMENT ON ORAL ARGUMENT

[¶1] Due to the lengthy case history and the public policy implications, the State requests oral argument to answer the Court's questions.

STATEMENT OF CASE

[¶2] Wilkinsons' Amended Complaint requested a declaratory judgment that Wilkinsons own the minerals in the Disputed Property. (R47:¶¶32-35). In addition, Wilkinsons made claims against the State for unconstitutional takings under both the United States and North Dakota Constitutions (*Id*. ¶¶36-51); conversion (*Id*. ¶¶52-55); constructive trust and unjust enrichment (*Id*. ¶¶56-58); civil conspiracy (*Id*. ¶¶59-62); and 42 U.S.C. § 1983 violations (*Id*. ¶¶63-67).

[¶3] The district court initially granted summary judgment in the State's favor. Am. Order on Summ. J. (R312). Wilkinsons appealed the decision. Not. of Appeal (R322). While the appeal was pending, the 2017 North Dakota Legislative Assembly passed Senate Bill 2134, codified as N.D.C.C. ch. 61-33.1. This Court remanded "for the district court to determine whether N.D.C.C. ch. 61-33.1 applies and governs ownership of the minerals at issue in this case." *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, ¶ 20, 903 N.W.2d 51 (*Wilkinson I*).

[¶4] After the remand, the district court again granted summary judgment, this time in Wilkinsons' favor, by concluding N.D.C.C. ch. 61-33.1 applies to the Disputed Property, that the disputed mineral interests were above the historic ordinary high water mark (OHWM), and that the statutory process was concluded. Order Granting Pls.' Mot. for Summ. J. (R510:¶22). This Court interpreted the district court's second summary judgment decision as also implicitly quieting title in Wilkinsons. *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2020 ND 179, ¶ 1, 947 N.W.2d 910 (*Wilkinson II*). This Court agreed with the

district court that N.D.C.C. ch. 61-33.1 applies to the Disputed Property, but remanded because there was not "a final judgment disposing of all claims against all parties." *Id.* ¶16.

[¶5] Upon remand, the district court held a trial and issued an Order for Judgment (R813) in favor of the State and Statoil[1] on all remaining issues. Wilkinsons timely appealed the Judgment (R818), and the parties now return to this Court for the third time.

STATEMENT OF FACTS

A. Sovereign Lands, the Phase I Line, and the Wenck Line.

[¶6] The State of North Dakota generally owns – in trust for its citizens – the land below the OHWM of navigable rivers. The Land Board and the State Engineer[2] co-manage these lands, with the Board responsible for the oil, gas, and other hydrocarbons, and the State Engineer responsible for the surface (including determination of the OHWM) and all other minerals. *See generally*, N.D.C.C. ch. 61-33.

[¶7] In 2009, the State commissioned an OHWM delineation of the Missouri River from the Montana border to Williston. Am. Compl. (R47:¶13). This delineation is commonly referred to as the Phase I delineation. The Board used Phase I to determine acreage amounts to issue oil and gas leases for minerals below the OHWM of the Missouri River. Am. Trial Tr. Vol. 1 (R844:129:9-16).

[¶8] The 2017 North Dakota Legislative Assembly passed Senate Bill 2134, which was codified as N.D.C.C. ch. 61-33.1. Under N.D.C.C. ch. 61-33.1, a new study was

[1] When this case began, this defendant was known as Brigham Oil & Gas, L.P. Brigham subsequently became Statoil and Gas, L.P., which subsequently became Equinor Energy LP. Am. Trial Tr. Vol. 1 (R844:10:5-10). This party will be referred to as Statoil.

[2] The North Dakota Office of the State Engineer and State Engineer were repealed and replaced with the Department of Water Resources and Director, respectively, on August 1, 2021, via House Bill 1353 of the 67th Legislative Assembly. Because this change did not occur until after trial, this party will be referred to as the State Engineer.

commissioned to determine the new limits of the State's mineral ownership interest. This study is commonly referred to as the Wenck Study/Wenck Line. Am. Trial Tr. Vol. 1 (R844:122:6-17). The Board is using the Wenck Line to adjust lease acreages on the Missouri River within the limits of the study area, as required by N.D.C.C. ch. 61-33.1, *Sorum v. State*, 2020 ND 175, 947 N.W.2d 382, *reh'g denied* (Sept. 21, 2020), *cert. denied,* 141 S. Ct. 1389 (2021), and *Wilkinson II*. Am. Trial Tr. Vol. 1 (R844:123:4-25).

B. The Board's Leasing Practices.

[¶9] Operators interested in leasing State minerals are required to file a nomination petition with the Board, and assuming the tract isn't already leased by the Board, the tract is placed on a public auction list. Aff. of Drew Combs (R197:¶10). The Board does "not advertise or otherwise promote minerals for leasing." *Id.*; Am. Trial Tr. Vol. 1 (R844:116:9-17). Because minerals are leased at a public auction, all interested parties know of any uncertainties surrounding title. Further, this puts riparian landowners on notice regarding potential title disputes.

[¶10] Because the State's sovereign land ownership boundaries are irregular and ambulatory, the Board leases minerals relative to river tracts on a quarter-section basis. Am. Trial Tr. Vol. 1 (R844:117:17-25). Rather than entering a lease with a specific legal description, the Board's riverbed leases are simply for a given number of acres within a quarter section, with no particular legal description specified beyond "Missouri River." *See, e.g.*, Oil & Gas Leases (R678), (R679), (R686), (R687), (R851), (R852).

[¶11] The Board adopted addendums to its leases stating that it "does not warrant its title" to riverbed acreage and that under N.D.A.C. § 85-06-01-01(3), leases of sovereign land minerals "may be adjusted … as survey information is obtained, the [OHWM] is

delineated, and other reliable relevant facts are identified." *See, e.g.*, Oil & Gas Leases, Addendums (R200:3), (R200:6), (R200:9), (R200:12); Am. Trial Tr. Vol. 1 (R844:118:5-6). The lease addendums also indicate that "[i]f, during any time prior to expiration of the lease" the acreage amount adjusts, the bonus payments will be adjusted accordingly and the Board will refund to the lessee any bonuses paid for acreage the Board does not own. Oil & Gas Leases, Addendums (R200:3), (R200:6), (R200:9), (R200:12); Am. Trial Tr. Vol. 1 (R844:120:4-10). It is standard industry practice that bonus payments on expired leases are not refunded. Am. Trial Tr. Vol. 1 (R844:119:21-25), *id.* (R844:120:1).

[¶12] If the operator believes there is a potential title dispute, the Board requires operators, as part of the Board's leasing conditions, to either pay royalties to the State or to establish an escrow account for each well. N.D.A.C. § 85-06-01-09; Am. Trial Tr. Vol. 1 (R844:140:21-25). The Board does not direct operators which option to choose, nor does it dictate where escrow accounts be established. Am. Trial Tr. Vol. 1 (R844:141:3-8).

[¶13] If a landowner chooses not to enter a lease within a spacing unit, the landowner will become a working interest owner. *Id.* (R844:120:11-25). Becoming a working interest owner subjects a landowner to its proportionate share of well-drilling costs and potential risk penalties. *Id*. The Board avoids becoming a working interest owner given the potential associated liability and constitutional issues. *Id.* (R844:121:1-12). Because the Board would have become a working interest owner if it had not entered leases in Section 12, the same title dispute over the State's ownership boundary limits in this case would have existed whether the Board leased the minerals or not.

C. The Lippert Well (Sections 1 and 12).

[¶14] The Lippert 1-12 1-H Well was drilled by Statoil in Section 1, T153N, R102W. The spacing unit for the Lippert Well consists of Sections 1 and 12, T153N, R102W. Am. Trial Tr. Vol. 2 (R845:21:10-12). The Lippert Well began producing in November 2010, and continues to produce today. *Id.* (R845:21:13-20). A portion of the Disputed Property is located in the western half of Section 12. None of the Disputed Property is located in Section 1, but Section 1 is relevant to the extent that operators' accounting methods are based on a well's spacing unit. In other words, when making royalty payments, there is no distinction between property located in Section 1 and Section 12 because both sections make up the spacing unit.

D. Section 13.

[¶15] A portion of the Disputed Property is located in Section 13, T153N, R102W. There has never been a well drilled or production from this location, so there is no associated spacing unit for Section 13. Am. Trial Tr. Vol. 1 (R844:176:25), *Id.* (R844:177:1-4).

E. The Board's Leases.

[¶16] As previously noted, the Board leases minerals relative to river tracts on a quarter-section basis. *Id.* (R844:117:17-25). However, operators' accounting methods are based on a well's spacing unit. *Id.* (R844:119:1-5). Therefore, the Lippert Well spacing unit contains eight quarter-sections, of which the Board entered leases in five. State Leases Relevant to this Case (R884).

[¶17] The Board entered leases in Section 12 with John H Holt Oil Properties and Bowie Oil Partners, LLC. *Id.*; Oil & Gas Leases (R678), (R679). The Board never entered a lease with Statoil, who came into lease possession through assignment.

[¶18] Additionally, the two northern quarters of Section 13 are also relevant to this case, but since no wells have been drilled there, there is no associated spacing unit. The Board initially entered leases in Section 13 with Petrogulf Corporation and XTO Energy, Inc. State Leases Relevant to this Case (R884). Those leases both expired due to non-production. The Board then entered leases with Petro-Hunt. *Id*.

[¶19] As shown in State Leases Relevant to this Case (R884), after acreage adjustments due to the implementation of N.D.C.C. ch. 61-33.1, the Board is leasing 159.1 mineral acres in the Lippert Well spacing unit. Additionally, the Board is leasing 11.15 acres in Section 13, but since there is still no well in that location, there is no associated spacing unit. *Id*., Am. Trial Tr. Vol. 1 (R844:176:25).

F. The Board's Lippert Well Bonus and Rental Payments.

[¶20] As part of the acreage adjustment process under N.D.C.C. § 61-33.1-04(2)(a) and in accordance with the Board's lease provisions, the Board issued all applicable bonus and rental refunds to its lessees for the Lippert Well spacing unit. State Leases Relevant to this Case (R884). In accordance with industry standard, the Board did not refund bonus payments from Petrogulf or XTO for expired leases in Section 13. *Id*.

G. The Board's Lippert Well Royalty Payments.

[¶21] After the acreage adjustments were made in accordance with the Wenck Line, Statoil's royalty statement submitted to the Board (dated August 27, 2021) lists the Board's total decimal interest in the Lippert Well spacing unit at 0.02079314. Decl. of Adam G. Otteson (R652:¶4). The Board received its first royalty payment in August 2011, for a fractional portion of its leased acreage within the Lippert Well spacing unit. Am. Trial Tr. Vol. 1 (R844:170:4-11). Prior to May 2012, Statoil paid the Board on a 0.00122905 interest (approximately 6% of the State's ultimate interest). *Id*.; August 2011 Royalty Payment

(R864). In May 2012, Statoil increased the Board's payment to a 0.00284179 interest (approximately 14% of the State's ultimate interest), which it paid until April 2015. Am. Trial Tr. Vol. 1 (R844:170:12-21); May 2012 Royalty Payment (R865).

[¶22] Then, due to the title dispute over minerals within the Lippert Well spacing unit, Statoil established an escrow account at the Bank of North Dakota. Am. Trial Tr. Vol. 1 (R844:170:18-21). From April 2015 until November 2020, the Board did not receive any royalty payments, as Statoil escrowed what it believed to be the State's portion of the Lippert Well spacing unit funds during this period. *Id*. From May 2015 until December 2020, the royalty payments escrowed by Statoil for the Lippert Well spacing unit earned $4,649.69 in interest. *Id*. (R854:¶8). All amounts deposited, including the interest, less $100 returned to the Board to reimburse the cost of opening the escrow account, were remitted by the Bank of North Dakota to Statoil upon escrow account closure. Am. Trial Tr. Vol. 1 (R844:171:17-24). This amount totaled $899,065.59. Decl. of Adam G. Otteson (R854:5).

[¶23] As part of the acreage adjustment process, the Board did not issue any royalty payment refunds to Statoil because the Board did not receive any excess royalty payments. To the contrary, at the time of trial, the Board had not been paid for its full royalty interests. Am. Trial Tr. Vol. 2 (R845:24:11-15).

[¶24] To summarize, from August 2011 through April 2015, the Board was paid monthly royalty payments at a reduced rate for a total of $47,185.26. Decl. of Adam G. Otteson (R652:¶5). From April 2015 through October 2020, the Board was not paid any royalty payments because all potential Board royalties were being escrowed. *Id*. From November 2020 through August 2021, the Board received monthly royalty payments totaling

$10,570.73. *Id*. In November 2020, the Board also received a $131,946.75 lump-sum "catch-up" payment for royalties due from production between October 2013 and October 2020. *Id*. The Board received a second lump-sum "catch-up" payment in July 2021 (after trial) for $298,932.69 for royalties from production prior to October 2013. *Id*. The total royalty payments received by the Board as of September 2021 were $488,635.43. *Id*.

H. Wilkinsons' Leases.

[¶25] Prior to Garrison Dam's construction, Wilkinsons' predecessors in interest sold their surface interest in the Disputed Property to the United States, but reserved any rights to mineral interests. 1958 Warranty Deed (R697). On July 15, 2009, Wilkinsons entered into oil and gas leases for 286.04 acres at the Disputed Property. Oil & Gas Leases (R143:5-12,15-18). Lease term number 3 indicates the leases have a primary term of three years beginning on February 8, 2010. The lease further provides that the "lease shall remain in effect … as long thereafter as oil and gas, or either of them, is produced from the leased premises or drilling operations are continuously prosecuted." *Id.* at 9.

[¶26] Because the Lippert Well began producing within the three-year primary term and continues to produce today, production from the Lippert Well has extended Wilkinsons' leases indefinitely until production ceases. As such, Wilkinsons have not had an opportunity to renegotiate lease terms beyond what they initially agreed to.

[¶27] Because there is a Pugh Clause, Wilkinsons' Section 13 leases expired.

I. Wilkinsons' Lippert Well Bonus Payments.

[¶28] Under the lease terms, Wilkinsons negotiated $300/acre bonus payments and a 3/16ths royalty rate. *Id.* at 19. Wilkinsons received their full bonus payments in September 2009 and March 2010. *Id.* at 20, 25. Wilkinsons did not refund the bonus payments

they received on the portion related to the expired Section 13 lease. Am. Trial Tr. Vol. 1 (R844:64:14-17).

J. Wilkinsons' Lippert Well Royalty Payments.

[¶29] Several Plaintiffs testified they did not receive royalty payments between November 2010 and November 2020. *Id.* (R844:23:17-20); (R844:57:7-20); (R844:98:13-16). This is corroborated by Statoil's expert Amy Becker's testimony, where she indicated that the royalties associated with Wilkinsons' leases were placed in suspense. Am. Trial Tr. Vol. 2 (R845:7:20-25); Amy Becker Report (R812:¶5). This means that Statoil retained Wilkinsons' royalty funds until this Court resolved the title dispute and Statoil put Wilkinsons back into "pay" status. Am. Trial Tr. Vol. 2 (R845:8:1-22). Ms. Becker's testimony is consistent with the fact that Wilkinsons' royalties were fully paid November 20, 2020 (Am. Trial Tr. Vol. 1 (R844:97:13-22)), in an amount totaling $571,094.69. Amy Becker Report (R812:¶9).

ARGUMENT

A. Introduction.

[¶30] This case spawned from a title dispute created by two conflicting legal theories regarding property ownership beneath the Missouri River that was subject to condemnation during Garrison Dam's construction. Under the legal theory previously advocated by the State, the State owned – and had since statehood – the land beneath navigable waters up to the current OHWM. This legal theory's foundation is rooted in the Napoleonic Code and has been reaffirmed for nearly two hundred years by numerous courts, including the United States and North Dakota Supreme Courts.

[¶31] Under Wilkinsons' legal theory, they owned the Disputed Property because the federal government condemned their surface interest but allowed them to retain a mineral interest. The conflict between these two legal theories caused the title dispute in this case.

[¶32] After the legislature created N.D.C.C. ch. 61-33.1, Wilkinsons' legal theory was ultimately adopted by this Court in *Sorum*. This theory became applicable to this case once *Wilkinson II* decided N.D.C.C. ch. 61-33.1 applied to the Disputed Property. Thus, the Disputed Property was subject to a title dispute from sometime in 2010 until September 2020, at which time the State conceded that Wilkinsons owned title to the mineral interests in the Disputed Property through application of N.D.C.C. ch. 61-33.1.

B. There has been no unconstitutional taking of the Disputed Property by the State in violation of the Fifth Amendment of the United States Constitution or Article I, § 16 of the North Dakota Constitution and N.D.C.C. ch. 32-15 *et seq*.[3]

[¶33] No court in this case has ever analyzed, addressed, or determined that there has been an unconstitutional taking of the Disputed Property. There are several reasons why this Court cannot hold that a taking has occurred.

1. Mootness – Wilkinsons' takings claims were mooted by the passage of legislation that resolved the title dispute.

[¶34] The takings claims involved in this litigation have been mooted by the passage of legislation that resolved the title dispute between the parties.

[¶35] It is well established that courts will not give advisory opinions on abstract legal questions, and an action will be dismissed if there is no actual controversy left to be determined and the issues have become moot or academic. *E.g., Gosbee v. Bendish*, 512

[3] While the factual scenarios differ, these same legal arguments are forthcoming in *Whitetail Wave v. XTO*, et al., Case No. 20220061. *See* Case No. 20220061, Notice of Appeal to the N.D. Supreme Court issues 1 and 2.

N.W.2d 450, 452 (N.D. 1994). An action may become moot by the occurrence of events that result in a court's inability to render effective relief. *Poochigian v. City of Grand Forks*, 2018 ND 144, ¶ 10, 912 N.W.2d 344.

[¶36] One occurrence that can moot an action is legislation that addresses the controversy, because legislators are free to resolve by statute a dispute between parties even during the litigation. *See, e.g.*, *Friends of the Earth, Inc. v. Weinberger*, 562 F. Supp. 265, 270 (D.D.C. 1983) ("Through the passage of legislation which governs the lawsuit, Congress can effectively moot a controversy notwithstanding its pendency before the courts."). *See also*, *Lundeen v. Canadian Pac. Ry. Co.*, 532 F.3d 682 (8th Cir. 2008) (Congress specifically targeted pending North Dakota litigation arising out of the January 2002 Minot train derailment, which had the effect of mooting claims by Canadian Pacific that certain personal injury lawsuits arising out of the derailment were preempted by federal law.).

[¶37] Although this Court does not appear to have addressed the issue of whether legislation aimed at resolving a specific legal controversy moots the litigation, numerous other federal and state courts have concluded as much. Indeed, "[i]t is well established that a case must be dismissed as moot if new legislation addressing the matter in dispute is enacted while the case is still pending." *Am. Bar Ass'n v. Fed. Trade Comm'n*, 636 F.3d 641, 643 (D.C. Cir. 2011); *see also, McQueary v. Conway*, 614 F.3d 591, 595 (6th Cir. 2010), *aff'd*, 508 F. App'x 552 (6th Cir. 2012); *Diffenderfer v. Gomez-Colon*, 587 F.3d 445, 451 (1st Cir. 2009); *Colo. Mining Ass'n v. Urbina*, 318 P.3d 562, 567 (C.A.D.C. 2004); *Dist. of Columbia v. Am. Univ.*, 2 A.3d 175, 181 (D.C. 2010); *Sarasota All. for Fair Elections, Inc. v. Browning*, 28 So. 3d 880, 888–89 (Fla. 2010); *Ark. State Med. Bd. v. Schoen*, 1 S.W.3d 430, 432 (Ark. 1999); *Cat's Meow, Inc. v. City of New Orleans Through*

Dep't of Fin., 720 So. 2d 1186, 1194 (La. 1998) ("[I]f it is concluded that the new legislation was specifically intended to resolve the questions raised by the controversy, a court may find that the case or controversy is moot. In such a case, there is no longer an actual controversy for the court to address, and any judicial adjudication on the matter would be an impermissible advisory opinion.").

[¶38] During the pendency of this litigation over the boundary dispute, the 2017 North Dakota Legislative Assembly passed Senate Bill 2134, codified as N.D.C.C. ch. 61-33.1. While litigation continued after the passage of Chapter 61-33.1, the issue being litigated was "to determine whether N.D.C.C. ch. 61-33.1 applies and governs ownership of the minerals at issue in this case." *Wilkinson I*, 2017 ND 231, ¶ 20, 903 N.W.2d 51. On remand, the district court determined Chapter 61-33.1 applied to the Disputed Property, and on appeal, this Court agreed. *Wilkinson II*, 2020 ND 179, ¶ 32, 947 N.W.2d 910. Thus, once this Court determined that Chapter 61-33.1 applied and the State conceded the title dispute was resolved, the takings claims became moot.

[¶39] Wilkinsons oppose this argument by citing to a host of takings cases. *See generally,* Appellants' Br. ¶¶ 29-48. These cases are inapposite for several reasons, but in the context of the State's mootness argument, they are inapposite because in most of these cases[4] there was never any underlying doubt regarding the plaintiff's property ownership. These cases

[4] In the few cases Wilkinsons cite where the underlying title was disputed, any takings that were found were the result of the government prohibiting the plaintiffs from leasing minerals. *See, e.g., Central Pines Land Co. v. United States*, 107 Fed. Cl. 310, 327-328 (2010) (temporary taking because the government's leases prevented the plaintiffs from leasing); *Yuba Nat. Res., Inc. v. United States*, 821 F.2d 638, 639 (Fed. Cir. 1987) (United States prohibited Yuba from mining during period of unsettled title.). To the contrary, nothing here prevented Wilkinsons from leasing their mineral interests, and any matter of payment is a matter between Wilkinsons and their lessee.

and Wilkinsons' argument to the contrary would only be applicable here if the property ownership dispute was resolved in favor of Wilkinsons (which it has been), then the State decided to take the mineral royalties anyway (which it hasn't), but then after taking them away decided to give them back to avoid further litigation. That has not happened.

[¶40] Thus, this Court should determine that the takings claim under the United States and North Dakota Constitutions have been mooted by the passage of Chapter 61-33.1 and its application, as confirmed by *Wilkinson II*, to the Disputed Property.

2. Waiver – Wilkinsons have waived their takings claims.

[¶41] This Court could also decline to further address the takings issue because it has been previously waived by Wilkinsons. When the parties were before the district court in 2019, Wilkinsons brought a summary judgment motion. Pls.' Br. in Supp. of Mot. for Summ. J. (R470). In the State Engineer's Response Brief in Opposition to Wilkinsons' Motion for Summary Judgment, the State Engineer specifically indicated that the takings issue had not been addressed by this Court and questioned whether the remaining claims had been waived. (R492:¶¶19-20). Wilkinsons' Reply Brief in Support of Motion for Summary Judgment completely ignored these inquiries. (R504). "'[A] party waives an issue by not providing supporting argument and, without supportive reasoning or citations to relevant authorities, an argument is without merit.'" *In re J.J.T.*, 2018 ND 165, ¶ 29, 915 N.W.2d 106 (citation omitted). By failing to respond to the State Engineer's arguments, Wilkinsons waived their ability to do so. When the State Engineer appealed, he again raised the issue of waiver. State Eng'r's Notice of Appeal (R517:¶3(a)). Again, the issue was ignored. Pls./Appellees Resp. Br., *Wilkinson II* (Supreme Ct. Case No. 20190354) (filed Mar. 2, 2020). In fact, Wilkinsons waived several of their claims by conceding that "[t]he [District] Court does not need to go any further than deciding the first

question remanded by the Supreme Court [application of N.D.C.C. ch. 61-33.1 to the Disputed Property].” Order Granting Pls.’ Mot. for Summ. J. (R508:¶22). Indeed, Wilkinsons’ prior argument that this Court need only decide the question regarding the applicability of Chapter 61-33.1 to the Disputed Property is an implicit admission that all other issues involved in this case were mooted by the passage of the legislation.

3. No taking has actually occurred.

[¶42] Finally, there is not a factual or legal basis to establish a taking. A title dispute does not establish a taking, and there is no factual basis to establish either a physical or regulatory taking.

a. A title dispute is not a taking.

[¶43] This action was initiated as a title dispute, and title disputes are not takings, but rather a way to quiet title so both parties have assurance of boundary lines. In a suit with remarkable similarity to this case, a federal district court in Idaho recognized this point.

[¶44] In *Mackin v. City of Coeur D’Alene*, the plaintiffs owned beach front property along Lake Coeur d’Alene, a navigable lake owned in trust by the State of Idaho for its citizens up to the OHWM. 551 F. Supp. 2d 1205, 1207 (D. Idaho 2008), *aff’d,* 347 F. App’x 293 (9th Cir. 2009). Litigation ensued over the OHWM location, which established the boundary between the plaintiffs’ and the State of Idaho’s property. *Id*. After final resolution of the OHWM location, the plaintiffs brought a subsequent action for an uncompensated temporal taking for the public’s use of the previously disputed area during the pendency of the litigation in violation of the Fifth Amendment of the U.S. Constitution. *Id.*

[¶45] The court dismissed the plaintiffs’ takings claim with prejudice. *Id*. at 1210. In doing so, the court noted that “a governmental entity is potentially liable under the Takings Clause for the improper use of *its* own inherent powers,” which in that case was

commencement of a quiet title action against the plaintiffs. *Id*. at 1207-08. But, when "a governmental entity is a participant in a judicial proceeding that results in a determination by a court as to the scope of property ownership, it is the court that has exercised its power, not the governmental entity." *Id*. at 1208. The fact that the OHWM is eventually determined to be in a different location does not change the nature of the action. *Id*. at 1209.

[¶46] Summarizing the reasoning for the dismissal, the court noted:

> What Plaintiffs are arguing, essentially, is that because the Idaho Supreme Court sided with them on appeal, then *a fortiori* the Defendants never had the right to seek a judicial determination in the first place, and doing so constituted an uncompensated takings. It is an argument that assumes that the ultimate answer negates the right to have asked the question in the first place. It is a flawed assertion because without the Defendants having asked the question, Plaintiffs would not have established legal title to the land in dispute, from which they now claim a takings.

Id. (citation omitted). The same reasoning applies to this case. Without the State asserting an opposing argument regarding the OHWM location, there could never have been a quieting of title from which Wilkinsons could claim a taking. Here, however, it was legislation that resolved the boundary dispute (i.e., the Legislative Assembly that exercised its power) rather than a court, but still not the governmental entity, the State.

[¶47] In a case involving the "same novel theory of takings liability" (*Id.* at 1209), a federal district court in Wyoming resolved a similar issue involving a road-use dispute. *Doenz v. Sheridan Cnty, Wyo.*, Case No. 98-CV-76-D (D. Wyo. June 25, 1999) (R561). In *Doenz*, Sheridan County brought a declaratory judgment action against the plaintiffs to resolve a road-use dispute over "East Lane." *Id*. at 1. Around the same time, the plaintiffs were actively marketing their property for sale. *Id*. at 2. As a result of the "cloud" on the title because of the declaratory judgment action, the plaintiffs lost out on a willing buyer, incurred significant attorneys' fees, and lost out on the opportunity to benefit from a "1031

tax free exchange" on their property transactions. *Id*. at 2-4. The Wyoming Supreme Court later found that Sheridan County lacked jurisdictional authority to bring the declaratory judgment action in the first place. *Id*. at 2. The plaintiffs then filed an action in federal district court alleging that Sheridan County's declaratory judgment action resulted in a temporary three-year taking without just compensation in violation of the state and federal Constitutions. *Id*. at 2, 4. The Court found that the "filing of a declaratory judgment action falls outside of the framework of takings jurisprudence." *Id*. at 5. If "[f]iling a lawsuit, even if without authority and injurious, does not amount to 'regulation' necessary to sustain a regulatory takings claim," *id.*, it's unfathomable how simply defending a declaratory judgment, as the State has done here, could amount to a regulatory takings claim. "As a matter of policy, governmental bodies should not be held financially accountable for the … adverse impact of seeking a judicial determination of rights." *Id*. at 5-6.

[¶48] Indeed, if this Court were to hold that a title dispute is a taking, then every title dispute that involves the State as one of the disputing parties would subject the State to potential liability for a takings claim. Particularly in the case of title disputes with riparian owners along navigable waterbodies, avoiding liability by having to concede title in such cases would conflict with the public policy and fiduciary responsibility that the State has to hold sovereign lands in trust for the citizens of North Dakota. Title disputes do not equate to a taking just because a state is one of the parties. Further, takings claims cannot ripen until the underlying title dispute's resolution.

b. There have been no physical or regulatory takings of the Disputed Property.

[¶49] The Takings Clause of the Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use, without just

compensation." By its plain text, the Takings Clause "'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005) (quoting *First Eng. Evangelical Lutheran Church v. Cnty. of Los Angeles,* 482 U.S. 304, 314 (1987)). As such, the Takings Clause does not "limit the governmental interference with property rights *per se,* but rather [is designed] to secure *compensation* in the event of otherwise proper interference amounting to a taking." *First Eng.*, 482 U.S. at 315.

[¶50] There are generally two categories of takings: physical takings and regulatory takings. *Lingle*, 544 U.S. at 538.

i. Physical Takings.

[¶51] The "classic" kind of taking is a "permanent physical invasion," where the "government directly appropriates private property or ousts the owner from his domain." *Id.* at 539. Such physical takings and evisceration of the owner's right to exclude from entering can require compensation. *Id.* But the State has never physically occupied the minerals claimed by Wilkinsons. The only actions the State has taken vis-à-vis the Disputed Property is to conduct surveys and lease minerals within the quarter sections occupied by the Disputed Property. When dealing with a subsurface estate, physical invasion and ouster are difficult to establish. The primary, and virtually only incident of ownership exercised by mineral owners, is to issue a mineral lease. But a lease alone does not establish physical occupation or possession. *See Sickler v. Pope*, 326 N.W.2d 86, 93 (N.D. 1982) (Oil and gas leases executed by plaintiffs "while evidence of possession, do not constitute actual possession … ."); *see also Priddy v. Thompson*, 204 F. 955, 960 (8th Cir. 1913) ("A grant by lease or deed of the oil or gas in a specified tract of land … is not

a grant of the oil and gas in the land, but of such a part thereof only as the grantee finds and reduces to possession. It vests no title to any oil or gas which he does not extract and reduce to possession, and hence no title to any corporeal right or interest."). Because a lease alone cannot establish physical possession, there has not been a physical taking.

ii. Regulatory Takings.

[¶52] Wilkinsons have received the entire value of their property. In a regulatory taking, as opposed to a physical taking, property interests are interfered with, but the owner is not physically ousted. To constitute a regulatory taking, "the complete elimination of a property's value is the determinative factor." *Lingle*, 544 U.S. at 539 (emphasis added); *see also*, *Wild Rice River Ests. v. City of Fargo*, 2005 ND 193, ¶ 13, 705 N.W.2d 850.

[¶53] The State has done nothing – and Wilkinsons have not alleged otherwise – to prevent Wilkinsons from leasing minerals and collecting bonus payments. To the contrary, Wilkinsons admitted that they leased the Disputed Property and received payments on the leases. Oil & Gas Leases (R143:19-21, 25); Patch Dep. (R205:8:13-16).

[¶54] Further, Wilkinsons entered their leases in July 2009. Oil & Gas Leases (R143:5-12, 15-18). The Board did not enter its leases until August 2010 (NW/4 and SW/4 Section 12), November 2010 (NE/4 Section 13), and May 2011 (NW/4 Section 13). Oil & Gas Leases (R200). Thus, any implication that the Board's leases or claims negatively impacted Wilkinsons' ability to negotiate better bonus or royalty rates is false.

[¶55] Additionally, from the time the minerals were leased, the State has always admitted that title to the Disputed Property was unclear. When the Board leases its minerals, it does not do so proactively. Rather, oil companies approach the Board to nominate tracts for auction. June 2010 Nomination Letter from Brigham (R148); Am. Trial Tr. Vol. 1

(R844:116:9-17). Upon winning an auction, operators enter leases with the Board that contain specific language acknowledging the potential title dispute and explicitly acknowledging that refunds will be issued to the operators if the State does not own title. *See, e.g.,* Oil & Gas Leases (R200:1:¶2) ("Lessor neither warrants nor agrees to defend title to the leased premises, except that all bonuses and rentals will be returned to the lessee in the event lessor does not have a lawful right to lease the leased premises for oil and/or gas exploration and production."). Thus, to the extent that a title dispute was created, it was created by the affirmative actions of oil companies approaching the Board and asking to lease minerals the oil companies believed the State may have owned.

[¶56] It is undisputed that the State has never stopped Wilkinsons from selling, leasing, or developing their minerals. With whatever actions the State has taken, there hasn't been any "elimination of [the] property's value," let alone a "complete elimination of a property's value" or an "eviscera[tion]" of its utility. *Lingle*, 544 U.S. at 539; *Wild Rice River Ests.*, 2005 ND 193, ¶ 13, 705 N.W.2d 850. Wilkinsons have asserted title to the minerals and have always been free to exercise the primary incident of mineral ownership, issuing oil and gas leases, which they did. Wilkinsons collected the bonus payments. Upon resolution of the title dispute, Wilkinsons received the royalties they were owed under the terms of the leases they entered. Am. Trial Tr. Vol. 1 (R844:97:10-12). A claim that the State ousted Wilkinsons and deprived them of all value in the Disputed Property cannot be supported because Wilkinsons have presumably received everything they are entitled to. Thus, there has been no regulatory taking.

[¶57] It is additionally unclear how the State could have committed a taking when the State has not received a benefit in return. The State never received royalty payments for

the Disputed Property. Wilkinsons claim that the State "exercised control over and possessed the royalties paid for Wilkinsons' minerals." Appellants' Br. ¶45. This is false and misunderstands the nature of an escrow account. While the State received royalty payments for a portion of the Board's leased acreage, as of the time of trial, the State was still owed nearly $300,000 in royalties from the Lippert well spacing unit. Decl. of Adam G. Otteson (R652:¶5), *see also*, ¶ 12 supra. It's unclear how the State could have "taken" Wilkinsons' royalties when, as of the time of trial, it had not even been fully compensated for its own interests in the Lippert Well spacing unit.

[¶58] After this title dispute arose, Statoil deposited royalty payments into an escrow account at the Bank of North Dakota. Decl. of Adam G. Otteson (R563:¶7). The royalties had earned $4,649.69 in interest at the time the escrow account was closed. *Id*. (R563:¶8). When the escrow account was closed, all amounts[5], including the interest, were remitted to Statoil as the well operator. *Id*. (R563:¶9). "The State never had access or control over those funds, and the State has not received any benefit as a result of the title dispute." *Id*. (R563:¶12). Query, how can there have been a governmental taking when the State never obtained the disputed funds, Wilkinsons have now obtained their full amount of the disputed funds, the State does not possess the property, and the State was not fully paid for its own interest in the spacing unit until after close of trial? Indeed, at the time of trial, while Wilkinsons had collected their full interest in the royalties from the spacing unit, the State had only received about 38% of its full interest.

[5] Upon escrow account closure, the State received $100 to reimburse it for the expense of opening the account. *Id*. (R563:¶10).

4. Conclusion

[¶59] Not only were the takings claims under the United States and North Dakota Constitutions mooted by the passage of N.D.C.C. ch. 61-33.1 and its subsequent application through *Wilkinson II*, Wilkinsons waived their takings claims by not addressing them the last time the parties appeared before this Court. Further, a title dispute is not a taking just because a state is a party to the proceeding. Lastly, the facts do not support the existence of either a physical or regulatory taking. The State never possessed, controlled, or accessed any of the minerals or revenue belonging to Wilkinsons, but to the contrary, experienced similar delays in receiving its proper share of royalty payments due to the unresolved title dispute.

C. This Court lacks jurisdiction over the conversion claim, but even if jurisdiction did exist, the State did not convert Wilkinsons' personal property.

1. This Court lacks jurisdiction over the conversion claim because conversion is a tort and Wilkinsons never filed a notice of claim.

[¶60] N.D.C.C. ch. 32-12.2 governs non-contract monetary claims against the State of North Dakota. N.D.C.C. § 32-12.2-04 is a "notice of claim" provision that provides that a plaintiff "shall" present written notification to the OMB director of any "claim" against the state for an "injury" within 180 days after the alleged injury. N.D.C.C. § 32-12.2-01 defines a "claim" as "any claim for money damages brought against the state or a state employee for an injury caused by the state or a state employee … ."

[¶61] Courts lack subject matter jurisdiction over claims against the State and its employees when a complainant has not given the State notice of the claims as required by statute. *See Ghorbanni v. N.D. Council on Arts*, 2002 ND 22, ¶ 8, 639 N.W.2d 507 ("Our prior cases indicate strict compliance with the requirements of N.D.C.C. § 32-12.2-04(1)

is a prerequisite to bringing an action against the State or its employees. Absent the timely filing of a notice of claim under N.D.C.C. § 32-12.2-04(1), the court lacks subject matter jurisdiction to entertain the lawsuit."). Accordingly, a complaint must be dismissed if a plaintiff fails to timely present written notification to the OMB director.

[¶62] Conversion is a tortious claim for money damages falling squarely within the provisions of N.D.C.C. § 32-12.2-04. But Wilkinsons did not file a notice of claim with OMB. Aff. of Tag Anderson (R99). Therefore, this Court lacks subject matter jurisdiction over the conversion claim.

2. The State did not convert Wilkinsons' personal property.

[¶63] Even if the Court has jurisdiction over the conversion claim, the State did not convert Wilkinsons' personal property. "Conversion consists of a tortious detention or destruction of personal property, or a wrongful exercise of dominion or control over the property inconsistent with or in defiance of the rights of the owner." *Ritter, Laber & Assoc., Inc. v. Koch Oil, Inc.*, 2004 ND 117, ¶ 11, 680 N.W.2d 634 (emphasis added). It "requires an intent to exercise control or interfere with the use of property to such a degree as to require a forced sale of the plaintiff's interest … to the defendant." *Id*. This Court's description of conversion is that "[t]he gist of conversion is not in acquiring the complainant's property, but in wrongfully depriving the complainant of the property." *Id*. The conversion claim fails as a matter of law for three reasons.

[¶64] First, for all the reasons that there has been no taking, there has also been no conversion. Second, conversion concerns personal property, but Wilkinsons' Amended Complaint alleged a conversion of mineral interests. (R47:¶54). Mineral interests are real property, not personal property. *Schulz v. Hauck*, 312 N.W.2d 360, 361 (N.D. 1981). It was only at the final briefing stages of this case that Wilkinsons have changed their arguments

to allege that the conversion was for royalty payments, but the Amended Complaint was never further amended to allege such. Third, similar to the takings claims, Wilkinsons previously waived their conversion claims. *See* ¶ 41 supra.

D. There has been no unjust enrichment/constructive trust by the State.

[¶65] "Five elements are required to establish unjust enrichment: '1. An enrichment; 2. An impoverishment; 3. A connection between the enrichment and the impoverishment; 4. Absence of a justification for the enrichment and impoverishment; and 5. An absence of a remedy provided by law.'" *McDougall v. AgCountry Farm Credit Servs.*, 2021 ND 98, ¶ 14, 960 N.W.2d 792 (quoting *Apache Corp. v. MDU Res. Group, Inc.,* 1999 ND 247, ¶ 13, 603 N.W.2d 891). A "defendant [is] not unjustly enriched [when] it [does] not receive a benefit from the plaintiff which would be inequitable to retain without paying for its value." *Id.* ¶ 17 (citing *Apache Corp.,* 1999 ND 247, ¶ 15, 603 N.W.2d 891).

[¶66] Establishing constructive trust requires two elements: unjust enrichment and a confidential relationship. *Schroeder v. Buchholz*, 2001 ND 36, ¶ 8, 622 N.W.2d 202. "'A confidential relationship exists whenever trust and confidence is reposed by one person in the integrity and fidelity of another, and that such relationship is a fact to be established in the same manner and by the same kind of evidence [as] any other fact is proven.'" *Id*. ¶ 9 (quoting *Estate of Wenzel-Mosset v. Nickels*, 1998 ND 16, ¶ 25, 575 N.W.2d 425).

[¶67] Wilkinsons claim that the State was unjustly enriched by receiving bonus payments for minerals in Section 13. Appellants' Br. ¶¶58-61. As noted in Wilkinsons' brief, unjust enrichment requires "'the receipt of a benefit by the defendant from the plaintiff … .'" *Id*. ¶60 (quoting *Schroeder*, 2001 ND 36, ¶ 14, 622 N.W.2d 202) (emphasis added).

[¶68] The unjust enrichment/constructive trust claims fail as a matter of law. First, the State has not been "enriched" by this title dispute. While the State did receive bonus

payments for acreage in Section 13, the State actually owns acreage in Section 13. The bonus payment amount and the terms of its return (or not) are governed by the contracts between the State and its lessees, of which Wilkinsons were not a party. Any required "disgorgement" would properly belong to the Board's lessees, not Wilkinsons. The State did not receive any benefit from Wilkinsons. Second, Wilkinsons received their own bonus payments for their minerals. Oil & Gas Leases (R143:19). Further, they received those bonus payments in September 2009 and March 2010, which was before the State entered its leases, so any implication that the State's leases or claims negatively impacted Wilkinsons' ability to negotiate better bonus or royalty rates is false. *Id.* (R143:20, 25).

[¶69] The constructive trust claim fails because there has not been any unjust enrichment sufficient to establish the first element of constructive trust, but also there is nothing in the record to support the fact that the State had a "confidential relationship" with anyone sufficient to establish the second element of the constructive trust.

[¶70] Finally, these claims have been waived, as discussed in ¶ 41 supra.

E. There has been no civil conspiracy between the State and Statoil.

[¶71] A civil conspiracy requires: "'a combination of 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 (quoting *Peterson v. N.D. Univ. Sys.*, 2004 ND 82, ¶ 27, 678 N.W.2d 163). Further, the "underlying act itself must be actionable as a tort claim to support a claim for civil conspiracy." *Id*. ¶ 45. "Dismissal of the underlying tort claim defeats the related claim for civil conspiracy." *Id*.

[¶72] Wilkinsons' Amended Complaint claims a civil conspiracy based on an underlying claim of the State's "wrongful taking … without just compensation … ." (R47:¶61).

[¶73] The civil conspiracy claim fails as a matter of law for three reasons. First, the alleged underlying act of a taking without just compensation is not a tort claim. *Minch v. City of Fargo*, 297 N.W.2d 785, 789 (N.D. 1980) (A takings claim "proceeds from a constitutional right and must be distinguished from claims grounded in tort theory only."). For the first time, Wilkinsons now allege that their civil conspiracy claim is based on their conversion claim. Appellants' Br. ¶62. If this is the case, this Court lacks jurisdiction because Wilkinsons never filed a notice of claim. Aff. of Tag Anderson (R99), *see also* ¶¶ 60-62 supra. Additionally, this claim has been waived. *See* ¶ 41 supra.

[¶74] Finally, there are no facts in the record to support a claim of conspiracy between the State and Statoil. Although the Appellants' Br. at ¶63 claims that the "State and Statoil knew Wilkinsons owned the minerals when they entered into leases in August 2010 … ," the State never entered into any leases in the area of the Disputed Property with either Statoil or its predecessors. State Leases Relevant to this Case (R884). The leases in question were assigned to Brigham (and subsequently to Statoil) after-the-fact. Am. Trial Tr. Vol. 1 (R844:132:12-15). While it is accurate that Statoil's predecessor Brigham nominated the tracts in Section 12 for auction, as noted in the June 10, 2010 letter from Brigham (R711), the notation on the nomination letter also indicates those tracts had already been previously nominated. In other words, Statoil's relationship with the State in the location of the Disputed Property came about entirely as a result of an after-the-fact lease assignment. Further, no party "knew" who owned the minerals until the title dispute was resolved via N.D.C.C. ch. 61-33.1 and this Court's rulings in *Sorum* and *Wilkinson II*.

F. Wilkinsons are not entitled to attorneys' fees or costs.

[¶75] Wilkinsons chiefly rely on their takings arguments as justification for their attorneys' fees request. Appellants' Br. ¶¶ 64-76. But Wilkinsons have not prevailed on their legal claims, thus there is no legal theory available upon which to award them attorneys' fees.

[¶76] However, if attorneys' fees were granted, the request for fees prior to September 16, 2019, was untimely. Finally, this Court must defer to the district court's discretion regarding the amount of fees it would have awarded if fees were allowed.

1. The request for all attorneys' fees prior to September 16, 2019, is untimely.

[¶77] North Dakota Rule of Civil Procedure 54(e)(2) requires that a claim for attorneys' fees "must be made by motion" and that "[t]he motion must be served and filed within 21 days after notice of entry of judgment." (Emphasis added). Rule 54 further provides that a "[j]udgment" within the context of the rule "includes … any order from which an appeal lies." N.D.R.Civ.P. 54(a).

[¶78] On September 5, 2019, Wilkinsons obtained an Order in their favor. Order Granting Pls.' Mot. for Summ. J. (R510). On September 16, 2019, a Judgment and a Notice of Entry of Judgment were filed. (R513), (R514). Assuming for the moment that the September 16 Judgment was appealable, pursuant to Rule 54, Wilkinsons were required to file any motion for fees related to that appealable Judgment within 21 days after notice of entry of the judgment, or by October 7, 2019. Wilkinsons' motion for fees was not brought until April 20, 2021. Pls.' Mot. for Attorney's Fees & Costs (R540).

[¶79] The word "must" in Rule 54 indicates that its 21-day deadline is mandatory. *Palmer v. Gentek Bldg. Prod., Inc.*, 2019 ND 306, ¶ 20, 936 N.W.2d 552 ("We have said the word

'must' in a statute or rule normally indicates a mandatory duty."). In fact, the North Dakota Supreme Court has applied this principle specifically to the use of the word "must" within Rule 54. *See Brock v. Price*, 2019 ND 240, ¶ 19, 934 N.W.2d 5 (interpreting Rule 54(e)(2)). The Court must, therefore, deny the request for any fees incurred prior to September 16, 2019, on the grounds that the request for those fees was untimely.

[¶80] Rule 54 of the North Dakota Rules of Civil Procedure is modeled after Rule 54 of the Federal Rules of Civil Procedure. *See Grenz v. Kelsch*, 436 N.W2d 552, 557 (N.D. 1989) (Meschke, J., concurring) ("That is true in the federal practice on which we modeled our present repository of the finality principle, NDRCivP 54(b)."). When a particular rule is modeled after the corresponding federal rule, the North Dakota Supreme Court frequently refers to the federal rule's advisory committee notes when interpreting North Dakota's rule. *See, e.g.*, *Binder v. Binder*, 557 N.W.2d 738, 741 n.2 (N.D. 1996) ("The Federal Rule Advisory Notes are, therefore, persuasive guidelines for our interpretation of Rule 63, N.D.R.Civ.P."); *Lawrence v. Delkamp*, 2008 ND 111, ¶ 10, 750 N.W.2d 452 (referring to "the advisory committee notes to corresponding federal rule" 43 when interpreting Rule 43 of the North Dakota Rules of Civil Procedure).

[¶81] The Federal Advisory Committee Notes explain the purpose behind the mandatory nature of Rule 54's fee deadline. Because the deadline is triggered by "any order from which an appeal lies," the deadline is intended to give notice of a fee request to a party contemplating an appeal before the time to appeal has expired. *See* Fed. R. Civ. P. 54 Advisory Committee's Notes (1993 Amendment) ("Subparagraph (B) provides a deadline for motions for attorneys' fees … One purpose of this provision is to assure that the opposing party is informed of the claim before the time for appeal has elapsed."). The

deadline "also enables the court in appropriate circumstances to make its ruling on a fee request in time for any appellate review of a dispute over fees to proceed at the same time as review on the merits of the case." *Id.* The Rule's deadline "require[s] … the filing of a motion sufficient to alert the adversary and the court that there is a claim for fees, and the amount of such fees[.]" *Id.*

[¶82] The Eighth Circuit has recently evaluated the deadline for attorneys' fees requests under Fed. R. Civ. P. 54 in *Spirit Lake Tribe v. Jaeger*, 5 F.4th 849, 852 (8th Cir. 2021). While the Eighth Circuit ultimately awarded attorneys' fees to Spirit Lake, it did so under a theory of excusable neglect after affirming that Spirit Lake's request for fees was untimely. *Id*. at 852. The reason for the excusable neglect in that case was the lack of clarity in the law of whether "a preliminary injunction" was a "'traditional judgment needed for a triggering event for filing a motion for attorney's fees.'" *Id*. at 855. (Citation omitted).

[¶83] No such lack of clarity exists here. In this case, Wilkinsons requested summary judgment (not partial summary judgment). Pls.' Mot. for Summ. J. (R469). In spite of the fact that the State Engineer specifically argued to the district court that there were outstanding legal questions that made summary judgment inappropriate, State Engineer's Response Brief in Opposition to Wilkinsons' Motion for Summary Judgment (R492:¶21), Wilkinsons' summary judgment motion was granted and the district court signed the proposed order – which was prepared by Wilkinsons – granting summary judgment. Order Granting Pls.' Mot. for Summ. J. (R510). A Judgment and Notice of Entry of Judgment were entered. (R513), (R514).

[¶84] Wilkinsons now claim that this 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 attorneys' fees request. Appellants' Br. ¶66. Certainly at the time, and without the benefit of this Court's subsequent ruling in *Wilkinson II* that the September 2019 judgment was "not appealable because it did not dispose of all claims against all parties," (2020 ND 179, ¶ 1, 947 N.W.2d 910), Wilkinsons believed that the summary judgment order was a final appealable order. The Order Granting Wilkinsons' Motion for Summary Judgment indicated to the parties that there were only two issues before the court, (R510:¶3), and further specified that "[t]he Court does not need to go any further than deciding the first question remanded by the Supreme Court." *Id.* (R510:¶ 22). It's a sure bet that if the State wouldn't have appealed, Wilkinsons would have considered the September 2019 order "final." Further, the triggering deadline under the plain language of Rule 54(e)(2) is the "notice of entry of judgment," which again, was prepared by Wilkinsons and filed on September 16, 2019. Notice of Entry of J. (R514). Therefore, it was reasonable for both Wilkinsons and the State to believe that the judgment was a "traditional judgment needed for a triggering event for filing a motion for attorney's fees" and that N.D.R. Civ. P. 54 was applicable. *Spirit Lake Tribe*, 5 F.4th at 855 (citations omitted). This Court's subsequent determination that the judgment did not dispose of all claims against all parties did not eviscerate Wilkinsons' obligation to file their motion for fees within 21 days of the September 16, 2019 notice of entry of judgment if they believed they were entitled to fees for any services provided as of that date.

[¶85] Wilkinsons' failure to file a motion for attorneys' fees before the time to appeal expired prejudiced the State. Because no motion for attorneys' fees was filed before the time for appeal elapsed, the State never had the opportunity to consider there would be a

claim for fees, or the amount of such fees, when considering whether to appeal. In addition, the North Dakota Supreme Court was unable to make a ruling on any fee request at the same time as it reviewed the merits of the 2019 judgment. Both the State and this Court were therefore prejudiced by the inability to assess and resolve a claim for fees "while the services performed are freshly in mind." Fed. R. Civ. P. 54 Advisory Committee's Notes (1993 Amendment).

[¶86] Permitting Wilkinsons to bring a motion for fees arising from any services performed prior to the September 2019 judgment would render the word "must" and the 21-day deadline in N.D.R.Civ.P. 54(e)(2) meaningless. The prejudice the State suffered from lack of notice before the time to appeal the September 2019 judgment expired cannot be undone or remedied. As there is no excusable neglect for Wilkinsons' untimely request, and any ambiguity about whether the deadline was triggered was the result of Wilkinsons' own actions, even if Wilkinsons had prevailed on any legal claim allowing for the recovery of attorneys' fees, this Court should deny the request for any fees incurred before September 16, 2019.

2. This Court must defer to the district court's findings regarding specific hours, dollar amounts, and costs.

[¶87] This court uses an abuse of discretion standard when reviewing a district court's determination regarding attorneys' fees. *Sorum*, 2020 ND 175, ¶ 57, 947 N.W.2d 382. Similarly, the matter of expert fees and costs is also left to the district court's discretion. However, the district court must provide an explanation for its decision to award or not award the fees. *N.D. Dep't of Trans. v. Schmitz*, 2018 ND 113, ¶ 11, 910 N.W.2d 874. In this case, the district court provided detailed explanations of its decision-making regarding

the total hours for which it would allow reimbursement, the use of the loadstar rate, and the reimbursement of both expert and non-expert costs. Order for J. (R813:¶¶130-145).

[¶88] If Wilkinsons had prevailed on their claim for hours incurred prior to September 16, 2019, the district court would have reduced the reimbursable attorneys' fees hours to 1,746.0 hours total for a total of $467,788.50. *Id.* (R813:¶134). Alternatively, if only hours arising after September 16, 2019, were reimbursable, the district court would have reduced the hours to 414.1 for a total of $113,970. *Id.* Additionally, even if Wilkinsons had prevailed on their legal claims, the district court would not have awarded Wilkinsons any costs. *Id.* (R813:¶135). Even if this Court finds in favor of Wilkinsons on their legal claims, the district court's findings on attorneys' fees and costs are entitled to discretion and should not be disturbed.

CONCLUSION

[¶89] This case was a title dispute. The district court first found for the State, so Wilkinsons persuaded the Legislative Assembly to change the law, resulting in a remand in *Wilkinson I*. The district court next found for Wilkinsons, and this Court agreed in *Wilkinson II* that the new law applied to the Disputed Property, but remanded because not all the questions had been answered. As such, the title dispute was resolved and Statoil paid both Wilkinsons and the State the money they were owed. That should have ended the case.

[¶90] A title dispute is not a taking. Nor is it conversion, unjust enrichment, constructive trust, civil conspiracy, or a civil rights violation. It's just a title dispute. The kind of title dispute that neighboring landowners have regularly. The fact that one of those landowners happens to be the State does not change the underlying nature of the dispute, and public policy urges that it should not.

[¶91] The State asks this Court to affirm the district court's order in its entirety.

Dated this 25th day of April, 2022.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20220037
Williams County District Court Case No. 53-2012-CV-00038

William S. Wilkinson; Ann L. Nevins and Amy L. 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,

v.

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, and all other persons unknown who have or claim an interest in the property described in the Complaint,

Defendants and Appellees,

and

North Dakota State Engineer

Intervenor and Appellee.

CERTIFICATE OF COMPLIANCE

[¶92] The undersigned certifies pursuant to N.D.R.App. P. § 32(a)(8)(A) that the State Appellees' Principal Brief contains 38 pages.

[¶93] This brief has been prepared in a proportionally spaced typeface, Times New Roman 12-point font, using Microsoft Office 365 Word.

Dated this 25th day of April, 2022.

State of North Dakota
Drew H. Wrigley
Attorney General

By: /s/ Jennifer L. Verleger

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court Case No. 20220037
Williams County District Court Case No. 53-2012-CV-00038

William S. Wilkinson; Ann L. Nevins and Amy L. 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,

v.

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, and all other persons unknown who have or claim an interest in the property described in the Complaint,

Defendants and Appellees,

and

North Dakota State Engineer

Intervenor and Appellee.

CERTIFICATE OF SERVICE

[¶1] I certify that on April 25, 2022, the **STATE APPELLEES' PRINCIPAL BRIEF** and **CERTIFICATE OF COMPLIANCE** were filed electronically with the Supreme Court through the E-Filing Portal and served on the following:

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Dated this 25th day of April, 2022.

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