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June 2, 2022

Ms. Petra Hulm
North Dakota Supreme Court
600 E Boulevard Ave
Bismarck, ND 58505-0530

Re: Supreme Court Case No. 20220037

Dear Ms. Hulm:

Pursuant to Rule 28(k) of the North Dakota Rules of Appellate Procedure, the North Dakota Board of University and School Lands and the Department of Water Resources (collectively, the State), advise the Court of the recent decision in *EEE Minerals, LLC v. State*, Case No. 1:20-cv-00219 (D.N.D. May 31, 2022). I have attached a copy for the Court's convenience.

This is an opinion arising out of a case filed in federal district court on the property immediately across the Missouri River from the property in the Wilkinson case. The arguments addressed by the decision at Section 3A (pp. 9-16) are relevant to the Wilkinsons' arguments made at ¶¶ 13, 28 of their principal brief, as well as arguments made at ¶¶ 42-48 of the State's brief.

Sincerely,

/s/ *Jennifer L. Verleger*
Jennifer L. Verleger
Assistant Attorney General

MCK
Enclosure – Order Granting Defendants' Motion to Dismiss
cc: Joshua A. Swanson; Lawrence Bender; Spencer D. Ptacek; Robert Stock; John E. Ward; David P. Garner; Michael J. Mazzone; Christopher C. Rosas; David D. Schweigert

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

EEE Minerals, LLC, and Suzanne Vohs as Trustee for the Vohs Family Revocable Living Trust, Plaintiffs, vs. State of North Dakota, the Board of University and School Lands of the State of North Dakota, and Joseph A. Heringer as Commissioner for the Board of University and School Lands of the State of North Dakota,[1] Defendants.	)	**ORDER GRANTING DEFENDANTS' MOTION TO DISMISS** Case No. 1:20-cv-219

On January 19, 2021, Defendants filed a Motion to Dismiss. (Doc. No. 17). The motion is ripe for consideration, as it has been fully briefed. (Doc. Nos. 18, 19, 21, 22). For the reasons set forth below, Defendants' motion (Doc. No. 17) is **GRANTED**.

I. BACKGROUND

Plaintiffs initiated this action on December 1, 2020 due to a dispute over who owns certain mineral interests in McKenzie County, ND. (Doc. No. 1). EEE Minerals and the Vohs Family Revocable Trust both claim they own the disputed mineral interests in, on, or under property in McKenzie County described as:

> Township 153 North, Range 101 West
> Section 6: Lot 10
> Section 7: Portions of Lots 1, 4, and 5, described on a deed recorded in Book 87, Page 505, in the office of the McKenzie County Register of Deeds.

[1] Joseph A. Heringer became the Commissioner for the Board of University and School Lands on March 14, 2022. Pursuant to Fed. R. Civ. P. 25(d), Heringer is automatically substituted for Jodi Smith.

Suzanne Vohs serves as the trustee for the Vohs Family Revocable Trust.

As one of its duties, the Board of University and School Lands of the State of North Dakota ("Land Board") is tasked with managing North Dakota's mineral interests. See N.D.C.C. § 15-01-02. The membership of the land board consists of North Dakota's governor, secretary of state, state treasurer, attorney general, and superintendent of public instruction. N.D.C.C. § 15-01-01. Jodi Smith served as the Commissioner for the Land Board ("Commissioner") at the time this lawsuit was initiated. Joseph Heringer is the current Commissioner.

At the center of this dispute is a disagreement over who owns the mineral interests due to the location of the Missouri River's historic ordinary high water mark ("OHWM"). In N.D.C.C. ch. 61-33.1, the State of North Dakota asserts its ownership of mineral interests up to the OHWM. In Continental Resources, Inc. v. North Dakota Board of University and School Lands, this Court provided a detailed explanation of the history of the OHWM. 505 F.Supp.3d 908, 910-13 (D.N.D. 2020). It stated:

> The Missouri River in North Dakota is a navigable river. In 1889, North Dakota was admitted to the Union and acquired title, pursuant to the equal footing doctrine, to the bed of the Missouri River, including the underlying minerals, up to the OHWM. To document the location of the Missouri River's OHWM, and thus delineate the boundary between state-owned riverbed and federally-owned uplands, the General Land Office (predecessor to the Bureau of Land Management "BLM") prepared and filed cadastral surveys between 1891 and 1901, using the Manual of Surveying Instructions in effect at the time. The meander line identified in these surveys marked the OHWM at the time.
>
> Rivers, especially large navigable rivers, such as the Missouri, are dynamic. They change course through erosion, accretion, and avulsion, and when they do, the OHWM changes as well. Rivers also flood. Missouri River flooding was particularly bad in the first half of the twentieth century. So it was that Congress passed the Flood Control Act of 1944, which authorized the United States Army Corps of Engineers ("Corps") to construct the Garrison Dam on the main stem of the Missouri River in North Dakota as part of the Pick-Sloan Missouri basin project dams. Several other dams along the Missouri River were constructed as well. The

waters impounded by the Garrison Dam created Lake Sakakawea, one of the largest reservoirs in the United States. Garrison Dam was completed in 1953. Once the dam was completed and Lake Sakakawea began to form, the portion of the Missouri River underlying Lake Sakakawea ceased its wanderings and the OHWM became fixed. This fixed, but hotly contested, OHWM is known as the historic OHWM.

By the time construction of Garrison Dam got underway, many of the uplands that would be inundated by Lake Sakakawea had been patented and passed from the federal public domain to private landowners. Before the dam was constructed, the Corps surveyed the privately-owned land which was expected to be inundated and would need to be acquired by the United States. The resulting survey maps are known as the "Corps Segment Maps." The Corps Segment Maps depict the riverbed and OHWM as it existed in 1952. Where the Corps was able to acquire the privately-owned lands that it needed through a voluntary sale, it allowed the landowners to reserve the underlying minerals. Where the Corps was forced to rely on the power of eminent domain, however, it acquired both the surface estate and the associated mineral estate. These lands which were acquired by the United States from private parties are referred to as "acquired lands."

Not all the land inundated by Lake Sakakawea was owned by private parties. Some of the land was owned by the United States. At the time, the United States still held title to public domain uplands above the historic OHWM of the Missouri River that had never left the possession of the United States since they were acquired from France in 1803. These lands, which have never been patented or left federal ownership, are referred to as "retained public domain lands." As a result, the surface estate of the former uplands now submerged by Lake Sakakawea is owned by the United States and consists of a mix of "retained public domain lands" and "acquired lands." The mineral estate in those former uplands consists of a mix of retained public domain mineral interests and acquired mineral interests which belong to the United States and mineral interests that remain in private ownership.

Prior to the Bakken oil boom which began around 2005, the exact location of the submerged riverbed was a question of only historical significance. However, with the advent of modern oil and gas drilling technology, and Lake Sakakawea's location in the Bakken oil fields, the submerged riverbed's historic OHWM has taken on new importance. The United States owns now submerged lands upland of the historic OHWM of the Missouri River. Its interests extend down to the historic OHWM. Pursuant to the equal footing doctrine, North Dakota owns the riverbed, including the mineral estate, up to the historic OHWM. With the United States and North Dakota at odds over the location of the historic OHWM, more surveys were conducted.

In 2010, the Land Board hired a private engineering firm, Bartlett & West, to conduct a survey of the Missouri River. The final report was completed in 2011. Bartlett & West conducted its analysis in compliance with Ordinary High Water Mark Delineation Guidelines issued by the North Dakota State Engineer in 2007. The study did not utilize the Corps Segment Maps. Since completion of the Bartlett & West study, the Land Board has leased North Dakota's mineral interests underlying the bed of the Missouri River consistent with the study's determination of the historic OHWM. Prior to the Bartlett & West study, North Dakota's minerals were leased based upon aerial photographs and ground surveys.

In 2013, the BLM prepared Supplemental Plats of the retained public domain lands in the vicinity of Lake Sakakawea to account for the movement of the Missouri River between the original cadastral surveys conducted in the late nineteenth and early twentieth centuries and the impoundment of Lake Sakakawea in the 1950s. The Supplemental Plats do not show the boundary between state-owned riverbed and any other riparian property, whether privately held or federally acquired. The BLM determined the Corps Segment Maps were the most comprehensive evidence of the Missouri River's location just prior to impoundment. The Supplemental Plats were created by overlaying the Corps Segment Maps on the original turn of the century surveys. The Supplemental Plats show the official position of the United States as to the historic OHWM of the Missouri River prior to the formation of Lake Sakakawea. The Supplemental Plats show the boundary between the now submerged federal public domain uplands and State riverbed along portions of the Missouri River in North Dakota. The BLM published the Supplemental Plats in late 2013 and early 2014. North Dakota protested the Supplemental Plats because the BLM applied federal law rather than state law in making its OHWM determination. The State contended the application of federal law led to an inaccurate OHWM boundary in the Supplemental Plats which resulted in some lands being shown as federally-owned uplands above the OHWM rather than state-owned riverbed below the OHWM. The BLM rejected the protest. North Dakota appealed. The Interior Board of Land Appeals rejected North Dakota's appeal, finding "[f]ederal law applies to BLM's determination of the OHWM along retained Federal riparian property, and state law should not be borrowed." 195 IBLA 194, 216 (March 25, 2020). This determination meant the boundary between state and federal lands would be determined as shown in the Supplemental Plats.

In April 2017, . . . while the IBLA proceeding was pending North Dakota enacted Chapter 61-33.1 of the North Dakota Century Code to address state ownership of the bed of the Missouri River. In litigation with private mineral owners regarding lands whose surface estate had previously been sold to the United States to construct the Garrison Dam, the Land Board claimed "title to the bed of the Missouri River up to the current ordinary high water mark." See Wilkinson v. Bd. of Univ. & School Lands, 903 N.W.2d 51, 54 (N.D. 2017) ("Wilkinson I")

(emphasis added). Chapter 61-33.1 rejected this view and made clear that "state sovereign land mineral ownership of the riverbed segments subject to inundation by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark." N.D.C.C. § 61-33.1-02 (emphasis added); see also N.D.C.C. § 61-33.1-01 (defining "[h]istorical Missouri riverbed channel" as the riverbed as it existed when the Pick-Sloan Plan dams were closed to begin impounding the Missouri River).

Section 61-33.1-03(1) provided that, for lands other than non-patented public domain lands, BLM's Supplemental Plats "must be considered the presumptive determination of the ordinary high water mark of the historical Missouri riverbed channel," subject to a review process set forth in the statute. N.D.C.C. § 61-33.1-03(1); see also N.D.C.C. § 61.33.1-01 ("'Corps survey' means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management"). For "nonpatented public domain lands" owned by the United States, on the other hand, the OHWM of the historic Missouri River on these lands "must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law." N.D.C.C. § 61-33.1-06. Chapter 61-33.1 is retroactive to the date of the closure of the Pick-Sloan dams save for the OHWM determination which is retroactive to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership. 2017 N.D. Sess. Laws Ch. 426, § 4. The Legislature appropriated $100 million for refunds and authorized an $87 million line of credit with the Bank of North Dakota if the initial appropriation was insufficient. 2017 N.D. Sess. Laws Ch. 426, § 3.

In Chapter 61-33.1, the North Dakota Legislature commissioned an additional study. See N.D.C.C. § 61-33.1-03. The report was completed by Wenck Associates, Inc. in 2018. The Wenck Report determination of the OHWM was made in accordance with the parameters set forth in the enabling legislation. See N.D.C.C. § 61-33.1-03(3). The Bartlett & West Report OHWM determination is favorable to North Dakota, while the OHWM determination in the Supplemental Plats favor the United States. The Wenck Report occupies the middle ground between the Bartlett & West Report and the Supplemental Plats in its determination of the OHWM. Thus, it would seem determination of the OHWM is more art than science.

Chapter 61-33.1 proved controversial. In January of 2018, a group of taxpayers challenged the law, contending it was unconstitutional. The plaintiffs' complaint alleged that Chapter 61-33.1 "unconstitutionally gives away State-owned mineral interests to 108,000 acres underneath the OHWM of the Missouri

> River/Lake Sakakawea, and above the Historic OHWM and gives away over $205 million in payments, in violation of the Constitution of the State of North Dakota." Sorum v. State, 947 N.W.2d 382, 388 (N.D. 2020). On July 30, 2020, the North Dakota Supreme Court issued an opinion finding Chapter 61-33.1 did not violate the North Dakota constitution's gift clause, watercourses clause, privileges or immunities clause, the local and special laws prohibition, and the public trust doctrine. Id. at 390-400 (noting the State recognized in Chapter 61-33.1 that it had an obligation to pay its debts and deal fairly with its citizens). On August 27, 2020, the North Dakota Supreme Court in Wilkinson v. Bd. of Univ. & School Lands, 947 N.W.2d 910, 920-21 (N.D. 2020) ("Wilkinson II") found Chapter 61-33.1 was not ambiguous and applied to the land in question which was above the OHWM of the historical Missouri riverbed channel and was not state sovereign lands. The case was remanded to the state district court for a determination of damages on the royalties the state had unfairly claimed.

Id. at 910-13 (footnotes omitted).

On July 24, 1957, the Plaintiffs' predecessors in interest signed a warranty deed with the United States conveying their interest in the surface of the property at issue. The deed was made under the authority of the Flood Control Act of 1944. In a portion of the deed, the predecessors in interest reserved the oil and gas interests. The relevant portion states:

> [R]eserving, however, to the owner of the land or the owner of any interest therein, including third party lessees, their heirs, successors and assigns, all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved are subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation and maintenance of the Garrison Dam and Reservoir, and that any exploration or development of such rights shall be subject to federal or state laws with respect to pollution of waters of the reservoir; provided further that the District Engineer, Corps of Engineers, Garrison District, or his duly authorized representative shall approve, in furtherance of the exploration and/or development of such reserved interests, the type of any structure and/or appurtenances thereto now existing or to be erected or constructed in connection with such exploration and/or development, said structures and/or appurtenances thereto not to be of a material determined to create floatable debris.

(Doc. No. 1-2). The parties do not appear to dispute the nature of the warranty deed itself.

In Count One of the Complaint, Plaintiffs allege the State of North Dakota's statutory scheme for determining the location of the OHWM–and, by extension, ownership of mineral interests–is unconstitutional because it is preempted by federal law through the Flood Control Act of 1944. In Count Two, Plaintiffs allege they have suffered an unconstitutional taking of their mineral interests because the State of North Dakota asserts ownership over the same interests. In Count Three, Plaintiffs seek a declaration from this Court that an unconstitutional taking has occurred and an injunction to prevent the Defendants from claiming ownership of the interests. Finally, in Count Four, Plaintiffs allege the Commissioner has violated their civil rights under 42 U.S.C. § 1983 by depriving them of their interests in the property.

Defendants moved to dismiss this action under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). (Doc. No. 17). They claim the Plaintiffs failed to state a claim upon which relief can be granted under Rule 12(b)(6) in Count One "because Chapter 61-33.1 does not stand as an obstacle to the flood control purposes of the completed Garrison Dam." They also argue the claims in Counts Two and Four should be dismissed under Rule 12(b)(1) because they are barred by sovereign immunity guaranteed in the Eleventh Amendment. Alternatively, Defendants claim under Rule 12(b)(6) Count Four fails to state a claim upon which relief can be granted against the Commissioner in his or her individual capacity. Additionally, they argue Count Three "should be dismissed because the Plaintiffs cannot demonstrate they are entitled to declaratory relief when all of their substantive claims fail . . . ."

II. STANDARD OF REVIEW

A. Rule 12(b)(6)

Rule 8(a)(2), Fed. R. Civ. P., requires a pleading to contain a "short and plain statement

of the claim showing that the pleader is entitled to relief." To meet the minimal pleading requirements of Rule 8(a)(2), something more is required than simply expressing a desire for relief and declaring an entitlement to it. See Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 556 n.3 (2007) ("Bell Atlantic"). The complaint must state enough to "give the defendant fair notice of what the . . . claim is and the grounds upon which it rests." Erickson v. Pardus, 551 U.S. 89, 93 (2007) (quoting Bell Atlantic, 550 U.S. at 555).

Rule 12(b)(6), Fed. R. Civ. P., mandates the dismissal of a claim if there has been a failure to state a claim upon which relief can be granted. In order to survive a motion to dismiss under Fed. Civ. P. 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). A plaintiff must show that success on the merits is more than a "sheer possibility." Id. A complaint is sufficient if its "factual content . . . allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. The court must accept all factual allegations as true, except for legal conclusions or "formulaic recitation of the elements of a cause of action." Id. at 681. A complaint does not "suffice if it tenders a naked assertion devoid of further factual enhancement." Ashcroft, 556 U.S. at 678 (2009).

B. Rule 12(b)(1)

Parties may assert a lack of subject-matter jurisdiction by motion under Fed. R. Civ. P. 12(b)(1). A court deciding a motion under Rule 12(b)(1) must distinguish between a "facial attack" and a "factual attack" on jurisdiction. Davis v. Anthony, Inc., 886 F.3d 674, 679 (8th Cir. 2018) (quoting Osborn v. United States, 918 F.2d 724, 729, n. 6 (8th Cir.1990)). The distinction between the two is described as follows:

> In a facial attack, the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under Rule 12(b)(6). A factual attack occurs when the defendant challenges the veracity of the facts underpinning subject matter jurisdiction. In a factual attack, the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards.

Id. (internal quotations and citations omitted).

Further, if a court considers matters outside the pleadings when adjudicating a Rule 12(b)(1) motion, such consideration does not convert the 12(b)(1) motion to one for summary judgment. Harris v. P.A.M. Transp., Inc., 339 F.3d 635, 637 n.4 (8th Cir. 2003). Additionally, the party seeking to invoke federal subject-matter jurisdiction carries the burden of showing its existence. Jones v. United States, 727 F.3d 844, 846 (8th Cir. 2013) (citing Great Rivers Habitat Alliance v. FEMA, 615 F.3d 985, 988 (8th Cir. 2010)). This burden may not be shifted to another party. Id.

III. DISCUSSION

A. Count One and Federal Preemption of N.D.C.C. ch. 61-33.1

In Count One, Plaintiffs–without citing a specific section–appear to argue the Flood Control Act of 1944 ("the Act") as a whole preempts N.D.C.C. ch. 61-33.1. Plaintiffs allege the Act preempts state law through the operation of the 1957 Warranty Deed because the deed was made under the authority of the federal law. Additionally, they argue the Fifth Amendment preempts the state law. Plaintiffs cite the North Dakota Supreme Court's Sorum opinion to support this preemption argument. See generally Sorum v. State, 2020 ND 175, 947 N.W.2d 382. Defendants argue Count One should be dismissed because it fails to state a claim upon which relief can be granted under Rule 12(b)(6) "because Chapter 61-33.1 does not stand as an obstacle to the flood control purposes of the completed Garrison Dam." (Doc. No. 17).

The Supremacy Clause of the US Constitution "provides that the Constitution, federal statutes, and treaties constitute 'the supreme Law of the Land.'" Kansas v. Garcia, 140 S.Ct. 791, 801 (2020) (citing U.S. Const. art. VI, cl. 2). "If federal law 'imposes restrictions or confers rights on private actors' and 'a state law confers rights or imposes restrictions that conflict with the federal law,' 'the federal law takes precedence and the state law is preempted.'" Id. (quoting Murphy v. Nat'l Collegiate Athletic Ass'n, 138 S.Ct. 1461, 1480 (2018)). "In all cases, the federal restrictions or rights that are said to conflict with state law must stem from either the Constitution itself or a valid statute enacted by Congress." Id.

Federal law may preempt state law either expressly or by implication. Id.; Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 540-41 (2001). When federal law implicitly preempts state law, it does so in one of two ways. Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 98 (1992). First, federal law may preempt a state law through field preemption. Id. Under this scenario, "the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it." Id. (quotations and citations omitted). Second, a federal law may preempt a state law through conflict preemption. Id. Conflict preemption occurs "where compliance with both federal and state regulations is a physical impossibility" or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Id. (quotations and citations omitted). These two forms of conflict preemption are respectively known as impossibility preemption and obstacle preemption. 81A C.J.S. States § 53 (2021). When a party alleges conflict preemption, "[t]he repugnance or conflict should be direct and positive so that the two acts cannot be reconciled or consistently stand together." Id.

Section 9 of the Flood Control Act of 1944 authorized the War Department and the Department of the Interior to create the Pick-Sloan Missouri River Basin Project. Pub. L. No. 78-534, 58 Stat. 891. The authority for the Secretary of the Interior to acquire land for the project was created by a cross reference to the Federal Reclamation Laws. Id. (stating "the reclamation and power developments to be undertaken by the Secretary of the Interior under said plans shall be governed by the Federal Reclamation Laws (Act of June 17, 1902, 32 Stat. 388, and Acts amendatory thereof or supplementary thereto)"). The relevant portion of the Federal Reclamation statute states:

> Where, in carrying out the provisions of this Act, it becomes necessary to acquire any rights or property, the Secretary of the Interior is authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and to pay from the reclamation fund the sums which may be needed for that purpose . . . .

43 U.S.C. § 421; see also U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation.").

In Sorum, the North Dakota Supreme Court reversed a state district court and held N.D.C.C. § 61-33.1-04(1)(b) did not facially violate the "gift clause" of the North Dakota Constitution. 2020 ND 175, ¶¶ 1, 40. Plaintiffs cite a portion of the opinion as authority to support their preemption argument. (See Doc. No. 19). The relevant portion states:

> The Submerged Lands Act, 43 U.S.C. § 1301 – 1356b, generally confirms state ownership or 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 propriety 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. Burling N. Santa Fe R.R., 2005 ND 74, ¶ 5, 694 N.W.2d 840 . . . . 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 . . . .

Sorum, 2020 ND 175, ¶¶ 44-46 (emphasis added).

Plaintiffs in this case are not the United States, and the warranty deed is explicitly clear. The Plaintiffs' predecessors in interest did "grant, bargain, sell and convey" the surface of the property to the United States in the warranty deed. (Doc. No. 1-2). However, the Plaintiffs' predecessors in interest *reserved* the oil and gas interests, and the United States never acquired them under the Flood Control Act. (Id.). Therefore, the proposition asserted in Sorum does not apply, as the United States never held an interest in the mineral interests at issue. See Sorum, 2020 ND 175, ¶¶ 44-46 (stating preemption principles apply to land obtained by the federal government under the Flood Control Act but not articulating a position on property reserved by private parties); see also Continental Resources, Inc., 505 F. Supp.3d at 914 ("Since title is

conferred to the States by the Constitution itself [under the equal footing doctrine], no Congressional land grant to a third party can defeat State title.").

Here, the parties are private entities and do not dispute the facts of the warranty deed. With respect to Count One, one question remains–whether a claim exists under preemption law principles for property reserved in a deed made under the authority of the Flood Control Act. In their complaint, Plaintiffs argue conflict preemption applies, preventing the operation of N.D.C.C. ch. 61-33.1. Plaintiffs seem to indicate both forms of conflict preemption apply–impossibility and obstacle. In any event, a thorough analysis is warranted, and each form of conflict preemption will be addressed in turn.

1. Impossibility Preemption

To establish impossibility preemption, a party must be unable to comply with both federal law and state law. PLIVA, Inc. v. Mensing, 564 U.S. 604, 618 (2011); Merck Sharp & Dohme Corp. v. Albrecht, 139 S.Ct. 1668, 1672 (2019). When determining whether impossibility preemption implies, a court must look to whether it is lawful under federal law to accomplish what the state law requires. See id.

In this instance, the Flood Control Act required the United States to acquire property for the construction of the Garrison Dam and Lake Sakakawea. It authorized the Secretary of the Interior to take the property by purchase or by condemnation. 43 U.S.C. § 421. The United States purchased the surface property it needed from the Plaintiffs' predecessors in interest and chose not to purchase the mineral interests or take them through condemnation. The United States complied with the Flood Control Act by buying the surface property it needed, and the Plaintiffs' predecessors in interest assisted in this compliance by selling the property.

Chapter 61-33.1, N.D.C.C., establishes the State of North Dakota owns the minerals beneath the OHWM of the historical Missouri riverbed channel. As a result, this law requires anyone claiming an interest in those minerals to recognize they belong to the state. The Flood Control Act does not render the operation of N.D.C.C. ch. 61-33.1 impossible. The Flood Control Act merely requires the acquisition of property for the creation of the Garrison Dam and Lake Sakakawea. When property was not acquired for this purpose–like the mineral interests at issue–it remained with the original owner. Chapter 61-33.1, N.D.C.C., recognizes that owner as the State of North Dakota. Since the mineral interests were not purchased or condemned by the United States under the Flood Control Act it is still possible for the State of North Dakota to own them under N.D.C.C. ch. 61-33.1. Therefore, impossibility preemption does not apply.

2. Obstacle Preemption

Obstacle preemption requires a more thorough analysis than impossibility preemption. The Supreme Court has previously said:

> What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects: For when the question is whether a Federal act overrides a state law, the entire scheme of the statute must of course be considered and that which needs must be implied is of no less force than that which is expressed. If the purpose of the act cannot otherwise be accomplished—if its operation within its chosen field else must be frustrated and its provisions be refused their natural effect—the state law must yield to the regulation of Congress within the sphere of its delegated power.

Crosby v. National Foreign Trade Council, 530 U.S. 363, 373 (2000) (internal citations and quotations omitted).

The Eighth Circuit Court of Appeals has already assessed the purpose and intended effects of the Flood Control Act. See South Dakota v. Ubbelohde, 330 F.3d 1014, 1019 (8th Cir. 2003). "Congress enacted the Flood Control Act of 1944 to provide for the orderly management

of the Missouri River Basin." Id. (citing Pub. L. No. 78-534, 58 Stat. 887 (1944)). It also "entrusted the Army Corps of Engineers with the task of managing the River basin." Id. This management requires "constructing and managing the dams and reservoirs created by the Act, making contracts for use of surplus water available at the reservoirs, and prescribing regulations for the use of storage allocated for flood control or navigation at all reservoirs." Id. (internal citations and quotations omitted). While "[t]he dominant functions of the Flood Control Act were to avoid flooding and to maintain downstream navigation," it also recognizes use for "irrigation, recreation, fish, and wildlife." Id. at 1019-20.

The Flood Control Act does not specifically address the allocation of mineral resources underlying the area for the Pick-Sloan Missouri River Basin Project. It also does not address what should be done with mineral resources once they are acquired by the United States or if they are retained by private parties. As this Court noted in Continental Resources, Inc., "Where the Corps was able to acquire the privately-owned lands that it needed through a voluntary sale, it allowed the landowners to reserve the underlying minerals." 505 F.Supp.3d at 911. In those instances, the United States essentially declined to exercise its unilateral option to purchase the mineral estates because it did not need the mineral resources around or underlying the Missouri River to create the Garrison Dam and Lake Sakakawea. Instead, it needed the surface of the property, so it would have an area to store the displaced water due to the construction of the dam.

The United States never needed the underlying mineral interests to pursue the purposes and intended effects of the Flood Control Act. As a result, Chapter 61-33.1 does not frustrate the purposes of the Act. It was enacted in 2017, long after the completed construction of the Pick-Sloan Missouri River Basin Project. Further, the State of North Dakota asserting its ownership of

the minerals beneath the OHWM does not stand in the way of managing the dams, preventing flooding, maintaining navigation, and generally managing the water for irrigation, people, fish, and wildlife. See Ubbelohde, 330 F.3d at 1019-20.

Plaintiffs further assert "states cannot deprive grantees of their interests in property derived from the United States." (See Doc. No. 19). At no point did the United States grant Plaintiffs an interest in any property. Rather, the deed reserved the mineral interests to the Plaintiffs' predecessors in interest. That interest did *not* transfer to the United States at any point. Congress did not pass the Flood Control Act to create additional rights, including when a deed was made under the Act's provisions, for property owners who retained mineral interests. Such a deed does not insulate private property from provisions of state law. Therefore, obstacle preemption does not apply.

3. Conclusion as to Count One

Rule 12(b)(6), Fed. R. Civ. P., requires dismissal of Count One. Plaintiffs have failed to state a claim upon which relief can be granted because conflict preemption does not apply through the creation of the 1957 Warranty Deed.

B. Sovereign Immunity and Counts Two and Four

Defendants argue Counts Two and Four should be dismissed under Fed. R. Civ. P. 12(b)(1) because the Eleventh Amendment entitles them to sovereign immunity. The Eleventh Amendment states, "The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state." "[A]bsent waiver by the State or valid congressional override, the Eleventh Amendment bars a damages action against a State in

federal court." Kentucky v. Graham, 473 U.S. 159, 169 (1985). "Additionally, the Eleventh Amendment prohibits federal-court lawsuits seeking monetary damages from individual state officers in their official capacities because such lawsuits are essentially for the recovery of money from the state." Treleven v. Univ. of Minn., 73 F.3d 816, 818 (8th Cir. 1996). North Dakota has not waived its Eleventh Amendment immunity. See N.D.C.C. § 32-12.2-10.

Here, Defendants claim this Court lacks subject-matter jurisdiction as to Counts Two and Four. This claim is based on the language within the complaint and qualifies as a facial attack on jurisdiction. See Davis, 886 F.3d at 679. In the complaint's prayer for relief, Plaintiffs request "damages to the Vohs Trust and EEE Minerals in an amount equal to damages proven at trial." (Doc. No. 1). However, the Eleventh Amendment bars any recovery for damages against the state and its employees acting in their official capacities, unless a waiver applies. No waiver applies in this instance, and sovereign immunity bars the recovery of damages. Therefore, Counts Two and Four are dismissed under Fed. R. Civ. P. 12(b)(1) to the extent they request monetary damages against Defendants and the Commissioner in his or her official capacity.

C. Counts Two and Four and Failure to State a Claim under Rule 12(b)(6)

Defendants further argue Counts Two and Four should still be dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Count Two alleges Defendants have violated the Fifth Amendment. Count Four alleges the Commissioner has violated 42 U.S.C. § 1983.

1. Count Two

Defendants argue Count Two should be dismissed because a taking never occurred. The Takings Clause of the Fifth Amendment states, "private property [shall not] be taken for public use, without just compensation." Generally, physical and regulatory takings are the two types of

takings recognized under the Fifth Amendment. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 537-38 (2005) (recognizing regulatory takings following Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)). A physical taking includes those instances "in which the government directly appropriates private property or ousts the owner from his domain." Id. at 539. In this instance, Plaintiffs do not allege Defendants physically took the disputed property. Instead, Plaintiffs assert Defendants acted "in a manner that interferes with, or disturbs [Plaintiffs'] rights in their minerals." (Doc. No. 19). They further assert Defendants "recharacterized as public property the Vohs Property, which was previously private property as evidenced by the 1957 Warranty Deed." (Id.). This allegation is more akin to a regulatory taking.

Two categories of regulatory action are generally deemed "*per se* takings." Lingle, 544 U.S. 528, 538 (2005). "First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." Id. "A second categorial rule applies to regulations that completely deprive an owner of all economically beneficial use of her property." Id. (internal quotations and citation omitted). A regulatory taking can also require looking at several different factors to determine if the action is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." Id. at 539. These factors look "directly upon the severity of the burden that government imposes upon private property rights." Id.

As this Court noted in Continental Resources Inc., "Under the equal footing doctrine, upon statehood, States acquire absolute title to the beds of waters then navigable within their borders." 505 F.Supp.3d at 914. Additionally, "Determining the OHWM does not affect title but is simply a matter of finding boundaries." Id. at 917.

Here, the complaint does not dispute the operation of the equal footing doctrine. Instead, the complaint alleges Plaintiffs own the disputed mineral interests by virtue of the 1957 Warranty Deed and Defendants unjustly took the property away through N.D.C.C. ch. 61-33.1. In order for a taking to occur, Plaintiffs needed to own the mineral interests at some point. However, as a matter of constitutional law, the equal footing doctrine has always precluded Plaintiffs from owning the mineral interests up to the OHWM. As indicated above, the 1957 Warranty Deed never transferred any mineral interests below the OHWM to the Plaintiffs because the United States never acquired the interests.

Defendants cannot unjustly take property under the Fifth Amendment, through a physical or regulatory taking, when the State always owned the property under the equal footing doctrine. To the extent Plaintiffs disagree with Defendants' determination of the historic OHWM it is a boundary dispute, not a takings dispute. See id. at 917. Therefore, because Plaintiffs never owned the mineral interests below the OHWM, Count Two is dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

2. Count Four

Defendants also argue Count Four should be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6) because a taking has not occurred. They also allege "state officials cannot commit public takings in their individual capacities." (Doc. No. 18).

As illustrated above, the State cannot take property it already owns. Under North Dakota law, the Commissioner could not have taken property away from the Plaintiffs when it has always been owned by the State. Further, "§ 1983 does not provide a remedy for Supremacy Clause violations." St. Louis Effort for AIDS v. Lindley-Myers, 877 F.3d 1069, 1071 (8th Cir.

2017) (citing Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 324 (2015)). Therefore, Count Four is dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6).

D. Count Three's Request for Declaratory Relief

In Count Three, Plaintiffs request a declaratory judgment stating an unconstitutional taking has occurred and enjoining Defendants from claiming ownership in the mineral interests. Defendants argue Plaintiffs are not entitled to declaratory relief because the substantive counts of the complaint fail. A court may grant declaratory relief when an "actual controversy" exists. 28 U.S.C. § 2201. When no actual controversy exists, a Plaintiff is not entitled to declaratory relief. See generally Regional Home Health Care, Inc. v. Becerra, 19 F.4th 1043 (8th Cir. 2021). Additionally, a court may dismiss a declaratory judgment action for lack of jurisdiction when no actual controversy exists. See McLeod v. General Mills, Inc., 856 F.3d 1160, 1166-68 (8th Cir. 2017) (stating a district court on remand should dismiss a declaratory judgment claim for lack of jurisdiction).

The Eighth Circuit has previously held:

> To satisfy the case-or-controversy requirement, a declaratory judgment action must be "definite and concrete, touching the legal relations of parties having adverse legal interests," "real and substantial," and "admi[t] of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts."

Id. at 1166 (quoting MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 127 (2007)). "Basically, the question in each case is whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Id. (quoting MedImmune, 549 U.S. at 127).

As explained above, N.D.C.C. ch. 61-33.1 is not preempted by federal law and no taking could have occurred. Additionally, Plaintiffs have not alleged a boundary dispute concerning the determination of the historic OHWM. As a result, no actual or substantial controversy exists, and Plaintiffs are not entitled to declaratory relief. Therefore, Count Three is dismissed under Fed. R. Civ. P. 12(b)(1) because this Court lacks jurisdiction.

IV. CONCLUSION

Counts One, Two, and Four fail to state a claim under Fed. R. Civ. P. 12(b)(6). Additionally, no actual controversy exists in Count Three and this Court lacks jurisdiction under Fed. R. Civ. P. 12(b)(1). Therefore, Defendants' Motion to Dismiss (Doc. No. 17) is **GRANTED**.

IT IS SO ORDERED.

Dated this 31st day of May, 2022.

/s/ Clare R. Hochhalter
Clare R. Hochhalter, Magistrate Judge
United States District Court