No. _____

In the Supreme Court of the United States

Paul Sorum, Marvin Nelson, Michael Coachman, Charles Tuttle and Lisa Marie Omlid, each on behalf of themselves and all other similarly situated tax payers of the State of North Dakota,

Petitioners,

vs.

The State of North Dakota, The Board of University and School Lands of the State of North Dakota, The North Dakota Industrial Commission, The Hon. Douglas Burgum, in his official capacity as Governor of the State of North Dakota, and the Hon. Wayne Stenehjem, in his official capacity as Attorney General of North Dakota,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF NORTH DAKOTA

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. In 2017, the North Dakota legislature directed transfer to private interests of 96,000 acres in the sovereign bed of the Missouri River and payment of $187 million. The bed was submerged by the Federal Garrison Dam Project. Petitioners, taxpayers of the State, challenged the statute as violating the Public Trust Doctrine and the State Constitution's Anti-Gift Clause and Flowing Waters Clause. Employing principles of "conflict preemption," the North Dakota Supreme Court held the Federal Flood Control Act of 1944 (33 U.S.C. 701-1) and Submerged Lands Act (43 U.S.C. § 1301) preempt all state law determining ownership of submerged lands. However, "After statehood, the extent of ownership of lands under navigable waters is decided solely as a matter of State law." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 378, 97 S. Ct. 582, 591, 50 L. Ed. 2d 550 (1977). The question presented is: Does Federal law preempt State law for the purpose of determining ownership of the bed of navigable waters within a State?

2. The Court held that the broad grant made by the Submerged Lands Act excluded all land acquired by eminent domain, whereas the plain language of the statute excludes only land acquired in the Government's "proprietary capacity." (43 U.S.C. § 1313(b)). The question presented is: After it is permanently submerged, is land acquired by the Federal Government as part of Federal dam projects included in the broad grant to the states made by the Submerged Land Act?

RELATED PROCEEDINGS

Cass County North Dakota District Court – East Central Division:

Paul Sorum, et al v. The State of North Dakota, et al, No. 09-2018-CV-00089 (July 13, 2019)

Supreme Court of the State of North Dakota:

Paul Sorum, et al v. The State of North Dakota, et al, No. 20190203 (July 30, 2020), Petition for rehearing denied Sept. 21, 2020.

Corporate Disclosure Statement

Not applicable to these Plaintiffs, who are not corporations.

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Marvin Nelson, Michael Coachman, Charles Tuttle and Lisa Marie Omlid, each on behalf of themselves and all other similarly situated tax payers of the State of North Dakota respectfully petition this Court for a Writ of Certiorari to review the Judgement of the North Dakota Supreme Court.

OPINIONS BELOW

The decision by the North Dakota Supreme Court dismissing Taxpayers' claims was reported at *Sorum v. State*, 947 N.W.2d 382 (N.D. 2020). The North Dakota Supreme Court denied Taxpayers' Petition for Rehearing on September 21, 2020. That Order is attached at Appendix pages A-37-A38.

JURISDICTION

Taxpayers' Petition for Rehearing to the North Dakota Supreme Court was denied on September 21, 2020. Taxpayers invoke this Court's jurisdiction under 28 U.S.C. § 1257, having timely filed this Petition for a Writ of Certiorari within 90 days of the denial of its Petition for Rehearing.

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const., Art VI, Cl. 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall

be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const., Art. IV, § 3

New States may be admitted by the Congress into this Union; but no new State shall be formed or erected within the Jurisdiction of any other State; nor any State be formed by the Junction of two or more States, or Parts of States, without the Consent of the Legislatures of the States concerned as well as of the Congress.

The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.

North Dakota State Const., Art. X, § 18

The state, any county or city may make internal improvements and may engage in any industry, enterprise or business, not prohibited by article XX of the constitution, but neither the state nor any political subdivision thereof shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor, not subscribe to or become the owner of capital stock in any association or corporation.

North Dakota State Const., Art. XI, § 3

All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigation and manufacturing purposes.

STATEMENT OF THE CASE

Congress authorized construction of the Garrison Dam Project on the Missouri River in the Flood Control Act of 1944. (33 U.S.C. 701-1). The Garrison Dam was constructed between Fort Berthold and the Montana border from 1947-1954. *See also North Dakota v. U.S. Army Corps of Engineers*, 264 F. Supp. 2d 871, 874-75 (D.N.D. 2003). The Garrison Dam Project added 96,000 acres to the Missouri River bed. N.D.C.C. 61-33.1 (the "Act") unlawfully grants these sovereign acres to private interests. (Cass County, ND, Ct. Doc. 455, Stipulated Facts).

Under the Equal Footing Doctrine, upon North Dakota's admission to the Union in 1889, the new State took title to the lands under navigable waters within the State. *State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 at 370 (1977), *supra* (citing *John Pollard et al., Lessee, v. John Hagan et al.,* 44 U.S. 212, 3 How. 212, 11 L.Ed. 565 (1845); *Reep v. State,* 2013 ND 253, 841 N.W.2d 664 at ¶ 14, 841 N.W.2d at 671. After statehood, State law determines the extent of that boundary. *Id*. Here, State law establishes that North Dakota owns 96,000 mineral acres in the expanded bed of the Missouri River, given away by the Act, in violation of the North Dakota State Constitution and Public Trust Doctrine. This title is absolute. *Corvallis, supra*, 429 U.S. at 374.

The Equal Footing Doctrine was codified by Congress in the Submerged Lands Act, 43 U.S.C.

§ 1311 (a), which granted ". . . (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law…" (43 U.S.C.A. § 1311), to the states, except those acquired by the Federal Government in its proprietary capacity. *Id.* § 1313. Thus, the State of North Dakota has absolute title to beds of its navigable waterways, including the Missouri River. (ND Supreme Court Doc. 59, January 3, 2005 Attorney General Opinion, at p. 2; Cass County, ND, Ct. Doc. 455, Stipulated Facts, ¶ 7).

Effective April 21, 2017, the North Dakota State Legislature passed the Act, transferring away the State's interest in the 96,000 mineral acres of the Missouri River submerged by the Garrison Dam Project and their proceeds. The Act donates to private interests (oil producers) nearly $2 billion of the State's sovereign lands and funds, without receiving return consideration. At the time of the Act, the 96,000 acres consisted of 710 mineral leases ("Leases") covering 25,000 Leased Mineral Acres owned by the State ("LMA") (ND Supreme Ct. Doc. 59, P. App. 137; ND Supreme Ct. Doc. 44, D. App. 51); and approximately 71,000 Unleased Mineral Acres ("UMA"). These are sovereign lands. The Act also gave the oil producers $187 Million in the form of oil lease royalty refunds from North Dakota's Strategic Investment and Initiative Fund (the "SIIF") and forfeited its claim to another $18 million escrowed due to royalty disputes.

The case below turned on the ownership of the bed of the Missouri River and its proceeds. If the State owns these assets, the Act violates the Public Trust Doctrine (prohibiting divestiture of sovereign trust

land) and the North Dakota State Constitution, including the Anti-Gift clause (Art. X., § 18) (prohibiting gifts of State assets to private interests) and the Flowing Waters Clause (Art. XI, § 3) (prohibiting divestiture of lands under navigable waters).

The North Dakota Supreme Court determined that the expanded bed of the Missouri River did not belong to the State. The North Dakota Supreme Court erroneously held: "[The Flood Control Act of 1944 and the Submerged Land Act] preempt operation of any state law that would otherwise vest ownership in the State, including chapter 61-33 and the Public Trust Doctrine." *Sorum v. State*, 947 N.W.2d. at 397-98.

The Court then applied Federal law and held that the State did not own any of the assets, and so "could not give away what it never owned in the first instance," upholding the Act. *Id*. at 398.

Under binding precedent of this Court, the North Dakota Supreme Court should have applied State law to determine ownership of navigable waters after statehood. (e.g. *See State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). Under North Dakota law, including N.D.C.C. 61-33 and forty years of unbroken precedent of the North Dakota Supreme Court, the bed of the Missouri River, the leases, and the proceeds therefrom are owned by the State of North Dakota.

Further, the North Dakota Supreme Court erred in its application of the Submerged Land Act, finding the broad grant of that statute excluded *all* lands acquired by eminent domain. *Sorum*, 947 N.W.2d at 397. However, the limited exception relied on by the Court only excludes lands acquired ". . . by eminent domain [or other means] in a proprietary capacity." (43 U.S.C. § 1313). The Submerged Land

Act then distinguishes between the Government's paramount capacity (e.g. control of navigation) from its proprietary capacity (e.g. ownership and management of mineral rights) (43 U.S.C. § 1314). The land acquired by the Federal Government as part of the Garrison Dam Project was not acquired in its proprietary capacity, so was not excluded from the grant.

The land acquired under the Flood Control Act of 1944 had a paramount purpose—a dam project to control navigation. Congress did not intend to develop or manage mineral rights. The acquisition was authorized by Congress in 1944, but oil was not even discovered until 1951. *Sorum*, 947 N.W.2d at 387.

Having erroneously determined that the State did not own the 96,000 acres, the North Dakota Supreme Court held that the Act was constitutional.

WHY THE COURT SHOULD HEAR THIS CASE

I. The Questions Presented Constitute a Superior Vehicle for this Court to Provide Guidance to the Lower Courts on the Application of the Submerged Land Act to Lands Submerged by Federal Dam Projects.

The Act gives away 96,000 mineral acres of riverbed under navigable waters[1] submerged as part of the Federal Garrison Dam Project. This Court will be able to clarify, for the first time, whether the Submerged Lands Act preempts State law in determining the boundary of State ownership of the land under navigable waterways.

[1] It is undisputed that the Missouri River is navigable. (Cass County, ND, Ct. Doc. 455, Stipulated Facts, ¶ 7).

II. The Questions Presented are of Exceptional Importance to the National Economy and Federal Policy.

The core question here is: Does a State own the mineral rights under navigable waterways submerged by Federal dams and diversion projects within its borders? This answer will affect the ownership of mineral lease royalties worth billions of dollars and regulation of millions of acres of land submerged by Federal projects.

This question impacts 96,000 mineral acres worth about $2 billion in just the section of North Dakota affected by the Act. One set of national estimates stated that water development projects in the United States resulted in 58,000,000 acres of irrigated land,[2] determination of ownership of lands flooded by these projects affects far more than oil royalties, extending to fishing rights, dredging rights and aquaculture. It also implicates regulatory authority and overall management of the riverbed. Modern technology permits access to submerged beds under navigable waters. States use this access for mining, farming and tourism. It is critical to clarify who owns, controls and regulates all lands submerged by Federal dam projects.

III. This Case is a Superior Vehicle for Addressing the Question Presented

It is difficult to conceive of a better case for determining the questions presented. The facts are

[2] See, e.g. https://www.usbr.gov/history/HistoryofLargeDams/LargeFederalDams.pdf (citing Arnold, Evolution of the 1936 Flood Control Act 6-7).

undisputed. Both questions emit clear results, depending on how the Court answers them.

The first question—Whether State law or Federal law should be employed to determine ownership of lands flooded by a Federal dam project—is cleanly presented by the facts of this case. State law clearly establishes State ownership, dictated by a 1989 State law transferring all submerged mineral rights to the State, followed by 40 years of unbroken North Dakota Supreme Court precedent. Relying on conflict preemption, the Court below held that the Federal law preempted State law. As a question of law, either preemption was proper or not. This case presents this question clearly.

The second question, if Federal law is to be applied, is whether lands acquired by eminent domain for a dam project were granted to the states by the Submerged Land Act. This question is squarely posed by the facts of this case. The Act is not ambiguous. It directs the giveaway of mineral rights and their proceeds in the land flooded by the Garrison Dam, keeping for the State the river as it existed before closure of the dam. The core undisputed facts are that the Federal Government acquired the land by purchase or eminent domain as part of the Garrison Dam Project. *Sorum*, 947 N.W.2d at 397. The expanded river bed was undeniably granted to the State in 43 U.S.C. § 1311, unless it is part of the "proprietary capacity" exception in 43 U.S.C. § 1313. Is land acquired by the Federal Government as part of a Federal dam project part of the Submerged Land Act grant? Again, this question of law is clearly presented by the facts of this case.

IV. The North Dakota Supreme Court's Decision is Incorrect.

The North Dakota Supreme Court decision below is the result of two material errors. First, the Court erroneously held that the Flood Control Act of 1944 and the Submerged Land Act preempt State law in determining ownership of navigable waters within the State. The Court should have applied State law, not Federal law, in determining the ownership of the land submerged by the Garrison Dam. *See State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363 (1977). Under North Dakota State law, the land submerged by the Garrison Dam is owned by the State.

Second, in applying the Submerged Land Act, the Court erred by finding that the grant excluded *all* land acquired by eminent domain. To the contrary, the Submerged Land Act grant only excludes "land acquired by eminent domain [or other means] in a proprietary capacity." (43 U.S.C. § 1313). Correct application of the Submerged Land Act determines that the exception does not apply and that the lands submerged by the Garrison Dam Project are owned by the State.

Determination of ownership determines the fate of the Act. If the State owns the submerged riverbed as sovereign land, giving it away to private interests clearly violates the North Dakota State Constitution and Public Trust Doctrine.

A. The Court Erred in Applying Federal Law to Determine the Ownership of the Riverbed.

1. After Statehood, State Law Determines the Extent to Which Ownership of Riverbed Passed to the State by the Equal Footing Doctrine.

The disputed ownership of the riverbed lands should be decided solely as a matter of State law. Upon admission to the union, each state receives absolute title to the beds of navigable waterways within its boundaries. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 3 How. 212, 11 L.Ed. 565 (1845). "Once the equal-footing doctrine vests title to the riverbed in [the State] as of the time of its admission to the Union, the force of that doctrine was spent; it did not operate after that date to determine what effect on titles the movement of the river might have." *Corvallis*, 429 U.S. at 374. After the boundary of the equal footing grant is determined, "The role of the Equal-Footing Doctrine is ended and the land is subject to the laws of the State." *Corvallis*, 429 U.S. at 376. "A similar result obtains in the case of riparian lands which did not pass under that doctrine; state law governs issues relating to such property, like other real property." *Id*. at 377.

"Under *Pollard's Lessee,* the State's title to lands underlying navigable waters within its boundaries is conferred not by Congress, but by the Constitution itself. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the title thus acquired by the State is absolute so far as any federal principle of land titles is concerned." *Corvallis*, 429 U.S. at 376.

The North Dakota Supreme Court erred by holding that, under "conflict preemption" principles, State law does not apply. Because there is no conflict between Federal and State law here, the lower Court's decision cannot be permitted to stand.

2. Legal Standard of Conflict Preemption

The Court below misapplied the Supremacy Clause of the United States Constitution, invoking "conflict preemption" to hold that [The Flood Control Act of 1944 and the Submerged Land Act] "preempt operation of any state law that would otherwise vest ownership in the state, including chapter 61-33 and the Public Trust Doctrine. *Sorum,* 947 N.W.2d at 397.

Conflict preemption exists where "compliance with both state and federal law is impossible," or where "the state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Oneok, Inc. v. Learjet, Inc*., 575 U.S. 373, 377, 135 S. Ct. 1591, 1595, 191 L. Ed. 2d 511 (2015) (citing *California v. ARC America Corp*., 490 U.S. 93, 100, 101, 109 S.Ct. 1661, 104 L.Ed.2d 86 (1989). "Preemption fundamentally is a question of congressional intent." *English v. General Elec. Co*., 496 U.S. 72, 78, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

Conflict preemption only applies where compliance with both the State and Federal laws is impossible or the State law interferes with the purpose of the Federal law. Neither is the case here, so conflict preemption should not have been applied.

3. Under State Law, the State Owns the Land Submerged by the Garrison Dam.

In conducting conflict preemption analysis, it is necessary to understand the extensive body of North Dakota law that establishes State ownership of the 96,000 mineral acres. Under North Dakota law, the State's mineral interest in the beds of navigable waters extends to the current Ordinary High Water Mark ("OHWM"). The Sovereign Lands Management Act (N.D.C.C. 61-33) and the North Dakota Supreme Court specifically confirm the State's ownership to the current OHWM, even as affected by the Garrison Dam. *See Reep,* 2013 ND 253, ¶ 24, 841 N.W.2d 664, 675; *State ex rel. Sprynczynatyk v. Mills*, 1999 ND 75, ¶ 1, 592 N.W.2d 591, 592 ("*Mills II*"); *In re Ownership of Bed of Devils Lake*, 423 N.W.2d 141, 145 (N.D. 1988) ("*Devils Lake*"); and *J.P. Furlong Enter., Inc. v. Sun Explor. & Prod. Co.*, 423 N.W.2d 130, 132 (N.D. 1988). It is undisputed that the State owned the $187 million appropriated from SIIF, the Leases on 25,000 LMA (ND Supreme Court Doc. 59, P. App 137; ND Supreme Court Doc. 44, D. App 51), the 71,000 UMA and the Disputed Claims (ND Supreme Court Doc. 44, D. App 370) and that these assets are lands under navigable waters within North Dakota or proceeds therefrom.

In 1989, North Dakota confirmed its ownership of the beds of navigable waters in the State, passing the Sovereign Lands Management Act. (N.D.C.C. 61-33). The Sovereign Lands Management Act transferred to the state the mineral rights in "all areas, including beds and islands, lying within the ordinary high water mark" in lands "owned or controlled by the State" conclusively affirming the State's title to the beds of "navigable lakes and

streams" up to the OHWM. (N.D.C.C. § 61-33-01 and § 61-33-03). This title includes mineral title. *Reep*, 2013 ND 253, 841 N.W.2d at 664.

North Dakota Chief Justice VandeWalle succinctly summarized North Dakota law regarding State ownership in *Mills II,* 1999 N.D. 75, ¶ 5, 592 N.W.2d. at 593:

> The state owns the beds of all navigable waters within the state. *E.g., J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co.*, 423 N.W.2d 130, 132 (N.D. 1988). As established in *Mills I*, the state has rights in the property up to the ordinary high watermark. The ordinary high watermark is ambulatory, and is not determined as of a fixed date. *See In re Ownership of the Bed of Devils Lake*, 423 N.W.2d 141, 143-44 (N.D. 1988). Thus, the state's ownership of land along the Missouri River is determined by 'the bed of the stream as it may exist from time to time.' *Hogue v. Bourgois*, 71 N.W.2d 47, 52 (N.D. 1955); *see also Devils Lake*, 423 N.W.2d at 144; *Jennings v. Shipp*, 115 N.W.2d 12, 13 (N.D. 1962).

In *Mills II*, the North Dakota Supreme Court *rejected* the argument that the OHWM of navigable water bodies should be "determined by river levels in their natural, pre-dam state, rather than on the artificial conditions created by the Missouri River dam system." 523 N.W.2d at 593, holding the OHWM "is ambulatory, and is not determined as of a fixed date,"

and the State owns the bed "as it may exist from time to time." *Id.*[3]

Under a plain application of State law, the State owns the 96,000 acres of navigable riverbed submerged by closing of the Garrison Dam, and its proceeds. These assets include the $187 million appropriation from SIIF, the Leases, 25,000 LMA, the 71,000 UMA and the $18 million of disputed claims.

The North Dakota Supreme Court erroneously held that the Flood Control Act of 1944 and Submerged Land Act preempted State law, so it ignored the State law of North Dakota. Had the Court applied State law, as it should have, it would have found the Act unconstitutional.

4. The Flood Control Act of 1944 and the Submerged Land Act Do Not Preempt State Law in Determining Ownership of Navigable Waters Within the State.

The North Dakota Supreme Court erred in holding that the Flood Control Act of 1944 and the Submerged Land Act preempt State law. Conflict preemption only applies if it is impossible to comply with both State and Federal law or the State law frustrates the purpose of the Federal law. *Oneok, Inc.,*

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[3] The same principles apply to navigable lakes, so it is legally immaterial whether Lake Sakakawea is a part of the Missouri River or a lake. *Devils Lake* decided that the current OHWM defines the boundary of State ownership of a navigable lake; that the OHWM is not fixed, but ambulatory; and that title to submerged lands reverts to the State. 423 N.W.2d 141, 145. Just as with a river, the State's title to the beds of navigable lakes fluctuates as the OHWM changes. *Id.* at 143-44.

575 U.S. at 377. Neither of these conditions exists, so preemption does not apply.

i. There is no conflict between the Flood Control Act of 1944 and the North Dakota body of law establishing that the State owns the 96,000 mineral acres at issue.

a. It is not impossible to comply with both the Flood Control Act of 1944 and the North Dakota law.

Conflict preemption turns on the identification of "actual conflict," *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 884, 120 S. Ct. 1913, 1927, 146 L. Ed. 2d 914 (2000) (citations omitted). Here, there is no actual conflict between the Flood Control Act of 1944. The North Dakota Supreme Court identified none. The Flood Control Act authorized the Garrison Dam Project, including, *inter alia*, authorizing the Federal Government to acquire land to be submerged when the Dam closed. This law was complied with and the Federal Government acquired the land. North Dakota law includes the Sovereign Lands Management Act and 40 years of North Dakota Supreme Court decisions (*Furlong, Mills I, Mills II and Reep, supra*) establishing that the State owns the bed of navigable waters up to the current OHWM. It is not impossible for the Federal Government to acquire land riparian to navigable waters and then transfer it or lose it later under State law, as the body of water shifts or expands. State law governs issues related to riparian property. *Corvallis*, 429 U.S. at 378. Under this test, conflict preemption does not apply.

b. The State law does not frustrate the purpose of the Flood Control Act of 1944.

The body of North Dakota law establishing State ownership does not interfere or frustrate the Flood Control Act of 1944 in any way. To the contrary, Congress stated its policy in passing the Flood Control Act as ". . . it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control…." (33 U.S.C. § 701-1). The purpose of the Flood Control Act was to recognize the rights of States to development of the waters within their states. Congress's stated purpose is promoted, not frustrated, by State ownership of the mineral rights at issue. Under this test, conflict preemption does not apply.

ii. There is no conflict between the Submerged Land Act and the North Dakota body of law establishing that the State owns the 96,000 mineral acres at issue.

a. It is not impossible to comply with both the Submerged Land Act and the North Dakota law.

Conflict preemption turns on the identification of "actual conflict," *Geier v. Am. Honda Motor Co.*, *supra* at 884. There is no actual conflict between the Submerged Land Act and State law. It is *not* impossible to comply with both. The Submerged Land Act granted to each state all land beneath navigable

water in the state, except for land acquired by the Federal Government in its proprietary capacity (i.e. land acquired to use or manage as a private owner would). This grant is a quitclaim to the States of any federal interest in the land granted. *See United States v. Louisiana*, 394 U.S. 11, 14, 89 S. Ct. 773, 776, 22 L. Ed. 2d 44, decision supplemented, 394 U.S. 836, 89 S. Ct. 1614, 23 L. Ed. 2d 22 (1969), decision supplemented sub nom. *United States v. State of La.*, 525 U.S. 1, 119 S. Ct. 313, 142 L. Ed. 2d 1 (1998) (citing *United States v. Louisiana*, 363 U.S. 1, 80 S.Ct. 961, 4 L.Ed.2d 1025 (1960)).

At its essence, the Submerged Land Act gave to the states whatever rights it had in the river bed, except for lands held in a proprietary capacity. The North Dakota Sovereign Lands Management Act also recognizes this exception, transferring all mineral rights under navigable waters to the state, "subject to existing contracts, rights, easements and encumbrances made or recognized by the state." (N.D.C.C. 61-33-05). Thus, the two bodies of law are harmonious and it is possible to comply with both. Any mineral rights owned by the Federal Government in a proprietary capacity were not granted to the State by the Submerged Land Act, and those rights are excepted from the North Dakota law. As the North Dakota Supreme Court recognized, these exceptions would not save the constitutionality of the Act. "A taxpayer's burden in a facial challenge under the gift clause is satisfied if the statute requires some transfers that would be unconstitutional donations regardless of whether other transfers under the statute would not constitute unconstitutional donations." *Sorum*, 947 N.W.2d at 391 (citing *Eckroth v. Borge*, 69 N.D. 1, 12, 283 N.W. 521, 526 (1939)).

b. The State Law does not frustrate the purpose of the Submerged Land Act.

The body of North Dakota law establishing State ownership does not interfere with or frustrate the purpose of Submerged Land Act. Rather, establishing the extent of ownership by State law is the explicitly stated purpose of the Submerged Land Act. The Submerged Land Act declares:

> It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be, and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors in interest thereof. 43 U.S.C.A. § 1311(a) (*emphasis added*).

By expressing its intent that ownership is to be determined by State law, Congress was effectively also

expressing its intent that the Submerged Land Act would *not* preempt State law in determining ownership. Determining ownership using State law does not frustrate, but rather promotes, the stated purpose of the Submerged Land Act, that State law shall apply. Under this test, conflict preemption does not apply.

In sum, the North Dakota Supreme Court erred by concluding that these Federal laws preempt operation of any state law that would otherwise vest ownership in the State, including chapter 61-33 and the Public Trust Doctrine. This finding is contrary to this Court's precedent requiring State law be used to determine ownership of lands under navigable waters. *Corvallis, supra*.

B. The North Dakota Supreme Court Erred in Applying the § 1313 Exception of the Submerged Lands Act Because the Land Was Not Acquired in a Proprietary Capacity.

All beds of navigable lakes and streams, including "the natural resources . . ." were granted to the State by the Submerged Lands Act (43 U.S.C. § 1311), except "lands acquired by the United States by eminent domain [or otherwise] in a proprietary capacity." (43 U.S.C. § 1313(a)). The North Dakota Supreme Court misapplied this exception. The 96,000 acres were not acquired in a proprietary capacity so the exception should not have applied.

1. The 96,000 Acres Were Not Acquired in the Government's Proprietary Capacity.

The Court erred in finding that the Submerged Lands Act excepts from its broad grant all land acquired through eminent domain. *Sorum*, 947 N.W.2d at 397. This is the wrong test. The correct test is whether the mineral rights were acquired in a "proprietary capacity" as defined in § 1314(a) of the Submerged Lands Act.

The Submerged Lands Act distinguishes between those rights which are "paramount" and those which are "proprietary":

> The United States retains all its navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs, all of which shall be paramount to, but shall not be deemed to include, proprietary rights of ownership, or the rights of management, administration, leasing, use, and development of the lands and natural resources which are specifically recognized, confirmed, established, and vested in and assigned to the respective States . . . . 43 U.S.C. § 1314.

In § 1314(a), the Federal Government defined its "paramount capacity" and its "proprietary" capacity. "Paramount rights" include "navigational servitude and rights in and powers of regulation and

control of said lands and navigable waters . . . ." "Proprietary rights" include "the rights of management, administration, leasing, use, and development of the lands and natural resources. . . ." *Id.* Because the Federal Government undertook the Garrison Dam project in its "paramount," not "proprietary," capacity, the § 1313 exception does not apply.

The key question is whether the Federal Government undertook the Garrison Dam project to control navigation and flooding (Paramount capacity) or to develop the mineral rights at issue (Proprietary capacity). In passing the Submerged Lands Act the Federal Government did not intend to manage the mineral rights which are specifically "vested in and assigned to the respective states." *Id.* The intent of the Submerged Lands Act was to foster management more adapted to the prevailing needs of the local area. *See Murphy v. Dep't of Nat. Res.*, 837 F. Supp. 1217, 1221 (S.D. Fla. 1993), *aff'd,* 56 F.3d 1389 (11th Cir. 1995).[4]

The land was acquired in the State's "paramount capacity"—to control navigation and flooding. The Garrison Dam project was authorized by The Flood Control Act of 1944, which declares its purpose to be "In connection with the exercise of jurisdiction over the rivers of the Nation through the construction of works of improvement, for navigation or flood control…." (33 U.S.C.A. § 701-1). This

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

purpose is the government's "paramount" capacity, not its "proprietary" capacity. (*See* 43 U.S.C. § 1314(a)). The Federal Government undertook the Garrison Dam project to control navigation and flooding, not to develop minerals.

When the Garrison Dam project was authorized in 1944, there was no technology available to develop submerged minerals. Further, oil was not even discovered in the area until 1951. *Sorum*, 947 N.W.2d at 387. In acquiring the land for the Garrison Dam project, the government stopped acquiring mineral rights when oil was discovered. (ND Supreme Court Doc. 59, P. App 126, ¶10). The absence of any mineral development possibility means Congress did not intend to manage, lease or develop the mineral rights, and so it was not acquired in a proprietary capacity.

In the Submerged Lands Act, The Federal Government transferred all submerged minerals to the States except those acquired in a "proprietary capacity" § 1313(a). The 96,000 acres were not acquired in a "proprietary capacity," so the § 1313 exception does not apply and the 96,000 acres were granted to the State.

C. Once State Ownership is Established, the Invalidity of the Act is Undisputed.

1. The State Assets Given Away by The Act.

Once State ownership is established, it is clear that the Act violates the North Dakota Constitution and Public Trust Doctrine. Assuming ownership, it cannot be disputed that the Act gives away State sovereign land in the form of:

a. Leases and Leased Acres ("LMA"):

§§ 04(2)(a) and (b) of the Act mandate forfeiture of the Leases, LMA and future revenue. The Act requires the State to forfeit its interest in and future royalties from 710 existing State-owned mineral leases and the related 25,000 State-owned mineral acres. (ND Supreme Court Doc. 59, P. App 137; ND Supreme Court Doc. 44, D. App 51). The State has owned the Leases for decades, "with the oldest of these leases having been issued in 1965." (ND Supreme Court Doc. 59, P. App 171; P. App 13-14, ¶¶ 4, 7). The Act forfeits a projected $30 million every two years in future income from the Leases. (ND Supreme Court Doc. 44, D. App 51). This transfer violates the Anti-Gift clause (N.D. Const. Art. X, § 18), the Public Trust Doctrine and Flowing Waters Clause (N.D. Const. Art. XI, § 3).

b. Unleased Mineral Acres ("UMA"):

Section 02 of the Act disclaims the State's "claim or title" to the UMA. Of the 96,000 mineral acres given away, about 71,000 mineral are not yet leased. This is sovereign land, subject to exceptions set forth in the Sovereign Lands Management Act (61-33-01, Subd. 5). This transfer violates the Anti-Gift clause (N.D. Const. Art. X, § 18), the Public Trust Doctrine and Flowing Waters Clause (N.D. Const. Art. XI, § 3).

c. $187 Million from North Dakota SIIF:

Sec. 04(1)(b) of the Act gives away $187 million from SIIF. (ND Supreme Court Doc. 59, P. App 130, ¶ 21; 190-91; ND Supreme Court Doc. 44,

D. App 51). These are vested State funds, collected since 2006. This transfer violates the Anti-Gift clause (N.D. Const. Art. X, § 18), the Public Trust Doctrine and Flowing Waters Clause (N.D. Const. Art. XI, § 3).

d. $18 Million in Escrow for Disputed Claims:

Sec 04(1) of the Act requires forfeiture of the State's claims to $18 million escrowed because of title disputes. (ND Supreme Court Doc. 44, D. App 52). The State previously asserted claims for these royalties as owner of each lease at issue. (ND Supreme Court Doc. 59, P. App 13-14). This transfer violates the Anti-Gift clause (N.D. Const. Art. X, § 18), the Public Trust Doctrine and Flowing Waters Clause (N.D. Const. Art. XI, § 3).

D. The Act Violates the Anti-Gift Clause of the North Dakota State Constitution.

Article X, § 18 of the Constitution ("The Anti-Gift clause") prohibits gifts of State assets, stating "…[n]either the state nor any political subdivision . . . shall otherwise loan or give its credit or make donations to or in aid of any individual, association or corporation except for reasonable support of the poor." (N.D. Const., Art. X, § 18). The Act unconstitutionally gives away, without return consideration, $187 million, 710 State issued leases on 25,000 State-owned acres, 71,000 UMA and $18 million in claims made by the State.

The Anti-Gift clause prohibits the State from transferring any public assets into private hands without receiving like value in return. *Gripentrog v. City of Wahpeton*, 126 N.W.2d 230, 237-38 (N.D. 1964); *Petters & Co v. Nelson County*, 281 N.W. 61, 64-65

(N.D. 1938); *Solberg v. State Treasurer*, 78 N.D. 806, 814, 53 N.W.2d 49, 53-55 (1952) (State mineral rights); *Herr v. Rudolf*, 25 N.W.2d 916, 922 (N.D. 1947) (state land); N.D.A.G. 2000-F-13 (books); N.D.A.G 2014-L-09 (royalties from trust land).

Further, the Anti-Gift clause specifically prohibits the transfer of sovereign riverbed and mineral interests to private parties without consideration. *State ex rel. Sprynczynatyk v. Mills*, 523 N.W.2d 537, 539 (N.D. 1994); *Solberg*, 78 N.D. at 817, 53 N.W.2d at 55; *see also Reep v. State,* 2013 ND 253, ¶ 24, 841 N.W.2d 664.

Section 02 of the Act gives away all the mineral rights the State owns within the UMA, disclaiming all title thereto. Section 04 gives away leases, leased mineral acres and royalties. The State receives no return consideration for these mineral rights and royalties. Therefore, giving away these mineral rights is an unconstitutional gift.

E. The Act Violates The Public Trust Doctrine in North Dakota.

1. The Public Trust Doctrine

In North Dakota, the Public Trust Doctrine applies to estop legislation or executive branch agency actions when: (1) the land subject to the legislation or action is sovereign trust corpus; and (2) the legislation or agency action alienates the public's interest in the corpus. *Cf. United Plainsmen Ass'n v. North Dakota State Water Conservation Commission*, 247 N.W.2d 457 at 460-61 (N.D. 1976) (citing *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892)).

The Public Trust Doctrine requires that the State hold its sovereign resources in trust for the

benefit of all people of North Dakota. The State holds as sovereign all riverbeds up to the current OHWM of the Missouri River and the proceeds derived from those lands. This includes the 96,000 mineral acres and $205 million in related royalties that are given away by the Act. The Act violates the Public Trust Doctrine because it separates these sovereign resources from the Public Trust.

The State "could not totally abdicate its interest 'in the bed of navigable waters' to private parties because it held that interest, by virtue of its sovereignty, in trust for the public." *Mills I*, 523 N.W.2d at 540. The fiduciary duty imposed by the Public Trust Doctrine is so sweeping that a legislature may never abdicate its trust over property in which the whole people are interested, like navigable waters and soils underneath them. *Illinois Cent. R. Co.*, 146 U.S. at 453–54; *Oregon*, 295 U.S. at 14. Courts must enforce the Public Trust Doctrine to safeguard the Public Trust corpus from improper dispensation or use by the legislature and executive branches.

The United States Supreme Court's decision in *Illinois Central* is the seminal case discussing the strict Public Trust interests in submerged lands. *Illinois Cent. R. Co.*, 146 U.S. at 452. "A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." *Id.* at 453. *Illinois Central* held that the State legislature lacked the power to grant submerged lands under Lake Michigan to a railroad and invalidated the statute doing so. *Id.* at 463-64. North Dakota has followed *Illinois Central*. *See United Plainsmen*, 247 N.W.2d at 461 (quoting *Illinois Central*, 146 U.S. at 453); *see also PPL Montana, LLC*

v. State of Montana, 565 U.S. 576, 603 (U.S. 2012) (citing *Illinois Central,* 146 U.S. at 453).

2. The Assets Given Away are all Sovereign Lands of the State of North Dakota.

The UMA and the LMA as the bed of navigable waters, are sovereign lands of the State. *Mills II*, 592 N.W.2d at 593-94; N.D.C.C. 61-33. Minerals below the OHWM of navigable lakes and streams became sovereign lands of the State by 1989, except where the State had sanctioned an existing encumbrance at that time. (N.D.C.C. 61-33-03; -04). This includes the mineral rights "lying within the ordinary high water mark of navigable lakes and streams." (N.D.C.C. § 61-33-01). "No evidence other than the provisions of this chapter is required to establish the fact of transfer of title to the state of North Dakota." (N.D.C.C. § 61-33-03). The North Dakota Supreme Court has confirmed the State's ownership of these minerals on multiple occasions. *See Furlong*, 423 N.W.2d at 140; *Reep*, 2013 ND 253, ¶ 26, 841 N.W.2d at 675; *Mills I*, 523 N.W.2d at 543; *Mills II*, 1999 ND 75, ¶¶ 5, 10, 592 N.W.2d at 593.

When land is submerged under navigable waters—specifically including land submerged by Garrison Dam—it becomes the State's sovereign property. *See Mills II*, 592 N.W.2d at 593-94; N.D.C.C. 61-33. No party disputes the 96,000 acres are among the State's navigable lakes and streams. It is part of the Missouri River, a navigable water body. (ND Supreme Court Doc. 59, P. App 159; ND Supreme Court Doc. 44, D. App 214, ¶ 13; 219). It is undisputed that by 1989 the 96,000 acres were "lying within the ordinary high water mark" and so the related mineral

rights were transferred to the State under the Sovereign Lands Management Act.

The 96,000 acres and $205 million are part of the public trust corpus. The Act alienates them from the public interest. (*See* pp. 21-22, *supra*). The Act thus violates the Public Trust Doctrine.

V. The Act Violates the Flowing Waters Clause of the North Dakota State Constitution.

The Act also violates North Dakota's constitutional "Flowing Waters Clause," which provides: "All flowing streams and natural watercourses shall forever remain the property of the State for mining, irrigation and manufacturing purposes." N.D. Const., Art. XI, § 3. This provision protects economic interests of the State in its rivers and lakes. *See Mills I*, 523 N.W.2d at 543 (citing N.D. Const., Art. XI, § 3). In conformity with this clause, the Legislature has confirmed that sovereign lands include "those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams." (N.D.C.C. § 61-33-01) (emphasis added). Sections 04 (2)(a) and (b) of the Act violate the Flowing Waters Clause by abdicating the State's mineral rights in the bed of a state water course—the Missouri River—thus depriving the State of its benefits for the purpose of mining.

CONCLUSION

For all the foregoing reasons, the Taxpayers of the State of North Dakota respectively petition the Court for a Writ of Certiorari to review the Judgment of the North Dakota Supreme Court.

Respectfully submitted.

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