Corrected Opinion Filed 8/17/20 by Clerk of the Supreme Court Substitute Opinion Page 2, Paragraph 4 and Page 3 filed 08/04/2020 Filed 07/30/20 by Clerk of Supreme Court

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

2020 ND 175

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

v.

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

No. 20190203

Appeal from the District Court of Cass County, East Central Judicial District, the Honorable John C. Irby, Judge.

AFFIRMED IN PART AND REVERSED IN PART.

Opinion of the Court by Tufte, Justice, in which Chief Justice Jensen, Justice VandeWalle, and Surrogate Judge Anderson joined. Justice Crothers filed a specially concurring opinion, in which Chief Justice Jensen joined.

Terrance W. Moore (argued), J. Robert Keena (appeared), and Joseph M. Barnett (on brief), Edina, Minnesota, for plaintiffs, appellees, and cross-appellants Marvin Nelson, Michael Coachman, Charles Tuttle, and Lisa Marie Omlid.

Paul J. Sorum (appeared), self-represented, Bismarck, North Dakota, plaintiff, appellee, and cross-appellant.

Matthew A. Sagsveen (appeared), Solicitor General, Office of Attorney General, Bismarck, North Dakota, for defendants, appellants, and cross- appellees the State of North Dakota, the Hon. Douglas Burgum, and the Hon. Wayne Stenehjem.

Daniel L. Gaustad (argued), Ronald F. Fischer (on brief), and Joseph E. Quinn (on brief), Special Assistant Attorneys General, Grand Forks, North Dakota, for defendant, appellant, and cross-appellee North Dakota Industrial Commission.

Mark R. Hanson (appeared), Special Assistant Attorney General, Fargo, North Dakota, for defendant, appellant, and cross-appellee Board of University and School Lands of the State of North Dakota.

Craig C. Smith (on brief) and Paul J. Forster (on brief), Bismarck, North Dakota, for amicus curiae North Dakota Petroleum Council.

Sorum v. State No. 20190203

Tufte, Justice.

[¶1] The Plaintiffs, in their individual capacities and on behalf of similarly situated taxpayers, commenced this action for a declaratory judgment that chapter 61-33.1, N.D.C.C., relating to the ownership of mineral rights in lands subject to inundation by the Garrison Dam, is unconstitutional. The district court concluded that N.D.C.C. § 61-33.1-04(1)(b) is on its face unconstitutional under the "gift clause," N.D. Const. art. X, § 18, and enjoined the State from issuing any payments under that statute. The court rejected Plaintiffs' constitutional challenges to the rest of chapter 61-33.1. The Defendants appeal and the Plaintiffs cross-appeal from the court's orders, judgment, and amended judgment. We reverse that portion of the judgment concluding N.D.C.C. § 61- 33.1-04(1)(b) violates the gift clause and the court's injunction enjoining those payments. We also reverse the court's award of attorney's fees and costs and service award to the Plaintiffs because they are no longer prevailing parties. We affirm the remainder of the orders and judgment, concluding the Plaintiffs have not established that chapter 61-33.1 on its face violates the constitution.

I

[¶2] In 1944, the United States Congress authorized the construction of the Garrison Dam on the Missouri River. Closure of the Garrison Dam resulted in the impoundment of water in a reservoir now known as Lake Sakakawea. Before construction began, the Army Corps of Engineers surveyed the area to be inundated by the reservoir. The Corps used the survey to

determine the acreage necessary to be taken for the Garrison Dam project. The Corps acquired through purchase or condemnation land that now makes up the bed of Lake Sakakawea.

[¶3] In 1951, oil was first discovered in the Bakken Formation, some of which lies under present-day Lake Sakakawea. Some owners of land in the Garrison Dam take area reserved their mineral interests when they conveyed land title to the United States. Beginning around 2006, horizontal drilling and hydraulic fracturing made oil and gas underneath the bed of Lake Sakakawea economically accessible to producers.

[¶4] The Board of University and School Lands ("the Land Board") manages the state's sovereign lands related oil and gas interests. The State Engineer manages all other state-owned minerals. In 2008, the Land Board authorized a "Phase l" survey to determine the ordinary high water mark ("OHWM") of the Yellowstone and Missouri Rivers west of the Highway 85 Bridge. In 2010, the Land Board authorized the "Phase 2" survey of the historical OHWM of the Missouri River from Trenton to the Fort Berthold Reservation as it existed prior to closure of the Garrison Dam. The Land Board used the Phase 2 survey results for leasing sovereign minerals east of the Highway 85 Bridge.

[¶5] The Phase 2 report contained the caveat that "[t]he work completed under this contract was to investigate and identify the OHWM using historic data, and is not a final legal determination as to whether any specific property is 'sovereign land.'" In anticipation of title disputes, the Land Board also established escrow accounts for disputed funds.

[¶6] In 2017, the Legislative Assembly enacted Senate Bill 2134, which is now codified as N.D.C.C. ch. 61-33.1 ("the Act"). The Act sought to define and limit claims of state ownership of the minerals underneath Lake Sakakawea. Section 61-33.1-02, N.D.C.C., states:

> The 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. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel subject to inundation by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments subject to inundation by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

[¶7] Under the Act, the Corps Survey acted as the presumptive historical OHWM of the Missouri River. N.D.C.C. § 61-33.1-03(1). The Act directed the department of mineral resources to hire an engineering

firm to review the corps survey. N.D.C.C. § 61-33.1-03(2). Wenck Associates, Inc., completed a survey, and its results were adopted as the true historical OHWM of the Missouri River.

[¶8] The Act also provided that within six months after the Land Board adopted the acreage determination, "[a]ny royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title." N.D.C.C. § 61- 33.l-04(1)(a). The Act is retroactive and applies to oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership. *Id;* 2017 N.D. Sess. Laws ch. 426, § 4. The Legislative Assembly appropriated $100 million for these 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.

[¶9] In January 2018, the Plaintiffs sued the Defendants, seeking a declaratory judgment that the Act is unconstitutional, and to enjoin the Defendants from enforcing it. The Plaintiffs' complaint alleged N.D.C.C. ch. 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." The Plaintiffs sought "a declaration that 61-33.1 is unconstitutional and an injunction prohibiting all State officials from further implementing and

enforcing the Act."
[¶10] The Defendants moved to dismiss under N.D.R.Civ.P. 19(b). The Defendants argued the Plaintiffs' failure to join all parties with leaseholds and other interests in the minerals affected by the lawsuit required dismissal. The district court denied the Defendants' motion, concluding the Plaintiffs did not fail to join any necessary party.

(¶11] The Plaintiffs moved to preliminarily enJ01n the Defendants from enforcing the Act. The district court concluded the Plaintiffs were unlikely to prevail on any of their claims except that payments authorized under N.D.C.C. § 61-33.1-04(1)(b) violated the gift clause of the North Dakota Constitution. The district court granted a partial preliminary injunction preventing the Defendants from releasing refund payments under N.D.C.C. § 61-33.1-04(1)(b).

[¶12] The parties submitted opposing motions for summary judgment premised on material facts stipulated for purposes of the motions. With one exception, the district court rejected the constitutional challenges to N.D.C.C. ch. 61-33.1 and granted summary judgment in favor of the Defendants. The court concluded the authorization for payment of refunds under N.D.C.C. § 61- 33.1-04(1)(b) on its face violates the gift clause, N.D. Const. art. X, § 18, and enjoined the Defendants from paying the refunds.

[¶13] The Plaintiffs moved for an award of attorney's fees, costs, and service awards. The Plaintiffs asked for $62,271,000 in attorney's fees under the common fund and private attorney general doctrines. The Plaintiffs' attorneys submitted affidavits indicating the number of hours billed and hourly rates of the attorneys

totaling $2,428,111 and $138,914.96. The district court concluded there was no common fund and the Plaintiffs' lodestars were excessive, but it awarded $723,200 and $43,800 in attorney's fees to the Plaintiffs under the private attorney general doctrine. It also awarded $18,145.20 in costs. The court awarded a service award to the named Plaintiffs in the amount of $5,000 plus $50 per hour dedicated to the case by each Plaintiff. The court did not cite legal authority for the award, but instead cited Quaker Oats pitchman Wilford Brimley, stating "it's the right thing to do."

II

(¶14] The Defendants argue the district court abused its discretion in denying their motion to dismiss for failure to join an indispensable party under N.D.R.Civ.P. 19(b). We review a district court's decision on a motion to dismiss for failure to join an indispensable party for an abuse of discretion. *Statoil Oil & Gas LP v. Abaco Energy, LLC,* 2017 ND 148, ¶ 6, 897 N.W.2d 1. A court abuses its discretion only when "it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law." *Id.* at ¶14 (quoting *Datz v. Dosch,* 2014 ND 102, ¶ 22, 846 N.W.2d 724).

[¶15] Rule 19(a), N.D.R.Civ.P., provides for the joinder of persons needed for just adjudication. *Stonewood Hotel Corp. v. Davis Dev., Inc.,* 447 N.W.2d 286, 289 (N.D. 1989). Under N.D.R.Civ.P. 19(a), a required party is one who "in that person's absence, the court cannot accord complete relief among existing parties" or one who holds "an interest relating to the subject of

the action and is so situated that disposing of the action in the person's absence may ... as a practical matter impair or impede the person's ability to protect the interest; or ... leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest."

[¶16] Rule 19(b), N.D.R.Civ.P., provides for dismissal of an action in which a required party cannot be made a party and is indispensable. "Dismissal of an action for non-joinder of a party is an extreme remedy which should only be granted where a party is truly 'indispensable.'" *Kouba v. Great Plains Pelleting, Inc.,* 372 N.W.2d 884, 887 (N.D. 1985).

[¶17] "Complete relief' enjoining any enforcement of N.D.C.C. ch. 61-33.1 can be accorded without joinder of leaseholders or other interest holders in this action. The Defendants argue the court erred because proceeding in the action without joining leaseholders and other interest holders would risk incurring double, multiple, or otherwise inconsistent obligations for those individuals. It is well-settled that joinder of all affected parties is not required where the plaintiff seeks to vindicate a public right. *See National Licorice* Co. *v. NLRB,* 309 U.S. 350, 362-63 (1940). Here, the action is a taxpayer challenge to the constitutionality of a statute. Taxpayer challenges differ from most civil cases in that a private party seeks to vindicate not only the party's own individual rights, but the rights of the public at large. Because the Plaintiffs here are seeking to enforce public rights, they were not required to join every affected party. The district court did not act in an arbitrary, unreasonable, or unconscionable manner, or misinterpret or misapply the law. Therefore, we hold

the district court did not abuse its discretion in denying the Defendants' Rule 19 motion to dismiss, and affirm the order denying the motion.

III

[¶18] In their complaint, the Plaintiffs sought a declaration that N.D.C.C. ch. 61-33.1 is unconstitutional under the North Dakota Constitution's gift clause, watercourses clause, privileges or immunities clause, and the local or special laws prohibition. The Plaintiffs also argued the Act violates the public trust doctrine and sought declaratory relief and an injunction prohibiting all state officials from implementing or enforcing the Act. The district court rejected these challenges to the Act, with the exception of N.D.C.C. § 61-33.1-04(1)(b), which the court concluded was facially unconstitutional under the gift clause.

[¶19] "Whether a statute is unconstitutional is a question of law, which is fully reviewable on appeal." *Teigen v. State,* 2008 ND 88, ¶7, 749 N.W.2d 505 (citing *Best Products* Co., *Inc. v. Spaeth,* 461 N.W.2d 91, 96 (N.D. 1990)). When interpreting constitutional provisions, "we apply general principles of statutory construction." *State ex rel. Heitkamp v. Hagerty,* 1998 ND 122, ¶13, 580 N.W.2d 139 (quoting *Comm'n on Med. Competency v. Racek,* 527 N.W.2d 262, 266 (N.D. 1995). We aim to give effect to the intent and purpose of the people who adopted the constitutional provision. *Id.* We determine the intent and purpose of a constitutional provision, "if possible, from the language itself." *Kelsh v. Jaeger,* 2002 ND 53, ¶ 7, 641 N.W.2d 100. "In interpreting clauses in a constitution we must presume that words have been employed in their

natural and ordinary meaning." *Cardiff v. Bismarck Pub. Sch. Dist.,* 263 N.W.2d 105, 107 (N.D. 1978).

[¶20] "A constitution 'must be construed in the light of contemporaneous history-of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.'" *Hagerty,* 1998 ND 122, ¶17, 580 N.W.2d 139 (quoting *Ex parte Corliss,* 16 N.D. 470, 481, 114 N.W. 962, 967 (1907)). Ultimately, our duty is to "reconcile statutes with the constitution when that can be done without doing violence to the language of either." *State ex rel. Rausch v. Amerada Petroleum Corp.,* 78 N.D. 247, 256, 49 N.W.2d 14, 20 (1951). Under N.D. Const. art. VI, § 4, we "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."

[¶21] The Plaintiffs' constitutional challenges are "facial" challenges rather than "as-applied" challenges. Rather than challenging a particular refund under a particular lease as a constitutional violation by the state officer executing the law, the complaint sought "a declaration that [N.D.C.C. ch.] 61-33.1 is unconstitutional." A claim that a statute on its face violates the constitution is a claim that the Legislative Assembly exceeded a constitutional limitation in enacting it, and the practical result of a judgment declaring a statute unconstitutional is to treat it "as if it never were enacted." *Hoff v. Berg,* 1999 ND 115, ¶ 19, 595 N.W.2d 285. The Plaintiffs' assertion of standing as taxpayers underscores this. The Plaintiffs assert no personal interest or ownership in the minerals at issue-as taxpayers, they claim only financial harm to the government and seek a

declaration that the Act is void and no payments may be made under its authority. A facial challenge to a statute presents a higher bar than an as-applied challenge because under N.D. Const. art. VI, § 4, it requires four votes in this court to declare a legislative enactment unconstitutional. A facial challenge is purely a question of law because the violation, if any, occurs at the point of enactment by virtue of the Legislative Assembly enacting a law prohibited by the constitution. *Id.* A violation that occurs at the time of enactment does not depend on any facts or circumstances arising later.

A

(¶22] The Defendants argue that because the Plaintiffs' claims are limited to facial challenges, their burden is to establish there is no set of circumstances under which chapter 61-33.1 could constitutionally be applied. As presented here, the Defendants argue the Plaintiffs must establish that the State owns the entire affected area because the Act could constitutionally be applied to any lands the State does not own. Likewise, N.D.C.C. § 61-33.1-04(1)(b) applies to claims for return of royalties within the statute of limitations and to claims that have lapsed. The Defendants cite to our recent application of a "no set of circumstances" standard to an individual's facial equal protection challenge. *Larimore Pub. Sch. Dist. No. 44 v. Aamodt,* 2018 ND 71, ¶ 38, 908 N.W.2d 442 (citing *U.S. v. Salerno,* 481 U.S. 739, 745 (1987)). The Defendants' assertion that they can defeat all of these facial challenges at the outset by hypothesizing a constitutional application is unpersuasive and inconsistent with how we have analyzed facial challenges brought by taxpayers seeking to invalidate

spending statutes under the constitution's gift clause and debt limit provisions.

[¶23] The Plaintiffs argue the State may not legitimate an unconstitutional gift by pairing it with transfers that do not violate the gift clause. If the State owns some of the mineral acres in the affected area, it may not by statute renounce all interest in all the acres and respond to a gift clause challenge by asserting the statute is facially constitutional because it has constitutional application to the renounced acreage the State didn't own to begin with. We apply our longstanding standard for taxpayer challenges to statutes under the gift clause. 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. *State ex rel. Eckroth v. Borge,* 69 N.D. 1, 12, 283 N.W. 521, 526 (1939) (reasoning that if statute removed recipient need as qualification, it would provide assistance "at least to some who are not in need" and would thus violate the gift clause).

(¶24] In resolving taxpayer challenges to the constitutionality of statutes authorizing government spending, we have said "where the constitutionality of a statute depends upon the power of the legislature to enact it, its validity must be tested by what might be done under color of the law and not what has been done." *Herr v. Rudolf,* 75 N.D. 91, 103, 25 N.W.2d 916, 922 (1947) (citing *State v. Stark County,* 14 N.D. 368, 103 N.W. 913 (1905)). Because the Act requires the State to release all royalties, under both enforceable claims and previously-lapsed claims, it necessarily

includes transactions that are without legal obligation and thus we must determine whether those transactions are prohibited "donations." Accordingly, despite having constitutional application to unexpired claims, in the context of a taxpayer challenge under the gift clause, we conclude the Plaintiffs' facial challenge does not fail merely because the statute includes constitutional applications along with potentially unconstitutional applications.

B

[¶25] The gift clause of the North Dakota Constitution provides:

> 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, nor subscribe to or become the owner of capital stock in any association or corporation.

N.D. Const. art. X, § 18. Section 61-33.1-04(1)(b), N.D.C.C., provides that within six months after adoption of the acreage determination by the Land Board:

> Any royalty proceeds held by the board of university and school lands

> attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

This section applies retroactively to all wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership. 2017 N.D. Sess. Laws ch. 426, § 4.

[¶26] The Plaintiffs identify four categories of state-owned funds or property which they claim the Act gives away to private individuals in violation of the gift clause. The categories are: (1) leases and leased mineral acres; (2) unleased mineral acres; (3) $187 million in the Strategic Investments and Improvements Fund ("SIIF"); and (4) $18 million escrowed because of royalty disputes. The district court's analysis of section 61-33.1-04(1)(b) implicates only category 3, the royalty proceeds held in the SIIF. Because the Plaintiffs cross-appeal the district court's rejection of their facial challenge to the chapter as a whole, we must also consider the chapter's application to the other categories of money or property. The Defendants argue the State had no protectable interest in the property that could be given away and that reviving claims against the State barred by the statute of limitations does not implicate the gift clause.

[¶27] The district court interpreted N.D.C.C. § 61-33.1-04(1)(b) to require the Land Board to transfer

State funds from the SIIF to newly adjudicated mineral owners without consideration to the State because its retroactivity to 2006 effectively extended the statute of limitations, reviving claims against the State that were barred before the Act became effective. The relevant statute of limitations is N.D.C.C. § 28-01-22.1, under which any action against the state, state employees or state officials "must be commenced within three years after the claim for relief has accrued." The district court reasoned that any royalty proceeds subject to claims that had lapsed under the three-year statute of limitations were indisputably owned by the State because they were no longer subject to any legally enforceable claim. It concluded that by directing payment of money to private parties under lapsed and unenforceable claims, section 61- 33.1-04(1)(b) violates on its face the constraints of N.D. Const. art. X, § 18. The district court also concluded there was no constitutional violation presented by the other provisions of the Act, either with respect to the funds in the SIIF or to the other categories of property interests asserted as prohibited gifts.

[¶28] The issue before us is whether refunds under section 61-33.1-04(1)(b) or other provisions of the Act directing transfer or release of the State's interest in these four classes of property constitute "donations" prohibited by the gift clause.

[¶29] We first consider the ordinary meaning of "donation" at the time the provision was enacted. The phrase "make donations to or in aid of any individual, association or corporation" appeared in the original 1889 constitution, then numbered Section 185. *Haugland v. City of Bismarck,* 2012 ND 123, ¶ 26, 818

N.W.2d 660. Dictionaries of the era defined "donation" by reference to the Latin word donatio, meaning "[t]he act by which the owner of a thing voluntarily transfers the title and possession of the same from himself to another person, without any consideration." Bouvier, *A Law Dictionary* 559 (15th ed. 1883); Black, *A Dictionary of Law* 389 (1st ed. 1891) (same); *Webster's Complete Dictionary* 404 (1886 ed.) (quoting Bouvier for definition used in law and providing common definition as "[t]hat which is given or bestowed; that which is transferred to another gratuitously, or without a valuable consideration; a gift; a grant."). These consistent definitions comport with the modern usage of "donation" and provide a reliable starting point in determining how the term would have been used and understood by those who drafted and adopted the provision. *See Wilkens v. Westby*, 2019 ND 186, ¶ 8, 931 N.W.2d 239 ("Using dictionaries close in time to the enactment of a statute is helpful in determining substantive meaning.").

[¶30] When the North Dakota Constitution was adopted, New York had a provision that was "nearly identical in language with section 185." *Erskine v. Steele Cty.*, 87 F. 630, 636 (C.C.D.N.D. 1898), *aff'd,* 98 F. 215 (8th Cir. 1899). Authoritative interpretations of gift clauses in other state constitutions that predated adoption of the North Dakota constitution in 1889 are particularly persuasive. "Courts in construing constitutional or statutory provisions which have been taken from another state almost invariably hold that the Legislature or the Constitution makers are presumed to have adopted it with knowledge of the construction or interpretation given it by the courts of the state whence it comes, and

therefore to have adopted such construction or interpretation." *State ex rel. McCue v. Blaisdell,* 18 N.D. 31, 119 N.W. 360, 365 (1909). New York amended its constitution in 1875 to forbid gift or loan of the money of the state. *Trustees of Exempt Firemen's Benev. Fund of City of New York v. Roome,* 93 N.Y. 313, 316 (1883). Interpreting this clause soon after its adoption, New York's high court considered a gift clause challenge to a statute authorizing payment to firemen "after the service ended, and when there was no legal or equitable obligation operating upon the State." *Id.* at 326. The court concluded the historical circumstances showed the payment was not a prohibited donation, but discharge of an honorable obligation, analogizing to payment of a debt discharged in bankruptcy:

> If a merchant fails in business and compromises with his creditors for a part only of their debts, or is discharged in bankruptcy with a small dividend, and thereafter being fortunate and becoming rich, calls his old creditors together, and gives to each principal and interest of the discharged balance, he does what he is not obliged to do, what neither law nor equity could compel, but he does not make a gift or dispense a charity. A purely moral obligation rests upon him, which he may or may not heed, but if he does, it characterizes his act, and makes that an honest payment of an honest debt which otherwise would have been a charity and a gift.

Roome, 93 N.Y. at 326.

[¶31] *Roome* did not characterize the appropriation for the firemen as supported by only a moral obligation without past consideration supporting it. As a result of technological and organizational changes in firefighting, many firemen were discharged from service, although "they stood ready to serve their full terms." *Id.* at 325. The court explained that the payment to the firemen after their service had ended was "an honorable obligation founded upon their past services and the injuries and suffering which those had occasioned." *Id.* at 326. The court concluded the payment of public money to the exempt firemen was not a gift or donation prohibited by the state constitution: "the constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation founded upon a public service, invited by the State, adopted as its agency for doing its work, and induced by exemptions and rewards which good faith and justice require should last so long as the occasion demands." *Id.* at 327.

[¶32] After North Dakota adopted its gift clause, at least two states considered whether payment of a claim against the state that is no longer legally enforceable is a donation under a similar constitutional provision. In *Bickerdike v. State,* the Supreme Court of California considered legislation waiving the defense of a statute of limitations for claims that had expired several years prior to passage of the act. 78 P. 270, 275 (Cal. 1904). The court concluded waiver of the limitations defense was not a gift within the meaning of the constitutional provision because the defense did not extinguish the underlying debt obligation but only barred remedy in court. "The payment of such a debt by the debtor is not a 'gift,' in any proper sense of the word, and there is

nothing in the constitutional provision invoked that can be held to prohibit the legislature from paying these claims." *Id.*

[¶33] The Supreme Court of Wyoming has also considered a challenge under a provision forbidding the state to "make donations to or in aid of any individual . . . except for necessary support of the poor." *State v. Carter,* 30 Wyo. 22, 29, 215 P. 477, 479 (1923). The Wyoming legislature had appropriated three thousand dollars for relief of the widow of an undersheriff who had been killed in the line of duty. Considering the claim that this was an unconstitutional donation, the court explained:

> In a sense, of course, every payment not legally enforceable might be said to be a gift. But courts have not, generally, construed that term as broadly as that. *A claim paid after it is barred by the statute of limitation is not considered a gift, but the recognition of a moral right,* and, when the existence thereof is acknowledged after the statute has run, it may even be enforced in an action at law. And it is generally held that, to be a claim which a state may recognize, it need not be such as is legally enforceable, but may be a moral claim, one based on equity and justice.

Id. (emphasis added).

[¶34] This Court has previously said that "a moral or equitable obligation on the state" may support a transfer lacking any money or other consideration.

Solberg v. State Treasurer, 78 N.D. 806, 814, 53 N.W.2d 49, 53 (1952). In *Solberg,* we found no sufficient moral or equitable obligation supported a finding of consideration for the release of a reservation of mineral rights. *Id.* at 53-54. In that case, the State conveyed land subject to a 50% mineral reservation for an agreed price that accounted for the reserved minerals. *Id.* at 50. The State never had a legal obligation to convey the 50% mineral interest it reserved, and thus we concluded the legislation gratuitously conveying this mineral interest to the surface owner was void under the gift clause. *Id.* at 53-54. We also considered "moral" consideration, finding none, when interpreting "donation" in *Petters* & Co. *v. Nelson County,* 68 N.D. 471, 480, 281 N.W. 61, 65 (1938). As in *Solberg,* and unlike the situation here, the State had no prior legal obligation to pay the plaintiffs claim. Rather than paying a previously valid claim to which the State had a statutory defense, the statute at issue in *Petters* & Co. created a new obligation, which the Court held would "constitute a donation, a pure and simple gratuity, unsupported by any consideration, legal, equitable, or moral." *Id.*

[¶35] These cases are consistent with the underlying rule of law found in the field of contracts, which for centuries has recognized the concept of moral obligations providing legal consideration to support formation of a contract - but only a contract related to the obligation. One prominent treatise explains the history of consideration based on a moral obligation as follows:

> Beginning about the middle of the 18th Century, the term "moral obligation" as a kind of past consideration that would

validate a subsequent promise to fulfill the obligation gained currency. This theory of moral consideration was applied in various cases during the latter half of the 18th Century; thus, a promise by overseers of the poor to pay for expenses incurred in curing a pauper was upheld, as was a promise by an executor, having assets sufficient for the purpose, to pay a pecuniary legacy. Courts also upheld a promise to pay the legal portion of a usurious debt on the ground that the promisor was morally obliged to do so, and a promise by a widow to indemnify one who had advanced money to another at her request during her coverture when she was incapable of contracting was upheld on similar grounds.

However, about the beginning of the 19th Century courts began to restrict the doctrine of moral consideration, out of concern for the fact that enforcement of such promises would lead to an unacceptable breadth of promissory liability. In the words of one court, "The enforcement of such promises by law, however plausibly reconciled by the desire to effect all conscientious engagements, might be attended with mischievous consequences to society, one of which would be the frequent preference of voluntary undertakings to claims for just debts. Suits would thereby be multiplied, and voluntary undertakings would also be multiplied, to the prejudice of real creditors. The temptations of

> executors would be much increased by the prevalence of such a doctrine, and the faithful discharge of their duty be rendered more difficult." The rule thus developed that an express promise could only give rise to liability if there had previously been a consideration which would have given rise to an implied promise which might have been enforced by an action at law but for some technical bar.

4 Williston on Contracts§ 8:14 (footnotes omitted).

[¶36] These nineteenth-century restrictions on the concept of moral consideration were included in the 1877 territorial code, and the provision remains materially unchanged in the century code today. N.D.C.C. § 9-05-02 ("An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor or prejudice suffered by the promisee, also is a good consideration for a promise to an extent corresponding with the extent of the obligation, but no further or otherwise."). Like the law of contract, the holding we announce today is limited to those obligations that existed at law and would have been enforceable against the State but for a technical bar such as the statute of limitations.

[¶37] The Defendants argue broadly that the State may extend a statute of limitations without implicating constitutional limits, but cite only cases addressing constitutional challenges under the due process clause, such as *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 229 (1995). These cases are

distinguishable because the constitutional issue was whether the state could extend a statute of limitations and revive a lapsed claim against a private party. *Id.* (explaining "a statute of limitations ... can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired"). Where vested property interests are implicated, a defendant may have a due process interest that limits retroactive extension of a statute of limitation. *See Interest of W. M. V.,* 268 N.W.2d 781, 786 (N.D. 1978) (rejecting due process challenge to statute reviving claims previously barred because challenger had no vested rights). Here, no due process issue is presented, because the State has extended the statute of limitation to claims against itself and it cannot be said to violate its own due process rights by enacting a statute. *See Schoon v. NDDOT,* 2018 ND 210, ¶ 23, 917 N.W.2d 199; *Ruotolo v. State,* 631 N.E.2d 90, 96-97 (N.Y. 1994) (rejecting argument that the legislature may violate the state's due process rights by enacting a law reviving unenforceable claims). But whether the Act is consistent with due process does not answer whether it may violate the gift clause by releasing funds the state had no legal obligation to pay.

[¶38] We hold that where the State has a legal obligation that becomes unenforceable by the passage of a statute of limitations, the Legislative Assembly may waive or extend the limitation period to revive a previously valid claim against the State without making a prohibited "donation" within the meaning of the gift clause.

[¶39] We now apply this framework to the Plaintiffs' claims about release of royalties from the SIIF, which the district court concluded was a prohibited gift.

Claims to the royalty proceeds held by the Land Board may be divided into two groups: those funds subject to claims that had lapsed prior to the effective date of the Act, and those funds subject to claims that had not lapsed.

[¶40] The money in the SIIF that the State is required to release under § 61- 33.1-04(1)(b) is in the SIIF because the State was paid royalties under leases of minerals that it once claimed but now by statute no longer claims. This section requires those funds be released to the operating oil company for payment to the mineral owners determined under the Act. We reject the Plaintiffs' argument that the gift clause requires the State to rely on the statute of limitations and keep money it was paid for leasing minerals it now acknowledges it does not own and should not have leased. Although the State may have a legal defense under the statute of limitations, it also has a moral obligation to pay its just debts and deal fairly with the people. These funds have accrued since 2006 and have been held separately from other funds, so no new revenue will have to be raised to pay these claims. We conclude the State may through legislation recognize this obligation and return funds from the SIIF without making a prohibited "donation" under the gift clause.

[¶41] In their cross-appeal, the Plaintiffs argue the district court erred in concluding there was no gift clause violation by the Act's disclaimer of interests in leases, leased mineral acres, unleased mineral acres, and $18 million escrowed because of royalty disputes. These claims turn on whether the State ever had a legal interest such that disclaimer of that interest could constitute a prohibited donation.

[¶42] Under the equal-footing doctrine, North Dakota acquired title to the bed of the Missouri River up to its ordinary high water mark at the time North Dakota was admitted to the union. *Reep v. State,* 2013 ND 253, ¶ 14, 841 N.W. 2d 664. Citing *Oregon ex. rel. State Land Bd. v. Corvallis Sand & Gravel Co.,* 429 U.S. 363, 371-72, 376 (1977), the district court concluded that the equal-footing doctrine vested the State with title to the bed of the Missouri River as it existed at the time of statehood, but that since statehood, the equal- footing doctrine does not determine how the changing footprint of the river over time affects title to the riverbed. Instead, how the changing riverbed affects the State's title is controlled by state law, including the public trust doctrine.

(¶43] The public trust doctrine was first recognized by this Court in *United Plainsmen v. N.D. State Water Conservation Commission,* 247 N.W.2d 457 (N.D. 1976). In *United Plainsmen,* this Court stated N.D.C.C. § 61-01-01 expresses the public trust doctrine. *Id.* at 462. Under the public trust doctrine, the State holds title to the beds of navigable waters in trust for the use and enjoyment of the public. This Court has said fostering the public's right of navigation is traditionally the most important feature of the public trust doctrine. *J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production* Co., 423 N.W.2d 130, 140 (N.D. 1988). We have also recognized other interests served by the public trust doctrine, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies. *Id.* (recognizing that legislation may modify this common law doctrine).

[¶44] The Submerged Lands Act, 43 U.S.C. § 1301-1356b, generally confirms state ownership of the title to the beds of navigable waters as against any claim of the United States. 43 U.S.C. § 1311. But from this broad confirmation of state authority, it excepts "all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity." 43 U.S.C. § 1313(a). The federal government acquired the bed of Lake Sakakawea above the historical OHWM by purchase or eminent domain so that it could be inundated by the Garrison Dam. Under § 1313 of the Submerged Lands Act, the land taken by the federal government for the Garrison Dam project is owned by the United States.

[¶45] Under the Supremacy Clause, U.S. Const. art. VI, cl. 2, the laws of the United States are the supreme law of the land, and any state law that conflicts with federal law is without effect. *Home of Economy v. Burlington N. Santa Fe R.R.,* 2005 ND 74, ¶ 5, 694 N.W.2d 840. The Plaintiffs present several arguments as to how the State obtained ownership of the disputed minerals, including by implication of the watercourses clause of the state constitution, by self-executing transfer under the Sovereign Lands Act, N.D.C.C. § 61-33-03, and the common law public trust doctrine first recognized in *United Plainsmen.* The Flood Control Act of 1944 authorized construction of the Garrison Dam and acquisition of the land that would be subject to inundation by the reservoir. Any contrary state law, including the constitution, a statute, or the common law, which purports to vest in the State the legal ownership of the bed of Lake Sakakawea is preempted under the Supremacy Clause to that extent.

[¶46] The federal government acquired through purchase or eminent domain both the surface and mineral estate to much of the affected area, but it allowed some landowners to reserve their mineral interests during the acquisition phase. Since the federal government's acquisition under authority of the Flood Control Act of 1944, the prior landowners' reservation of mineral interests has remained in the chain of title. The Submerged Lands Act expressly excepts from an otherwise broad assignment to states of the lands beneath navigable waters those lands acquired by the United States by eminent domain or purchase. 43 U.S.C. §§ 1311, 1313. These federal laws preempt operation of any state law that would otherwise vest ownership in the state, including chapter 61-33 and the public trust doctrine. As a result, we conclude the lakebed above the historic OHWM and accompanying mineral estates were never the State's to "give away." The State does not violate the gift clause by transferring property or renouncing claims to property that it does not own in the first instance. Because the State cannot give away that which it does not own, we hold the Act does not violate the gift clause of the North Dakota Constitution to the extent that it renounces claims to leases, leased mineral acres and unleased mineral acres in the affected area. The Defendants' release of claims to funds held in escrow as a result of royalty disputes is derivative of its claims to the leases and leased mineral acres and would not be subject to a statute of limitation defense and so also does not violate the gift clause.

C

[¶47] The Plaintiffs argue the district court erred in concluding N.D.C.C. ch. 61-33.1 does not violate N.D.

Const. art. XI, § 3 ("the watercourses clause").

[¶48] The watercourses clause provides, "All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes." N.D. Const. art. XI, § 3. The word "remain" in the text of the watercourses clause reinforces the principle that the State's ownership of flowing streams and natural watercourses was fixed at statehood. *See Riemers v. Eslinger,* 2010 ND 76, ¶ 11, 781 N.W.2d 632 (emphasizing the word "remain" in concluding the scope of the jury trial right was fixed at statehood by N.D. Const. art. I, § 13, which guarantees "the right to a jury trial 'shall ... *remain* inviolate'" (quoting *City of Bismarck v. Fettig,* 1999 ND 193, ¶ 11, 601 N.W.2d 247)); *State v. Lohnes,* 69 N.W.2d 508, 512-13 (N.D. 1955) *(overruled on other grounds)* (emphasizing use of "remain" in the enabling act and section 203 of the constitution to emphasize that state and federal jurisdiction over Indian lands was fixed at statehood). We conclude the watercourses clause operated to vest in the State ownership of watercourses which existed at statehood, but does not operate to vest in the State watercourses that become navigable after statehood, such as Lake Sakakawea.

(¶49] This is consistent with this Court's prior interpretation of the watercourses clause. For example, in *Ozark-Mahoning* Co. *v. State,* 76 N.D. 464, 37 N.W.2d 488 (1949), this Court held that the watercourses clause applies only to watercourses which were navigable upon North Dakota's admission to the United States. There, the State appealed from a judgment quieting title to the bed of Grenora Lake in favor of the riparian owners of the lots abutting the meander lines around the lake. *Id.* at 489-90. The

State argued that only it could own the lakebed under the watercourses clause. *Id.* at 492-93. Because no evidence showed that Grenora Lake was navigable when North Dakota was admitted to the United States, the Court affirmed the judgment in favor of the landowners. *Id.* at 493. Citing *Bigelow v. Draper,* 6 N.D. 152, 69 N.W. 570 (1896), the Court explained that under the common law of Dakota Territory when North Dakota was admitted to the United States, "the owner of land through which a nonnavigable stream flowed was possessed of the title to the bed of the stream." The watercourses clause was interpreted to apply only to those watercourses that were navigable at statehood because an interpretation that would divest the rights of riparian owners to the beds of watercourses that were not navigable in fact at statehood would violate the Fourteenth Amendment to the U.S. Constitution. *Id.*

[¶50] Here, the stipulated facts reflect that the land from the bank of the Missouri River up to an elevation of 1854 feet mean sea level was acquired by the Corps for impounding water by operation of the Garrison Dam. The area above the banks of the Missouri River was not navigable when North Dakota was admitted to the United States. Because the affected area was not navigable at statehood, and became navigable only when inundated by operation of the Garrison Dam beginning in 1953, we conclude N.D.C.C. ch. 61-33.1 does not violate the watercourses clause.

D

(¶51] The Plaintiffs argue the district court erred in concluding N.D.C.C. ch. 61-33.1 does not violate sections 21 and 22 of the North Dakota Constitution.

Article I, § 21, provides:

> No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shall not be granted to all citizens.

Article I, § 22, N.D. Const., provides:

> All laws of a general nature shall have a uniform operation.

[¶52] The state constitution "does not prohibit legislative classifications or require identical treatment of different groups of people." *Larimore Pub. Sch. Dist. No. 44 v. Aamodt,* 2018 ND 71, ¶ 34, 908 N.W.2d 442 (citing *State v. Leppert,* 2003 ND 15, ¶ 7, 656 N.W.2d 718). In *MCI Telecommunications Corp. v. Heitkamp,* 523 N.W.2d 548, 552 (N.D. 1994), this Court distinguished between general laws and special laws, and stated that "[s]pecial laws are made for individual cases of less than a class, due to peculiar conditions and circumstances[,]" while general laws "appl[y] to all things or persons of a class." This Court then stated, "Reasonable classification does not violate the special laws provision of the North Dakota Constitution." *Id.* at 553. "A statutory classification challenged under the special laws provision of our constitution is ... to be upheld if it is natural, not arbitrary, and standing upon some reason having regard to the character of the legislation of which it is a feature." *Id.*

(¶53] The Plaintiffs cite *Solberg v. State Treasurer,* 78 N.D. 806, 816-17, 53 N.W.2d 49, 55 (1952), for the proposition that the Act denies equal protection to the many by distributing state-owned assets to the few. In *Solberg,* this Court's holding was limited to the gift clause. *Id.* The Plaintiffs equal protection argument is simply a repackaging of the Plaintiffs' gift clause argument which we rejected in section III-B above.

[¶54] The Plaintiffs also argue the Act created an unconstitutionally arbitrary classification by distinguishing between wells spud before and after January 1, 2006. The record reflects January 2006 was the approximate time oil and gas production began under Lake Sakakawea via horizontal drilling. Therefore, the Act's retroactive application to January 1, 2006, reflects a rational line dividing periods with different economic and industrial characteristics and is not arbitrary. Because the Act did not create an unconstitutional classification, we hold that the district court did not err in concluding it does not violate N.D. Const. art. I, §§ 21 and 22.

E

[¶55] The Plaintiffs argue the district court erred in concluding N.D.C.C. ch. 61-33.1 does not violate the public trust doctrine.

[¶56] In North Dakota, a mineral estate severed from the surface estate charges the surface estate owner with an implied servitude for the owner or lessee of the mineral estate to develop the minerals. *Krenz v. XTO Energy, Inc.,* 2017 ND 19, ¶ 42, 890 N.W.2d 222 (citing *Hunt Oil* Co. *v. Kerbaugh,* 238 N.W.2d 131, 135 (N.D. 1979)). Because the mineral estate is dominant

over the surface estate, easements implied by private mineral ownership under a navigable waterway would offend the public trust if the mineral owner's easement is in conflict with and superior to the State's trust interest. However, as discussed above, the federal government holds title to the lakebed of Lake Sakakawea, and its interest supersedes the State's public trust interest under the Supremacy Clause. Because the federal government, rather than the State, holds title to the lakebed outside the historical river channel, the public trust is not implicated by private mineral ownership under Lake Sakakawea. Because the public trust doctrine is a common law principle, it cannot invalidate a statute that is not prohibited by the constitution. N.D.C.C. § 1-01- 06; § 1-02-01; *Verry v. Trenbeath,* 148 N.W.2d 567, 571 (N.D. 1967). We conclude the district court did not err in concluding N.D.C.C. ch. 61-33.1 does not violate the public trust doctrine.

IV

(¶57] The Defendants argue that the district court abused its discretion in awarding attorney's fees, costs, and service fees. The Plaintiffs also argue on cross-appeal that the district court abused its discretion in its calculation of attorney's fees, costs, and service fees. A district court's decision on attorney's fees is reviewed under the abuse of discretion standard. *Rocky Mountain Steel Foundations, Inc. v. Brockett Company, LLC,* 2019 ND 252, i1 7, 934 N.W.2d 531 (citing *Lincoln Land Dev., LLP v. City of Lincoln,* 2019 ND 81, ¶ 20, 924 N.W.2d 426).

[¶58] North Dakota courts generally apply the "American Rule" for attorney's fees and assume each

party to a lawsuit will bear its own attorney's fees. *Rocky Mountain Steel Foundations,* 2019 ND 252, ¶ 9, 934 N.W.2d 531 (citing *Deacon's Dev., LLP v. Lamb,* 2006 ND 172, ¶ 11, 719 N.W.2d 379). "[S]uccessful litigants are not allowed to recover attorney fees unless authorized by contract or by statute." *Id.* As an exception to the American Rule, a lawyer who recovers a common fund for the benefit of persons other than himself or his client may be entitled to reasonable attorney's fees from the fund as a whole. *Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc.,* 2007 ND 163, ¶ 27, 740 N.W.2d 67 (citing *Horst v. Guy,* 211 N.W.2d 723, 732 (N.D.1973)).

[¶59] The award of attorney's fees was not authorized by contract or statute. As a result of our decision, the Plaintiffs did not recover a common fund for the benefit of others and are therefore not entitled to attorney's fees under the common fund doctrine. We reverse the award of attorney's fees. Under N.D.C.C. § 28-26-06, costs are taxed in favor of the prevailing party. Because we reverse the portion of the summary judgment finding application of N.D.C.C. § 61-33.1-04(1)(b) unconstitutional, the Plaintiffs are no longer prevailing parties. We reverse the award of costs.

[¶60] As a result of our decision here the Plaintiffs are no longer prevailing parties, and therefore no theory supports a service award. Because we reverse the portion of the summary judgment on which the Plaintiffs initially prevailed, we also reverse the district court's grant of the requested service award.

V

[¶61] We affirm the district court's order denying the Defendants' N.D.R.Civ.P. 19(b) motion to dismiss. We

affirm that part of the court's judgment concluding the Plaintiffs have not demonstrated N.D.C.C. ch. 61-33.1 is facially unconstitutional. We reverse the order granting an injunction and reverse the judgment to the extent it concludes the release of lease and bonus refunds authorized under N.D.C.C. § 61-33.1-04(1)(b) would result in unconstitutional gifts under N.D. Const. art. X, § 18, and to the extent It awards to the Plaintiffs attorney's fees, costs, and service awards.

[¶62]

[signatures]

[¶63] The Honorable Norman G. Anderson, Surrogate Judge, sitting in place of McEvers, J., disqualified.

Crothers, Justice, specially concurring.

[¶64] I generally agree with the majority opinion. I write separately to make clear my view that the rationale underpinning Part III (B) is not naked authority for the State to appropriate funds for any cause describable as a "moral obligation." Rather, in the context of our constitutional gift clause, permissible appropriations are limited to circumstances where a legal obligation exists, even though the obligation may not be presently enforceable for reasons such as the statute of limitations.

[¶65] The majority opinion seems to acknowledge the limitation about which I write, including citations to judicial decisions from California and Wyoming. *See* majority opinion, at ¶¶ 31-32. In those cases, legal claims against the state existed but could not be asserted due to the passage of time. *Id.* The states

essentially waived the statute of limitations and the respective state's highest courts held the waiver was not a violation of their gift clauses restrictions. *Id.* However, the majority opinion also cites *The Trustees of the Exempt Firemen's Benev. Fund of the City of New York v. Roome,* 93 N.Y. 313, 316 (1883). There, New York interpreted its constitutional gift clause as authorizing a statute directing payment to firemen "after the service ended, and when there was no legal or equitable obligation operating upon the State." *Id.* at 326. In *Roome,* the obligation was purely moral. No legal obligation existed before passage of the law at issue. I therefore would not cite or rely on the *Roome* decision as persuasive authority for interpretation of North Dakota's gift clause.

[¶66]

[signatures]

UNSWORN DECLARATION

I, Petra H. Mandigo Hulm, Clerk of the Supreme Court of North Dakota, declare under penalty of perjury that this is a full, true and correct copy of the original as the same remains on file in my office.

Signed and Seal of this Court affixed
this 30th day of September, 2020

PETRA H. MANDIGO HULM
Clerk, Supreme Court

By: Becky Mosbrucker
Deputy Clerk

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER ON PETITION FOR REHEARING

Supreme Court No. 20190203
Cass Co. No. 2018-CV-00089

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

v.

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

[¶1] This appeal having been heard by the Court at the March 2020 Tenn and an opinion having been filed on July 30, 2020 by:

[¶2] Chief Justice Jon J. Jensen, Justice Gerald W. VandeWalle, Justice Daniel J. Crothers, Justice Jerod E. Tufte, and Surrogate Judge Norman Anderson sitting in place of Justice Lisa Fair McEvers;

[¶3] and a petition for rehearing having been filed by Terrance W. Moore and J. Robert Keena, for the Appellees and Cross-Appellants Marvin Nelson, Michael Coachman, Charles Tuttle, and Lisa Marie Omlid, and the Court having considered the matter, it is hereby ORDERED AND ADJUDGED, that the petition be and is hereby **DENIED.**

[¶4] AND IT IS FURTHER ORDERED, that this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the judgment of this Court.

Dated: September 21, 2020

By the Court:

[signatures]

STATE OF NORTH DAKOTA IN DISTRICT COURT
COUNTY OF CASS EAST CENTRAL JUDJCIAL DISTRICT

File No. 09-2018-CV-89

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

Plaintiffs,

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

-vs-

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

Defendants.

[¶1] The Plaintiffs commenced this action against the named Defendants, collectively representing the State, seeking to have N.D.C.C. § 61-33.1 ("The Act" or 61-33.1), declared unconstitutional as an unlawful transfer without consideration of State-owned resources to private parties. As will be further set forth in more detail, one feature of The Act was that, with some exception, the State would abdicate any claim of mineral interests between the ordinary high watermark ("OHWM") of the historical Missouri riverbed channel and what is essentially the shoreline

of the current Lake Sakakawea. The effective date of The Act is April 21, 2017.

[¶2] The title of the Act is State Ownership of Missouri Riverbed. The text of The Act is as follows:

61-33.1-01. Definitions. (Retroactive application - See note)

> For purposes of this chapter, unless the context otherwise requires:
>
> 1. "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.
>
> 2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections 33 and 34, township 153 north, range 102 west which is the approximate location of river mile marker 1,565, and from the South Dakota border to river mile marker 1,303.
>
> 3. "Segment" means the individual segment maps contained within the corps

survey final project maps for the Pick-Sloan project dams.

4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams..(Retroactive application .. See note)

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-02. Mineral ownership of land inundated by Pick-Sloan Missouri basin project dams. (Retroactive application - See note)

The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams> except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase J foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

3. The selected and approved firm shall review the delineation of the ordinary high water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:

a. Aerial photography of the historical Missouri riverbed channel existing before

the closure date of the Pick-Sloan project dams;

b. The historical records of the army corps of engineers pertaining to the corps survey;

c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high water mark; and

e. Subsection 3 of section 61-33-01 and section 47-06-05, which provide all accretions are presumed to be above the ordinary high water mark and are not

sovereign lands. Accreted lands may be determined to be within the ordinary high water mark of the historical Missouri riverbed channel based on clear and convincing evidence. Areas of low-lying and flat lands where the ordinary high water mark may be impracticable to determine due to inconclusive aerial photography or inconc1usive vegetation analysis must be presumed to be above the ordinary high water mark and owned by the riparian landowner.

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.

5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the de1ineation of the ordinary high water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law.

6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.

7. After the public hearing, the department, in consultation with the firm, shall consider all public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high water mark for the segment of the river addressed by the finding.

61-33.1-04. Implementation. (Retroactive application - See note)

1. Within six months after the adoption of the final review findings by the industrial commission:

   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely *above* the ordinary high

water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the final review findings by the industrial commission:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after the date of adoption of the final review findings.

b. Operators of oil and gas wells affected by the final review findings immediately shall begin to implement any acreage

and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the date of adoption of the review findings. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two- year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding.

61-33.1-05. Actions challenging review findings. (Retroactive application - See note)

An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary

of the ordinary high water mark of the historical Missouri riverbed channel which varies from the boundary determined under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for challenging the final review, recommendations, and determination of the ordinary high water mark under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands. (Retroactive application - See note)

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting non-patented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction. (Retroactive application - See note)

This chapter does not affect the authority of the state engineer to regulate the historical

> Missouri riverbed channel, minerals other than oil and gas, or the waters of the state, provided the regulation does not affect ownership of oil and gas minerals in and under the riverbed or lands above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams.

[¶3] The note, which accompanied the passage of The Act states as follows:

> As provided by S.L. 2017, ch. 426 § 4, this section is retroactive to the date of the closure of the Pick-Sloan Missouri Basin project dams. The ordinary high watermark determination under this act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership.

[¶4] The Plaintiffs contend that The Act 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 of the Missouri River (the Affected Area") and gives away over $205 million in payments in violation of the Constitution of the State of North Dakota. The Plaintiffs contend that when the Missouri River was dammed to form Lake Sakakawea, the State became the owner of the lakebed roughly defined as the area between the ordinary high watermark of the Historic Missouri River channel and the ordinary high watermark of Lake Sakakawea, in addition to the bed of the historic Missouri River. The Plaintiffs' Complaint

alleges that the State affirmatively gives away its sovereign ownership in 108,000 acres of mineral rights held by the Board of University and School Lands between the currently existing OHWM of the Missouri River/Lake Sakakawea and the historical Missouri Riverbed channel. The Plaintiffs further state that The Act goes retroactively back to 2006 for purposes of giving away oil and gas mineral rights of ownership and royalties to private parties. The Plaintiffs contend that the Act is unlawful and unconstitutiona1 for the following reasons:

> 1. 61-33.1 violates the public trust doctrine and the anti-gift clause of the North Dakota Constitution, Article X, Section 18.
>
> 2. The Act violates the privileges and immunities clause of the State of North Dakota Constitution, Article 1, Section 21 by arbitrarily affecting the substantial property rights of upland landowners differently along the Missouri River as opposed to other navigable bodies of water in the State of North Dakota and for leases prior to 2006.
>
> 3. The Act violates the North Dakota Constitution, Article IV, Section 13, because The Act is a local or special law that impermissibly benefits a particular locality and private individuals.
>
> 4. The Act violates the North Dakota State Constitution, Article XI, Section 3, which provides that all the

> flowing streams and natural water courses shall forever remain the property of the State for mining, irrigating and manufacturing.

[¶5] The Plaintiffs sought a preliminary injunction to enjoin the entire Act. The Court, by Order filed June 26, 2018 (Odyssey No. 446), partially granted the Plaintiffs' motion for preliminary injunction and enjoined the Defendants from distributing the following items of revenue, relating to the leasing of oil and gas minerals within the area of land that is subject to N.D.C.C. § 61-33.1, that have been collected prior to April 21, 2017, the effective date of The Act, and held in the Strategic Investment and Improvement Funds (SIIF):

a. Oil and gas lease bonus and rents;

b. Royalties collected; and

c. Royalties escrowed.

[¶6] The parties have brought cross-motions for summary judgment. The parties stipulated to undisputed facts for purposes of their cross-motions for summary judgment. The parties reserve the right to submit additional material facts which, though not stipulated as undisputed, may, in fact, be indisputable. The stipulation of the undisputable facts (found at Odyssey #455) is as follows:

[¶7] **NOW, THEREFORE,** the parties, for purposes of presenting and deciding the parties' cross-motions for summary judgment on Plaintiffs' challenge to N.D.C.C. Ch. 61-33.1, stipulate and agree that the following

facts are undisputed for purposes of cross motions for summary judgment.

A. **Introduction.**

[¶8] The Missouri River was a navigable body of water at the time of North Dakota's statehood. By virtue of its navigability at statehood, the State of North Dakota (the "State") received absolute right to the bed of the Missouri River through the equal footing doctrine. The State's absolute right to the bed of the Missouri River received through the equal footing doctrine includes the minerals[1] located within the bed of the Missouri River.

B. **Garrison Dam Constructed by the Federal Government to Manage Missouri River Flooding**

[¶9] The United States Congress authorized the construction of Garrison Dam through the Flood Control Act of 1944. Garrison Dam is one of six Pick-Sloan Missouri basin project dams authorized under the Flood Control Act of 1944. The water impounded by the closure of Garrison Dam became known as Lake Sakakawea.

[¶10] Pursuant to the authorization to construct Garrison Dam, the Army Corps of Engineers ("the

[1] The word "minerals" includes but is not limited to, oil and gas and related hydrocarbons. Moreover, deeds within the Department of Trust Lands, the administrative agency carrying out the daily operations of the Land Board, indicate that the Anny Corps of Engineers appears to have reserved to some grantees in such deeds oil and gas interests, not other mineral interests such as coal.

Corps") acquired, by purchase or condemnation, property rights to allow for impounding water and the operation of Garrison Dam.

[¶11] Before acquiring[2] any private property for Garrison Dam, the Corps determined how much property it would need to acquire for impounding water and the operation of Garrison Dam. This determination is defined as the "Corps Survey" in N.D.C.C. § 61-33.1-01(1) and shall be referred to herein as the "Corps Survey."

[¶12] The Corps Survey was used to determine the boundary of what the Corps believed was property located between the location of the river bank of the Missouri River ("Lower Garrison Acquisition Line"), up to an elevation of 1854' mean sea level (the "Upper Garrison Acquisition Line"), and extending from Garrison Dam to the southern border of sections 33 and 34, Township 153 North, Range 102 West, Williams County, North Dakota1 the approximate location of which is river mile marker 1565 (the "Total Garrison Take Area"). The sum of the surface area within the Total Garrison Take Area is approximately 368,000 acres.

[¶13] The area located (a) between the Corp Survey's determination of the river bank of the Missouri River up to an elevation of 1854' mean sea level and (b) between the northern boundary of the Fort Berthold Indian reservation and the southern border of sections 33 and 34, Township 153 North, Range 102 West, Williams County, North Dakota, is approximately

[2] As used herein, the term "acquire" or "acquired" includes both condemnation and purchase.

123,000 acres. The approximate 123,000 acre area shall be referred to herein as the "Affected Area."

[¶14] In some instances during the Garrison Dam acquisition process, the Corps acquired both the surface rights and mineral rights, while in other instances the owners reserved an interest in minerals. See Court Doc. No. 93 (An example of a reservation of the mineral rights in favor of landowners).

[¶15] Within the Affected Area and other portions of the Total Garrison Take Area are parcels of land and related mineral interests the State has acquired through purchase, foreclosure or other written conveyance.

[¶16] The Defendant Board of University and School Lands of the State of North Dakota (the "Land Board") manages, operates and supervises oil, gas and related hydrocarbons under N D.C.C. ch. 61-33. The Land Board is authorized to enter into any agreements regarding such property, and may enforce all subsurface rights of the owner in its own name.

C. Board of University and School Lands Manages Minerals

[¶17] Parties can request that certain tracts managed by the Land Board be nominated for mineral auction. A true and correct copy of the Land Board's current form for mineral auction nomination is attached hereto as Exhibit "A." (Odyssey #474).

[¶18] Oil and gas mineral interests auctioned and leased by the Land Board are leased pursuant to a standard Oil and Gas Lease. A true and correct copy

of the Land Board's current standard Oil and Gas Lease is attached hereto as Exhibit "B," and by this reference is incorporated herein. (Odyssey #471).

[¶19] The Land Board has previously relied upon reports, studies and delineations such as Technical Report for the Ordinary High Water Mark Delineation of the Yellowstone River and Missouri River, dated November, 2010 ("Phase I") and the Technical Report for the Ordinary High Water Mark Investigation for the Missouri River Under Lake Sakakawea, dated March, 2011 ("Phase 2") for leasing within the Affected Area. For ease of reference the Phase 1 delineation and Phase 2 investigation are referred to herein as "reports." A true and correct copy of the Phase 1 report is attached hereto as Exhibit "C," (Odyssey #1s 479-485) and a true and correct copy of the Phase 2 report is attached as Exhibit "D." The Phase 2 report is defined at N.D.C.C. § 61-33.1-01(4) as the "State phase two survey." (Odyssey #'s 486-491).

[¶20] The Land Board's request for proposal for the Phase 1 report is filed with the Court as Court Doc. No. 236, Bates Number SD 508-517.

[¶21] The Land Board's request for proposal for the Phase 2 report is filed with the Court as Court Doc. No. 236, Bates Number SD518-525.

[¶22] There is some overlap between the Phase 1 and Phase 2 reports.

[¶23] Governor Dalrymple made a statement regarding the Land Board's mineral leasing practices and use of the Phase 1 and Phase 2 reports during the Land Board's October 18, 2016 meeting A true and

correct copy of the minutes of the October 18, 2016 meeting of the Land Board are attached hereto as Exhibit "E." (Odyssey #472).

[¶24] Disputes between the State, private parties (including those claiming as mineral owners) and/or the federal government have arisen regarding areas in which the Land Board claims ownership of mineral interests and the location of the upper boundary line under Phase 1 and Phase 2.

[¶25] Two bills were introduced during the 2017 North Dakota Legislative Session - Senate Bill 2134 ("SB 2134") and House Bill 1199. Because SB 2134 was making its way through the legislative process, House Bill 1199 was defeated in the North Dakota Senate.

[¶26] SB 2134 was passed by the North Dakota Senate on April 18, 2017. SB 2134, now codified as N.D.C.C. Ch. 61-33.1, became effective April 21, 2017.

[¶27] As part of SB 2134, a fiscal note was provided, a true and correct copy of which has been filed at Court Doc. No. 3.

[¶28] Under N.D.C.C. § 61-33.1-03(1), the Corps Survey is to be 'considered the presumptive determination of the ordinary high water mark of the historical Missouri riverbed channel, subject only to the review process under [N.D.C.C. 61-33.1-03] and judicial review as provided in [chapter 61-33.1]."

[¶29] Under N.D.C.C. § 61-33.1-03(2), the Legislature directed the Department of Mineral Resources ("DMR"), a department under the authority of the North Dakota Industrial Commission ("NDIC"), to

hire an engineering firm to perform a review of the "delineation of the ordinary high water mark of the corps survey segments." N.D.C.C. § 61-33.1-03(2)-(3) and § 61-33.1-06. The DMR hired Wenck Associates, Inc. ("Wenck") to conduct this task by considering the parameters listed in N.D.C.C. § 61-33.1-03.

[¶30] Wenck completed its review of the Corps Survey and presented its recommendation to the NDIC on April 17, 2018. Court Doc. Nos. 293-365. Pursuant to N.D.C.C. § 61-33.1-03(5), Wenck's April 17, 2018, report recommended findings for the adjustment, modification and correction to the OHWM of the historical Missouri riverbed channel for the reviewed segments of the Corps Survey. Court Doc. Nos. 293-365.

[¶31] Wenck's analysis of the Corps Survey reflected 16,687 of Missouri riverbed channel acres are within the project boundary. Court Doc No. 295 (Bates No. 736). Wenck determined, after its review of the Corps Survey, that clear and convincing evidence established the OHWM of the historical Missouri riverbed channel was different than the Corps Survey. Court Doc. Nos. 293-365. Wenck determined the total acres within the OHWM of the historical Missouri riverbed channel to be approximately 27,089 acres, or an increase of 10,042 acres. Court Doc. No. 295 (Bates No. 736).

[¶32] The DMR published notice of Wenck's findings and notice of a public hearing on such findings on April 21, 2018. The 60-day public comment period provided under the statutory process set out in N.D.C C. § 61-33w-1-03(6) ended on June 20, 2018. The public hearing required by N.D.C.C. § 61-33.1-03(6) was on June 26, 2018 at 9:00 a.m.

Determining Ownership of the Minerals Under Lake Sakakawea

[¶33] Under the equal-footing doctrine, at the time of statehood, North Dakota acquired title to the bed of the Missouri River up to the ordinary high water mark as the river channel then existed. Reep v. State, 2013 ND 253, ¶ 14, 841 N.W.2d 664. Building off the equal-footing doctrine, the Plaintiffs assert that the State held title to the entire lake bed of Lake Sakakawea before 61-33.1 became law. The Plaintiffs support this contention by citing language from a series of North Dakota Supreme Court cases. The Plaintiffs contend that because the Missouri River was navigable in 1889, the State took sovereign title to its bed. The Missouri River (i.e. Lake Sakakawea) is still navigable and its bed still belongs to the State. The Plaintiffs contend that what is essentially the shoreline of Lake Sakakawea is the current ordinary high watermark of the Missouri River. Plaintiffs contend that title to the riverbed shifts as the OHVVM shifts, even as affected by the Garrison Dam. The Plaintiffs refer to a string of North Dakota cases which confirm the State ownership of mineral rights to support the Plaintiffs' contention that the State owns mineral rights to the entire lake bed of Lake Sakakawea. Quoting from paragraph 18 of Plaintiff's brief:

> [¶18] As a matter of law, the State's mineral ownership has been decided by the North Dakota Supreme Court in a long line of cases. The State owns these mineral rights. Reep, 2013 N.D. 253,¶24; State ex. rel. Sprynczynatyk v. Mills, 999 N.D. 75, ¶4, 592 N.W. 2d 591, 592 (N.D. 1999) ("Mills II"); J.P. Furlong Enters. v. Son Exploration

> and Prod. Co., 423 N.W. 2d 130, 132 (N.D. 1988); Hoque v. Bourgois, 71 N.W. 2d 471 52 (N.D. 1955); ...

[¶34] The Court does not find the Plaintiffs' argument that the State holds title to the entire lake bed before 61-33.1 persuasive. The equal-footing doctrine determines which submerged lands are granted to a State at the time of statehood. PPL Montana, LLC v. Montana, 565 U.S. 576, 590-92 (2012). Bodies of water, particularly large rivers such as the Missouri, move or change over time. The equal-footing doctrine vests title to the river in the State at the time of statehood but does not operate to determine how the movement of the river over time, past the time of statehood, affects title to the riverbed. This is determined by the laws of the State. 'The role of equal-footing is ended, and the land is subject to the laws of the State. Oregon ex. rel. State Land Bd. v. Corvallis Sand and Gravel Company, 429 U.S. 363, 371-72, 376 (1977). Lake Sakakawea did not exist at statehood. Thus, the equal-footing doctrine does not vest the State with title to Lake Sakakawea outside the ordinary high water mark of]its natural channel. The lake was not created by river channel movements such as accretion or erosion. The lake was created by the Garrison Dam project. This lake is substantially different from the Missouri River whose banks meander from time to time through natural forces. The cases cited by the Plaintiffs can be distinguished adequately. For example, the Furlong case deals with an abandoned riverbed. The Act, 61-33.1, deals with an artificial reservoir created by the Garrison Dam. Under North Dakota law the State has no right to acquire private property without compensation to the owner. Plaintiffs appear to be urging a construction of

the law that would allow the State to claim ownership of deliberately flooded private land without offering any compensation for it. The Plaintiffs however, might be recognizing that even if the State did acquire title to the minerals under the lake bed of Lake Sakakawea, the owners (or former owners) might be entitled to compensation. The Plaintiffs have cited a recent North Dakota Supreme Court case, Wilkinson v. Bd. of Univ. & School Lands, 2017 N.D. 231, ,r 24, 903 N.W. 2d 51. As will be explained later in this opinion, this concession by the Plaintiffs undermines their claim of unconstitutionality to that part of the act which abdicates any claim of title which the State may be making to minerals under the bed of Lake Sakakawea above the ordinary high water mark of the historic Missouri River channel. The Court will also find that Mills II does not apply. Mills III like the Furlong case, considered an artificial change to a river channel as opposed to the flooding of condemned land to create a lake. The Furlong case stated a policy of ensuring that the State's title would follow the movement of the river to protect the public's interest in navigability and other important features of the public trust doctrine such as bathing, swimming, recreation and fishing. The Act has not had any effect on any of those uses of the lake.

[¶35] It is undisputed that the United States government has the power to acquire land for flood control purposes. It would be a curious result if the federal government would, through the flooding, lose title to property that it acquired either through purchase or condemnation. Even if the equal footing doctrine extended the State's claim of title to the ordinary high watermark of Lake Sakakawea, any interpretation of State law that would divest the title of the federal government in lands that the federal

government acquired would appear to run afoul of the Supremacy Clause of the United States Constitution. 43 U.S.C. § 1301, *et seq* is the Submerged Land Act (SLA) which was enacted by Congress. The effect of this Act was, essentially, to confirm that the State retained title to the beds of navigable waters within its boundaries as to any claim of the United States. Section 1313 of the SLA excluded from The Act lands acquired by the United States through eminent domain or purchase.

There is excepted from the operation of § 1311 of this title -

> (a) All tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon... acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity...

[¶36] It certainly appears that it was Congress's intent that states do not acquire lands under the equal-footing doctrine, public trust law, the Submerged Lands Act, or otherwise when the United States condemns or purchases the rand in a proprietary capacity. This is the case in this action. The United States acquired the land, and in some cases the mineral interests, through purchase or condemnation.

[¶37] Following the conclusion that the State does not own minerals under the bed of Lake Sakakawea above the determined ordinary high watermark of the historic Missouri River, it follows that any abdication of any claim to such minerals cannot violate the public

trust in regards to those mineral rights. The Act in no way interferes with enjoyment by the public of the important features of Lake Sakakawea such as swimming, recreation, fishing, irrigation and water supply. Affirming the State's non-claim to minerals that the State does not believe it owns is not a violation of the public trust.

[¶38] The Act does not violate the water course provision of the North Dakota Constitution. The water course clause of the Constitution, N.D. Const. art. XI, Section 3 reads as follows:

> AH flowing streams and natural water courses shall forever remain the property of the State for mining, irrigation and manufacturing purposes.

[¶39] The North Dakota Supreme Court has held that this provision applies only to the waters of flowing streams and natural water courses. Burlington N. & Santa Fe Ry. Co. v. Benson Cty. Water Res. Dist., 2000 N.D. 182, ¶11, 618 N.W. 2d 155. The Supreme Court cited the case of Mosark-Mahoning Co. v. State, 37 N.W. 2d 488, 493 (N.D. 1949).

> The rights of the grantees under the patent issued by the United States government were fixed and vested as of the date of those patents. The riparian rights that the grantees thus acquired were valuable property rights.
> The State cannot constitutionally divest the owners thereof and transfer the property to itself without the payment of due compensation under the exercise of the

> powers of eminent domain. (Citations omitted).

[¶40] The Court continued quoting from State v. Brace, 36 N.W. 2d 330 (N.D. 1949).

> We are here dealing with titles vested by patents from the United States. Such titles cannot be affected by the declaration of navigability contained in Section 61-1501, RCND 1943. The legislature may not adopt a retroactive definition of navigability that would destroy a title already vested under a federal grant, or transfer to the State a property right and a body of water or the bed thereof that had been previously acquired by a private owner.

[¶41] Clearly, the State has long recognized that property acquired by patent (and presumably subsequent conveyances of that patented property) cannot be acquired by the State without just compensation paid to the owner. Neither the public trust doctrine nor the water course clause would render the act invalid. In regards to mineral ownership, the Act appears to be an effort to codify existing law and policy regarding the State's ownership of the lake bed and minerals in the disputed area.

[¶42) The Plaintiffs also contend that the Act is a violation of equal protection. The equal protection clause of the North Dakota Constitution is found at Article I, § 21, and Article I § 22, N.D. Const. Art. I, § 21 provides:

> No special privileges or immunities shall ever be granted which may not be altered, revoked or repealed by the legislative assembly; nor shall any citizen or class of citizens be granted privileges or immunities which upon the same terms shal1 not be granted to all citizens.

[¶43] N.D. Const. Art. I, § 22, provides:

> All laws of a general nature shall have a uniform operation.

[¶44] 'The equal protection clauses of the state and federal constitutions do not prohibit legislative classifications or require identical treatment of different groups of people." State v. Leppert, 2003 N.D. 15, ¶ 7, 656 N.W. 2d 718. "The equal protection guarantee does not forbid classifications, but simply keeps government decision-makers from treating differently persons who are in all relevant respects alike." Haney v. N.D. Workers Comp. Bureau, 518 N.W. 2d 195, 197 (N.D. 1996).

[¶45] The North Dakota Supreme Court has distinguished general laws from special laws. In the case of MCI Telecommunications Corp. v. Heitkampt the Court stated:

> A statute relating to persons or things as a class is a general law; one relating to particular persons or things of a class is special. Special laws are made for individual cases of less than a class, due to peculiar conditions and circumstances. We have recently said that special laws language of

> our state constitution constrains laws relating only to particular persons or things of a class as distinguished from a general law, which applies to all things or persons of a class." A statute is not special, but general, if "it operates equally upon all persons and things within the scope of the statute. It operates alike on all persons and property similarly situated ... in other words, it operates alike in all cases where the facts are substantially the same.
>
> 523 N.W. 2d 548, 552 (N.D. 1994) (citations omitted).

[¶46] The Court essentially set up a two prong test to determine whether a statute is an impermissible classification. Id. at 552-53. Thus, even if a statute defined a class or made a classification, the classification would be constitutional if it is reasonable. Id. The Court in MCI Telecommunications stated:

> Reasonable classification does not violate the special laws provision of the North Dakota constitution. When we examine a statute to decide if a classification used is impermissibly particular, that is, special, rather than general, we examine the reasonableness of the classification. In other words, the test of the constitutionality of a statutory classification under the special laws provision of the North Dakota constitution is the reasonab1eness of the classification. A "statutory classification challenged under

> the special laws provision of our constitution is... to be upheld if it is natural, not arbitrary, and standing upon some reason having regard to the character of the legislation of which it is a feature."
>
> 523 N.W. 2d at 553 (Citations omitted).

[¶47] The Court would conclude that The Act is a general law and, even if there was a classification, such classification is reasonable under the circumstances. The Act simply distinguishes between navigable waters of Lake Sakakawea from the navigable waters acquired at statehood. The statute treats these different types of water differently.

[¶48] As previously alluded to, the North Dakota Supreme Court has recently given direction in a situation such as this. In the case of Wilkinson v. Board of University and School Lands, 2017 N.D. 231, 905 N.W. 2d 51, the Court addressed the Plaintiffs' takings claim under the Fifth Amendment of the United States Constitution. Justice McEvers noted, "if the District Court determines the State owns the minerals, the Plaintiffs will be deprived of the mineral interests." Because the federal government had compensated the Wilkinson's for their surface but not their minerals, "the Plaintiffs are entitled to compensation if the government's actions result in a 'taking' of the mineral interests." Thus, even if the State had some sort of claim to the minerals of the entire lake bed, the State would be in a position where it would create liabilities for itself in the form of having to compensate mineral owners, justly, for the State's acquisition of those minerals. The State legislature is completely within its prerogative to weigh the benefits

and the detriments to pursuing an ownership claim and to make a rational decision not to pursue an ownership claim of those minerals and create such a liability for the State. It was apparently not the State's policy to intentionally claim mineral ownership in the disputed area and to codify that policy, and thereby avoid claims for compensation is certainly within the authority of the legislature.

Retroactive Application

[¶49] As set forth in paragraph three above, "the ordinary high watermark determination under this Act is retroactive and applies to all oil and gas wells spud after January 1, 2006, for purposes of oil and gas mineral and royalty ownership." Over the years the State has collected various sums from rent, royalties, and bonuses, which the State has received as a lessor of mineral acres. The Act is retroactive to include all oil and gas wells spud after January 1, 2006. Accordingly, that money already collected and in the bank and indisputably owned by the State would have to be refunded to various claimants. To make the payments, the act appropriated $100,000,000.00 for the purpose of mineral revenue payments for retroactive payments under the Act and also authorized access to an $87,000,000.00 line of credit from the Bank of North Dakota. It is the retroactive portion of this statute that raises serious issues in regards to certain monetary payments made to mineral owners whose ownership rights have been clarified by this statute. While money held in escrow at the Bank of North Dakota due to title disputes could certainly be re1eased, royalties and bonuses collected more than three years prior to the Act for which no action against the State has been taken

would be subject to the statute of limitations that would bar making the claim. N.D.C.C. § 28-01-22.1 limits actions against the State to three years. Thus, any money required to be refunded under the Act, which have been collected by the State more than three years prior to the Act and for which no action had been brought could not be legally claimed by the newly determined mineral owner. Such a claim would be barred by the three year statute of limitations. As stated in the Defendant's brief:

> N.D. Const. Art. X, § 18. It is self-evident that in order for there to be a gift under this constitutional provision, the State must have ownership of the particular asset that is allegedly being donated, or as Plaintiffs put it, being 'given away.'
>
> E.G. Solberg v. State Treasurer, 53 N.W. 2d 49 (N.D. 1952).

In this case there are certainly funds going back to 2006 that the State owns. The statute of limitations would bar any claim made to those funds by a claimant. The Act removes the statute of limitations, retroactively, resulting in a transfer of money from the State to newly determined mineral rights owners for no value. The Defendants have also pointed out that the North Dakota Supreme Court has explained that:

> Because the State constitution does not confer power on the legislature, but is a limitation on power and, therefore, the legislature may enact any law not expressly or impliedly forbidden by the Constitution of the State or prohibited by

> the Constitution of the United States, the legislature may in the exercise of its power appropriate and expend money for whatever purpose it pleases unless its action violates a limitation found, either expressly or impliedly in the Constitution. Within these limits legislative action is not subject to control by the courts. Verry v. Trendbath, 148 N.W. 2d 567, 571 (N.D. 1967).

[¶50] Giving money to newly adjudicated mineral owners, who had no legal basis to make a claim for that money, is a direct violation of Article X, § 18 of the North Dakota Constitution which prohibits the State from giving away state assets without receiving like value in return. The anti-gift clause prohibits the State from giving away public resources. It applies to any assets, including minerals, funds derived from trust property, real property, and other tangible assets. Solberg, 33 N.W. 2d at 53-55. Regardless of the intention, the result of this transfer will be, in part, for those claims that would be otherwise barred by the statute of limitations, a give-away of a state asset. An incidental or ostensible public purpose will not save its constitutionality. Stutsman v. Arthur, 16 N.W. 2d 449J 454 (N.D. 1944).

CONCLUSION

[¶51] Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. Hamilton v. Woll,

2012 N.D. 238, ¶9, 623 N.W. 2d 754. Motions for summary judgment are governed by Rule 56 of the North Dakota Rules of Civil Procedure, which provides:

> Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.

[¶52] The Plaintiffs Complaint is a facial constitutional challenge to the Act. The Plaintiffs contend that the Act is unconstitutional on its face. As stated by the United States Supreme Court in the case of United States v. Salerno, 481 U.S. 739, 745 (1987);

> A facial challenge to a legislative act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exist under which the act would be valid.

[¶53] The Court concludes that the act, on its face, is a constitutional act of the North Dakota legislature. It codifies the State's policy of not making any claims to the minerals above the ordinary high water mark of the historic Missouri River channel as previously determined by the Army Corp of Engineers study. Ironically, by commissioning a new study which resulted in the Wenck line, the number of acres determined to be within the ordinary high water mark of the historical Missouri River bed to be 26,194 acres.

The original determination by the Army Corp of Engineers was 16,687 acres. This is actually an increase of 9,507 acres.

[¶54] The Court is troubled by the implementation provisions found in N.D.C.C. § 61- 33.1-04, the resulting implementation, and its retroactive application. In the case of Solberg v. State Treasurer, 53 N.W. 2d 49 (N.D. 1952), the Plaintiff, Solberg, had reacquired property from the State of North Dakota. The State, pursuant to law and pursuant to explicit titles in its deed to Solberg, reserved 50 percent of all oil, natural gas and minerals. In 1951 the legislature enacted a law, Chapter 231 of the Session Laws of 1951 which stated:

> Whenever the State or any of its departments sell lands to any person, from whom the State derived the title to such lands, or to his spouse or to his lineal decedents in the first degree, the lands shall be sold free of...

[¶55] The Plaintiff, Solberg, requested that the 50 percent of the oil, natural gas and minerals be conveyed to him. The North Dakota Supreme Court reasoned that Solberg accepted a conveyance which included a reservation in specific language which could not be misunderstood. This was done according to the law that was in effect at the time. At the time the 1951 legislative assembly enacted Chapter 231 the State owned 50 percent of the oil, natural gas and minerals therein. The Court found that conveying, without consideration, a 50 percent interest in the oil, natural gas and minerals that it owned to Plaintiff Solberg, without consideration; violated the anti-gift

clause of the North Dakota Constitution.

[¶56] Section 61-33.1-04(1)(b) essentially requires the Board of University and School Lands to take funds which it legally owns and has legally placed in the bank and without consideration write a check for those amounts to be distributed to the newly determined owners of previously disputed tracts. This is retroactive to January 11 2006. As such the Court finds that N.D.C.C. § 61-33.1-04(1)(b) violates on its face the North Dakota State Constitution's anti-gift clause found at Article X, § 18 and is thus unconstitutional.

[¶57] In sum, Defendants motion for summary judgment is granted to the extent that the Act is constitutional with the exception of N.D.C.C. § 61-33.1-04(1)(b). Plaintiff's motion for summary judgment is denied with the exception that the Court finds N.D.C.C. § 61-33.1-04(1)(b) in violation of the anti-gift clause of the North Dakota State Constitution. Defendants shall prepare a judgment consistent with this order.

Dated this 27 day of February, 2019.

BY THE COURT:

s/
Honorable John C. Irby
Judge of the District Court

STATE OF NORTH DAKOTA IN DISTRICT COURT
COUNTY OF CASS EAST CENTRAL
JUDICIAL DISTRICT

Case No. 09-2018-CV-00089

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

Plaintiffs, **ORDER FOR**

-vs- **PRELIMINARY INJUNCTION**

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

Defendants.

[¶1] The above entitled matter came before the Honorable John C. Irby, Judge of the District Court, on Plaintiffs' Motion for Preliminary Injunction (Court Docs. 32-54 and 368-374), which was resisted by the Defendants (Court Docs. 120-365 and 394-398). Hearing on this motion was held at 10:00 a.m. on May 21, 2018, and having considered the written and oral argument presented by the parties arguments,

[¶2] **THE COURT HEREBY ISSUES THE FOLLOWING FINDINGS OF FACT, CONCLUSIONS** OF **LAW AND ORDER:**

[¶3] This Court is not convinced that Plaintiffs'

case going forward is going to be successful given the significant burden Plaintiffs must meet for the constitutional challenge they have brought, but the Court does have concerns relating to N.D.C.C. Chapter 61-33.1 retroactive application to the year 2006 and distribution of funds back to this 2006 date may violate the anti- gift clause of the North Dakota Constitution (N.D. Const. Att. 10, § 19).

[¶4] Accordingly, the Plaintiffs' motion for preliminary injunction is **PARTIALLY GRANTED** and the Defendants are enjoined from distributing the following items of revenue, relating to the leasing of oil and gas minerals within the area of land that is subject to N.D.C.C. 61-33.1, that have been collected prior to the April 21, 2017 the effective date of N.D.C.C. Chapter 61-33.1 and held in the Strategic Investment and Improvements Fund (SIIF):

(a) Oil and Gas Lease Bonus & Rents

(b) Royalties Collected

(c) Royalties Escrowed

[¶5] The Court determines there is no inseparable harm to the State with the retention of the money described in Paragraph 4 above.

[¶6] Any and all other requests made by the Plaintiffs in their motion for preliminary injunction are **DENIED IN TOTAL,** and except for the enjoining the distribution of money specifically described in Paragraph 4 above, nothing in this Order limits or otherwise restricts the Defendants from proceeding with and completing all matters

described in N.D.C.C. Chapter 61-33.1, including but not limited to (a) receiving and acting upon public comments, (b) conducting public hearings, (c) actions to be taken by the Department of Mineral Resources, a department of the Industrial Commission, and the engineering firm hired the Department of Mineral Resources pursuant to N.D.C.C. § 61-33.1-03, (d) actions to be taken by the North Dakota Industrial Commission, (e) future leasing of minerals, and (f) the distribution of revenues relating to the leasing of oil and gas minerals, within the area of land subject to N.D.C.C. 61-33.1, that are collected from and after the April 21, 2017 effective date of N.D.C.C. Chapter 61-33.1.

[¶7] The Plaintiffs shall be not be required provide a security.

[¶8] The terms and conditions of this Order shall continue throughout the pendency of this action and until further order of this Court.

BY THE COURT:

s/ 6/26/18
Honorable John C. Irby
District Court Judge

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

JUDGMENT

Supreme Court No. 20190203
Cass County Case No. 2018-CV-00089

Appeal from the district court for Cass County.

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

Plaintiffs, Appellees, and Cross-Appellants,

v.

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

Defendants, Appellants, and Cross-Appellees.

[¶1] This appeal having been heard by the Court at the March 2020 Term before:

[¶2] Chief Justice Justice Jon J. Jensen, Justice Gerald W. VandeWalle, Justice Daniel J. Crothers, Justice Jerod E. Tufte, and Surrogate Judge Norman G. Anderson, sitting in place of Justice Lisa Fair McEvers;

[¶3] and the Court having considered the appeal, it is ORDERED AND ADJUDGED that the judgment of the district court is AFFIRMED in part and REVERSED in part.

[¶4] IT IS FURTHER ORDERED AND ADJUDGED that Plaintiffs, Appellees, and Cross- Appellants have and recover from Defendants, Appellants, and Cross-Appellees costs and disbursements on this appeal under N.D.R.App.P. 39, to be taxed and allowed in the court below.

[¶5] This judgment, together with the opinion of the Court filed this date, constitutes the mandate of the Supreme Court on the date it is issued to the district court under N.D.R.App.P. 41.

Dated: July 30, 2020

By the Court:

s/_____
Chief Justice

ATTEST:

s/_____
Clerk

CHAPTER 61-33
SOVEREIGN LAND MANAGEMENT

61-33-01. Definitions.

As used in this chapter, unless the context otherwise requires:

1. "Board" means the sovereign lands advisory board.
2. "Board of university and school lands" means that entity created by section 15-01-01.
3. "Navigable waters" means waters that were in fact navigable at the time of statehood, and that are used, were used, or were susceptible of being used in their ordinary condition as highways for commerce over which trade and travel were or may have been conducted in the customary modes of trade on water.
4. "Ordinary high water mark" means that line below which the presence and action of the water upon the land is continuous enough so as to prevent the growth of terrestrial vegetation, destroy its value for agricultural purposes by preventing the growth of what may be termed an ordinary agricultural crop, including hay, or restrict its growth to predominantly aquatic species.
5. "Sovereign lands" means those areas, including beds and islands, lying within the ordinary high water mark of navigable lakes and streams. Lands established to be riparian accretion or reliction lands pursuant to section 47-06-05 are considered to be above the ordinary high water mark and are not sovereign lands.

6. "State engineer" means the person appointed by the state water commission pursuant to section 61-03-01.

61-33-01.1. Ordinary high water mark determination - Factors to be considered.

The state engineer shall maintain ordinary high water mark delineation guidelines consistent with this section.

1. When determining the ordinary high water mark for delineating the boundary of sovereign lands, vegetation and soils analysis must be considered the primary physical indicators. When considering vegetation, the ordinary high water mark is the line below which the presence and action of the water is frequent enough to prevent the growth of terrestrial vegetation or restrict vegetation growth to predominately aquatic species. Generally, land, including hay land, where the high and continuous presence of water has destroyed the value of the land for agricultural purposes must be deemed within the ordinary high water mark.
2. When feasible, direct hydrological and hydraulic measurements from stream gauge data, elevation data, historic records of water flow, high resolution light detection and ranging systems, prior elevation and survey maps, and statistical hydrological evidence must be considered when determining the ordinary high water mark. The state engineer shall establish appropriate guidelines, technical standards, and other criteria, including use of light

detection and ranging systems or other future technological advancements, as necessary, for conducting hydrologic and hydraulic modeling required by this section.

3. Secondary physical indicators, including litter, debris, or staining, may be considered to supplement the analysis of the ordinary high water mark investigation but may not supersede primary physical indicators unless primary physical indicators are deemed inadequate or inconclusive. Physical indicators directly affected by influent non-navigable tributaries, adjoining water bodies, or wetlands may not be used to delineate the sovereign land boundary of a navigable body of water.

61-33-02. Administration of sovereign lands.

All sovereign lands of the state must be administered by the state engineer and the board of university and school lands subject to the provisions of this chapter. Lands managed pursuant to this chapter are not subject to leasing provisions found elsewhere in this code.

61-33-03. Transfer of possessory interests in real property.

All possessory interests now owned or that may be acquired except oil, gas, and related hydrocarbons, in the sovereign lands of the state owned or controlled by the state or any of its officers, departments, or the Bank of North Dakota, together with any future increments, are transferred to the state of North Dakota, acting by and through the state engineer. All such possessory interests in oil, gas, and related hydrocarbons in the sovereign lands of the state are

transferred to the state of North Dakota, acting by and through the board of university and school lands. These transfers are self-executing. 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, acting by and through the state engineer and board of university and school lands. Proper and sufficient delivery of all title documents is conclusively presumed.

61-33-04. Existing contracts and encumbrances recognized.

The transfers made by this chapter are subject to all existing contracts, rights, easements, and encumbrances made or sanctioned by the state or any of its officers or departments.

61-33-05. Duties and powers of the state engineer.

The state engineer shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all rights of the owner in its own name; may issue and enforce administrative orders and recover the cost of the enforcement from the party against which enforcement is sought; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter. The state engineer may enter agreements with the game and fish department or other law enforcement entities to enforce this chapter and rules adopted under this chapter.

61-33-05.1. Navigability determinations.

1. Before making a determination that a body of water or portion of a body of water is navigable, the state engineer shall:
    a. Develop and deliver to the state water commission a preliminary finding regarding the navigability of the body of water or portion of a body of water and the legal rationale for the preliminary finding; and
    b. Consult with the state water commission in an open meeting and demonstrate the public need and purpose for the determination to be made.
2. After completing the requirements of subsection 1, the state engineer may proceed with making a final determination of navigability by:
    a. Providing reasonable public notice of the preliminary finding, legal rationale for the preliminary finding, and opportunity for the public to provide comments for no less than sixty days. The notice must:
        (1) Include the address and electronic mail address to which public comments may be sent and the deadline by which public comments must be received;
        (2) Clearly identify the specific body of water or portion of a body of water for which the finding of navigability is sought;
        (3) State the state engineer will hold a public hearing regarding the preliminary finding before a final

determination of navigability is made, and provide the date, time, and location of the public hearing;

(4) Be provided to the governing body of each soil conservation district, water resource district, and county adjacent to the body of water or portion of a body of water for which the preliminary finding was made;

(5) Be published in the official county newspaper for each county adjacent to the body of water or portion of a body of water for which the preliminary finding was made; and

(6) Briefly state the purpose of the hearing and describe the impact or effect a determination of navigability will have on the property rights of persons who own property adjacent to the body of water or portion of a body of water for which the determination of navigability may be made; and

b. Holding a public hearing regarding the preliminary finding.

3. After completing the requirements of subsection 2 and making a determination of navigability, the state engineer shall prepare a report regarding the determination, including summaries of the information provided to the state water commission, the public hearings held, and the public comments received. The state engineer shall provide the report to the state water commission, send the report by

certified mail to any person that appeared at the public hearing required under subsection 2 or provided written comments by the deadline, make the report available to the public, including on the website for the office of the secretary of state, and provide public notice of the report's availability. The report is final on the date it is provided to the state water commission.

4. A determination of navigability may be appealed directly to a court of competent jurisdiction in accordance with sections 28-32-42 through 28-32-46 and sections 28-32-50 and 28-32-51.

61-33-06. Duties and powers of the board of university and school lands.

The board of university and school lands shall manage, operate, and supervise all properties transferred to it by this chapter; may enter into any agreements regarding such property; may enforce all subsurface rights of the owner in its own name; and may make and execute all instruments of release or conveyance as may be required pursuant to agreements made with respect to such assets, whether such agreements were made heretofore, or are made hereafter.

61-33-07. Deposit of income.

All income derived from the lease and management of the lands acquired by the state engineer and board of university and school lands pursuant to this chapter and not belonging to other trust funds must be deposited in the strategic investment and improvements fund.

61-33-08. Advisory board - Responsibilities.

There is created a sovereign lands advisory board. The board's responsibility is to advise the state engineer and the board of university and school lands on general policies as well as specific projects, programs, and uses regarding sovereign lands. The board, being solely advisory, has no authority to require the state engineer or the board of university and school lands to implement or otherwise accept the board's recommendations.

61-33-09. Members of the board - Organization - Meetings.

1. The board consists of the manager of the Garrison Diversion Conservancy District, the state engineer, the commissioner of university and school lands, the director of the parks and recreation department, the director of the game and fish department, and the director of the department of environmental quality, or their representatives.
2. The state engineer is the board's secretary.
3. The board shall meet at least once a year or at the call of the state engineer or two or more members of the board. The board shall meet at the office of the state engineer or at any other place decided upon by the board.
4. The board may adopt rules to govern its activities.

61-33-10. Penalty.

A person who violates this chapter or any rule implementing this chapter is guilty of a class B misdemeanor unless a lesser penalty is indicated. A civil penalty may be imposed by a court in a civil

proceeding or by the state engineer through an adjudicative proceeding pursuant to chapter 28-32. The assessment of a civil penalty does not preclude the imposition of other sanctions authorized by law, this chapter, or rules adopted under this chapter. The state engineer may bring a civil action to recover damages resulting from violations and may also recover any costs incurred.

CHAPTER 61-33.1
STATE OWNERSHIP OF MISSOURI RIVERBED

61-33.1-01. Definitions. (Retroactive application - See note)

For purposes of this chapter, unless the context otherwise requires:

1. "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.
2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections 33 and 34, township 153 north, range 102 west which is the approximate location of river mile marker 1,565, and from the South Dakota border to river mile marker 1,303.
3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.
4. "State phase two survey" means the "Ordinary High Water Mark Survey Task Order #2 Final Technical Report" commissioned by the board of university and school lands.

61-33.1-02. Mineral ownership of land subject to inundation by Pick-Sloan Missouri basin project dams. (Retroactive application - See note)

The 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. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel subject to inundation by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments subject to inundation by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

61-33.1-03. Determination of the ordinary high water mark of the historical Missouri riverbed channel. (Retroactive application - See note)

1. The corps survey must be considered the presumptive determination of the ordinary high water mark of the historical Missouri riverbed channel, subject only to the review process under this section and judicial review as provided in this chapter.
2. Effective April 21, 2017, the department of mineral resources shall commence procurement to select a qualified engineering and surveying firm to conduct a

review of the corps survey under this section. The review must be limited to the corps survey segments from the northern boundary of the Fort Berthold Indian reservation to the southern border of sections 33 and 34, township 153 north, range 102 west. Within ninety days of the first date of publication of the invitation, the department shall select and approve a firm for the review. The department may not select or approve a firm that has a conflict of interest in the outcome of the review, including any firm that has participated in a survey of the Missouri riverbed for the state or a state agency, or participated as a party or expert witness in any litigation regarding an assertion by the state of mineral ownership of the Missouri riverbed.

3. The selected and approved firm shall review the delineation of the ordinary high water mark of the corps survey segments. The review must determine whether clear and convincing evidence establishes that a portion of the corps survey does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law. The following parameters, historical data, materials, and applicable state laws must be considered in the review:
   a. Aerial photography of the historical Missouri riverbed channel existing before the closure date of the Pick-Sloan project dams;
   b. The historical records of the army corps of engineers pertaining to the corps

survey;

c. Army corps of engineers and United States geological survey elevation and Missouri River flow data;

d. State case law regarding the identification of the point at which the presence of action of the water is so continuous as to destroy the value of the land for agricultural purposes, including hay lands. Land where the high and continuous presence of water has destroyed its value for agricultural purposes, including hay land, generally must be considered within the ordinary high water mark. The value for agricultural purposes is destroyed at the level where significant, major, and substantial terrestrial vegetation ends or ceases to grow. Lands having agricultural value capable of growing crops or hay, but not merely intermittent grazing or location of cattle, generally must be considered above the ordinary high water mark; and

e. Section 61-33-01 and section 47-06-05, which provide all accretions are presumed to be above the ordinary high water mark and are not sovereign lands. Accreted lands may be determined to be within the ordinary high water mark of the historical Missouri riverbed channel based on clear and convincing evidence. Areas of low-lying and flat lands where the ordinary high water mark may be

impracticable to determine due to inconclusive aerial photography or inconclusive vegetation analysis must be presumed to be above the ordinary high water mark and owned by the riparian landowner.

4. The firm shall complete the review within six months of entering a contract with the department of mineral resources. The department may extend the time required to complete the review if the department deems an extension necessary.
5. Upon completion of the review, the firm shall provide its findings to the department. The findings must address each segment of the corps survey the firm reviewed and must include a recommendation to either maintain or adjust, modify, or correct the corps survey as the delineation of the ordinary high water mark for each segment. The firm may recommend an adjustment, modification, or correction to a segment of the corps survey only if clear and convincing evidence establishes the corps survey for that segment does not reasonably reflect the ordinary high water mark of the historical Missouri riverbed channel under state law.
6. The department shall publish notice of the review findings and a public hearing to be held on the findings. The public must have sixty days after publication of the notice to submit comments to the department. At the end of the sixty days, the department shall hold the public hearing on the review.
7. After the public hearing, the department, in consultation with the firm, shall consider all

public comments, develop a final recommendation on each of the review findings, and deliver the final recommendations to the industrial commission, which may adopt or modify the recommendations. The industrial commission may modify a recommendation from the department only if it finds clear and convincing evidence from the resources in subsection 3 that the recommendation is substantially inaccurate. The industrial commission's action on each finding will determine the delineation of the ordinary high water mark for the segment of the river addressed by the finding.

8. Upon adoption of the final review findings by the industrial commission, the board of university and school lands may contract with a qualified engineering and surveying firm to analyze the final review findings and determine the acreage on a quarter- quarter basis or government lot basis above and below the ordinary high water mark as delineated by the final review findings of the industrial commission. The acreage determination is final upon approval by the board.

61-33.1-04. Implementation. (Retroactive application - See note)

1. Within six months after the adoption of the acreage determination by the board of university and school lands:
   a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical

Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and

b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.

2. Upon adoption of the acreage determination by the board of university and school lands:

a. The board of university and school lands shall begin to implement any acreage adjustments, lease bonus and royalty refunds, and payment demands as may be necessary relating to state-issued oil and gas leases. The board shall complete the adjustments, refunds, and payment demands within two years after approving the acreage determination.

b. Operators of oil and gas wells affected by the final acreage determination immediately shall begin to implement any acreage and revenue adjustments relating to state-owned and privately owned oil and gas interests. The operators shall complete the adjustments within two years after the

board approves the acreage determination. Any applicable penalties, liability, or interest for late payment of royalties or revenues from an affected oil or gas well may not begin to accrue until the end of the two-year deadline. The filing of an action under section 61-33.1-05 tolls the deadline for any oil and gas well directly affected by the action challenging the review finding or final acreage determination.

61-33.1-05. Actions challenging review findings or final acreage determinations. (Retroactive application - See note)

1. An interested party seeking to bring an action challenging the review findings or recommendations or the industrial commission actions under this chapter shall commence an action in district court within two years of the date of adoption of the final review findings by the industrial commission. The plaintiff bringing an action under this section may challenge only the final review finding for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the finding, recommendation, or industrial commission action challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a boundary of the ordinary high water mark of the historical Missouri riverbed channel which varies from the boundary determined under this

chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of the type required to be considered by the engineering and surveying firm under subsection 3 of section 61-33.1-03.

2. An interested party seeking to bring an action challenging the final acreage determination under this chapter shall commence an action in district court within two years of the date the acreage determinations were approved by the board of university and school lands. The plaintiff bringing an action under this section may challenge only the acreage determination for the section or sections of land in which the plaintiff asserts an interest. The state and all owners of record of fee or leasehold estates or interests affected by the final acreage determination challenged in the action under this section must be joined as parties to the action. A plaintiff or defendant claiming a determination of the acreage above or below the historical Missouri riverbed channel which varies from the final acreage determination under this chapter bears the burden of establishing the variance by clear and convincing evidence based on evidence of
the type required to be considered by the engineering and surveying firm contracted by the board of university and school lands under subsection 2 of section 61-33.1-04.

3. Notwithstanding any other provision of law, an action brought in district court under this section is the sole remedy for

challenging the final review, recommendations, determination of the ordinary high water mark, and final acreage determination under this chapter, and preempts any right to rehearing, reconsideration, administrative appeal, or other form of civil action provided under law.

61-33.1-06. Public domain lands. (Retroactive application - See note)

Notwithstanding any provision of this chapter to the contrary, the ordinary high water mark of the historical Missouri riverbed channel abutting nonpatented public domain lands owned by the United States must be determined by the branch of cadastral study of the United States bureau of land management in accordance with federal law.

61-33.1-07. State engineer regulatory jurisdiction. (Retroactive application - See note)

This chapter does not affect the authority of the state engineer to regulate the historical Missouri riverbed channel, minerals other than oil and gas, or the waters of the state, provided the regulation does not affect ownership of oil and gas minerals in and under the riverbed or lands above the ordinary high water mark of the historical Missouri riverbed channel subject to inundation by Pick-Sloan Missouri basin project dams.

43 U.S.C.A. § 1311

§ 1311. Rights of States

Currentness

(a) Confirmation and establishment of title and ownership of lands and resources; management, administration, leasing, development, and use

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 in which the land is located, and the respective grantees, lessees, or successors in interest thereof;

(b) Release and relinquishment of title and claims of United States; payment to States of moneys paid under leases

(1) The United States releases and relinquishes unto said States and persons aforesaid, except as otherwise reserved herein, all right, title, and interest of the United States, if any it has, in and to all said lands, improvements, and natural resources; (2) the United States releases and relinquishes all claims of the United States, if any

it has, for money or damages arising out of any operations of said States or persons pursuant to State authority upon or within said lands and navigable waters; and (3) the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States shall pay to the respective States or their grantees issuing leases covering such lands or natural resources all moneys paid thereunder to the Secretary of the Interior or to the Secretary of the Navy or to the Treasurer of the United States and subject to the control of any of them or to the control of the United States on May 22, 1953, except that portion of such moneys which (1) is required to be returned to a lessee; or (2) is deductible as provided by stipulation or agreement between the United States and any of said States;

(c) Leases in effect on June 5, 1950

The rights, powers, and titles hereby recognized, confirmed, established, and vested in and assigned to the respective States and their grantees are subject to each lease executed by a State, or its grantee, which was in force and effect on June 5, 1950, in accordance with its terms and provisions and the laws of the State issuing, or whose grantee issued, such lease, and such rights, powers, and titles are further subject to the rights herein now granted to any person holding any such lease to continue to maintain the lease, and to conduct operations thereunder, in accordance with its provisions, for the full term thereof, and any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued such lease: *Provided, however,* That, if oil or gas was not being

produced from such lease on and before December 11, 1950, or if the primary term of such lease has expired since December 11, 1950, then for a term from May 22, 1953 equal to the term remaining unexpired on December 11, 1950, under the provisions of such lease or any extensions, renewals, or replacements authorized therein, or heretofore authorized by the laws of the State issuing, or whose grantee issued, such lease: *Provided, however,* That within ninety days from May 22, 1953 (i) the lessee shall pay to the State or its grantee issuing such lease all rents, royalties, and other sums payable between June 5, 1950, and May 22, 1953, under such lease and the laws of the State issuing or whose grantee issued such lease, except such rents, royalties, and other sums as have been paid to the State, its grantee, the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States and not refunded to the lessee; and (ii) the lessee shall file with the Secretary of the Interior or the Secretary of the Navy and with the State issuing or whose grantee issued such lease, instruments consenting to the payment by the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States to the State or its grantee issuing the lease, of all rents, royalties, and other payments under the control of the Secretary of the Interior or the Secretary of the Navy or the Treasurer of the United States or the United States which have been paid, under the lease, except such rentals, royalties, and other payments as have also been paid by the lessee to the State or its grantee;

(d) Authority and rights of United States respecting navigation, flood control and production of power

Nothing in this subchapter or subchapter I of this chapter shall affect the use, development, improvement, or control by or under the constitutional authority of the United States of said lands and waters for the purposes of navigation or flood control or the production of power, or be construed as the release or relinquishment of any rights of the United States arising under the constitutional authority of Congress to regulate or improve navigation, or to provide for flood control, or the production of power;

(e) Ground and surface waters west of 98th meridian

Nothing in this subchapter or subchapter I of this chapter shall be construed as affecting or intended to affect or in any way interfere with or modify the laws of the States which lie wholly or in part westward of the ninety-eighth meridian, relating to the ownership and control of ground and surface waters; and the control, appropriation, use, and distribution of such waters shall continue to be in accordance with the laws of such States.

CREDIT(S)

(May 22, 1953, c. 65, Title II, § 3, 67 Stat. 30.)

Notes of Decisions (67)

43 U.S.C.A. § 1311, 43 USCA § 1311
Current through P.L. 116-214.

43 U.S.C.A. § 1313

§ 1313. Exceptions from operation of section 1311 of this title

Currentness

There is excepted from the operation of section 1311 of this title--

(a) all tracts or parcels of land together with all accretions thereto, resources therein, or improvements thereon, title to which has been lawfully and expressly acquired by the United States from any State or from any person in whom title had vested under the law of the State or of the United States, and all lands which the United States lawfully holds under the law of the State; all lands expressly retained by or ceded to the United States when the State entered the Union (otherwise than by a general retention or cession of lands underlying the marginal sea); all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity; all lands filled in, built up, or otherwise reclaimed by the United States for its own use; and any rights the United States has in lands presently and actually occupied by the United States under claim of right;

(b) such lands beneath navigable waters held, or any interest in which is held by the United States for the benefit of any tribe, band, or group of Indians or for individual Indians; and

(c) all structures and improvements constructed by the United States in the exercise of its navigational

servitude.

CREDIT(S)

(May 22, 1953, c. 65, Title II, § 5, 67 Stat. 32.)

Notes of Decisions (12)

43 U.S.C.A. § 1313, 43 USCA § 1313
Current through P.L. 116-214.

43 U.S.C.A. § 1314

§ 1314. Rights and powers retained by United States; purchase of natural resources; condemnation of lands

Currentness

(a) 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 and others by section 1311 of this title.

(b) In time of war or when necessary for national defense, and the Congress or the President shall so prescribe, the United States shall have the right of first refusal to purchase at the prevailing market price, all or any portion of the said natural resources, or to acquire and use any portion of said lands by proceeding in accordance with due process of law and paying just compensation therefor.

CREDIT(S)

(May 22, 1953, c. 65, Title II, § 6, 67 Stat. 32.)

Notes of Decisions (5)

43 U.S.C.A. § 1314, 43 USCA § 1314
Current through P.L. 116-214.

33 U.S.C.A. § 701-1

§ 701-1. Declaration of policy of 1944 act

Effective: December 16, 2016

Currentness

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, as herein authorized, 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, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers; to facilitate the consideration of projects on a basis of comprehensive and coordinated development; and to limit the authorization and construction of navigation works to those in which a substantial benefit to navigation will be realized therefrom and which can be operated consistently with appropriate and economic use of the waters of such rivers by other users.

In conformity with this policy:

(a) Plans, proposals, or reports of the Chief of Engineers, Department of the Army, for any works of improvement for navigation or flood control not heretofore or herein authorized, shall be submitted to the Congress only upon compliance with the provisions of this paragraph (a). Investigations which form the basis of any such plans, proposals, or reports shall be

conducted in such a manner as to give to the affected State or States, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and, to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. If such investigations in whole or part are concerned with the use or control of waters arising west of the ninety-seventh meridian, the Chief of Engineers shall give to the Secretary of the Interior, during the course of the investigations, information developed by the investigations and also opportunity for consultation regarding plans and proposals, and to the extent deemed practicable by the Chief of Engineers, opportunity to cooperate in the investigations. The relations of the Chief of Engineers with any State under this paragraph (a) shall be with the Governor of the State or such official or agency of the State as the Governor may designate. The term "affected State or States" shall include those in which the works or any part thereof are proposed to be located; those which in whole or part are both within the drainage basin involved and situated in a State lying wholly or in part west of the ninety-eighth meridian; and such of those which are east of the ninety-eighth meridian as, in the judgment of the Chief of Engineers, will be substantially affected. Such plans, proposals, or reports and related investigations shall be made to the end, among other things, of facilitating the coordination of plans for the construction and operation of the proposed works with other plans involving the waters which would be used or controlled by such proposed works. Each report submitting any such plans or proposals to the Congress shall set out therein, among other things, the relationship between the plans for construction and

operation of the proposed works and the plans, if any, submitted by the affected States and by the Secretary of the Interior. The Chief of Engineers shall transmit a copy of his proposed report to each affected State, and, in case the plans or proposals covered by the report are concerned with the use or control of waters which rise in whole or in part west of the ninety-seventh meridian, to the Secretary of the Interior. Within 30 days from the date of receipt of said proposed report, the written views and recommendations of each affected State and of the Secretary of the Interior may be submitted to the Chief of Engineers. The Secretary of the Army shall transmit to the Congress, with such comments and recommendations as he deems appropriate, the proposed report together with the submitted views and recommendations of affected States and of the Secretary of the Interior. The Secretary of the Army may prepare and make said transmittal any time following said 30-day period. The letter of transmittal and its attachments shall be printed as a House or Senate document and shall be made publicly available.

(b) The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes.

(c) The Secretary of the Interior, in making investigations of and reports on works for irrigation

and purposes incidental thereto shall, in relation to an affected State or States (as defined in paragraph (a) of this section), and to the Secretary of the Army, be subject to the same provisions regarding investigations, plans, proposals, and reports as prescribed in paragraph (a) of this section for the Chief of Engineers and the Secretary of the Army. In the event a submission of views and recommendations, made by an affected State or by the Secretary of the Army pursuant to said provisions, sets forth objections to the plans or proposals covered by the report of the Secretary of the Interior, the proposed works shall not be deemed authorized except upon approval by an Act of Congress; and section 485h(a) of title 43 and section 590z-1(a) of title 16 are amended accordingly.

CREDIT(S)

(Dec. 22, 1944, c. 665, § 1, 58 Stat. 887; July 26, 1947, c. 343, Title II, § 205(a), 61 Stat. 501; Pub.L. 104-303, Title II, §223, Oct. 12, 1996, 110 Stat. 3697; Pub.L. 114-322, Title I, § 1136(a), Dec. 16, 2016, 130 Stat. 1656.)

Notes of Decisions (2)

33 U.S.C.A. § 701-1, 33 USCA § 701-1
Current through P.L. 116-214.