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.
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.


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, 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 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.

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 unconstitutional 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.

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.

\(^1\) 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 Army Corps of Engineers appears to have reserved to some grantees in such deeds oil and gas interests, not other mineral interests such as coal.
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 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 Dakota, 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.

\(^2\) As used herein, the term "acquire" or "acquired" includes both condemnation and purchase.
[¶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 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).
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).

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 #’s 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).

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.

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.

There is some overlap between the Phase 1 and Phase 2 reports.

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.


[¶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. § 61-33.1-03(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 water mark of the Missouri River. Plaintiffs contend that title to the riverbed shifts as the OHWM 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); Hogue v. Bourgois, 71 N.W. 2d 47, 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, ¶ 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 II, 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
thereeto, 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 land 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:

All 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

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).


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 shall 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.


[¶45] The North Dakota Supreme Court has distinguished general laws from special laws. In the case of MCI Telecommunications Corp. v. Heitkamp, 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 reasonableness 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 deterrents 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 released, 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. Verrey 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.


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.
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.

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...

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.

\[\text{¶56}\] 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 1, 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.

\[\text{¶57}\] 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:

[Signature]
Honorable John C. Toby
Judge of the District Court