

IGNORANCE OF THE CONSTITUTION IS NOT BLISS: THE
TAKINGS CLAUSE PROTECTS AGAINST THE STATE OF
NORTH DAKOTA CLAIMING PRIVATE MINERALS
UNDERNEATH LAKE SAKAKAWEA BY VIRTUE OF THE
UNITED STATES ACQUIRING THE LAND FOR THE
GARRISON DAM PROJECT

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ABSTRACT

The government cannot flood private property by virtue of a man-made dam, or acquire such property for flood control purposes, and then claim that it owns the property. This principle is not nuanced, complex, or complicated. It is basic Constitutional law. It is a bedrock protection afforded landowners through the Takings Clause of the United States and North Dakota Constitutions. In cases of artificial, government-induced flooding, or the acquisition of private property for flood control purposes, state law lacks the power to transfer title to the government without compensation and a showing that the property is being taken for a public use. The Takings Clause is an unbreakable shield protecting property owners from the government claiming their minerals through fiat, study, or legislation. The Takings Clause shields property owners like the Wilkinson family who lost their surface lands to the United States when it acquired the property for the Garrison Dam and Lake Sakakawea in the late 1950s but reserved the mineral interests. The State of North Dakota has no right, title, or claim to any of the minerals, like the Wilkinsons' mineral interests, underneath Lake Sakakawea. Given North Dakota's economic dependence on its land for agricultural and energy-related purposes, it is imperative that our courts protect landowners from ultra vires attempts by the State to eviscerate private property rights and claim that which is not theirs. This article discusses the State's unconstitutional attempt to claim ownership of all the mineral interests underlying Lake Sakakawea and the history of the Wilkinson case, where one family stood up to the State to protect property that has been in their family for generations.

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I. INTRODUCTION

It seems like a straightforward constitutional question because it is: can the government flood private property by building a massive dam and reservoir and then claim ownership of that property without compensating you for what they acquired for flood control purposes?¹ This question assumes the government is acquiring your property for a “public use” for our constitutional analysis.² A law degree is not required to answer this question. Without grabbing a textbook or doing intensive constitutional research, your first

1. This article was inspired, in part, by a column the author wrote for *Ag Week* in May 2017, where he asked the same question posed by this article’s title. See Joshua Swanson, *When a Straightforward Constitutional Question Isn’t*, *AG WEEK* (May 11, 2017 2:00 PM), <https://www.ag-week.com/opinion/columns/4265514-when-straightforward-constitutional-question-isnt>.

2. To exercise its eminent domain power, the government’s acquisition of the property must be for a “public use” before it can condemn the property under article 1, section 16 of the North

instinct was probably something along the lines of, “Hey, doesn’t something in the Constitution, like the Takings Clause in the Fifth Amendment, protect us from that?”

The framers of our Constitution, particularly James Madison, would agree with your gut instinct that the government cannot flood private property by virtue of a massive, man-made dam, and then claim ownership of it.³ So, too, would the United States Supreme Court. The Supreme Court has stated “[W]hen the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner.”⁴ In an article for the Congressional Research Service, Takings Clause scholar Robert Meltz described the government’s acquisition of property for federal dams as “the archetypal” federal takings example.⁵ Similarly, the Federal Court of Claims summarized it thusly: “As we have said, the Government built its public improvement. The plaintiffs lost their land. The loss resulted naturally from the improvement. We hold that the plaintiffs are entitled, under the Constitution, to be compensated.”⁶ Quite literally, the government acquiring property for a dam and resulting reservoir is the textbook definition of a taking.

The framers of our Constitution believed so strongly in the importance of private property rights they accorded it gospel-like status by including the prohibition against the government taking your property in the Bill of Rights. The Fifth Amendment of the United States Constitution provides an answer to our simple question in its closing sentence, stating “[N]or shall private property be taken for public use, without just compensation.”⁷ The North Dakota Supreme Court has explained that, “The state cannot constitutionally divest the owners thereof and transfer the property to itself without the pay-

Dakota Constitution and the Fifth Amendment of the United States Constitution. *See* *City of Jamestown v. Leever's Supermarkets, Inc.*, 552 N.W.2d 365, 369 (N.D. 1996) (citing *Square Butte Elec. Coop. v. Hilken*, 244 N.W.2d 519, 523 (N.D. 1976)); *see also* *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶ 22, 903 N.W.2d 51. In the oft-criticized *Kelo v. New London* decision, the Supreme Court emphasized that the government’s taking must serve a legitimate purpose of government. 545 U.S. 469, 477 (2005). “As for the first proposition, the City would no doubt be forbidden from taking petitioners’ land for the purpose of conferring a private benefit on a particular private party.” *Id.* “A purely private taking could not withstand the scrutiny of the public use requirement; it would serve no legitimate purpose of government and would thus be void.” *Id.* (quoting *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984)).

3. JAMES MADISON, *THE PAPERS OF JAMES MADISON VOL 1, CH. 26, NO. 23* (William T. Hutchinson ed., Chicago and London, Univ. of Chicago Press, 1962-77) (1792).

4. *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 31 (2012).

5. ROBERT MELTZ, CONG. RESEARCH SERV., RS20741, *THE CONSTITUTIONAL LAW OF PROPERTY RIGHTS “TAKINGS”*: AN INTRODUCTION 5 (2008).

6. *Cotton Land Co. v. United States*, 75 F.Supp. 232, 235 (Ct. Cl. 1948).

7. U.S. CONST. amend. V.

ment of due compensation under the exercise of the powers of eminent domain.”⁸ The government must provide compensation for the time period that its actions resulted in a taking.⁹

Notwithstanding the constitutional prohibition against the government taking private property, in *Wilkinson v. Bd. of Univ. & Sc. Lands*,¹⁰ the State of North Dakota (hereafter, the “State”) argued that it owns the entirety of the oil and gas interests underlying Lake Sakakawea outside the boundaries of the Fort Berthold reservation by virtue of the United States acquiring these surface lands through eminent domain for the Garrison Dam/Lake Sakakawea project.¹¹ This area spans approximately 310,140 private mineral acres.¹² This includes the Wilkinson plaintiffs’ 286 mineral acres that have been in the family since before World War II.¹³ The Supreme Court rejected the State’s claim that it owned the Wilkinsons’ minerals, holding that, “If the district court determines the State owns the minerals, the [Wilkinsons] will be deprived of the mineral interests. The federal government compensated the [Wilkinsons] for the surface property, but the [Wilkinsons] have not been compensated for the mineral interests. The [Wilkinsons] are entitled to compensation if the government’s actions result in a ‘taking’ of the mineral interests.”¹⁴ The Supreme Court remanded the case to the Williams County District Court, Northwest Judicial District, to decide two narrow issues: (1) the application of Ch. 61-33.1, N.D.C.C., a statutory scheme enacted by the North Dakota Legislature while the case was first on appeal in 2017; and (2) if the District Court determines that Ch. 61-33.1, N.D.C.C., did not apply, whether the State’s actions constituted an unconstitutional taking of the Wilkinson’s property.¹⁵

8. *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488, 492 (N.D. 1949).

9. *See Arkansas Game & Fish Comm’n*, 568 U.S. at 33 (“Once the government’s actions have worked a taking of property, ‘no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.’”) (citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304 (1987)).

10. 2017 ND 231, 903 N.W.2d 51.

11. U.S. ARMY CORPS OF ENG’RS, OMAHA DIST., GARRISON DAM/LAKE SAKAKAWEA MASTER PLAN WITH INTEGRATED PROGRAMMATIC ENVIRONMENTAL ASSESSMENT: MISSOURI RIVER, NORTH DAKOTA: UPDATE OF DESIGN MEMORANDUM MGR-107D 1-11 (2007).

12. *Id.*

13. *See Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶ 12, 903 N.W.2d 51.

14. *Id.* at ¶ 24. The North Dakota Supreme Court recognized that fact the State was a stranger to title, and that the Wilkinsons, and their predecessors, had continually leased the minerals since the United States acquired the surface of the property in 1958. *Id.* “There is undisputed evidence the plaintiffs have leased the minerals numerous times since they conveyed the surface property to the United States.” *Id.*

15. *Id.* at ¶¶ 20, 25. As discussed herein, pursuant to North Dakota Century Code § 61-33.1-03, the North Dakota Industrial Commission issued Order No. 29129 on September 27, 2018, which determined the Wilkinsons minerals were above the ordinary high watermark of the historical Missouri riverbed channel and thus not sovereign land owned by the State. *See generally* A Hearing on

The State's position was that the "Phase I Study" done by Bartlett & West on behalf of the Board of University and School Lands in November 2010, which purported to locate the ordinary high watermark ("OHWM") of the Missouri River and Lake Sakakawea, controlled and gave the State ownership of the Wilkinsons' minerals.¹⁶ The State admitted that, "[t]he Phase I Study did not take into account the location of the OHWM before the construction of the Garrison Dam or any alleged direct effect from Lake Sakakawea but denies that the Phase I Study is not an accurate measurement and delineation of the current OHWM."¹⁷ The State ignored nearly 150 years of Takings Clause case law going back to the United States Supreme Court's 1872 decision in *Pumpelly v. Green Bay Co.*,¹⁸ which held the government cannot construct an artificial, man-made dam, and then claim ownership of the property flooded, or otherwise acquired for flood control purposes.¹⁹ The government cannot even acquire a flowage easement over private property for flood control purposes without providing just compensation under the Takings Clause.²⁰

The *Wilkinson* case is one of the more significant property and constitutional law cases decided in North Dakota with respect to the Takings Clause

the Review of the Delineation of the Ordinary High Water Mark, N.D. Indus. Comm'n 29129, No. 26584 (Sept. 27, 2018).

16. State's Brief in Support of Motion for Summary Judgment at ¶ 18, *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038). The Phase I Study is shorthand and the common name for the "Technical Report For The Ordinary High Watermark Delineation of the Yellowstone and Missouri River (From ND/MT Border to Williston, ND) in Western North Dakota." See generally BARTLETT & WEST & MCCAIN AND ASSOCS., INC., TECH. REPORT FOR THE ORDINARY HIGH WATERMARK DELINEATION OF THE YELLOWSTONE AND MISSOURI RIVER (FROM ND/MT BORDER TO WILLISTON, ND) IN WESTERN NORTH DAKOTA (2010).

17. State's Answer to Amended Complaint at ¶ 22, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

18. 80 U.S. 166, 181 (1872) ("where real estate [] is invaded by superinduced additions of water . . . so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution . . .").

19. See, e.g., *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31-34 (2012) (summarizing cases involving the government's flooding of private property constituting a taking). This stands as one of the few bright line rules in Takings Clause jurisprudence. "[w]e have drawn some bright lines, notably, the rule that a permanent physical occupation of property authorized by government is a taking." *Id.* at 31 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982)); see also *United States v. Dickinson*, 331 U.S. 745, 750 (1947) ("When it [the government] takes property by flooding, it takes the land which it permanently floods as well as that which inevitably washes away as a result of the flooding. The mere fact that all the United States needs and physically appropriates is the land up to the new level of the river, does not determine what in nature it has taken. If the Government cannot take the acreage it wants without also washing away more, that more becomes part of the taking.").

20. See *Quebedeaux v. United States*, 112 Fed. Cl. 317, 321 (2013). "These and other cases indicate that 'government actions may not,' in effect, 'impose upon a private landowner a flowage easement without just compensation.'" *Id.* (quoting *Ridge Line, Inc. v. United States*, 346 F.3d 1346, 1353 (Fed. Cir. 2003)).

and the government's overreach in violation of the Fifth Amendment of the United States Constitution and Article I, § 16 of the North Dakota Constitution.²¹ The outcome impacts not only the thousands of private property owners with mineral interests within the boundaries of Lake Sakakawea and the oil and gas companies developing those minerals, with billions of dollars at stake, but all property owners throughout the Roughrider State. For example, if the State's position is ultimately validated by the courts, then the government could simply take whatever property it wants for the Fargo-Moorhead Area Diversion Project in the Red River Valley without providing any compensation to affected landowners. That is significant – and dangerous – considering the Fargo-Moorhead Area Diversion Project “will require the acquisition of approximately \$350-400 million in land rights.”²² This comparison is particularly concerning. Mineral interests in Williams County along the boundary of Lake Sakakawea are valuable, as is the farmland needed for the Fargo-Moorhead Area Diversion on the State's eastern side.²³ The land in the Red River Valley is some of the richest farmland in the world.²⁴ The Fargo-Moorhead Area Diversion includes more than 1,300 parcels of land

21. Representative George Keiser and Representative Bob Martinson, in particular, championed the cause of private landowners and their constitutional rights, including the Wilkinsons, during the hearings on Senate Bill 2134, which culminated in chapter 61-33.1 of the North Dakota Century Code, during the 65th Legislative Assembly in 2017. *See Hearings on S.B. 2134 Before the House and Senate Energy and Nat. Res. Comms.*, 65th Legis. Assemb., Reg. Sess. 131-32 (N.D. 2017) (statements of Representative Keiser and Representative Martinson) [hereinafter *Hearings on S.B. 2134*]. Representative Keiser described the actions of the State during a hearing on an amendment to Senate Bill 2134 in April 2017. *Id.* at 132 (statements of Representative Keiser). “We have a problem here. Let’s do it fair and right. Those folks who took the initiative to challenge the state. It is hard to challenge the state. So many hurdles to challenge the state. The state has so many resources and attorneys that the private sector does not have. I applaud any citizen who has the guts to stand up to us once in a while. This is such an egregious action. Maybe we should build a bigger dam. Flood more. If this is the right concept, then we can take the mineral rights. This is not the right concept. What [the State] did was wrong.” *Id.* (statements of Representative Keiser). Representative Martinson pulled no punches in his description of the State’s claim of suddenly owning private mineral interests that had been in families for generations, long before the United States acquired the property for Garrison Dam and Lake Sakakawea. *Id.* at 131 (statements of Representative Martinson). “We feel pretty strongly that the state stole these people’s minerals. How would you feel if someone stole your property and you had to go to court to get it back and you paid as much money in court fees as you got returned?” *Id.* at 131 (statements of Representative Martinson).

22. *Project Update*, FM AREA DIVERSION PROJECT (Nov. 18, 2014), <https://fmdiversion.com/land-acquisition-underway/>.

23. *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶ 24, 903 N.W.2d 51. “Mineral interests in Williams County, in the oil-producing Bakken formation, have value. *Id.* (citing *Jacobs-Raak v. Raak*, 2016 ND 240, ¶ 12, 888 N.W.2d 770 (stating it would be disingenuous to believe mineral interests in a county in the Bakken formation have little or no value)).

24. 144 CONG. REC. 4146 (1998) (statement of Sen. Conrad). “The Red River Valley has the richest farmland in the world. . . . When you come to the Red River Valley of North Dakota, you see the richest farmland anywhere in the world. In places it is 8 feet thick, an incredible lode that is so rich.” *Id.*

and approximately 7,000 acres, which includes fee titles, permanent easements, and temporary easements.²⁵

The outcome of the *Wilkinson* case will interpret the protections afforded to our citizens by the Fifth Amendment of the United States Constitution and Article I, § 16 North Dakota Constitution broadly, rather than impacting only those with oil and gas interests under Lake Sakakawea. The straightforward, time-tested protections against the government taking property contained in the United States and North Dakota Constitutions are of particular significance here, in the Great Plains, where our economy and livelihoods literally depend on the land and agriculture.²⁶ According to the North Dakota Department of Commerce: “Agriculture is still the #1 industry in North Dakota’s economy. The state typically leads the nation in over a dozen crops.”²⁷ Educational curriculum developed for the North Dakota Studies program by the State Historical Society of North Dakota boasts that nearly 25 percent of North Dakota’s workforce is “employed in farm-related jobs.”²⁸ In 2017, the last year for which data is available from the Office of the United States Trade Representative, North Dakota was the nation’s ninth largest agricultural exporting state, shipping \$4.5 billion in domestic agricultural exports abroad.²⁹ The North Dakota Legislature has rightfully declared that “the public welfare of North Dakota is largely dependent on agriculture” in recognizing the industry’s importance to the “economic well-being” to our state.³⁰ The State must not be allowed to trample the private property rights of her citizens, wherever that property is located, and the sacred protections afforded by our federal and state constitutions must be given their due meaning by the courts.

25. *Project Update*, FM AREA DIVERSION PROJECT (Nov. 18, 2014), <https://fmdiversion.com/land-acquisition-underway/>.

26. According to the USDA’s National Agricultural Statistics Service data from 2017, North Dakota had nearly 40,000,000 million acres, or 90% of the state’s land, devoted to agriculture spread across 26,100 farm operations. *2017 Census of Agriculture*, U.S. DEP’T OF AGRIC. NAT’L AGRIC. STAT. SERV., https://www.nass.usda.gov/Quick_Stats/CDQT/chapter/2/table/1/state/ND (last visited Oct. 4, 2019). The USDA’s 2017 state-by-state census indicated the market value of commodities sold in North Dakota for that year was \$8,234,102,000. *Id.*

27. *Agriculture*, ND DEP’T OF COMMERCE, <https://www.business.nd.gov/agriculture/> (last visited Oct. 4, 2019).

28. State Historical Soc’y of N.D., *ND Agriculture Teacher Resource Guide: Quick Facts*, N.D. STUDIES, <https://www.ndstudies.gov/curriculum/4th-grade/nd-agriculture> (last visited Oct. 4, 2019).

29. *North Dakota*, OFF. OF THE U.S. TRADE REP., <https://ustr.gov/map/state-benefits/nd> (last visited Sept. 17, 2019).

30. N.D. CENT. CODE § 38-18-02 (2019).

II. THE WILKINSONS' PREDECESSORS RESERVED THE MINERALS UNDER THEIR FARMLAND WHEN THE SURFACE ESTATE WAS ACQUIRED BY THE UNITED STATES FOR LAKE SAKAKAWEA

Like many North Dakota families, the property directly at issue in *Wilkinson* has been owned by the family for generations, going back to before World War II. The property consists of mineral interests in Sections 12 and 13, Township 153 North, Range 102 West, in Williams County (the “Wilkinson Property”).³¹ The Wilkinson Property is just west of the Highway 85 Bridge near Williston, North Dakota. The Wilkinsons’ predecessors, J.T. and Evelyn Wilkinson, farmed this property as early as the 1920s.³² Several of the Plaintiffs, Lois Jean Patch, now deceased,³³ Williams S. Wilkinson, and Vanessa E. Blaine, who are J.T. and Evelyn’s children, helped farm the property. They recalled “harvesting mainly spring wheat on these parcels of land.” During World War II, when Vanessa was only 12-years old, Evelyn took her before Judge Owens in Williston to get her driver’s license. The family needed her help farming this very property because her two older brothers had enlisted in the Army Air Force and United States Navy.³⁴

In June 1958, the United States purchased the surface of the Wilkinson Property as part of the Garrison Dam Project.³⁵ The surface was acquired by the United States under the authority of the Flood Control Act of 1944, Public Law 534, 78th Congress, 2nd session.³⁶ The U.S. Army Corps acquired fee title to all land that would be inundated when Lake Sakakawea reached full pool at

31. The Wilkinson Property is located in Section 12: SW1/4, S1/2NW1/4, and Section 13: Farm Unit 312 in the Buford-Trenton Project. *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶ 2, 903 N.W.2d 51.

32. Affidavits of Lois Jean Patch, William S. Wilkinson, and Vanessa E. Blaine, *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

33. Lois Jean Patch died on April 3, 2018. *Lois Jean Patch*, BISMARCK TRIB. (Apr. 15, 2018), https://bismarcktribune.com/news/obituaries/lois-jean-patch/article_86046229-ecfb-580e-968e-68bdc841b5e2.html.

34. Affidavit of Vanessa E. Blaine, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038). “During the WWII years my two older brothers enlisted in the AAF [Army Air Force] and Navy respectively. In preparing for my being able to help in the fields and with farm work, my mother [Evelyn] took me before Judge Owens to obtain a driver’s license at twelve years of age. I was fifteen when my brother Tom entered the Navy and I began driving a 3/4 ton truck hauling grain from the harvested fields to the local grain elevator.” *Id.*

35. Exhibit 5 – Warranty Deed between JT and Evelyn Wilkinson and the United States, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038) [hereinafter Warranty Deed].

36. U.S. ARMY CORPS OF ENG’RS, OMAHA DIST., *supra* note 11, at 1-1. The Garrison Dam/Lake Sakakawea project, along with four other Missouri River main stem projects, Gavins Point, Fort Randall, Big Bend, and Oahe, “are elements of the comprehensive development program in the Missouri River Basin,” referred to by the U.S. Army Corps of Engineers as the Pick-Sloan Plan. U.S. ARMY CORPS OF ENG’RS, OMAHA DIST., *supra* note 11, at 1-1.

1,854 feet mean sea level (“msl”).³⁷ The Wilkinson Property is within the 1,854 msl. The United States acquired title to the surface of the property because it was within the operational pool of Lake Sakakawea. The U.S. Army Corps of Engineers defines the elevation of Lake at crest as 1,854 msl.³⁸

The United States purchased the surface of the property from J.T. and Evelyn Wilkinson through Warranty Deed on June 9, 1958.³⁹ The Warranty Deed reserved, to the Wilkinsons, all of the oil and gas interests in the property subject only to the United States rights related to flood the property for Garrison Dam and its reservoir, stating:

all oil and gas rights therein, on or under said described lands, with full rights of ingress and egress for exploration, development, production and removal of oil and gas; upon condition that the oil and gas rights so reserved as subordinated to the right of the United States to flood and submerge the said lands permanently or intermittently in the construction, operation and maintenance of the Garrison Dam and Reservoir . . .

The Wilkinson Property was “Tract No. HH-3190” for the Garrison Project. This is reflected on the upper right corner of the Warranty Deed. In the Abstractor’s Certificate prepared for the United States as part of the land acquisition process, the abstractor indicated the Wilkinsons’ property was acquired for the “Garrison Dam & Reservoir, N.D.” project as “Tract No. HH-3190.”⁴⁰ The Segment Map for the Garrison Project and Acquisition Tract Register shows the Wilkinson Property in Sections 12 and 13 just south of the railroad

37. U.S. ARMY CORPS OF ENG’RS, OMAHA DIST., *supra* note 11, at 2-47. “Since the U.S. Army Corps of Engineers (Corps) acquired fee title to all land that would potentially flood if Lake Sakakawea was at full pool, all of the headwaters area and immediate shoreline is owned by the Corps.” U.S. ARMY CORPS OF ENG’RS, OMAHA DIST., *supra* note 11, at 2-47. The Corps’ Master Plan goes on to explain that, “High Pool operating conditions are defined as the reservoir surface between elevations 1850 and 1855. The flood control pool for the Garrison Reservoir is defined as the range between elevations 1850 and 1854, with 1854 being the top of the emergency spillway gates.” U.S. ARMY CORPS OF ENG’RS, OMAHA DIST., *supra* note 11, at 3-4.

38. U.S. ARMY CORPS OF ENG’RS, OMAHA DIST., *Garrison Project Statistics* (Aug. 6, 2012), <https://www.nwo.usace.army.mil/Media/Fact-Sheets/Fact-Sheet-ArticleView/Article/487634/garrison-project-statistics>. The U.S. Army Corps of Engineers defines the land boundary as extending 178 miles upstream from the Garrison Dam, which is located at River Mile 1,389.86. *See also* North Dakota v. U.S. Army Corps of Engineers, 270 F. Supp. 2d 1115, 1129 (D.N.D. 2003) (recognizing that Lake Sakakawea is 178 miles long).

39. Warranty Deed, *supra* note 35.

40. Exhibit 1 Abstract at 6-7, 9, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038) [hereinafter “Abstract”]; Exhibit 4 to Plaintiffs’ Response [Exhibit “3” Abstractor’s Certificate], *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038) [hereinafter Abstractor’s Certificate].

right of way, labeled as HH-3190.⁴¹ The Abstractor certified that the Wilkinson Property was acquired “for the use and benefit of the United States of America and its assigns . . .”⁴²

In May 1959, the United States Attorney General, the Honorable William P. Rogers, wrote to the Secretary of the United States Army, affirming that the Wilkinsons retained all the oil and gas rights in the property, and specifically noted their oil and gas leases were subject only to the rights of the United States.⁴³ The State acquired no rights in this process and is not mentioned in any of the United States documents. The State is a stranger to title, with no cognizable right or interest to the Wilkinson Property, that stood a legal doctrine – the Equal Footing Doctrine – on its head, arguing it stands for the proposition that the government can flood property then claim ownership of the same, in attempting to manufacture a basis to claim hundreds of thousands of mineral acres that it has no legal right to.⁴⁴ As noted by the Supreme Court, the Wilkinsons leased the property “numerous times” since

41. Exhibit 6 – Final Project Map Section HH, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038). In the note portion of the United States’ Segment Map, it states that the oil and gas were reserved in all tracts, including HH-3190, with the exception of Tract HH-3153.

42. Abstractor’s Certificate, *supra* note 40 (stating in relevant part, “I hereby certify that for the use and benefit of the United States of America and its assigns I have made a complete examination of all public records pertaining to the title to the captioned land [Tract HH-3190] since Oct. 17, 1940, & July 8, 1941 the date of the previous certificate and that nothing affecting or relating to the title in any manner whatsoever has been filed or recorded in such records since the date of the previous certificate except as shown in pages 1 to 9, inclusive, of the abstract. I further certify that no taxes or special assessments now appear upon the records as unpaid and no tax sales now appear upon the records as unredeemed.”). Doc. #140 contains the abstract entries referenced in the Abstractor’s Certificate mentioned in this note. *See generally* Abstract, *supra* note 40. Outside of Entry No. 1, the Warranty Deed whereby J.T. and Evelyn acquired their fee simple interest in the property, all other entries are oil and gas leases entered by the Wilkinsons. The State is not listed anywhere in the Abstract of the Record Title. *See generally* Abstract, *supra* note 40.

43. Exhibit 5 to Plaintiffs’ Response [Attorney General’s May 12, 1959 letter to Secretary of the Army], *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038) (“A re-examination has been made of the title data relating to 286.04 acres of land, more or less, Tract No. HH-3190, Garrison Dam and Reservoir Project in Williams County, North Dakota. This land was conveyed to the United States of America under the provisions of existing legislation by J.T. Wilkinson and Evelyn M. Wilkinson, his wife, under deed dated June 9, 1958, filed of record of June 10, 1958, and recorded among the land records of the county in Book 131 of Deeds at page 411. . . . The abstract, recorded deed, and accompanying data disclose valid title to be vested in the United States of America subject to: . . . 3. Reservation by grantors [Wilkinsons] and owners of interest therein including third party lessees, their heirs, successors and assigns of all oil and gas rights therein, under the terms contained in the deed to the United States.”).

44. The Supreme Court explained the history, and significance, of the Equal Footing Doctrine in its seminal decision in *PPL Montana, LLC v. Montana*, and the line of cases cited therein. 565 U.S. 576 (2012). Under the Equal Footing Doctrine, the State’s interest is strictly limited to the beds of navigable waterways that existed at the moment of statehood, and no more. *See id.* at 591-92. “The title consequences of the equal-footing doctrine can be stated in summary form: Upon statehood, the State gains title within its borders to the beds of waters then navigable . . . For state title under the equal-footing doctrine, navigability is determined at the time of statehood, and based on the ‘natural and ordinary condition’ of the water.” *Id.*

the United States acquired the surface for the Garrison Project.⁴⁵ A familiar component of the “bundle of sticks” accompanying property rights is the ability to lease your property, and the ability to exclude others from that property. If the Wilkinsons had the right to lease their property, and, indeed, exercised that right over the last several decades as the Supreme Court recognized, the State could not have held any ownership interest in that same property to the Wilkinsons’ detriment.⁴⁶

III. THE STATE UNILATERALLY, AND UNCONSTITUTIONALLY, TAKES HUNDREDS OF THOUSANDS OF MINERALS ACRES UNDER LAKE SAKAKAWEA WITHOUT INFORMING LANDOWNERS

Without public notice, and without informing the Wilkinsons and other impacted mineral owners, the State unilaterally and clandestinely decided it owned the Wilkinsons’ minerals—minerals that had been in the family and leased for over 60 years.⁴⁷ A September 2010 Memorandum to the Board of University and School Lands makes clear the State’s rationale for claiming these valuable property rights—money.⁴⁸ This memorandum cavalierly asserts the State’s ownership as if it were a cursory matter, without caring to explain the legal rationale for how the State acquired private property like the Wilkinsons’ land, or the property of thousands of other private landowners.⁴⁹ Instead, the memorandum informed the board that, “There are many issues that could lead to potential title disputes related to the State’s ownership of the minerals beneath navigable bodies of water. It may be some time before

45. *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶ 24, 903 N.W.2d 51.

46. *See Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *see also Kartch v. EOG Res., Inc.*, No. 4:10-CV-014, 2010 WL 11562067, at *3 (D.N.D. Oct. 15, 2010). “As already discussed, the Kartches did not acquire a ‘full bundle of sticks’ when they purchased the subject property. Rather, some of the ‘sticks’ were retained by the prior owner in form of mineral reservation, which, under North Dakota law, is the dominate interest and carries with it an implied easement for reasonable access and use of Kartches’ surface estate.” *Kartch*, 2010 WL 11562067, at *3.

47. Exhibit 13 – November 1, 2010 E-mail between Craig Smith and Ron Ness, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038). Smith tells Ness (president of the North Dakota Petroleum Council) that, “Last I knew, when Preszler was still there, the State Land Department was not releasing their surveys [of the OHWM] to the public (at least as of a few months ago). I had requested copies but was never provided the information.” *Id.* Preszler was the former commissioner of the North Dakota Land Department, now known as the Board of University and School Lands.

48. Exhibit 11 – September 2010 Memorandum to the Bd. of Univ. and Sch. Lands, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038) [hereinafter September 2010 Memorandum].

49. September 2010 Memorandum, *supra* note 48. There is no explanation in the September 2010 Memorandum, or any sort of legal rationale, as to how the State acquired these mineral rights from private property owners like the Wilkinsons. *See generally* September 2010 Memorandum, *supra* note 48.

all of these potential title disputes are resolved, by the courts or through negotiations and agreements between the various parties.”⁵⁰ The memorandum then reveals the driving force behind the State’s decision, stating, “With the current Bakken/Three Forks oil activity, LMTF [Land and Minerals Trust Fund] revenues have skyrocketed. . . . Most of that amount is oil and gas lease bonuses related to the beds of the Missouri and Yellowstone Rivers.”⁵¹ This demonstrates that the State is focused on financial gains rather than the constitutional rights of its citizens.

The United States previously warned the State that any attempt to claim property acquired for the Garrison Project and Lake Sakakawea constituted an unconstitutional taking. In a March 2009 e-mail to the State, the U.S. Army Corps of Engineers told the State, “Essentially, State law does not supercede [sic] federal land ownership. The end result of the Ordinary High Water survey cannot be a ‘taking’ by the State of ND of land acquired by the federal government.”⁵² After the State informed oil and gas operators that it claimed ownership of the Wilkinson Property, and other acres under Lake Sakakawea, Brigham Oil & Gas L.P., nominated the Wilkinson’s minerals for leasing at the August 3, 2010 State Lease Sale.⁵³ However, in the letter, Brigham Oil & Gas L.P. questioned the State’s claim: “Brigham is aware of the State of North Dakota’s recent claim to the [OHWM] along the Missouri River and it appears that the State is claiming and is now leasing more acreage than previously leased and/or claimed. . . . Brigham is only nominating the tracts listed above and has not approved or verified title to said river tracts.”⁵⁴

The Wilkinsons initiated their lawsuit against the State in January 2012.⁵⁵ Even after the Supreme Court’s decision directing the District Court to address the two narrow issues on remand, and the Industrial Commission issuing its Order determining the OHWM of the historical Missouri riverbed channel in September 2018 in the Wilkinsons’ favor, the State sought to stay

50. September 2010 Memorandum, *supra* note 48.

51. September 2010 Memorandum, *supra* note 48.

52. Exhibit 12 – March 23, 2009 Email from Tim Kolke, United States Army Corps of Engineers to Mike Brand, the Director of the Surface Management Division for the Land Board, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

53. Exhibit 9 – June 2010 Nomination Letter from Brigham Oil & Gas LP to State of North Dakota, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

54. Exhibit 9 – June 2010 Nomination Letter from Brigham Oil & Gas LP to State of North Dakota, *supra* note 53.

55. Summons, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038); Complaint, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038). As of October 15, 2019, in addition to the 11 briefs filed with the Supreme Court, there are 515 docket entries in the case.

and further delay the proceedings in the case.⁵⁶ To put this prolonged litigation into perspective, in addition to the mounting attorneys' fees incurred by the Wilkinsons, it took less than half the time for the landmark Fifth Amendment takings case, *Kelo v. City of New London*,⁵⁷ to make its way from the Superior Court of Connecticut to the United States Supreme Court. It took a third of the time for the landmark First Amendment case on campaign finance law, *Citizens United v. Fed. Election Comm'n*,⁵⁸ to travel from the United States District Court of the District of Columbia to the United States Supreme Court.⁵⁹ It took less than three years for PPL Montana, LLC, an electric utility, to argue its case against the State of Montana to the Montana Supreme Court and then successfully appeal to the United States Supreme Court in *PPL Montana, LLC v. Montana*,⁶⁰ which vindicated the utility's property rights.⁶¹

At every turn, the State has actively sought to delay justice and deprive the Wilkinsons of what is rightfully theirs under the law.⁶² As Rep. Keiser noted during his April 2017 testimony on SB 2134, what citizen should have to battle their own State government for the better part of a decade over property that has been in their family for more than seven decades?⁶³ The Court should follow that time-honored maxim stated by the Supreme Court a century ago in a pair of cases regarding delayed justice: "A judge should take

56. Notice of Motion for Continued Stay of Proceedings, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038); Motion for Continued Stay of Proceedings, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038); Brief in Support of Motion for Continued Stay of Proceedings, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

57. 545 U.S. 469 (2005).

58. 558 U.S. 310 (2010).

59. See generally *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).

60. 565 U.S. 576 (2012).

61. See generally *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012). *PPL Montana, LLC* involved the application of the Equal Footing Doctrine, and is discussed more below. *Id.* In the case, the United States Supreme Court rejected Montana's expansive interpretation of the doctrine, ruling that under the equal footing doctrine, the State of Montana did not hold title to riverbed segments of river that were nonnavigable at the time of statehood. See *id.* at 593-603.

62. The Supreme Court held that the Fifth Amendment of the United States Constitution, and Article I, § 16 of the North Dakota Constitution, applied to the State's attempt to claim the Wilkinsons' property. *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶ 22, 903 N.W.2d 51. The Supreme Court also held that if the State persists in claiming the Wilkinsons' property, and the Court determines the State owns the minerals, an unconstitutional taking will have occurred for which the State is required to compensate the Wilkinsons. *Id.* at ¶ 24. The Wilkinsons could not be deprived of the minerals if they did not first own them, as the Supreme Court concluded. Any outcome here that ends with the State owning the Wilkinsons' minerals is an unconstitutional taking for which the State must compensate the Wilkinsons. Yet, the State persists in claiming the family's minerals. The family may have recourse in federal court under the recent decision in *Knick v. Twp. of Scott*, 139 S.Ct. 2162 (2019) (holding that a property owner has an actionable Fifth Amendment takings claim when the government takes their property without paying for it, and may bring that claim in federal court under 42 U.S.C.A. § 1983, overruling *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985)).

63. See *Hearings on S.B. 2134*, *supra* note 21 (statement of Representative Keiser).

notice of the fact that an injured party may not have means to carry on a lawsuit indefinitely, and that *justice delayed is justice denied*.”⁶⁴

IV. THE STATE’S VIEW OF THE EQUAL FOOTING DOCTRINE AND ORDINARY HIGH WATER MARK OF THE HISTORIC MISSOURI RIVERBED CHANNEL IGNORED THE TAKINGS CLAUSE

Contrary to the State’s theory, any state law determining ownership of property lying within a navigable water body must comply with overriding principles of federal and constitutional law, namely, the Equal Footing Doctrine and the Takings Clause.⁶⁵ In the case of artificial, government-induced changes to the OHWM – as occurred here in relation to Garrison Dam and Lake Sakakawea – North Dakota law lacks the power to transfer title to the State without compensation and a showing that the property is being taken for a public use.⁶⁶ As the Supreme Court held in *Ozark-Mahoning Co.*, the state cannot constitutionally divest property owners like the Wilkinsons and transfer the property to itself without paying due compensation under the powers of eminent domain.⁶⁷ When the government artificially flooded property causing it to lie within the OHWM of the historical Missouri riverbed channel, before it can claim title to that property, the government must first pay for what it takes.⁶⁸ To hold otherwise would allow the State to flood property – even to the extent it creates a massive body of water, like Lake Sakakawea – and then claim title to the newly flooded property as “sovereign land” without paying compensation.

In a separate case involving the constitutionality of Ch. 61-33.1, N.D.C.C., the State takes the exact opposite position as it does in the Wilkinson litigation. In *Sorum v. State of North Dakota*,⁶⁹ the very same board claiming the Wilkinsons’ minerals describes the plaintiffs’ argument that the

64. See *Reid v. Ehr*, 162 N.W. 903, 907 (1917) (emphasis added); *State v. Langer*, 177 N.W. 408, 438 (1919).

65. See *PPL Montana, LLC*, 565 U.S. at 590-91 (“The rule for state riverbed title assumed federal constitutional significance under the equal-footing doctrine. . . . It follows that any ensuing questions of navigability for determining state riverbed title are governed by federal law.”).

66. *Ozark-Mahoning Co. v. State*, 37 N.W.2d 488, 492 (N.D. 1949).

67. *Id.*

68. See *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, ¶ 22, 903 N.W.2d 51 (quoting the Fifth Amendment of the U.S. Constitution and Article 1, Section 16 of the North Dakota Constitution).

69. No. 09-2018-cv-00089 (N.D. East Central Jud. Dist. April 26, 2019), *appeal filed*, No. 20190203 (N.D. June 27, 2019).

government can flood property and then claim ownership of it “absurd.”⁷⁰ In *Sorum*, the State parrots the Wilkinsons’ position, stating:

In fact, if [Sorum’s] contention is correct, which it is not, then the takings clauses under the U.S. Constitution and North Dakota Constitution seem inapplicable because there would not be any need for governmental bodies to compensate landowners for or proceed with an eminent domain action relating to mineral interests when constructing a dam because such interests automatically become assets of the State upon flooding the surface. Another absurd result – but a result that follows from the underpinning of [Sorum’s] claims.⁷¹

The State continues, again echoing the same arguments the Wilkinsons had been making for years, noting that Sorum’s claim is not supported by any authority:

In other words, the entire foundation of [Sorum’s] claims is based upon the belief that the State was the fortuitous beneficiary of thousands of acres of minerals upon the closure of Garrison Dam and the flooding of the surface of lands, despite the federal government having acquired the surface and the underlying minerals or having acquired the surface with the minerals specifically reserved in favor of landowners. [This] claim is not supported by any authority.⁷²

The fact the United States acquired the Wilkinson Property is all the evidence needed to conclusively establish that the property never was – and can never be – sovereign land that belongs to the State. According to the Master Plan

70. State Defendants’ Brief in Support of Motion for Summary Judgment at ¶ 88, *Sorum v. State of North Dakota*, No. 09-2018-cv-00089 (N.D. East Central Jud. Dist. April 26, 2019), *appeal filed*, No. 20190203 (N.D. June 27, 2019).

71. State Defendants’ Brief in Support of Motion for Summary Judgment, *supra* note 70, at ¶ 88. In light of the State’s argument in *Sorum*, the doctrine of judicial estoppel prevents the State from continuing to claim that it owns the Wilkinsons’ minerals. *BTA Oil Producers v. MDU Res. Grp., Inc.*, 2002 ND 55, ¶ 14, 642 N.W.2d 873 (explaining “Judicial estoppel prohibits a party from assuming inconsistent or contradictory positions during the course of litigation.”). In *Sorum*, the State admitted the statutory process contained in Chapter. 61-33.1 of the North Dakota Century Code—which culminated with the Industrial Commission’s Order that determined the Wilkinsons’ property was above the OHWM—is binding as a matter of law. *See* State Defendants’ Brief in Support of Motion for Summary Judgment, *supra* note 70, at ¶ 61 The State cannot take the very opposite position in *Wilkinson* and argue Chapter 61-33.1 of the North Dakota Century Code does not control and the Industrial Commission’s Order is not binding on them. *See BTA Oil Producers*, 2002 ND 55, ¶ 14, 642 N.W.2d 873. In *BTA Oil Producers*, the North Dakota Supreme Court explained that judicial estoppel “. . . is intended to protect the integrity of the judicial process. *Id.* at ¶ 14. Judicial estoppel doctrine is equitable and is intended to protect the courts from being manipulated by chameleonic litigants who seek to prevail, twice, on opposite theories.” *Id.* (quoting 28 AM. JUR. 2d *Estoppel and Waiver* § 74 (2002)).

72. State Defendants’ Brief in Support of Motion for Summary Judgment, *supra* note 70, at ¶ 2.

for Lake Sakakawea, the State's sovereign land interest that existed before Garrison Dam and Lake Sakakawea was limited to 30,000 acres.⁷³ While claiming the Wilkinsons' minerals in the present litigation, in 2007, when commenting on the Master Plan, the North Dakota State Water Commission, chaired by then-Governor John Hoeven, submitted a letter from then-State Engineer Dale Frink, admitting the State's real interest was limited to the 30,000 acres of sovereign land existing at statehood. This letter states:

On page 1-11, it is stated that 30,000 of the 493,000 project acres did not need to be purchased because they were part of the original 'riverbed.' Further explanation might be appropriate to outline the fact the [sic] those 30,000 riverbed acres were, and are, sovereign lands, which are owned and managed by the State of North Dakota, through the Office of State Engineer (N.D.C.C. 61-33-05) and the State Land Department (N.D.C.C. 61-33-03).⁷⁴

Gary Preszler, the former Commissioner for the Board of University and School Lands, testified at his deposition that prior to 2010, the State never claimed ownership of anything beyond the 30,000 acres of sovereign land that was the Missouri riverbed channel as it existed prior to Garrison Dam and Lake Sakakawea.⁷⁵ Similarly, Tom Feeney, the former Director of Mineral Management for the State, testified that because Lake Sakakawea did not exist at Statehood, the State could not claim the minerals under the lake as sovereign land. Feeney explained that during his time with the State, it was their policy and "standard operating procedure" to lease only those 30,000 acres of sovereign lands that existed prior to Garrison Dam and Lake Sakakawea.⁷⁶

In March 2016, the United States Bureau of Land Management rejected the location of the OHWM from the Phase I study relied upon by the State in

73. U.S. ARMY CORPS OF ENG'RS, OMAHA DIST., *supra* note 11, at 1-11 ("The Garrison Dam/Lake Sakakawea Project was constructed from 1947 to 1954 at a cost of \$294 million and included approximately 493,000 acres of land and water. Of this project area, approximately 30,000 acres was riverbed that did not need to be purchased, and approximately 463,000 acres was acquired by the Federal Government."); *see also* U.S. ARMY CORPS OF ENG'RS, OMAHA DIST., *supra* note 11, at 2-137 ("[t]he Garrison Dam/Lake Sakakawea project included approximately 30,000 acres of riverbed, owned by the State of North Dakota, that was not acquired. These 30,000 acres remain sovereign lands that are owned and managed by the State of North Dakota, through the Office of the State Engineer (N.D.C.C. 61-33-05) and the State Land Department (N.D.C.C. 61-33-03).").

74. U.S. ARMY CORPS OF ENG'RS, OMAHA DIST., *supra* note 11, at E-14.

75. Exhibit 8 to Plaintiffs' Response [Gary D. Preszler Deposition] at 23-26, *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

76. Exhibit 10 to Plaintiffs' Response [Tom Feeney Deposition] at 29-31, 37-40, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

Wilkinson.⁷⁷ The Bureau of Land Management concluded that the Segment Maps used by the United States to acquire property, like the Wilkinsons, for the Garrison Project were “the most comprehensive evidence of the Missouri River OHWM just prior to the formation of Lake Sakakawea.”⁷⁸ The Segment Maps “were the basis for land title acquisition by the [Corps] for those upland lands that would be affected by the artificial rising of the Missouri River to create Lake Sakakawea.”⁷⁹ The Bureau of Land Management went on to explain that, “The [Corps] Segment Maps are firmly grounded in guidance, methodology, and contemporaneous field investigations of the land prior to the effects of the flooding. . . . The Segment Maps were the basis for millions of dollars of appropriated funds being spent to acquire displaced uplands and were generated from in-the-field investigations by, and involvement from the BLM, and ND SLD [North Dakota Land Board], and have gone uncontested for over 60 years.”⁸⁰ The BLM pulled no punches in its conclusions, finding that the State’s OHWM delineations under the Phase I study: (1) did not comply with the federal definition of the OHWM; (2) did not honor chain of title or previous involvement with the Corps; and (3) was “an overreaching delineation that impairs: (a) the mineral rights of private owners as vested from original patents from the Federal Government; (b) the Federal Government’s acquired rights in land; and (c) the rights of all in the Public Domain interests in land.”⁸¹

The Wilkinson Property did not suddenly morph into sovereign land under the Equal Footing Doctrine by virtue of the United States acquiring their property for the Garrison project because it would be flooded by Lake Sakakawea.⁸² If the Wilkinson’s property was sovereign land that belonged to the State under the Equal Footing Doctrine, it was sovereign land at the moment of statehood. The Equal Footing Doctrine passes, to the states, title to

77. A copy of the BLM’s March 23, 2016 opinion was provided to the Industrial Commission by the Wilkinsons during the public comment period provided by Chapter 61-33.1 of the North Dakota Century Code. The BLM’s opinion rejecting the State’s position is available online. See N.D. INDUS. COMM’N, ORDINARY HIGH WATER MARK WRITTEN COMMENTS 146-66 (2018), <https://www.dmr.nd.gov/OrdinaryHighWaterMark/docs/C26584WrittenCommentsUpdated6-22.pdf>. The Segment Map for the Wilkinson Property is discussed, and shows that the United States acquired 286.04 acres from the Wilkinsons for the Garrison Project. Exhibit 6 – Final Project Map Section HH, *supra* note 41. This included 228.95 acres in Section 12 and 57.09 acres in Section 13. Exhibit 6 – Final Project Map Section HH, *supra* note 41.

78. N.D. INDUS. COMM’N, ORDINARY HIGH WATER MARK WRITTEN COMMENTS 161-62 (2018), <https://www.dmr.nd.gov/OrdinaryHighWaterMark/docs/C26584WrittenCommentsUpdated6-22.pdf>.

79. *Id.* at 161.

80. *Id.* at 164.

81. *Id.*

82. State Defendants’ Brief in Support of Motion for Summary Judgment, *supra* note 70, at ¶ 5 (“Because the vast majority of the Disputed Area was not navigable at the time North Dakota became a state, Equal Footing Doctrine title did not attach to the non-navigable Disputed Area.”).

navigable waters as those waters existed at the exact moment of statehood, at which point the doctrine is spent.⁸³ When determining navigability at the moment of statehood, the determination is “based on the ‘natural and ordinary’ condition of the water.”⁸⁴ Lake Sakakawea did not exist at North Dakota’s statehood, and the State has no legal basis to claim the Wilkinsons, or anyone else’s, minerals under Lake Sakakawea under the Equal Footing Doctrine. The Takings Clause protects the Wilkinsons from the State claiming their minerals through fiat, study, or legislation. As the Supreme Court held in *Arkansas Game & Fish Comm’n*, “Once the government’s actions have worked a taking of property, ‘no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.’”⁸⁵

The State’s actions have worked a taking of the Wilkinson’s minerals – and no action can relieve the State of its duty to provide the Wilkinsons compensation for that period since 2010 until either the State drops its claim, or the Court orders the State to release its claim to the property. Moreover, if the State’s claim fails, the State must pay the Wilkinsons prejudgment interest on their damages for that time period the State engaged in its taking.⁸⁶ The State must also reimburse the Wilkinsons their costs in resisting the State’s taking action.⁸⁷ Most significantly, the Court has discretion to award

83. *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 371 (1977) (“Once the equal-footing doctrine had vested title to the riverbed in Arizona as of the time of its admission to the Union, the force of that doctrine was spent, . . .”).

84. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 592 (2012) (“For state title under the equal-footing doctrine, navigability is determined at the time of statehood, *see* [United States v. Utah, 283 U.S. 64, 75 (1931)], and based on the ‘natural and ordinary condition’ of the water, *see* [Oklahoma v. Texas, 258 U.S. 574, 591 (1922)].”).

85. *Arkansas Game & Fish Comm’n v. United States*, 568 U.S. 23, 34 (2012) (citing *First English Evangelical Lutheran Church of Glendale v. Los Angeles Cty.*, 482 U.S. 304, 321 (1987)). The Court further held the property does not always need to be underwater to constitute a taking. *Id.* “No decision of this Court authorizes a blanket temporary-flooding exception to our Takings Clause jurisprudence, and we decline to create such an exception in this case.” *Id.* The key is the deprivation of the property right. That is a bright line rule, and the State is depriving the Wilkinsons of their valuable mineral interests by claiming the minerals belong to the State. There is no greater deprivation and taking of another’s property than claiming the State outright owns the property. “We conclude that a permanent physical occupation authorized by the government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention.” *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982).

86. *See* N.D. CENT. CODE § 32-03-04 (2019). In *Donaldson v. City of Bismarck*, 3 N.W.2d 808 (N.D. 1942), the North Dakota Supreme Court held that, “And, where, as here, property is taken or damaged for a public use without just compensation having been first made, payment is legally due to the owner as of the date of the taking or damaging of the property, and hence interest should be given from the time when the property is taken or damaged.” *Id.* at 815. *See also* *Huber v. Farmers Union Service Ass’n of North Dakota*, 2010 ND 151, ¶ 25, 787 N.W.2d 268 (“Prejudgment interest is required by N.D.C.C. § 32-03-04 if damages are certain or capable of being made certain by calculation.”) (citing *Village West Assocs. V. Boeder*, 488 N.W.2d 376, 380 (N.D. 1992)).

87. *See generally* *Petersburg School Dist. of Nelson Cty. v. Peterson*, 103 N.W. 756 (1905).

the Wilkinsons their attorney's fees in resisting the State's taking of their mineral interests.⁸⁸ The Court should exercise that discretion and award the Wilkinsons their attorneys' fees incurred in fighting the State over the course of the last decade. A contrary result would mean the Wilkinsons' depleted a majority of the oil and gas proceeds they are entitled to under the law to prevent the State from unconstitutionally taking that property.

V. FOLLOWING THE STATUTORY PROCEDURE IN CH. 61-33.1, N.D.C.C., THE INDUSTRIAL COMMISSION DETERMINED THE WILKINSONS' MINERALS WERE ABOVE THE ORDINARY HIGH WATER MARK OF THE HISTORICAL MISSOURI RIVERBED CHANNEL

The crux of the State's claim to the Wilkinson Property is that it's located below the OHWM of the historical Missouri riverbed. The Supreme Court summarized the State's position thusly: "The Land Board counterclaimed and requested a judgment 'ruling that neither the Plaintiffs nor any lessee of Plaintiffs holds any interests in the property described in the Amended Complaint which is located below the Missouri River's ordinary high watermark,' and 'quieting title in the State to all property claimed by Plaintiffs in the Amended Complaint.'"⁸⁹ The location of the OHWM of the historic Missouri riverbed channel was determined in the Wilkinsons' favor through the statutory process detailed in Ch. 61-33.1, N.D.C.C., which culminated in the Industrial Commission's Order.⁹⁰

The State concedes the statute applies to the Wilkinson Property and agrees the Industrial Commission determined the property was above the OHWM of the historic Missouri riverbed channel but refuses to drop its claim to the minerals.⁹¹ Pursuant to the legislature's definitions in N.D.C.C. § 61-33.1-01, the Wilkinson's minerals are well inside the area for deciding the

88. See *City of Medora v. Golberg*, 1997 ND 190, ¶¶ 18-23, 569 N.W.2d 257 (citing N.D. CENT. CODE § 32-15-32 (2019)); see also *North Dakota Dep't of Transportation v. Rosie Glow, LLC*, 2018 ND 123, ¶ 7, 911 N.W.2d 334.

89. *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, ¶ 12, 903 N.W.2d 51.

90. The interpretation of Chapter 61-33.1 of the North Dakota Century Code and whether it applies to the Wilkinson Property, is a question of law. See *Mosser v. Denbury Res., Inc.*, 2017 ND 169, ¶ 13, 898 N.W.2d 406 (citing *In re Estate of Hogen*, 2015 ND 125, ¶ 12, 863 N.W.2d 876). "Statutory interpretation is a question of law." *Id.*

91. See State Defendants' Brief in Support of Motion for Summary Judgment, *supra* note 70, at ¶ 30 ("It is axiomatic that the Land Board does not have authority to lease sovereign land minerals over which it is determined the State does not have any ownership interest"); see State Defendants' Brief in Support of Motion for Summary Judgment, *supra* note 70, at ¶ 39 ("Relevant to the present litigation, SB 2134 [N.D. CENT. CODE ch. 61-33.1] provides that within the Affected Area [which the State concedes includes the Wilkinson Property], the State holds no claim or title to any minerals above the OHWM of the historical riverbed channel.").

OHWL under Ch. 61-33.1, N.D.C.C.⁹² The Wilkinson's minerals in Sections 12 and 13 are located between river mile 1554.0 and 1554.5. This is within the statutory area set by Ch. 61-33.1, N.D.C.C., for determining the OHWL of the historical Missouri riverbed channel under North Dakota law.⁹³ The area for delineating the OHWL pursuant to Ch. 61-33.1, N.D.C.C., continues even further southwest of the Wilkinson Property for approximately another 11 river miles to river mile 1,565 under the clear and unambiguous language in N.D.C.C. § 61-33.1-01.⁹⁴

As required by N.D.C.C. § 61-33.1-03, the Industrial Commission issued its Order delineating the OHWL, and setting the limit on the State's claims.⁹⁵ The Industrial Commission adopted the Wenck Study after the public comment period required by law pursuant to N.D.C.C. § 61-33.1-03. The Wenck Study concluded that the Wilkinson's minerals were above the OHWL of the historical Missouri riverbed channel, and therefore not owned by the State.⁹⁶ The fact that the Wilkinson Property is above the OHWL, and thus not owned by the State, is clearly and indisputably visible in the Wenck Study maps that are part of the Order.⁹⁷

The State's interest is strictly limited to the historical Missouri riverbed channel as determined by Ch. 61-33.1, N.D.C.C., which states: "The state sovereign land mineral ownership of the riverbed segments inundated by

92. N.D. CENT. CODE § 61-33.1-01(1)-(3) (2019). This includes the definition of what constitutes the historical Missouri riverbed channel. "'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." N.D. CENT. CODE § 61-33.1-01(2) (2019). The Wilkinson Property is within this boundary.

93. N.D. CENT. CODE § 61-33.1-01(1)-(3) (2019).

94. *Id.*

95. A Hearing on the Review of the Delineation of the Ordinary High Water Mark, N.D. Indus. Comm'n 29129, No. 26584 (Sept. 27, 2018). This is not to say the Industrial Commission's determination is immune from constitutional challenge. To the contrary. The Order concluded there are approximately 9,000 mineral acres that, like the Wilkinsons, while reserved by landowners when the United States acquired the surface for Garrison Dam and Lake Sakakawea, the Industrial Commission determined are now owned by the State in violation of the Takings Clause.

96. Exhibit B to Affidavit of Joshua A. Swanson – Ordinary High Water Mark of the Historical Missouri River Bed at 4-5, *Wilkinson v. Bd. of Univ. & Sch. Lands*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038). The Wilkinson's minerals in Section 12 are located in the SW/4 and S/2NW/4. *See id.* The Wenck Study maps, adopted by the Industrial Commission, conclusively show this property in Section 12 is above the OHWL. *See id.* Therefore, the State does not own the Wilkinsons' property in Section 12. *See id.* The Wilkinson's minerals in Section 13 are located in Farm Unit No. 312 in the Buford-Trenton Project. *See id.* Farm Unit No. 312 is located in the N/2NW/4 of Section 13. *See id.* The Wenck Study maps, adopted by the Industrial Commission, conclusively show this property in Section 13 is above the OHWL. *See id.* Therefore, the State does not own the Wilkinsons' property in Section 13. *See id.*

97. *Id.*

Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark.”⁹⁸ As a matter of law, the Wenck Study, adopted by the Industrial Commission in its Order, determined that the Wilkinson Property is above the OHWM.⁹⁹ The State cannot get around this, particularly with its admissions and position in *Sorum*.¹⁰⁰ Yet, frustratingly, in the face of the statutory determination that the minerals are above the OHWM under Ch. 61-33.1, N.D.C.C., the State persists in claiming it owns them.

VI. THE FUNDAMENTAL LEGAL ISSUE IN *WILKINSON* DID NOT CHANGE WITH THE CODIFICATION OF CH. 61-33.1, N.D.C.C.

As a matter of constitutional law, the Takings Clause analysis does not change with any statute or state-sanctioned study. No study, whether the Wenck Study or the Bartlett & West studies, can deprive the Wilkinsons of the minerals they reserved when the United States acquired their property for the Garrison project without it being an unconstitutional taking.¹⁰¹ The State’s actions are the textbook definition of an unconstitutional taking. “A taking under the fifth amendment occurs when the Government acts in a manner that directly interferes with or disturbs a claimant’s rights in his private property.”¹⁰² Even with the Wilkinsons prevailing under Ch. 61-33.1, N.D.C.C., a taking has still occurred requiring damages for that time period that the State unconstitutionally deprived the Wilkinsons, and any other similarly situated persons, of their minerals.

No study can change the fact that in 1958, the United States forced J.T. and Evelyn Wilkinson, and hundreds of others, to sell their valuable surface

98. N.D. CENT. CODE § 61-33.1-02 (2019).

99. See Exhibit B to Affidavit of Joshua A. Swanson, *supra* note 96; see also Order Granting Plaintiffs’ Motion for Summary Judgment, *Wilkinson*, 2017 ND 231, 903 N.W.2d 51 (No. 53-2012-cv-00038).

100. The State admits in *Sorum* that, “Relevant to the present litigation, SB 2134 [codified at N.D. CENT. CODE ch. 61-33.1 (2019)] provides that within the Affected Area, the State holds no claim or title to any minerals above the OHWM of the historical riverbed channel, ‘except for original land grants acquired by the state under federal law and any acquired by the state through purchase, foreclosure, or other written conveyance.’ N.D.C.C. §§ 61-33.1-01(2) and 61-33.1-02. The historical Missouri riverbed channel is defined as the channel as it existed upon closure of the Pick-Sloan Missouri basin project dams, which project dams include the Garrison Dam. N.D.C.C. § 61-33.1-01(2).” State Defendants’ Brief in Support of Motion for Summary Judgment, *supra* note 70, at ¶¶ 39, 106 (“[B]y virtue of the process under N.D.C.C. ch. 61-33.1, the Wenck report is the foundation for the delineation of the OHWM of the historical Missouri riverbed channel.”).

101. The North Dakota Supreme Court recognized that, “In 1958, the Wilkinsons conveyed the property to the United States for construction and operation of the Garrison Dam and Reservoir, but they reserved the oil and gas rights in and under the property. The plaintiffs are the Wilkinsons’ successors in interest.” *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶ 2, 903 N.W.2d 51.

102. *Stockton v. United States*, 214 Ct. Cl. 506, 514 (1977) (citing *Widen v. United States*, 174 Ct. Cl. 1020, 1027 (1966)).

interests or have them condemned for Garrison Dam and Lake Sakakawea. No study can change the fact that the Wilkinsons, and hundreds (if not thousands) of others reserved their minerals when the United States acquired the surface.¹⁰³ And nothing changes the fact that the State was, and remains, a stranger to title with no basis to claim an interest in these minerals. In cases of artificial, government-induced changes to the OHWM, or when government acquires land for flood-control purposes, as occurred for Garrison Dam and Lake Sakakawea, state law lacks the power to divest mineral owners like the Wilkinsons of their property without first providing compensation and showing the property is being taken for a public use.

The new law at Ch. 61-33.1, N.D.C.C., does not change that, nor could it ever change the Wilkinson's fundamental protections in the Fifth Amendment of the United States Constitution, and Art. I, § 16, of the North Dakota Constitution, that prohibit the State from taking their private property unless it is for a public use, and then only if just compensation is paid. The Takings Clause protects the Wilkinsons from the State claiming their minerals through fiat, study, or legislation. Since the *Pumpelly* decision in 1871, the United States Supreme Court has reiterated multiple times that government flooding of property or acquisition of property for flood-control purposes is a taking for which just compensation is required.¹⁰⁴ This issue was never nuanced, it was never complex, nor was it novel, and it certainly should not have taken the better part of a decade to resolve. The State's ignorance of, and blind eye towards, bedrock constitutional law that protects citizens like the Wilkinsons against abuses from their government should never be allowed to happen again. For North Dakota property owners, the consequences are simply too great.

103. In *State v. Brace*, 36 N.W.2d 330 (N.D. 1949), the Supreme Court recognized this bedrock principle of takings law. "The legislature may not adopt a retroactive definition of navigability which would destroy a title already vested under a federal grant, or transfer to the state a property right in a body of water or the bed thereof that had been previously acquired by a private owner. A legislative declaration that all meandered lakes are navigable will not make them so if they are not navigable in fact, as against the pre-existing rights of riparian owners, unless compensation is made to such owners for the property thus injured or taken by the state. Thus we reach the conclusion that the state may not now successfully assert title, on the ground of navigability, to lands lying beneath non-navigable waters unless those waters were in fact navigable at the time of statehood in the absence of subsequent conveyances to the state." *Id.* at 332-33.

104. See e.g., *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23, 31-34 (2012) (summarizing decisions, beginning with *Pumpelly*, holding that government-induced flooding of property constitutes a taking); *Tarrant Reg'l Water Dist. v. Gragg*, 43 S.W.3d 609, 620 (Tex. App. 2001), *order withdrawn* (June 13, 2002), *aff'd*, 151 S.W.3d 546 (Tex. 2004) ("A 'taking' occurs when the 'inundation after erection of the flood-control structures was greater in extent than it previously had been.'") (quoting *Ansley v. Tarrant Cty. Water Control & Imp. Dist. No. 1*, 498 S.W.2d 469, 475 (Tex. Civ. App. 1973)).

VII. CONCLUSIONS

In September 2019, on remand, the district court granted summary judgment in the Wilkinsons' favor, holding that, as a matter of law, the State did not have a legal basis to continue claiming an interest in the Wilkinsons' minerals.¹⁰⁵ It remains to be seen, however, when the Wilkinsons and other similarly situated mineral owners will finally see the proceeds from their property. Despite the Industrial Commission's Order, and the district court's order granting summary judgment, the Wilkinsons still have not been paid for nearly a decades of oil and gas produced from their property.

Nearly a century ago, the Supreme Court stated, in a pair of cases, "that justice delayed, is justice denied."¹⁰⁶ The Wilkinsons filed this action on January 10, 2012, nearly eight years ago. To put that in perspective, it took less than half the time for the landmark Fifth Amendment takings case, *Kelo v. City of New London*, to make its way from the Superior Court of Connecticut to the United States Supreme Court. It took a third of the time for the landmark First Amendment case on campaign finance law, *Citizens United v. Fed. Election Comm'n*, to travel from the United States District Court for the District of Columbia to the United States Supreme Court.¹⁰⁷ It took less than three years for PPL Montana, LLC, an electric utility, to argue its case against the State of Montana to the Montana Supreme Court and then successfully appeal to the United States Supreme Court, which vindicated the utility's property rights.

The Wilkinsons pursued this worthy endeavor to contest the State's unconstitutional attempt to take their property – and, in so doing, have championed that cause for those other mineral owners in the same position, vindicating their mineral ownership in the process – despite the undisputed fact that these minerals have been in their family since before World War II. It seems like a straightforward constitutional question because it was. The government cannot flood your private property by building a massive dam and reservoir and then claim ownership of that property. Property rights in North Dakota must be protected from government intrusion and actions like those of the State against the Wilkinsons – the Fifth Amendment of the United States Constitution and Art. I, Sect. 16 of the North Dakota Constitution demand nothing less. In this case, ignorance of the Constitution is not bliss.

105. See Order Granting Plaintiffs' Motion for Summary Judgment, *supra* note 99.

106. *State v. Langer*, 177 N.W. 408, 438 (1919); *Reid v. Ehr*, 162 N.W. 903, 907 (1917).

107. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010).