NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes important decisions rendered by the North Dakota Supreme Court. The purpose of the Review is to indicate cases of first impression, cases of significantly altered earlier interpretations of North Dakota law, and other cases of interest. As a special project, Associate Editors assist in researching and writing the Review.* The following topics are included in the Review:

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CIVIL LAW – LEGAL SERVICES – ATTORNEY-CLIENT RELATIONSHIP

Traynor Law Firm, PC v. State

In *Traynor Law Firm, PC v. State*,[1] appellant Traynor Law Firm appealed the decision of the Ward County District Court to award only 6% interest on an outstanding bill for legal services.[2] The State of North Dakota cross-appealed, arguing that no interest should have been awarded, and that Ward County, not the State, was responsible for the outstanding bill.[3] In a unanimous decision, the North Dakota Supreme Court affirmed in part, reversed in part, and remanded for further proceedings.[4]

This case followed an occurrence in Ward County in which a person in custody died in the Ward County Jail, leading to an investigation and subsequent criminal charges filed against then-Ward County Sheriff, Steven Kukowski.[5] The first attorney appointed to prosecute Kukowski determined that Kukowski should be removed from his position.[6] Eventually, Dan Traynor of the Traynor Law Firm was appointed by the Governor to be the special prosecutor in charge of Kukowski's removal, and Traynor submitted the bill for these services to the State of North Dakota following the removal proceedings.[7] However, when the State forwarded the bill to Ward County, the County refused to pay the bill, leading Traynor to file suit against both Ward County and the State to recover the unpaid fees.[8] The State responded by filing a motion to dismiss and Ward County cross-claimed against the State.[9] The district court dismissed Traynor's complaint against Ward County, but entered judgment for Traynor against the State, awarding Traynor 6% annual interest on the outstanding charges.[10] The issue before the North Dakota Supreme Court was who would be responsible to pay the unpaid fees and whether interest was recoverable.[11]

The State argued that the responsibility for payment of Traynor's fees belonged to Ward County, because North Dakota Century Code ("N.D.C.C.") chapter 44-11 makes no mention of who should pay the fees for a special prosecutor in the case of a removal proceeding of a county

1. 2020 ND 108, 943 N.W.2d 320.
2. *Traynor Law Firm, PC*, 2020 ND 108, ¶ 1.
3. *Id.*
4. *Id.*
5. *Id.* ¶ 2.
6. *Id.*
7. *Id.*
8. *Id.* ¶¶ 2-3.
9. *Id.* ¶ 3.
10. *Id.*
11. *Id.* ¶ 4.

official.[12] The State claimed that the "catch-all provision" in N.D.C.C. section 54-12-03 would apply, making Ward County responsible for removal expenses.[13] Ward County, on the other hand, argued that neither N.D.C.C. chapter 44-11 nor chapter 54-12 require a county to pay for a Governor-appointed attorney to conduct removal proceedings for a public official.[14]

The court determined that N.D.C.C. chapter 44-11 outlines the process for a governor to remove a public official and therefore applied to the proceedings in this case.[15] The court specifically pointed to N.D.C.C. section 44-11-01, which states in part that, "[t]he governor may remove from office any county commissioner, sheriff . . . whenever it appears to the governor by a preponderance of the evidence after a hearing as provided in this chapter, that the officer has been guilty of misconduct . . . ."[16] The court referenced the district court's opinion regarding the State's argument that section 54-12-03 should be imported into chapter 44-11.[17] In its opinion, the district court discussed that section 54-12-03 requires counties to pay for expenses incurred from investigations initiated by the Attorney General, but that chapter 44-11 removal proceedings involve expenses incurred by the Governor's use of his power to appoint a special prosecutor, based on his decision to proceed following a recommendation from the Attorney General.[18] The court held that because N.D.C.C. chapter 44-11 is silent on who is responsible for paying the fees when the governor removes a public official, the analysis of this issue must be made under contract law.[19] The court agreed with the district court's finding that "[t]here is no authority in [N.D.C.C. section 54-12-03] to pass the costs of the Special Prosecutor on to other governmental entities."[20]

In order to determine who was responsible for paying the fees, the court analyzed whether a contract existed between Traynor and the State to provide legal services.[21] The State argued that because no written agreement existed between it and Traynor, there existed no obligation for the state to pay Traynor's fees.[22] Traynor argued that an implied contract existed based on the correspondence and conduct of the parties.[23] In support of this assertion,

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12. *Id.* ¶ 5.

13. *Id.*; N.D. CENT. CODE § 54-12-03 (2019) ("[T]he necessary expenses incurred in making the investigation or in prosecuting any resulting case, as determined by the attorney general and not otherwise specifically provided by law, must be paid by the county out of the state's attorney's contingent fund. . . .").

14. *Traynor Law Firm*, 2020 ND 108, ¶ 6.

15. *Id.* ¶ 7.

16. *Id.*(quoting N.D. CENT. CODE § 44-11-01(2019)).

17. *Id.* ¶¶ 7-8.

18. *Id.*

19. *Id.* ¶ 11.

20. *Id.* ¶ 10.

21. *Id.* ¶ 4.

22. *Id.* ¶ 11.

23. *Id.* ¶ 12.

Traynor cited *B.J. Kadrmas, Inc. v. Oxbow Energy, LLC.*,[24] in which the North Dakota Supreme Court determined that the district court's finding of an implied contract based on the circumstances and conduct of the parties were not clearly erroneous.[25] The State argued that *Oxbow Energy* did not apply because the contract in that case did not involve legal services.[26] The court, however, agreed with Traynor that *Oxbow Energy* was similar to this case in that the conduct between the parties supported the conclusion that their mutual intent was to form a contract for legal services.[27] Specifically, the court cited the fact that Traynor was appointed by the Governor, Traynor's services and fees were discussed in a meeting attended by the State's Bureau of Criminal Investigation, the Attorney General, and the Deputy Attorney General, and there were conversations between Traynor and the State regarding the removal proceedings, all of which was evidence of the State's intent to form a contract with Traynor.[28] The court affirmed the district court's finding that a contract existed between Traynor Law Firm and the State.[29]

Finally, the court addressed the question of how much interest should be awarded to Traynor Law Firm for the outstanding bills.[30] In its judgment, the district court determined that N.D.C.C. section 47-14-05 applied, limiting the amount of interest that could be charged to 6% per annum.[31] The invoice from Traynor Law Firm, however, included an interest rate of 1.5% per month.[32] The court determined that, as N.D.C.C. section 47-14-05 relates to loans of money, it was inapplicable in this case because no money was loaned, and therefore the 6% per annum interest rate did not apply.[33]

The State, on the other hand, argued that Traynor should not have been awarded interest at all, citing *Johnson v. North Dakota Workers Compensation Bureau* and its interpretation of N.D.C.C. section 13-01.1, which deals with interest on delinquent accounts.[34] In *Johnson*, the court stated that, "[w]e decline to broaden the Legislature's interpretation of 'business' as used in Chapter 13-01.1 to include legal services rendered to Worker's Compensation claimants."[35] The holding in that case specifically excluded legal

24. B.J. Kadrmas, Inc. v. Oxbow Energy, LLC, 2007 ND 12, 727 N.W.2d 270.
25. *Traynor Law Firm*, 2020 ND 108, ¶ 19 (citing *Oxbow Energy*, 2007 ND 12, ¶ 2).
26. *Id.* ¶ 17.
27. *Id.* ¶ 20.
28. *Id.*
29. *Id.*
30. *Id.* ¶ 21.
31. *Id.* ¶ 22.
32. *Id.* ¶ 21.
33. *Id.* ¶ 23.
34. *Id.* ¶ 25 (citing Johnson v. N.D. Workers Comp. Bureau, 428 N.W.2d 514 (N.D. 1988)).
35. *Johnson*, 428 N.W.2d at 520.

services in Worker's Compensation cases from the definition of "business," but here, the State argued that the holding should apply equally to legal services that are provided under N.D.C.C. chapter 44-11.[36]

Traynor argued that Traynor Law Firm fell within the plain meaning of a "business" as used in N.D.C.C. section 13-01.1-01, and therefore chapter 13-01.1 would apply.[37] N.D.C.C section 13-01.1-01 requires prompt payment and provides:

> Every State agency . . . which requires property or services pursuant to a contract with a business shall pay for each complete delivered item of property or service on the date required by contract between such business and agency or, if no date for payment is specified by contract, within forty-five days after receipt of the invoice covering the delivered items or services . . . .[38]

Traynor further argued that the *Johnson* holding was inapplicable because in that case, the court applied chapter 13-01.1 to N.D.C.C. section 65-02-08, which is not involved in the present case.[39] The court agreed with Traynor that his firm qualified as a "business" under the meaning of the word provided by *Black's Law Dictionary*[40] and therefore chapter 13-01.1 indeed applied. The court further held that, as the State had not made any payments to Traynor, the payments were overdue under N.D.C.C. section 13-01.1-01, and the rule regarding interest payments from N.D.C.C. section 13-01.1-02 applied, awarding interest to Traynor.[41] However, under N.D.C.C. section 13-01.1-03, interest on overdue payments is compounded, that is, "added to the principal amount of the debt and must thereafter accumulate interest," after forty-five days of nonpayment and not after thirty days as it appeared on Traynor's invoices.[42] While the court agreed that Traynor was entitled to 1.5% interest monthly, he could not begin collecting interest until after forty-five days of nonpayment.[43]

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36. *Traynor Law Firm*, 2020 ND 108, ¶ 25.

37. *Id.* ¶ 24.

38. ND. CENT. CODE § 13-01.1-01 (2019).

39. *Traynor Law Firm*, 2020 ND 108, ¶ 24.

40. *Id.* ¶ 30-31; *Business*, BLACK'S LAW DICTIONARY (5th ed. 1979) (defining business as "[e]mployment, occupation, profession, or commercial activity engaged in for gain or livelihood. Activity or enterprise for gain, benefit, advantage or livelihood. . . . That which habitually busies or occupies or engages the time, attention, labor, and effort of persons as a principal serious concern or interest or for livelihood or profit").

41. *Traynor Law Firm*, 2020 ND 108, ¶ 33; N.D. CENT. CODE § 13-01.1-02 (2019) ("Interest must accrue and be made on payments overdue under section 13-01.1-01 at the rate of one and three-fourths percent per month, unless a different rate is specified within the contract upon which the claim is based. Interest must accrue beginning on the day after payment is due, . . . if payment is not made within forty-five days. . . .").

42. *Traynor Law Firm*, 2020 ND 108, ¶¶ 33, 36 (quoting N.D. CENT. CODE § 12-01.1-03 (2019)).

43. *Id.* ¶¶ 33, 36.

The State alternatively argued that, as an attorney, Rule 1.5 of the North Dakota Rules of Professional Conduct prohibited Traynor from charging the 1.5% interest rate because it was a "unilateral attempt to charge a client interest on a delinquent account."[44] The court disagreed with this argument as well, stating that because Traynor charged less than the rate of interest authorized in N.D.C.C. section 13-01.1-02, this indicates that his rate of 1.5% was reasonable under Rule 1.5.[45] The court affirmed in part, reversed in part, and remanded for further proceedings.[46]

44. *Id.* ¶ 34.
45. *Id.* ¶ 36.
46. *Id.* ¶ 37.

CIVIL LAW - REAL PROPERTY – EMINENT DOMAIN

Northern States Power Company v. Mikkelson

In *Northern States Power Company v. Mikkelson*,[47] Northern States Power Company ("NSP") filed an eminent domain action to obtain an easement over the property of Laverne and Kandi Mikkelson for the purpose of installing an electrical transmission line.[48] The Ward County District Court granted a partial summary judgment to NSP on the issue of whether the taking was necessary, and left open the issue of the amount of damages to be awarded to the Mikkelsons for the taking.[49] On that issue, NSP moved again for summary judgment, arguing that, as it "was only a partial taking, the proper measure of damages was diminution to the property's fair market value."[50] NSP further claimed that the Mikkelsons failed to provide any "competent, admissible evidence to present at trial."[51] The district court granted summary judgment to NSP, concluding that the Mikkelsons lacked sufficient evidence to prove damages at trial.[52] In *Northern States Power Co. v. Mikkelson*, the Mikkelsons appealed the district court's decision on the grounds that the court erred by failing to allow them the opportunity to present evidence to a jury on their claim for damages.[53] In a three-to-two decision, the North Dakota Supreme Court reversed and remanded the case for further proceedings.[54] The opinion was written by Justice Crothers, with Justice VandeWalle and Surrogate Justice Schmalenberger, who was sitting in place of Justice McEvers, joining.[55] Justice Tufte dissented, joined by Chief Justice Jensen.[56]

Laverne and Kandi Mikkelson own a 278-acre property in Ward County, of which 13.39 acres is encumbered with the NSP easement.[57] In his deposition, Mr. Mikkelson stated his belief that the value of the 13.39 acres under easement had fallen to zero.[58] He further stated his belief that the value of the unencumbered acres would drop proportionately as a result of the

47. 2020 ND 54, 940 N.W.2d 308.
48. *Mikkelson*, 2020 ND 54, ¶ 2; *Eminent domain*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Eminent domain refers to the power of the government to take private property without an owner's consent, but with payment of just compensation, and convert that property to public use).
49. *Mikkelson*, 2020 ND 54, ¶ 2.
50. *Id.* ¶ 3.
51. *Id.*
52. *Id.* ¶ 5.
53. *Id.* ¶ 1.
54. *Id.*
55. *Id.* ¶ 15.
56. *Id.* ¶ 25.
57. *Id.* ¶ 4.
58. *Id.*

unseverability of the encumbered acreage from the rest of the property.[59] On appeal, the Mikkelsons claimed their theory of damages is that the diminution of burdened acres should be spread across the entire property to determine the fair market value after the taking.[60] Article 1, section 16 of the North Dakota Constitution states that "[p]rivate property shall not be taken or damaged for public use without just compensation . . . ."[61]

NSP, in their argument, compared this case with that of *Lenertz v. City of Minot*.[62] In that case, the district court found that the proper measure of damages for a partial taking was diminution in value.[63] Lenertz offered testimony from an expert witness who testified that the property in question had no value at all following the taking.[64] Further, the expert based his opinion on the cost of repairing the property, not on its fair market value, and stated, "I am not an engineer, I am only guessing that it would cost this much to repair the property."[65] The district court judge did not allow the testimony into evidence and, in the absence of any other proffered testimony or evidence, "entered judgment as a matter of law and dismissed the case."[66]

The North Dakota Supreme Court disagreed with NSP that the present case was comparable to *Lenertz*.[67] First, unlike the expert testimony in *Lenertz,* here, the Mikkelsons did not claim that the value of the entire parcel had diminished to zero.[68] The Mikkelsons' theory of damages was that only the acreage burdened by the easement was worthless and, when spread across the entire property, would result in the diminution of the fair market value of the entire property.[69] Further, the Mikkelsons did not base their theory of damages on repair costs, as was done in *Lenertz*.[70] The court concluded that the Mikkelsons' theory of damages was consistent with the proper measure of damages in a partial taking, which is diminution in value.[71] Because NSP and the Mikkelsons disagreed on the amount of damages that should be awarded, with NSP offering a lower amount than the Mikkelsons believed they were owed according to their theory of damages, the court concluded that there existed a genuine issue of material fact on the issue of damages and

59. *Id*.
60. *Id*. ¶ 8.
61. N.D. Const. art 1, § 16.
62. Lenertz v. City of Minot, 2019 ND 53, 923 N.W.2d 479.
63. *Mikkelson*, 2020 ND 54, ¶ 9 (citing *Lenertz*, 2019 ND 53, ¶ 4).
64. *Id*. (citing *Lenertz*, 2019 ND 53, ¶ 4).
65. *Id*. (quoting *Lenertz*, 2019 ND 53, ¶ 4).
66. *Id*. ¶ 10 (citing *Lenertz*, 2019 ND 53, ¶¶ 4-5).
67. *Id*. ¶ 11.
68. *Id*.
69. *Id*.
70. *Id*.
71. *Id*.; *see also Diminution-in-value method*, BLACK'S LAW DICTIONARY (11th ed. 2019) (Diminution in value is based on the reduction of market value of the property).

that summary judgment was not appropriate in the case.[72] The court also stated that, under the state constitution, as well as state statute, "[a] determination of compensation must be made by a jury, unless a jury is waived."[73] Accordingly, the majority of the North Dakota Supreme Court reversed the district court's order for summary judgment and remanded for further proceedings.[74]

Justice Tufte dissented, joined by Chief Justice Jensen.[75] In his dissent, Justice Tufte pointed out that the reason the taking was only a partial taking was because NSP only took an easement to the burdened land rather than taking the entire fee simple title.[76] The Mikkelsons retain the "full use and enjoyment of the easement areas . . . so long as [it] is consistent with [the easement]."[77] However, despite their continued ownership of the property and right to use it in any way "not inconsistent with the easement", they only offered testimony that the entire section of burdened land had a new market value of zero as a result of the taking.[78] Justice Tufte stated that "[t]he Mikkelsons did not raise a triable issue of fact by asserting their desire to be paid for all the sticks when only one stick is condemned."[79]

Justice Tufte also discussed the references made by the majority to severance damages.[80] He pointed out that the Mikkelsons did not specifically argue for severance damages, either below or on appeal.[81] The evidence provided by the Mikkelsons was that the 13.39-acre easement was worthless and that the market value of the entire 278-acre parcel was reduced because of the now-worthless easement corridor.[82] He stated that this evidence, rather than supporting severance damages, only "repackages the . . . unsupported claim that the easement reduces the value of the burdened strip of land to zero[,]" and that this claim is in conflict with the court's holding in *Lenertz*.[83] In *Lenertz*, the court held that testimony from a landowner supporting only a 100% loss in value of the burdened land was insufficient to raise a question of fact for a jury.[84]

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72. *Mikkelson,* 2020 ND 54, ¶ 12.
73. *Id.* ¶ 7; N.D. CONST. art. I, § 16; N.D. CENT. CODE § 32-15-01(2) (2019).
74. *Mikkelson*, 2020 ND 54, ¶ 14.
75. *Id.* ¶¶ 16, 25 (Tufte, J., dissenting).
76. *Id.* ¶ 21.
77. *Id.*
78. *Id.* ¶ 20.
79. *Id.* ¶ 21.
80. *Id.* ¶ 22.
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.* ¶¶ 22-23 (citing Lenertz v. City of Minot, 2019 ND 53, ¶¶ 26-28, 923 N.W.2d 479).

Justice Tufte also discussed whether summary judgment was even appropriate in an eminent domain case.[85] In reference to the Mikkelsons' argument that they were entitled to present evidence to a jury on the question of damages under article I, section 16, of the North Dakota Constitution and under North Dakota Century Code section 32-15-22, Justice Tufte stated that their argument was not fully developed, and therefore he would "reserve for another day when the argument is fully briefed the question of whether the state constitution curtails the application of our summary judgment rule to eminent domain cases[,]" citing several state cases in which this issue had been briefly mentioned but not yet decided.[86]

85. *Id.* ¶ 17.
86. *Id.*

CONSTITUTIONAL LAW – GOVERNMENT - PROPERTY

Sorum v. State

In *Sorum v. State*,[87] plaintiffs, as taxpayers and on behalf of those similarly situated, filed suit in January 2018 against the State of North Dakota and its relevant entities seeking a declaratory judgment "that chapter 61-33.1, N.D.C.C. ["the Act"], relating to the ownership of mineral rights in lands subject to inundation by the Garrison Dam, is unconstitutional."[88] In addition, plaintiffs sought a preliminary injunction to prohibit State officials "from further implementing and enforcing the Act."[89] Particularly, the plaintiffs argued the enforcement of the Act would unconstitutionally gift "State-owned mineral interests to 108,000 acres underneath the [Ordinary High Water Mark][90] of the Missouri River/Lake Sakakawea, and above the Historic OHWM and give[] away over $205 million in payments."[91]

The relevant portion of the Act states:

> 1. Within six months after the adoption of the acreage determination by the board of university and school lands:
>
> > a. Any royalty proceeds held by operators attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the owners of the tracts, absent a showing of other defects affecting mineral title; and
> >
> > b. Any royalty proceeds held by the board of university and school lands attributable to oil and gas mineral tracts lying entirely above the ordinary high water mark of the historical Missouri riverbed channel on both the corps survey and the state phase two survey must be released to the relevant operators to distribute to the owners of the tracts, absent a showing of other defects affecting mineral title.[92]

The above section applies retroactively "to all oil and gas wells spud after January 1, 2006[.]"[93]

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87. 2020 ND 175, 947 N.W.2d 382.
88. *Sorum*, 2020 ND 175, ¶ 1.
89. *Id.* ¶ 9.
90. *Id.* ¶ 4 [hereinafter OHWM].
91. *Id.* ¶ 9.
92. N.D. CENT. CODE § 61-33.1-04(1)(a)-(b) (2019).
93. Act of Apr. 21, 2017, ch. 426, § 4, 2017 N.D. Sess. Laws 22, 27; *Sorum*, 2020 ND 175, ¶ 25.

The district court found in favor of the plaintiffs, in part, holding North Dakota Constitution, article X, section 18 ("the Gift Clause") prohibited the State from issuing payments to owners of the affected oil and gas mineral tracts.[94] The district court rejected the plaintiffs' three other constitutional challenges to the Act under the "watercourses clause,[95] privileges or immunities clause,[96] and the local or special laws prohibition.[97]"[98] In addition, plaintiffs failed in arguing the Act "violate[d] the public trust doctrine . . . ."[99]

Justice Jerod E. Tufte, writing for the majority, reversed with regard to the district court's application of the Gift Clause, holding: 1) that the State "was paid royalties under leases of minerals that it once claimed but now by statute no longer claims"[100] and thereby bears a "moral obligation to pay its just debts and deal fairly with the people;"[101] and 2) the State cannot "violate the gift clause by transferring property or renouncing claims to property that it does not own in the first instance."[102] The Court affirmed the remaining constitutionally-based holdings.

The U.S. Congress authorized the Garrison Dam's construction in 1944.[103] The water reserved behind the Dam became Lake Sakakawea.[104] Pursuant to a survey conducted by the Army Corps of Engineers, the United States "acquired through purchase or condemnation . . . the bed of Lake

94. *Sorum*, 2020 ND 175, ¶ 1.

95. N.D. CONST. art. XI, § 3 ("All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.").

96. N.D. CONST. art. I, § 21 ("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."); *id*. § 22 ("All laws of a general nature shall have a uniform operation.").

97. N.D. CONST. art IV, § 13 ("The legislative assembly shall enact all laws necessary to carry into effect the provisions of this constitution. Except as otherwise provided in this constitution, no local or special laws may be enacted, nor may the legislative assembly indirectly enact special or local laws by the partial repeal of a general law but laws repealing local or special laws may be enacted.").

98. *Sorum*, 2020 ND 175, ¶ 18.

99. *Id*.

100. *Id*. ¶ 40.

101. *Id*.

102. *Id*. ¶ 46.

103. *Id*. ¶ 2.

104. *Id*.

Sakakawea."[105] However, the United States did not acquire all the mineral rights from the owners of these purchased or condemned properties.[106]

Part II of the court's opinion addressed the defendants' motion to dismiss under Rule 19 of the North Dakota Rules of Civil Procedure.[107] Under this rule, the defendants argued to the district court that "the Plaintiffs' failure to join all parties with leaseholds and other interests in the minerals affected by the lawsuit required dismissal."[108] Finding no abuse of discretion, the court affirmed the district court's order denying the defendants' motion to dismiss under Rule 19.[109]

The court explained that Rule 19(b) "provides for dismissal of an action in which a required party cannot be made a party and is indispensable,"[110] but that such a dismissal is "an extreme remedy which should only be granted where a party is truly indispensable."[111] The defendants' argument centered on the risk of positioning non-joined "leaseholders and other interest holders" to bear "double, multiple, or otherwise inconsistent obligations" in the event an injunction prohibiting the enforcement of the Act was granted.[112]

The court rejected the defendants' argument, ruling that "joinder of all affected parties is not required where the plaintiff seeks to vindicate a public right."[113] As noted, the plaintiffs filed suit as taxpayers and "on behalf of similarly situated taxpayers,"[114] and as the court described, it is a "taxpayer challenge."[115] Suits pursuing the enforcement of public rights do not require the joinder of "every affected party."[116]

Part III presented the court's focus: whether the payments to be issued pursuant to the Act violated the Gift Clause. The court wrote that, as

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105. *Id*. Brief of Defendants, Appellants and Cross-Appellees The State of North Dakota et. al. ¶ 13, Sorum v. State, 2020 ND 175, (No. 20190203) [hereinafter Defendants' Brief] ("The Corps Survey was used to acquire property bounded by the banks of the Missouri River up to an elevation of 1854' mean sea level and extending from Garrison Dam to the southern border of sections 33 and 34, Township 153 North, Range 102 West, Williams County, North Dakota ("Total Garrison Take Area")).

106. *Sorum*, 2020 ND 175, ¶ 3; Defendants' Brief, *supra* note 105, ¶ 14 ("In some instances, the Corps acquired both surface and mineral rights, while in other instances private landowners reserved an interest in minerals.").

107. *Sorum*, 2020 ND 175, ¶¶ 14-17.

108. *Id*. ¶ 10.

109. *Id*. ¶ 17.

110. *Id*. ¶ 16

111. *Id*. (quoting Kouba v. Great Plains Pelleting, Inc., 372 N.W.2d 884, 887 (N.D. 1985)) (embedded quotation omitted).

112. *Id*. ¶ 17.

113. *Id*. (citing Nat'l Licorice Co. v. NLRB, 309 U.S. 350, 362-63 (1940)).

114. *Id*. ¶ 1.

115. *Id*. ¶ 17.

116. *Id*.

questions of law,[117] the constitutionality of a law is "fully reviewable on appeal."[118] On interpreting the North Dakota Constitution, the court iterated the following rules of construction:

> When interpreting constitutional provisions, "we apply general principles of statutory construction." We aim to give effect to the intent and purpose of the people who adopted the constitutional provision. We determine the intent and purpose of a constitutional provision, "if possible, from the language itself." "In interpreting clauses in a constitution we must presume that words have been employed in their natural and ordinary meaning."
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> "A constitution 'must be construed in the light of contemporaneous history—of conditions existing at and prior to its adoption. By no other mode of construction can the intent of its framers be determined and their purpose given force and effect.'" Ultimately, our duty is to "reconcile statutes with the constitution when that can be done without doing violence to the language of either." Under N.D. Const. art. VI, § 4, we "shall not declare a legislative enactment unconstitutional unless at least four of the members of the court so decide."[119]

The plaintiffs' action sought a declaration that the Act was unconstitutional on its face, not "as-applied," because they "assert[ed] no personal interest or ownership in the minerals at issue."[120] The court explained that a facial challenge to a law asserts "the Legislative Assembly exceeded a constitutional limitation in enacting [the law][.]"[121] A successful facial challenge then would have the "practical result" of treating the law "as if it never were enacted."[122] Thus, "facts or circumstances arising" after a law's enactment do not affect the determination of a violation under a facial challenge.[123]

The court rejected the defendants' argument that the plaintiffs' "burden is to establish there is no set of circumstances under which [the Act] could constitutionally be applied."[124] The court found the States' "hypothesizing a constitutional application is unpersuasive and inconsistent" with the court's history of "analyz[ing] facial challenges brought by taxpayers" challenging

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117. *See id.* ¶ 21 ("A facial challenge is purely a question of law because the violation, if any, occurs at the point of enactment by virtue of the Legislative Assembly enacting a law prohibited by the constitution.").

118. *Id.* ¶ 19 (quoting Teigen v. State, 2008 ND 88, ¶ 7, 749 N.W.2d 505).

119. *Id.* ¶ 19-20 (citations omitted).

120. *Id.* ¶ 21.

121. *Id.*

122. *Id.* (quoting Hoff v. Berg, 1999 ND 115, ¶ 19, 595 N.W.2d 285).

123. *Id.*

124. *Id.* ¶ 22.

laws under the Gift Clause.[125] The plaintiffs asserted that "pairing" unconstitutional gifts with otherwise legitimate transfers will not legitimatize the former.[126] The court ruled that a "taxpayer's burden in a facial challenge under the gift clause is satisfied if the statute requires some transfers that would be unconstitutional donations regardless of whether other transfers under the statute would not constitute unconstitutional donations."[127]

The court defined the issue as whether the States' issuance of royalty payments that it is not legally obligated to issue constitute "prohibited 'donations.'"[128] Noting that even though the Act might apply constitutionally, *i.e.*, "to unexpired claims" and thus obligatory payments, the court stated that this was not the sole reason the plaintiffs' claims failed.[129]

The plaintiffs argued the prohibited donations fell within "four categories of state-owned funds or property . . . (1) leases and leased mineral acres; (2) unleased mineral acres; (3) $187 million in the Strategic Investments and Improvements Fund ("SIIF"); and (4) $18 million escrowed because of royalty disputes."[130] Despite the district court addressing only the SIIF royalties under section 61-33.1-04(1)(b), the district court's rejection of plaintiff's facial challenge to the entire Act required the North Dakota Supreme Court's consideration of each of these four categories.[131] "Defendants argue[d] the State had no protectable interest in" any of the categories and that the Act's function of "reviving claims" back to January 1, 2006,[132] did not "implicate the gift clause."[133]

The district court held the retroactive function of the Act, pertaining only to section 61-33.1-04(1)(b),[134] violated the Gift Clause because any claim

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125. *Id*.

126. *Id*. ¶ 23.

127. *Id*. (citing State ex rel. Eckroth v. Borge, 283 N.W. 521, 526 (N.D. 1939)); *see id*. ¶ 24 ("In resolving taxpayer challenges to the constitutionality of statutes authorizing government spending, we have said 'where the constitutionality of a statute depends upon the power of the legislature to enact it, its validity must be tested by what might be done under color of the law and not what has been done.'") (quoting Herr v. Rudolf, 25 N.W.2d 916, 922 (N.D. 1947)).

128. *Id*. ¶ 24.

129. *Id*.

130. *Id*. ¶ 26; *see also* Defendants' Brief, *supra* note 105, ¶ 16 ("The Board of University and School Lands of the State of North Dakota (the "Land Board") has the authority to manage sovereign land minerals.").

131. *Sorum*, 2020 ND 175, ¶ 26 ("The district court's analysis of section 61-33.1-04(1)(b) implicates only category 3, the royalty proceeds held in the SIIF. Because the Plaintiffs cross-appeal the district court's rejection of their facial challenge to the chapter as a whole, we must also consider the chapter's application to the other categories of money or property.").

132. Act of Apr. 21, 2017, ch. 426, § 4, 2017 N.D. Sess. Laws 22, 27.

133. *Sorum*, 2020 ND 175, ¶¶ 26-27.

134. *Id*. ¶ 27 (The district court "concluded that by directing payment of money to private parties under lapsed and unenforceable claims, section 61-33.1-04(1)(b) violates on its face the constraints of N.D. Const. art. X, § 18. The district court also concluded there was no constitutional violation presented by the other provisions of the Act, either with respect to the funds in the SIIF or to the other categories of property interests asserted as prohibited gifts.").

lapsing within the three-year statute of limitations[135] period caused any property under said claims, by nature of both transferring "without consideration to the State"[136] and being no longer legally enforceable, to be deemed "indisputably owned by the State."[137] The North Dakota Supreme Court presented the issue before it as whether the transfer of any property within the four categories constituted prohibited "donations" under the Gift Clause.[138]

Guided by the rules of construction,[139] the court determined the "ordinary meaning of 'donation' at the time [the Gift Clause] was enacted."[140] The court noted contemporaneous dictionaries', *i.e.*, those circa 1889, definitions of "donation" reflected the term's "modern usage" and "provide a reliable starting point in determining how the term would have been used and understood by those who drafted and adopted the provision."[141]

"Particularly persuasive" when construing constitutional provisions are the "[a]uthoritative interpretations of gift clauses in other state constitutions that predated adoption of the North Dakota constitution in 1889."[142] New York, for instance, "had a provision that was 'nearly identical in language'" to the Gift Clause as adopted by North Dakota in 1889.[143] The court quoted *State ex rel. McCue v. Blaisdell*, which noted the presumption that constitutional drafters, when incorporating the provisions of other state constitutions, adopted those states' construction and interpretation of those provisions.[144]

The court then discussed a series of early cases interpreting gift clauses that either prohibited or allowed donations.[145] *Roome*, the court noted, found that the "discharge of an honorable obligation" does not constitute a prohibited donation.[146] "[A]nalogizing to payment of a debt discharged in bankruptcy," the *Roome* court ruled that despite the absence of a legal or equitable claim upon a debtor, if the debtor's debts are discharged via bankruptcy, but

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135. N.D. CENT. CODE § 28-01-22.1 (2019).

136. *Sorum*, 2020 ND 175, ¶ 27.

137. *Id.*

138. *Id.* ¶ 28.

139. *See supra* text accompanying note 119.

140. *Sorum*, 2020 ND 175, ¶ 29.

141. *Id.*

142. *Id.* ¶ 30.

143. *Id.* (quoting Erskine v. Steele Cty., 87 F. 630, 636 (C.C.D.N.D. 1898), *aff'd*, 98 F. 215 (8th Cir. 1899).

144. *Id.* ("[C]onstitution makers are presumed to have adopted [a provision] with knowledge of the construction or interpretation given it by the courts of the state whence it comes, and therefore to have adopted such construction or interpretation.") (quoting State ex rel. McCue v. Blaisdell, 119 N.W. 360, 365 (N.D. 1909)).

145. Bickerdike v. State, 78 P. 270 (Cal. 1904); Trustees. of Exempt Firemen's Benevolent Fund of N.Y.C. v. Roome, 93 N.Y. 313 (N.Y. 1883); *see* Solberg v. State Treasurer, 53 N.W.2d 49 (N.D. 1952); Petters & Co. v. Nelson Cty., 281 N.W. 61 (N.D. 1938); State v. Carter, 215 P. 477 (Wyo. 1923).

146. *Sorum*, 2020 ND 175, ¶ 30 (citing *Roome*, 93 N.Y. at 326).

he nonetheless thereafter makes good his debts, he "makes . . . an honest payment of an honest debt which otherwise would have been a charity and a gift."[147] *Roome* characterized this as a "purely moral obligation" for past consideration.[148] The court quoted *Roome*'s reasoning as follows:

> [T]he constitutional provision was not intended and should not be construed to make impossible the performance of an honorable obligation founded upon a public service, invited by the State, adopted as its agency for doing its work, and induced by exemptions and rewards which good faith and justice require should last so long as the occasion demands.[149]

Following its analysis of *Roome*, the court turned to *Bickerdike*.[150] Like the issue presented in *Sorum*, *Bickerdike* concerned a California statute "waiving the defense of a statute of limitations for claims that had expired several years prior to passage of the act."[151] Because the limitations defense "only barred remedy in court" and did not act on any claims' substance, any "gifts" resulting from a waiver were nonetheless constitutional.[152]

Next, the court considered *State v. Carter*.[153] The constitutional provisions at issue in *Carter* read "[n]either the state nor any county . . . shall . . . make donations to or in aid of any individual . . . except for necessary support of the poor" and "[n]o appropriation shall be made for charitable, industrial, educational or benevolent purposes to any person, corporation or community not under the absolute control of the state."[154] Following the death of an undersheriff in the line of duty, the Wyoming legislature "appropriated three thousand dollars for relief of [the undersheriff's] widow."[155] The court

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147. *Id.* (quoting *Roome*, 93 N.Y. at 326).

148. *Id.* ¶¶ 30-31 (quoting *Roome*, 93 N.Y. at 326). *Roome* concerned "a statute authorizing payment to firemen 'after the service ended, and when there was no legal or equitable obligation operating upon the state." *Id.* ¶ 30 (quoting *Roome*, 93 N.Y. at 326). However, "*Roome* did not characterize the appropriation for the firemen as supported by only a moral obligation without past consideration supporting it." *Id.* ¶ 31. The "past consideration" in *Roome* consisted of the firemen's "past services and the injuries and suffering which those had occasioned." *Id.* (quoting *Roome*, 93 N.Y. at 325); *but see id.* ¶¶ 64-65 (Crothers, J., specially concurring).

149. *Id.* ¶ 31 (quoting *Roome*, 93 N.Y. at 327).

150. Bickerdike v. State, 78 P. 270 (Cal. 1904).

151. *Sorum*, 2020 ND 175, ¶ 32 (citing *Bickerdike*, 78 P. at 275).

152. *Id.; Bickerdike*, 78 P. at 275 ("The statute of limitations does not, however, go to the *substance* of the right, but only to the *remedy*. When the statute has made the defense available to the debtor, his debt has not been extinguished. It still exists, and may be enforced against him, unless he chooses to avail himself of the defense afforded by the statute, and specially plead it. *The payment of such a debt by the debtor is not a 'gift,' in any proper sense of the word, and there is nothing in the constitutional provision invoked that can be held to prohibit the Legislature from paying these claims*.") (emphasis added).

153. 215 P. 477 (Wyo. 1923).

154. *Carter*, 215 P. at 479.

155. *Sorum*, 2020 ND 175, ¶ 33.

quoted *Carter*'s ruling that a "recognition of a moral right" may still be paid out despite being barred by the statute of limitations.[156]

Sorum then addressed two North Dakota cases, *Solberg v. State Treasurer*[157] and *Petters & Co. v. Nelson County*,[158] each of which considered moral obligation or consideration. The court noted that each case "found no sufficient moral or equitable obligation" and concerned conveyances or payments bearing no previous legal obligation.[159]

As noted by the court, contract law also "recognize[s] the concept of moral obligations providing legal consideration to support formation of a contract — but only a contract related to the obligation."[160] The court quoted Williston on Contracts,[161] which states that by mid-18th Century, moral obligations gained traction and status as valid past consideration when followed by "promise[s] to fulfill the obligation."[162] Most pertinent from the court's quote of Williston on Contracts is that "[t]he rule thus developed that an express promise could only give rise to liability if there had previously been a consideration which would have given rise to an implied promise which might have been enforced by an action at law but for some technical bar."[163]

This rule found itself incorporated in North Dakota's "1877 territorial code, and the provision remains materially unchanged in the century code today."[164] Parenthetically, the court recited the current statutory provision supporting this rule.[165] Thus, the court emphasized its holding "is limited to

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156. *Id.* ("In a sense, of course, every payment not legally enforceable might be said to be a gift. But courts have not, generally, construed that term as broadly as that. *A claim paid after it is barred by the statute of limitation is not considered a gift, but the recognition of a moral right*, and, when the existence thereof is acknowledged after the statute has run, it may even be enforced in an action at law. And it is generally held that, to be a claim which a state may recognize, it need not be such as is legally enforceable, but may be a moral claim, one based on equity and justice.") (quoting *Carter*, 215 P. at 479); *see also Carter*, 215 P. at 480 ("In attempting a definition of a moral claim the Supreme Court of Illinois . . . said: 'It is of the essence of a moral obligation that it arise out of a state of facts appealing to a universal sense of justice and fairness, though upon such facts no legal claim can be based. The state may be said to owe a moral debt to an individual when his claim grows out of the principles of right and justice. When it is of such a nature as to be binding on the conscience or honor of an individual, it may be said to be based upon considerations of a moral or honorary nature of which the state may take cognizance. Payments to individuals in the nature of a gratuity yet having some features of a moral obligation to support them have been made by Congress since the foundation of the government.'") (quoting Hagler v. Small, 138 N.E. 849, 856 (Ill. 1923).

157. 53 N.W.2d 49 (N.D. 1952).

158. 281 N.W. 61 (N.D. 1938).

159. *Sorum*, 2020 ND 175, ¶ 34.

160. *Id.* ¶ 35.

161. 4 WILLISTON ON CONTRACTS § 8:14 (4th ed. 1993)

162. *Sorum*, 2020 ND 175, ¶ 35 (quoting 4 WILLISTON ON CONTRACTS § 8:14 (4th ed. 1993)).

163. *Id.* (quoting 4 WILLISTON ON CONTRACTS § 8:14 (4th ed. 1993)).

164. *Id.* ¶ 36 (citing N.D. CENT. CODE § 9-05-02 (2019)).

165. *Id.* ("An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor or prejudice suffered by the promisee, also is a good consideration for a promise to an extent corresponding with the extent of the obligation, but no further or otherwise.") (quoting N.D. CENT. CODE § 9-05-02 (2019)).

those obligations that existed at law and would have been enforceable against the State but for a technical bar such as the statute of limitations."[166] The court deemed inapplicable the defendants' Due Process argument that "the State may extend a statute of limitations without implicating constitutional limits," insofar that "the State . . . cannot be said to violate its own due process rights by enacting a statute."[167]

The court then applied the foregoing interpretation to the payment of the SIIF royalties.[168] "Claims to the royalty proceeds held by the Land Board may be divided into two groups: those funds subject to claims that had lapsed prior to the effective date of the Act, and those funds subject to claims that had not lapsed."[169] The State of North Dakota acquired the money subject "to release under § 61-33.1-04(1)(b) . . . because the State was paid royalties under leases of minerals that it once claimed but now by statute no longer claims."[170]

The court rejected the plaintiffs' argument that the State cannot, by virtue of the Gift Clause and the statute of limitations, disown the money acquired through the relevant mineral leases.[171] Despite the State's option to assert a statute of limitations defense regarding the funds, the court found "it also has a moral obligation to pay its just debts and deal fairly with the people."[172] Thus, the court found the State does not violate the Gift Clause by "recogniz[ing] this obligation and return[ing] funds from the SIIF."[173]

Next, the court turned to the plaintiffs' cross-appeal from the district court's finding that the other three categories of funds, such as "leases, leased mineral acres, unleased mineral acres, and $18 million escrowed because of royalty disputes," to be released pursuant to the Act did not violate the Gift Clause.[174] The court focused on whether disclaiming a prior legal interest violated the Gift Clause.[175]

The equal-footing doctrine provided North Dakota with "title to the bed of the Missouri River up to its ordinary high water mark [OHWM] at the time

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

167. *Sorum*, 2020 ND 175, ¶ 37 (citing Schoon v. N.D. Dep't of Transp., 2018 ND 210, ¶ 23, 917 N.W.2d 199)).

168. *Id.* ¶ 39.

169. *Id.*

170. *Id.* ¶ 40.

171. *Id.*

172. *Id.* ("These funds have accrued since 2006 and have been held separately from other funds, so no new revenue will have to be raised to pay these claims.").

173. *Id.*

174. *Id.* ¶ 41.

175. *Id.*

North Dakota was admitted to the union."[176] Accordingly, even though the State holds title to the Missouri River bed, "state law [and] the public trust doctrine" determine how any changes to the riverbed affect that title.[177] The public trust doctrine, incorporated in N.D.C.C. section 61-01-01, provides for the State to "hold[] title to the beds of navigable waters in trust for the use and enjoyment of the public."[178]

Except under certain circumstances, state ownership of said titles are "generally confirm[ed] . . . as against any claim of the United States."[179] As applied to the titles at issue here, the court found:

> The federal government acquired the bed of Lake Sakakawea above the historical OHWM by purchase or eminent domain so that it could be inundated by the Garrison Dam. Under § 1313 of the Submerged Lands Act, the land taken by the federal government for the Garrison Dam project is owned by the United States.[180]

Despite application of the Supremacy Clause,[181] the plaintiffs asserted that the public trust doctrine and the Sovereign Lands Act[182] authorized "State . . .

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176. *Id.* ¶ 42 (citing Reep v. State, 2013 ND 253, ¶ 14, 841 N.W.2d 664); *Reep*, 2013 ND 253, ¶ 14 ("The United States Supreme Court has recognized the equal footing doctrine is constitutionally based under an unbroken line of cases explaining that, upon entering the union on equal footing with established States, a newly-admitted State receives absolute title to beds of navigable waters within the State's boundaries from high watermark to high watermark.").

177. *Sorum*, 2020 ND 175, ¶ 42.

178. *Id.* ¶ 43; *see* N.D. CENT. CODE § 61-01-01 (2019) ("All waters within the limits of the state from the following sources of water supply belong to the public and are subject to appropriation for beneficial use and the right to the use of these waters for such use must be acquired pursuant to chapter 61-04: 1. Waters on the surface of the earth, excluding diffused surface waters but including surface waters whether flowing in well-defined channels or flowing through lakes, ponds, or marshes which constitute integral parts of a stream system, or waters in lakes; 2. Waters under the surface of the earth whether such waters flow in defined subterranean channels or are diffused percolating underground water; 3. All residual waters resulting from beneficial use, and all waters artificially drained; and 4. All waters, excluding privately owned waters, in areas determined by the state engineer to be noncontributing drainage areas. A noncontributing drainage area is any area that does not contribute natural flowing surface water to a natural stream or watercourse at an average frequency more often than once in three years over the latest thirty-year period.").

179. *Sorum*, 2020 ND 175, ¶ 44 (citing 43 U.S.C. § 1311 (2018)); *see generally*, 43 U.S.C. §§ 1301 – 1356b (2018) ("The Submerged Lands Act"). The exceptions, as quoted by the Court in part: "excepted from the operation of section 1311 of this title— (a) . . . all lands acquired by the United States by eminent domain proceedings, purchase, cession, gift, or otherwise in a proprietary capacity." *Sorum*, 2020 ND 175, ¶ 44 (quoting 43 U.S.C. § 1313 (2018)).

180. *Sorum*, 2020 ND 175, ¶ 44.

181. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."); *see* Home of Econ. v. B.N.S.F.R.R., 2005 ND 74, ¶ 5, 694 N.W.2d 840 ("Under the Supremacy Clause, state law that conflicts with federal law is 'without effect.'") (citing Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992)).

182. N.D. CENT. CODE § 61-33-03 (2019) ("All possessory interests in oil, gas, and related hydrocarbons in the sovereign lands of the state are transferred to the state of North Dakota, acting by and through the board of university and school lands. These transfers are self-executing. No evidence other than the provisions of this chapter is required to establish the fact of transfer of title

ownership of the disputed minerals."[183] The court held the United States' acquisition of the bed of Lake Sakakawea pursuant to the Flood Control Act of 1944 preempted any legal ownership the State otherwise asserted through either "the constitution, a statute, or the common law."[184]

Aside from "some landowners" retaining their mineral interests in the Total Garrison Take Area, the federal government acquired many of the surface and mineral estates located therein.[185] The court reinforced the fact that the United States purchased, or otherwise acquired, such as through eminent domain, "both the surface and mineral estate to much of the affected area."[186] And despite the State's title to certain navigable waters under the public trust doctrine, the court noted that "The Submerged Lands Act expressly excepts . . . those lands acquired by the United States by eminent domain or purchase."[187] Thus, "chapter 61-33 and the public trust doctrine" are preempted under the Supremacy Clause.[188] Accordingly, the court held that the area of Lake Sakakawea's "lakebed above the historic OHWM and accompanying mineral estates were never the State's to 'give away.'"[189]

> The State does not violate the gift clause by transferring property or renouncing claims to property that it does not own in the first instance. Because the State cannot give away that which it does not own, we hold the Act does not violate the gift clause of the North Dakota Constitution to the extent that it renounces claims to leases, leased mineral acres and unleased mineral acres in the affected area. The Defendants' release of claims to funds held in escrow as a result of royalty disputes is derivative of its claims to the leases and leased mineral acres and would not be subject to a statute of limitation defense and so also does not violate the gift clause.[190]

The court then addressed whether the Act violated the Watercourses Clause.[191] Focusing on the Clause's term "remain," the court found the term's use "reinforces the principle that the State's ownership of flowing streams and natural watercourses was fixed at statehood."[192] The court ruled that the

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to the state of North Dakota, acting by and through the state engineer and board of university and school lands. Proper and sufficient delivery of all title documents is conclusively presumed.").

183. *Sorum*, 2020 ND 175, ¶ 45.

184. *Id*.

185. *Id*. ¶ 46; *see supra* note 105.

186. *Sorum*, 2020 ND 175, ¶ 46.

187. *Id*. (citing 43 U.S.C. §§ 1311, 1313 (2018)).

188. *Id*.

189. *Id*.

190. *Id*.

191. *Id*. ¶ 47; N.D. CONST. art. XI, § 3 ("All flowing streams and natural watercourses shall forever remain the property of the state for mining, irrigating and manufacturing purposes.")

192. *Sorum*, 2020 ND 175, ¶ 48.

Watercourses Clause only "vest[s] in the State ownership of watercourses . . . navigable at statehood" and not those which "become navigable" thereafter.[193] Accordingly, Lake Sakakawea is not state owned.[194] The Missouri River was not navigable above the historical OHWM at the time North Dakota earned its statehood.[195] The area from the OHWM to "1854 feet mean sea level was acquired by the Corps" following the Corps Survey around 1944.[196] Thus, the court held that the Act "does not violate the watercourses clause."[197]

The court also held that the Act does not violate the Privileges or Immunities Clause, the Uniform Operation Clause, or the Special or Local Law Prohibition Clause.[198] Regarding the first two, the court found that "[t]he state constitution 'does not prohibit legislative classifications or require identical treatment of different groups of people.'"[199] As to the Special or Local Law Prohibition Clause, the court reiterated a prior definition of "special laws" as those "made for individual cases of less than a class, due to peculiar conditions and circumstances."[200] On the other hand, permissible general laws "appl[y] to all things or persons of a class."[201] Reasonable, not arbitrary, classifications are constitutional and do "not violate the special laws provision of the North Dakota Constitution."[202] The plaintiffs argued that "the Act denies equal protection to the many by distributing state-owned assets to the few."[203] However, the court found that this argument "is simply a

193. *Id*. ¶¶ 48-49; *Id*. ¶ 49 ("This is consistent with this Court's prior interpretation of the watercourses clause. For example, in *Ozark-Mahoning Co. v. State*, 76 N.D. 464, 37 N.W.2d 488 (1949), this Court held that the watercourses clause applies only to watercourses which were navigable upon North Dakota's admission to the United States. . . . [C]iting *Bigelow v. Draper*, 6 N.D. 152, 69 N.W. 570 (1896), the Court explained that under the common law of Dakota Territory when North Dakota was admitted to the United States, 'the owner of land through which a nonnavigable stream flowed was possessed of the title to the bed of the stream.' The watercourses clause was interpreted to apply only to those watercourses that were navigable at statehood because an interpretation that would divest the rights of riparian owners to the beds of watercourses that were not navigable in fact at statehood would violate the Fourteenth Amendment to the U.S. Constitution.").

194. *Id*. ¶ 48.

195. *Id*. ¶ 50; Defendants' Brief, *supra* note 105, ¶ 11 ("Under the Equal Footing Doctrine, the boundary of the State's title to the bed of the Missouri River extended to the ordinary high water mark . . . of the Missouri River at the time of statehood.").

196. *Sorum*, 2020 ND 175, ¶ 50; *see also supra* note 105.

197. *Sorum*, 2020 ND 175, ¶ 50.

198. *Id*. ¶¶ 52-54.

199. *Id*. ¶ 52 (quoting Larimore Pub. Sch. Dist. No. 44 v. Aamodt, 2018 ND 71, ¶ 34, 908 N.W.2d 422).

200. *Id*. (quoting MCI Telecommunications Corp. v. Heitkamp, 523 N.W.2d 548, 552 (N.D. 1994)).

201. *Id*. (quoting *MCI*, 523 N.W.2d at 552).

202. *Id*. (quoting *MCI*, 523 N.W.2d at 553).

203. *Id*. ¶ 53. The Court observes that the case the plaintiffs' argument relied upon, i.e. Solberg v. State Treasurer, 53 N.W.2d 49, 55 (N.D. 1952), "limited [its holding] to the gift clause." *Id*.

repackaging of the Plaintiffs' gift clause argument which we rejected in section III-B above."[204]

As noted above, the release of payments under the Act is limited to those funds received from wells spud post-January 1, 2006.[205] The court rejected the plaintiff's argument that this delimitation "created an unconstitutionally arbitrary classification."[206] The court held:

> The record reflects January 2006 was the approximate time oil and gas production began under Lake Sakakawea via horizontal drilling. Therefore, the Act's retroactive application to January 1, 2006, reflects a rational line dividing periods with different economic and industrial characteristics and is not arbitrary. Because the Act did not create an unconstitutional classification, we hold that the district court did not err in concluding it does not violate N.D. Const. art. I, §§ 21 and 22.[207]

In Section III-E, the court held the Act "does not violate the public trust doctrine," rejecting the plaintiffs' argument otherwise.[208] The court explained that surface estates bear "an implied servitude for the owner or lessee of the [severed] mineral estate to develop the minerals."[209] Accordingly, "private mineral ownership[s] under a navigable waterway would offend the public trust if the mineral owner's easement is in conflict with and superior to the State's trust interest."[210] In this case, however, the United States "holds title to the lakebed of Lake Sakakawea," and thus "the public trust is not implicated by private mineral ownership under Lake Sakakawea."[211]

Section IV of the court's opinion addressed the district court's award of "attorney's fees, costs, and service fees" to the Plaintiffs.[212] Noting that North Dakota generally follows the "'American Rule' for attorney's fees," and thus such awards are not granted to "[S]uccessful litigants . . . unless authorized by contract or by statute."[213] However, the American Rule excepts "common

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204. *Id.*

205. Act of Apr. 21, 2017, ch. 426, § 4, 2017 N.D. Sess. Laws 22, 27.

206. *Sorum*, 2020 ND 175, ¶ 54.

207. *Id.*

208. *Id.* ¶ 56.

209. *Id.* (citing Krenz v. XTO Energy, Inc., 2017 ND 19, ¶ 42, 890 N.W.2d 222, 237). "When a mineral estate is severed from the surface estate, the mineral estate is dominant and the surface estate is servient in the sense it is charged with a servitude for the implied right of the mineral lessee to develop the minerals." *Krenz*, 2017 ND 19, ¶ 42.

210. *Sorum*, 2020 ND 175, ¶ 56.

211. *Id.* ("Because the public trust doctrine is a common law principle, it cannot invalidate a statute that is not prohibited by the constitution.") (citing N.D. CENT. CODE §§ 1-01-06, 1-02-01 (2019)).

212. *Id.* ¶¶ 57-60.

213. *Id.* ¶ 58 (quoting Rocky Mountain Steel Foundations, Inc. v. Brockett Co., LLC, 2019 ND 252, ¶ 9, 934 N.W.2d 533) (alteration in original).

fund[s]" awarded to a lawyer "for the benefit of" another who is not his client.[214] Therefore, "reasonable attorney's fees from the fund as a whole" may be awarded.[215]

In *Sorum*, no contract or statute authorized an award of attorney's fees to the prevailing party.[216] And "[a]s a result of [the Court's] decision, the plaintiffs did not recover a common fund for the benefit of others and are therefore not entitled to attorney's fees under the common fund doctrine."[217] Thus, the court reversed the attorney's fees award.[218]

Likewise, the court reversed the award of costs to plaintiffs.[219] "Under N.D.C.C. § 28-26-06, costs are taxed in favor of the prevailing party. Because we reverse the portion of the summary judgment finding application of N.D.C.C. § 61-33.1-04(1)(b) unconstitutional, the Plaintiffs are no longer prevailing parties."[220] The Court reversed the plaintiffs' service award for like reasons.[221]

The Court concluded in section V by summarizing its holdings:

> We affirm the district court's order denying the Defendants' N.D.R.Civ.P. 19(b) motion to dismiss. We affirm that part of the court's judgment concluding the Plaintiffs have not demonstrated N.D.C.C. ch. 61-33.1 is facially unconstitutional. We reverse the order granting an injunction and reverse the judgment to the extent it concludes the release of lease and bonus refunds authorized under N.D.C.C. § 61-33.1-04(1)(b) would result in unconstitutional gifts under N.D. Const. art. X, § 18, and to the extent it awards to the Plaintiffs attorney's fees, costs, and service awards.[222]

Chief Justice Jensen, Justice VandeWalle, and Surrogate Judge Anderson, joined the majority opinion.[223]

Justice Crothers specially concurred, with Chief Justice Jensen joining, cautioning that "the rationale underpinning Part III (B) is not naked authority for the State to appropriate funds for any cause describable as a 'moral

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214. *Id.* (citing Ritter, Laber & Assocs., Inc. v. Koch Oil, Inc., 2007 ND 163, ¶ 27, 740 N.W.2d 67, 75).

215. *Id.* (citing *Koch Oil, Inc.*, 2007 ND 163, ¶ 27, 740 N.W.2d at 75).

216. *Id.* ¶ 59.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.*

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

222. *Id.* ¶ 61.

223. *Id.* ¶ 62.

obligation.'"[224] Justice Crothers made a distinction between legal obligations barred by a statute of limitations and purely moral obligations.[225] Pointing to the majority opinion's citations to California and Wyoming decisions, Justice Crothers noted that those cases involved actual "legal claims . . . [barred by] the passage of time," and the "states essentially waived the statute of limitations and the respective state's highest courts held the waiver was not a violation of their gift clauses restrictions."[226] On the other hand, he noted that "[i]n *Roome*, the obligation was purely moral. No legal obligation existed before passage of the law at issue."[227] Justice Crothers would "therefore . . . not cite or rely on the *Roome* decision as persuasive authority for interpretation of North Dakota's gift clause."[228]

224. *Id.* ¶ 64 (Crothers, J., specially concurring).
225. *Id.* ¶ 65.
226. *Id.*
227. *Id.*
228. *Id.*

CRIMINAL LAW – CRIMINAL JUSTICE – DOUBLE JEOPARDY

City of West Fargo v. Ekstrom

In *City of West Fargo v. Ekstrom*,[229] Mandie Le Ekstrom appealed from a guilty verdict of aggravated driving under the influence ("DUI") following a second jury trial.[230] Ekstrom presented three issues on appeal: 1) the second jury trial violated her state and federal constitutional double jeopardy rights; 2) the jury did not find her blood alcohol content ("BAC") to be over .16, a fact required to establish an aggravating factor for sentencing purposes; and 3) the jury instructions requiring the jury to find her BAC over .16 were improperly denied. The North Dakota Supreme Court held that Ekstrom's double jeopardy rights were not violated but reversed and remanded for resentencing without considering the aggravating factor.[231]

Early in the first trial, the district court sustained Ekstrom's objection to the City's offer of Ekstrom's chemical test results into evidence, and "granted her mistrial motion based on the City's failure to provide proper foundation for the test result's admission."[232] The foundation necessary for admitting the chemical test results would have included evidence that the Intoxilyzer 8000 was appropriately installed.[233] Prior to laying a proper foundation, "the City's police officer [and first witness] testified to the chemical breath test results."[234]

After the district court provided the City with the option of setting a new trial, "Ekstrom objected on double jeopardy grounds and moved to dismiss the charge."[235] Ekstrom's motion to dismiss was denied following a hearing.[236] Ekstrom also petitioned for a supervisory writ to the North Dakota Supreme Court, but that too was denied.[237]

Part II of the court's opinion addressed Ekstrom's state and federal double jeopardy arguments. The Fifth Amendment to the U.S. Constitution reads, in relevant part: "No person shall . . . be subject for the same offence to be twice put in jeopardy of life or limb."[238] The North Dakota Constitution article I, section 12, reads in relevant part: "No person shall be twice put in

229. 2020 ND 37, 938 N.W.2d 915.
230. *Ekstrom*, 2020 ND 37, ¶¶ 1, 4.
231. *Id.* ¶¶ 1, 18, 24.
232. *Id.* ¶ 3.
233. *Id.*
234. *Id.* ¶¶ 2, 16.
235. *Id.* ¶ 4.
236. *Id.*
237. *Id.*
238. U.S. CONST. amend. V.

jeopardy for the same offense."[239] These provisions, the court ruled, "prohibit successive prosecutions and punishments for the same criminal offense."[240] In addition, the court ruled that attachment of jeopardy occurs "when the jury is empaneled and sworn,"[241] but the termination of a trial "before a verdict is rendered" might not bar retrial despite double jeopardy attachment.[242] Furthermore, determinations of double jeopardy violations are questions of fact relevant to each case.[243]

In the eyes of the court, it is particularly relevant when a defendant consents to a declaration of mistrial.[244] "[W]ithout having been goaded into [consenting to a mistrial] by misconduct attributable to the prosecutor," for example, subsequent prosecution is not generally barred.[245] The court quoted *Oregon v. Kennedy*[246] to explain its rule behind determining sufficient prosecutorial misconduct warranting a bar to subsequent prosecutions following a mistrial.[247] In *Kennedy*, the U.S. Supreme Court ruled that a prosecutor must intend to "subvert" a defendant's double jeopardy protections or otherwise "'goad' the defendant into moving for a mistrial" before a second trial is barred.[248] Any prosecutorial conduct must be "intended to provoke the defendant into moving for a mistrial."[249]

Ekstrom essentially argued that the "*Kennedy* standard" set too high of a bar.[250] She argued that subsequent prosecutions are barred "when prosecutorial overreach provokes a mistrial and affords the prosecution a more favorable opportunity to convict a defendant."[251] The court observed that Ekstrom relied on *Downum v. United States*[252] and *United States v. Dinitz*[253] in "assert[ing] a broader understanding of what constitutes prosecutorial

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239. N.D. CONST. art. I, § 12; *see* N.D. CENT. CODE § 29-01-07 (2019) ("No person can be twice put in jeopardy for the same offense, nor can any person be subjected to a second prosecution for a public offense for which that person has once been prosecuted and convicted, or acquitted, or put in jeopardy, except as is provided by law for new trials.").

240. *Ekstrom*, 2020 ND 37, ¶ 9.

241. *Id.* (citing Day v. Haskell, 2011 ND 125, ¶ 8, 799 N.W.2d 355); *Day*, 2011 ND 125, ¶ 8 ("The general rule is that a person is put in jeopardy when his trial commences, which in a jury case occurs when the jury is empaneled and sworn, and in a non-jury trial when the court begins to hear evidence.") (quoting Linghor 2004 ND 224, ¶ 20, 690 N.W.2d 201).

242. *Ekstrom*, 2020 ND 37, ¶ 9.

243. *Id.*

244. *Id.*

245. *Id.* (citing State v. Voigt, 2007 ND 100, ¶ 18, 734 N.W.2d 787).

246. Oregon v. Kennedy, 456 U.S. 667 (1982).

247. *Ekstrom*, 2020 ND 37, ¶ 10.

248. *Id.* (quoting *Kennedy*, 456 U.S. at 675-76).

249. *Id.* (quoting *Kennedy*, 456 U.S. at 679).

250. *Id.* ¶¶ 11-12.

251. *Id.* ¶ 11.

252. Downum v. United States, 372 U.S. 734 (1963).

253. United States v. Dinitz, 424 U.S. 600 (1976).

overreach or harassment."[254] However, the court appeared to agree with a decision from Connecticut, *State v. Butler*,[255] which stated *Kennedy* overruled "the extent these cases invoke a broader 'harassment' standard."[256]

In addition, Ekstrom contended that "the City not only caused the mistrial, but also acquiesced to the motion by not attempting to cure the foundational deficiency or objecting."[257] She asserted the City "deliberately" questioned the officer in manner "which a highly prejudicial answer was foreseeable, *i.e.*, the inadmissible chemical test results."[258] This conduct, Ekstrom claimed, "goaded or provoked her" into moving for a mistrial and thus, "does not preclude dismissal" under the *Kennedy* standard.[259] Ekstrom otherwise argued the "Court should not adopt the *Kennedy* standard."[260]

Relying upon a dissenting opinion in *State v. Jacobson*,[261] Ekstrom argued that the court might rule the North Dakota Constitution extends double jeopardy protections beyond that of its federal counterpart.[262] However, the court noted the majority in *Jacobson* "declined to overrule settled law, stating the framers of our state constitution did not intend an interpretation different than the Double Jeopardy Clause of the United States."[263] Aside from citing to *Jacobson*, the court found that Ekstrom offered "no new legal or factual support" for extending double jeopardy protections via the state constitution.[264] Thus, the Court ruled that the *Kennedy* standard "is the proper standard in North Dakota," and held Ekstrom's argument for greater State protection "unpersuasive."[265]

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254. *Ekstrom*, 2020 ND 37, ¶ 11; *see* Appellant's Brief ¶ 17, City of West Fargo v. Ekstrom, (No. 20190079) [hereinafter Appellant's Brief] ("Harassment of an accused by successive prosecutions or declaration of a mistrial so as to afford the prosecution a more favorable opportunity to convict are examples when jeopardy attaches.") (quoting *Downum*, 372 U.S. at 736); *id.* ¶ 18 ("To find prosecutorial overreaching, the government must have, through gross negligence or intentional misconduct, caused aggravated circumstances to develop which seriously prejudiced the defendant, causing her reasonably to conclude that a continuance of the tainted proceeding would result in conviction. (citing *Dinitz*, 424 U.S. at 611, n.38 (Stevens, J., concurring)).

255. State v. Butler, 810 A.2d 791 (Conn. 2002).

256. *Ekstrom*, 2020 ND 37, ¶ 11; *see Butler*, 810 A.2d at 796-97.

257. *Ekstrom*, 2020 ND 37, ¶ 12.

258. *Id.*

259. *Id.* ¶ 13.

260. *Id.*; Appellant's Brief, *supra* note 254, ¶ 36 ("[S]hould this Court decide to adopt *Kennedy*, it would create a confusing and subjective test for defendants to satisfy, and would provide prosecutors with a shield against accountability, absent blatant 'goading' of the defendant into moving for a mistrial.").

261. State v. Jacobson, 545 N.W.2d 152, 156 (N.D. 1996).

262. *Ekstrom*, 2020 ND 37, ¶ 13.

263. *Id.* ¶ 14 (citing *Jacobson*, 545 N.W.2d at 153).

264. *Id.*

265. *Id.* ¶¶ 15, 17.

The court then discussed Ekstrom's challenge under *Kennedy*.[266] However, the court noted that Ekstrom did not argue in the district court the "requisite intent" of the City to "provoke her into moving for a mistrial."[267] In the district court, Ekstrom argued that the City's intent was irrelevant "because the City's misconduct caused the mistrial," and that the "City and the testifying police officer knew or had reason to know not to discuss the specific chemical test results."[268]

Rejecting this argument, the court found "the police officer was the City's first witness early in the trial [and] had no reason to provoke a mistrial at that early stage, and it did not intend to provoke Ekstrom's mistrial motion."[269] The City claimed that the "officer's unsolicited testimony was, at most, an unintended mistake."[270] Moreover, the court found the City's failure to object to the mistrial "does not establish an intent to provoke a mistrial."[271] Thus, the court held that Ekstrom failed to show "the City's conduct at issue was intended to 'goad' her into moving for a mistrial," precluding application of the Double Jeopardy Clause.[272] Accordingly, the Double Jeopardy Clause did not bar Ekstrom's retrial.[273]

Part III of the court's opinion addressed the jury's failure to find Ekstrom's BAC to be over .16. Ekstrom argued the district court "erred by denying her demand for the jury to decide whether her chemical breath test was .16 or greater."[274] Whether Ekstrom's BAC was over .16 was relevant because a BAC over that level constitutes an aggravating factor,[275] and aggravating factors determine minimum mandatory penalties.[276]

The court noted the following in explaining the applicable jury-determination rules:

> In *Apprendi v. New Jersey*, 530 U.S. 466, 490, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), the United States Supreme Court held that a fact used to enhance a criminal sentence beyond the statutory maximum for the crime committed must be decided by a jury beyond a reasonable doubt. *See also Clark v. State*, 2001 ND 9, ¶¶ 3, 5, 621 N.W.2d 576. In *Alleyne v. United States*, 570 U.S. 99, 133 S.Ct. 2151, 2155, 186 L.Ed.2d 314 (2013), the Supreme Court extended

266. *Id.* ¶ 15.
267. *Id.*
268. *Id.*
269. *Id.* ¶ 16.
270. *Id.*
271. *Id.*
272. *Id.* ¶¶ 16-17.
273. *Id.* ¶ 18.
274. *Id.* ¶ 19.
275. *Id.* ¶ 21.
276. *Id.*

> the reasoning in *Apprendi* and held that any fact leading to the imposition of a mandatory minimum sentence must also be found by a jury beyond a reasonable doubt.[277]

Ekstrom argued that she was "entitled to have the jury make [a] factual determination" on her BAC level, and that it was improper for the district court "to take 'judicial notice' of a heightened alcohol concentration when evaluating the defendant's sentence, as the court does with prior convictions."[278]

The City, on the other hand, argued that the "[c]ourt should either affirm the sentence or, in the alternative, remand for resentencing" because "Ekstrom waived the issue by not properly articulating it to the district court."[279] However, the court noted that the City "essentially concedes the jury should have decided" Ekstrom's BAC level.[280] The City also argued that affirming the sentence would be appropriate because the "district court did not substantially rely on the mandatory minimum provision."[281]

The court remanded "to the district court for resentencing without consideration of the mandatory minimum under the ordinance."[282] Ekstrom's BAC level determines whether or not the aggravating factor applies "for purposes of the enhanced sentence."[283] "The jury as the factfinder did not specifically find this aggravating fact."[284]

Justice Tufte concurred specially, joined by Chief Justice Jensen, "to emphasize that we may not prospectively bind ourselves to follow future as yet unannounced interpretations of the Fifth Amendment when we interpret art. I, § 12."[285] The case at hand, he noted, warrants a like interpretation of the North Dakota and United States Double Jeopardy Clauses "despite differences in language and history that suggest the possibility of different applications in some scenarios not yet presented to this Court."[286] Although the Court may have interpreted the two clauses to be consistent, this "does not mean that it must always be so."[287]

Justice Tufte stated that the court is "periodically asked to interpret the state constitution to 'provide greater protection' compared to a related provision in the U.S. Constitution," and that Ekstrom's argument on this point was

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277. *Id.* ¶ 20 (quoting State v. Watkins, 2017 ND 165, ¶ 9, 898 N.W.2d 442).
278. *Id.* ¶ 22.
279. *Id.* ¶ 23.
280. *Id.*
281. *Id.*
282. *Id.* ¶ 24.
283. *Id.*
284. *Id.*
285. *Id.* ¶ 27 (Tufte, J., concurring specially) (citing State v. Jacobson, 545 N.W.2d 152, 153 (N.D. 1996) (VandeWalle, C.J., concurring specially)).
286. *Id.*
287. *Id.*

"more developed than arguments in some other matters."[288] However, Justice Tufte still found Ekstrom's argument unpersuasive "because it lacks support in the primary sources and authorities our cases have relied on when interpreting the North Dakota Constitution."[289]

Ekstrom's reliance on Surrogate Judge Levine's dissent in *Jacobson* also failed to persuade Justice Tufte.[290] Judge Levine's dissent, he noted, concerned various state statutes purporting to expand double jeopardy protection.[291] However, the statutes "do not appear to have been enacted close in time to the 1889 adoption of art. I, § 12."[292] These non-contemporaneous statutes were unpersuasive to Justice Tufte in light of his approach to constitutional and statutory interpretation:

> Statutes adopted contemporaneously with a constitutional provision may reflect a legislative understanding of the scope of the constitutional provision, particularly when an argument is made that the statute conflicts with a newly-enacted constitutional provision. Such legislative enactments may be informative about the scope of a related constitution provision because we have presumed the Legislative Assembly makes its own assessment of the constitutionality of a bill when it passes through the legislative process.[293]

Moreover, he added that where "the Legislative Assembly has provided additional double jeopardy protections in statute is perfectly consistent with a narrow reading of the double jeopardy clause," otherwise "there would have been little reason to enact them."[294]

Justice Tufte also addressed Judge Levine's "proposition that later legislative expressions of a state's public policy may justify a court's interpretation of the state constitution,"[295] a proposition which Ekstrom included in her brief by quoting Judge Levine's dissent:

> We recognized in [*State v. Orr*. 375 N.W.2d 171, 177 (N.D.1985)], that legislative action to "zealously" guard a right illustrates the special significance that right enjoys in our state. *State v. Hunt*, 91 N.J. 338, 450 A.2d 952 (1982) (holding a divergent interpretation of the

288. *Id.* ¶ 28.
289. *Id.*
290. *Id.* ¶ 29.
291. *Id.*
292. *Id.* ¶ 30.
293. *Id.* ¶ 29 (citations omitted).
294. *Id.* ¶ 30.
295. *Id.*

> state and federal constitutions is justified when the state's public policy favors protection of certain interests).[296]

Justice Tufte disagreed, stating that public policy statements by the Legislature "require a contextual connection to the meaning of a constitutional provision when it was adopted, to properly inform a judicial interpretation of the provision."[297] Thus, he was unconvinced how the intent of the "framers and adopters" of the State's Double Jeopardy Clause could be revealed through the statutes to which Ekstrom cited from Judge Levine's dissent.[298]

He next turned to Ekstrom's assertion that the *Kennedy* standard provides "a confusing and subjective test."[299] He cited opinions from *State v. Hendrickson*[300] and *State v. Gardner*,[301] each of which expressed the possibility of the court "developing [its] own doctrine under the North Dakota Constitution that may be more suitable to circumstances in North Dakota and clearer in its application for both the state and its citizens."[302] The court, he said, "remain[s] free to independently develop our own docrine" but cautions advocates "should . . . provide persuasive reasons to do so."[303]

Recent arguments of this nature before the court failed largely because "they too often reach no further than policy arguments supported by 'because you can.'"[304] Justice Tufte urged attorneys to start "with the text of our constitution . . . [and] [i]dentify whether the text differs from a related federal provision."[305] He noted that Ekstrom failed to do so with regard to the respective double jeopardy clauses.[306] Similarly, Ekstrom "provided no evidence about what the original public meaning of the text was when it was

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296. Appellant's Brief, *supra* note 254 ¶ 35 (quoting State v. Jacobson, 545 N.W.2d 152, 158 (N.D. 1996) (Levine, J., dissenting)).

297. *Ekstrom*, 2020 ND 37, ¶ 30 (Tufte, J., concurring specially).

298. *Id.*

299. *Id.* ¶ 31.

300. State v. Hendrickson, 2019 ND 183, 931 N.W.2d 236; *id.* ¶ 23 (Crothers, J., specially concurring) ("As long as we interpret the North Dakota constitutional provision the same as the Fourth Amendment, we are bound by the United States Supreme Court's decision in *Navarette*. However, while not a question presented in this case, the *Navarette* dissent raises legitimate concerns about its majority opinion. Those concerns should make us at least question, in an appropriate case where we were asked, whether we should decouple our federal and state constitutional analysis in the area of driving under the influence investigative stops. If we chose that direction, we would not be alone in doing so.").

301. State v. Gardner, 2019 ND 122, 927 N.W.2d 84; *id.* ¶ 16 ("The district court's focus on privacy (while perhaps understandable in view of the sometimes murky way *Katz* has influenced search and seizure cases to turn solely on expectations of privacy) was a misapplication of law . . . .").

302. *Ekstrom*, 2020 ND 37, ¶ 31 (Tufte, J., concurring specially).

303. *Id.* ¶ 32.

304. *Id.* ¶ 33.

305. *Id.*

306. *Id.*

adopted in 1889."[307] To do so with regard to a disputed term, an attorney should cite sources contemporaneous with the adoption of the Constitution, such as "[d]ictionaries and leading treatises from the period."[308] For instance, Justice Tufte explained that Thomas M. Cooley "spoke to the North Dakota Constitutional Convention" in 1889 about state constitutions.[309] He quoted one of Cooley's comments on double jeopardy: "the jury are discharged with the consent of the defendant expressed or implied . . . the accused may again be put upon trial upon the same facts before charged against him, and the proceedings had will constitute no protection."[310]

Furthermore, Justice Tufte noted that when a state adopts "language from an identifiable source," the state adopts the "prior authoritative interpretations" of the language along with it.[311] In this regard, when interpreting the North Dakota Constitution, "[p]re-1889 interpretations are particularly relevant."[312] Again, Justice Tufte stated that "Ekstrom has not argued there are relevant authoritative interpretations of a source text" for the State's double jeopardy clause, although "[i]t appears likely that there was no single source for this provision."[313]

Justice Tufte concluded by reiterating that the court is "not bound to follow in lockstep federal doctrine implementing similar federal provisions," but that the court has "[t]o date . . . not been persuaded" to diverge from analyzing the state and federal double jeopardy clauses differently.[314] Nonetheless, he suggested that "[c]ounsel may assist the court and serve their clients by marshalling any available evidence that may illuminate what meaning was intended when adopting a particular provision."[315]

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307. *Id.* ¶ 34.
308. *Id.*
309. *Id.* ¶ 35.
310. *Id.* (quoting THOMAS M. COOLEY, CONSTITUTIONAL LIMITATIONS 401-02 (5th ed. 1883)).
311. *Id.* ¶ 36 (citing State ex rel. Linde v. Hall, 159 N.W. 281 (N.D. 1916)).
312. *Id.*
313. *Id.*
314. *Id.* ¶ 37.
315. *Id.*