STATE OF NORTH DAKOTA

COUNTY OF WILLIAMS

IN DISTRICT COURT

NORTHWEST JUDICIAL DISTRICT

William S. Wilkinson et al., Plaintiffs, v. The Board of University and School Lands of the State of North Dakota et al., Defendants.	Case No. 53-2012-cv-00038 **ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

[¶1] The matter before the Court is the Plaintiffs' Motion for Summary Judgment. Having reviewed the matter, based on the briefs submitted, arguments made by the parties at the Williams County Courthouse on July 31, 2019, and the narrow scope of the two very specific issues remanded to the Court by the North Dakota Supreme Court, the Plaintiffs' Motion for Summary Judgment is hereby **GRANTED**.

[¶2] The North Dakota Supreme Court was specific in its instructions to the Court. The Supreme Court held that two narrow issues must be addressed on remand: (1) the application of N.D.C.C. ch. 61-33.1 to the Wilkinsons' mineral interests; and (2) if the Court decides the State owns the Wilkinsons' mineral interests, the Court must consider the Wilkinsons' takings claim.

[¶3] The North Dakota Supreme Court held that, "we remand for the district court to determine whether N.D.C.C. ch. 61-33.1 applies and governs the ownership of the minerals at issue in this case." *Wilkinson v. Bd. of Univ. & Sc. Lands*, 2017 ND 231, ¶20, 903 N.W.2d 51. The Supreme Court then held, in applying N.D.C.C. ch. 61-33.1, "If the district court determines the State owns the minerals, the plaintiffs will be deprived of the mineral interests," and, "The court must

reconsider this [takings] issue on remand if it decides the State owns the disputed minerals." *Id.* at ¶ 25. These are the *only issues* before the Court, and the issues the Court now decides.

[¶4] Summary judgment in the Wilkinsons' favor is appropriate because the State has no basis to continue claiming that it owns the Wilkinsons' property. The State claims in its pleadings, as described by the Supreme Court, that it owns the Wilkinsons' property because it is below the ordinary high watermark ("OHWM") of the historical Missouri riverbed channel. As a matter of law, pursuant to the statutory process contained in Chpt. 61-33.1, N.D.C.C., specifically, N.D.C.C. § 61-33.1-03, the Industrial Commisison determined that the Wilkinsons' property is above the OHWM of the historical Missouri riverbed channel.

[¶5] Therefore, the State's claim to the Wilkinsons' property now fails as a matter of law because, pursuant to Chpt. 61-33.1, N.D.C.C., the Industrial Commission determined that the Wilkinsons' minerals are above the OHWM of the historical Missouri riverbed channel. In short, the State no longer has any legal basis to continue claiming that it owns the Wilkinsons' property. Contrary to Statoil Oil and Gas LP's position, the question of the Wilkinsons' mineral ownership as alleged in the Amended Complaint, and as remanded by the Supreme Court, has been answered as a matter of law by the Industrial Commission. The statutory language in Chpt. 61-33.1, N.D.C.C., does not require or otherwise contemplate the Wilkinsons having to file yet another lawsuit to resolve the questions remanded on appeal.

[¶6] As noted by the Wilkinsons during oral argument, there is no new lawsuit for them to file in light of the Industrial Commission's determination that their property is above the OHWM of the historical Missouri riverbed channel. Under N.D.C.C. § 61-33.1-05, only a party challenging the Industrial Commission's determination of the location of the OHWM may bring a lawsuit. As the defendants admit, including the State of North Dakota, the decisive question has been answered

in the Wilkinsons' favor by the Industrial Commission pursuant to Chpt. 61-33.1, N.D.C.C. For these reasons, the Court grants the Wilkinsons' motion for summary judgment and quiets title to the property in their favor, and against the State of North Dakota. The State of North Dakota has no interest, title, or claim to the Wilkinsons' property. The State is ordered to release and relinquish any claim to the Wilkinsons' property because in applying the statute, as required by the Supreme Court, Chpt. 61-33.1, N.D.C.C., has determined the property is above the OHWM of the historical Missouri riverbed channel.

STATEMENT OF UNDISPUTED FACTS

[¶7] The Wilkinsons' property consists of mineral interests located in Sections 12 and 13, Township 153 North, Range 102 West, in Williams County. The property is located in Section 12: SW/4, S/2NW/4, and Section 13: Farm Unit 312 in the Buford-Trenton Project. The Supreme Court held that, "There is undisputed evidence the plaintiffs have leased the minerals numerous times since they conveyed the surface property to the United States." *Wilkinson* at ¶ 24.

[¶8] In June 1958, the United States purchased the surface of the Wilkinsons' property as part of the Garrison Dam Project through a Warranty Deed. As the Supreme Court determined, the Wilkinsons reserved the minerals subject only to the rights acquired by the United States, and continued leasing the minerals for approximately the next fifty years. That Warranty Deed states the Wilkinsons' property was acquired because of the flooding and inundation that would be caused by Lake Sakakawea. The Wilkinsons' property was "Tract No. HH-3190" for the Garrison Project. In the Abstracter's Certificate prepared for the United States, the abstractor states the property was acquired for the "Garrison Dam & Reservoir, N.D." project as "Tract No. HH-3190." The Wilkinsons' property includes 286.04 acres, of which 228.95 acres are in Section 12, and 57.09 acres are in Section 13.

[¶9] The Abstractor certified that the property was acquired "[f]or the use and benefit of the United States of America and its assigns ... ." The Final Project Map for the Garrison Project and Acquisition Tract Register shows the location of the Wilkinsons' property in Sections 12 and 13, just south of the railroad right of way, labeled HH-3190. In the "Note" portion, it states the oil and gas were reserved in all tracts, including HH-3190. The 1958 Warranty Deed reserved to the Wilkinsons all of the oil and gas rights on or under their property in Section 12 and 13. The State acquired no rights in this process, nor did the State acquire any interest in the minerals reserved in private landowners like the Wilkinsons.

[¶10] In April 2017, the North Dakota legislature enacted, and the governor signed, Senate Bill 2134 (SB 2134) into law. SB 2134 created Chpt. 61-33.1, N.D.C.C., which codified the process for determining the extent of the State's ownership of minerals within the boundary of the property acquired by the United States for Lake Sakakawea and the Garrison Project. As part of the statutory process, the State hired the Wenck engineering firm to conduct a survey to delineate the OHWM for the historical Missouri riverbed channel ("Wenck Study"). On September 27, 2018, the Industrial Commission issued Order No. 29129, which determined the OHWM of the historical Missouri riverbed channel, and the limit of the State's interests.

[¶11] The Industrial Commission determined, pursuant to Chpt. 61-33.1, N.D.C.C., that the Wilkinsons' minerals were above the OHWM of the historical Missouri riverbed channel. Therefore, as a matter of law, the Wilkinsons own their minerals in Sections 12 and 13, and the State has no basis to continue claiming that it owns the Wilkinsons' property.

LEGAL ANALYSIS

[¶12] The standard for summary judgment is established by N.D.R.Civ.P. 56. Summary judgment is available for the "disposition of controversies without the necessity of trial

when, after viewing the evidence in a light most favorable to the opposing party and giving that party the benefit of all favorable inferences, there is no dispute as to either the material facts or inferences to be drawn from the undisputed facts." *Farmers Union Oil Co. of Williston v. Harp*, 462 N.W.2d 152, 154 (N.D. 1990). "Summary judgment is proper against a party who fails to show sufficient evidence to establish the existence of an element essential to the party's case and on which that party will bear the burden of proof at trial." *Swenson v. Raumin*, 583 N.W.2d 102, 105 (N.D. 1998). The party opposing summary judgment must present competent admissible evidence by affidavit or other comparable means that raises an issue of material fact, they cannot "simply rely upon the pleadings or upon unsupported conclusory allegations, ..." *Perius v. Nodak Mut. Ins. Co.*, 2010 ND 80, ¶ 9, 782 N.W.2d 355.

[¶13] The interpretation of Chpt. 61-33.1, N.D.C.C., and whether it applies, is a question of law. "Statutory interpretation is a question of law." *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). The primary objective of statutory interpretation is determining the legislature's intent, which must be determined from the language of the statute. *Id.* Words and statutory provisions are given their plain and ordinary meaning.

> Statutory provisions are given their plain, ordinary, and commonly understood meaning, unless they are specifically defined or a contrary intention plainly appears. N.D.C.C. § 1–02–02. Words and phrases are construed according to the context in which they are used and technical words defined by statute must be construed according to the appropriate definition. N.D.C.C. § 1–02–03. Statutes are construed as a whole and harmonized to give meaning to related provisions. N.D.C.C. § 1–02–07. Statutes are construed to give effect to all of their provisions so no part of the statute is rendered inoperative or superfluous. N.D.C.C. § 1–02–38(2) and (4).

Mosser at ¶ 13. *See also In re Estate of Hogan, supra*, and *In re Estate of Elkin*, 2007 ND 107, ¶¶ 7 – 8, 735 N.W.2d 842 (holding that statutory interpretation is a question of law.)

[¶14] The interpretation of Chpt. 61-33.1, N.D.C.C., is a question of law. As a matter of law, Chpt. 61-33.1, N.D.C.C., applies to the Wilkinsons' property, and the Industrial Commission's determination that the Wilkinsons' minerals are above the OHWM of the historical Missouri riverbed channel is conclusive.

[¶15] Pursuant to the definitions established by the legislature in N.D.C.C. § 61-33.1-01, the Wilkinsons' property falls inside the area under the control of Chpt. 61-33.1, N.D.C.C., for determining the OHWM of the historical Missouri riverbed channel. As a matter of law, the State has no claim to any of the minerals, including the Wilkinsons', that the Industrial Commission determined are above the OHWM of the historical Missouri riverbed channel.

> 1. "Corps survey" means the last known survey conducted by the army corps of engineers in connection with the corps' determination of the amount of land acquired by the corps for the impoundment of Lake Sakakawea and Lake Oahe, as supplemented by the supplemental plats created by the branch of cadastral survey of the United States bureau of land management.
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> 2. "Historical Missouri riverbed channel" means the Missouri riverbed channel as it existed upon the closure of the Pick-Sloan Missouri basin project dams, and extends from the Garrison Dam to the southern border of sections 33 and 34, township 153 north, range 102 west which is the approximate location of river mile marker 1,565, and from the South Dakota border to river mile marker 1,303.
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> 3. "Segment" means the individual segment maps contained within the corps survey final project maps for the Pick-Sloan project dams.

N.D.C.C. § 61-33.1-01(1) – (3). The Wilkinsons' property is in Township 153 North, Range 102 West, Section 12: SW/4, S/2NW/4, and Section 13: Farm Unit No. 312 in the Buford-Trenton Project. This is within the area the legislature included as part of the process for delineating the OHWM of the historical Missouri riverbed channel controlled by Chpt. 61-33.1, N.D.C.C.

[¶16] Further, the Wilkinsons' property in Sections 12 and 13 is located between river mile 1554.0 and 1554.5. This also indisputably shows that the Wilkinsons' property is within the statutory area set by Chpt. 61-33.1, N.D.C.C., for determining the OHWM of the historical

Missouri riverbed channel under North Dakota law. The area for determining the OHWM pursuant to Chpt. 61-33.1, N.D.C.C., continues further southwest of the Wilkinsons' 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.

[¶17] As required by N.D.C.C. § 61-33.1-03, the Industrial Commission issued its Order that determined the OHWM of the historical Missouri riverbed channel, and set the limit on the State's interests. 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 the Wilkinsons' property was above the OHWM of the historical Missouri riverbed channel. The fact that the Wilkinsons' minerals are above the OHWM, and thus not owned by the State, is clearly visible in the Wenck Study maps adopted by the Industrial Commission in its Order.

[¶18] The Wilkinsons' property in Section 12 is located in the SW/4 and S/2NW/4. The Wenck Study maps, adopted by the Industrial Commission, conclusively show that the Wilkinsons' property in Section 12 is above the OHWM. Therefore, the State does not own the Wilkinsons' property in Section 12.

[¶19] The Wilkinsons' property in Section 13 is located in Farm Unit No. 312 in the Buford-Trenton Project. Farm Unit No. 312 is located in the N/2NW/4 of Section 13. The entirety of Farm Unit No. 312 is located in the NW/4 of Section 13. The entire NW/4 of Section 13 is above the OHWM as shown in the Wenck Study maps adopted by the Industrial Commission. Therefore, the State does not own the Wilkinsons' property in Section 13.

[¶20] The State's interest is statutorily-limited to the historical Missouri riverbed channel as determined by Chpt. 61-33.1, N.D.C.C. This cannot be disputed by the State. "The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project

dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark." N.D.C.C. § 61-33.1-02. The Industrial Commission determined that the Wilkinsons' property was above the OHWM of the historical Missouri riverbed channel. This is not a question of fact. It was established as a matter of law under Chpt. 61-33.1, N.D.C.C. The State is required to follow the Industrial Commission's Order. The State has no basis to continue claiming that it owns the Wilkinsons' property, and summary judgment in the Wilkinsons' favor is thus appropriate.

[¶21] The Court notes that in *Sorum v. State*, case no. 09-2018-cv-00089, the State admitted the statutory process contained in Chpt. 61-33.1, N.D.C.C., which culminated with the Industrial Commission's Order that determined the Wilkinsons' property was above the OHWM, is binding as a matter of law. The State cannot take the opposite position in this case and argue Chpt. 61-33.1, N.D.C.C., does not control, and the Industrial Commission's Order is not binding on them.

[¶22] The Court does not need to go any further than deciding the first question remanded by the Supreme Court. As a matter of law, N.D.C.C. ch. 61-33.1 applies and controls the ownership of the property at issue. The Industrial Commission determined that the Wilkinsons' minerals are above the OHWM of the historic Missouri riverbed channel, and therefore, the Wilkinsons are entitled to those minerals. That concludes the statutory process as applied to the Wilkinsons and their claims in the Amended Complaint. The Wilkinsons are not required to pursue a separate lawsuit under N.D.C.C. § 61-33.1-05, as argued by Statoil Oil and Gas LP. The State is bound, as a matter of law, by the Industrial Commission's Order issued pursuant to Chpt. 61-33.1, N.D.C.C., and has no basis to continue claiming ownership of these minerals.

[¶23] Therefore, considering the foregoing, it is hereby **ORDERED** that the Plaintiffs' Motion for Summary Judgment is **GRANTED**, and the Court further **ORDERS** that **JUDGMENT** be entered accordingly in the Wilkinsons' favor.

Dated this ___ day of _____, 2019.

By _____
Honorable Paul W. Jacobson
District Judge