



## **Court Issues Two Significant Orders Affecting Rights to Minerals Under Lake Sakakawea and Missouri River**

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### *Executive Summary*

The Supreme Court of North Dakota decided on Thursday, July 30, 2020, to uphold Senate Bill 2134 (2017), codified as N.D.C.C. ch. 61-33.1, which limited state ownership of the minerals underneath Lake Sakakawea to the ordinary high water mark (OHWM) as it existed before the completion of the Garrison Dam in 1953. In so doing, the Supreme Court reversed the District Court's holding that N.D.C.C. ch. 61-33.1 violated the gift clause of the North Dakota Constitution.

This decision requires the state to return mineral royalties dating back to 2006 for oil and gas leases covering lands under the lake, but beyond the original OHWM of the Missouri River. As a result, the state will refund an estimated \$200 million in disputed royalties. The remainder of this article provides more detail about the history of this complex situation, the North Dakota Supreme Court's decision, and the recent federal court stay impacting portions of the Missouri River.

### *Construction of the Garrison Dam*

In 1944, the U.S. Congress authorized the construction of the Garrison Dam on the Missouri River. The creation of the Garrison Dam created what is now known as Lake Sakakawea. Before completion of the dam in 1953, oil was found in the Bakken Formation. Some landowners in the area owned mineral interests in the lands inundated by the creation of Lake Sakakawea. Horizontal drilling has made most of the oil and gas located under the lake accessible to producers. Over the last 12 years, the Board of University and School Lands ("Land Board")<sup>1</sup> and the United States Department of Interior have conducted surveys to determine the historical OHWM prior to the completion of the Garrison Dam.

### *Senate Bill 2134*

North Dakota Senate Bill 2134, 2017 N.D. Leg. (codified at N.D.C.C. ch. 61-33.1) which took effect April 21, 2017, established that the state owned no minerals above the original OHWM by virtue of Lake Sakakawea's inundation of the Missouri River Valley. Title to mineral interests that the state owned prior to creation of the lake remained unaffected by S.B. 2134. The bill also required that any royalties attributable to the owners of the tracts above the original OHWM. Those royalties amount to approximately \$200 million or more. The Land Board, in anticipation of ownership disputes, previously established escrow accounts for disputed funds. In addition to the escrow accounts, the Legislative Assembly appropriated \$100 million for these refunds and

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<sup>1</sup> The Board of University and School Lands manages the state lands related to oil and gas interests.

authorized an additional \$87 million line of credit with the Bank of North Dakota if the initial appropriation is insufficient. 2017 N.D. Sess. Laws ch. 426 § 3. In January of 2018, a North Dakota State Representative, and others, filed a lawsuit claiming the law to be unconstitutional. The plaintiffs sought an injunction against royalties being repaid from the state to landowners.

#### *Sorum v. State*

In May of 2018, the District Court issued an injunction against royalties being repaid. Later, in February 2019, the District Court issued an order upholding the law for the most part, ruling that it does not violate North Dakota Constitution's watercourses clause, privileges or immunities clause, and the local or special laws prohibition. However, the District Court ruled that it would be unconstitutional to apply the law retroactively to allow claims previously barred by the three-year statute of limitations. Thus, much of the \$200 million of royalties that were incorrectly paid to the state would not have been refunded to the rightful owners.

On July 30, 2020, the North Dakota Supreme Court issued its opinion upholding the law in its entirety, including the portion allowing claims dating back to 2006. In doing so, the North Dakota Supreme Court partially upheld and partially reversed the lower court's decision. It agreed with the lower court's order insofar as that order found Senate Bill 2134 to be constitutional. However, it reversed the lower court's finding that the law was unconstitutional to the extent it allowed claims older than three years. The Court reasoned that the lakebed above the historic OHWM and accompanying mineral estates were never the State's to "give away." *Sorum. v. State*, 2020 ND 175, ¶ 46. The State cannot violate the gift clause of the North Dakota State Constitution if it never owned the land. Although the statute of limitations has run, the State has a moral obligation to pay its debts and deal fairly with its people. *Id.* at ¶40. The Court ruled that the State can fulfill that moral obligation through legislation and return those funds without violating the gift clause.

#### *Department of Interior – Bureau of Indian Affairs*

Producers and mineral owners of land and interest under Lake Sakakawea may not be completely out of the woods. A portion of the Missouri River is within the Fort Berthoud Reservation ("the Reservation"). Ownership of around 30,000 acres of land within the historic boundaries of the Reservation are disputed by the Three-Affiliated Tribes of the Reservation ("MHA Nation").

On January 18, 2017, the Solicitor of the United States Department of the Interior ("DOI") issued an opinion regarding the ownership of the disputed minerals. The Solicitor concluded that Congress intended that the land and minerals underlying the Missouri River within the boundaries of the Reservation did not pass to North Dakota upon statehood and that under the 1984 Mineral Restoration Act the minerals are held in trust for the benefit of the MHA Nation.

On June 8, 2018, the Principal Deputy Solicitor exercising the authority of the Solicitor, temporarily suspended the January 2017 order, to ensure a thorough legal and factual basis as it seeks to address title to the riverbed. The 2018 memorandum requested a review and expansion by a professional historian.

In May of 2020, the DOI issued a new opinion reversing the 2017 opinion, concluding that the State of North Dakota owns the minerals underlying the Missouri River within the Fort Berthold Reservation. The MHA Nation has filed two lawsuits in response to the DOI's May 2020 opinion. In one of those lawsuits, Federal District Judge Amy Berman Jackson granted a motion

filed by the MHA Nation, ordering that no oil and gas royalties in dispute will be paid until the court resolves the conflict.

For more information regarding the Supreme Court of North Dakota Decision or the Department of Interior Solicitor Opinion, please contact [James Parrot](#) or [Brandon Taylor](#).