



North Dakota Supreme Court Reverses and Remands Wilkinson v. Board of University and School Lands Decision

On September 28, 2017, the North Dakota Supreme Court reversed and remanded the district court's decision in *Wilkinson v. Board of University and School Lands*, 2017 ND 231 ("*Wilkinson*"). The Supreme Court held: (1) the district court must determine whether newly enacted N.D.C.C. ch. 61-33.1 applies and governs ownership of the minerals at issue; and (2) the district court must reconsider the landowners' takings claim if it decides the State owns the disputed minerals.

Wilkinson involved an ownership dispute for minerals under land along the Missouri River that the United States acquired for operation of the Garrison Dam and Reservoir (also known as Lake Sakakawea). Central to the case is whether the current or historic ordinary high water mark controls ownership. Prior to 1958, J.T. and Evelyn M. Wilkinson owned the surface and minerals for lands located in Williams County, North Dakota (the "property"). In 1958, they conveyed the surface to the United States for construction and operation of Garrison Dam but reserved the oil and gas. Garrison Dam was built and the Missouri River was flooded to form Lake Sakakawea. The flooding of Lake Sakakawea altered the historic Missouri River channel.

In 2012, Plaintiffs, as successors to J.T. and Evelyn M. Wilkinson, sued the Board of University and School Lands of the State of North Dakota ("Land Board"), and others, seeking a determination of mineral ownership. They also asserted a takings claim against the Land Board; a claim under 42 U.S.C. § 1983 against the Land Board for depriving them of their constitutional rights; and claims for conversion, unjust enrichment, civil conspiracy, and injunctive relief against all of the defendants. The State Engineer intervened as an additional defendant. The Land Board and State Engineer (collectively "State") moved for summary judgment, requesting the court determine that the State holds title to the bed of the Missouri River up to the current ordinary high watermark and that the disputed property is located below the current ordinary high watermark. The landowners argued that summary judgment should be denied because the property is not part of the State's sovereign lands, there was no navigable body of water on the property at the time of statehood, the surface property was purchased by the United States as part of the Garrison Project, the property was

flooded by Lake Sakakawea, and the property is located above the historical ordinary high watermark. Plaintiffs also argued that they alleged sufficient facts to support their takings claim.

The district court granted the State's motion and dismissed all of the landowners' claims. The court ruled the State holds title to the current ordinary high watermark, and therefore owns both the minerals and surface of the disputed property. The court explained that the State's title to ownership up to the ordinary high water mark shifts with changing conditions regardless of whether those changes are naturally or artificially caused. The district court also held that no unlawful taking occurred because the landowners had not been denied the right to lease or produce minerals in the past. The landowners appealed the decision to the Supreme Court of North Dakota.

Following the district court's decision, and while the appeal was pending, the North Dakota legislature enacted N.D.C.C. ch. 61-33.1. Chapter 61-33.1 now governs mineral rights of land inundated by Pick-Sloan Missouri basin project dams and limits State sovereign ownership "to the ordinary high water mark" of the "historical Missouri riverbed channel" with limited exceptions. Section 61-33.1-02 states:

- The state sovereign land mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams extends only to the historical Missouri riverbed channel up to the ordinary high water mark. The state holds no claim or title to any minerals above the ordinary high water mark of the historical Missouri riverbed channel inundated by Pick-Sloan Missouri basin project dams, except for original grant lands acquired by the state under federal law and any minerals acquired by the state through purchase, foreclosure, or other written conveyance. Mineral ownership of the riverbed segments inundated by Pick-Sloan Missouri basin project dams which are located within the exterior boundaries of the Fort Berthold reservation and Standing Rock Indian reservation is controlled by other law and is excepted from this section.

On September 29, 2017, the North Dakota Supreme Court issued an opinion reversing the district court's decision and remanding the case for further proceedings. The Court first ruled that the district court erred in determining ownership of the surface estate, because that claim was not asserted in the pleadings and because the United States appears to have an interest in the surface that would be affected. The Court noted that the federal Submerged Lands Act confirms and recognizes the states' title to and ownership of lands beneath navigable waters, but exempts all tracts or parcels of land which were lawfully and expressly acquired by the United States through eminent domain proceedings, purchase, or otherwise in a proprietary capacity.

Concerning the mineral ownership claims, the Court ruled that the district court must "determine whether newly enacted N.D.C.C. ch. 61-33.1 applies and governs ownership of the minerals at issue." Chapter 61-33.1 is "retroactive to the date of closure of the Pick-Sloan Missouri basin project dams." Because the Chapter is retroactive and was enacted while the appeal was pending, the Court concluded that the district court should have an opportunity to consider the new statutory provisions when deciding ownership of the disputed minerals.

Finally, the Court held that the district court "erred in determining there was no taking." The federal government compensated the plaintiffs for the surface property, but the plaintiffs have not been compensated for the mineral interests. If the district court determines the State owns the minerals, the plaintiffs will be deprived of the mineral interests. The Court concluded that the landowners are entitled to compensation if the government's actions result in a "taking" of the mineral interests, citing other cases that suggest government-induced flooding can constitute a taking. Thus, the district court "must reconsider this issue on remand if it decides the State owns the disputed minerals."

NOTE: Crowley Fleck filed an *amicus curiae* brief on behalf of the North Dakota Petroleum Council in this case.

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