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**June 18, 2024**

Office of Attorney General  
600 E. Boulevard Ave, Dept. 125  
Bismarck ND 58505

***RE: Request for Attorney General's Opinion***

Attorney General Wrigley:

[¶1] Please consider this letter as a request for a legal opinion pursuant to section 54-12-01 of the North Dakota Century Code.

**BACKGROUND INFORMATION**

[¶2] In October of 2023, a local landowner approached the Board of County Commissioners for Ramsey County (hereafter "Commission") with several questions of administrative law, water law, tax law, and the sovereign land doctrine. The several materials offered by the landowner discuss the ambulatory nature of Devils Lake and patent parcels. After due consideration, the Commission made and carried a motion to request an Attorney General's opinion. The Ramsey County State's Attorney's Office was directed to review the materials provided and draft an opinion request.

### **QUESTIONS PRESENTED**

1. If previously identified “navigable waters” and “non-navigable waters” merge into a single continuous body of water, is the water considered “navigable” subject to N.D.C.C. § 61-33?
2. Does the analysis of navigability change if the merger was natural or artificial?
3. Are patent parcels exempt from claims of State ownership when state water has inundated said patent parcels?
4. If patent parcels are not exempt, by what lawful authority is the State exercising its claim to the inundated patent parcels?

### **STATEMENT OF FACTS**

[¶] Devils Lake (hereafter "Lake") is a large freshwater body of water located in northeastern North Dakota. The Lake is situated between Ramsey County, Benson County, and the Spirit Lake Indian Reservation. The Lake is located entirely within the Devils Lake Basin which covers approximately 3,810 square miles of land area spanning across eight counties. The Basin is closed and therefore has no natural outlet below 1,446.5 feet above sea level. Historically, the Lake has fed into nearby Stump Lake but because both lakes are part of the same closed basin system the water levels would need to rise 1,457 feet above sea level before there is any natural outlet. Since modern records have been maintained the Lake's elevation has fluctuated and hundreds of thousands of acres of agricultural and residential lands have been inundated throughout the Basin due to flooding.

[¶4] In 1940 the low-water mark was recorded at 1,401 feet above sea level, and in 2011 the corresponding high-water mark was recorded at 1,454.3 feet above sea level.<sup>1</sup> In 2002 construction began on an artificial outlet from the West Bay of the Lake to combat the inundation and flooding of communities, agricultural land, homes, roads, and other facilities.<sup>2</sup> The West outlet pumps water from Devils Lake into the Sheyenne River and have a discharge capacity of 250 cubic feet per second . In 2012, the State of North Dakota constructed an additional artificial outlet from East Devils Lake to combat record levels of rainfall. The East outlet has a discharge capacity of 350 cubic feet per second, which results in a combined discharge capacity of 600 cubic feet per second. Between 2012 and 2020 it is estimated that over 1.3 million acre-feet of water has been drained from the Lake. The several sub-basins, lakes, and coulees that exist within the Basin are as follows:

[T]he Stump Lake drainage basin, which drains directly into Stump Lake, and eight other sub-basins that ultimately drain into Devils Lake- the Edmore Coulee sub-basin located in Nelson, Ramsey, and Cavalier Counties; the Starkweather Coulee sub-basin located in Cavalier and Ramsey Counties; the Calio Coulee sub-basin located in Cavalier, Ramsey, and Towner Counties; the Mauvais Coulee sub-basin located primarily in Towner, Benson, and Ramsey Counties; the Little Coulee sub-basin located in Benson, Pierce, and Rolette Counties; the Comstock Coulee sub-basin located in Benson County; the Devils Lake North Slope sub-basin located in Ramsey County; and the Devils Lake South Slope sub-basin located in Benson County.<sup>3</sup>

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<sup>1</sup> Water Resource Board Fact Sheet

<sup>2</sup> [https://www.dwr.nd.gov/basins/devils\\_lake/outlets/](https://www.dwr.nd.gov/basins/devils_lake/outlets/).

<sup>3</sup> Aasmundstad v. State, 2008 ND 206, 763 N.W.2d 748.

[¶5] Due to the flood prevention practices of Federal, State, and local entities the land surrounding these sub-basins, lakes, and coulees have been inundated for such an extended period that they could be characterized as “permanently flooded.” The use and utility of the inundated lands vary from parcel to parcel as some landowners have only lost access to a portion of their lands, while others have had their lands rendered unusable. Although most effected landowners hold ordinary fee simple title to their parcels, there are also some that hold federal land patents that were granted at or prior to North Dakota’s admission into the Union. Based on the guidance provided in prior court decisions, Attorney General opinions, flood management practices, and navigable waters doctrine, landowners have begun to raise questions regarding marketability and the title of their parcels.

#### **APPLICABLE LAW**

[¶6] American colonies who achieved sovereignty and independence from Great Britian held “the absolute right to all their navigable waters and the soils under them ... subject only to the rights since surrendered by the constitution to the general government.” Martin v. Waddell's Lessee, 41 U.S. 367, 41 O (1842). Since the beds of navigable waters were not surrendered by the U.S. Constitution to the federal government, they were retained by the states. Mumford v. Wardwell, 73 U.S. 423, 436 (1867). New states admitted to the Union were entitled to the same rights as those held by the original states. Id.; Pollard v. Hagan, 44 U.S. 212, 224, 228-29 (1845). This concept is known as the equal footing doctrine. See Utah Division of State Lands v. United States, 482 U.S. 193, 195-196 (1987). North Dakota's Enabling Act

provides that North Dakota shall be “admitted ... into the union ... on an equal footing with the original States ...” 25 Stat. 676, 679 (1889) reprinted in 13 N.D.C.C. p. 63 (1981).

[¶7] Under the equal footing doctrine, upon North Dakota's admission to the Union it took title to the sovereign lands within the state. State v. Brace, 36 N.W.2d 330, 332 (N.D. 1949). “The starting legal principle is that a state acquires, as an incident of statehood, title to the beds of all navigable bodies of water within its boundaries ....” 101 Ranch v. United States, 714 F. Supp. 1005, 1013 (D.N.D. 1988), *aff'd*, 905 F.2d 180 (8th Cir. 1990). See also J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co., 423 N.W.2d 130, 132 (N.D. 1988). The State’s title is "absolute," and has been confirmed by the Submerged Lands Act. 43 U.S.C. §1311(a). See Oregon ex rel. State Land Bd. v. Corvallis Sand and Gravel Co., 429 U.S. 363, 372, 374 (1977). Therefore, North Dakota has absolute title to the beds of navigable waterways.

[¶8] Courts have determined that “Devils Lake is navigable.” See In re Matter of the Ownership of the Bed of Devils Lake, 423 N.W.2d 141 (N.D. 1988); Rutten v. State, 93 N.W.2d 796 (N.D. 1958); Devils Lake Sioux Tribe v. State of North Dakota, 917 F.2d 1049 (8th Cir. 1990); National Wildlife Federation v. Alexander, 613 F.2d 1054 (D.C. Cir. 1979). And although North Dakota took title to the bed of Devils Lake at statehood, as part of the Garrison Diversion water project in 1971, the State conveyed to the United States by quitclaim deed all land “lying below the meander line in the Devils Lake-Stump Lake chain of lakes.” 101 Ranch v. United States, 905

F.2d 180, 184 (8th Cir. 1990). “The 1971 deed expressly conveyed the lakebed by reference to pools in the lake.” Id. at 184.

[¶9] The Lake’s boundary is generally determined by reference to the ordinary low water mark, the ordinary high-water mark, and the area between those two marks which is referred to as the "shorezone." The State owns absolute title to the bed of navigable bodies of water up to the low watermark. State ex rel. Sprynczynatyk v. Mills, 523 N.W.2d 537, 540 (N.D. 1994) (citing Hogue v. Bourgois, 71 N.W.2d 47, 52 (1955)). The adjacent or upland owner owns title to the ordinary high-water mark. Both the State and the upland owner have correlative rights between the ordinary high-water mark and the ordinary low water mark known as the shorezone. Sprynczynatyk, at 544-45.

[¶10] The Fifth Amendment guarantees that private property shall not “be taken for public use, without just compensation.” U.S. Const. Amend. V. “The takings clause of the Fifth Amendment is made applicable to the states through the Fourteenth Amendment.” Wild Rice River Estates, Inc. v. City of Fargo, 2005 ND 193, ¶ 12, 705 N.W.2d 850. “[P]rivate property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner.” Article I, § 16, of the North Dakota Constitution. “Whether there has been a taking of private property for public use is a question of law.” Wilkinson v. Bd. of Univ. & Sch. Lands, 2017 ND 231, ¶ 22, 903 N.W.2d 51.

[¶11] There are two categories of regulatory action considered per se takings: physical takings and total regulatory takings. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 538, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005). A physical taking is where the government “requires an owner to suffer a permanent physical invasion of her property.” Lingle, at 538. “[T]otal regulatory takings” occur when regulations “completely deprive an owner of ‘all economically beneficial use’ of [their] property.” Lingle, at 538 (quoting Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019, 1026, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992)). For total regulatory takings, the “complete elimination of a property's value is the determinative factor . . . because the total deprivation of beneficial use is, from the landowner's point of view, the equivalent of a physical appropriation.” Id. Beyond these two categories, takings challenges are governed by the standards set out in Penn Central Transportation Co. v. New York City, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978). Challenges regarding constitutional takings require situation-specific factual inquiries. Wild Rice River, at ¶ 13.

[¶12] Where the government's actions have already worked a taking, “no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.” Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 33, 133 S. Ct. 511, 184 L. Ed. 2d 417 (2012) (quoting First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987)); see also Knick v. Township of Scott, 139 S. Ct. 2162, 2171-72, 204 L. Ed. 2d 558 (2019) (noting that government's

post-takings actions cannot nullify property owner's Fifth Amendment right). The government's assertion of title and further governmental action can also amount to a taking. See Yuba Goldfields, Inc. v. United States, 723 F.2d 884, 888-89 (Fed. Cir. 1983); Central Pines Land Co. v. United States, 107 Fed. Cl. 310, 325, 327-28 (Fed. Cl. 2010); Petro v. United States, 47 Fed. Cl. 136, 147-49 (Fed. Cl. 2000). Additionally, the North Dakota Legislative Assembly passed chapter 61-33.1 of the North Dakota Century Code, effective April 21, 2017, to provide a framework for takings challenges.

[¶13] The Fifth Amendment does not prevent the government from taking private property; rather, the government cannot take property without payment of just compensation. The court in Central Pines explained:

The Fifth Amendment specifies that private property shall not be taken by the government without "just compensation." U.S. Const. amend. V. Thus, when the government is found to have taken property, just compensation must be paid as damages. In the context of a temporary taking, the proper measure of just compensation is generally recognized to be the rental value of the property (or "fair rental value") over the period of time for which it was taken.

Additionally, in 1949 the North Dakota Supreme Court opined:

The rights of the grantees under the patents issued by the United States government were fixed and vested as of the dates of those patents. The riparian rights that the grantees thus acquired were valuable property rights. The [S]tate [of North Dakota] cannot constitutionally divest the owners thereof and transfer the property to itself without the payment of due compensation under the exercise of the powers of eminent domain.

...

We are here dealing with titles vested by patents from the United States. Such titles cannot be affected by the declaration of navigability contained in [North Dakota's statutes]. The legislature may not adopt a retroactive definition of navigability which would destroy a title already



vested under a federal grant, or transfer to the state a property right in a body of water or the bed thereof that had been previously acquired by a private owner. A legislative declaration that all meandered lakes are navigable will not make them so if they are not navigable in fact, as against the pre-existing rights of riparian owners, unless compensation is made to such owners for the property thus injured or taken by the state.

Ozark-Mahoning Co. v. State, 76 N.D. 464, 471, 37 N.W.2d 488, 492 (1949) (citing United States v. Champlin Refining Co., 10 Cir, 156 F2d 769; 56 Am Juris, Waters, Sec 185).

[¶14] On May 11, 2004, former Attorney General Wayne Stenehjem issued Opinion 2004-L-33 (hereafter "Letter Opinion") which discusses the boundaries of Devils Lake and vaguely addresses how they are determined. Although the opinion does provide some guidance on the ownership rights of adjacent riparian landowners, it also creates ambiguity regarding how and if upstream sub-basins, lakes, coulees, streams, and rivers become State property. The section of the Letter Opinion that I believe needs to be clarified is as follows:

[Y]ou ask whether lakes and coulees connected to Devils Lake that become inundated by the rising waters of Devils Lake become part of Devils Lake and subject to State ownership. As explained above, the extent of the State's ownership in the bed of Devils Lake fluctuates with the rise and fall of the lake. If geographic features *connected* to Devils Lake become *covered* by the rising lake, I see no reason why the principles discussed above would not apply and, therefore, the bed of the "connected" lakes and coulees could become owned by the State.

ND Att'y Gen. Op. No. 2004-L-33, p. 7 (May 11, 2004).

[¶15] In 2020, the North Dakota Supreme Court issued an opinion in Sorum v. State which reaffirmed that "[T]he watercourses clause operated to vest in the State ownership of watercourses which existed at statehood but does not operate to vest in

the State watercourses that become navigable after statehood[.]” 2020 ND 175, ¶ 48 (N.D. July 30, 2020) (cleaned up). The Court went on to explain:

[U]nder the common law of Dakota Territory when North Dakota was admitted to the United States, "the owner of land through which a nonnavigable [sic] 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.

2020 ND 175, ¶ 49, 947 N.W.2d 382 (Citing Bigelow v. Draper, 6 N.D. 152, 69 N.W. 570 (1896)).

### DISCUSSION

[¶16] Under the Letter Opinion’s guidance, questions regarding the spread of navigable waters onto dry land are easily identifiable and answered. However, when rising waters “cover” or “connect” to existing non-navigable waters upstream such as the several sub-basins, lakes, and coulees north of the Lake the analysis becomes muddied. As written, the Letter Opinion provides that the only requirement to transform a body of water from non-navigable to navigable is physical connectivity but stops short of addressing whether the physical connectivity must be naturally occurring or whether artificial connectivity also creates State ownership.

[¶17] Understandably, the Letter Opinion creates an unsettling result for local political subdivisions and landowners. Using the guidance of the Letter Opinion the State could choose to dam any navigable water until it connects with non-navigable waters and inundates private property thereby seizing ownership, which I believe creates a potential violation of the Takings Clause of the Fifth Amendment to the

United States Constitution, as applied to the States by the Fourteenth Amendment to the United State Constitution, and Article I, § 16 of the North Dakota Constitution. Additionally, the Letter Opinion gives rise to questions of taxation on “permanently inundated” parcels and almost certainly implicates local political subdivisions.

[¶18] It appears that the Letter Opinion does not address the precedent established in Ozark-Mahoning Co. v. State; and due to the Supreme Court’s recent opinion in Sorum v. State, the issue of ownership of the land beneath previously non-navigable waters that have now become connected to Devils Lake must be addressed.

### **CONCLUSION**

[¶19] If the two bodies of water become merged and therefore “navigable” what implications does that have on the title of landowners? Furthermore, because the State manages the Devils Lake Basin, sets the Lake’s levels, and determines when pumps are activated, does that rise to the level of a constitutional taking created by the artificial merger of the waterways? I believe that landowners that hold patent parcels are exempt from claims of State ownership based on the virtue of their title; however, if their property has been rendered useless or without clear title, then analysis under the Takings Clauses should apply. If patent parcels are not exempt, by what lawful authority is the State exercising its claim to the inundated patent parcels, and by extension are there exceptions to the Sovereign Land Act that preclude state ownership of patent land through inundation?

[¶20] Thank you for your time and consideration of this opinion request. If you need further information or clarification, please contact me at the information listed above.

Respectfully Yours,

Beau M. Cummings  
Ramsey County State's Attorney