STATE OF NORTH DAKOTA COUNTY OF WILLIAMS		IN DISTRICT COURT NORTHWEST DISTRICT
Marvin Nelson, Michael Coachman, and Paul Sorum Petitioners, vs. Persons Unknown, Kenneth & Mary Schmidt, Wesley & Barbara J. Lindvig Respondents.	)	Civil No. 53-2023-CV-00400 BRIEF IN SUPPORT OF EVIDENTIARY HEARING

BRIEF IN SUPPORT EVIDENTIARY HEARING

PETITIONERS HAVE AN EQUITABLE INTEREST

[¶1.] Petitioners have an equitable interest in their subject minerals in the instant case.

[¶2.] Because of their equitable interest, Petitioners are entitled to quiet title their subject minerals pursuant to N.D.C.C. § 32-17-1.

[¶3.] Before the Act (N.D.C.C. § 61-33.1) became law on April 21, 2017, the State of North Dakota owned Petitioners' subject minerals in the Affected Area (the Affected Area as defined in N.D.C.C § 61-33.1-02) and held them in trust for the benefit of the people of this state including Petitioners:

> "However, North Dakota could not totally abdicate its interest to private parties because it held that interest, by virtue of its sovereignty, in trust for the public. *Illinois Central Railroad v. Illinois,* 146 U.S. 387, 13 S.Ct. 110, 36 L.Ed.

> 1018 (1892); ***670** *United Plainsmen Ass'n v. North Dakota State Water Conservation Commission,* 247 N.W.2d 457 (N.D.1976). Reep v. State, 2013 ND 253, *669, 841 N.W.2d 664.
> …
> We conclude that the State owned the mineral interests under the shore zone of navigable waters upon statehood in 1889 under the equal footing doctrine and that the enduring language of the anti-gift clause now found in N.D. Const. art. X, § 18, precludes construing the language now codified in N.D.C.C. § 47–01–15 as a gift of the State's mineral interests under the shore zone to the upland owners. Reep v. State, 2013 ND 253, ¶1, 841 N.W.2d 664.

[¶4.] Because in *Reep* the subject property was on the shore of Lake Sakakawea, it is a fact that the North Dakota Supreme Court decided in 2013 the state owned the bed of the lake and the minerals in entire bed of Lake Sakakawea until the Act was passed and the state's title to the minerals in the bed of Lake Sakakawea were abrogated in the Affected Area.

[¶5.] Petitioners were members of the "public" beneficiaries described in *Reep*. Petitioners have an equitable interest in their subject minerals because the U.S. Supreme Court defines the beneficiaries of a trust to have an equitable interest in the trust corpus:

> "The trust comprises the separate interests of the beneficiary, who has an "equitable interest" in the trust property, and the trustee, who has a "legal interest" in that property. *Greenough v. Tax Assessors of Newport*, 331 U.S. 486, 494, 67 S.Ct. 1400, 91 L.Ed. 1621 (1947)."
> North Carolina Dep't of Revenue v. The Kimberley Rice Kaestner 1992 Family Tr., 588 U.S. 262, *265, (2019).

[¶6.] Because Petitioners are members of the "public" beneficiaries, Petitioners have an equitable interest in their subject properties and are entitled to quiet title their subject minerals.

[¶7.] Petitioners do not claim to "create" their equitable interest – it existed before their quiet title action as a function of the State of North Dakota holding their subject properties in trust for the benefit of the public including Petitioners. (see *Reep Supra*). Nelson v. Lindvig, 2024 ND 208, ¶21, 14 N.W.3d 66, reh'g denied (Dec. 4, 2024).

[¶8.] Because Petitioners hold an equitable interest in their subject minerals, they are entitled to quiet title under *Dalrymple*:

> "Nor can we assent to the proposition that legal title in plaintiff is essential in this state to a recovery in an action when brought for the sole purpose of quieting title." Franklin S. Dalrymple, et al vs. The Security Loan & Trust Company. Supreme Court of North Dakota 9 N.D. 306; 83 N.W. 245; 1900 N.D. (R1:1:2 FN1)[1]

[¶9.] "The Court in *Dalrymple* concluded that "if this action were brought for the sole purpose of removing clouds and quieting title, plaintiffs would be in a position to institute the action if they could show either a legal title or an equitable interest in the premises in question."" Nelson v. Lindvig, 2024 ND 208, ¶21, 14 N.W.3d 66, reh'g denied (Dec. 4, 2024).

[¶10.] In the instant case, Petitioners have shown they hold an equitable title to their subject submerged mineral properties. Because of this legal reason, Petitioners are entitled to quiet title their subject minerals under equitable interest rule in *Dalrymple*.

[¶11.] Blacks Law Dictionary defines a frivolous claim as "A claim that has no legal basis or merit, esp. one brought for an unreasonable purpose such as harassment. N.D.R.Civ.P. 11(b)." Black's Law Dictionary (12th ed. 2024), frivolous claim.

[1] In *Dalrymple*, the petitioner for quiet title was also a beneficiary of trust property.

[¶12.] Merriam Websters dictionary defines frivolous as having no sound basis in fact or law. (See https://www.merriam-webster.com/dictionary/frivolous).

[¶13.] Because Petitioners have an equitable interest in their subject minerals, they are entitled to file the instant quiet title action pursuant to N.D.C.C. § 32-17-1 because their action is **NOT FRIVOLOUS**.

NO EVIDENCE EXISTS TO SUPPORT RESPONDENTS' STANDING

[¶14.] On January 22, 2025, Petitioners served Subpoenas for Respondents Barbara J. Lindvig (R187), Kenneth Schmidt (R188), Mary Schmidt (R189) and Wesley Lindvig (190) (collectively Respondents).

[¶15.] These subpoenas specifically stated:

> Provide a list of legal descriptions for submerged mineral properties located under Lake Sakakawea for which you hold title. Provide documents which show the origin, nature, and extent of your claim to these same submerged properties including general deeds, warranty deeds, and all other deeds and related documentation proving your ownership and title to mineral properties submerged under Lake Sakakawea. If you do not claim to hold title to mineral properties submerged under Lake Sakakawea, please admit this fact in your response.

[¶16.] The Subpoena required that Respondents provide this information to Petitioners by February 5, 2025 by 5:oo PM. Respondents have failed to provide this information and are potentially in contempt of court for failing to comply with Petitioners' subpoena.

[¶17.] In the record, the only evidence provided by Respondents is a list of legal descriptions (all on dry land) in an affidavit by their attorney Taylor Olson. (R140).

[¶18.] Taylor Olsons affidavit is not evidence nor is it testimony:

> **(a)** A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless:
>
> (1) The testimony relates to an uncontested issue;
>
> North Dakota Rules of Professional Conduct Rule 3.7;
> Sargent Cnty. Bank v. Wentworth, 500 N.W.2d 862, *780, (N.D. 1993).

[¶19.] Certainly, the fact that Respondents do not own Petitioners' subject submerge oil and gas properties is contested by Petitioners. Because of this reason, Taylor Olson's affidavit is not admissible.

[¶20.] Respondents must provide evidence, such a deed, which documents their ownership of a portion of Petitioners' oil and gas properties which are all submerged under Lake Sakakawea, but Respondents refuse to do so -- they cannot produce such evidence.

[¶21.] The U.S. Supreme Court has stated that courts cannot make factual determination when the facts have not been developed (emphasis added): "… courts cannot make factual determinations which may be decisive of vital rights where the crucial facts have not been developed. Cf. *Kennedy v. Silas Mason Co*., 334 U.S. 249, 68 S.Ct. 1031.

Price v. Johnston, 334 U.S. 266, *291, (1948).

[¶22.] This Court erred in not requiring Respondents to comply with the requirements of N.D.C.C. § 32-17-08 with regard to Respondents partial answers (R20) (R26) because there is no evidence in the record that Respondents own a "portion" of Petitioners subject properties.

[¶23.] This is a violation to Petitioners' right to due process and equal protection under

the fifth and fourteenth amendments of the U.S. Constitution.

[¶24.] Respondents must present this Court with a full and complete record of the material relevant facts in support of their Answer (emphasis added):

> We wish to impress upon the North Dakota legal profession the dire necessity of presenting a full and complete record of the material relevant facts to this Court in support of the issues presented. Even if the facts of the case are not disputed they nevertheless need to be properly presented in order for this Court to reach a fair and just determination of the matters before it. In brief, it is the responsibility of the parties to make available the material and relevant facts pertaining to the issues. This Court is required to base its decision upon "such papers, affidavits, and portions of the record as the parties present." Rule 9, NDRAppP, and Rule 46, NDRCrimP.
> State v. Engel, 284 N.W.2d 303, *305, (N.D. 1979).

[¶25.] Respondents cannot be awarded attorney fees because they lack evidence of facts that prove their standing:

> Obviously, however, a plaintiff cannot achieve standing to litigate a substantive issue by bringing suit for the cost of bringing suit. The litigation must give the plaintiff some other benefit besides reimbursement of costs that are a byproduct of the litigation itself. An "interest in attorney's fees is ... insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Lewis v. Continental Bank Corp., supra,* at 480, 110 S.Ct., at 1255 (citing *Diamond v. Charles,* 476 U.S. 54, 70–71, 106 S.Ct. 1697, 1707–1708, 90 L.Ed.2d 48 (1986)).
> Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, *107, (1998).

[¶26.] The court is in error because it is obligated to determine standing and has not done so - there is no finding of fact that Respondents have an interest in Petitioners subject properties and are entitled to litigate the merits of the instant case because Respondents

have provided no evidence that they own a "portion" (R20) (R26) of Petitioners' submerged oil and gas properties.

[¶27.] This Court "has an obligation to assure itself of litigants' standing under Article III before proceeding to the merits of a case. U.S. Const. art. 3, § 2, cl. 1." Department of Educ. v. Brown, 143 S. Ct. 2343 (2023) at *2351. DaimlerChrysler Corp. v. Cuno, 547 U.S. 332 *338 (2006).

[¶28.] Because this Court has failed to make a finding of standing, Petitioners constitutional rights under U.S. Const. art. 3, § 2, cl. 1 has been violated.

[¶29.] "A district court must make the specific factual findings upon which it bases legal conclusions. *Nelson*, 2017 ND 152, ¶ 5, 896 N.W.2d 923. The district court errs as a matter of law when its findings are insufficient or do not support the legal conclusions." Interest of G.L.D., 2019 ND 304, 936 N.W.2d 539 ¶5.

[¶30.] Because there is no finding of facts, no evidence that Respondents hold title to Pettioners' submerged minerals, and evidence does exist that Respondents do not hold title to submerged minerals, this court must find that Respondents lack standing and this Court must vacate its Order for Petitioners pay attorney fees.

[¶31.] Because no party answered Petitioners' published summons (R61) pursuant to N.D.C.C. § 32-17-08, this Court has also failed to follow N.D.R.Civ.P. Rule 8(6)(b).

[¶32.] Because no party answered Petitioners' published summons (R61) pursuant to N.D.C.C. § 32-17-08, this Court has also failed to follow the requirements of N.D.C.C. § 32-17-10.

[¶33.] Because no party answered Petitioners' published summons (R61) pursuant to N.D.C.C. § 32-17-08, this Court has violated N.D.R.Civ.P. Rule 52(a)(3), N.D.R.Civ.P. Rule 55 (a), N.D.C.C. § 61-33.1-05, v, and N.D.C.C. § 28-26-01(02).

[¶34.] Because no party answered Petitioners' published summons (R61) pursuant to N.D.C.C. § 32-17-08, this Court has violated N.D.R.Civ.P. Rule 55 – Petitioners are entitled to a default judgment.

THE STATE OF NORTH DAKOTA OWNED THE MINERALS IN THE BED OF LAKE SAKAKAWEA BEFORE THE ACT BECAME LAW

[¶35.] All of Petitioners' subject minerals are submerged under Lake Sakakawea. The boundary line of these oil and gas properties are the Ordinary High Water Mark of Lake Sakakawea as it exists today.

[¶36.] It is not possible for Respondents to own mineral properties under the current Ordinary High-Water Mark of Lake Sakakawea because these oil and gas properties were owned by the State of North Dakota before the Act be came law on April 21, 2017.

[¶37.] Respondents do not refute this fact and have now waived their right to do so.

[¶38.] There is no evidence provided by any party, nor by the Court, that the State of North Dakota did not own the bed of Lake Sakakawea and the minerals in the bed of Lake Sakakawea before the Act became law.

[¶39.] In addition to *Reep* (*Supra*), there is extensive case law and statutes that clearly

provide well settled law and a solid evidentiary foundation for the fact that the State of North Dakota did own the bed of Lake Sakakawea and the minerals in the bed of Lake Sakakawea up to the OHWM.

[¶40.] The OHWM is the boundary of the States' ownership of the bed of Lake Sakakawea even after the Garrison dam was inundated:

> In *State v. Loy*, supra, it was held that title to the lands under navigable waters vested in the State of North Dakota as an incident of sovereignty …
> Hogue v. Bourgois, 71 N.W.2d 47, *52, (N.D. 1955).

> The State, however, argues that the doctrine of reliction is inapplicable to Devils Lake because the fluctuations of Devils Lake have not been permanent. This court, however, has recognized the applicability of the doctrines of accretion and reliction in situations involving something less than "permanent" change. *See, e.g., Oberly v. Carpenter, supra,* ("shifting" water lines); *Jennings v. Shipp, supra* ("undulating" Missouri River causes accretion and reliction); *Hogue v. Bourgois, supra,* (state's title is "coextensive with the bed of the stream as it may exist from time to time.").
> Matter of Ownership of Bed of Devils Lake, 423 N.W.2d 141, *144, (N.D. 1988).

> Although § 47-06-05, N.D.C.C., refers only to rivers and streams, this court has applied it to lakes as well. In *Roberts v. Taylor,* 47 N.D. 146, 181 N.W. 622, 625 (1921), this court observed that "a lake is differentiated from a water course only in that it is simply an enlarged water course wherein the waters ... are quiescent."
> Matter of Ownership of Bed of Devils Lake, 423 N.W.2d 141,FN 3, (N.D. 1988).

> Given the development of the Field Code in North Dakota, this conclusion follows logically. The Territorial Legislative Assembly recognized that our state would receive title to the beds of navigable waters at statehood. Accordingly, by 1877, it had enacted a code that would secure title of the state to such lands and modify common law so that the state's title would follow the movement of the bed of the river. This accords with the underlying public policy, since the purpose of a state

holding title to a navigable riverbed is to foster the public's right of navigation, traditionally the most important feature of the public trust doctrine. Moreover, it seems to us that other important aspects of the state's public trust interest, such as bathing, swimming, recreation and fishing, as well as irrigation, industrial and other water supplies, are most closely associated with where the water is in the new riverbed, not the old.
J.P. Furlong Enterprises, Inc. v. Sun Expl. & Prod. Co., 423 N.W.2d 130, *140, (N.D. 1988).

"[T]he law governing riparian rights has no regard for artificial boundary lines." *Oberly v. Carpenter,* 67 N.D. 495, 274 N.W. 509, 513 (1936). "Where a water line is the boundary of a given lot, that line, no matter how it shifts, remains the boundary." *Jefferis v. East Omaha Land Co.,* 134 U.S. 178, 196, 10 S.Ct. 518, 523, 33 L.Ed. 872 (1890); *Oberly,* 274 N.W. at 513.
101 Ranch v. United States, 905 F.2d 180, *185, (8th Cir. 1990).

[¶41.] No matter how the OWHM shifts, it remains the boundary of the State's sovereign lands:

The state owns the beds of all navigable waters within the state. *E.g., J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co.,* 423 N.W.2d 130, 132 (N.D.1988). As established in *Mills I,* the state has rights in the property up to the ordinary high watermark. The ordinary high watermark is ambulatory, and is not determined as of a fixed date. *See In re Ownership of the Bed of Devils Lake,* 423 N.W.2d 141, 143–44 (N.D.1988). Thus, the state's ownership of land along the Missouri River is determined by "the bed of the stream as it may exist from time to time." *Hogue v. Bourgois,* 71 N.W.2d 47, 52 (N.D.1955); *see also Devils Lake,* 423 N.W.2d at 144; *Jennings v. Shipp,* 115 N.W.2d 12, 13 (N.D.1962). "Where a water line is the boundary line of a given lot, that line, no matter how it shifts, remains the boundary." *Oberly v. Carpenter,* 67 N.D. 495, 274 N.W. 509, Syll. ¶ 5 (1937), *quoted in Devils Lake,* 423 N.W.2d at 144.

State ex rel. Sprynczynatyk v. Mills, 1999 ND 75, 592 N.W.2d 591 ¶5.

[¶42.] Regarding impact of dams on OHWM, the U.S. Supreme Court has recognized

that the construction and operation of dams can alter the OHWM. For instance, in *U.S. v. Kansas City Life Ins. Co*., the construction of a dam on the Mississippi River raised the water level to a new permanent stage, which was recognized as the new OHWM (United States v. Kansas City Life Ins. Co., 339 U.S. 799, *805, (1950)). This case illustrates that the OHWM can be redefined by the effects of a dam and the extent of the state's ownership of the new bed is up to the new OHWM. This Court must adhere to the U.S. Supreme Court decision.

[¶43.] The fact that that the state owned the entire Bed of Lake Sakakawea before the Act became law is state in North Dakota's Sovereign Land's Act N.D.C.C. § 61-33 61-33-01. Which states:

> "Ordinary high water mark" means that line below which the presence and action of the water upon the land is continuous enough so as to prevent the growth of terrestrial vegetation, destroy its value for agricultural purposes by preventing the growth of what may be termed an ordinary agricultural crop, including hay, or restrict its growth to predominantly aquatic species.

[¶44.] Before the Act became law, the State owned the beds of all navigable water including Lake Sakakawea up to the current OHWM pursuant to N.D.C.C. § 61-33-03.

[¶45.] The North Dakota Land Department leased minerals in the Affected Area before the Act became law and Respondents made no objection to the leasing of these minerals. This is evidence that Respondents do not own a "portion" of Petitioners' subject minerals and they have waived their right to defend these submerged minerals.

[¶46.] Petitioners ask this court to take mandatory Judicial Notice of the fact that the State of North Dakota owned the bed of Lake Sakakawea and the minerals in the bed of

Lake Sakakawea up to the current Ordinary High Water Mark before the Act was passed on April 21, 2017.

CONCLUSION

[¶47.] It is a fact that Petitioners have an equitable interest in their subject oil and gas properties.

[¶48.] Because Petitioners have an equitable interest in their subject submerged oil and gas properties, this case is not frivolous.

[¶49.] The cases cited in this brief are binding on this case.

[¶50.] There is extensive evidence that the state did own Petitioners' submerged oil and gas properties before the Act became law.

[¶51.] Because of this legal reason, there is **no possibility** that Respondents own a portion of Petitioners' subject properties.

[¶52.] Petitioners' Constitutional rights to due process and equal protection under the U.S. Constitution have been violated repeatedly in the instant case.

[¶53.] Because of these legal and factual reasons, N.D.C.C. § 28-26-01 does not apply and this Court's order for attorney fees does violence to the law and must be vacated.

DEPRIVATION OF RIGHTS

[¶54.] By repeatedly ignoring Petitioners cited facts and authorities and repeatedly ignoring the rules of procedure and the statutes listed above, this court has established a pattern of depriving Petitioners of their constitutional rights to due process and equal protection under the fifth and fourteenth amendments of the U.S. Constitution. 18 U.S.C.A. § 242.

[¶55.] Petitioner Michael Coachman is a member of a protected class pursuant to 42 U.S.C.A. § 1981.

[¶56.] Petitioner Michael Coachman is entitled "to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens ..." 42 U.S.C.A. § 1981 Equal rights under the law.

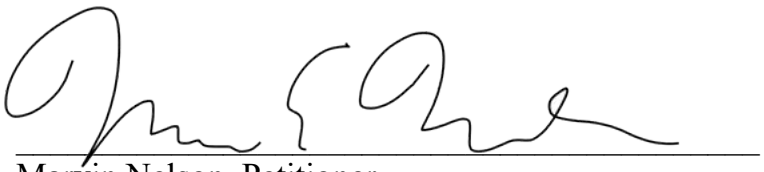
[¶57.] Petitioner Michael Coachman has been repeatedly denied his rights to equal protection under the North Dakota Rules of Civil Procedure and under the North Dakota Century Code by this Court.

[¶58.] The pattern of deprivation of rights in the instant case is proof by a "preponderance of the evidence a prima facie case of discrimination" pursuant to a modified version of the federal McDonnell Douglas formula. Spratt v. MDU Res. Grp., Inc., 2011 ND 94, 797 N.W.2d 328 ¶ 10.

[¶59.] Petitioner Coachman is a victim in the instant case of racial discrimination.

[¶60.] Petitioners Marvin Nelson and Paul Sorum, by association, are also victims of the Court's pattern of deprivation of rights.

Dated this 16th day of February, 2025,



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