ORIGINAL (e-filed)

20060366

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Joan Mann, Ken Danks d/b/a TEK Industries, Tracy Wilkie, Christa Monette, and other persons similarly situated.

Plaintiffs-Appellants.

v.

No. 20060366

ND Tax Commissioner, Cory Fong.
ND Treasurer, Kelly Schmidt.

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT

MOUNTRAIL COUNTY

NORTHWEST JUDICIAL DISTRICT

PLAINTIFFS-APPELLANTS' BRIEF

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ORIGINAL

20060366

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hi

Here is a corrected copy:

page 5 at §4 reads: was a fair; it should read was fair.

page 12 at §23 reads does not retroactively; it should read: not retroactively.

page 13, second paragrah reads The district; it should read: the court.

page 17 at §36 reads: refunds to Indian; it should read refunds to Indians.

page 24 at top of page, line 2 reads under, Strike comma after under.

Thanks,

vance gillette 858 0667

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Statement of the Case.

¶ 1. The plaintiffs appeal from denial of a class action, over fuel tax refunds to Indian claimants. In 2003 the plaintiffs challenged the state fuel tax on Indians who live on a Reservation. Plaintiffs sought refunds under Ch. 57-43 (when a tax is ruled illegal). On January 12, 2004 Judge Gary A. Holum ruled the fuel tax was illegal, and that only plaintiff Danks had filed a notice of claim for refund. The parties sought reconsideration. On April 29, 2004 the district court stayed the injunction, and denied the motions for reconsideration. Both parties appealed. Judge Holum retired in December 2004.

¶ 2. In Mann v. ND Tax Comm'r, 2005 ND 36, 692 N.W. 2d 490 the Court ruled the appeals were premature as the motion to certify class was pending. The Court declined to issue a supervisory writ over the legality of the fuel tax. The Court urged the Legislature to come up with a fair refund law. In April 2005 the ND Legislature enacted a law that allowed for refunds by Native Americans (Indians), through an administrative (admin.) scheme. It also provided for fuel agreements with Indian Tribes.

¶ 3. Procedural background. In June 2005 plaintiffs filed a motion to declare the refund process unlawful because it denies a hearing. App. 15. Plaintiffs filed an amended motion for summary judgment for a ruling on class relief, statute of limitations, interest, and attorney's fees. App. 18-23.

¶ 4. Ruling below. In June 2005 the class motion was argued before Judge Wm. McLees. After 11 months of deliberation, on April 17, 2006 the district court denied relief. App. 26-45. First, the court ruled that that no court hearing was required, saying the admin. scheme was a fair. App. 31. The district court construed the 2005 law, which incorporated a "form of refund" law that required actual receipts for fuel tax refunds.

Next, the court said a six year statute of limitations applied and Indians could file claims for years from 2004 to 1999. The court said the 2005 law, with the admin. scheme, applied to plaintiffs' claims for years 2004 and back. App. 39-44. Then the court denied the class action, saying Indians had to file claims "out of court." App. 43.

¶ 5. On May 1, 2006 the plaintiffs filed a motion to reconsider asserting the 2005 law could not be applied retroactively. App. 46-48, 55-56. On May 17, 2006 the defendant mailed notice of entry of judgment. On October 17, 2006 the district court denied reconsideration. App. 57. On November 3, 2006 ND mailed notice of same. App. 64. Plaintiffs appealed on December 12, 2006. App. 65.

¶ 6. Jurisdiction. Plaintiffs appealed from the April 2006 memo. opinion, and from the October 17, 2006 denial of plaintiffs motion for reconsideration. N.D. R. App. P. 4 (a) (2) tolled the time for appeal until denial of reconsideration. The plaintiffs timely appealed on December 12, 2006. N.D. R. App. 4 (60 days to appeal). The Court has jurisdiction over this appeal: a) from the denial of class certification, and b) from the 2006 orders that bounced the plaintiffs out of court. N.D.C.C. § 28-27-02.

Statement of facts.

¶ 7. The Indian plaintiffs (claimants) seek fuel tax refunds. This dispute centers on the meaning and impact of two laws. First, Ch 57-43 contains a refund law that provides when a tax is "erroneously or illegally" collected, it requires the tax commissioner to provide a refund. The district court did not use this law, but applied a 2005 law. Second, another law allows refunds over "non-licensed" equipment for an agriculture or industry. App. 6. This law requires detailed receipts to the tax commissioner. The law is designed for bulk sales, or Cenex farm accounts (business). If a refund claim is denied, no hearing

is allowed to contest it. N.D.C.C. § 57-43.1-04.

¶ 8. Plaintiff Ken Danks applied for refunds, and ND rejected his claims in an October 2002 letter. "We denied the claim based on the premise that all fuel used in licensed vehicles by individuals and businesses is nonrefundable. This includes fuel sold to Native Americans located on an Indian Reservation and Indian owned businesses on an Indian Reservation." App. 6 (2002 ND letter). ND imposed a 21 cents per gallon tax on gasoline, which is passed on to the consumer. N.D.C.C. § 57-43.1-03. Ch. 57-43 imposes a similar tax on diesel fuel.

¶ 9. In 2003 plaintiffs sued the defendant tax commissioner, now Cory Fong (ND). Plaintiffs: Joann Mann and Ken Danks are members of the Three Affiliated Tribes (Fort Berthold Indian Reservation): Tracy Wilkie and Christa Monette are members of the Turtle Mountain Band of Chippewa (T. Mt. Reservation). Plaintiffs Mann and Danks rely on the 1851 Ft. Laramie Treaty with the Hedatsa, Mandan and Arickara (aka Three Affiliated Tribes). Plaintiffs Wilkie and Monette rely on the 1863 Treaty with Chippewa, Pembina Band.

¶ 10. Claims. The plaintiffs alleged the fuel tax was illegal and sought refunds under Ch. 57-43 that states when a tax is "erroneously or illegally" collected from any person the tax commissioner "shall" pay a refund. App. 1-5. In 2004 Judge Holum ruled the tax illegal, as imposed on enrolled tribal members who live on a Reservation. J. Holum stated the plaintiffs could seek declaratory relief for refunds. N.D.C.C. § 57-43.1-32. App. 12A-14. In 2005 the Indian plaintiffs sought class relief under *McKesson*, which held due process requires refunds when a tax is ruled illegal. App. 18-23. The plaintiffs seek refunds for years 2004 and back, for 2005 or as allowed by law.

¶ 11. The putative class consists of over 3,000 tribal members (Three Aff. Tribes. T. Mt. Chippewa, and Spirit Lake Sioux). The class members purchased fuel on a Reservation and paid the fuel tax. App. 18, 39. Indian taxpayers pay an estimated $1 million per year. App. 7-10. ND disputes the amount but it is substantial. Around 18,700 Indians live on ND reservations, so the class estimate is conservative. Census data. App. 7-9. The class does not include the Standing Rock Sioux Tribe, who have a fuel tax agreement with ND. The Spirit Lake Tribe entered into a fuel agreement with ND in late 2006 (fuel taxes paid back to Tribe based on population). This suit seeks refunds for individuals.

¶ 12. In April 2005 the ND Legislature enacted a law that allowed refund claims by Indians, who paid the fuel tax on a reservation. It adopted the admin. scheme set out in prior law that requires actual receipts. N.D.C.C. § 57-43.1-04. The new law became effective "after December 31, 2004." N.D.C.C. § 57-43.1-03.2.

¶ 13. Admin. scheme. ND relies on a law that allows refunds over non-licensed equipment for agricultural or industry, but not over "licensed vehicles." 2002 Letter to K. Danks, denying refund. App. 6. This law requires the *original invoice* or sales ticket (actual receipt) that includes the seller's name, date, tax as a separate item or statement the tax is included in the sale price, and name of claimant. A retailer like Cenex keep records for a business. The district court ruled that Indians had to produce actual receipts. App. 34. This ruling allowed ND to implement the receipt rule in 2006.

¶ 14. Challenge to admin. scheme. First, its undisputed the 2005 law does not allow for a hearing. Plaintiffs alleged they had no chance to present admissible evidence in a hearing, and no chance to contest a refund amount. The actual receipt rule harmed

Danks and plaintiffs because no other other proof is allowed. App. 15-17. Plaintiff Danks rejected a check for $3,900 to "... settle the entire case" as the class was not paid, (May 2005). App. 17. A claimant cannot get a full refund as no hearing is allowed. Dank's affidavit, App. 24. Plaintiffs sought an order for a fair process. App. 25.

¶ 15. Second, the type of receipts demanded by Fong do not exist. Regular gas stations don't give out the actual receipts listed in the 2005 admin. scheme law. A receipts lists the gallons and price, but not a tax "separately stated." App. 49-52. Fong rejected a $105 claim (year 2005) by Indian claimant T. Wilkie, apparently on the basis the tax was not "separately stated" in the receipt. ND letter to Tracy Wilkie. App. 49-50. The claimant submitted the owner's statement: fuel tax included in the gas price. Id. Despite this proof, Fong rejected the 2005 claim. App. 49. "As of early May 2006 only 29 Indians out of 3,000 plus ... applied for refunds." (Memo, pls. motion for reconsideration). App. 55-56. The actual receipt rule, and lack of a hearing, leaves an Indian claimant without any recourse.

SUMMARY OF ARGUMENT

¶16. The U.S. Supreme Court has emphasized that a State must provide a refund over an illegal tax, under *McKesson and Reich v. Collins*. In 1992 this Court ordered a refund over an illegal tax, *Service Oil v. State*. In this case the errors are:

A). Class action - applicable law. The 2005 law became effective "after Dec. 31, 2004." The court applied the 2005 law to plaintiffs' claims from 2004 and back. The court misapplied the substantive law in denying the class action. Ch. 57- 43 (refund over illegal tax) is the substantive law that applies, under *Reich* and *Service Oil*.

B). The 2005 admin. scheme does not allow for a hearing or judicial review. Due

process requires some form of hearing before one is deprived of their property. The actual receipt rule designed for business is imposed on Indian claimants in a manner that violates equal protection.

C). Class action. Since the 2005 law does not apply to plaintiffs' claims for 2004 and back, the court erred in analyzing Rule 23 and in denying the class action. Under *Reich and Service Oil*, Ch. 57-43 applies and the class should be certified.

ARGUMENT

¶ 17. Standard of Review. A district court's decision on class certification will not be reversed unless the court abuses its discretion. A court abuses its discretion when a decision is unreasonable, arbitrary: or misinterprets or misapplies the law. Werlinger v. Champion Healthcare Corp., 1999 ND 173, 598 N.W. 2d 820 (ND 1999). A motion to reconsider is treated as a motion to alter or amend the judgment, and tolls the time period for an appeal. Mann v. N.D. Tax Comm'r, 2005 ND 36, ¶ 14, 692 N.W. 2d 490. A trial court's decision (on motion to reconsider) is reviewed for an abuse of discretion. Hanson v. Hanson, 2003 ND 20, 658 N.W. 2d 656 (custody). When a trial court grants relief by applying "an erroneous interpretation of the law," reversal is required. Dinger v. Strata Corp., 2000 ND 41, ¶12, 607 N.W. 2d 886 (motion to reconsider after summary judgment over contract interpretation). The district court denied a motion to reconsider without analysis of the merits. Id.

¶ 18. Next, on a question of law the standard of review is de novo. See Service Oil v. State, 479 N.W. 815 (ND 1992) (due process requires clear and certain remedy: refund upheld over illegal tax). D.D.I. Inc. v. State Tax Comm., 2003 ND 32, 657 N.W. 2d 228 (declaratory relief over corporate tax that violated commerce clause: ruling affirmed).

Hoff v. Berg, 1999 ND 114, ¶ 13, 595 N. W. 2d 285 (striking down grandparent visitation law on due process grounds). A law limiting a fundamental right is subject to strict scrutiny. Id.

¶ 19. In this case, the plaintiffs moved for reconsideration: a) Ch. 57-43 required a refund when a tax is ruled illegal, under Service Oil, supra; b) and imposing the 2005 admin. scheme on claimants, without hearing violated due process. Plaintiffs also cited *Reiling* noting the 2005 law, effective "after 2004," could not be applied retroactively to bar a class action. App. 46, 55. In October 2006 the district court denied plaintiffs' motion for reconsideration, saying no basis for relief was shown. Error: the district court misapplied the 2005 law as discussed below, and misinterpreted leading cases that require a hearing and adequate remedy over an illegal tax, Hanson and Strata Corp.

¶ 20. Late Motion. At the 11th hour on January 19, 2007 ND moved to dismiss this appeal. ND argues the standard of review is an abuse of discretion; we agree. Next, ND argues the district court was correct: it said none of the plaintiffs' arguments justify reconsideration. Response: rather than do a separate brief, the appellants respond as set out herein. The short answer is the district court misinterpreted the 2005 law, and wrongly applied it to deny the class action. Hanson, supra. The long answer is set out fully below.

CLASS ACTION

¶ 21. **The 2005 law is not retroactive as the substantive law. It is effective "after Dec. 31, 2004" and does not apply to plaintiffs' claims for years 2004 and back.**

¶ 22. Statutes involved. 2005 law. This law added a new section to Ch. 57-43. It stated an Indian claimant may file a refund claim with the tax commissioner over fuel

taxes paid on an Indian Reservation. N.D.C.C. § 57-43.1-03.2. "This section is effective for qualifying motor vehicle and special fuel purchases made after December 31, 2004." Next, Ch. 57-43 provides that when a tax has been "erroneously or illegally collected" the tax commissioner "shall" arrange for payment ... for a refund. N.D.C.C. §§ 57-43.1-32 (gas refunds), 57-43.2- 20 (diesel refunds) [Ch. 57-43]. Plaintiffs relied on these refund laws in Ch. 57-43, and due process, in their complaint and motions. App. 1-5, 18-23.

¶ 23. **Under Reiling the 2005 law does not retroactively.** In deciding whether common issues predominate, the court must first identify the *substantive law* that will control the outcome of the litigation. Werlinger v. Champion Healthcare Corp., supra. In Werlinger the defense argued that separate admin. claims were required, rather than a class action suit for back wages. This Court rejected the defense argument: the plaintiffs had a right of action under a wage law. When interpreting a statute, we first look to the language of the statute to ascertain legislative intent. If unambiguous, we apply the plain language of the statute. If ambiguous, we look to extrinsic aids such as legislative history. *Accord.* In re Estate of Kimball, 2005 ND 107, 697 N.W. 2d. 315. In construing a statute, our duty is to ascertain the Legislature's intent, which initially must be sought from the statutory language itself, giving its plain, ordinary, and commonly understood meaning.

¶ 24. When a later law sets up an admin. scheme, it cannot be imposed retroactively. Reiling v. Bhattacharyya, 276 N.W. 2d 237 (ND 1978). The plaintiff's claim arose prior to the new law (admin. scheme on medical claims). The new law did not apply or bar plaintiff's claim that arose prior to the new law. Id. In this case, the district court erred as follows:

First, the district court ruled the claimants had to comply with the 2005 admin. scheme. App. 36-38. The court decided a six year statute of limitations, and Indians could file claims (from the 2005 law), or from 1999 to 2004. App. 38-39. Error: the 2005 laws states it's effective for purchases made "after December 31, 2004 ...." The term "year" is commonly understood. The term effective "after December 31, 2004" obviously refers to claims that arise *after* 2004. The 2005 law is unambiguous. See Smith v. Baumgartner, 2003 ND 120, 665 N.W. 12 (a statute can operate retroactively only when the legislative intent is shown or implied).

Second, the district court misapplied the 2005 law to plaintiffs' claims that arose previously: years 2004 and back, Reiling. The district then ruled the claimants had to use the 2005 admin. scheme, and come up with actual receipts for years back to 1999. The court erred in its construction of the 2005 law, Hoff v. Berg. Then the court went on to apply the 2005 law to the class action, and misapplied it in denying the class action under Reiling, Werlinger and Hanson.

¶ 25. Defense. The defense may argue the 2005 law was "intended" to apply to claims arising in 2004 or prior years. Response: the Note on legislative intent says: "Section 13 and 16 of the Act may not be construed to preclude claims for motor vehicle and special fuel tax refunds by tribal members or tribal entities for taxes on purchases made before January 1, 2005." (emphasis added). Fairly read, this directive emphasizes that the 2005 law does not bar plaintiffs' 2004 and prior claims.

¶ 26. Applicable law. Since the 2005 does not apply, the correct substantive law is Ch. 57-43 (refund over illegal tax). The district court erred in not granting declaratory relief that Ch. 57-43 and due process control as the substantive law. See D.D.I. Inc. v.

State Tax Comm., 2003 ND 32. 657 N.W. 2d 228 (declaratory relief over corporate tax), and Werlinger (plaintiffs could sue under wage law, for the class).

HEARING REQUIRED

¶ 27. **The 2005 admin. scheme fails to provide a hearing, and wrongly deprives the Indian claimants of fuel tax refunds, contrary to due process and equal protection.**

¶ 28. The Due Process Clause, of the Fourteenth Amendment, states "[N]or shall any State deprive any person of life, liberty or property, without due process of law ...." U.S. Constitution. On an identical issue the U.S. Supreme Court held that a state must pay refunds on taxes illegally imposed. Reich v. Collins, 513 U.S. 106 reviewed Georgia law: "A taxpayer shall be refunded any and all taxes or fees, which are determined to have been erroneously or illegally ... collected." [1] The Court required "meaningful backward-looking relief," quoting McKesson Corp. v. Florida Alcohol & Tobacco Div., 496 U.S. 18, 31 (1990) (refund suit over liquor tax). McKesson required a "clear and certain remedy" under the Fourteenth Amendment.

> Because extraction of a tax constitutes deprivation of property, the State must procedural safeguards against unlawful extractions in order to satisfy the commands of the Due Process Clause.

Id. 496 U.S. at 36.

McKesson stated that Florida must provide an adequate post-deprivation remedy. The Court cited Matthews v. Eldridge, 424 U.S. 319 (1976), for the rule that some form of hearing is required before an individual is finally deprived of a property interest. Id. at 36. This includes the opportunity to be heard in a meaningful time and manner. Id. at 35. n. 22. *Accord*, Newsweek v. Florida Dept. of Revenue, 522 U.S. 442 (1998) (Georgia

[1] ND law provides that when a tax is "erroneously or illegally collected" the tax commissioner ... shall arrange payment for a refund. Ch. 57-43 (gas and diesel refunds).

could not deny a refund over an illegal tax). Service Oil v. State, 479 N.W. 2d 815 (ND 1992) (due process required retroactive refund, over an illegal fuel additive tax).

¶ 29. Court access. Due process includes the right of access to court. Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982). *Accord*, Jones v. Flowers, 120 S. Ct. 1708 (2006) (due process requires notice to owner before his home was sold over taxes). Limiting access to court violates due process. Calif. Teachers Ass'n v. State, 975 P. 2d. 622 (Cal. 1999) (conditioned admin. appeal on payment of all costs if teacher lost).

¶ 30. **Reich requires a court remedy under Ch. 57-43.** In Reich the taxpayer challenged a state tax and it was ruled illegal. Then the state rejected a taxpayer's refund claim under a refund statute that provided for a refund over an "illegal tax." Georgia could not withdraw the post-deprivation remedy (refund law). Here the ND refund law is the same as Georgia's: a plaintiff can sue for a refund over a tax ruled illegal. Under Reich a court remedy is required. See Newsweek v. Florida Dept. of Revenue, supra. It stated that under Reich v. Collins a state could not use a "bait and switch" move to deny a refund. Once relief is available under a state refund law, and relied on, the state cannot withdraw the remedy. Id. In this case the events are:

a) plaintiffs secured a ruling the fuel tax was illegal, then sought refunds under Ch. 57-43 – the same as in Reich;

b) in 2005 ND enacted the admin. scheme law, which denies a hearing or judicial review. ND cannot impose the admin. scheme through a "bait and switch" move condemned in Newsweek. As in Reich, the claimants are entitled to a "clear and certain remedy" - to sue in court under Ch. 57-43 for refunds. Service Oil, supra.

¶ 31. The district court failed to apply the leading tax refund cases such as Reich. This

sets a scary precedent: it vests Fong with absolute authority. The 2005 admin. scheme lacks procedural safeguards required by Mckesson. For example, a claimant cannot present proof of a refund, or cross-examine on the basis for a denial. App. 15, 24. Fong can reject a claim at whim, without a reason, contrary to Flowers. Also, in 2006 Fong rejected a $105 refund claim though receipts and owner's statement were submitted, as noted below.

¶ 32. **The "actual receipt" rule, designed for business, is arbitrarily imposed on Indian claimants, contrary to equal protection.**

¶ 33. Arbitrary conduct is prohibited by equal protection. Village of Willowbrook v. Olech, 120 S. Ct. 1073 (2002) (class of one). Selective use of laws creates an unlawful classification. Yick Wo v. Hopkins, 118 U.S. 356 (1886) (law eliminated Chinese wooden laundries, while white brick laundries exempted). ND must show a compelling interest to justify differing treatment. State v. Carpenter, 301 N. W. 2d 106 (ND 1980) (NSF law struck down as it favored the wealthy).

¶ 34. Admin. scheme. Simply, the 2005 law does not fit. This law requires the *original invoice* (actual receipt), or history of accounting from a seller. This covered non-licensed equipment, but excluded refunds for "licensed vehicles." ND 2002 letter. App. 6. The district court said the receipt requirements were "not unduly burdensome" and denied an equal protection challenge. [2] App. 33-34. The district court ruled the "licensed vehicle" restrictions "do *not* apply" to refund claims by Indians under the 2005

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[2] The invoices or sales ticket must include the seller's name and address, the date the fuel was purchased, type of product, the number of gallons [liters] of motor vehicle fuel purchases, the state tax as a separate item or a statement that the state tax is included in the price, and name of the claimant. Or, a certified history of purchases detailing required information may be accepted by the commissioner in lieu of original sales invoices or sales tickets. N.D.C.C. § 57-43.1-04 (originated in 1997).

law. But, the law still excludes refunds over "non-licensed" vehicles. N.D.C.C. § 57-43.1-04. Claimants seek refunds mainly over "licensed vehicles."

¶ 35. The admin. scheme operates as follows: a) Fong gives refunds to industry for "non-licensed" equipment, based on business receipts: b) this same *original invoice* rule is imposed on Indian claimants - when such receipts do not exist (tax stated separately), App. 49-52; c) and this rule extends back in time (before 2005 law).

¶ 36. As in Yick Wo v. Hopkins, ND uses a "neutral looking" law and imposes it in a way that bars refunds to Indian, as a class. Fong demand actual receipts – which do not exist for "licensed vehicles." This arbitrary use of the receipt rule bars refunds to Indians. In short, ND imposes standards unattainable my mortal man.

¶ 37. ND has argued that to allow hearings to Indians would discriminate against white folks. This is an "apples and oranges" argument. First, the Indian claimants were *excluded* from refunds: they sued, won a favorable ruling in 2004, and now seek refunds. Second, a business can send an accountant to Cenex for receipts: no need for a hearing. Third, non-Indians get refund hearings. NL Industries v. ND Tax Comm., 498 N.W. 2d 141 (ND 1993) (corp. refund tax). In 2006 ND paid out a few paltry refunds to Indians (Cenex accounts) for year 2005. But, this leaves claimants (3.000) still waiting for the "clear and certain" remedy mandated by McKesson.

¶ 38. In sum, Reich requires a court remedy under Ch. 57-43. Also, the 2005 admin. scheme is unconstitutional and cannot be applied to claims for years 2004 and back, nor to plaintiffs' claims for 2005. The class action should be certified as discussed next.

RULE 23 FACTORS

¶ 39. **Under Reich v Collins, Ch. 57-43 applies as the substantive law. The**

plaintiffs satisfied the Rule 23 requirements.

¶ 40. To certify a class four requirements must be met: 1) the class is so numerous or so constituted that joinder of all members ... is impracticable; 2) There is a question of law or fact common to the class; 3) A class action should be permitted for the fair and efficient adjudication of the controversy; 4) The representative parties fairly and adequately will protect the interests of the class. Werlinger, supra. The cases have construed Rule 23 to favor class actions. It is a remedial rule to resolve claims in a single action: it eliminates the need for repetitious litigation over common questions. Rose v. United Equitable Ins. Co., 2002 ND 148, 651 N. W. 2d 683. Rule 23 provides an effective procedure for those whose economic position is such that it is unrealistic to expect them to seek to vindicate their rights in separate lawsuits. Id.

¶ 41. **Three requirements met.** The district court found the requirements of Rule 23 (a) were "arguably" satisfied. Rule 23 (a) states one or more members of a class can sue: the class is numerous: and there is a common question of law or fact. First, claimants will discuss three factors which were met: numerosity, commonality, and adequate representation. Then, claimants will discuss the fourth requirement: fair and efficient adjudication, in which the district court erred by using the 2005 admin. scheme as the substantive law.

¶ 42. *Numerosity.* It is not seriously disputed that the putative class is numerous, at over 3,000 Indian claimants. The class consists of "enrolled members who reside on an Indian Reservation, and paid the state fuel tax on a Reservation in ND." App. 39. This requirement is satisfied. Werlinger.

¶ 43. *Commonality.* Only one common question of law or fact is necessary to establish

commonality, this requirement is easily satisfied. Bice v. Petro-Hunt L.L.C., 2004 ND 113, 681 N.W. 2d 74. When a question of law refers to standardized conduct toward class members, a common nucleus of facts is presented and the commonality requirement is met. Id. Individual difference in cases concerning treatment or damages do not defeat commonality. Here the plaintiffs raise common claims for refunds under Ch. 57-43 and due process. Also, plaintiffs raise a common question of law for class declaratory relief, Ch. 57-43. D.D.I. Inc. v. State Tax Comm'r (declaratory relief over illegal tax).

¶ 44. *Adequate representation.* In the court below, ND did not contest the adequacy of the representative parties. Rule 23 (b) (3). At the class hearing plaintiff Danks testified on his resources and stamina to serve as class representative, and ND had the opportunity to question him. In Rose an elderly man served as class representative; plaintiff Danks is middle age.

¶ 45. *Fair and efficient adjudication.* Rule 23 (c) sets out thirteen factors a court can consider. The district court found there were "joint or common interests" among the members of the class, which favored granting certification. On the rest of the Rule 23 (c) factors, the district court said the admin. scheme applied. The district court misapplied the 2005 law, as the substantive law:

a) Rule 23 (c) (l) (B): risk of inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for a party opposing the class. The court said under the 2005 law "all claimants must provide the same documentation: there is no risk of inconsistent or vary adjudications." This factor weighs in favor of denying the class action. App. 41. Error: this finding is wrong. Incompatible standards occur when the party opposing the class would be unable

to comply with one judgment without violating the terms of another judgment. Because there may be different damage amounts does not qualify as incompatible standards. Klagues v. Maintenance Engineering, 2002 ND 59, ¶13, 643 N. W. 2d 45.

b) Rule 23 (c) (l) (C): whether adjudications with respect to individual members of the class as a practical matter would be "dispositive of the interests of the other members not parties to the adjudication..." The district court said each refund claim must "stand or fall" on its own, and "adjudications" would not be dispositive of other members. Error: the district court misapplied the 2005 admin. scheme law. Bice v. Petro-Hunt (when declaratory relief is sought this sets precedent for the class and favors certification). The claimants seek declaratory relief and refunds.

c). Rule 23 (c) (l) (E): whether common questions of law or fact predominate over any questions affecting only individual members. The district court said: Once again, eligibility will be determined on a *case-by-case* basis ...." [under 2005 law]. App. 42. Error: this finding is inconsistent, as the district court found the *numerosity* requirement was met on common claims. Also, Ritter, Laber and Associates v. Koch Oil, 2000 ND 15, 605 N. W. 2d. 153 stated that when common questions of law and fact predominate this factor is satisfied. Here the plaintiffs raise common refund claims. Merely because differing amounts of damages (refunds) are involved, this does not defeat the common issues raised. Bice v. Petro-Hunt.

¶ 46. Because the district court failed to apply Ch. 57-43 (refund when tax illegal) and due process as the substantive law. this led to other errors. Rule 23 (c) (l) (F): whether "other means of adjudicating the claims and defenses are impracticable and inefficient." The district court said the refund process [2005 admin. scheme] is "more practical and

efficient here." App. 42. Error: the district court misapplied the 2005 law.

¶ 47. Rule 23 (c) (l) (G): whether a class action offers the "most appropriate means of adjudicating the claims and defenses." The district court noted the fuel tax is illegal and claimants should "logically be required to resort to the refund process specifically designed by the Legislature ...." Error: to require 100 separate arbitration proceedings is contrary to "fair and efficient adjudication." Peterson v. Dougherty Dawkins, Inc., 1998 ND 159, 583 N.W. 2d 626 (bond dispute). In this matter, to require over 3,000 administrative claims is the opposite of efficiency.

¶ 48. Rule 23 (c) (l) (M): whether the claims of individual class members are "insufficient in the amounts of interest involved, in view of the complexities of the issues and the expenses of the litigation ...." App. 43. The district court said the Legislature provided a "... very straightforward, uncomplicated, method of making claims for refunds ... the claimants should be able to process their individual claims with minimal difficulty ----- outside the court system." App. 43. Error: A class action allows small claimants an economical vehicle for redress in court. The inquiry is not the strength of the individual claim, but whether the claimants, as a class, have common complaints. Martin v. Amana Refrig. In., 435 N. W. 2d 364 (IA 1989) (suit over defective water heaters). Here most Indian claimants are poor and cannot file separate lawsuits. A class action is the only decent remedy available.

¶ 49. *Class Representative*. In Rose v. United Equitable Insur. Co., 2002 ND 148, 651 N.W. 2d 683 (ND 2002) a lone class representative filed suit over an insurance rates on behalf of many policy holders. The district court certified the class and it was upheld on appeal. In this case, plaintiff Danks can serve as class representative on two grounds:

First, he filed a notice of claim law and exhausted remedies. In Arizona Dept. of Revenue v. Dougherty, 29 P. 2d 862 (AZ 2001) the court held each person did not have to file a tax refund claim. The statute required that a claim must be in writing and provide information about the claimant. The Court said: "We see no reason why the statutory requirements cannot be satisfied through a single class representative claimant that provides the requisite information about the representative claimant." *Accord.* Barnes v. City of Atlanta, 2006 Ga. Lexis 831 (class challenged occupation tax). Where exhaustion of remedies is required, a class representative can act on behalf of a class. This avoids the need for each class member to file an administrative claim, citing 22 *Newberg on Class Actions* 5:15 (4th Ed 2002). The court required retroactive refunds for the class, and attorney's fees under the common fund doctrine. Id.

¶ 50. The notice of claim law states: "No action upon a claim arising upon contract for the recovery of money only can be maintained against the state until the claim has been presented ...." N.D.C.C. § 32-12-03. Plaintiff Danks complied with the notice of claim law and exhausted remedies; Judge Holum so ruled. The grounds of the representative claim are clear. As in Dougherty, nothing in N. D. Rule Civ. P Rule 23 bars a class action based on one plaintiff. See Rose (lone plaintiff served as class representative). Conversely, to require many separate admin. claims would be an exercise in futility and defeat the purpose of Rule 23.

¶ 51. Second, the other reason plaintiff Danks can serve as class representative is he (and other plaintiffs) secured declaratory relief in 2004 (fuel tax illegal). So Danks can represent the class for refunds. Ch. 57-43. Service Oil v. State (declaratory relief that ND must refund taxes illegally collected). McKesson stated: Florida waived immunity from

suit through enacted of a state-court refund action. Id. 495 U.S. at 49, n. 34. In this matter, all the plaintiffs are entitled to declaratory relief that Ch. 57-43 applies as the substantive law under McKesson. D.D.I. Inc. v. State Tax Comm'r (declaratory relief over illegal tax). Also, in 2004 Judge Holum stated the plaintiffs could seek declaratory relief for refunds under 57-43.1-32 N.D.C.C. (gas refunds when tax ruled illegal). Thus, Danks (or other plaintiffs) can serve as class representative.

¶ 52. Rule 23 (r). The statute of limitations is tolled for all class members upon the commencement of an action asserting a class action. Dougherty, 29 P. 3d at 869. The Comment to Rule 23 notes the federal rule allows tolling for the class until a determination of class action status. Issue: what is the statute of limitations and what is the "look back" period? The district court ruled a six year statute of limitation applied, in this action "arising upon contract." Ford Motor Co. v. State, 231 N.W. 2d 883, 885 (ND 1930). N.D.C.C. § 28-01-16 (6 years, action on contract). App. 37-39. We agree. But, the court ruled the "look back" period is to 1999 (on plaintiff's claims for 2004 and back), citing the 2005 admin. scheme law. App. 39. The district court erred, as the correct "look back" period is to 1997:

a) An action commences upon service on the defendant. N.D.C.C. § 28-01-38. The defendant was served on September 23, 2003. App. 37.

b) To determine the "look back" period, the statute of limitations is extended back six years from when suit is filed. See Standing Rock Sioux Tribe v. Janklow, 103 F. Supp. 2d (D. S.D. 2000) (six year statute of limitation in SD excise refund case; the "look back" is six years from when suit filed (1998) - back to 1992).

c) Here the "look back" period extends six years from when suit filed in 2003: 2002,

01, 00, 99, 98, 1997. Standing Rock, supra. Thus, the statute of limitations is tolled for the class from 2003 under, Dougherty, and "looks back" to 1997.

¶ 53. Defense. ND may drag out a one year argument, citing N.D.C.C. § 57-43.1-05. It allows a refund claim for all "motor fuel purchases" during a calendar year ... and before July 1st of the next year." The problem with this argument is the statutory scheme excludes refund claims by Indians:

> The refund claim must state that the motor vehicle fuel was used or is to be used by the claimant other than in a licensed **motor vehicle**, the purpose or type of project for which the motor vehicle fuel was used....

N.D.C.C. § 57-43.1-04 (form of refund law). Refunds are allowed only for "non-licensed equipment" and not for "licensed vehicles." 2002 ND letter to plaintiff Danks. App. 6 Fairly read, these laws exclude Indians. So the one year statute of limitation can't be plucked out to bar refund claims to Indian claimants. Regardless, a tax refund suit "arises upon contract" under Ford Motor; a six year statute of limitation applies. § 28-01-16. See Burr v. Kulas, 1997 ND 98, 564 N.W. 2d 631 (longer statute of limitation applies when considering the nature of the action; RICO action with seven year period).

¶ 54. The district court stated the legislative history on the 2005 law did not provide a clear indication on "how far back ... applications can be filed. App. 38. The court cited the Note to the 2005 law; it says "... this Act may not preclude claims for motor vehicle and special fuel tax refunds by tribal members or tribal entities for taxes on purchases made before January 1, 2005." The Notes states the obvious.

¶ 55. Attorney's fees and expenses. Rule 23 (q) provides for a hearing at which the attorney provides a copy of a written fee agreement. In April 2004 Judge Holum held a class hearing and plaintiffs' counsel presented a contingency fee agreement. After the

Mann appeal, in June 2005 Judge McLees heard arguments on the class motion. Rule 23 (p) allows a fee award when a prevailing class recovers a judgment or other award. In 2006, the district court denied the class action. On reconsideration, the court said the common fund doctrine did not apply, citing a California smog case. App. 60-62.

¶ 56. When a common fund is created the modern trend is to award a percentage for attorney's fees. The common fund doctrine is proper when: a) the class is identifiable; b) the benefits can be traced; and c) the fees can be apportioned among those who benefit. Paul, Johnson, Alson & Hunt, v. Graulty, 886 F. 2d 268 (9th Cir. 1989) (benchmark figure for fee award is 25% in class case). ND recognizes the common fund doctrine. Estate of Rohrich, 496 N. W. 2d 566 ND (1993) (attorney fees awarded when benefit to others or class). (citations omitted). This doctrine applies to tax refunds, City of Atlanta, supra. Here, under the correct substantive law, a common fund exists (tax monies held by ND). The Indian claimants are identifiable, and refunds and fees can readily be determined. On remand, the fee issue has to be addressed.

CONCLUSION

¶ 57. Since 1992 this Court has required refunds over an illegal tax, under Service Oil v. State. The same remedy is appropriate here. Since 2003 plaintiffs sought refunds under Ch. 57-43, and secured declaratory relief over the fuel tax. In 2005 ND came up the admin. scheme that bars refunds to Indian claimants. The district erred in ruling the 2005 law applies to plaintiffs' claims from 2004 and back, Reiling. The district court failed to apply Reich, Newsweek, and Service Oil. These leading cases require that plaintiffs get a "clear and certain" remedy in court. Alternatively, the 2005 law is unconstitutional as applied to Indian refund claimants.

¶ 58. Class action. The correct substantive law to decide the class action is Ch. 57-43 and due process. The district court misapplied the 2005 admin. scheme and this lead to a faulty analysis. Relief: the district court should be reversed, and the case remanded for a proper analysis on class certification, or for a ruling the claimants satisfied the Rule 23 requirements as discussed herein. A sound ruling will open the courthouse door to Indian claimants in their quest for tax refunds.

Dated January 23, 2007.

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Certificate of Compliance. I certify compliance with Rule 32; the brief contains 7,687 words. s/_____
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