

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Virginia Bice, Helen A. and Hillis J. Bice, Helen A. Bice Life Estate, Naomi Brew, Patricia Burian Ingman, Myran S. and Mary C. Burian, Estate of Steve Burian, Arnold and Sharon Burian, Connie F. Burian Heck, Jane Elizabeth Kiker, Elmer L. Glovatsky, Timothy Glovatsky, Shirley and Lawrence W. Jablonsky, Leo and Selina Kaiser, Russell L. Kiker, Russell L. Kiker Trust, Sally A. Kiker Trust, Ardyce Burian Palanuik, Irene E. Scott Mineral Trust, Jane Scott, William D. and Agnes M. Scott, Ervin and Mildred Waldie, Gregory Lynn Waldie, Mary M. Weber, Martin A. Weber, Jerry Zabalotny, William D. Walters, Jr., Imperial Oil Company c/o William D. Walters, Jr., Lillian Hardcastle, a/k/a Lillian Kaiser, Robert T. Smith, Carrie W. Smith,

Plaintiffs-Appellants,

vs.

Petro-Hunt, L.L.C., J.W. Beavers, Jr., as Trustee of William Herbert Hunt Trust Estate,

Defendants-Appellees

Appeal from Judgment entered August 19, 2008 pursuant to Order for Judgment on Motions for Summary Judgment regarding Memorandum Opinion dated April 30, 2007 and Memorandum Opinion and Order Granting Summary Judgment dated July 30, 2008

Honorable Zane Anderson
Billings County District Court, Southwest Judicial District
Supreme Court No. 20080265
Billings County Civil No. 01-C-00001

**HERBERT L. MESCHKE AMICUS BRIEF IN SUPPORT OF APPELLANTS
REQUEST TO REVERSE THE TRIAL COURT GRANT OF SUMMARY
JUDGMENT**

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STATE OF NORTH DAKOTA

ATTORNEYS FOR AMICUS CURIAE HERBERT L. MESCHKE

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae Herbert L. Meschke is the Plaintiff in Meschke v. Whiting Oil Company, a yet unfiled case dated November 10, 2008 in the Central Judicial District, Billings County, regarding the deduction of the same sort of charges from percentage gas royalties in the Big Stick Madison Unit. Amicus is interested in this case because this is a broad issue that is occurring in other oil fields. Gas producers are deducing more "Payee Fees" from gas royalties.

LAW AND ARGUMENT

This Amicus Brief supports the Appellants' position in this case.

I. West v. Alpar used a marketable-product analysis.

North Dakota precedent interpreting a similar royalty clause rejected deductions from percentage gas royalties for expenses incurred in producing and processing to make the gas saleable. West v Alpar, 298 N.W.2d 484 (1980). A single quote demonstrates this:

"[W]e conclude that the Wests are entitled to royalty payments based upon a percentage of total proceeds received by Alpar from the sale of the gas without deduction for the cost of extracting hydrogen sulfide and without deduction for any other costs incurred by Alpar."

West at 491. In reaching this conclusion, the *West* decision reasoned:

"If Alpars's predecessor in interest had desired to limit the royalty payments under the lease to a fraction pf the net proceeds from the sale of the gas after after allowance for a deduction of certain costs . . ., it could have easily included express language to that effect in the lease."

Id. The *West* precedent, holding royalties are to be paid “without deduction for any other costs incurred by” the producer in marketing the gas, unless expressly stated in the lease, should apply in this case and like cases.

II. The decision here will have wide effects.

This Amicus Curiae is the Plaintiff in a similar lawsuit filed on behalf of a proposed class of royalty owners. His claim is against Whiting Oil Company, a different oil and gas company, operating the Big Stick Madison Unit in Billings County, North Dakota. The main allegation of the complaint is

BREACH OF ROYALTY OBLIGATIONS

12. **Claim 1:** For gas produced by the Big Stick Madison Unit in May 200[2] and for each month since, Defendant Whiting has wrongfully deducted amounts for unspecified “Gathering Expense” from gas royalties paid to Plaintiff Meschke. Such deductions are not authorized by the royalty clause in the underlying oil and gas lease. Defendant Whiting thereby breached its express, implied and statutory obligations under the Meschke leases and other similar oil and gas leases in the Big Stick Madison Unit.

Whiting Complaint, paragraph 12.

The gas royalty clause of the underlying lease agreed:

“2nd. To pay lessor one-eighth (1/8) of the proceeds received by lessee of the well for all gas (including oil substances contained in such gas) produced from the leased premises and sold by lessee; if such gas is used by lessee off the leased premises or used by lessee for the manufacture of casinghead gasoline or other products to pay to lessor one-eighth (1/8) of the prevailing market price at the well for the gas so used.”

Whiting Complaint, paragraph 4. These details from another pending case demonstrate how other pending and impending claims will be affected.

Moreover, this Amicus has identified other recent and similar deductions (“payee fees”) being made by other gas producers for other tracts and in other fields.

CONCLUSION

The Supreme Court's decision in this case will have a broad impact beyond the Little Knife field. As such, Amicus respectfully requests that the Court grant the Appellants their requested relief.

Dated this 31 day of December, 2008.



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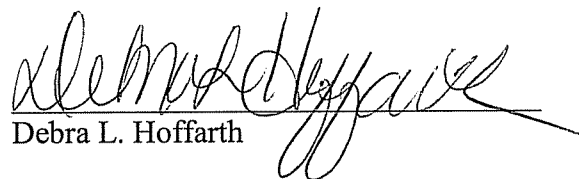
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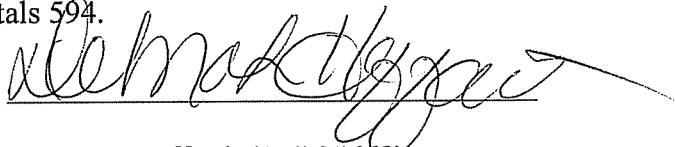
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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Amicus Curiae in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32(a)(7) of the North Dakota Rules of Civil Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 594.

A handwritten signature in black ink, appearing to read "Debra L. Hoffarth", written over a horizontal line.

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