

**IN THE SUPREME COURT**

**STATE OF NORTH DAKOTA**

BAHA Petroleum Consulting Corp.,	)	
Account: 1091247	)	
	)	
Appellant	)	
	)	Supreme Court No. 20140452
vs.	)	
	)	
Job Service North Dakota,	)	
	)	
Appellee.	)	

**BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION OF  
PROFESSIONAL LANDMEN IN SUPPORT OF APPELLANT BAHA  
PETROLEUM CONSULTING CORP.'S APPEAL FOR REVERSAL OF THE  
DISTRICT COURT JUDGMENT ENTERED SEPTEMBER 24, 2014  
AND NOTICE OF ENTRY OF JUDGMENT SERVED OCTOBER 24, 2014**

**WILLIAMS COUNTY – NORTHWEST JUDICIAL DISTRICT  
THE HONORABLE PAUL JACOBSON**

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### **Statement of Identity and Interest of the *Amicus***

[1] The American Association of Professional Landmen (“AAPL”) is a professional organization consisting of approximately 20,000 individuals nationwide who elected to become members of the association. AAPL is dedicated to supporting and advocating for the best interests of America’s landmen before the public, legislators, and federal administrations and agencies. This includes promoting the land profession and bringing attention to issues landmen care about within the energy industry and the public arena. AAPL advocates for policies and practices that ensure the continued success of America’s energy needs and encourages sound stewardship of energy development and mineral resources.

[2] All AAPL members must meet the ethical standards established in the AAPL Code of Ethics and Standards of Practice. AAPL also offers three certifications furthering the education, credibility, and earning potential of landmen throughout the country. The initial certification of “Registered Landman” identifies someone with a fundamental knowledge of the land industry. The “Registered Professional Landmen” certification identifies someone with professional experience as a landman. Finally, the “Certified Professional Landman,” the highest level of certification, demonstrates a comprehensive level of professional experience and competency in the land business.

[3] AAPL has a thorough knowledge of the unique history and current status of the landmen profession. Because of this knowledge, AAPL understands the importance to North Dakota and America’s landmen of maintaining the traditional understanding of landmen as independent contractors, rather than employees. AAPL supports the Appellant, BAHA Petroleum Consulting Corp. (“BAHA”), on appeal

because it believes Job Service North Dakota (“JSND”) and the District Court for the Northwest Judicial District erred in classifying landmen placed by BAHA as employees of BAHA rather than independent contractors. The nature of BAHA’s business is providing referrals of various professionals to exploration and production companies including referrals of independent landman services. (App. 061). BAHA itself is neither an exploration and production company nor a company exclusively engaged in referral of independent landmen, but rather BAHA is in the business of referring others who provide services to oil and gas companies, including independent landmen. *Id.* As a result, the independent landmen referred by BAHA comprise the interests of which the AAPL represents on a state and national level. Specifically, AAPL supports BAHA’s position that the North Dakota Legislature intended to exempt independent landmen from the twenty-factor common law test for determining employment status expounded in N.D.A.C. § 27-02-14-01(5)(b) by passing N.D.C.C. § 52-01-01(18)(k). Further, and notwithstanding the clear exemption in N.D.C.C. § 52-01-01(18)(k), AAPL supports BAHA’s position that, even under the traditional twenty-factor common law test established in N.D.A.C. § 27-02-14-01(5)(b), the only reasonable conclusion is that the independent landmen BAHA referred to its clients constitute independent contractors.

#### **Authorship of Brief**

[4] This brief was authored and funded entirely by AAPL and its undersigned counsel, and none of the *amici* has represented either party in this case. No party to this case funded or authored the brief. Furthermore, BAHA’s counsel neither contributed money nor authored any portion of this brief.

## Argument

### **I. JSND and the District Court Erred in Failing to Consider the Uniqueness of the Landman Profession as Evidenced by the Historical and Current State of the Landman Profession as Well as the Legislative History of N.D.C.C. § 52-01-01(18)(k).**

#### *A. Historical Treatment of Independent Landmen as Independent Contractors.*

[5] BAHA, among other things, serves as a broker whereby an energy company can use BAHA's services to locate experienced independent landmen to complete specific tasks ancillary to the drilling and extraction business of the energy company. BAHA is one of many such brokers throughout the United States serving such a function.

[6] AAPL moved to file an *amicus curiae* brief in this case because it understands the unique nature of the landman profession, which can sometimes be overlooked by courts which lack an adequate understanding of the historical and current status of the profession. Since the inception of the oil and gas industry in the United States and North Dakota, landmen have performed vital services for the energy industry and economy. In the landman profession, typically two types of landmen exist: independent landmen and company landmen. Landmen routinely engage in a variety of tasks critical to North Dakota's economy. Independent landmen are generally contracted for and found, often through brokerage companies, by oil and gas companies to complete specifically defined tasks. These tasks may include, but are not limited to, negotiating leases with surface and mineral owners, locating mineral interest owners, and gathering and reporting on recordation information found in county records. (App. 62). These independent landmen are typically paid a daily rate, and are only contracted for

completion of one project (i.e. “task”) at a time. Company landmen, on the other hand, are landmen retained as employees by the oil and gas company on an ongoing basis, and are paid an annual salary or hourly wage. This appeal concerns only independent landmen. Therefore, what is relevant is the history and current status of independent landmen.

[7] Independent landmen have a long history of acting as independent contractors, and have long been recognized as falling outside the conventional definition of employee. Michael C. Haines and William A. Horn, *Michigan: Survey*, 1 Tex. A&M L. Rev. 143, 151 (Spring 2014); *see also Brief of Appellant*, Add. 04. This concept is the understanding upon which the energy industry operates. *See id.* In 1994, AAPL conducted a survey of its members, and members of affiliated industry associations, to determine whether independent landmen were treated as independent contractors or employees within the oil and gas industry. Alan H. Morgan, *The Independent Contractor Issue & You*, available at [http://www.landman.org/docs/whitepapers/gcli\\_morgan\\_independentcontractorissueandyou4.pdf](http://www.landman.org/docs/whitepapers/gcli_morgan_independentcontractorissueandyou4.pdf) (August, 2014). At AAPL’s request, major auditing firm KMPG Peat Marwick (“KMPG”) conducted an analysis of this survey, which contained over 2,800 responses, and ultimately determined that 98% of respondents indicated that independent landmen act as independent contractors. *Id.* 95% of respondents had worked in the oil and gas industry for ten (10) years or longer and 75% of all respondents held the opinion that the practice of treating independent landmen as independent contractors was in existence for more than thirty (30) years prior to the date of the survey (1994). *Id.* Overall, KMPG determined that the practice of treating

independent landmen as independent contractors was in existence for many years and is the prevalent view throughout the United States. *Id.*

B. *North Dakota Recognizes the Public Policy Importance of Treating Independent Landmen as Independent Contractors.*

[8] The tradition of treating independent landmen as independent contractors has continued throughout the twenty-one (21) years since AAPL conducted the 1994 survey. This tradition is evidenced by numerous statutes enacted in oil and gas producing states expressly recognizing that independent landmen are independent contractors rather than employees. *See* N.D.C.C. Code § 52-01-01(18)(k); Tex. Bus. & Com. Code § 201.077; N.M. Stat. § 51-1-42(F)(12)(r); Okla. Stat. tit. 40, § 1-210(15)(x); La. Rev. Stat. § 23:1048; Colo. Rev. Stat. § 8-70-140.7; Mont. Code § 39-51-204(i). As expounded in the Appellant’s Brief, North Dakota recognizes the unique status of landmen in N.D.C.C. § 52-01-01(18)(k):

Service performed for a private for-profit person or entity by an individual as a landman if substantially all remuneration, including payment on the basis of a daily rate, paid in case or otherwise for the performance of the service is directly related to the completion by the individual of the specific tasks contracted for rather than the number of hours worked by the individual, and the services are performed under a written contract between the individual and the person for whom the services are performed which provides that the individual is to be treated as an independent contractor and not as an employee with respect to the services provided under the contract.

[9] The exception to “employee” classification is important to independent landmen because of the nature of the work landmen perform. An oil and gas company often seeks the aid of an independent landman when the company is contemplating drilling or mining, presently or in the future, on a specific parcel of land. To determine mineral and surface ownership, as well as royalty rights, a landman must search through

physical land records and attempt to locate interest owners on specific tracts of land. Because numerous oil and gas companies may be present or involved in any specific region of the country, and because the needs of these companies are constantly changing, the work independent landmen perform for these companies is necessarily temporary. Moreover, because of these factors, an independent landman must have the flexibility to work for multiple oil and gas companies simultaneously and over short periods of time at ever-changing intervals. Furthermore, oil and gas companies need to have the capability to contact brokers to quickly secure an independent landman when the need arises without having to conduct its own search for these professionals. This also means independent landmen's income and costs are continuously in flux. Treating independent landmen as independent contractors gives all parties the flexibility to conduct their business without unnecessary administrative overhead and delay. Oil and gas companies can quickly engage an independent landman for a specific task, and the independent landman can efficiently deal with his or her business expenses while continuing to keep abreast of the next opportunity.

[10] In 2011, N.D.C.C. § 52-01-01(18)(k) was amended to recognize the practice that independent landmen are paid a "daily rate of pay." *Brief of Appellant*, Add. 03. Speaking in support of the amendment before the North Dakota Legislature, Ron Ness of the North Dakota Petroleum Council noted that "[t]he duties of the landman have not changed for 30 years. The tasks have remained the same and the way they have been paid remains the same." *Id.* The stated purpose of the amendment was to continue ensuring "the historical utilization of landmen and their non-participation in [sic] as being exempt from Job Service fees and also from the benefits associated with unemployment."

*Id.* The Legislature, in approving this amendment, recognized the historical and current importance of exempting landmen and their contracting oil and gas companies from meeting the requirements of the twenty-factor common law test for determining employment status established in N.D.A.C. § 27-02-14-01(5)(b) before classifying independent landmen as independent contractors.

[11] This statutory exemption is recognition that the landman profession is unique, and the importance of the energy industry to North Dakota requires a unique approach by JSND when classifying independent landmen as either independent contractors or employees. JSND and the District Court erred in failing to recognize the specialized and unique nature of the independent landman and the legislative intent behind N.D.C.C. § 52-01-01(18)(k).

*C. The Importance of Maintaining the Traditional Understanding of Independent Landmen as Independent Contractors is Recognized in Other Oil and Gas Producing States.*

[12] The contemporary and historical understanding of the relationship between landmen and energy companies has been that an independent landman is an independent contractor. The advantages of this relationship are explained above. However, more recently some administrative agency applications of the common law and other multi-factor tests have threatened this understanding, leading to apprehension and concern among independent landmen and the AAPL.

[13] In 2014, this trend was recognized in the *Texas A&M Law Review*:

The lack of predictability in the application of [tests to determine employer-employee relationships] and factors to oil and gas landmen by state unemployment insurance officials has created concern that the relationship between oil and gas landmen and an oil and gas company, which has traditionally been viewed as an independent contractor

relationship, might unpredictably be classified as an employer-employee relationship, with unintended consequences and liabilities.

Haines and Horn, *supra* at 151. This unpredictability was recently evidenced when the Michigan Unemployment Insurance Agency (“MUIA”) determined that an independent landman who performed specific tasks for an oil and gas exploration and production company, Oil Energy Group, was an employee under the Michigan Unemployment Security Act. *Oil Energy Group*, Appeal No. L2013-00015 (Mich. Admin. Hearing Sys. June 5, 2013).

[14] On appeal, a Michigan administrative law judge reversed this determination, holding instead that the independent landman was indeed an independent contractor. Oil Energy Group contracted with a number of independent landmen in 2008 to conduct a specific activity: searching property records to determine mineral ownership in a specific prospect area. *Id.* at 4. The landmen were required to sign a non-compete agreement for the prospect area, but were otherwise free to conduct work for multiple clients. *Id.* Besides a plat map of the prospect area, each landman provided his or her own requisite tools and equipment to perform the services. *Id.* The landmen were allowed to hire assistants, and were responsible for supervising and paying assistants. *Id.* None of the named individuals sought unemployment benefits from the State of Michigan. *Id.* at 5.

[15] In reversing MUIA’s determination, the administrative law judge recognized that “[t]he oil and gas industry has a longstanding practice of recognizing landmen as independent contractors.” *Id.* The judge also found the following factors supported finding independent landmen are independent contractors:

- The parties were not free to terminate the relationship without cause.
- The services were ancillary to Oil Energy Group’s business of exploration and production of oil.
- The landmen depended on earnings from more than one oil and gas company to cover living expenses.
- The landmen furnished their own equipment and materials.
- The landmen held themselves out to the public as able to perform certain tasks.
- The work involved is customarily performed by independent contractors.
- The landmen set their own schedules and were free to hire assistants.

*Id.* at 5-6. In addition to concluding the above, the judge stated that the landmen “were utilizing their unique skills, knowledge and abilities to earn a living in a manner of their choosing in a specialized industry.” *Id.* at 7. In reaching this conclusion, the judge recognized the unique nature and history of the landman profession to determine that the landmen were independent contractors rather than employees, *even absent* a legislative exemption such as that found in N.D.C.C. § 52-01-01(18)(k).

[16] In response to the initial determination in the MUIA case, and to alleviate concerns among independent landmen and the oil and gas industry, the Michigan Legislature unanimously passed an exemption for independent landmen similar to N.D.C.C. § 52-01-01(18)(k). Haines and Horn, *supra* at 151; Michigan Legislature, *Senate Bill 0427* (February 25, 2015), available at [http://www.legislature.mi.gov//{\(S\(ae3kg3pusabq4xvnmajvgnbw\)\)/mileg.aspx?page=GetObject&objectName=2013-SB-0427}](http://www.legislature.mi.gov//{(S(ae3kg3pusabq4xvnmajvgnbw))/mileg.aspx?page=GetObject&objectName=2013-SB-0427}). This unanimous approval further evidences that the continued

understanding of independent landmen as independent contractors is hardly controversial. Moreover, the Michigan bill is the most recently passed piece of legislation recognizing that the common law test is inadequate to determine whether a landman is an independent contractor for the purpose of a state's unemployment compensation act.

[17] Texas, New Mexico, Oklahoma, Louisiana, Colorado, and Montana, all states with a long history and economy of oil and gas development, also recognize exemptions or exceptions to their respective state unemployment compensation laws for independent landmen. Tex. Bus. & Com. Code § 201.077; N.M. Stat. § 51-1-42(F)(12)(r); Okla. Stat. tit. 40, § 1-210(15)(x); La. Rev. Stat. § 23:1048; Colo. Rev. Stat. § 8-70-140.7; Mont. Code § 39-51-204(i). The fact that all these states traditionally engage in mineral and/or oil and gas exploration and development demonstrates that these states recognize, as has North Dakota, the important role the mineral and oil and gas industries play in those states. The policy goal is ensuring these industries are not disrupted by the insecurity created by upsetting the traditional understanding of independent landmen as independent contractors. In enacting these statutes, these legislatures recognized that landmen are not appropriately served by the common law test, which does not fit the unique requirements and quirks of the profession.

## **II. JSND and the District Court Erred in Concluding that the Services Performed by the Landmen Referred by BAHA to its Clients Constitute Employment Under the North Dakota Unemployment Compensation Law.**

[18] “The primary objective of statutory construction is to ascertain the intent of the Legislature.” *State by Job Service North Dakota v. Dionne*, 334 N.W.2d 842, 846 (1983). In this case, the intent of the Legislature is shown by the legislative history behind the amendment to N.D.C.C. § 52-01-01(18)(k). This history shows that the

Legislature views the landman profession as unique, which should have been taken into account by JSND in evaluating whether the landmen referred by BAHA were independent contractors. *Brief of Appellant*, Add. 02-04.

[19] As argued, JSND and the District Court erred in failing to account for the uniqueness and traditional understanding of the independent landman in coming to their conclusions. *Id.* The difficulty of making this “round” profession fit into the “square” definition of employment is the very reason the oil industry sought to have the legislature exempt landmen from the definition, and the North Dakota Legislature recognized this uniqueness in passing N.D.C.C. § 52-01-01(18)(k). *See Brief of Appellant*, 33. Here, the appeals referee had before him uncontroverted evidence showing payment to the landmen of a daily rate. (App. 010). Further, the compensation paid to the landmen was tied directly to performance of the specific tasks they were required to perform by the *oil company* (and not BAHA) rather than the number of hours worked, and the tasks coincided directly with those tasks exemplified in N.D.C.C. § 52-01-01(18)(k). *Id.*; (App. 062, 067, 145). The unqualified result is that the landmen BAHA referred to the oil companies were not employees, but rather independent contractors. Despite this clear result, the appeals referee failed to apply the test contemplated by the Legislature in N.D.C.C. § 52-01-01(18)(k), instead utilizing the traditional twenty-factor common law test for determining employment status established in N.D.A.C. § 27-02-14-01(5)(b).

[20] In the absence of proper application of N.D.C.C. § 52-01-01(18)(k), BAHA succinctly demonstrated in its brief that the only reasonable conclusion one can come to even after applying the traditional twenty-factor common law test is that the relationship between BAHA, its clients, and the landmen was not one of employee-

employer. Therefore, a full review of all factors considered by JSND on appeal need not be restated. However, numerous instances in JSND's decision demonstrate JSND's failure to fully consider the unique situation presented in this case and properly apply the traditional common law test established in N.D.A.C. § 27-02-14-01(5)(b).

[21] Specifically, testimony clearly indicates that the landmen received no employment benefits such as vacation, insurance (health or life), profit sharing, or 401K contributions. (App. 068). The landmen were issued a 1099 rather than a W-2, and no federal or state taxes were withheld from wages. *Id.* Indeed, most landmen have their own federal tax identification number. (App. 082). Further, despite being referred by BAHA, the undisputed testimony indicates that landmen independently operate their businesses as do other business owners—they buy their own equipment, supplies, vehicles, computers, and rent office space. In other words, the landman provides nearly all of the equipment required to perform their duties at their own expense. (App. 145). Because these specific tools and equipment are ubiquitous in the landman profession, just as other tools may be in other professions, a landman is going to possess the required tools regardless of any supposed requirement BAHA or another broker may impose on the landmen it refers. Indeed, landmen make a significant investment in their businesses, and realize profits or losses dependent on their conduct and management of the business, just like other independent contractors. Landmen also can and typically do work for numerous oil companies and businesses at any one time, and traditionally are not controlled in the method or means in the performance of services. (App. 062, 068); *see also* Carleton L. Ekberg, *Contracts With Land Services Consultants*, 2009 No. 2 RMMLF-Inst Paper No. 11 (April 30-May 1, 2009).

[22] Further, nothing in the record supports the appeals referee's findings that the work performed by the landman was done for BAHA or that BAHA wanted the services performed in a particular manner. Rather, BAHA referred experienced landmen who knew the business and worked without direction or interference from BAHA, reporting back and communicating only to the oil company on the status of the specific tasks to which they were assigned. (App. 064, 065, 084). BAHA never required or requested reports from the landmen it referred, and the landmen were only required to provide written reports by and to the oil companies for whom the work was performed. (App. 064, 065, 084).

[23] The landmen referred by BAHA were paid a daily rate (as opposed to an hourly wage) tied directly to the services set out in N.D.C.C. § 52-01-01(18)(k)(1) – (6) and directly related to completion of the specific task assigned by the oil company. Further, the record indicates that expenses were agreed upon and paid for by the oil and gas companies, not BAHA, and expenses were billed directly through the client with no responsibility for payment on the part of BAHA. (App. 069, 070). Clearly, while the landmen were reimbursed costs, the record conclusively demonstrates that BAHA was not responsible for such reimbursement.

[24] Ultimately, and as demonstrated by BAHA in its brief, application of N.D.C.C. § 52-01-01(18)(k) to this case leads to the unqualified result that the landmen BAHA referred to the oil and gas companies were not employees, but rather independent contractors. Even in the absence of proper application of N.D.C.C. § 52-01-01(18)(k), when all relevant, undisputed facts are considered and the law properly applied, the vast majority of the factors under the traditional common law test expounded in N.D.A.C. §

27-02-14-01(5)(b) weigh in favor of classifying independent landmen as independent contractors, and not employees. With this in mind, JSND's decision is clearly against the weight of the evidence, is contrary to law, disregards the intent of the North Dakota Legislature, and thus must be reversed.

### **Conclusion**

[25] The traditional understanding is that independent landmen are independent contractors. North Dakota and other oil and gas producing states recognize this fact. This case contains no unique circumstances to challenge the understanding of that fact. The services performed by the landmen referred by BAHA are the same services performed by independent landmen for decades. BAHA merely provides a broker service so that independent landmen and oil and gas companies may efficiently go about their business and complete specifically defined tasks geared toward the ultimate goal of oil and gas development in North Dakota. JSND erred in failing to acknowledge the unique nature of the landman profession and the historical understanding of landmen as independent contractors. Furthermore, JSND ignored the legislative intent and public policy behind exempting independent landmen from North Dakota's Unemployment Compensation Law in N.D.C.C. § 52-01-01(18)(k).

[26] Ultimately, the intent of the legislature should not be disregarded but respected, and the obvious and plain language of N.D.C.C. § 52-01-01(18)(k) must be followed. The decisions by JSND and the District Court were unreasonable given the facts and context of this case, and AAPL thus respectfully requests this Court reverse the order of the District Court and decision of JSND.

Dated this 11th day of March, 2015.

**AMERICAN ASSOCIATION OF  
PROFESSIONAL LANDMEN**

*/s/ Jacob T. Haseman*

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**CERTIFICATE OF SERVICE/COMPLIANCE**

I hereby certify that on March 11, 2015, I filed the foregoing with the Clerk of the Court for the Supreme Court of North Dakota by email. On the same day and in the same manner, I served this brief on all parties in this matter named below. This brief conforms to the requirements set form in N.D. R. App. P. 25, N.D. R. App. P. 29, and N.D. R. App. P. 32(a)(7).

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