IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27885

THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR,

Plaintiffs and Appellees,

v.

KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without permission of the owners of the property over which the waters lie,

Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
Circuit Court Judge

APPELLANT'S BRIEF

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Notice of Appeal filed May 26, 2016

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PRELIMINARY STATEMENT

In this brief, Defendant and Appellant, Kelly R. Hepler, will be referred to as Secretary Hepler. Defendant and Appellant, South Dakota Department of Game, Fish and Parks will be referred to as GF&P. At times, named Defendants and Appellants will be referred to as "State Defendants," while the class of defendants as certified by the circuit court will be referred to as "Class." Plaintiffs and Appellees, Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr, will be referred to as "Plaintiffs" or "Appellees." The electronic settled record, which includes the transcripts of the hearings on the motion for certification of the class and the motions for summary judgment will

be cited as "SR." All document designations will be followed by the appropriate page number(s).

JURISDICTIONAL STATEMENT

The circuit court issued an Order and Final Judgment granting declaratory relief and permanent injunction to Plaintiffs on April 28, 2016. A Notice of Entry of the Order was filed on April 29, 2016. The Notice of Appeal was filed on May 26, 2016. The Court has jurisdiction over this matter pursuant to SDCL 15-26A-3.

STATEMENT OF LEGAL ISSUES AND AUTHORITIES

I

WHETHER THE CIRCUIT COURT ERRED IN CERTIFYING THE CLASS, NAMING SECRETARY HEPLER AS THE CLASS REPRESENTATIVE, AND COMPELLING THE ATTORNEY GENERAL'S OFFICE TO REPRESENT PRIVATE INDIVIDUALS?

The circuit court certified a class of private individuals and included the State and GF&P as members of the class, named Secretary Hepler as class representative, and ordered the Attorney General's Office to represent private individuals in violation of a statutory prohibition precluding such representation.

Wal-mart Stores, Inc., v. Dukes, 564 U.S. 338, 131 S.Ct. 2541, 180 L.Ed. 2d 374 (2011)

Thurman v. CUNA Mut. Ins. Society, 2013 S.D. 63, 836 N.W.2d 611

In re S.D. Microsoft Antitrust Litig., 2003 S.D. 19, 657 N.W.2d 668

SDCL 1-11-1

SDCL 1-11-1.1

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II

WHETHER THE CIRCUIT COURT ERRED IN FINDING THAT THE WATERS HELD IN PUBLIC TRUST COULD NOT BE USED FOR RECREATIONAL PURPOSES UNDER THE PUBLIC TRUST DOCTRINE AND EXISTING LAWS?

The circuit court held that absent express authorization by the Legislature the public could not utilize waters held in public trust.

Illinois Cent. R. Co. v. Illinois, 146 U.S. 387, 452, 13 S.Ct. 110, 36 L.Ed. 1018 (1892)

PPL Montana, LLC v. Montana, ___ U.S. ___, 132 S. Ct. 1215, 1235, 182 L. Ed. 2d 77 (2012)

Parks v. Cooper, 2004 S.D. 27, 676 N.W.2d 823

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III

WHETHER THE CIRCUIT COURT ERRED IN GRANTING AN INJUNCTION WHICH PROHIBITS THE USE OF WATERS HELD IN PUBLIC TRUST FOR RECREATION BY THE PUBLIC WITHOUT EXPRESS AUTHORIZATION FROM THE LEGISLATURE BUT ALLOWS PRIVATE LANDOWNERS THE RIGHT TO USE AND CONTROL THE ACCESS TO THOSE WATERS?

The circuit court issued an injunction prohibiting the public from utilizing the waters held in trust for the public but allowing Plaintiffs and private individuals, to control access to and utilize these public waters for their personal benefit.

Anderson v. Ray, 37 S.D. 17, 156 N.W. 591 (1916)

Flisrand v. Madson, 35 S.D. 457, 152 N.W. 796 (1915)

Parks v. Cooper, 2004 S.D. 27, 676 N.W.2d 823

SDCL 21-8-14

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STATEMENT OF THE CASE

Plaintiffs commenced this civil action alleging that State Defendants had engaged in a taking by allowing the public to recreate on water overlying their private lands and thus encouraging "trespass." SR 10-11, ¶¶ 51-56. Plaintiffs further alleged that such use of waters held in public trust was in violation of the South Dakota Supreme Court's holding in *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823, asserting that this Court held that absent express authorization from the Legislature such waters could not be put to recreational use. SR 7-20.

Plaintiffs also sought the certification of a class of defendants defined as "[a]ll individuals who have entered or used, intend to enter or use, or have encouraged others to enter or use the bodies of water that overlie private property owned by Plaintiffs . . . ." SR 42-44. Plaintiffs additionally requested the appointment of Kelly R. Hepler, Secretary of the South Dakota Department of Game, Fish and Parks, as class representative with the South Dakota Attorney General's Office providing legal representation for all defendants, including the private individuals who would be members of the class. SR 172.

On August 19, 2015, the circuit court certified the class as proposed by Plaintiffs and appointed Secretary Hepler as the class representative with the South Dakota Attorney General's Office providing representation of all defendants. SR 166-75. State Defendants then petitioned this Court for an intermediate review which was denied.

Subsequently, all parties moved for summary judgment. SR 189, 480. A hearing was held on April 20, 2016, before the Honorable Jon S. Flemmer. The circuit court denied Defendants' Motion for Summary Judgment, ruled in favor of Plaintiffs and declared that the waters held in public trust overlying Plaintiffs' private land may not be used by the public for recreation absent express authorization of the Legislature or permission of the landowner. SR 647-50. The circuit court then issued an injunction prohibiting the GF&P from facilitating access to these waters. *Id.* The injunction further prohibits the public from using these waters held in public trust. *Id.* Plaintiffs, however, are permitted to use the waters for recreation and, if Plaintiffs so desire, they may allow others to recreate on this water.[1] *Id.*

[1] State Defendants objected to the proposed order for injunctive relief. SR 601-2. The circuit court overruled the objection in an email which is not part of the settled record.

STATEMENT OF THE FACTS

Plaintiffs are landowners in Day County. SR 8; 508. Portions of their lands, through no fault of the State, have become inundated with water. SR 508-9, 637, ll. 12-13. Jesse Slough, aka Jesse Lake, is comprised of approximately 1,175 acres and is located primarily over Section 23 in Day County which is owned by Plaintiffs Thad, Clint and Robert Duerre. SR 508-9. Jesse Slough, aka Jesse Lake, also covers portions of Sections 16, 21, and 22. SR 508. Plaintiff Herr owns portions of Sections 21 and 22. *Id.* Duerre Slough, aka Duerre Lake, is comprised of approximately 1,495 acres and is located in Sections 12, 13, 14, 23 and 24, which are owned in whole or in part by Plaintiffs Thad, Clint and Robert Duerre. SR 508-9.

In 2004, the South Dakota Supreme Court clarified that all water in South Dakota is held by the State in trust for the public. *Parks v. Cooper*, 2004 S.D. 27, ¶ 46, 676 N.W.2d 823, 838-39. However, the Supreme Court allowed an injunction prohibiting the public use of three non-meandered bodies of water located over private land to stand "in the interest of maintaining the status quo" despite finding that the injunction was issued in error. *Id.* at ¶ 51, 676 N.W.2d at 841.

Plaintiffs requested the same injunctive relief which was issued in *Parks*. SR 212. Plaintiffs also sought a declaratory ruling from the circuit court that their rights stemming from their land ownership are

superior to the public's rights in the water which is held in public trust by the State. SR 190-91. Plaintiffs further requested a declaratory ruling that GF&P has been acting outside the scope of its authority by allowing the public to use non-meandered waters located over private property if such waters can be legally accessed. *Id.*

ARGUMENTS

I

THE TRIAL COURT ERRED IN CERTIFYING THE CLASS, NAMING SECRETARY HEPLER AS THE CLASS REPRESENTATIVE, AND COMPELLING THE ATTORNEY GENERAL'S OFFICE TO REPRESENT A CLASS CONSISTING OF PRIVATE INDIVIDUALS.

In reviewing the circuit court's order certifying a class, this Court reviews the action for an abuse of discretion. *See Thurman v. CUNA Mut. Ins. Society*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 615-16. An abuse of discretion occurs when there "'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Id.* (quoting *State v. Lemler*, 2009 S.D. 86, ¶ 40, 774 N.W.2d 272, 286).

South Dakota Codified Law, section 15-6-23(a) provides as follows:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if:
> (1) The class is so numerous that joinder of all members is impracticable;
> (2) There are questions of law or fact common to the class;
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;

(4) The representative parties will fairly and adequately protect the interests of the class; and
(5) The suit is not against this state for the recovery of a tax imposed by chapter 10-39, 10-39A, 10-43, 10-44, 10-45, 10-46, 10-46A, 10-46B, or 10-52.

In determining whether a class should be certified, "[A] court is required to conduct a rigorous analysis to determine if the elements of Rule 23 have been met." *In re S.D. Microsoft Antitrust Litig.*, 2003 S.D. 19, ¶ 8, 657 N.W.2d 668, 672. The circuit court failed to conduct such a rigorous analysis and certified the class in error.

The class as certified is defined as "[a]ll individuals who have entered or used, or intend to enter or use, or have encouraged others to enter or use the bodies of water that overlie private property owned by the Plaintiffs . . ." SR 169-70. This class definition included not only South Dakota residents but also non-residents. *Id.* Thus, it included individuals over whom the circuit court may not have had jurisdiction as those private individuals may not have the requisite minimum contacts with the forum. *See Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, ¶ 10, 857 N.W.2d 401, 506-7 (citing *Int'l Shoe Co. v. Wash., Office of Unemp't Comp. & Placement*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). Hence, the mere definition of the class as set forth by the circuit court is "a choice outside the range of permissible choices[.]" *Thurman*, 2013 S.D. 63, at ¶ 11, 836 N.W.2d at 616.

Moreover, the record lacks "at least some evidence" as to the number of class members as required by SDCL 15-6-23(a). *See Shangreaux v. Weber*, 281 N.W.2d 590, 593 (S.D. 1979). A party seeking class certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are *in fact* sufficiently numerous parties, common questions of law or fact, etc." *Wal-mart Stores, Inc. v. Dukes*, 564 U.S.338, 131 S.Ct. 2541, 2551, 180 L.Ed.2d 374 (2011). No evidence in support of this factor appears in the record despite Plaintiffs' contention that hundreds of individuals were trespassing on their private land. SR 126 ll.2-11, 133 ll. 9-15, 134 ll. 1-7.

Furthermore the circuit court erred in determining the requirements of commonality, typicality or adequate representation were satisfied. As this Court has noted, these three factors "tend[] to merge" with each other. *See Thurman,* 2013 S.D. 63, at ¶ 17, 836 N.W.2d at 619. "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Dukes,* 564 U.S. at 350, 131 S.Ct. at 2551 (quoting *Gen. Tel. Co. of Sw. v. Falcon,* 457 U.S. 147, 157, 102 S.Ct. 2364, 72 L.Ed.2d 740 (1982)).

> Their claims must depend upon a common contention . . . . That common contention, moreover, must be of such a nature that it is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

Dukes, 564 U.S. at 350, 131 S.Ct. at 2551. "[T]he typicality provision requires a demonstration that there are other members of the class who have the same or similar grievances . . . ." *Belles v. Schweiker*, 720 F.2d 509, 515 (8th Cir. 1983) (citations omitted). "Proof of typicality requires more than general conclusory allegations." *Belles*, 720 F.2d at 515.

The circuit court found that the commonality prong was satisfied because there is a common question of law - whether the public may use public water which overlies private land. SR 171. However, the allegations against the State, Secretary Hepler, and GF&P were that they violated the Takings Clause whereas the claims against private parties were that they committed a trespass. SR 17. *See also Rupert v. City of Rapid City*, 2012 S.D. 13, ¶ 44, 827 N.W.2d 55, 71. These claims, while similar, require a substantially different analysis and present a conflict within the class. *Benson v. State*, 2006 S.D. 8, ¶ 63, 710 N.W.2d 131, 156. Thus, the requirements of commonality and typicality were not met.

In addition to a lack of commonality or typicality and potential conflicts within the class, the requirement of adequate representation by the class representative was not satisfied.

> In evaluating whether a plaintiff has fulfilled the adequacy of representation requirement of Rule 23(a), a trial court should consider two factors: "'(a) the [defendant's] attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the [defendant] must not have interests antagonistic to those of the class.'"

Thurman, 2013 S.D. 63, at ¶ 17, 836 N.W.2d at 619 (citations omitted). In the instant case, counsel is not "generally able to conduct the proposed litigation."

Secretary Hepler is represented by the South Dakota Attorney General's Office pursuant to state law. The authority of the Attorney General is derived from statute. *See* SDCL 1-11-1. The primary duties of the Attorney General include representation of the State of South Dakota. *See id.* The Attorney General is not authorized to represent private citizens of the State. *See id.* In fact, the Attorney General is prohibited from engaging in the private practice of law. *See* SDCL 1-11-1.1. Likewise, assistant attorneys general "shall have the same power and authority as the attorney general[.]" Additionally, special assistant attorneys general "have the power and authority specifically delegated to them by the attorney general in writing." *See* SDCL 1-11-5. Thus, the undersigned counsel was, and still is, prohibited by law to represent private parties.

Furthermore, as previously indicated, the class as defined was not comprised only of private citizens of the State of South Dakota, but included those individuals who may come from other states or countries. SR 169-70. If counsel does not have the authority to represent citizens of this State, counsel surely does not have the authority to represent individuals who are not residents of South

Dakota. For this reason alone, the motion to certify the class with Secretary Hepler as the class representative should have been denied.

Moreover, as previously demonstrated, Secretary Hepler did not share the same interests as the members of the proposed class. A class representative "must be part of the class and 'possess the same interest and suffer the same injury' as the class members." *Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996). Secretary Hepler was neither an appropriate member of the class nor did he share the same interests or suffer the same injury as the members of the proposed class. The class was defined broadly enough to attempt to include Secretary Hepler by incorporating individuals who "have encouraged others to enter or use the bodies of water that overlie private property owned by Plaintiffs. . . ." However, neither Secretary Hepler nor GF&P, or its agents, have *encouraged* others to enter or use these bodies of water. Defendants do not deny that they have publicly stated that if public water can be accessed legally then it can be used, but this does not amount to encouragement. SR 28.

Additionally, Secretary Hepler's interests are not the same as those of a private individual. Secretary Hepler is charged with the conservation, protection, and management of the State's wildlife and fish and their habitats. *See* SDCL 41-2-18. Secretary Hepler is also responsible for the enforcement of the laws of the State of South Dakota as it relates to wildlife and fisheries. *See id.* As such,

Secretary Hepler's general interests are not the same as those of a private sportsman though some of these interests may be shared.

Likewise, Secretary Hepler's interests with regard to this litigation differ from the interests of the private sportsmen. The claims against Secretary Hepler in this action were initially based upon a theory that the State has engaged in a taking of Plaintiffs' private property without just compensation.[2] Plaintiffs' claims against private parties were based upon a trespass theory. Not only do these two theories require different analyses, they also present a conflict between the State Defendants and the private defendants as illustrated in *Benson*, 2006 S.D. 8, 710 N.W.2d 131.

Because the requirements of Rule 23(a) were not met[3], and for the reasons previously set forth, the certification of this class constitutes "a fundamental error of judgment, a choice outside the range of permissible choices." *Thurman,* 2013 S.D. 63, at ¶ 11, 836 N.W.2d at 616. The circuit court erred in certifying the class as defined, naming Secretary Hepler as the class representative, and

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[2] Plaintiffs have contended that there is no Takings claim despite paragraphs ¶¶ 53-56 of their Complaint. SR 17. Plaintiffs, however, noted in their reply brief on the class certification motion that they wished to amend their Complaint and remove any reference to a Takings claim. SR 123. No motion to amend, however, was ever made. As such, the Takings claim remains a part of the Complaint.

[3] South Dakota Codified Law, section 15-6-23 requires Plaintiffs to satisfy both (a) and (b) of the statute. Satisfaction of § 15-6-23(a) is mandated in order to satisfy the requirements of § 15-6-23(b). As Plaintiffs did not satisfy SDCL § 15-6-23(a), and such satisfaction is a prerequisite for complying with (b), the circuit court additionally erred in finding that Plaintiffs met the requirements of § 15-6-23(b).

compelling the Attorney General's Office to represent private individuals, both residents and nonresidents of this State, contrary to statute. State Defendants respectfully request that this Court rule that it is improper to name the head of an executive agency as a class representative over a class comprised of private individuals. Further, State Defendants request that this Court rule that it is improper to compel the Attorney General's Office to represent a class of private individuals under these circumstances.

II

THE CIRCUIT COURT ERRED IN FINDING THAT WATERS HELD IN PUBLIC TRUST COULD NOT BE USED FOR RECREATIONAL PURPOSES UNDER THE PUBLIC TRUST DOCTRINE AND EXISTING LAWS.

"'This Court reviews declaratory judgments as we do any other order, judgment, or decree' giving no deference to a circuit court's conclusions of law under the de novo standard of review." *In re Pooled Advocate Trust*, 2012 S.D. 24, ¶ 20, 813 N.W.2d 130, 138 (quoting *Fraternal Order of Eagles No. 2421 of Vermillion v. Hasse*, 2000 S.D. 139, ¶ 8, 618 N.W.2d 735, 737).

The circuit court declared that waters held in public trust could not be used for recreational purposes without express authorization of the Legislature. SR 649. This Court, however, has held that all the waters of the state are held in trust for the public by the State under the public trust doctrine. *Parks*, 2004 S.D. 27, at ¶ 1, 676 N.W.2d at 825. Furthermore, the Legislature has previously enacted legislation

providing the authority to manage the waters of the state and generally setting forth its policy regarding how these waters should be put to beneficial use.

"[T]he public trust doctrine imposes an obligation on the State to preserve water for public use. It provides that the people of the State own the waters themselves, and that the State, not as a proprietor, but as a trustee, controls the water for the benefit of the public." *Parks*, 2004 S.D. 27, at ¶ 53, 676 N.W.2d at 840. The United States Supreme Court has held that the scope of "the public trust doctrine remains a matter of state law[.]" *PPL Montana, LLC v. Montana*, ___ U.S. ___, 132 S.Ct. 1215, 1235, 182 L.Ed.2d 77 (2012). It is important to note, however, that the United States Supreme Court has previously recognized a recreational component to the public trust doctrine. *See Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452, 13 S.Ct. 110, 36 L.Ed. 1018 (1892) (finding that water was held in public trust so the people "may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties."). Indeed, many of our sister states have found a right of recreation for waters held in public trust. *See National Audubon Society v. Superior Court*, 658 P.2d 709, 719 (Cal. 1983); *In re Sanders Beach*, 147 P.3d 75, 85 (Idaho 2006); *State v. Sorenson*, 436 N.W.2d 358, 363 (Iowa 1989); *Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942); *Montana Coalition for Stream Access*

v. Curran, 682 P.2d 163, 172 (Mont. 1984); *State ex rel. State Game Commission v. Red River Valley Co.,* 182 P.2d 421, 428 (N.M. 1945); *J.P. Furlong Enterprises, Inc., v. Sun Exploration and Production Co.*, 423 N.W.2d 130, 140 (N.D. 1988); *State ex rel. Brown v. Newport Concrete Co.,* 336 N.E.2d 453, 458 (Ohio 1975); *Oregon Shores Conservation Coalition, et al. v. Oregon Fish and Wildlife Commission*, 662 P.2d 356, 364 (Or. 1983); *Conaster v. Johnson*, 194 P.3d 897, 901 (Utah 2008); *Day v. Armstrong*, 362 P.2d 137, 147 (Wyo. 1961).

This Court has recognized that the Legislature has "codifie[d] public trust principles." *Parks*, 2004 S.D. 27, at ¶ 45, 676 N.W.2d at 838. The Legislature has set forth its overall policy for the management of those waters. "It is hereby declared that the people of the state have a paramount interest in the use of all the water of the state and that the state shall determine what water of the state, surface and underground, can be converted to public use or controlled for public protection." SDCL 46-1-1. Additionally, the Legislature has decreed,

> . . .that the protection of the public interest in the development of the water resources of the state is of vital concern to the people of the state and that the state shall determine in what way the water of the state, both surface and underground, should be developed for the greatest public benefit.

SDCL 46-1-2. Moreover, the Legislature has declared

> . . . that, because of conditions prevailing in this state, the general welfare requires that the water resources of the state be put to beneficial use to the fullest extent of which they are

> capable, and that the waste or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this state is limited to an amount of water reasonably required for the beneficial use to be served, and such right does not extend to the waste or unreasonable use or unreasonable method of diversion of water.

SDCL 46-1-4. Thus, it is the mandate of the Legislature that the waters of the state be put to beneficial use whenever possible.

The Legislature has also generally set forth its policy that the public be allowed to use water which can be legally accessed and that recreation is a beneficial use of water.[4] *See* SDCL 43-17-29 (providing that the public may use a navigable lake, without limitation, when the water level rises above the ordinary high water mark and covering private property if the water can be legally accessed). S*ee also* SDCL §§ 34A-2-1 (protecting waters for the use of recreation from pollution); 41-2-18; 46A-2-2 (listing recreation as a beneficial purpose for creating a water district). Thus, as this Court noted, the Legislature has "codifie[d] public trust principles" and it has indicated that it

[4] GF&P has desired and sought specific legislative direction as to what recreational use may be made of these waters held in public trust. *See* SB 169. Indeed, several attempts have been made to clarify the policy regarding beneficial uses of the waters of the state. *See* SB 169 (2014), HB 1135 (2013), and HB 1096 (2006). None of these attempts were successful. In the absence of specific legislation, GF&P relies on the policies in existing legislation and the public trust doctrine.

adheres to the notion that the public trust doctrine includes recreational purposes.[5]

Additionally, the Legislature vested authority to manage the State's waters to the Department of Environment and Natural Resources and the Department of Game, Fish and Parks. *See* SDCL ch. 1-40 (grant of authority to DENR over water); *see also* SDCL §§ 1-39-5 (grant of quasi-legislative and quasi-judicial authority to GF&P to perform in accordance with ch. 41-2); 41-2-18 (areas upon which the Commission may promulgate rules, including the use of the land and water under the State's control); 41-2-38 (manage land and water for recreation purposes); 41-3-1 (propagation and preservation of game and fish). Furthermore, the Legislature has provided the ability to restrict the use of public water. *See* SDCL 42-8-1.2.

While the "'Legislature cannot abdicate its essential power to enact basic policies into law, or delegate such power to any other department or body[,]'" the Legislature may ""delegate the duty of working out the details and the application of the policy"" when they

[5] In addition to the legislative policies discussed, the South Dakota Supreme Court has long held that public purposes for water include recreation. *Sample v. Harter*, 37 S.D. 150, 156 N.W. 1016 (1916) (recognizing that public uses of lakes include "boating, fishing, fowling, bathing, and taking ice"); *Anderson v. Ray*, 37 S.D. 17, 156 N.W. 591 (1916) (noting public waters "are of value to the public as mere places of recreation, and ought to be preserved by the state for such purposes, if for no other."); *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796 (1915) (noting the public's use of public waters to include "navigating, boating, fishing, fowling, and the like . . .").

have "'written broad policy into law[.]'" *Oahe Conservancy Subdistrict v. Janklow*, 308 N.W.2d 559, 563 (S.D. 1981) (citations omitted). As this Court noted in *Parks*, "the Legislature and Governor formulate policies in the public interest to 'be carried out through a coordination of all state agencies and resources.'" *Parks*, 2004 S.D. 27, at ¶ 51, 676 N.W.2d at 841. The Legislature has spoken as to the broad policy and now GF&P has implemented that policy. Given the delegation of authority to GF&P and DENR to manage the State's water resources and the indications in the broad, legislative policy of placing water to beneficial use, including recreation, GF&P has been acting within the scope of a permissible grant of authority. *See Oahe Conservancy*, 308 N.W.2d at 563 (citations omitted). Accordingly, the circuit court erred in declaring that further authorization was necessary before these public waters could be put to beneficial use by the public for recreation.

III

THE CIRCUIT COURT ERRED IN GRANTING AN INJUNCTION WHICH PROHIBITS THE RECREATIONAL USE OF WATERS HELD IN PUBLIC TRUST BUT ALLOWS PRIVATE LANDOWNERS THE RIGHT TO USE AND CONTROL ACCESS TO THOSE PUBLIC WATERS.

The circuit court's grant of injunctive relief is reviewed for an abuse of discretion. *See Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 10, 855 N.W.2d 133, 138. The circuit court's findings of fact are

reviewed under a clearly erroneous standard but the conclusions of law are reviewed de novo. *See id.*

The circuit court erred in granting Plaintiffs' request for injunctive relief. An injunction may be granted only where it is necessary to "prevent the breach of an obligation existing in favor of the applicant." SDCL 21-8-14. South Dakota Codified Law, section 21-8-14 sets forth the conditions under which an injunction may issue. It provides as follows:

> Except where otherwise provided by this chapter, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:
>
> (1) Where pecuniary compensation would not afford adequate relief;
> (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
> (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or
> (4) Where the obligations arises from a trust.

SDCL 21-8-14. In addition to satisfying the circumstances set forth in SDCL 21-8-14, this Court has set forth other factors that should be considered when determining whether injunctive relief is appropriate.

> Those factors include: "(1) Did the party to be enjoined cause the damage? (2) Would the irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party. . . disproportionate to the . . . benefit to be gained by the injured party?"

Strong, 2014 S.D. 69, at ¶ 11, 855 N.W.2d at 138 (quoting *New Leaf, LLC v. FD Dev. of Black Hawk LLC*, 2010 S.D. 100, ¶ 15, 793 N.W.2d 32, 35).

The grant of injunctive relief was improper as there is no "obligation existing in favor" of Plaintiffs. *See* SDCL 21-8-14. This water is held in public trust by the State for the benefit of the public. Plaintiffs' rights in that public water are only those rights which they share with the public in general. *See Parks*, 2004 S.D. 27, at ¶ 30, 676 N.W.2d at 833. Thus, Plaintiffs have no rights in public water that could be protected by issuing an injunction which prohibits the public from using water held in public trust which may be legally accessed. Moreover, Plaintiffs' property rights stemming from ownership of land are not superior to those rights the public holds in this asset held in public trust. *See, cf., Anderson v. Ray*, 37 S.D. 17, 156 N.W.591, 595 (1916) (holding that riparian landowner's rights are "subject to the superior right of the public").

The record demonstrates no admissible evidence to support a finding that it would be difficult to ascertain the amount of compensation that would be appropriate or that an injunction is necessary to "prevent a multiplicity of judicial proceedings." The only evidence provided by Plaintiffs to support their request for injunctive relief are conclusory statements and a series of photographs for which there is little foundation and no clear relevance. SR 504. In fact, while

State Defendants are aware that the public utilizes the water held in public trust overlying Plaintiffs' privately-owned land, there is no evidence of trespass occurring on Plaintiffs' land. Individuals who legally access and subsequently use the public water are not committing a trespass when they remain on the public water, so long as there is no impermissible invasion of the privately-owned land.[6] *See, cf., Heikkila v. Carver*, 416 N.W.2d 593 (S.D. 1987) (holding that "[o]wnership of oil and gas rights carries with it by implication the means of enjoying the mineral estate[]"). State Defendants have never received an official report of trespass on Plaintiffs' private property. SR 510, 551.

Furthermore, there was no demonstration that any of the circumstances set forth in SDCL 21-8-14 were satisfied. Moreover, none of the other factors to be considered set forth by this Court are satisfied. State Defendants are not the cause of the alleged damage, nor can they be held responsible for the actions of private individuals under *Benson*. *See Benson*, 2006 S.D. 8, at ¶ 63, 710 N.W.2d at 156. Additionally, Plaintiffs would still have a remedy at law against any individuals who actually committed a trespass on their land.

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[6] South Dakota Codified Law, section 41-9-1 provides, "Except as provided in § 41-9-2, no person may fish, hunt or trap upon any private land not his own or in his possession without permission from the owner or lessee of such land. A violation of this section is a Class 2 misdemeanor and is subject to § 41-9-8." Thus, a trespass does not result from mere contact with public water. Rather, to constitute a trespass, there must be contact with the land.

Furthermore, State Defendants are not acting in bad faith. Rather, State Defendants are acting in accordance with the policies set forth by the Legislature. Finally, the harm that would result to the public is far greater than any benefit that Plaintiffs may receive.[7] The public would be harmed by not being allowed to use an asset held in public trust which can be accessed legally. Additionally, a harm would be done to the State as it would be unable to manage or control an asset which it holds in trust.

Likewise, in light of the legislative policies enacted and the prior holdings of this Court that public water may be put to recreational use, those individuals legally accessing these waters have not been acting in bad faith. An asset which is held in public trust is to be used for the benefit of the public. To withhold use of that asset would result in a grave harm to the public interest. Ultimately, Plaintiffs cannot demonstrate that any of the circumstances set forth in SDCL 21-8-14 are satisfied. As a result, injunctive relief in favor of Plaintiffs was not warranted.[8]

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[7] The disproportionate burden becomes even more evident with the fact that Duerres approved of the stocking of their slough as a rearing pond with 2.6 million walleye fry by GF&P in 2002 while acknowledging the potential of increased use by the public once the slough ceased to be used as a rearing pond. SR 536.

[8] Additionally, it was inappropriate to issue an injunction similar to the one in *Parks* against any individuals. This Court in *Parks*, did not approve of the grant of an injunction prohibiting the public use of those particular bodies of water. This Court held:

The circuit court additionally erred in issuing an injunction that prohibits the public use of, and limits the control of the State over, an asset held in trust for the public but allows Plaintiffs, who are private individuals, the authority to use and control a public asset. The South Dakota Supreme Court declared in *Parks*, that the waters of the State are held in trust for the public's use. "[W]e conclude that the State of South Dakota retains the right to use, control, and develop the water in these lakes as a separate asset in trust for the public." *Parks*, 2004 S.D. 27, at ¶ 46, 676 N.W.2d at 838. The Court further held "we acknowledge, in accord with the State's sovereign powers and the legislative mandate, that all waters within South Dakota, not just those waters considered navigable under the federal test, are held in trust by the State for the public." *Id.* It is inherently unjust to provide private individuals the authority to dictate the use of an asset held in public trust. Such a grant of authority flies in the face of the public trust doctrine and is contrary to this Court's holding in *Parks*. *Id.* at

> [t]he trial court erred in declaring these waters to be private and in granting an injunction on that basis. In the meantime, in the interest of maintaining the status quo, we leave the injunction intact until such time as, on remand, the trial court has the opportunity to consider the positions of the parties, the state agencies, and the public and grant such relief as it deems appropriate in light of this opinion.

Parks, 2004 S.D. 27, at ¶ 51, 676 N.W.2d at 840. The injunction was, therefore, determined to be improper. That those parties have not appeared before the trial court on remand to address whether the injunction should remain in effect does not signal any sort of approval or ratification of that injunction by State Defendants.

¶ 51 (holding that this Court would not substitute its determination for the Legislature's as to how to utilize this asset).

Plaintiffs have no right or authority to exercise control over this asset. South Dakota has "never recognized in its riparian doctrine or in appropriation doctrine an unqualified right to own and control water." *Parks,* 2004 S.D. 27, at ¶ 28, 676 N.W.2d at 832. Plaintiffs have only those rights in the water that they share in common with the public. *Id.* at ¶ 30, 676 N.W.2d at 833. They have no vested interest arising from prior usage or appropriation of the water. *See* SDCL 46-1-15 (prohibiting the appropriation of water without a permit). Plaintiffs are akin to riparian landowners who have a right to access and use the waters "for the purposes for which the public has a right to use it, viz., navigating, boating, fishing, fowling, and like public uses." *Flisrand*, 35 S.D. 457, 152 N.W. at 801. Furthermore, Plaintiffs' property rights do not extend to the public water overlying their private land, nor are the property rights they do possess in the land superior to those rights of the public in the water. *See, cf.*, *Anderson*, 37 S.D. 17, 156 N.W. at 595 (holding that riparian landowner's rights are "subject to the superior right of the public").

The circuit court thus erred in determining that Plaintiffs' property rights stemming from land ownership are superior to the public's right to utilize public water. Furthermore, the circuit court essentially transferred control of a public asset to private individuals.

It is error to allow a few private individuals to access and use a public asset while telling the State and the public that it cannot use the asset without express authorization of the Legislature. Such actions constitute an abuse of discretion which should be reversed.

CONCLUSION

This Court aligned South Dakota with Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah, and Wyoming when it declared that all waters of the state are held in public trust. *Parks,* 2004 S.D. 27, at ¶ 46, 676 N.W.2d at 838. These states recognize a recreational use of public water under the public trust doctrine. *See In re Sanders Beach*, 147 P.3d at 85; *Sorenson*, 436 N.W.2d at 363; *Nelson*, 7 N.W.2d at 346; *Curran*, 682 P.2d at 172; *Red River Valley,* 182 P.2d at 428; *J.P. Furlong*, 423 N.W.2d at 140 ; *Oregon Shores*, 662 P.2d at 364; *Conaster*, 194 P.3d at 901; *Day*, 362 P.2d at 147. This Court should likewise recognize that water held in trust for the public can be put to recreational use if lawfully accessed. Accordingly, Appellants respectfully request that this Court reverse the determination of the circuit court and hold that the waters held in public trust are available for recreational use by the public under the public trust doctrine as enacted in existing legislation. Appellants additionally request that this Court vacate the injunction issued by the circuit court and nullify the privatization of a public asset. Finally, Appellants respectfully request that this Court hold that it was

improper to designate Secretary Hepler as class representative and compel the Attorney General's Office to provide legal representation for private individuals.

Respectfully submitted,

MARTY J. JACKLEY
ATTORNEY GENERAL

/s/ *Ann F. Mines Bailey*
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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellant's Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellee's Brief contains 6,131 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this 11th day of July 2016.

/s/ *Ann F. Mines Bailey*
Ann F. Mines Bailey
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 11th day of July 2016, a true and correct copy of Appellant's Brief in the matter of *Duerre et al. v. Hepler et al.* was served via electronic mail upon Ronald A. Parsons, Jr., ron@janklowabdallah.com; Shannon R. Falon, Shannon@janklowabdallah.com; Jack H. Hieb, jhieb@rwwsh.com; and zpeterson@rwwsh.com.

/s/ *Ann F. Mines Bailey*
Ann F. Mines Bailey
Assistant Attorney General

APPENDIX

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STATE OF SOUTH DAKOTA) :ss COUNTY OF DAY)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR; Plaintiffs, vs. KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie, Defendants.	CIV. 14-43 **ORDER AND FINAL JUDGMENT GRANTING DECLARATORY RELIEF AND PERMANENT INJUNCTION TO PLAINTIFFS**

Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr filed this action seeking declaratory and injunctive relief against the State Defendants and a putative certified class.

On August 19, 2015, this Court entered an Order Granting Motion for Certification of Defendant Class in this action defined as follows: "All individuals who have entered or used, intend to enter or use, or have permitted others to enter or use the bodies of water that overlie private property owned by the Plaintiffs as detailed on Exhibits A and B to the Plaintiffs' Complaint for Declaratory and Injunctive Relief."

The private property covered by this judgment consists of the following property owned by Thad Duerre, Clint Duerre, and Robert Duerre:

> All of Sections 13 and 23; the Northwest Quarter (NW1/4) and Southwest Quarter (SW1/4) of Section 12; the Northeast Quarter (NE1/4) and

> Southeast Quarter (SE1/4) of Section 14; the East Half and Southwest Quarter of the Northeast Quarter (E1/2SW1/4) of Section 22; the North Half of the Southeast Quarter (N1/2SE1/4) of Section 22; and the North Half of the Southwest Quarter (N1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

And the following property owned by LaRon Herr:

> The Southeast and the East Half of the Northeast Quarter (E1/2NE1/4) of Section 21; the South Half of the Southeast Quarter (S1/2SE1/4) of Section 22; and the South Half of the Southwest Quarter (S1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

No other property is covered by this judgment or grant of declaratory and injunctive relief.

On March 3, 2016, Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr filed a motion for summary judgment and the Defendants filed a cross-motion for summary judgment. A hearing on the motions was held on April 20, 2016, at 3:00 p.m. in the courtroom of the Day County Courthouse in Webster, South Dakota, the Honorable Jon Flemmer, Circuit Judge, presiding. Present at the hearing were Attorneys Ron Parsons and Jack Hieb, as counsel for the Plaintiffs, and Assistant Attorney General Ann F. Mines-Bailey, as counsel for the Defendants. Counsel for the Plaintiffs and Defendants each submitted briefs to the Court before the hearing. The parties agreed on the record that there are no disputed material facts and that the case presents a question of law amenable for summary judgment.

Based upon the arguments of counsel, the briefs, the pleadings and evidence in the record, and the applicable law, for the reasons stated on the record at the hearing, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

The Defendants' cross-motion for summary judgment is DENIED; and

The Plaintiffs' motion for summary judgment is GRANTED as follows:

> Southeast Quarter (SE1/4) of Section 14; the East Half and Southwest Quarter of the Northeast Quarter (E1/2SW1/4) of Section 22; the North Half of the Southeast Quarter (N1/2SE1/4) of Section 22; and the North Half of the Southwest Quarter (N1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

And the following property owned by LaRon Herr:

> The Southeast and the East Half of the Northeast Quarter (E1/2NE1/4) of Section 21; the South Half of the Southeast Quarter (S1/2SE1/4) of Section 22; and the South Half of the Southwest Quarter (S1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

No other property is covered by this judgment or grant of declaratory and injunctive relief.

On March 3, 2016, Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr filed a motion for summary judgment and the Defendants filed a cross-motion for summary judgment. A hearing on the motions was held on April 20, 2016, at 3:00 p.m. in the courtroom of the Day County Courthouse in Webster, South Dakota, the Honorable Jon Flemmer, Circuit Judge, presiding. Present at the hearing were Attorneys Ron Parsons and Jack Hieb, as counsel for the Plaintiffs, and Assistant Attorney General Ann F. Mines-Bailey, as counsel for the Defendants. Counsel for the Plaintiffs and Defendants each submitted briefs to the Court before the hearing. The parties agreed on the record that there are no disputed material facts and that the case presents a question of law amenable for summary judgment.

Based upon the arguments of counsel, the briefs, the pleadings and evidence in the record, and the applicable law, for the reasons stated on the record at the hearing, it is hereby

ORDERED, ADJUDGED, AND DECREED that:

The Defendants' cross-motion for summary judgment is DENIED; and

The Plaintiffs' motion for summary judgment is GRANTED as follows:

FINAL JUDGMENT ON ALL CLAIMS IS ENTERED ACCORDINGLY.

Dated this _____ day of April, 2016.

BY THE COURT:
Signed: 4/28/2016 6:05:04 PM

Hon. Jon Flemmer
Circuit Judge

ATTEST: Attest:
Claudette Opitz
By: Clerk/Deputy

(SEAL)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing **Proposed Order and Final Judgment** was served via the Odyssey system and email upon the following:

Ann F. Mines-Bailey
Assistant Attorney General
Richard J. Neill
Special Assistant Attorney General
ATTORNEY GENERAL'S OFFICE
1302 E. Highway 14, Suite 1
Pierre, S.D. 57501

on this 25th day of April, 2016.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

STATE OF SOUTH DAKOTA) :ss COUNTY OF DAY)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR; Plaintiffs, vs. KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie, Defendants.	CIV. 14-43 **Findings of Fact and Conclusions of Law in Support of Order Granting Motion for Certification of Defendant Class**

Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr filed a motion for an order certifying a class of defendants in the above-captioned case pursuant to SCL 15-6-23. A hearing on the motion was held on May 20, 2015, at 9:30 a.m. in the courtroom of the Day County Courthouse in Webster, South Dakota, the Honorable Jon Flemmer, Circuit Judge, presiding. Present at the hearing were Attorneys Ron Parsons and Zach Peterson, as counsel for the Plaintiffs, and Assistant Attorney General Ann F. Mines-Bailey, as counsel for the Defendants. Counsel for the Plaintiffs and Defendants each submitted briefs to the Court prior to the hearing.

Based upon the arguments of counsel, the briefs, the pleadings and evidence in the record, and the applicable law, the Court granted the motion to certify a class of defendants pursuant to

SDCL 15-6-23(a) and 23(b)(1) and now issues the following findings of fact and conclusions of law in support of that order:

FINDINGS OF FACT

1. Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre all own land in Day county, South Dakota that they have farmed since it was homesteaded by their family in the late nineteenth century.

2. The covered private property owned by Thad Duerre, Clint Duerre, and Robert Duerre consists of:

> All of Sections 13 and 23; the Northwest Quarter (NW1/4) and Southwest Quarter (SW1/4) of Section 12; the Northeast Quarter (NE1/4) and Southeast Quarter (SE1/4) of Section 14; the East Half and Southwest Quarter of the Northeast Quarter (E1/2SW1/4) of Section 22; the North Half of the Southeast Quarter (N1/2SE1/4) of Section 22; and the North Half of the Southwest Quarter (N1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

3. Plaintiff LaRon Herr owns land in Day County, South Dakota, that he and his family have farmed for at least thirty years.

4. And the covered private property owned by LaRon Herr consists of:

> The Southeast and the East Half of the Northeast Quarter (E1/2NE1/4) of Section 21; the South Half of the Southeast Quarter (S1/2SE1/4) of Section 22; and the South Half of the Southwest Quarter (S1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

5. Pursuant to SDCL 15-6-23, Plaintiffs brought this complaint for declaratory and injunctive relief against the State and all persons who have entered or used, intend to enter or use, or have permitted others to enter or use the bodies of water that overlie their private property since the South Dakota Supreme Court's decision in *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823.

6. Defendant South Dakota Department of Game, Fish and Parks is an arm of the

Executive Department of the State of South Dakota.

7. Defendant Kelly R. Hepler is the duly appointed Secretary of the State of South Dakota.

8. In approximately 1993, due to excessive rainfall, much of the farmland owned by the Duerre and Herr families became submerged.

9. Beginning in approximately 2001, numerous people began entering on the Duerre and Herr properties on a regular basis in order to fish and hunt on their private land without permission. Many individuals launched boats from County Road 33, which runs through the Duerre and Herr properties.

10. Since at least 2004, whenever the Duerres or Herrs informed these individuals that they were trespassing, they would typically refuse to leave, stating that the Game Fish and Parks Department had told them that it was "public water" on which they authorized to hunt and fish, including ice fishing.

11. In their answer, the Defendants "admit that members of the public may have made recreational use this water" and "further admit that boats are launched from County 33 into waters held in public trust." (Answer, ¶ 12).

12. The Defendants further admitted that "since the decision in *Parks*, the public has been informed that if they can reach waters held in public trust via legal access, they may use those waters for recreational purposes," that they have "advised the public that waters held in public trust are open to the public for recreational purposes," and have "informed the public they are free to use water held in public trust for recreational purposes if reached by legal access with the exception of walking on submerged land." (Answer, ¶¶ 13, 14, 15).

13. As the result of the Defendants' actions, the Plaintiffs' private property – their

submerged farmland on which they pay taxes – has been constantly inundated with trespassers who treat it as a public park, driving trucks, snowmobiling, boating, fishing, firing guns, operating loud machinery, erecting and using ice shacks that stay up all winter, blaring music, getting drunk, littering, cooking dinner, and camping out.

14. Such conduct is barred on submerged private land owned by the plaintiffs in the *Parks* case as the result of the injunction granted in that case and left in place by the South Dakota Supreme Court in the absence of action by the South Dakota Legislature.

15. The *Parks* decision involved a similar, if not identical, certified class of defendants.

16. The Defendants enforce the injunction preventing members of the public from entering the submerged private lands owned by the plaintiffs in the *Parks* case, but refuse to treat the submerged private lands owned by the Plaintiffs in this case with the same respect and equal treatment under the law, instead openly informing members of the public that they are free to enter and use the submerged private lands owned by the Plaintiffs for any purpose and to remain on them, so long as the submerged private property is wet or covered with ice and can be accessed through a submerged county road or some other legal access point.

17. Hundreds of people are already entering and using the water and ice located on the Plaintiffs' submerged farmland and many more are likely to continue to do so.

18. As the newly appointed Secretary of the Games, Fish and Parks Department (replacing Secretary Vonk), Secretary Hepler disagrees with the Plaintiffs' claims in this case and, through his counsel, has signaled his intention to vigorously oppose them.

19. It is clear from the Defendants' filings in this case that they are taking a position that Court should determine that the public has the right to use the water and ice on the Plaintiffs' private farmland for recreational purposes.

20. Regarding non-meandered waters on private property in South Dakota after *Parks*, Secretary Hepler's General Counsel has announced that the "State continues to follow pre-Parks approach to recreational use of these waters."

21. Any finding of fact more properly designated as a conclusion of law shall be treated as such.

CONCLUSIONS OF LAW

1. The Court has proper jurisdiction over this matter.

2. The certification of a class action under South Dakota law is governed by SDCL 15-6-23.

3. As soon as practicable after the commencement of a class action, the Court is to determine by order whether it will be so maintained. *See* SDCL 15-6-23(c)(1).

4. Because SDCL 15-6-23(a) applies equally to permit the certification of a class "to sue or be sued," it is also well settled that claims may be brought against a class of defendants. This is particularly true in cases such as this for purely declaratory or injunctive relief involving the proper application of statewide law.

5. Because this proposed class of defendants meets the requirements of SDCL 15-6-23, just as in *Parks*, the motion for certification is granted.

6. Certification of a defendant class is granted only as to declaratory and injunctive relief sought prohibiting public entrance and use of the water overlying the Plaintiffs' private property in the absence of Legislative authorization. *See* SDCL 15-6-23(c)(4).

7. The Class of Defendants certified by the Court is defined as members of the public, and specifically designated as follows:

> All individuals who have entered or used, intend to enter or use, or have permitted others to enter or use the bodies of water that overlie private property owned by the

Plaintiffs as detailed on Exhibits A and B to the Plaintiffs' Complaint for Declaratory and Injunctive Relief.

8. On a motion for class certification, the burden lies with the party seeking certification to demonstrate that the criteria of class certification have been met.

9. Plaintiffs are not required to prove their cases on the merits at the class certification stage. Thus, when considering a motion for class certification, the court's inquiry is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met.

10. Under South Dakota law, class certification is favored by courts and any doubts as to whether a class should be granted certification should be resolved in favor of certification.

11. An action may be brought against a class of defendants where the five requirements of SDCL 15-6-23(a) are met and, additionally, any one of the three prongs of SDCL 15-6-23(b) is satisfied.

Rule 23(a)

12. This action meets all five prerequisites for a class of defendants that may be sued pursuant to SDCL 15-6-23(a).

13. Regarding Rule 23(a)(1), the Court finds and concludes that the members of the class are so numerous that their individual joinder in a single action is impracticable.

14. The class consists of all members of the public who have entered or used, intend to enter or use, or have permitted others to enter or use, either the Plaintiffs' private property or the waters or ice that overlie the Plaintiffs' private property.

15. It is not practicable for the Plaintiffs to serve and bring a lawsuit against all of the members of the public who have or might seek to use the water or ice on the Plaintiffs' submerged private property in this case.

16. The members of the defendant class are so numerous that their individual joinder in a single action is not only impracticable, but impossible. The plaintiffs could never identify each of the potential individuals who might enter their property or permit others to do so.

17. Regarding Rule 23(a)(2), the Court finds and concludes that there is a question of law or fact in this action that is common to the class of defendants.

18. For class certification under South Dakota law, not all questions of law or fact raised need to be in common; rather, this requirement is concerned with whether or not the particular issues in an action are individual in nature, and therefore, must be decided on a case-by-case basis.

19. There a common question of law in this case that applies in exactly the same manner to all of the members of the defendant class: whether or not members of the public are authorized to enter and use the water and ice overlying the Plaintiffs' submerged private property in the absence of Legislative authorization.

20. There are no individual questions of law or fact requiring resolution on a case-by-case basis.

21. Regarding Rule 23(a)(3), the Court finds and concludes that the defenses of the representative parties are typical of the defenses of the class.

22. The case involves questions of state law that apply equally to all and do not depend upon the identities of the representative parties.

23. As in the *Parks* case, the typicality test is readily satisfied because the defendants, represented by Secretary Hepler, have the same legal defenses available to any other member of the class who would seek to enter and use the water overlying the Plaintiff's private land or otherwise make contact with that private property.

24. The same nature and quantum of proof regarding the defenses asserted by the named representative in this case are applicable to all defendants.

25. Regarding Rule 23(a)(4), the Court finds and concludes that the representative defendants will fairly and adequately protect the interests of the class.

26. Adequate representation depends on two factors: (1) the attorney for the representative party must be qualified, experienced, and generally able to conduct the defense, and (2) the representative party must not have interests antagonistic to those of the class.

27. Secretary Hepler is designated as the class representative for the Class of Defendants on this issue of public law affecting every citizen in the State of South Dakota in the identical manner.

28. The Class of Defendants could not have a better representative or one with more experienced and capable counsel. The representative parties are represented by the Attorney General's Office, whose attorneys are qualified, experienced, and generally able to conduct the defense.

29. The Attorney General's Office very capably conducted the defense of the *Parks* litigation, which involved a very similar, if not identical certified class of defendants.

30. SDCL 1-11-1(1) & (2) authorize the Attorney General to appear for the State and defend "in any court or before any officer, any cause or matter, civil or criminal, in which the state shall be a party or interested." This case qualifies as a cause or matter in which the State is party or interested.

31. SDCL 1-11-1.1 states that "The attorney general shall serve on a full-time basis and shall not actively engage in the private practice of law." Defending this action will in no sense constitute actively engaging in the private practice of law or providing legal representation to

private parties. The only parties to this action, other than the Plaintiffs, are State entities and officials.

32. The representative parties do not have interests antagonistic to those of the class. Rather, they have expressed a strong interest in defending against this action and upholding the perceived rights of members of the public to enter and use the waters that overlie the Plaintiffs' private land.

33. Based upon the position taken by the Defendants in this case, it is clear that the interests of any private individual who would intend to use the water or ice on the Plaintiffs' private lands for recreational purposes, and thus would be part of the class of defendants, would have their interests protected by the named Defendants.

34. Secretary Hepler is as much a part of the class and is in the same position as any other individual who might seek to enter and use the waters over the Plaintiffs' private property.

35. It is difficult envision any individual better suited than Secretary Hepler to represent the interests of the class.

36. With Secretary Hepler representing the defendant class, it will receive splendid legal representation and an excellent defense.

37. In such circumstances, there is no reason to unnecessarily expand the number of litigants in order to obtain answers to the basic statewide questions of law involved in this case.

38. Regarding Rule 23(a)(5), the Court finds and concludes that this suit is not against the State of South Dakota for the recovery of a tax imposed by SDCL Chapter 10-39, 10-39A, 10-43, 10-44, 10-45, 10-46, 10-46A, 10-46B, or 10-52.

Rule 23(b)(1)

39. In addition, the Court concludes that this class of defendants is appropriate for certification under Rule 23(b)(1).

40. This action is maintainable against this class of defendants pursuant to SDCL 15-6-23(b)(1). In order for a class to be certified under Rule 23(b)(1), it need only meet one of the two elements set forth in Rule 23(b)(1)(A) and Rule 23(b)(1)(B). The Court finds and concludes that both of these elements are met.

41. Regarding Rule 23(b)(1)(A), the Court finds and concludes that the prosecution of separate actions against individual members of the class would create a risk of inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class.

42. Alternatively, regarding Rule 23(b)(1)(B), the Court finds and concludes that adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

43. If the Plaintiffs were forced to bring separate actions against every person that they believe is trespassing or might trespass on their land by entering and using the water that overlies it, an adjudication with respect to individual members of the class would essentially also be dispositive of those who were not parties to the specific litigation, in that the final adjudication of the applicable questions of law would, as a practical matter, be applied to others.

44. If this Court granted the injunction sought against one individual, it would as a practical matter be applicable to all in the same the fashion, just as the injunction in the *Parks* decision is and remains to this day.

45. Having certified this class of defendants under Rule 23(b)(1), this Court does not certify the class under either Rule 23(b)(2) or rule 23(b)(3).

46. Because this class of defendants is not certified under Rule 23(b)(3), there is no notice requirement pursuant to SDCL 15-6-23(c)(2).

47. Any conclusion of law more property designated as a finding of fact shall be treated as such.

Dated this _____ day of August, 2015.

Signed: 8/19/2015 4:28:46 PM

BY THE COURT:

Hon. Jon Flemmer
Circuit Judge

Attest:
Claudette Opitz , Clerk/Deputy

ATTEST:

By:_____

(SEAL)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing **Plaintiffs' Proposed Findings of Fact and Conclusions of Law in Support of Order Granting Certification of Defendant Class** was served via the Odyssey system upon the following:

Ann F. Mines-Bailey
Assistant Attorney General
Richard J. Neill
Special Assistant Attorney General
ATTORNEY GENERAL'S OFFICE
1302 E. Highway 14, Suite 1
Pierre, S.D. 57501

on this 4th day of August, 2015.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

STATE OF SOUTH DAKOTA) :ss COUNTY OF DAY)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR; Plaintiffs, vs. KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie, Defendants.	CIV. 14-43 **STATEMENT OF UNDISPUTED MATERIAL FACTS IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

Pursuant to SDCL 15-6-56(c)(1), Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr respectfully submit their statement of material facts as to which they contend there is no genuine issue to be tried in support of their motion for summary judgment. This statement is further supported by: (1) Plaintiffs' Brief; (2) Affidavit of Counsel and attached exhibits filed on May 15, 2015 in support of Plaintiffs' Motion for Certification of Defendant Class with Attached Exhibits 1-19; (3) Affidavit of Warren L. Fisk with attached Exhibit 20; (4) Affidavit of Thad Duerre with attached Exhibit 21; (5) Affidavit of LaRon Herr with Attached Exhibit 21; and (6) the Affidavit of Counsel filed in connection with this motion with attached Exhibits 22-32.

1. Plaintiffs Thad Duerre, Robert Duerre, Clint Duerre, and LaRon Herr are farmers and private property owners in Day County. (Duerre Aff., ¶¶ 1-3; Herr Aff., ¶¶ 1-3; Complaint, Ex. A).

2. The private property owned by Thad Duerre, Clint Duerre, and Robert Duerre consists of:

> All of Sections 13 and 23; the Northwest Quarter (NW1/4) and Southwest Quarter (SW1/4) of Section 12; the Northeast Quarter (NE1/4) and Southeast Quarter (SE1/4) of Section 14; the East Half and Southwest Quarter of the Northeast Quarter (E1/2SW1/4) of Section 22; the North Half of the Southeast Quarter (N1/2SE1/4) of Section 22; and the North Half of the Southwest Quarter (N1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

(Duerre Aff., ¶¶ 1-3; Complaint, Ex. A).

3. The private property owned by LaRon Herr consists of:

> The Southeast and the East Half of the Northeast Quarter (E1/2NE1/4) of Section 21; the South Half of the Southeast Quarter (S1/2SE1/4) of Section 22; and the South Half of the Southwest Quarter (S1/2SW1/4) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

(Herr Aff., ¶¶ 1-3; Complaint, Ex. A).

4. Defendant South Dakota Department of Game, Fish and Parks is an arm of the Executive Department of the State of South Dakota. (Defendant's Answer).

5. Defendant Kelly R. Hepler is the duly appointed Secretary of the South Dakota Department of Game, Fish and Parks. (Order substituting party).

6. Secretary Hepler was appointed to succeed former Defendant Jeffrey Vonk, the former Secretary of the South Dakota Department of Game, Fish, and Parks following Vonk's retirement in 2015. (Order substituting party).

7. None of the farmland owned by the plaintiffs was meandered at the time of its original survey as part of the Dakota Territory and properly so, because there were no lakes nor any substantial standing water on the land at that time. (Ex. 24 (original plat survey of Township 120); Fisk Aff., Ex. 20; Ex. 26 at p. 111 – testimony of South Dakota Game, Fish and Parks Wildlife Investigator Robert Losco).

8. Some of the farmland owned by the plaintiffs flooded during the 1990's. (Duerre Aff., ¶¶ 4-6; Herr Aff., ¶¶ 4-6; Complaint, Ex. B; Ex. 21; Ex. 26 at p. 126-30).

9. The farmland owned by the plaintiffs is now frequently subjected to encroachment by people who, with the active encouragement of the defendants, now boat, fish, hunt, fire guns, set up villages of ice shacks, drive cars, trucks and snowmobiles, and camp out on the water or ice and snow covering their property for much of the year. (Defendant's Answer, ¶ 12; Duerre Aff., ¶¶ 7-10; Herr Aff., ¶¶ 7-10; Ex. 2; Ex. 4; Ex. 7; Ex. 8; Ex. 25).

10. In more than ten years since the South Dakota Supreme Court's decision in *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823, the South Dakota Legislature has never granted any right to members of the general public to use non-meandered bodies of water on private property for recreational uses, but instead has rejected proposed legislation drafted by the defendants that would grant the public a limited right to use certain non-meandered bodies of water for recreational uses and purport to allow certain trespasses upon private land underlying non-meandered bodies of water. *See, e.g.*, S.B. 169 (2014) (Ex. 32).

11. The defendants do not enforce the injunctive relief set forth in the *Parks* decision for any private farmland with the sole exception of the land owned by the named plaintiffs in the *Parks* lawsuit. (Ex. 2; Ex. 4; Ex. 7; Ex. 8; Ex. 22; Ex. 25).

12. The defendants have informed the public that anyone is welcome to walk, drive, set up ice shacks, fish, or hunt on the private farmland owned by the plaintiffs so long as it is covered by water or ice and the public can find a way to legally access the property using a submerged county road or some other means. (Defendant's Answer, ¶¶ 13, 14, 15; Ex. 2; Ex. 22; Ex. 26 at p. 101-05, 110-13, 117-20 – testimony of South Dakota Game, Fish and Parks Wildlife Investigator Robert Losco).

13. As a result, because several washed-out county roads now dead-end into the plaintiffs' farms, their private property has been inundated with people seeking to enter it to fish, hunt, snowmobile, or set up ice shacks that remain all winter. (Duerre Aff., ¶¶ 7-10; Herr Aff., ¶¶ 7-10; Ex. 2; Ex. 4; Ex. 7; Ex. 8; Ex. 22; Ex. 25).

14. In order to obtain the same rights, peace and quiet, privacy, security, and protection that the defendants continue to provide to the plaintiffs in the *Parks* lawsuit, these families brought an action simply to enforce that decision regarding their land as well. (Duerre Aff., ¶ 11; Herr Aff., ¶ 11).

15. The Defendants have admitted "that members of the public may have made recreational use this water" and "further admit that boats are launched from County 33 into waters held in public trust." (Answer, ¶ 12).

16. The Defendants have admitted that "since the decision in *Parks*, the public has been informed that if they can reach waters held in public trust via legal access, they may use those waters for recreational purposes," that they have "advised the public that waters held in public trust are open to the public for recreational purposes," and have "informed the public

they are free to use water held in public trust for recreational purposes if reached by legal access with the exception of walking on submerged land." (Answer, ¶¶ 13, 14, 15).

17. After *Parks* was issued by the South Dakota Supreme Court, Secretary Hepler's General Counsel publicly stated that the "State continues to follow pre-Parks approach to recreational use of these waters." (Ex. 12 at 4 -ATG 00003583; Ex. 13 at 13 – ATG 00003668).

18. Regarding the bodies of water located on the private farmland owned by the plaintiffs in Day County, Secretary Vonk stated in 2011 that, "it would take an act of the South Dakota Legislature to dedicate these non-meandered water bodies as public recreational resources." (Ex. 22).

Dated this 11th day of March, 2016.

JOHNSON JANKLOW ABDALLAH BOLLWEG & PARSONS LLP

BY */s/ Ronald A. Parsons, Jr.*
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Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing **Plaintiffs' Statement of Undisputed Material Facts in Support of Motion for Summary Judgment** was served via email upon the following:

Ann F. Mines-Bailey
Assistant Attorney General
Richard J. Neill
Special Assistant Attorney General
ATTORNEY GENERAL'S OFFICE
1302 E. Highway 14, Suite 1
Pierre, S.D. 57501

on this 11th day of March, 2016.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss.	
COUNTY OF DAY	)	FIFTH JUDICIAL CIRCUIT
THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR;	)	No. 18 CIV 14-43
Plaintiffs,	)	
v.	)	
KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie,	)	DEFENDANTS' RESPONSE TO PLAINTIFFS' STATEMENT OF UNDISPUTED MATERIAL FACTS
Defendants.	)	

Comes now, Secretary Hepler, Department of Game, Fish and Parks (GF&P), the State of South Dakota, and the class of individuals as defined and certified by this Court, and file Defendants' Response to Plaintiffs' Statement of Material Facts pursuant to SDCL §15-6-56(c).

1. Plaintiffs Thad Duerre, Robert Duerre, Clint Duerre, and LaRon Herr are farmers and private property owners in Day County.

Defendants' Response: Admit.

2. The private property owned by Thad Duerre, Clint Duerre, and Robert Duerre consists of:

> All of Sections 13 and 23; the Northwest Quarter (NW¼) and Southwest Quarter (SW¼) of Section 12; the Northeast Quarter (NE¼) and Southeast Quarter (SE¼) of Section 14; the East Half and Southwest Quarter of the Northeast Quarter (E½SW¼) of Section 22; the North Half of the Southeast Quarter (N½SE¼) of Section 22; and the North Half of the Southwest Quarter (N½SW¼) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

Defendants' Response: Admit.

3. The private property owned by LaRon Herr consists of:

> The Southeast and the East Half of the Northeast Quarter (E½NE¼) of Section 21;the South Half of the Southeast Quarter (S½SE¼) of Section 22; and the South Half of the Southwest Quarter (S½SW¼) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

Defendants' Response: Admit.

4. Defendant South Dakota Department of Game, Fish and Parks is an arm of the Executive Department of the State of South Dakota.

Defendants' Response: Admit.

5. Defendant Kelly R. Hepler is the duly appointed Secretary of the South Dakota Department of Game, Fish and Parks.

Defendants' Response: Admit.

6. Secretary Hepler was appointed to succeed former Defendant Jeffrey Vonk, the former Secretary of the South Dakota Department of Game, Fish, and Parks following Vonk's retirement in 2015.

Defendants' Response: Admit.

7. None of the farmland owned by the plaintiffs was meandered at the time of its original survey as part of the Dakota Territory and properly so, because there were no lakes nor any substantial standing water on the land at that time.

Defendants' Response: Admit.

8. Some of the farmland owned by plaintiffs flooded during the 1990's.

Defendants' Response: Admit.

9. The farmland owned by the plaintiffs is now frequently subjected to encroachment by people who, with the active encouragement of the defendants, now boat, fish, hunt, fire guns, set up villages of ice shacks, drive cars, trucks and snowmobiles, and camp out on the water or ice and snow covering their property for much of the year.

Defendants' Response: Defendants admit that the water held in public trust which overlies portions of Plaintiffs' privately-owned land is used by the public for recreational purposes. State Defendants deny that they encourage the public use of Plaintiffs' privately-owned land. *See* Affidavit of Kelly R. Hepler.

10. In more than ten years since the South Dakota Supreme Court's decision in *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823, the South Dakota Legislature has never granted any right to members of the general public to use non-meandered bodies of water on private property for recreational uses, but instead has rejected proposed legislation drafted by defendants that would grant the public a limited right to use certain non-meandered bodies of water

for recreational uses and purport to allow certain trespasses upon private land underlying non-meandered bodies of water.

Defendants' Response: Defendants admit that the South Dakota Legislature has not passed legislation specifically addressing the public use of non-meandered bodies of water for recreation. Defendants assert that this statement is incomplete as it fails to note that the South Dakota Legislature has also rejected proposed legislation which would restrict the public use of non-meandered bodies of water. *See* HB1135 (2013) and HB 1096 (2006). Defendants additionally assert that the South Dakota Legislature has enacted broad policy and authorized state agencies to manage the waters of the State. *See* SDCL chs. 1-39, 1-40, and 41-2. See also SDCL §§ 34A-2-1, 41-2-18, 42-8-1.2, 43-17-29, 46-1-1, 46-1-2, 46-1-4, and 46A-2-2.

11. The defendants do not enforce the injunctive relief set forth in the *Parks* decision for any private farmland with the sole exception of the land owned by the named plaintiffs in the *Parks* lawsuit.

Defendants' Response: State Defendants[1] admit that they do not enforce the *Parks* injunction on any body of water outside of the *Parks* litigation. Defendants, however, contend that the statement as set forth by Plaintiffs is incomplete. The injunction in *Parks* was determined to be improper. *Parks*, 2004 S.D. ¶ 51, 676 N.W.2d at 841. The South Dakota Supreme Court allowed the injunction to remain in effect on the specific bodies of water involved in that litigation only to maintain the status quo until the parties were able to return to the trial court and re-litigate the issue. *Id.*

12. The defendants have informed the public that anyone is welcome to walk, drive, set up ice shacks, fish, or hunt on the private farmland owned by the plaintiffs so long as it is covered by water or ice and the public can find

[1] Counsel presumes that Plaintiffs are referring only to State Defendants in this statement and not to the class comprised of private sportsmen.

a way to legally access the property using a submerged county road or some other means.

Defendants' Response: State Defendants[2] deny this statement. State Defendants have not informed anyone that they may use Plaintiffs' private farmland. State Defendants have informed the public that they may use public water so long as it can be legally accessed.

13. As a result, because several washed-out roads now dead-end into the plaintiffs' farms, their private property has been inundated with people seeking to enter it to fish, hunt, snowmobile, or set up ice shacks that remain all winter.

Defendants' Response: Defendants object to this statement as written. There is no evidence as to the number of alleged trespassers or that the alleged trespasses are the result of washed-out roads. Plaintiffs' proffered evidence in support of this statement lacks foundation, is conclusory, and/or does not support this statement. For example, Exhibit 2 provides that "a few folks are venturing out on area lakes..."

14. In order to obtain the same rights, peace and quiet, privacy, security, and protection that the defendants continue to provide to the plaintiffs in the *Parks* lawsuit, these families brought an action simply to enforce that decision regarding their land as well.

Defendants' Response:. Defendants admit that Plaintiffs are seeking injunctive relief similar to what was issued by the trial court in the *Parks* action. However, that injunction was *ruled* by the South Dakota Supreme Court to have been issued in error. *Parks*, 2004 S.D. at ¶ 51, 676 N.W.2d at 841.

[2] Again, counsel presumes that Plaintiffs are referring only to State Defendants in this statement and not to the class comprised of private sportsmen.

15. The Defendants have admitted "that members of the public may have made recreational use this of water" and "further admit that boats are launched from County 33 into waters held in public trust."

Defendants' Response: Admit.

16. The Defendants have admitted that "since the decision in *Parks*, the public has been informed that if they can reach waters held in public trust via legal access, they may sue those waters for recreational purposes," that they have "advised the public that waters held in public trust are open to the public for recreational purposes," and "informed the public they are free to use water held in public trust for recreational purposes if reached by legal access with the exception of walking on submerged land."

Defendants' Response: Admit.

17. After *Parks* was issued by the South Dakota Supreme Court, Secretary Hepler's General Counsel publicly stated that the "State continues to follow the pre-Parks approach to the recreational use of these waters."

Defendants' Response: Admit.

18. Regarding bodies of water located on the private farmland owned by the plaintiffs in Day County, Secretary Vonk stated in 2011 that, "it would take an act of the South Dakota Legislature to dedicate these non-meandered water bodies as public recreational resources."

Defendants' Response: Defendants object to this statement as incomplete. First, Secretary Vonk was not speaking specifically as to plaintiffs' private farmland. Rather, Secretary Vonk's letter begins with reference to "non-meandered bodies of water across the state" and then makes the statement quoted in Plaintiffs' Statement No. 18 when

discussing the *Parks* opinion. Plaintiffs' Exhibit 22. Second, Secretary Vonk goes on to state, with specific regard to Jesse Slough, that "[t]he water itself is held in public trust but has never been dedicated for public recreational use. If a person uses this water and does not use the bed, which is privately owned, they would not be trespassing on private property. The water is public property, so there would be no trespass on the water. However, whether this means that the public may also use the water for recreational purposes absent specific Legislative approval is open to legitimate debate." *Id.*

Dated this 5th day of April, 2016.

Ann F. Mines Bailey,
Assistant Attorney General, and
Richard J. Neill,
Special Assistant Attorney General
Attorney General's Office
1302 E. Highway 14, Suite 1
Pierre, S.D. 57501
Tel: (605)-773-3215

STATE OF SOUTH DAKOTA	)	IN CIRCUIT COURT
	: ss.	
COUNTY OF DAY	)	FIFTH JUDICIAL CIRCUIT
THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR;	)	No. 18 CIV 14-43
Plaintiffs,	)	
v.	)	
KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie,	)	DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS
Defendants.	)	

Comes now, Secretary Hepler, Department of Game, Fish and Parks (GF&P), the State of South Dakota, and the class of individuals as defined and certified by this Court, and file this Statement of Material Facts in support of Defendants' Cross Motion for Summary Judgment pursuant to SDCL §15-6-56(c).

1. Plaintiffs Thad Duerre, Clint Duerre, and Robert Duerre own the following property:

> All of Sections 13 and 23; the Northwest Quarter (NW¼) and Southwest Quarter (SW¼) of Section 12; the Northeast Quarter (NE¼) and Southeast Quarter (SE¼) of Section 14; the East Half and Southwest Quarter of the Northeast Quarter (E½SW¼) of Section 22; the North Half of the Southeast Quarter (N½SE¼) of Section 22; and the North Half of the Southwest Quarter (N½SW¼) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

Complaint, ¶ 19.

2. Plaintiff LaRon Herr owns the following property:

> The Southeast and the East Half of the Northeast Quarter (E½NE¼) of Section 21;the South Half of the Southeast Quarter (S½SE¼) of Section 22; and the South Half of the Southwest Quarter (S½SW¼) of Section 22, Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota.

Complaint, ¶ 21.

3. Plaintiffs do not possess any interest in the water aside from the interests they share with the public in general. *Parks v. Cooper*, 2004 S.D. 27, ¶ 30, 676 N.W.2d 823.

4. Plaintiffs do not have a vested interest in the water due to prior usage or prior appropriation. *Parks v. Cooper*, 2004 S.D. 27, ¶¶ 28, 30, 676 N.W.2d 823.

5. Jesse Slough, aka Jesse Lake, is comprised of approximately 1,175 acres and is over 20 feet deep in places. It is located primarily in Section 23, and also covers portions of Sections 22, 21, and 16 of Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota. It is located on

private land but has been accessed by the public via public rights-of-way. Affidavit of Mark Ermer.

6. Jesse Slough was mistakenly stocked as a fishery in 2008 with 1,200,000 walleye fry. The fish were intended Lily Lake but were stocked and recorded as West Lily. Affidavit of Mark Ermer, Exhibit A.

7. Duerre Slough, aka Duerre Lake, is approximately 1,495 acres large. It is located in Sections 24, 23, 14, 13, and 12 of Township 120 North, Range 58 West of the 5th P.M., Day County, South Dakota. It is located on private land but there has been public access via public rights-of-way. It, too, is over 20 feet deep in places. Affidavit of Mark Ermer.

8. Duerre Slough, aka Duerre Lake, was stocked with 1,200,000 walleye fry in 2002 as a rearing pond. There is no record that those fish were harvested that fall. It has not been stocked since that time. Affidavit of Mark Ermer, Exhibit A.

9. Jesse Slough, aka Jesse Lake, and Duerre Slough, aka Duerre Lake were separate bodies of water at one time. Over the years, these two bodies of water have grown to a point where they are now connected. Affidavit of Mark Ermer.

10. Lily GPA is comprised of 1,360 acres, 480 of which are owned by GF&P. Lily is significant only in that these water bodies have, or may have, grown to the point of connecting with each other. Lily was stocked with 1,200,000 walleye fry in 2002, 1,500,000 walleye fry in 2003, 1,200,000

walleye fry in 2008, 1,200,000 walleye fry in 2010, 600,000 walleye fry in 2012, and 650,000 walleye fry in 2014. Affidavit of Mark Ermer, Exhibit A.

11. It is the policy of GF&P that recreation is a beneficial use of the waters of the State, including waters held in public trust. Affidavit of Kelly R. Hepler.

12. It is the policy of GF&P that the public is allowed to use the waters of the State for recreational purposes provided that the public obtains access through legal means. Affidavit of Kelly R. Hepler.

13. GF&P has neither encouraged nor condoned public trespass on privately-owned lands. Affidavit of Kelly R. Hepler.

14. GF&P has not informed the public that it has a right to enter privately-owned land without permission of the owners of the land for the purpose of obtaining access to waters of the State. Affidavit of Kelly R. Hepler.

15. There are no reports which indicate that Plaintiffs have filed official complaints of trespass with GF&P. Affidavit of Kelly R. Hepler.

16. The Legislature has previously considered legislation which would approve or restrict public access to non-meandered waters located over private lands even if such waters could be legally accessed. *See* SB 169 (2014), HB 1135 (2013), and HB 1096 (2006)[1]. However, none of these bills were ever enacted by the Legislature. Affidavit of Kelly R. Hepler.

[1] Attached are copies of SB 169 (2014), HB 1135 (2013), and HB 1096 (2006) for the Court's convenience. Defendants further request that the Court take judicial notice of these bills pursuant to SDCL § 19-19-20.

Dated this 5th day of April, 2016.

Ann F. Mines Bailey,
Assistant Attorney General and
Richard J. Neill,
Special Assistant Attorney General
Attorney General's Office
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Pierre, S.D. 57501
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STATE OF SOUTH DAKOTA) :ss COUNTY OF DAY)	IN CIRCUIT COURT FIFTH JUDICIAL CIRCUIT
THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR; Plaintiffs, vs. KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie, Defendants.	CIV. 14-43 **PLAINTIFFS' RESPONSE TO DEFENDANTS' STATEMENT OF UNDISPUTED MATERIAL FACTS**

Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr respectfully submit their response to the Defendants' statement of material facts filed in support of their cross-motion for summary judgment.

1. Not disputed.

2. Not disputed.

3. Objection. This is an asserted legal conclusion, not a statement of undisputed material fact. Denied.

4. Objection. This is an asserted legal conclusion, not a statement of undisputed material fact. Denied.

5. Objection. This is, in part, an asserted legal conclusion. Not disputed to the extent that it states affirmative facts. However, not all individuals who have entered the plaintiffs' land have done so via public rights-of-way.

6. Not disputed.

7. Not disputed.

8. Not disputed.

9. Not disputed.

10. Not disputed.

11. Objection. This is an asserted legal conclusion, not a statement of undisputed material fact. Denied.

12. Not disputed.

13. Disputed. *See* Duerre Affidavit, ¶¶ 7-10; Herr Affidavit, ¶¶ 7-10; Answer, ¶¶ 12 at 4, 13, 14, 15; Ex. 2; Ex. 4; Ex. 7; Ex. 8; Ex. 13 at 13; Ex. 22; Ex. 25; Ex. 26 at p. 101-05, 110-13, 117-20.

14. Disputed. *See* Duerre Affidavit, ¶¶ 7-10; Herr Affidavit, ¶¶ 7-10; Answer, ¶¶ 12 at 4, 13, 14, 15; Ex. 2; Ex. 4; Ex. 7; Ex. 8; Ex. 13 at 13; Ex. 22; Ex. 25; Ex. 26 at p. 101-05, 110-13, 117-20.

15. Not disputed.

16. Not disputed.

Dated this 14th day of April, 2016.

JOHNSON JANKLOW ABDALLAH BOLLWEG & PARSONS LLP

BY */s/ Ronald A. Parsons, Jr.*
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RICHARDSON, WYLY, WISE, SAUCK & HIEB LLP

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Attorneys for the Plaintiffs

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the above and foregoing was served via the Odyssey system and email upon the following:

Ann F. Mines-Bailey
Assistant Attorney General
Richard J. Neill
Special Assistant Attorney General
ATTORNEY GENERAL'S OFFICE
1302 E. Highway 14, Suite 1
Pierre, S.D. 57501

on this 14th day of April, 2016.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27885

THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR,

Plaintiffs / Appellees

vs.

KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH, AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners over which the waters lie,

Defendants / Appellants

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT, DAY COUNTY, SOUTH DAKOTA
NOTICE OF APPEAL FILED MAY 26, 2016

THE HONORABLE JON FLEMMER
CIRCUIT COURT JUDGE

BRIEF OF *AMICUS CURIAE* SOUTH DAKOTA WILDLIFE FEDERATION

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I. INTEREST OF AMICUS CURIAE

South Dakota Wildlife Federation ("SDWF") is a conservation organization formed in 1945 to protect and preserve South Dakota's outdoor sporting heritage. It is one of South Dakota's oldest conservation organizations. SDWF's over 3,500 members actively hunt, trap, fish, and generally recreate on South Dakota's lands and waters. As such, SDWF is interested in keeping South Dakota's public lands and waters accessible for the public's use and enjoyment.

II. INTRODUCTION

South Dakota's waters held in public trust inherently carry certain rights and uses immune from private intervention and inseparable by any circuit court act. Recognized in common law, those rights include navigation, boating, fishing, fowling, and other like purposes. The Fifth Judicial Circuit Court ruled, however, that in the absence of express legislative authorization, the public may not exercise nor enjoy those rights on the waters at issue. That ruling violates the very public trust the judiciary was obligated to protect. SDWF respectfully asks this Court to embrace its gatekeeper role and vacate the circuit court's order so SDWF's members and the general public may exercise those inherent rights and uses associated with the public trust.

III. STANDARD OF REVIEW / BURDEN

The circuit court's "findings of facts are examined under the clearly erroneous standard" while its "conclusions of law are reviewed under the de novo standard." *Parks v. Cooper*, 2004 S.D. 27, ¶ 20, 676 N.W.2d 823, 828-29. Public trust concerns, however, demand heightened scrutiny. The Arizona Supreme Court recognized as such when it, in reviewing legislative or agency action that implicated public trust concerns, stated it "will

take a 'close look' at the action to determine if it complies with the public trust doctrine." *Ariz. Ctr. For Law in the Pub. Interest v. Hassell,* 837 P.2d 158, 168-169 (Ariz. Ct. App. 1991). The Washington Supreme Court took a similar position, stating "courts review legislation under the public trust doctrine with a heightened degree of scrutiny, 'as if they were measuring that legislation against constitutional protections.'" *Weden v. San Juan Cnty.*, 958 P.2d 273, 283 (Wash. 1998) (*quoting* Ralph W. Johnson et al., *The Public Trust Doctrine and Coastal Zone Management in Washington State*, 67 Wash. L. Rev. 521, 525-27 (1992)). Recognized water law expert Joseph Sax stated similarly: "When a state holds a resource [for] the general public, a court will look with considerable skepticism upon any governmental conduct which is calculated either to reallocate that resource to more restricted uses or subject public uses to the self-interest of private parties." Joseph L. Sax, *The Public Trust Doctrine in Natural Resourse Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 556-57 (1969-70). In applying the standard of review here, because the public trust is implicated, this Court should look upon the circuit court's order prohibiting the public from accessing public trust waters with heightened scrutiny.

In *Parks*, this Court placed the burden on those asserting the public trust. *Parks*, 2004 S.D. 27, ¶ 20, 676 N.W.2d at 829. But here, Plaintiffs are attempting to limit those inherent rights associated with the public trust. The Hawaii Supreme Court placed the burden on permit applicants to justify their use in light of protected public rights, stating that "the public trust effectively creates this burden through its inherent presumption in favor of public use, access, and enjoyment." *In re Water Use Permit Applications (Waiahole Ditch)*, 9 P.3d 409, 472 (Haw. 2000). The principle is sound—that the public

trust places the burden on those attempting to restrict the trust's inherent presumptions in favor of public use, access, and enjoyment. Here, the burden of proving the public has no right to access waters held in public trust should remain with Plaintiffs.

IV. THE PUBLIC MAY ACCESS WATERS HELD IN PUBLIC TRUST CAPABLE OF PUBLIC USE FOR NAVIGATION, BOATING, FISHING, FOWLING, AND OTHER LIKE PURPOSES.

In *Parks v. Cooper*, this Court recognized that all waters in South Dakota are held in public trust. 2004 S.D. 27, ¶ 46, 676 N.W.2d at 838-39. In so holding, the Court also addressed the "narrow inquiry" of "whether the public has a right to use [non-meandered] waters for recreation." *Id.* ¶ 47. Ultimately, this Court declared: "[I]t is not for us now to proclaim the highest and best use of these public waters in the interest of the general health, welfare and safety of the people. Decisions on beneficial use belong ultimately to the Legislature." *Id.* (internal citation omitted).

Contrary to the circuit court's ruling, though, inaction by the Legislature cannot be construed as an affirmative abrogation of those inherent rights associated with the public trust. *Marks v. Whitney*, 491 P.2d 374, 381 (Cal. 1971). As stated by the California Supreme Court: "In the absence of state or federal action the court may not bar members of the public from lawfully asserting or exercising public trust rights on this privately owned tidelands." *Id.* The California Court continued, in a statement similar to this Court's statement in *Parks*: "It is a political question, within the wisdom and power of the Legislature, acting within the scope of its duties as trustee, to determine whether public trust uses should be modified or extinguished." *Id.*

Not only did the circuit court violate the public trust by prohibiting the public from using the waters at issue, it also exceeded its jurisdiction by extinguishing the

inherent right of access and its associated uses. *Id.* at 380-81 (holding the trial court's injunction barring members of the public from exercising public trust uses was "beyond the jurisdiction of the court"). *See* Michelle Bryan Mudd, *Hitching Our Wagon to a Dim Star: Why Outmoded Water Codes and "Public Interest" Review Cannot Protect the Public Trust in Western Water Law*, 32 Stan. Envtl. L.J. 283, 310, 314 (2013) (distinguishing public trust as covering the traditional uses of navigation, commerce, and fishing, while public interest review as helping state agencies decide between competing proposals for water used based on the public interest, and proposing that when courts suggest public interest statutes are a vehicle for considering the public trust, the appropriate reading of those judicial statements must be one where the public trust overlays and defines the outer limits of those statutes).

SDWF is not asking the Court to abandon its position in *Parks*. Nor is SDWF asking this Court to answer a political question. But it is necessary now, in light of the circuit court's ruling, to recognize and affirm the public trust's rights and uses inherent in its existence—that waters held in public trust may be used, at a minimum, for navigation, boating, fishing, fowling, and other like purposes. *Illi. Cent. R. Co. v. State of Illi.*, 146 U.S. 387, 13 S. Ct. 110, 36 L. Ed. 1018 (1892); *Flisrand v. Madson*, 152 N.W. 796, 801 (S.D. 1915). Doing so is consistent with the public trust doctrine and ensures that public waters remain open for the public's use and enjoyment.

A. The Unites States Supreme Court in *Illinois Central R. Co. v. State of Illinois* recognized that waters held in public trust may be used by the public for navigation, commerce, and fishing.

Illinois Central is widely recognized as the seminal case in public trust jurisprudence. 146 U.S. 387, 13 S. Ct. 110, 36 L.Ed. 1018. There, the Illinois

Legislature granted title to certain portions of Lake Michigan's bed to a railroad company. The Legislature later repealed the act and the railroad complained. The parties filed suit to judicially determine title. On appeal, the United States Supreme Court found the original grant invalid, reasoning that the state held title to those lands beneath the navigable waters of Lake Michigan in trust for its citizens and could not convey the lands inconsistent with the trust. *Id.* at 452-456. In so doing, the Court recognized the unique character of the state's title to the submerged lands and the public's right to use such waters for navigation, commerce, and fishing:

> But it is a title different in character from that which the state holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. *It is a title held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty fishing therein, freed from the obstruction or interference of private parties.*

Id. at 452. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S 469, 476 (1988) (recognizing that the Court has previously observed that public trust lands may be used for fishing). Notably, the Court did not rely on state statute or constitutional provisions when identifying navigation, commerce, and fishing as the inherent uses of navigable waters. Instead, the Court followed recognized common law principles. The Court also noted the special responsibility the state has to protect the public trust:

> The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate is police powers in the administration of government and the preservation of the peace.

Illi. Cent. R. Co., 146 U.S. at 453.

Those common law principles defined in *Illinois Central* have long guided public trust analysis and formed the bedrock of today's public trust jurisprudence.

B. South Dakota's public trust doctrine recognizes the presumptive uses of navigation, boating, fishing, fowling, and other like purposes.

South Dakota appears to have first referenced this state's public trust doctrine with regard to water rights in *St. Germain Irrigating Co. v. Hawthorn Ditch Co.*, 32 S.D. 260, 143 N.W. 124 (1913). There, this Court qualified a riparian's rights as "*publica juris*." *Id.* at 126. "*Publica juris*" is "[a] right that is exercisable by all persons of the community. When the thing is common property so that anyone can make use of it, it is said to be *publici juris*, as in the case of light, air, and public water." *Parks*, 2004 S.D. 27, n.15, 676 N.W.2d at 833, n.15 (quoting Latin Words and Phrases for Lawyers, (R.S. Vasan ed., 1980)).

Then, in *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796 (S.D. 1915), this Court addressed the presumptive uses of public trust waters. There, the South Dakota Court determined that Lake Albert is a navigable lake within the meaning of the civil code. The Court then ruled that the state owns the lake's bed in a trustee capacity similar to *Illinois Central*:

> And when we say that the state is the owner of the bed of said lake we do not mean that the state is the proprietary owner, in the sense that the state might sell or otherwise dispose of the same to private individuals for private ends, but that the state holds the title to such lake bed in trust for the benefit of the public.

Id. at 800. Turning then to the public's right to access and use public trust waters, the Court first noted that although a riparian owner's title extends to the ordinary low water mark, his or her title is "not absolute, except to ordinary high-water mark, and as to the intervening shore spaces between high and low water mark the title of the riparian owner

is qualified or limited by and subject to the *rights of the public*." *Id.* at 801 (emphasis added). The Court recognized those public rights as "navigation, boating, fishing, fowling, and other like purposes":

> The Plaintiff has the right of access to and use of such waters; he has the right to accretions and relictions which may attach to such shore; he has the right to use such shore in all ways that he may desire, *so long as and with the exception that he does not interfere with or prevent the public from also using or having access to the same for the purposes for the public has a right to use it, viz., navigation, boating, fishing, fowling, and other like public uses*. And the state has no right to control or interfere with plaintiff's said use so long as plaintiff does not interfere with said public use.

Id. at 801 (emphasis added). *See State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) (quoting 65 C.J.S. *Navigable Waters* § 92, at 289-91 (1966) ("Public trust purposes include rights of navigation, commerce, fishing, bathing, recreation, or enjoyment, and other appropriate public and useful purposes, or such other rights as are incident to public waters at common law, free from obstruction and interference by private persons. . . ."). The *Flisrand* Court limited its holding, though, stating it did not apply to "ponds or nonnavigable lakes, whether meandered or not, *which could not reasonably be subject of such public use*[.]" *Flisrand*, 152 N.W. at 801 (emphasis added). In making that holding and setting out the parties' rights, the Court downplayed the fact that Lake Albert is a meandered lake, saying it did "not directly control this matter[,]" but instead noted that "determination of these questions must depend upon the character of the lake in question." *Id.* at 798-99. The *Flisrand* Court ultimately set the standard for determining public use—"'whether the water is capable of use by the public for public purposes.'" *Parks*, 2004 S.D. 27 ¶ 49, 676 N.W.2d at 840 (quoting *Flisrand*, 152 N.W. at 800).

In *Hillebrand v. Knapp*, 65 S.D. 414, 274 N.W. 821 (1937), this Court affirmed *Flisrand's* recognized uses of public trust waters—"The state holds title to the bed of such lake or stream not in a proprietary capacity, but in trust for the people *that they may enjoy the use of navigable waters for fishing, boating, and other public purposes freed of interference of private parties.*" *Id.* at 822-23. *See Sorensen*, 436 N.W.2d at 363 (citing *Hardin v. Jordan*, 140 U.S. 371, 381, 11 S.Ct. 808, 812, 35 L.Ed. 428, 433 (1891) ("Fishing and navigation are among the expressly recognized uses protected by the public trust doctrine.").

Similarly here, Plaintiffs' submerged land below the ordinary low water mark, similar to their submerged land between the ordinary high and low water mark, is burdened by the public trust and thus is "*qualified or limited by and subject to the rights of the public*." *Filsrand*, 152 N.W. at 801 (emphasis added). Those public rights include navigation, boating, fishing, fowling, and other like purposes. *Id.*

C. The public trust and its inherent uses apply regardless of bed ownership.

In *Parks v. Cooper*, this Court noted that "notwithstanding private ownership of beds underlying water bodies, a number of state courts have recognized the application of the public trust doctrine to their water resources, holding that where a body of water is suitable for public use according to state law standards, a public right to use that water will be recognized." 2004 S.D. 27, ¶ 37, 676 N.W.2d 823, 835. *Parks* then cited caselaw from Idaho, Montana, New Mexico, Wyoming, Minnesota, North Dakota, and Iowa as approving "the public's right to use water independent of bed ownership." *Id.* ¶ 38. *See S. Idaho Fish & Game Ass'n v. Picabo Livestock, Inc.*, 528 P.2d 1295 (Idaho 1974)

(affirming trial court's determination that creek over private land was navigable and thus the public had the right to use the water for recreational purposes); *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163 (Mont. 1984) (holding "if the waters are owned by the State and held in trust for the people by the State, no private party may bar the use of those waters by the people"); *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1945) (recognizing the state may exercise authority over waters with privately owned beds); *State v. Kuluvar*, 123 N.W.2d 699 (Minn. 1963) (recognizing state, as trustee, must protect waters against interference by anyone, including riparian owners); *North Dakota State Water Comm'n v. Bd. Of Managers*, 332 N.W.2d 254, 258 (N.D. 1983) (holding "[t]he State does not lose its right to exercise authority over a lake merely because its bed is subject to private ownership"); *State v. Sorensen*, 436 N.W.2d 358, 363 (Iowa 1989) (holding private land was subject to public trust and thus its recognized uses). *See also Diane Shooting Club v. Husting*, 145 N.W. 816 (Wis. 1914) (holding that the public could use navigable waters for the purposes permitted by state law irrespective of bed ownership); *State ex rel. Brown v. Newport Concrete Co.*, 44 Ohio App. 2d 121, 336 N.E.2d 453 (1975), *app. dism'd* (holding that even though riparian stream owners own stream bed, according to the public trust, "such title and ownership is subject to the use the public may make of such waters for the purpose of navigation"); *J.J.N.P. Co. v. State of Utah*, 55 P.2d 1133, 1136 (Utah 1982) (stating "[i]rrespective of the ownership of the bed and navigability of the water, the public, if it can obtain lawful access to a body of water, has the right to float leisure craft, hunt, fish, and participate in any lawful activity when utilizing that water").

The *Parks* Court did mention that Idaho, Montana, New Mexico, and Wyoming have explicit constitutional provisions to rely on. But that distinction is of minimal significance because those constitutional provisions simply recognize what South Dakota does by code, that all water in the respective state is the public's property. *Compare* SDCL 46-1-3 ("all water within the state is the property of the people of the state), *with* Idaho Constitution Article 15, section 1 ("all water . . . is hereby declared to be a public use"); Montana Constitution, Article 9, Section 3 ("(3) All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state"); New Mexico Constitution, Article 16, Section 2 ("The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public"); Wyoming Constitution, Article 8, Section 1 ("The water of all natural streams, springs, lakes or the collections of still water, within the boundaries of the state, are hereby declared to be the property of the state.").

The *Parks* Court further recognized the "common direction in some western states," spelled out in Montana under *Curran*, that "any surface waters that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes." *Parks*, 2004 S.D. 27, ¶ 40, 676 N.W.2d at 836 (quoting *Curran*, 682 P.2d at 171). Ultimately, this Court aligned South Dakota with Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah, and Wyoming and "recognized the public trust doctrine's applicability to water, independent of bed ownership." *Id.* ¶ 46. *See* 42 U.S.C. 321 (applying the Desert Land Act to thirteen, similarly situated western states, including South Dakota). This Court should continue its alignment with those similarly situated states and follow the common

direction—that any surface waters in South Dakota that are capable of recreational use may be so used by the public without regard to streambed ownership or navigability for nonrecreational purposes.

That common direction is not a unique position, but instead a logical recognition of South Dakota's public trust doctrine. Former Attorney General Roger A. Tellinghuisen opined as such over twenty five years ago. In a formal opinion addressing whether South Dakota has followed the reasoning of other states in allowing the public use of waters regardless of the ownership of the lands underlying those waters[,]" the Attorney General opined—"it has." Official Opinion No. 89-22, South Dakota Attorney General Roger A. Tellinghuisen.

Further, this Court continuing to align with those western states and their common direction would not alter any private rights not already subject to the public trust. Plaintiffs' would maintain their legal title in the proprietary capacity identified in *Flisrand*. Plaintiffs may sell their submerged land—subject of course to the public trust—or they can wait until the water is no longer capable of recreational use. But as long as Plaintiffs' submerged land is capable of public use, their title is qualified and subject to the public trust's uses.

D. The public trust is the preemptive right.

The Massachusetts Supreme Court, over one-hundred and fifty years ago, addressed the relationship between private and public property rights:

> We think it is a settled principle, growing out of the nature of a well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community.

Commonwealth v. Alger, 61 Mass. (7 Cush.) 53, 84-85 (1851). The United States Supreme Court reasoned similarly in *Illinois Central* when it posturized that the public trust is the preemptive right, and private property rights are subversive to those rights associated with the public trust. *Illi. Cent. R. Co.*, 146 U.S. at 436-37, 452.

This Court has recognized similarly, stating that the title of those who own the "the strip of land below the ordinary high-water mark" is "subject to the *superior* right of the public[.]" *Anderson v. Ray*, 37 S.D. 17, 156 N.W 591, 5945-95 (1916) (emphasis added). *See State v. Kuluvar*, 123 N.W.2d at 706 ("[r]iparian rights are subordinate to the rights of the public"). In *Parks*, this Court stated that the public trust does not "divest the rights of riparian owners in the waters and beds of all natural water courses in the state," but is intended to place "the integrity of our water courses beyond the control of individual owners." *Parks*, 2004 S.D. 27, ¶ 36, 676 N.W.2d at 835 (quoting *State v. Brace*, 76 N.D. 314, 36 N.W.2d 330, 335 (1949).

That *Parks* view appears to follow the *jus publicum* and *jus privatum* estates approach, similar to traditional trust law. *See Marks v. Whitney*, 491 P.2d 374, 380-81 (Cal. 1971). Under that analysis, the landowner's recognized *jus privatum* rights such as possession and alienation are burdened by the public's *jus publicum* rights of access and use. The Michigan Supreme Court applied that doctrine when holding the public trust doctrine gave the public access rights on privately held lands along the Great Lakes below the mean high water mark. *Glass v. Goeckel*, 703 N.W.2d 58, 65 (Mich. 2005). Another view is that the public trust doctrine imposes an easement on fee simple estates. New Jersey Supreme Court applied that theory when it held the public trust doctrine burdened private beaches with a public easement. *Matthews v. Bay Head Improvement*

Ass'n, 471 A.2d 355 (N.J. 1984). As did Utah, where the Utah Supreme Court stated: "A corollary of the proposition that the public owns the water is the rule that there is a public easement over the water regardless of who owns the water beds beneath the water. Therefore, public waters do not trespass in areas where they naturally appear, and the public does not trespass when upon such waters." *J.J.N.P. Co.*, 655 P.2d at 1136. Whatever approach this Court finds convincing, the result is that the public trust is the preemptive right over the property burdened with the trust. Indeed a "great wrong" would befall South Dakota citizens if private interests were prioritized over the public trust—"To hand over all these lakes to private ownership, under any old or narrow test of navigability, would be a great wrong upon the public for all time, the extent of which cannot, perhaps, be now even anticipated." *Flisrand*, 152 N.W. at 799 (quoting *Lamprey v. State*, 53 N.W. 1139, 1143 (Minn. 1893).

Plaintiffs' complaints of littering and general disrespect are frustrating for all conservationists. But the unfortunate bad acts of a few do not warrant extinguishing a public right, as eloquently addressed by the Arkansas Supreme Court:

> McIlroy and others testified that the reason they brought the lawsuit was because their privacy was being interrupted by the people who trespassed on their property, littered the stream and generally destroyed their property. We are equally disturbed with that small percentage of the public that abuses public privileges and has no respect for the property of others. Their conduct is a shame to us all. It is not disputed that riparian landowners on a navigable stream have a right to prohibit the public from crossing their property to reach such a stream. The McIlroys' rights in this regard are not affected by our decision. While there are laws prohibiting such misconduct, every branch of Arkansas' government should be more aware of its duty to keep Arkansas, which is a beautiful state, a good place to live. No doubt the state cannot alone solve such a problem, it requires some individual effort of the people. Nonetheless, we can no more close a public waterway because some of those who use it annoy nearby property owners, than we could close a public highway for similar reasons.

> In any event, the state sought a decision that would protect its right to this stream. With that right, which we now recognize, goes a responsibility to keep it as God made it.

State v. McIlroy, 595 S.W.2d 659, 665 (Ark. 1980).

South Dakotans share that same duty—indeed everyone has a role in protecting our state's delicate resources for our future generations' use and enjoyment.

V. CONCLUSION

South Dakota's waters held in public trust inherently carry certain rights and uses immune from private intervention and inseparable by any circuit court act. Recognized in common law, those rights include navigation, boating, fishing, fowling, and other like purposes. Allowing private individuals to single-handedly extinguish those public rights on waters susceptible of public uses is a great wrong, the extent of which is currently realized by SDWF's members and the general public. SDWF respectfully asks this Court to right that wrong by recognizing and affirming the public trust's rights and uses inherent in its existence and reversing the circuit court's order—for the greater good.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, counsel for Amicus Curiae does hereby submit the following:

- The foregoing brief is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 4,405 words and 22,324 characters in the body of this brief.

/s/ Eric J. Cleveringa
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CERTIFICATE OF SERVICE

Eric J. Cleveringa, one of the attorneys for the South Dakota Wildlife Federation, hereby certifies that a true and correct copy of its *BRIEF OF AMICUS CURIAE* was served by email transmission, upon the parties named herein as follows:

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/s/ Eric J. Cleveringa
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IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

APPEAL NO. 27885

THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR

Plaintiffs and Appellees,

vs.

KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie,

Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
CIRCUIT COURT JUDGE

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PRELIMINARY STATEMENT

References to the settled record as reflected by the Clerk's Index are cited as (R.). Two hearings were held in this case. The transcript of the May 20, 2015 hearing on the motion for certification of a defendant class begins on page 111 of the record. The transcript of the April 20, 2016 summary judgment hearing begins on page 608 of the record. The exhibits to which this brief refers are attached to the Affidavit of Counsel filed May 15, 2015 (Exhibits 1-19) (R. 48), Affidavit of Warren L. Fisk (Exhibit 20) (R. 194), Affidavits of Laron Herr (R. 205) and Thad Duerre (R. 210) (Exhibit 21), Affidavit of Counsel filed on March 4, 2016 (R. 215) (Exhibits. 22-32), Affidavit of Counsel filed on April 14, 2016 (R. 554) (Ex. 33). Exhibit 34 was accepted into the record at the summary judgment hearing. (R. 599).

REQUEST FOR ORAL ARGUMENT

Appellees Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr respectfully request the privilege of oral argument.

STATEMENT OF THE ISSUES

I. Does current South Dakota law authorize the general public to cross private property lines and use water or ice located on private flooded lands for recreational purposes such as hunting and fishing?

The circuit court held that it does not and granted declaratory relief.

- *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823
- *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215 (2012)
- *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)
- SDCL 21-24-14

II. Given the status of South Dakota law as recognized in *Parks v. Cooper*, did the circuit court abuse its discretion in granting an injunction to prohibit the general public from crossing private property lines and using the flooded water and ice located on the Duerre and Herr farms for recreational purposes?

The circuit court granted such an injunction.

- *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823
- *Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, 855 N.W.2d 133
- SDCL 21-8-14

III. Did the circuit court abuse its discretion in granting the motion to certify the class of defendants in this case?

The circuit court granted the motion for certification of a class of defendants and named the Secretary of the Department of Game, Fish, and Parks as the representative defendant.

- *Thurman v. CUNA Mutual Ins. Society*, 2013 S.D. 63, 836 N.W.2d 611
- *In re South Dakota Microsoft Antitrust Litig.*, 2003 S.D. 19, 657 N.W.2d 668
- SDCL 15-6-23(a) & (b)

STATEMENT OF THE CASE

On August 8, 2014, Plaintiffs Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr, all farmers and landowners in Troy Township located in Day County, filed a complaint for declaratory and injunctive relief in Day County Circuit Court against the South Dakota Department of Game Fish and Parks, Secretary Jeffrey Vonk, and the State of South Dakota (collectively "GFP"), as well as a class of individuals who have used or intend to use floodwaters located on the Duerre and Herr farms for recreational purposes such as hunting and fishing. (R. 7).

The complaint sought certification of a defendant class for one count of declaratory and one count of injunctive relief addressed to the question of whether members of the general public have an existing legal right under South Dakota law to cross private property lines and occupy the water or ice on the Duerre and Herr farms for recreational purposes in light of this Court's decision in *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823. (R. 20).

On September 5, 2014, the GFP filed its answer, admitting that "since the decision in *Parks*, the public has been informed that if they can reach waters held in public trust via legal access, they may use those waters for recreational purposes." (R. 27). The GFP further admitted that "County Road 33 runs through the Duerre and Herr properties" and that "boats are launched from County Road 33 into waters held in public trust." (R. 27).

On April 3, 2015, the circuit court entered its order substituting current GFP Secretary Kelly R. Hepler for former Secretary Vonk. (R. 36).

Certification of Defendant Class

On April 24, 2015, the plaintiffs filed a motion for certification of a defendant class. (R. 42). A hearing was held before the Honorable Jon S. Flemmer, Circuit Judge, on May 20, 2015. (R. 111). On August 19, 2015, the circuit court entered its order, findings of fact, and conclusions law certifying a class of defendants defined as:

> All individuals who have entered or used, intend to enter or use, or have permitted others to enter or use the bodies of water that overlie private property owned by the Plaintiffs as detailed on Exhibits A and B to the Plaintiffs' Complaint for Declaratory and Injunctive Relief.

(R. 162, 169-70). The defendant class was certified pursuant to SDCL 15-6-23(a) and (b)(1) on a common question of law regarding public rights that applies in the same manner to all members of the class. (R. 170-75). That common question of law is: "whether or not members of the public are authorized to enter and use the water and ice overlying the Plaintiffs' submerged private property in the absence of Legislative authorization." (R. 171).

Cross-Motions Summary Judgment

On March 3, 2016, the plaintiffs filed their motion for summary judgment. (R. 189). On April 5, 2016, the defendants filed their cross-motion for summary judgment. (R. 480). A hearing on the cross-motions was held before Judge Flemmer on April 20, 2016. (R. 608). Recognizing that there were no disputed material facts, the circuit court granted the plaintiffs' motion for summary judgment and denied the defendants' cross-motion. (R. 633-40).

On April 29, 2016, the circuit court entered its order and final judgment granting declaratory relief that:

> Pursuant to *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823, in the absence of authorization from the Legislature, members of the general public are not legally authorized to enter or use any of the water or ice located on the Plaintiffs' private property for any recreational use such as hunting or fishing without the permission of the landowner.

(R. 649). And entering an injunction:

> Prohibiting the Defendants, the certified Class, and members of the public from entering or using for any recreational purpose, including hunting and fishing, the bodies of water or ice located on the private property owned by the Plaintiffs without the permission of the landowner [and]
>
> Prohibiting the Department of Game, Fish and Parks and other Defendants from facilitating access to members of the public to enter or use the bodies of water or ice on the Plaintiffs' private property for any recreational purpose, including hunting and fishing, in the absence of permission from the landowner or authorization from the Legislature.

(R. 649). This appeal followed.

STATEMENT OF THE FACTS

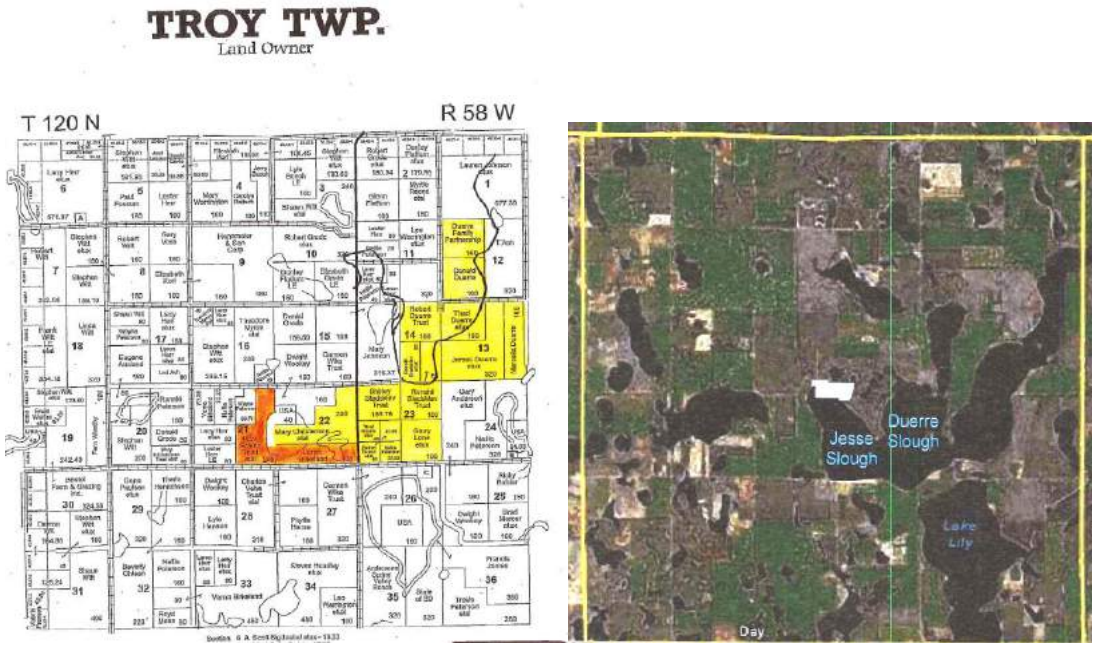
Thad Duerre, Robert Duerre, Clint Duerre, and LaRon Herr are farmers and landowners in Troy Township, located in Day County. (R. 21, 205-06, 210-11). Much of their land has been in their families since it was homesteaded in the 1890's. (R. 210-11). None of their farmland was meandered at the time of its original survey as part of the Dakota Territory and properly so, because there were no lakes, nor was there any substantial standing water, on the land at that time. (R. 198, 249). As explained by Warren Fisk, an expert land surveyor in South Dakota:

> I have examined closely the township in question and all of the surrounding townships. There is a great similarity throughout the southeasterly 70% of this area which shows a great many dry lakes, sloughs, small ponds and hay marshes, with a noted lack of water courses. Those townships have been known historically as "pot-hole"

> country. There are a few large drainage basins and the runoff in most years collects in small ponds and marshes which dry up later in the year for the most part, if not entirely. During dry years the lake beds have no water at all and have been used for agricultural uses.
>
> This appears to be the condition of the land in 1876 when many of the original surveys were conducted in late fall. The instructions to the surveyors at the time clearly indicated that, regardless of size, if a lake, pond, or marsh (slough) was likely to dry up and perhaps be useful for agricultural purposes, meaning used for crops and harvests, they were not to be meandered.

(R. 198, 271). This means that the farmland owned by the families in this case has the same legal status as the land owned by the plaintiffs in *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823.

Like the plaintiffs in *Parks*, sections of the farms owned by these families flooded during the 1990's, more than a century after it was originally surveyed. (R. 22, 107, 206, 209, 211, 213, 286-91). The farmland owned by the Duerre and Herr families is depicted here as platted (Duerre land in yellow, Herr land in orange) and in a satellite photograph showing where the flooding has occurred:



(R. 21, 209, 213). The flooded lands on these farms have become known as Jesse Slough and Duerre Slough. (R. 536). The Duerre and Herr farms are being overrun with strangers who, with the encouragement of the GFP, now boat, fish, hunt, fire guns, operate augers, set up villages of ice shacks, drive trucks and snowmobiles, and camp out for much of the winter. (R. 206-07, 211-12, 27, 108-10, 261-62).[1]

The GFP's reaction to *Parks*

Since the *Parks* decision in 2004, the South Dakota Department of Game, Fish, and Parks has limited its enforcement of that decision to only the handful of farmers who were plaintiffs in that case. As GFP Secretary Vonk explained in 2011:

> Your letter refers to Long Lake in Day County. The Fifth Judicial Circuit Court issued an injunction prohibiting recreational use on this lake (and on Schiley Slough and Parks Slough), and the South Dakota Supreme Court in the *Parks* decision held that the injunction prohibiting recreational use of these bodies of water cannot be lifted unless the Legislature dedicates the water for recreational use. Accordingly, the public may not fish, hunt, or trap on this body of water.

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[1] (*See also* R. 55 – "We are starting to get calls about Jesse Lake (slough south of Bristol) and whether it is open again"; R. 57 – "Danny Smiens called today and told me that fisherman are now driving onto Jesse Lake at the north end on the oil road again. Apparently someone cleared off the oil road access on the north, in and around the closed road barricades. People are now driving past the road closed barricades…"; R. 62 – "The problem has been that fishermen have only been able to access the lake from a flooded county road and to do this they had to drive around road closed barricades"; R. 63 – "The Jesse Lake you are referring to is open to fishing. However, the most controversial aspect of fishing on this lake had been the means of legally accessing the lake. ... Most fisherman are now utilizing snow mobiles to access and get around on our lakes"; R. 250 – "I am aware that, over the past few years, fishermen have been attempting to launch their boats from some county roads in Day County to access nonmeandered waters which have flooded private property").

(R. 219). The GFP has refused to follow or enforce the *Parks* decision for anyone else in South Dakota who owns private land that has been flooded. (R. 54, 58, 505).

GFP's failed efforts to change the law

Unhappy with the current law as recognized in *Parks*, the GFP drafted legislation and asked the South Dakota Legislature to change the law in order to allow the public to use water or ice located on private flooded lands for personal recreation. (R. 530). But the Legislature has repeatedly rejected efforts by the GFP and others to change South Dakota law to open private flooded lands for public recreational use to varying degrees. (R. 76, 107, 503). *See* H.B. 1096 (2006) (defeated) (R. 530); H.B. 1135 (2013) (defeated) (R. 522); S.B. 169 (2014) (defeated) (R. 460).

Supported by the South Dakota Wildlife Federation, the GFP also asked the Water Management Board to promulgate rules purporting to allow the general public to enter water or ice located on flooded private lands and treat all such lands as public parks open for recreational use by anyone. (R. 555, 559, 565, 572). In a unanimous vote, the Water Management Board also refused. (R. 597). As one Board member commented in voting down the proposed rule change:

> … I don't like being put in that position of declaring all of the water in the state wide open for recreation, without some sort of definition of which water is going to be used for recreation. I don't think that John Doe's farm pond out here is necessarily open to the public for recreation just because it may touch a section line road.

(R. 582). One Brown County farmer testifying against the GFP's proposed rule change noted the irony of the GFP asking the Water Management Board to enact rules that would open flooded *private* land to the public for unlimited recreation, when

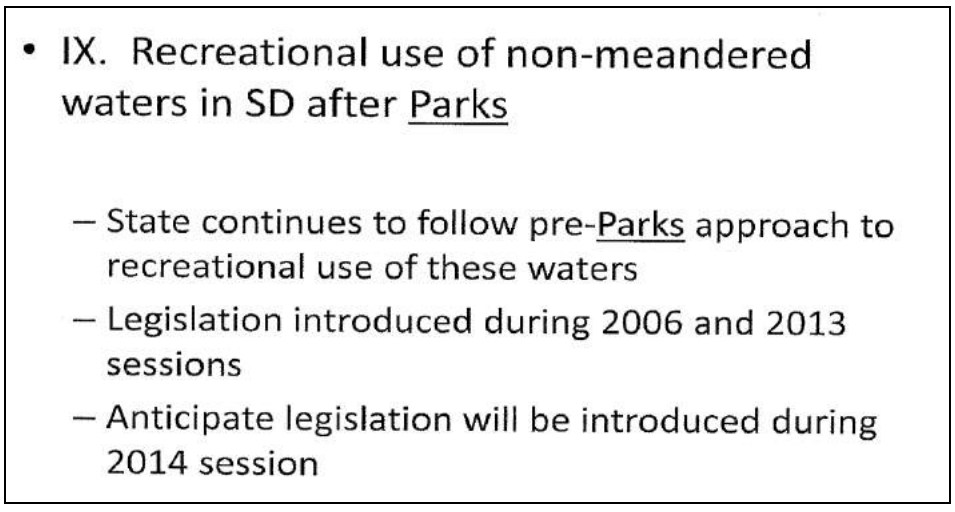
the GFP routinely prohibits public recreational access to waters on *public* land controlled by the GFP. (R. 581).

GFP enforces the "pre-*Parks* approach"

Rebuffed by the democratic process, the GFP decided to change the law as recognized in *Parks* on its own to enforce an unwritten policy that all flooded private lands in South Dakota (with the exception of land owned by the *Parks* plaintiffs) are open to anyone for recreational use. As GFP Secretary Hepler admitted:

> Your Affiant is personally aware and states as a fact that it has been the policy of the South Dakota Department of Game, Fish and Parks to recognize that recreation is a beneficial use of the waters of the State, including waters held in public trust, and to allow public use of such waters for recreational purposes provided that the public obtains such access by legal means and does not walk or stand on the land underlying such waters.

(R. 546). In service of its unwritten policy, the GFP instructed its conservation officers across the state that "Parks v. Cooper pertains only to public recreational use of Parks Slough, Schiley Slough and Long Lake in Day County." (R. 54, 503). This unwritten policy was revealed in a GFP PowerPoint presentation to the Association of Fish and Wildlife Agencies in Portland, Oregon that included the following slide:



(R. 88, 76, 77). Communications from GFP officials to members of the public confirm that the GFP understood this Court's holding in *Parks*, but simply refused to grant its protections to anyone other than the landowners in that case:

> Long Lake is a whole different issue. It was closed as part of a lawsuit involving landowners around the lake. In the end, the Supreme Court held that all water is held in trust for the beneficial use of the public, but refused to hold that this issue included recreational use – it left that determination to the legislature. The legislature has not yet taken any action to decide what, if any, public recreational use will be allowed for these three waters. Until that time, Long Lake, Parks Slough and Schiley Slough are closed as part of that ruling.

(R. 60). The GFP's unwritten policy limiting this Court's legal reasoning to the specific private lands at issue in *Parks* also was confirmed in an email to a Minnesota duck hunter telling him that: "Our Department's interpretation is that the public may use public waters that inundate flooded, private land (with the exception of three bodies of water in Day County)." (R. 58-59).

Effect on the Duerre and Herr farms

Since *Parks* was issued in 2004, the GFP has informed the public that anyone is welcome to cross private property lines and walk, drive, fish, hunt, and set up ice shacks on flooded private lands, including those owned by the Duerre and Herr families, so long as it is covered by water or ice and one can find a way to legally get onto the property using a submerged county road, a section line, or some other means. (R. 56, 272, 276-81, 505).

As one GFP official explained for purposes of a radio broadcast about the flooded land on the Duerre and Herr farms: "What we are telling people is that there are roads entering the lake at the north and at the south and as long as people are

accessing the ice through a public road right of way they are free to fish anywhere on the lake." (R. 55, 219**,** 261-65, 270-73, 277-80).

Because several washed-out county roads now dead-end into the Duerre and Herr farms, the land on which they and their families work and make their homes has been inundated with strangers, often from surrounding states, who cross onto their property to fish, hunt, snowmobile, and set up ice shacks that remain all winter. (R. 110, 206-07, 211-12, 264-65, 270-71, 502). When flooded county roads in Troy Township are closed for safety reasons, moreover, people simply use trucks, ATVs, or snowmobiles to drive across private property to get to the floodwaters or ice on the Duerre and Herr farms. (R. 57, 62, 66, 71, 270-71).

For any private landowner not protected by the *Parks* injunction, the GFP's unwritten policy enforcing the pre-*Parks* approach remains in place today. (R. 503). In fact, just two-days before the summary judgment hearing in this case, the GFP conservation officer stationed in Day County was quoted in a story on the front page of the *Aberdeen American News* announcing that:

> [A]nglers can access a body of water by legal means, including using a public road or getting permission from the landowner. For instance, if somebody can unload a boat from a gravel road to a body of water that used to be a farmer's field, that's considered legal. "And once you get to that body of water, you can stay on it wherever it goes, and you can fish and hunt and do whatever you want to," Yonke said.

(R. 600). In order to obtain the same rights, peace and quiet, privacy, security, and protection that the GFP continues to provide to the landowners in the *Parks* lawsuit, these farm families brought this action to enforce that decision regarding their land as well. (R. 207, 212).

STANDARD OF REVIEW

This Court reviews whether the moving party was entitled to summary judgment de novo. *See AMCO Ins. Co. v. Employers Mut. Cas. Co.*, 2014 S.D. 20, ¶ 6, 845 N.W.2d 918, 920 n.2

This Court reviews declaratory judgments as any other order or judgment, reviewing findings of fact under the clearly erroneous standard and conclusions of law de novo. *See Parks v. Cooper*, 2004 S.D. 27, ¶ 20, 676 N.W.2d 823, 828-29 (citing SDCL 21-24-13). In this particular case, the burden of proving navigability and asserting the public trust lies with the party asserting it. *See Parks*, 2004 S.D. 27, ¶ 20, 676 N.W.2d at 829.

This Court reviews both a grant of injunctive relief and a grant of class certification for an abuse of discretion. *See Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 10, 855 N.W.2d 133, 138 (injunction); *Thurman v. CUNA Mut. Ins. Society*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 615-16 (class certification). An abuse of discretion occurs when there "is a fundamental error of judgment, a choice outside the range of permissible choices, a decision which, on full consideration, is arbitrary or unreasonable." *Id.* (citation omitted).

ARGUMENT

I. As this Court held in *Parks v. Cooper*, South Dakota law does not presently authorize the general public to cross private property lines and use water or ice located on private flooded lands for recreational purposes such as hunting and fishing.

A. The lower court properly granted summary judgment to the Duerre and Herr families on their claim for declaratory relief.

The South Dakota Legislature has enacted the Uniform Declaratory Judgments Act empowering circuit courts to grant declaratory relief in appropriate cases. Specifically, SDCL 21-24-1 provides:

> Courts of record within their respective jurisdictions shall have the power to declare rights, status, and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may either be affirmative or negative in form and effect; and such declaration shall have the force and effect of a final judgment or decree.

SDCL 21-24-14 makes clear that the act is intended "to be remedial; its purpose is to settle and to afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations; and is to be liberally construed and administered." SDCL 15-6-57 further provides that "[t]he existence of another adequate remedy does not preclude a judgment for declaratory relief in cases where it is appropriate."

Here, the Duerre and Herr families sought and obtained summary judgment on their claim for declaratory relief asking the lower court to hold that members of the general public are not authorized under current South Dakota law to enter or use the water or ice located on their farms for recreational purposes without permission. (R. 633-37, 656). Because that is the state of the law as recognized by this Court in *Parks v. Cooper*, the lower court correctly granted that relief.

1. Neither the Legislature nor the Water Management Board have ever authorized the general public to enter private flooded lands for recreational purposes.

The public trust doctrine is a matter of state law and "[u]nder accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1235 (2012). In 2004, this Court issued its decision in *Parks*, 2004 S.D. 27, ¶ 46, 676 N.W.2d at 838-39, in which it recognized for the first time that all waters in South Dakota, not just those considered navigable under the federal test, are held in trust by the State for the people in accordance with the public trust doctrine. In addition, the *Parks* decision affirmed that riparian landowners retain title to their private property, including flooded private lands beneath non-meandered bodies of water held in trust for the public by the State. *See id.,* 2004 S.D. 27, ¶ 25, 676 N.W.2d at 831 ("Applying the federal navigability for title test to the lakebeds here, we conclude that the title to these beds lies with the landowners").

But the *Parks* decision rejected the argument made by the GFP in that case (and repeated in the briefs of the GFP and its amicus here) that because all waters are held in trust for the public by the State, the public trust automatically extends to *recreational* use of all waters independent of bed ownership. *See id.,* 2004 S.D. 27, ¶¶ 47-53, 676 N.W.2d at 839-41. Rather, this Court emphasized that "although state law in both South and North Dakota makes all water public property, neither state has gone so far as to hold that non-meandered lakes navigable under the state test are open for public recreational uses." *Id.,* 2004 S.D. 27, ¶ 49, 676 N.W.2d at 839. As a

result, this Court explained, "it is not for us now to proclaim the highest and best use of these public waters in the interest of the 'general health, welfare and safety of the people.'" *Id.,* 2004 S.D. 27, ¶ 51, 676 N.W.2d at 841. Instead, "[d]ecisions on beneficial use belong ultimately to the Legislature." *Id.*

Thus, while this Court determined in *Parks* that all waters in the State are held in public trust, it refused to judicially extend recreational rights to the public in waters located on flooded private lands because, unlike in some states, neither our Constitution nor our Legislature has ever authorized such a thing. *See id.,* 2004 S.D. 27, ¶ 40, 676 N.W.2d at 836. And it expressly declined to follow decisions in certain other states judicially proclaiming that public recreational use of flooded private lands fell within the purview of the public trust doctrine in the absence of a legislative or constitutional mandate. *See id.,* 2004 S.D. 27, ¶¶ 49-53, 676 N.W.2d at 839-41.

The *Parks* decision further held that because the Water Resources Act (SDCL 46-1-1 to 16) and the Water Resources Management Act (SDCL 46A-1-1 to 106) govern public water lying on or under private property, "the Department of Environment and Natural Resources is the agency at present given oversight of these lakes," acting through the Water Management Board. *See id.,* 2004 S.D. 27, ¶ 51, 676 N.W.2d at 840-41 (citing SDCL 46-2-11). As this Court explained, the Water Resources Act and Water Resources Management Act codified the public trust doctrine as originally set forth in Chapters 430 and 431 of the Session Laws of 1955. *See id.,* 2004 S.D. 27, ¶ 45, 676 N.W.2d at 838. Those laws were enacted to determine the rights to water in South Dakota and protect the water supply for specific

beneficial uses. *See id.,* 2004 S.D. 27, ¶ 50, 676 N.W.2d at 840; *Knight v. Grimes*, 127 N.W.2d 708, 709-14 (S.D. 1964).

As determined by the Legislature, the highest and best use for water is *domestic* use. *See Parks*, 2004 S.D. 27, ¶ 50, 676 N.W.2d at 840 (citing SDCL 46-1-5); SDCL 46-1-1. Public recreational use of private flooded lands has never been authorized under the law. *Id.,* 2004 S.D. 27, ¶ 49, 676 N.W.2d at 839. Rather than *requiring* public access to water and ice on private flooded lands, as the GFP contends, the public trust doctrine operates to *protect* such waters from public recreational use in the absence of legislative authorization. *See Knight*, 127 N.W.2d at 711 ("South Dakota is largely a semi-arid state. The legislature was fully justified in finding that the public welfare requires the maximum protection and utilization of its water supply").

In sum, this Court recognized in *Parks* that the judiciary is not empowered under our constitutional order to change the law to authorize public recreational use of waters on flooded private lands unless and until the Legislature has exercised its constitutional authority to permit such activities. *See Parks*, 2004 S.D. 27, ¶¶ 51-53, 676 N.W.2d at 840-41. The *Parks* decision held that it is the province of the South Dakota Legislature to determine the extent of the public's right to use non-meandered bodies of water held in trust for the public and left in place the injunction against public recreational use of such waters against essentially the same class of defendants as certified here.

None of the applicable laws, regulations, or rules have changed in any material way since *Parks*. In more than a decade since that decision, the South Dakota

Legislature has never granted any right to members of the general public to use non-meandered bodies of water that lie over private property for recreational uses such as hunting, fishing, snowmobiling, or setting up ice shacks. Indeed, the Legislature has repeatedly *rejected* legislation that would authorize the public to use nonmeandered bodies of water for recreational uses and purport to allow certain trespasses on flooded private lands. (R. 76, 107, 460, 503, 522, 530). The Water Management Board has refused to enact such regulations as well. (R. 555, 572).

The upshot is, as Governor Rounds recognized in 2010, that "[u]nder the South Dakota Supreme Court ruling in *Parks v. Cooper*, the court found that fisherman and hunters *do not* have a state law right to recreate on nonmeandered lakes." (R. 250). As GFP Secretary Vonk admitted in 2011, "it would take an act of the South Dakota Legislature to dedicate these non-meandered water bodies as public recreational resources." (R. 219).

In contrast to those candid admissions by the Executive Department and in contravention of this Court's holding in *Parks*, the GFP filed an answer in this case that turns that holding upon its head, proclaiming that "waters held in public trust under the public trust doctrine are waters held for the use of the public, including for purposes of recreation, and legislative action is not required to effectuate this use of waters held in public trust." (R. 30-31). That is the same argument that the GFP advocated and this Court unanimously rejected in *Parks*. In the sequestered corridors of the GFP, it is as though *Parks* was never decided. (R. 88, 76, 77).

2. The Legislature's refusal to change the law is supported by the protections for private property and individual liberty secured by the United States Constitution.

There is a strong legal and constitutional basis for the Legislature's refusal to go along with the GFP's efforts to change our laws. Private property rights are fundamental to the preservation of liberty and personal freedom under our democratic and constitutional order. In the seventeenth century, John Locke wrote that "property is the protection of consent ... not merely or chiefly what supplies men's needs; it is what keeps men free." Johnathan O'Neill, *Property Rights and the American Founding*, Journal of Supreme Court History, Vol. 38, Issue 3 at p. 310 (2015) (R. 315). More than two centuries ago, Blackstone further defined the fundamental concept of private property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total *exclusion* of the right of any other individual in the universe." 2 *William Blackstone, Commentaries of the Laws of England* 2 (3d ed. 1768) (emphasis supplied).

Trespass laws and, eventually, constitutional protections such as the Fourth and Fifth Amendments evolved from and were expressly designed to protect the exclusive possession of owners or occupiers of land and the corresponding right to exclude others. *See* David J. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U.J.L. & Pol'y 39, 58 (2000); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998); Richard A Epstein, *Takings: Private Property and the Power of Eminent Domain*, 63

(1985); *Restatement of Property*, § 7 (1936); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 13 at 77 (5th ed. 1984).

The United States Supreme Court has always recognized that the right of landowners to exclude others from their private property is "one of most essential sticks in the bundle of rights that are commonly characterized as property." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433 (1982); *see also Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029-31 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987); *Hodel v. Irving*, 481 U.S. 704, 716 (1987); *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). In other words, the power to exclude is the quintessential feature of property rights guaranteed by the United States Constitution. As one prominent legal historian has explained, "[w]hatever the other attributes or extensions of the concept of property, at its core is the right to exclude others." O'Neill, *Property Rights and the American Founding*, *supra* at p. 309 (R. 314). Without the power to exclude, the concept of private property means nothing.

Since the *Parks* decision, the GFP has protected the right to exclude others from privately-owned lands submerged in water or covered in ice, but only for a select few. As a result, water and ice located on private property owned by the *Parks* plaintiffs may not be used by the public for recreational purposes. However, it is the GFP's position that the plaintiffs in *Parks* are the only private property owners to whom its protections apply. For other families owning farms or private land where there is any ice or water, this Court's decision is being systematically ignored. It has

been open season for anyone to cross onto that private flooded land using a submerged county road, bring motorized vehicles, weapons and alcohol, set up an ice fishing shack, and treat that flooded land as a GFP-sponsored public park.

3. None of the statutes cited by the GFP alter the status of South Dakota law as recognized in *Parks*.

Without exception, the South Dakota statutes cited by the GFP in attempting to avoid the principles set forth in *Parks* were examined and considered by this Court in rendering that decision. As discussed above, the Water Resources Act and Water Resources Management Act formed the basis of this Court's holding in *Parks* and provide no help to the GFP in seeking to avoid that decision here. As it did in the *Parks* case,[2] the GFP cites to SDCL 43-17-29, but that statute refers to public use of a *navigable* lake, and so actually cuts against the GFP's argument. The GFP also cites to SDCL 34A-2-1, which declares that it is state public policy to protect waters from pollution, but such findings provide no authorization for public recreational use of private flooded lands. The GFP cites to SDCL 46A-2-2 stating the purposes for which water districts are created. That statute likewise provides no authorization for opening private flooded lands to public recreation.

Finally, the GFP's brief cites generally, without any analysis of statutory text, to the general grants of authority to the Department of Environment and Natural Resources (DENR), SDCL Ch. 1-40, and the GFP itself, SDCL 1-39-5, and rule-making authority granted to those agencies, SDCL 41-2-18; SDCL 41-2-38; SDCL

[2] *Parks v. Cooper*, App. No. 22601, GFP Appellant's Brief at page 18.

41-3-1, and SDCL 42-8-1.2. The GFP asserts – just as it did in *Parks*[3]– that these general grants of authority reflect a "broad policy" that give the GFP the autocratic power to have "implemented that policy" and summarily opened all private flooded lands to public recreational use. (Brief at 19). Twelve years after *Parks*, that argument still does not hold water.

Although this Court recognized in *Parks* that the DENR, through the Water Management Board, has been given oversight over waters held in the public trust, including waters on flooded private lands, *see Parks,* 2004 S.D. 27, ¶ 51, 676 N.W.2d at 840-41 (citing SDCL 46-2-11), the Water Management Board has not attempted to exercise that authority to open those lands to public recreational use and, in fact, decisively rejected a proposed rule change purporting to do so. (R. 597).

This Court likewise rejected the GFP's argument in its *Parks* briefing[4] that statutes such as SDCL 41-2-18(5) grant it the power to declare private flooded lands legally open for public recreational use. By its express terms, SDCL 41-2-18(5) applies only to "*meandered* lakes, sloughs, marshes, and streams." By definition, private flooded lands, including those owned by the Duerre and Herr families, are not meandered. (R. 198, 271). In any event, SDCL 41-2-18 grants the GFP authority to enact rules that "shall be adopted pursuant to chapter 1-26 and shall be in accordance

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[3] *Parks v. Cooper*, App. No. 22601, GFP's Appellant's Brief at page 20; GFP's Reply Brief at pages 23-24.

[4] *Parks v. Cooper*, App. No. 22601, GFP's Appellant's Brief at page 20; GFP's Reply Brief at pages 23-24.

with the provisions of this chapter." The plaintiffs question whether the Legislature has lawfully delegated and may constitutionally delegate authority to the DENR, GFP, or any agency to promulgate rules pursuant to the Administrative Procedures Act abrogating the constitutional rights of private property owners to exclude others by opening their flooded land to public recreational use. Such an action would require this Court to examine the intersection of the public trust doctrine, various constitutional protections for private property, and the separation of powers under the South Dakota Constitution, including the standards for delegation of "quasi-legislative authority" to the executive branch. But here, the issue is moot because neither the DENR nor GFP has ever promulgated such rules.

In this case, there is nothing new under the sun. The law has not changed since *Parks v. Cooper*. The lower court acted properly to enter declaratory relief pursuant to SDCL 21-24-1 enforcing that decision for the farmers in this case. Consistent with *Parks*, this Court should affirm the grant of declaratory relief.

B. The lower court property granted summary judgment to the Duerre and Herr families on their claim for injunctive relief.

The GFP has also appealed from the circuit court's grant of injunctive relief to the Duerre and Herr families. (R. 637-40, 656). The South Dakota Legislature has empowered circuit courts to grant injunctive relief within their sound discretion. *See Strong*, 2014 S.D. 69, ¶ 10, 855 N.W.2d at 138. Pursuant to SDCL 21-8-14, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant in any one of four circumstances:

(1) Where pecuniary compensation would not afford adequate relief;

(2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;

(3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or

(4) Where the obligation arises from a trust.

As the lower court correctly recognized, any one of the first three circumstances authorized the grant of the injunction in this case. Pecuniary compensation would not afford adequate relief to the families in this case for many reasons, chiefly because it would be virtually impossible to identify every member of the general public encroaching upon their land and collect monetary compensation from them. For similar reasons, it would be extremely difficult to ascertain what that payment would be. In the view of the Duerre and Herr families, no amount of money would compensate them for having to allow a small army of armed strangers, many of them operating trucks, boats, and other vehicles, to invade their peace of mind and privacy by camping out on their property all winter and traversing across it throughout the year.

And surely, the restraint imposed by the same injunctive relief left in place to preserve the status quo in *Parks* is necessary to prevent the multiplicity of judicial proceedings that would result from the Duerre and Herr families attempting to individually enforce their rights against anyone seeking to cross private property lines and enter their flooded private lands.

Additional factors to consider when granting or denying injunctive relief include: (1) Did the party to be enjoined cause the damage? (2) Would irreparable

harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting bad faith? (4) In balancing the equities, is the hardship to be suffered by the enjoined party disproportionate to the benefit to be gained by the injured party? *See Strong*, 2014 S.D. 69, ¶ 11, 855 N.W.2d at 139. Considered as a whole, these factors and the equities involved also strongly weighed in favor of granting injunctive relief. This Court issued its decision in *Parks*. The law is settled. Although all water is held in the public trust, private property owners retain full title to their land even when it is wet or covered with ice or snow. As this Court made clear, such land is not presently open for public recreational use and it would take an act of the Legislature to change that settled status quo.

In its brief, the GFP summarily raises some criticisms of the circuit court's grant of an injunction in this case, none of which demonstrate an abuse of discretion under this Court's strict standard. *See Strong*, 2014 S.D. 69, ¶ 10, 855 N.W.2d at 138.

First, the GFP contends that "[t]he grant of injunctive relief was improper as there is no 'obligation existing in favor' of Plaintiffs." (Brief at 21). Like most of the GFP's brief, that is essentially a re-argument of *Parks* and the GFP's incorrect view of that decision discussed above. As the circuit court recognized, the Duerre and Herr families have the same right to the preserve the status quo and protect their private flooded lands from unauthorized public use as the families protected by the injunction in the *Parks* case. (R. 633-40, 656).

Second, the GFP speculates whether monetary compensation, rather than injunctive relief, might be awarded to the families here and whether an injunction is

necessary to prevent a multiplicity of judicial proceedings to prevent unauthorized entry onto to their private flooded lands. That argument also does not carry weight. The evidence in the record and admissions of the GFP amply demonstrated that the flooded private lands owned by the Duerre and Herr families have been inundated with strangers seeking to hunt, fish, and camp out on the water and ice. (R. 27, 54, 55, 57-59, 62-63, 108-10, 206-07, 211-12, 219, 250, 261-62, 264-65, 270-71, 502, 505). An individualized remedy that does not apply to the entire class of people trying to enter the flooded private lands owned by these families is not a remedy at all, but rather a recipe for chaos, confrontation, and large-scale consumption of administrative, judicial, and law enforcement resources. With the injunction in place, everyone is on notice and on the same legal page regarding the status of this private flooded land, unless and until the Legislature decides to open it for public recreation.

Before the injunction granted by the lower court, the only landowners in South Dakota whose rights to exclude others from their flooded private lands were being protected were those in *Parks* who obtained an injunction against a certified class of past and future trespassers. But the families in this case, who are in an identical position as the farmers in *Parks*, are entitled to the same protection under the law. In light of the unambiguous legal directives from this Court, the equities of this case are clear. The Duerre and Herr families are entitled to the same injunctive measures left in place by this Court in *Parks* to preserve the status quo and enforced by the GFP for the farmers in *Parks* in that case to this day.

Next, the GFP claims that the lower court abused its discretion in granting the injunction because there is no evidence that it has been acting in bad faith. The circuit court agreed, but recognized that the other relevant factors weighed in strongly in favor of granting the injunction. (R. 638). Neither do the plaintiffs question the GFP's intentions. However, the GFP's view of the law and understanding of the limited scope of its statutorily delegated authority were incorrect in 2004 and remain incorrect today.

Finally, the GFP argues that the circuit court abused its discretion by tailoring its injunction to make clear that the property owners themselves retain the right to permit hunting and fishing and their private flooded lands. The GFP protests that "Plaintiffs have no right or authority to exercise control over this asset" and that the Duerre and Herr families cannot lawfully grant permission to others to hunt or fish within the boundaries of their flooded private lands. (Brief at 25).

Once again, the GFP's view of the law is mistaken. The South Dakota Legislature has expressly granted all landowners the right to give such permission. SDCL 43-1-1 provides that "the thing of which there may be ownership is called property." SDCL 43-1-3 provides that "Real or immovable property consists of (1) Land" and also includes "(3) That which is <u>incidental or appurtenant to land</u>[.]" SDCL 43-1-5 then defines "appurtenant to land" as follows: "A thing is deemed to incidental or <u>appurtenant to land</u> when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air, or hear, from or across the land of another." Finally, SDCL 43-13-2 provides that "[t]he following

burdens or servitudes upon land may be attached to other land as incidents or appurtenances, and are called easements: … (2) The right of fishing; (3) The right of taking game[.]"

The sum of these statutes is that the Legislature has recognized that the right of fishing and taking game (hunting) are part of "[t]hat which is incidental or appurtenant to land," and thus part of the bundle of property rights inherently belonging to a landowner under South Dakota law. Furthermore, the Legislature has preserved the right of a landowner to grant permission to be on the property and to extend such rights to others, including "[t]he right to pasture, and of fishing and taking game[.]" SDCL 43-13-1.

These laws should come as no surprise to the GFP, which acknowledged during the *Parks* appeal that "[a]ccording to these statutes the riparian landowner at a lake can grant easements for fishing and taking game on his property. These statutes provide that to the extent riparian landowners have rights to hunt and fish on water lying over their property, they may convey those rights to another." *Parks v. Cooper*, App. No. 22601, GFP Appellant's Brief at page 26-27.

As a result, the circuit court's injunction comported fully with South Dakota law as established by the Legislature. The GFP's proposal to modify the injunction to remove such rights from the Duerre and Herr families would not have been consistent with the law and properly was rejected by the lower court. Because the GFP has not shown any abuse of discretion, the circuit court's grant of injunctive relief should be affirmed.

II. The circuit court did not abuse its discretion in its order certifying the defendant class.

A. Requirements for certification of a defendant class.

Finally, the GFP has attempted to resuscitate a challenge to the lower court's order certifying the defendant the class pursuant to SDCL 15-6-23. This Court has consistently emphasized that:

> Class actions serve an important function in our judicial system. By establishing a technique whereby the claims of many individuals can be resolved at the same time, the class suit both eliminates the possibility of repetitious litigation and provides small claimants with a method of obtaining redress for claims which would otherwise be too small to warrant individual litigation.

In re South Dakota Microsoft Antitrust Litig., 2003 S.D. 19, ¶ 9, 657 N.W.2d 668, 673 (citation omitted). Because SDCL 15-6-23(a) applies equally to permit the certification of a class "to sue or be sued," it is well settled that claims may be brought against a class of defendants. This is particularly true in cases such as this for purely declaratory or injunctive relief involving the proper application of statewide law. *See, e.g., Doe v. Miller*, 216 F.R.D. 462, 466-67 (D. Iowa 2003).

On a motion for class certification, the burden lies with the party seeking certification to demonstrate that the criteria for class certification have been met. *See Trapp v. Madera Pacific, Inc.*, 390 N.W.2d 558, 560 (S.D. 1986). However, plaintiffs "are not required to prove their cases on the merits at the class certification stage." *Thurman*, 2013 S.D. 63, ¶ 14, 836 N.W.2d at 618; *see also Microsoft*, 2003 S.D. 19, ¶ 12, 657 N.W.2d at 673. For the purpose of determining class certification, in other words, the allegations are taken as true and the merits of the complaint are not

examined. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). Thus, when considering a motion for class certification, the court's inquiry "is not whether the plaintiff or plaintiffs have stated a cause of action or will prevail on the merits, but rather whether the requirements of Rule 23 are met." *Id.* at 178.

Under South Dakota law, "class certification 'is favored by courts in questionable cases.'" *Thurman*, 2013 S.D. 63, ¶ 14, 836 N.W.2d at 618 (quoting *Beck v. City of Rapid City*, 2002 S.D. 104, ¶ 12, 650 N.W.2d 520, 525). In other words, "any doubts as to whether a class should be granted certification should be resolved in favor of certification." *Microsoft*, 2003 S.D. 19, ¶ 5, 657 N.W.2d at 672 (citations omitted). As this Court has explained:

> The weight of authority suggests that even in doubtful cases the maintenance of class action is favored, because decertification is always possible, and that wherever a question exists, the court should give the benefit of the doubt to approving the class … If the court does have doubts … the law requires that they be resolved in favor of certification.

Beck, 2002 S.D. 104, ¶ 12, 650 N.W.2d at 525; *Trapp*, 390 N.W.2d at 560.

An action may be brought against a class of defendants where the five requirements of SDCL 15-6-23(a) are met and, additionally, any *one* of the three elements of SDCL 15-6-23(b) is satisfied. Here, the circuit court entered detailed findings of fact and conclusions of law holding that all of the requirements of Rule 23(a) were satisfied in this case and that the class of defendants was appropriate for certification under Rule 23(b)(1). (R. 162, 165-75).

On appeal, the GFP's brief makes several arguments in support of its suggestion that the requirements of Rule 23(a) were not been met (no arguments have been made on appeal regarding Rule 23(b)). Each is unpersuasive.

B. All of the requirements of SDCL 15-6-23(a) were met.

As an initial matter, the GFP suggests that because the injunction does not exclude non-residents of South Dakota, it "included individuals over whom the circuit court may not have jurisdiction as those private individuals may not have the requisite minimum contracts with the forum." (Brief at 8). But that is not so. The injunction granted by the lower court does not reach beyond South Dakota's borders, but rather prohibits "the Defendants, the certified Class, and members of the public from entering or using for any recreational purpose, including hunting and fishing, the bodies of water or ice located on the private property owned by the Plaintiffs without the permission of the landowner." (R. 649). Under the laws of physics, only by entering Troy Township in Day County, South Dakota and crossing onto the Duerre or Herr farms could one be found in violation of the injunction.

Next, the GFP suggests that the record lacks "at least some evidence" as to the number of class members as required by SDCL 15-6-23(a)(1). (Brief at 9). A review of the record demonstrates otherwise. (R. 27, 54, 55, 57-59, 62-63, 108-10, 206-07, 211-12, 219, 250, 261-62, 264-65, 270-71, 502, 505).

Regarding the commonality and typicality elements, the GFP does not dispute that there is a common question of law applicable to all members of the class involving the proper interpretation of the *Parks* decision and whether the public

presently may enter flooded private land to make recreational use of the water, ice, or snow that overlies it. The GFP also does not dispute that for class certification under South Dakota law, "not all questions of law or fact raised need to be in common." *Trapp*, 390 N.W.2d at 561. "This requirement is concerned with whether or not the particular issues in an action are individual in nature, and therefore, must be decided on a case-by-case basis." *Id.* at 561 (citation omitted). Not only is there a common question of law in this case that applies in precisely the same manner to all of the class members, there are *no* individual questions of law or fact requiring resolution on a case-by-case basis.

Instead, the GFP's argument on this point is that a trespass claim and a takings claim have different elements. (Brief at 10). But the Duerre and Herr families did not bring a takings claim and the lower court neither entertained nor granted any such relief. Rather, the complaint sought purely declaratory and injunctive relief. True, the complaint originally sought a declaration that "the *Legislature's* authorization of any use of the plaintiffs' private property described above, without payment of just compensation to the plaintiffs, would constitute inverse condemnation and a Taking in violation of the South Dakota Constitution and United States Constitution." (R. 18-19).

The Legislature, of course, has never authorized any such use. As a result, the circuit court could never have granted declaratory relief on that ground as it would amount to an advisory opinion based upon a hypothetical that may or may not come to pass. In any event, that part of the complaint was withdrawn prior to the hearing

on class certification. (R. 128-29, 630-31). This action simply sought to enforce the *Parks* decision in a manner that applies equally to the Duerre and Herr families. And in that, the commonality and typicality tests plainly were met.

Finally, the GFP has constructed an argument challenging the adequacy of representation element of SDCL 15-6-23(a)(4). Under Rule 23(a)(4), it must be shown that the class representative will fairly and adequately protect the interests of the class. Adequate representation depends on two factors: (1) the attorney for the representative party must be qualified, experienced, and generally able to conduct the defense, and (2) the representative party must not have interests antagonistic to those of the class. *See Thurman*, 2013 S.D. 63, ¶ 17, 836 N.W.2d at 619; *Trapp,* 390 N.W.2d at 561-62. At the time that the class is certified, "a class representative must be a part of the class and possess the same interest and suffer the same injury as the class members." *Thurman*, 2013 S.D. 63, ¶ 17, 836 N.W.2d at 619.

The GFP contends that the Attorney General is "not 'generally able to conduct the proposed litigation.'" (Brief at 11). Given that the Attorney General ably conducted the *Parks* litigation involving almost identical issues, that argument is difficult to credit. In essence, the GFP suggests that it is prevented from being involved a case involving claims against a class of defendants as the result of SDCL 1-11-1 and SDCL 1-11-1.1. A cursory examination of those statutes, however, belies the GFP's contention.

SDCL 1-11-1(1) & (2) clearly authorize the Attorney General to appear for the State and defend "in any court or before any officer, *any cause or matter*, civil or

criminal, in which the state shall be a party or interested." This case certainly qualifies as a cause or matter in which the State is a party or interested. SDCL 1-11-1.1 simply states that "[t]he attorney general shall serve on a full-time basis and shall not actively engage in the private practice of law." Defending this action in no sense constituted actively engaging in the private practice of law or providing legal representation to private parties. This is a case about the existing scope of public rights. And the only individual parties to this action, other than the Duerre and Herr families, are State entities and officials. The GFP cannot use these statutes to thwart certification of the defendant class in this case.

As part of that same argument, the GFP also challenges the appointment of GFP Secretary Hepler as the named representative. Again, however, the GFP's rationale is based upon the mistaken premise that "[t]he claims against Secretary Hepler in this action were initially based upon a theory that the State has engaged in a taking of Plaintiffs' private property without just compensation." (Brief at 13). Not so. There is no takings claim. No damages were sought. The complaint sought purely declaratory and injunctive relief and that is what the lower court granted.

The representative defendant, moreover, does not have interests antagonistic to those of the class. Rather, he has strongly defended against this action and sought to uphold the perceived rights of members of the public to enter and use the floodwaters on the Duerre and Herr farms. As head of the GFP, Secretary Hepler disagrees with the contention by the families in this case that the *Parks* decision should apply equally to their farms and, through his counsel, has vigorously opposed

it. He is as much a part of the defendant class and possesses the same interests as any other individual who might seek to enter and use the flooded private lands on the Duerre and Herr farms. In such circumstances, there was no reason to unnecessarily expand the number of litigants in order to confirm the answer to the basic statewide question of law involved in this case. Truly, the defendant class could not have had a better representative or one with more experienced and capable counsel.

In sum, none of the arguments advanced on appeal demonstrate that the circuit court abused its discretion in entering its order certifying the defendant class.

III. The GFP has waived any arguments not made in its brief.

Finally, it should be noted that the GFP has not raised any challenge in this appeal to the lower court's certification of the defendant class concerning SDCL 15-26(b)(1). In addition, the GFP's brief does not appear to raise any challenge to the second aspect of injunctive relief granted in this case prohibiting the GFP "from facilitating access to members of the public to enter or use the bodies of water or ice on the Plaintiffs' private property for any recreational purpose, including hunting and fishing, in the absence of permission from the landowner or authorization from the Legislature." (R. 649). As a result, any such arguments are waived. *See In re Marvin M. Schwan Charitable Foundation*, 2016 S.D. 45, ¶ 13, 880 N.W.2d 88, 92; *Daily v. City of Sioux Falls*, 2011 S.D. 48, ¶ 10, 802 N.W.2d 905, 910 n.6.

CONCLUSION

"It should never be forgotten," Justice Field sagely cautioned, "that protection of property and person cannot be separated. Where property is insecure, the rights

of persons are unsafe." Stephen J. Field, "The Centenary of the Supreme Court," February 4, 1890, *reprinted in* 134 U.S. 729, 745. (R. 337). In the case of the Duerre and Herr families, the GFP's refusal to follow the *Parks* decision has flooded their lives with a constant and inescapable sense of profound unease.

This case presents a common question of law of great significance to farmers and all private property owners in South Dakota, as well the hunters and anglers from across the region seeking to enter their private flooded lands. That question, however, was resolved in *Parks v. Cooper*, a decision that the GFP is obligated to follow, rather than the "pre-*Parks* approach" developed in its offices that it has enforced since 2004. Without question, the GFP is supremely convinced that it has full power to enact *de facto*, unwritten legislation declaring that the private property right to exclude may not be enforced if the land is wet or covered with ice and that the public has the right to enter flooded private lands and use them for hunting, fishing, or other recreation. But no matter how strongly held, that conviction does not comport with the law.

In *Parks*, the GFP asked this Court to allow the public to enter water or ice located on submerged private lands and treat those lands as public parks open to all for recreational use. This Court examined our statutes and said that is not the law. The GFP then asked the Legislature to pass legislation to open private flooded lands. The Legislature refused and said that is not the law. The GFP asked the Water Management Board to promulgate rule changes purporting to allow public

recreational use of private flooded lands. The Water Management Board likewise refused and said that it not the law.

Now, the GFP has come full circle and once again asks this Court perform an about-face from *Parks* and declare that current South Dakota law allows the public to enter water or ice located on flooded private land for recreational use. This Court should refuse once again, because that still is not the law.

The arguments made in GFP's brief and its companion brief from the South Dakota Wildlife Federation that under the public trust doctrine, flooded private lands are automatically open to the public for recreational use are the same essential arguments rejected by this Court in *Parks*. The circuit court acted properly in entering declaratory and injunctive relief for these families to return peace and quiet to their farms and their lives and remedy this untenable situation.

WHEREFORE, Appellees Thad Duerre, Clint Duerre, Robert Duerre, and LaRon Herr respectfully request that this Honorable Court affirm in all respects.

Dated this 29th day of August, 2016.

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CERTIFICATE OF COMPLIANCE

In accordance with SDCL 15-26A-66(b)(4), I hereby certify that this brief complies with the requirements set forth in the South Dakota Codified Laws. This brief was prepared using Microsoft Word, and contains 9,637 words from the Statement of the Case through the Conclusion. I have relied on the word count of a word-processing program to prepare this certificate.

/s/ Ronald A. Parsons, Jr.
Ronald A. Parsons, Jr.

IN THE SUPREME COURT
OF THE STATE OF SOUTH DAKOTA

Appeal No. 27885

THAD DUERRE, CLINT DUERRE, ROBERT DUERRE, AND LARON HERR,
Plaintiffs and Appellees,

vs.

KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish, and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without the permission of the owners of the property over which the waters lie,
Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT,
FIFTH JUDICIAL CIRCUIT, DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON FLEMMER
CIRCUIT COURT JUDGE

BRIEF OF *AMICI CURIAE* SOUTH DAKOTA CATTLEMEN'S ASSOCIATION, SOUTH DAKOTA CORN GROWERS ASSOCIATION, SOUTH DAKOTA FARM BUREAU FEDERATION, SOUTH DAKOTA SOYBEAN ASSOCIATION, AND SOUTH DAKOTA STOCKGROWERS ASSOCIATION

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I. INTEREST OF AMICI CURIAE

Amici Curiae are five of the leading agricultural producer groups in South Dakota, organized as voluntary membership organizations. Amici Curiae have an interest in the outcome of this matter as they represent the interests of thousands of agricultural producers across the state who believe that the public use of non-meandered bodies of water located on private property for recreational purposes, without any compensation to landowners or legislative authorization, infringes on private property rights, including the right to exclude others from the use and enjoyment of private property.

II. INTRODUCTION

Agriculture is South Dakota's number one industry. South Dakota agriculture produces an economic impact of over $25 billion annually and employs 122,000 people.[1] But, the impact of agriculture in South Dakota reaches beyond the state's bottom line. Agriculture has an especially personal impact on the everyday lives of many South Dakotans in every corner of the state. Over 31,000 South Dakota families rely on farming and ranching for a portion of their income.[2] More than 43 million of the state's approximately 48.5 million total acres are devoted to agricultural production. Because crop and livestock production are highly dependent on land and water and because over

[1] *Agriculture Industry | South Dakota Department of Agriculture*, SDDA.SD.GOV, https://sdda.sd.gov/office-of-the-secretary/agriculture-industry/ (last visited August 25, 2016); *South Dakota Statistics | Farmland Information Center*, FARMLANDINFO.ORG, http://www.farmlandinfo.org/statistics/south%20dakota (last visited August 25, 2016); *USDA/NASS State Agriculture Overview for South Dakota*, NASS.USDA.GOV, https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=SOUTH%20DAKOTA (last visited August 25, 2016).

[2] *Agriculture Industry | South Dakota Department of Agriculture*, SDDA.SD.GOV, https://sdda.sd.gov/office-of-the-secretary/agriculture-industry/ (last visited August 25, 2016); *USDA/NASS State Agriculture Overview for South Dakota*, NASS.USDA.GOV, https://www.nass.usda.gov/Quick_Stats/Ag_Overview/stateOverview.php?state=SOUTH%20DAKOTA (last visited August 25, 2016).

98 percent of South Dakota farms and ranches are family owned and operated,[3] this Court's decision will have a profound impact on South Dakota's economy and on the livelihood and well-being of thousands of families and dozens of communities across the state.

Farm and ranch families contribute to their communities, serve on local school and county boards, and pay property taxes—sometimes on flooded private land that is temporarily unfit for agricultural production—all while producing enough food to feed, on average, 155 people per producer annually.[4] After spending long hours providing food for the world, providing for their families, and giving back to their local communities, these fellow South Dakotans enjoy the privacy afforded to them in their homes, fields, and pastures. The issue before this Court threatens the historical and traditional meaning of private property rights upon which the "family farm" is based and the common understanding of family farmers and ranchers that their private property rights include the right to exclude others.

The "flooded private lands" issue is complex, controversial, emotional, and will impact South Dakota agricultural producers for generations. In *Parks v. Cooper*, 2004 S.D. 27, 676 N.W.2d 823, this Court correctly held that the question of whether to allow strangers onto flooded portions of private farms and ranches without the consent of the property owner should be resolved by the South Dakota Legislature. Until the people have spoken through the legislative process, the Department of Game, Fish and Parks

[3] *Agriculture Industry | South Dakota Department of Agriculture*, SDDA.SD.GOV, https://sdda.sd.gov/office-of-the-secretary/agriculture-industry/ (last visited August 25, 2016).
[4] *Id.*

should not be able to usher the uninvited public across the boundaries of private land under the color of law by mere bureaucratic fiat.

Based on the legal arguments and analysis of case law decisions from this Court and courts in other jurisdictions, the non-meandered real property owned by South Dakota's 31,000 farms and ranch families in South Dakota should remain private and—just as with traditional field hunting—subject only to recreational use when permitted by the landowner.

Because of the significance of this issue to the South Dakota agriculture industry, the Amici Curiae have invited Professor A. Dan Tarlock to participate in the preparation of this brief. Professor Tarlock is a nationally known expert in water law, published a treatise entitled "Law of Water Rights and Resources," and is a co-author of four casebooks: Water Resource Management, Environmental Law, Land Use Controls, and Environmental Protection: Law and Policy.[5]

III. SOUTH DAKOTA WATER LAW RECOGNIZES THE STATE'S VARIED GEOGRAPHY AND DISTRIBUTION OF WATER AND PROTECTS INDIVIDUAL PRIVATE PROPERTY RIGHTS.

A. The Unique History Of Water Law In South Dakota Supports Respecting Private Property Rights.

The unique geological and hydrological characteristics of Eastern South Dakota, with its series of lakes and depressions with fluctuating water levels, has created the long settled landowner expectations of exclusive land owner use and control of the water and ice overlying private property. Since the area was surveyed and settled, the lakes and depressions have been allocated between private ownership and public access based on

[5] *Professor A. Dan Tarlock | IIT Chicago-Kent College of Law*, KENTLAW.IIT.EDU, https://www.kentlaw.iit.edu/faculty/full-time-faculty/a-dan-tarlock (last visited August 25, 2016).

contemporary assumptions about bed ownership. *Parks v. Cooper*, 2004 S.D. 27, ¶ 2, 676 N.W.2d 823, 825. Smaller lakes and depressions were not meandered in federal surveys, and thus title to the beds of these bodies of water passed to the federal patentee as private property. GENERAL LAND OFFICE, INSTRUCTIONS FOR THE SURVEYORS GENERAL OF PUBLIC LANDS OF THE UNITED STATES, 12-13 (1855). This has led to the landowner expectation that non-meandered, flooded private lands are the exclusive property of the private land owners whose titles derive from federal patents, even if the water becomes temporarily accessible from a public right of way due to changed climatic conditions.

Fluctuation in water levels covering private land in Eastern South Dakota is not a new phenomenon. In 1955, the United States Department of the Interior recognized that water levels, over time, fluctuate to such a great extent in Eastern South Dakota that even the term "lake" itself is completely arbitrary and is not an accurate description of these water forms:

> In eastern South Dakota lakes, or at least depressions capable of holding water, are numerous. There is a complete gradation from minor depressions in the glacial drift, containing water only temporarily in exceptionally wet seasons, to basins that have contained lakes continuously, at least since the earliest settlement of the region. Hence any map of the "lakes" of this region would necessarily be based on some arbitrary determination of what constitutes a lake.

EDWARD FOSTER FLINT, PLEISTOCENE GEOLOGY OF EASTERN SOUTH DAKOTA 17 (1955).

Parks recognized the possibility that the unique water fluctuations that occur in Eastern South Dakota might open non-meandered water bodies to unprecedented public use and blur a long-standing line between submerged private lands and waters open to

public use. *Parks*, 2004 S.D. 27, ¶ 1-7, 676 N.W.2d at 824-26. Although this Court declared that all waters of the state are subject to the public trust, it recognized that this declaration does not automatically transform all waters into public recreational areas and properly deferred to the legislature to determine the extent of public access in waters on private property subject to fluctuating levels. *Id.* at 841.

B. The Public Trust Doctrine Does Not Mean Automatic Public Use For All Purposes.

The declaration that the state holds all waters in trust for the public is simply an assertion of its reserved Tenth Amendment police power to regulate the use and enjoyment of its waters. None of the various meanings of trust ownership compel the conclusion that the waters of non-meandered lakes and depressions overlying privately owned land are automatically subject to unlimited public recreational use.

The default rule for this analysis is established in *Parks*: Current South Dakota law does not authorize the general public to cross private property lines to use water or ice on private property for recreational hunting or fishing without Legislative authorization. *Parks*, 2004 S.D. 27, ¶ 53, 676 N.W.2d at 841. *Parks* also held that all water in South Dakota, including non-meandered lakes and depressions, "belongs to the people in accordance with the public trust doctrine." *Parks*, 2004 S.D. 27, ¶ 1, 676 N.W.2d at 825. This declaration of ownership in trust, however, does not compel opening the waters of non-meandered lakes and depressions to unlimited public recreational use. The public *trust*, in other words, does not mean unlimited public *use*.

There are at least four meanings of "public trust." None of them mandate the recognition of public rights in non-meandered lakes or depressions, even when connected to a public access point or a navigable, meandered lake.

i. The first meaning of the public trust merely affirms that the state owns the beds of navigable lakes based on the federal test for title navigability. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892). The federal test requires proof that the specific reach of a river or lake was part of a highway of interstate commerce at the time of statehood. *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1219 (2012) (citing *The Daniel Ball*, 77 U.S. 557, 563 (1870)). This meaning does not apply because none of the non-meandered lakes and depressions at issue in this litigation or found in Eastern South Dakota are navigable under the federal test for title.

ii. The second formulation of state ownership in public trust is merely an assertion of the state's reserved Tenth Amendment police power over waters within its territory. As a leading early 20th Century scholar, Roscoe Pound, explained: "The state as a corporation does not own a river as it owns the furniture in the state house." ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 199 (1922). State ownership of water asserts two foundational principles: (1) the relationship between the state and its waters is regulatory, not proprietary ownership because state ownership in trust is actually only an assertion of the state's residual police power to regulate the creation and use of water rights, and (2) no one—not the state, riparian property owner or any other person or entity—can claim any property relationship to water until a state water right is perfected through, for example, the issuance of a permit by the state for use of a watercourse. *Farm Investment Co. v. Carpenter*, 61 P. 258, 267 (Wyo. 1900).

The consequences of these two principles are illustrated by *California v. Superior Court of Riverside Cnty.*, 78 Cal. App. 4th 1019 (2000). The State of California owned a Superfund site which contained contaminated groundwater. *Id.* at 1022. After liability

was imposed on the state under the federal Superfund Act, California turned to its insurer for reimbursement for the cleanup costs that it incurred. *Id.* To avoid liability, the state's insurer invoked the "owned property" liability exclusion citing state statutory declarations of state ownership similar to those found in South Dakota statutory law. *Id.* at 1023; SOUTH DAKOTA CODIFIED LAW § 46-1-3. In holding that the state did not have a proprietary relationship to the waters in spite of these declarations, the appellate court concluded: "The State 'owns' the groundwater in a regulatory, supervisory sense, but it does not own it in a possessory, proprietary sense." *Superior Court of Riverside Cnty.*, 78 Cal. App. 4th at 1033. In declining to recognize the state's ownership interest in water, the court, asked the rhetorical question: "If the State can own the water of the state, what becomes of the State's 'ownership' of water in a river which crosses state or national boundaries?" *Id.* at 1032.

Ownership in trust as a basis for regulation does not apply to the decision at issue because the state is not asserting any actual power to regulate the use of the water in question. The reason is simple: no state agency has the power to infringe upon private property rights by regulating the use of non-meandered depressions or lakes on private lands. SOUTH DAKOTA CODIFIED LAW § 41-2-18(5) provides that, "[t]he management, use, and improvement of all *meandered* lakes, sloughs, marshes, and streams extending to and over dry or partially dry *meandered* lakes, sloughs, marshes, and streams, including all lands to which the state has acquired any right, title or interest for the purpose of water conservation or recreation . . . ." (emphasis added). This section clearly limits the authority of the Department of Game, Fish and Parks (GFP) to "meandered" lakes. Any unauthorized assertion of administrative authority over non-meandered water and ice

located on private lands would violate the separation of powers doctrine as *Parks* expressly recognizes the power of the legislature to decide if and when non-meandered depressions and lakes are open to public use, and to what extent. *Parks*, 2004 S.D. 27, ¶ 53, 676 N.W.2d at 841.

iii. The third meaning of the public trust is that ownership in trust imposes a duty on the state to use the beds of navigable waters for trust related purposes and to consider the full range of trust purposes in allocating water. *See Nat'l Audubon Soc'y v. Superior Court of Alpine Cnty.*, 658 P.2d 709 (Cal. 1983). Courts have long policed the sale or lease of state owned beds to ensure that the use was related to the historic purposes of the trust, *e.g.*, *City of Long Beach v. Marshall*, 82 P.2d 362 (Cal. 1938) (public trust allows leasing of tidelines for oil and gas), but this meaning of the trust does not apply in this case since the waters in question are not navigable and the state lacks the power to use privately owned beds unless it decides to expropriate them.

iv. The fourth meaning of the public trust is that state ownership in trust opens all waters of the state to recreational public use. *E.g., Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 171 (Mont. 1984). However, we are unaware of any reported decision of any court which has held that the public trust rationale alone automatically opens the surface of non-meandered depressions and lakes to public use where the beds are in private ownership. Rather, it has been used to open non-navigable surface streams to public use. *E.g., id.* at 169.

Even before the United States Supreme Court developed its modern takings jurisprudence, state court decisions to adopt recreational navigability or the public trust as

the basis for opening smaller bodies of water to public use have been guided by two prudential considerations, which anticipated the constitutional issues:

> (1) opening waters over privately owned beds increases the risk of difficult to police trespasses to the beds and banks of the water body as well as use that constitutes a private nuisance, *See Galt v. State by & through Dep't of Fish, Wildlife & Parks*, 731 P.3d 912 (Mont. 1987) (holding statute allowing overnight camping, duck blinds and boat moorage unconstitutional taking of private property), and
>
> (2) the difference between the public use of flowing streams compared to lakes or depressions. *Bott v. Natural Resources Commission*, 327 N.W.2d 838, 845 (Mich. 1982).

The result of the above analysis is this: none of the above four meanings of the public trust mandate the recognition of public rights in non-meandered lakes or depressions. This Court should continue to recognize and respect the rule of law and legal process set forth in *Parks*: "it is ultimately up to the Legislature to decide how these waters are to be beneficially used in the public interest." *Parks*, 2004 S.D. 27, ¶ 53, 676 N.W.2d at 841.

C. The Parks Court, Consistent With Courts In Other States, Held That Water On Private Land Is Not Open For Recreational Use Without Legislative Authorization.

Public trust does not mean automatic public use. This Court's determination in *Parks*, that the legislature is the appropriate forum for deciding whether to open water over privately owned lands for public use, is consistent with the holding of the Colorado Supreme Court in *People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979), and the Kansas

Supreme Court in *State ex rel. Meek v. Hays*, 785 P.2d 1356, 1364-65 (Kan. 1990). The Colorado Supreme Court, in *People v. Emmert*, upheld the common law, granting the individual private property owner the right to exclude, but recognized that a legislative decision may open water above privately owned lands to public use, holding "it is within the competence of the General Assembly to modify rules of common law *within constitutional parameters*." *Emmert*, 597 P.2d at 1027 (emphasis added).

The Kansas Supreme Court rejected the public trust rationale as a basis for opening private lands to automatic public recreational use in a way that directly applies to South Dakota. In *Meek*, The Kansas Supreme Court distinguished *Curran*, 682 P.2d at 171, which opened all Montana water capable of recreational use to the public without regard to ownership. *Meek*, 785 P.2d at 1364-65. The court noted that Montana's use of the public trust rests on MONTANA CONST. art. IX, § 3, which provides: "All surface, underground, flood and atmospheric waters within the boundaries of the state are the property of the state for the use of its people and subject to appropriation for beneficial uses as provided by law." *Meek*, 785 P.2d at 1364-65. Consistent with the Kansas Constitution, no similar provision exists in the South Dakota Constitution. Therefore, as this Court recognized in *Parks*, the extent of public access over private property created by the public trust is a legislative rather than a judicial decision. *Parks*, 2004 S.D. 27, ¶ 53, 676 N.W.2d at 841.

Wyoming has relied on state constitutional assertions of state ownership to adopt the pleasure boat test of navigability for non-navigable streams. *Day v. Armstrong*, 362 P.2d 137, 151 (Wyo. 1961). *Parks* implicitly recognized that there is a crucial distinction between the public use of flowing surface streams and lakes and depressions. Streams

are used for small flotation craft, either for fishing or the pleasure of floating down a stream. The time that a recreational floater spends over the bed of a stream is relatively limited, and thus, the opportunity for trespass is limited. Courts, such as Montana Supreme Court, have recognized and severely limited the ability to touch the beds or use the banks of a stream. *Galt*, 731 P.2d at 915. Lakes are different. The recreational user comes to the site and stays there to boat, hunt or fish. In the case of ice fishing, the recreational user fires up an ice auger, sets up camp, and erects structures that may remain in place for months. Thus, the opportunity for trespass and the creation of a private nuisance is much greater.

Parks implicitly recognized two related aspects of the public trust relevant to the non-meandered depressions and lakes of Eastern South Dakota: (1) there is a range of public trust values and no one value, such as hunting and fishing, is predominate, especially on non-meandered water bodies; and (2) the non-trespassory environmental benefits of these waters, such as wetlands maintenance and waterfowl habitat, are consistent with the public trust.

Thus, this Court's *Parks* decision and other decisions such as *In re Water Use Permit Applications*, 9 P.3d 409, 454 (Haw. 2000), properly placed the burden on users who seek to cross private property lines to engage in a use inconsistent with existing private property rights to demonstrate that the proposed new use is consistent with the public trust. *See Parks*, 2004 S.D. 27, ¶ 20, 676 N.W.2d at 829. In the case before the Court, the burden is on the state and the forum for that demonstration is the South Dakota Legislature.

D. Even Under The Public Trust Doctrine, Any Authorized Beneficial Use Of Private Lands Must Still Observe Constitutional Limitations And Respect Private Property Rights.

A judicial rule or bureaucratic decision authorizing public recreational access over the private land in question raises serious Fifth Amendment takings issues. *Parks* prudentially did not extend the trust rationale to non-meandered depressions or lakes, perhaps, as explained below, because the use of the state's police power to open historically private waters to public use is restricted by the Fifth Amendment to the Federal Constitution.

The Fifth Amendment protects reasonable, investment-backed expectations from governmental taking of private property. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). A taking may either be *per se* or determined by a balancing test. *Id.*; *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992). *Penn Central* adopted a three factor balancing test: (1) the economic impact of the regulation or rule on the claimant, (2) the extent to which the regulation or rule interferes with investment backed expectation, and (3) the character of the government action. *Penn Cent. Transp. Co.*, 438 U.S. at 124. The right to exclude is the keystone protected property right. *Loretto v. Teleprompter Manhattan CATV Corp*, 458 U.S. 419, 433 (1982). A judicial rule or bureaucratic declaration that all non-meandered, non-navigable lakes and depressions in South Dakota are open to public recreational use if non-trespassory access is available is a presumptive *per se* taking because it would eliminate the common law rule that littoral owners of property have the right to exclude non-littoral owners from using the surface. *See Id.* (statute requiring apartment owners to install cable facilities an unconstitutional taking because it eliminated the keystone right to exclude).

A judicial or bureaucratic decision to open the flooded private lands in northeastern South Dakota to public use would raise serious taking questions because it would subject South Dakota property owners to the risk of repeated and hard to police trespasses, nuisance-like conditions, loss of property value, and loss of privacy. The implicit motivation of the state seems to be GFP's desire to open additional private lands to the public for recreational hunting and fishing without the burden of administrative procedures or the legislative approval required in *Parks*. The desire to utilize another person's private property cannot be the rationale for impairing the right to exclude. Governed by such an ideology, any piece of private property could be dedicated to public use without compensation to the landowner, effectively destroying the very idea of private property. The South Dakota farmers and ranchers who are represented by the Amici Curiae are opposed to such an infringement of their property rights.

IV. CONCLUSION

Climatic conditions have physically blurred the line between meandered and non-meandered bodies of water. The GFP's ad hoc and uncoordinated response to fluctuating water levels and expanded ice covered bodies of water, together with the GFP's bureaucratic preference for sportsmen at the expense of private property rights, has created unnecessary tension and adversely affected private property owners across South Dakota. The *Parks* court prudently recognized that this issue should be resolved by future action of the South Dakota Legislature, and South Dakota law has never recognized nor authorized any right of the general public to cross private property lines and make recreational use of flooded private lands.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to SDCL 15-26A-66, counsel for Amici Curiae does hereby submit the following:

- The foregoing brief is typed in proportionally spaced typeface in Times New Roman 12 point. The word processor used to prepare this brief indicates that there are a total of 3,882 words and 21,480 characters in the body of this brief.

*/s/ Matthew S. McCaulley*_____
Matthew S. McCaulley

CERTIFICATE OF SERVICE

Matthew S. McCaulley, one of the attorneys for the South Dakota Cattlemen's Association, South Dakota Corn Growers Association, South Dakota Farm Bureau Federation, South Dakota Soybean Association, and South Dakota Stockgrowers Association, hereby certifies that a true and correct copy of its *BRIEF OF AMICI CURIAE* was served by email transmission upon the parties named herein as follows:

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IN THE SUPREME COURT
STATE OF SOUTH DAKOTA

No. 27885

THAD DUERRE; CLINT DUERRE; ROBERT DUERRE; and LARON HERR,

Plaintiffs and Appellees,

v.

KELLY R. HEPLER, in his official capacity as Secretary of the State of South Dakota Game, Fish and Parks Department; SOUTH DAKOTA DEPARTMENT OF GAME, FISH AND PARKS; STATE OF SOUTH DAKOTA; and a class of individuals, similarly situated, who have used or intend to use the bodies of water described in this Complaint without permission of the owners of the property over which the waters lie,

Defendants and Appellants.

APPEAL FROM THE CIRCUIT COURT
FIFTH JUDICIAL CIRCUIT
DAY COUNTY, SOUTH DAKOTA

THE HONORABLE JON S. FLEMMER
Circuit Court Judge

APPELLANTS' REPLY BRIEF

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Notice of Appeal filed May 26, 2016

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Defendants and Appellants.

ARGUMENTS

Appellants hereby incorporate all arguments set forth in the initial brief and further provide the following discussion in support of their positions.

I

THE TRIAL COURT ERRED IN CERTIFYING THE CLASS, NAMING SECRETARY HEPLER AS THE CLASS REPRESENTATIVE, AND COMPELLING THE ATTORNEY GENERAL'S OFFICE TO REPRESENT A CLASS CONSISTING OF PRIVATE INDIVIDUALS.

In reviewing the circuit court's order certifying a class, this Court reviews the action for an abuse of discretion. *See Thurman v. CUNA Mut. Ins. Society*, 2013 S.D. 63, ¶ 11, 836 N.W.2d 611, 615-16.

An abuse of discretion occurs when there "'is a fundamental error of judgment, a choice outside the range of permissible choices, a decision, which, on full consideration, is arbitrary or unreasonable.'" *Id.* (quoting *State v. Lemler*, 2009 S.D. 86, ¶ 40, 774 N.W.2d 272, 286).

The circuit court's certification of a class of defendants was an abuse of discretion. South Dakota Codified Law, section 15-6-23(a) provides the circumstances under which a class may be certified. It states:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if:
>
> (1) The class is so numerous that joinder of all members is impracticable;
>
> (2) There are questions of law or fact common to the class;
>
> (3) The claims or defenses of the representative parties are typical of the claims or defenses of the class;
>
> (4) The representative parties will fairly and adequately protect the interests of the class; and
>
> (5) The suit is not against this state for the recovery of a tax imposed by chapter 10-39, 10-39A, 10-43, 10-44, 10-45, 10-46, 10-46A, 10-46B, or 10-52.

SDCL 15-6-23(a).

The circuit court lacked jurisdiction over a portion of the class as defined since it includes individuals who may not have the requisite minimum contacts with the state. Appellees' contend, however, that the class as defined does not include individuals over whom the circuit

court did not have jurisdiction because anyone who violates the injunction would necessarily have entered into the state. Appellees' Brief, 30. Appellees' argument ignores the definition of the class as proposed by Appellees and ordered by the circuit court. The class as certified is defined as "[a]ll individuals who have entered or used, or *intend to enter or use*, or *have encouraged* others to enter or use the bodies of water that overlie private property owned by the Plaintiffs . . ." SR 169-70. Thus, the class is comprised of not only those individuals who have used the water but also those who *may* use the water as well as those who encourage others to use the water. An individual could be a member of the class if he had never been to the state merely because he thought about using this water or encouraged someone to use the water. Thus, the class as certified by the circuit court necessarily included individuals over whom the circuit court may not have had jurisdiction as those private individuals may not have the requisite minimum contacts with the forum. *See Kustom Cycles, Inc. v. Bowyer*, 2014 S.D. 87, ¶ 10, 857 N.W.2d 401, 406-07 (citing *Int'l Shoe Co. v. Wash., Office of Unemp't Comp. & Placement*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95 (1945)). The question is not whether the circuit court could someday have jurisdiction over the class, but whether it has jurisdiction over the members of the class at the time the class is defined. Thus, the class definition was overly broad and constitutes "a choice outside the range

of permissible choices[.]" *Thurman*, 2013 S.D. 63, ¶ 11, 836 N.W.2d at 616.

Additionally, the requirements to certify a class as set forth in SDCL 15-6-23 were not met. The requirements of numerosity, commonality, and typicality were not satisfied. Further, the requirement of adequate representation by the class representative was not satisfied.

As previously set forth, when determining the adequacy of representation requirement of Rule 23(a), a trial court is to consider "'(a) the [defendant's] attorney must be qualified, experienced, and generally able to conduct the proposed litigation, and (b) the [defendant] must not have interests antagonistic to those of the class.'" *Thurman*, 2013 S.D. 63, ¶ 17, 836 N.W.2d 611, 619 (citations omitted). In the instant case, neither of these considerations is satisfied.

The authority of the Attorney General is derived from statute. [1] *See* SDCL 1-11-1. The Attorney General is prohibited from engaging in the private practice of law. *See* SDCL 1-11-1.1. The essence of private practice is the representation of private individuals. *See, e.g.,* SDCL 7-16-19. Appellees assert that there is no legal representation

[1] Likewise, assistant attorneys general "shall have the same power and authority as the attorney general[.]" *See* SDCL 1-11-4. Additionally, special assistant attorneys general "have the power and authority specifically delegated to them by the attorney general in writing." *See* SDCL 1-11-5.

of private individuals by the Attorney General's Office. Appellees' Brief, 33. Yet, the class is comprised of private individuals whom the Attorney General's Office is being compelled to represent. It does not matter if the core issue of this case involves the scope of public rights; the undersigned counsel was, and still is, prohibited by law from representing private parties.

Additionally, Secretary Hepler, in his official capacity, did not share the same interests as the members of the proposed class. *See Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996). Secretary Hepler was neither an appropriate member of the class nor did he share the same interests or suffer the same injury as the members of the proposed class. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 625-26, 117 S.Ct. 2231, 2250-51, 138 L. Ed.2d 689 (1997) (citations omitted) (stating "[A] class representative must be part of the class and 'possess the same interest and suffer the same injury' as the class members."). As previously set forth, Secretary Hepler is charged with the conservation, protection, and management of the State's wildlife and fish and their habitats, as well as the enforcement of the laws of the State of South Dakota as it relates to wildlife and fisheries. *See* SDCL 41-2-18. As such, Secretary Hepler's general interests are not the same as those of a private sportsman.

Because the requirements of Rule 23(a) were not met,[2] and for the reasons previously set forth, the certification of this class constitutes "'a fundamental error of judgment, a choice outside the range of permissible choices . . .'" *Thurman*, 2013 S.D. 63, ¶ 11, 836 N.W.2d at 616. The circuit court erred in certifying the class as defined, naming Secretary Hepler as the class representative, and compelling the Attorney General's Office to represent private individuals, both residents and nonresidents of this State, contrary to statute. State Defendants respectfully request that this Court rule that it is improper to name the head of an executive agency as a class representative over a class comprised of private individuals. Further, State Defendants request that this Court rule the circuit court erred in compelling the Attorney General's Office to represent a class of private individuals under these circumstances.

II

THE CIRCUIT COURT ERRED IN FINDING THAT WATERS HELD IN PUBLIC TRUST COULD NOT BE USED FOR RECREATIONAL PURPOSES UNDER THE PUBLIC TRUST DOCTRINE AND EXISTING LAWS.

"'This Court reviews declaratory judgments as we do any other order, judgment, or decree' giving no deference to a circuit court's

[2] South Dakota Codified Law, section 15-6-23 requires Plaintiffs to satisfy both (a) and (b) of the statute. Satisfaction of 15-6-23(a) is mandated in order to satisfy the requirements of 15-6-23(b). As Appellees did not satisfy SDCL 15-6-23(a), and such satisfaction is a prerequisite for complying with (b), the circuit court additionally erred in finding that Plaintiffs met the requirements of 15-6-23(b).

conclusions of law under the de novo standard of review." *In re Pooled Advocate Trust*, 2012 S.D. 24, ¶ 20, 813 N.W.2d 130, 138 (quoting *Fraternal Order of Eagles No. 2421 of Vermillion v. Hasse*, 2000 S.D. 139, ¶ 8, 618 N.W.2d 735, 737).

In *Parks v. Cooper*, 2004 S.D. 27, ¶ 1, 676 N.W.2d 823, 825, this Court stated,

> we conclude that all water in South Dakota belongs to the people in accord with the public trust doctrine and as declared by statute and precedent, and thus, although the lake beds are mostly privately owned, the water in the lakes is public and may be converted to public use, developed for public benefit, and appropriated, in accord with legislative direction and state regulation.

This Court went on to acknowledge that the Legislature had recognized multiple uses for the water and determined that domestic use was superior to all other uses.[3] *Id.*, ¶ 50, at 840. The Court further stated, "[t]o balance these multiple uses, the Legislature and Governor formulate policies in the public interest to 'be carried out through a coordination of all state agencies and resources.'" *Id.,* ¶ 51, at 841. The Court concluded its discussion by stating "[d]ecisions on beneficial use belong ultimately to the Legislature." *Id.*

Appellees do not deny that there has been an appropriate delegation of authority to executive agencies to manage the waters of

[3] Appellants assert that that water may be put to more than one beneficial use at the same time. Thus, that domestic use is the highest priority does not prevent water from being used for recreational purposes so long as it does not interfere with the domestic use.

the State, in particular to the Department of Game, Fish and Parks to manage the land and water for the purposes of recreation including hunting and fishing. Moreover, Appellees do not deny that the Legislature has set forth a broad policy regarding the utilization of water in this state. Rather, Appellees contend that the Legislature must enact a specific directive authorizing recreational use of nonmeandered waters.[4]

Appellees base this argument on the Court's statement in *Parks* that "[d]ecisions on beneficial use belong ultimately to the Legislature." *Id.* While the Court held in *Parks* that the Legislature is the final decision maker regarding the recreational use of nonmeandered waters, the Court did not mandate specific legislative action. In fact, the Court noted, "[d]eciding how these waters and immediate shorelines should be managed and what constitutes a proper use goes beyond the scope of this opinion." *Id.* State Defendants have followed

[4] Appellees attempt to make much over the failure of specific measures regulating public recreation on nonmeandered waters. Appellees' Brief, 8, 16-17. The Legislature has previously considered legislation which would approve or restrict public access to nonmeandered waters located over private lands even if such waters could be legally accessed. *See* SB 169 (2014), HB 1135 (2013), and HB 1096 (2006). However, none of these bills were ever enacted by the Legislature. Nonetheless, Appellees contend the failure to pass specific legislation indicates the Legislature's disapproval of the recreational use of nonmeandered waters. It is just as likely that the Legislature felt that the delegation of authority and broad legislative policy previously enacted was sufficient to allow public water to be put to beneficial use. The most logical explanation, however, is that the rejection of these measures merely indicates a lack of consensus.

the holding of *Parks* by placing these waters to beneficial use while participating in the request for specific direction from the Legislature. However, the Legislature has not acted.

Additionally, this Court has recognized that the Executive Branch has authority to carry out the policies which have been enacted into legislation. *Id.* As stated in the opening brief, the Legislature has vested authority to manage the State's waters to the Department of Environment and Natural Resources and the Department of Game, Fish and Parks. *See* SDCL ch. 1-40 (grant of authority to DENR over water). *See also* SDCL §§ 1-39-5 (grant of quasi-legislative and quasi-judicial authority to GF&P to perform in accordance with ch. 41-2); 41-2-18 (areas upon which the Commission may promulgate rules, including the use of the land and water under the State's control); 41-2-38 (manage land and water for recreation purposes); 41-3-1 (propagation and preservation of game and fish). The Legislature has also provided the ability to restrict the use of public water. *See* SDCL 42-8-1.2.

Furthermore, as this Court has acknowledged, the Legislature has enacted a broad legislative policy regarding the management of water. *Parks*, 2004 S.D. 27, ¶¶ 50-51, 676 N.W.2d at 840-41. *See also* SDCL §§ 43-17-29 (providing that the public may use a navigable lake, without limitation, when the water level rises above the ordinary high water mark and covering private property if the water can be

legally accessed); 34A-2-1 (protecting waters for the use of recreation from pollution); 41-2-18 (authorizing the adoption of rules to implement game, fish and conservation laws); 46A-2-2 (listing recreation as a beneficial purpose for creating a water district). This legislative policy includes the "cod[ification of] public trust principles." *Parks*, 2004 S.D. 27, ¶ 45, 676 N.W.2d at 838.

The public trust doctrine has been recognized to include recreational use. *See Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 452, 13 S.Ct. 110, 118, 36 L.Ed. 1018 (1892) (finding that water was held in public trust so the people "may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties"). *See also National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709, 719 (Cal. 1983); *In re Sanders Beach*, 147 P.3d 75, 85 (Idaho 2006); *State v. Sorenson*, 436 N.W.2d 358, 363 (Iowa 1989); *Nelson v. DeLong*, 7 N.W.2d 342, 346 (Minn. 1942); *Montana Coalition for Stream Access, Inc. v. Curran*, 682 P.2d 163, 172 (Mont. 1984); *State ex rel. State Game Commission v. Red River Valley Co.,* 182 P.2d 421, 428 (N.M. 1945); *J.P. Furlong Enterprises, Inc. v. Sun Exploration and Production Co.*, 423 N.W.2d 130, 140 (N.D. 1988); *State ex rel. Brown v. Newport Concrete Co.,* 336 N.E.2d 453, 458 (Ohio 1975); *Oregon Shores Conservation Coalition v. Oregon Fish and Wildlife Com'n*, 662 P.2d 356, 364 (Or. 1983); *Conatser v. Johnson*, 194 P.3d 897, 901

(Utah 2008); *Day v. Armstrong*, 362 P.2d 137, 147 (Wyo. 1961). This Court has already joined the majority of states with respect to the public trust and there is no reason to reverse this position. This Court also has recognized that public purposes for water include recreation. *Sample v. Harter*, 37 S.D. 150, 156 N.W. 1016, 1018 (1916) (recognizing that public uses of lakes include "boating, fishing, fowling, bathing, and taking ice"); *Anderson v. Ray*, 37 S.D. 17, 156 N.W. 591, 593 (1916) (noting public waters "are of value to the public as mere places of recreation, and ought to be preserved by the state for such purposes, if for no other."); *Flisrand v. Madson*, 35 S.D. 457, 152 N.W. 796, 801 (1915) (noting the public's use of public waters to include "navigating, boating, fishing, fowling, and the like . . ."). Thus, it is widely recognized that recreation is a beneficial use of water.

The Legislature has mandated that water be put to maximum beneficial use. *See* SDCL §§ 46-1-2 and 46-1-4. Moreover, this Court has held that the water is held in trust under the public trust doctrine thus placing a fiduciary duty upon State Defendants to carefully manage this asset. "[T]he public trust doctrine imposes an obligation on the State to preserve water for public use. It provides that the people of the State own the waters themselves, and that the State, not as a proprietor, but as a trustee, controls the water for the benefit of the public." *Parks*, 2004 S.D. 27, ¶ 53, 676 N.W.2d at 841. While specific legislation would provide the most desirable guidance as to

how to manage these waters, it has not been enacted. Existing laws indicate recreation has been deemed by the Legislature to be a beneficial use of the waters of the State. State Defendants are left to carry out the policy that has been enacted under the authority granted to fulfill their obligations to the people of this State. Accordingly, the circuit court erred in declaring that further authorization was necessary before these public waters could be put to beneficial use by the public for recreation.

III

THE CIRCUIT COURT ERRED IN GRANTING AN INJUNCTION WHICH PROHIBITS THE RECREATIONAL USE OF WATERS HELD IN PUBLIC TRUST BUT ALLOWS PRIVATE LANDOWNERS THE RIGHT TO USE AND CONTROL ACCESS TO THOSE PUBLIC WATERS.

The circuit court's grant of injunctive relief is reviewed for an abuse of discretion. *See Strong v. Atlas Hydraulics, Inc.*, 2014 S.D. 69, ¶ 10, 855 N.W.2d 133, 138. The circuit court's findings of fact are reviewed under a clearly erroneous standard but the conclusions of law are reviewed de novo. *See id.*

An injunction may be granted only where it is necessary to "prevent the breach of an obligation existing in favor of the applicant." SDCL 21-8-14. South Dakota Codified Law, section 21-8-14 sets forth the conditions under which an injunction may issue. It provides as follows:

> Except where otherwise provided by this chapter, a permanent injunction may be granted to prevent the breach of an obligation existing in favor of the applicant:
>
> (1) Where pecuniary compensation would not afford adequate relief;
>
> (2) Where it would be extremely difficult to ascertain the amount of compensation which would afford adequate relief;
>
> (3) Where the restraint is necessary to prevent a multiplicity of judicial proceedings; or
>
> (4) Where the obligations arises from a trust.

SDCL 21-8-14. This Court has set forth additional considerations when determining whether injunctive relief is appropriate.

> Those factors include: '(1) Did the party to be enjoined cause the damage? (2) Would the irreparable harm result without the injunction because of lack of an adequate and complete remedy at law? (3) Is the party to be enjoined acting in bad faith or is the injury-causing behavior an innocent mistake? (4) In balancing the equities, is the hardship to be suffered by the enjoined party . . . disproportionate to the . . . benefit to be gained by the injured party?'

Strong, 2014 S.D. 69, ¶ 11, 855 N.W.2d at 138 (quoting *New Leaf, LLC v. FD Dev. of Black Hawk LLC*, 2010 S.D. 100, ¶ 15, 793 N.W.2d 32, 35).

The circuit court erred in granting Appellees' request for injunctive relief. The grant of injunctive relief was improper as there is no "obligation existing in favor" of Appellees. *See* SDCL 21-8-14. Appellees attempt to dismiss this argument stating that it is a re-argument of *Parks* and that they are entitled to the same injunctive

relief as the plaintiffs in *Parks*.[5] Appellees' Brief, 24. The flaw in their argument is that the injunction in *Parks* was wrongly granted by the circuit court on the premise that the water was private. *Parks*, 2004 S.D. 27, ¶ 51, 676 N.W.2d at 841. When this Court ruled the water was indeed public and not private, the injunction was allowed to remain to preserve the status quo and presumably allow the circuit court an opportunity to determine if alternative grounds existed upon which the injunction should issue. *Id.* Appellees are making the same "private water" arguments that were rejected in *Parks*. These arguments should fail again.

Despite Appellees' protestations, this Court has held that *all* water is held in trust for the public. *Parks*, 2004 S.D. 27, ¶ 46, 676 N.W.2d at 838-39. While Appellees enjoy the rights of a riparian owner with regard to the water, they do not own the water. *Id.* They have the right to exclude the public from their land, but they do not have the right to exclude the public from the waters which are held in

[5] Appellees attempt to paint a picture of State Defendants flouting this Court's opinion in Parks merely because State Defendants have not applied the Parks injunction statewide. The injunction, however, was specific as to Parks, Schiley, and Long Lake. The Court did not proclaim that the injunction was applicable to all nonmeandered bodies of water. Moreover, State Defendants have adopted the Court's holding that all water is held in trust and has attempted to care for and manage these waters for the benefit of the entire public and not just for the benefit of a few.

trust for the public.[6] Simply put, Appellees' private property rights do not extend to the water. Nor are Appellees' property rights superior to the rights of the public to have the water put to beneficial use. *See, cf., Anderson*, 37 S.D. 17, 156 N.W. at 595 (holding that riparian landowner's rights are "subject to the superior right of the public").

Appellees continue to assert that the requirements for an injunction to issue have been met. Appellees' Brief, 27. Yet, the record demonstrates no admissible evidence to support a finding that it would be difficult to ascertain the amount of compensation that would be appropriate or that an injunction is necessary to "prevent a multiplicity of judicial proceedings." This is especially difficult to prove as individuals who legally access and subsequently use the public water are not committing a trespass when they remain on the public water, so long as there is no impermissible invasion of the privately-owned land. *See, cf., Heikkila v. Carver*, 416 N.W.2d 593, 596 (S.D. 1987) (holding that "[o]wnership of oil and gas rights carries with it by implication the means of enjoying the mineral estate[]"). Additionally,

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[6] Appellees frequently confuse the issue by referring to the public's use of the waters held in by trust as trespass on their private land. If there is no contact with the land, there is no trespass. South Dakota Codified Law, section 41-9-1 provides, "Except as provided in § 41-9-2, no person may fish, hunt or trap upon any private land not his own or in his possession without permission from the owner or lessee of such land. A violation of this section is a Class 2 misdemeanor and is subject to § 41-9-8." Thus, a trespass does not result from mere contact with the water. Rather, to constitute a trespass, there must be contact with the land.

Appellees do not dispute that State Defendants have never received an official report of trespass on Appellees' private property. SR 510, 551. Moreover, Appellees concede State Defendants are not the cause of the alleged damage and that they cannot be held responsible for the actions of private individuals under *Benson*. *See Benson v. State,* 2006 S.D. 8, ¶ 63, 710 N.W.2d 131, 156. Furthermore, Appellees admit that State Defendants are not acting in bad faith. Appellees' Brief, 26.

In lieu of specific legislation, Appellees urge this Court to ignore its decision in *Parks* that all water is held in public trust by asking the Court to allow private individuals to exercise dominion and control over public waters inundating private land. Appellees' Brief, 26-27. The circuit court's injunction provided for that exact outcome. It prohibits the State from exercising its authority over the water while allowing Appellees sole discretion over who may make use of the water for recreational purposes.[7] The injunction grants a few private individuals dominion and control over a public asset. This is in direct contravention to South Dakota law and the holdings of this Court. *Parks*, 2004 S.D. 27, ¶ 46, 676 N.W.2d at 838 (holding "that the State of South Dakota retains the right to use, control, and develop the

[7] The disproportionate burden becomes even more evident with the fact that Duerres approved of the stocking of their slough as a rearing pond with 2.6 million walleye fry by GF&P in 2002 while acknowledging the potential of increased use by the public once the slough ceased to be used as a rearing pond. SR 536.

water in these lakes as a separate asset in trust for the public."). *See also Illinois Cent. R. Co.*, 146 U.S. at 453, 13 S.Ct. at 118 (stating "[t]he state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties . . . than it can abdicate its police powers in the administration of government and the preservation of peace."). Such actions constitute an abuse of discretion and the grant of injunctive relief should be reversed.

CONCLUSION

In *Parks*, this Court stated,

> we conclude that all water in South Dakota belongs to the people in accord with the public trust doctrine and as declared by statute and precedent, and thus, although the lake beds are mostly privately owned, the water in the lakes is public and may be converted to public use, developed for public benefit, and appropriated, in accord with legislative direction and state regulation.

Parks, 2004 S.D. 27, ¶ 1, 676 N.W.2d at 825. Though the *Parks* Court indicated that the Legislature is the ultimate decision maker with regard to the recreational use of nonmeandered waters, the Court stopped short of mandating specific legislative action. State Defendants have followed the holding of *Park*s by putting public waters to beneficial use while requesting specific direction from the Legislature. While Appellees concerns are understandable, they do not change the fact the Legislature has enacted a broad policy and

delegated authority to the Executive Branch to manage these waters. Nor do their concerns change the fact that recreation has been recognized by the Legislature as a beneficial use of water and as a beneficial use under the public trust doctrine. A few private individuals should not be allowed to control and monopolize an asset held in trust for the public.

Appellants urge this Court to continue to align South Dakota with Idaho, Iowa, Minnesota, New Mexico, Montana, North Dakota, Oregon, Utah, and Wyoming when it declared that all waters of the state are held in public trust and recognize a recreational use of public water under the public trust doctrine. Accordingly, Appellants respectfully request that this Court reverse the determination of the circuit court and hold that the waters held in public trust are available for recreational use by the public under the public trust doctrine as enacted in existing legislation. Appellants additionally request that this Court vacate the injunction issued by the circuit court and nullify the privatization of a public asset. Finally, Appellants respectfully request that this Court hold that it was improper to designate Secretary Hepler as class representative and compel the Attorney General's Office to provide legal representation for private individuals.[8]

[8] The amicus brief filed in support of Appellees should be disregarded insofar as it attempts to argue a takings theory. An amicus brief must be confined to the claims addressed by the parties in the appeal. Appellees have not pressed a takings claim. Appellees' Brief, 31.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. I certify that the Appellants' Reply Brief is within the limitation provided for in SDCL 15-26A-66(b) using Bookman Old Style typeface in 12 point type. Appellants' Reply Brief contains 4,457 words.

2. I certify that the word processing software used to prepare this brief is Microsoft Word 2010.

Dated this _____ day of September, 2016.

_____
Ann F. Mines Bailey
Assistant Attorney General

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this _____ day of September, 2016, a true and correct copy of Appellants' Reply Brief in the matter of *Duerre v. Hepler* was served by electronic mail upon Ronald A. Parsons, Jr. at ron@janklowabdallah.com; Shannon R. Falon at shannon@janklowabdallah.com; Jack H. Hieb at jheib@rwwsh.com; Zachary W. Peterson at zpeterson@rwwsh.com; Matthew S. McCaulley at matt@redstonelawfirm.com; Eric R. Matt at eric@redstonelawfirm.com; and Eric J. Cleveringa at cleveringalaw@gmail.com.

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