
**IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

Debbora Rolla, Personal Representative)	
of the Estate of George Tank, deceased,)	
)	
Plaintiff/Appellee,)	McKenzie County Civil Case No.:
vs.)	27-09-C-39
)	
Greggory G. Tank, and all other persons)	Supreme Court No.: 20130035
unknown claiming any estate or interest)	
in, or lien or encumbrance upon, the)	
property described in the Complaint,)	
)	
Defendant/Counterclaimant/Appellant.)	
)	

BRIEF OF DEFENDANT/APPELLANT, GREGGORY G. TANK

Appeal from District Court of McKenzie County
North West Judicial Court
District Court No. 27-09-C-39
The Honorable Joshua B. Rustad

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STATEMENT OF THE ISSUES

1 I. WHETHER THE DISTRICT COURT ERRED IN HOLDING THE DECEMBER 7, 2007, AND MARCH 3, 2008, QUIT CLAIM DEEDS (LIFE ESTATE RESERVED) RESERVED THE MINERAL INTERESTS TO GEORGE TANK AND ONLY CONVEYED THE SURFACE INTEREST IN THE SUBJECT LANDS TO GREGGORY TANK (WITH A LIFE ESTATE RESERVED TO THE GRANTOR).

STATEMENT OF THE CASE

2 On March 26, 2009, Personal Representative of the George Tank Estate, Debbora Rolla (hereinafter “Debbora Rolla PR”) filed a Summons and Complaint to quiet title in mineral interests once owned by George Tank. (Appendix at 6 (“Appendix” hereafter cited to as “A.”)). At issue was whether the title to the Premises should be quieted as to the claims of the Debbora Rolla, PR or Gregory Tank.

3 Gregory Tank responded to the Complaint with an Answer and Counterclaim on April 9, 2009. (A. at 14). Then, Gregory Tank filed an Amended Answer and Counterclaim on July 9, 2009. (A. at 19).

4 The matter came on for trial on April 28, 2011, in Watford City, McKenzie County, North Dakota before the Honorable Josh B. Rustad, Judge of the District Court. (Transcript. at 1 (“Transcript” hereafter cited to a “T.”)).

5 The District Court entered an Order on December 9, 2011. (A. at 27). The District Court quieted title in mineral interests on several parcels in favor of Debbora Rolla, PR. (A. at 38).

6 The Judgment Quieting Title to this action was entered in on November 28, 2012. (A. at 100-101).

7 Gregory Tank filed his Notice of Appeal on January 28, 2013. (A. at 102).

STATEMENT OF THE FACTS

8 This is an action by the Plaintiff, Debhora Rolla PR, to quiet title to mineral acres in the oil, gas and other minerals in lands located in McKenzie County, North Dakota:

Township 150 North, Range 96 West

Section 1: NW1/4SW1/4

Section 2: E1/2SE1/4; SE1/4NE1/4; Lot 2; SW1/4NE1/4; NW1/4SE1/4;
NE1/4SW1/4

Section 4: W1/2SW1/4

Section 5: SE1/4SE1/4

Section 8: N1/2SE1/4; NE1/4

Section 9: W1/2NW1/4; NW1/4SW1/4

Township 151 North, Range 96 West

Section 2: SW1/4

Section 11: NE1/4; S1/2

Section 12: NW1/4

Section 22: S1/2SW1/4; NE1/4SW1/4; NW1/4SW1/4; SW1/4SE1/4

Section 23: E1/2NE1/4; NE1/4SE1/4; SE1/4NW1/4; NE1/4SW1/4; SW1/4NE1/4;
NW1/4SE1/4

(hereinafter “subject property”). (A. at 6).

9 George Tank, now deceased, is the former owner of the subject property. George Tank passed away on June 14, 2008, and Debhora Rolla was appointed as the Personal Representative of George Tank’s estate according to George Tank’s Last Will and Testament. (T. at 12).

10 Prior to George Tank’s death, he executed the Deeds in question through his attorney Ken Hedge. (T. at 92-93, 101). A Quit Claim Deed (Life Estate Reserved) executed December 7, 2007, and Recorded on December 11, 2007, as Document Number 374078. (A. at 42-43). A section of land was inadvertently left off of the December 7, 2007, Deed thus a corrective deed was executed on March 2, 2008, and recorded on March 5, 2008, as Document Number 376301 (hereinafter both deeds are referred as “Deeds”). (A. at 44-45). Deeds both contained the following reservation clauses:

EXCEPTING and RESERVING to the Grantor, his successors and assigns, all oil, gas and other minerals now owned by Grantor, including coal, in and under the above-described land, or any part thereof, together with the right of ingress and egress and the use of so much of the surface of the land as is reasonably necessary for the purposes of exploring for, mining, drilling, excavating, operating, developing, storing, handling, transporting and marketing such minerals. Sand, gravel and clay shall be considered part of the surface.

FURTHER EXCEPTING and RESERVING to the Grantor, the full use, control, income and possession of the described property, including without limitation, the right to lease and receive the bonuses, rentals and royalties therefrom, without liability for depletion or waste, for and during Grantor's natural life.

(A. at 42-45).

11 A third Quit Claim Deed on December 7, 2007, and Recorded as Document Number 374079 wherein George Tank reserved a life estate and passed the surface estate and minerals to Gregory Tank. (A. at 41). The third deed is not a part of this action but is referenced in the transcript and argument.

12 At approximately the same time George Tank executed the Deeds, George Tank signed a codicil to his Last Will and Testament directing his children except for Gregory Tank to receive all the minerals he owned at death. (T. at 113).

13 Following George Tank's death, Conoco Philips ceased making production payments on the subject mineral estate because its title attorneys determined Gregory Tank was the owner of the minerals. (A. at 46-47; T. at 170).

14 This action then arose regarding who owned the minerals to the subject property: Gregory Tank as the remainderman to George Tank's Life Estate as set forth in the Deeds or George Tank's other children pursuant George Tank's Last Will and Testament.

15 At trial, evidence focused on whether George Tank intended the Deeds to convey

to Gregory Tank: (a) the surface estate in the Deeds alone, or (b) both the surface and mineral estates via quit claim deed with a life estate reserved. The District Court heard testimony from Debora Rolla PR, Attorney Ken Hedge, George Tank's former attorney, Attorney Dwight Eiken, oil and gas expert, and Gregory Tank.

16 The Deeds in question are set forth as Trial Exhibits I and M. (A. at 42-45). Trial Exhibit I is a Quit Claim Deed dated December 7, 2007, recorded as Document Number 374078. Id. Trial Exhibit M is a Corrective Quit Claim Deed dated March 3, 2008, recorded as Document Number 376301. Id. The only difference between these two deeds is that the corrective deed adds additional acreage that was mistakenly not included in the original deed. Trial Exhibit H is a December 7, 2007 Quit Claim Deed recorded as Document Number 374079. (A. at 41).

17 The Quit Claim Deeds set forth on Exhibits I and M are both specifically labeled as "Life Estate Reserved". (A. at 42-45). In addition, as can be seen from a review of Exhibit H, the exact same caption and reservation language was used in that deed to reserve a life estate as well. (A. at 41).

18 During, Debora Rolla's testimony, she relied upon Attorney Ken Hedge to support her position that notwithstanding the clear and undisputed language of the Deeds (Trial Exhibits I and M), that George Tank really wanted something else. (T. at 54-57).

19 Oil and Gas Expert Attorney Dwight Eiken, with over thirty-five years of oil and gas law experience including all types of work related to oil and gas related conveyances and who has performed over 200 drilling opinions, (T. at 181-182) testified that the clear meaning of the Deeds (Trial Exhibits I and M) was that George Tank had reserved an estate for his natural life time and the remainder interest conveyed to Gregory Tank subject to

that life estate. (T. at 185, 187-188). Attorney Eiken concluded this meant that Gregory Tank acquired a remainder interest in the oil, gas and other minerals which became a fee simple interest upon the subsequent death of George Tank. (T. at 193; A. at 92).

20 In addition, as Attorney Eiken repeatedly pointed out, all of the indicators of a life estate were present in the Deeds. (T. at 185-190).

21 Furthermore, Attorney Eiken testified that at the time he reviewed the Deeds for Attorney Pippin, he had absolutely no knowledge of who Attorney Pippin was representing, the only thing he was asked was what his opinion was as to the meaning and legal effect of the subject Deeds. (T. at 183).

22 Evidence was also introduced that Attorney Craig Smith,¹ an oil and gas expert attorney in his own right, reached the exact same opinion as Attorney Eiken. (T. at 161-162, 167-168; A. at 48, 60-63). In his drilling site opinion, Attorney Craig Smith determined that George Tank owned a life estate and that Gregory Tank owned the remainderman interest. Id.

23 Evidence was also introduced that oil giant Conoco Phillips repeatedly refused to pay production payments with respect to the minerals in the Deeds despite the Estate's requests to do so. (T. at 170). As set forth on Trial Exhibit CC, Conoco Phillips states: "Reduced to its simplest terms, our title opinions show ownership in Gregory Tank as the remainderman owner under the QCD...." (A. at 46-47). In this regard, despite numerous requests of Debora Rolla PR and her attorneys, for Conoco Phillips to start paying on production to the Estate, Conoco Phillips refused and continued to refuse to do so given the

¹ Attorney Smith formerly practiced with the Fleck firm that now merged into Crowley Fleck. Attorney Ken Hedge works with the Crowley Fleck firm. George Tank was a longtime client of the McIntee and Whisenand law firm that merged into Crowley. Crowley also represents the Estate of George Tank, Debora Rolla PR. However, this case was then sent to outside counsel (Attorney Van

opinion of its title attorneys as to the proper ownership of the subject minerals. (T. at 170; A. at 46-47).

24 While Debhora Rolla PR alleged that the Deeds were clear (in her favor), correspondence from the law firm that prepared the Deeds (Crowley) indicates otherwise. (T. at 21-22, 170). Again, Trial Exhibit CC reflects the email exchange between Crowley and Conoco Phillips where Crowley goes so far as to suggest an indemnifying Order so as to hold Conoco Phillips harmless so long as they make the payments as requested by the Estate, which Conoco Phillips would not agree to. (A. at 46-47).

25 Gregory Tank testified that George Tank had intended for Gregory Tank to receive the oil and gas minerals that George Tank owned. (T. at 224-225, 228, 238-239). Gregory and his wife had taken over significant amounts of debt over for George Tank amounting to all of George's debt until he died. (T. at 223-224). Gregory Tank further testified that, George Tank had repeatedly stated to Gregory Tank and others that George Tank wanted Gregory Tank to receive all of his oil and gas minerals, after George Tank's death. (T. at 224-225, 228, 238-239).

LAW AND ARGUMENT

I. Standard of Review.

26 Conveyances of real property are interpreted as contracts. Royse v. Easter Seal Soc. for Crippled Children & Adults, Inc. of North Dakota, 256 N.W.2d 542, 544 (N.D. 1977), and deeds that convey mineral interests are subject to the general rules governing contract interpretation. Minex Resources, Inc. v. Morland, 467 N.W.2d 691, 696 (N.D. 1991), Miller v. Schwartz, 354 N.W.2d 685, 688 (N.D. 1984), Mueller v. Stangeland, 340

Grinsven) for this quiet title action.

N.W.2d 450, 452 (N.D. 1983). See also N.D.C.C. § 47-09-11.

27 "The construction of a written contract to determine its legal effect is a question of law for the court to decide." Dakota Partners, L.L.P. v. Glopak, Inc., 2001 ND 168, ¶8, 634 N.W.2d 520. On appeal, this Court independently examines the conveyance "to determine whether the trial court erred in its interpretation". Id.

28 On appeal, Gregory Tank asks this Court to reverse the District Court and hold that the Deeds conveyed a remainder interest of both the surface and mineral estates in the subject property to Gregory Tank. Further, under this interpretation, as a successor-in-interest to George Tank, Gregory Tank is the owner of surface and mineral interests in the subject property, and this Court should direct the District Court to quiet title to this mineral interest to Gregory Tank.

II. Arguments

29 The District Court's finding that George Tank reserved the mineral estate in the subject Deeds was erroneous in several respects. First, under the North Dakota's Rules of Deed Construction the Deeds unambiguously reserved the mineral interests for George Tank's natural life and upon his death are owned by Gregory Tank as the remainderman. Second, even if the reservations paragraphs conflict, under the rules of construction, the second paragraph prevails over the first and the Deeds reserve four of the five attributes of the mineral estate only for Grantor's natural life.² Third, even if the Court finds a repugnancy and finds such repugnancy irreconcilable, the Deeds must be construed against the party who prepared them, in this case, the Grantor.

² The five attributes of a mineral estate are: "(1) the right to develop (the right of ingress and egress); (2) the right to lease (the executive right); (3) the right to receive bonus payments; (4) the right to receive delay rentals; and (5) the right to receive royalty payments"). Veterans Land Bd. v. Lesley, 281 S.W.3d 602,

30 The North Dakota Supreme Court in Mueller v. Stangeland, 340 N.W.2d at 452, stated:

The primary purpose in construing a deed is to ascertain and effectuate the intent of the grantor. Malloy v. Boettcher, 334 N.W.2d 8, 9 (N.D.1983). Section 47-09-11, N.D.C.C., provides that grants of real property "shall be interpreted in like manner with contracts in general except so far as otherwise provided" in that chapter.

We therefore look to the rules for interpreting contracts provided by Chapter 9-07, N.D.C.C., to aid us in construing a deed. Summarized, Chapter 9-07, N.D.C.C., provides, among other things, that: (1) the language of a contract governs if it is clear and explicit and does not involve an absurdity (Sec. 9-07-02); (2) a contract must be interpreted to give effect to the mutual intention of the parties (Sec. 9-07-03); (3) the intention of the parties to a written contract is to be ascertained from the writing alone if possible (Sec. 9-07-04); (4) a contract is to be interpreted as a whole to give effect to every part (Sec. 9-07-06); (5) a contract may be explained by reference to the circumstances under which it was made (Sec. 9-07-12); and (6) in cases of uncertainty not otherwise removed, the language is to be interpreted most strongly against the party who caused the uncertainty to exist (Sec. 9-07-19).

Mueller, 340 N.W.2d at 452.

31 The position of Gregory Tank that the subject Deeds conveyed the surface and mineral estates with a life estate reserved is entirely consistent with that of:

- (1) Oil giant, Conoco Philips;
- (2) Oil and Gas Expert Attorney Dwight Eiken; and
- (3) Oil and Gas Expert Attorney Craig Smith's drilling site opinion.

A. Under North Dakota's Rules of Deed Construction, the Deeds Unambiguously Reserve the Mineral Interests for George Tank's Natural Life and upon his Death are owned by Gregory Tank as the Remainderman.

32 As stated above, the Deeds are unambiguous and the intention of the Grantor, George Tank, can be ascertained by the writing alone under the rules of construction, and under these rules, the Grantor intended that both reservation paragraphs to be limited to

Grantor's natural life.

33 Grants of real property are to be interpreted in the same manner as contracts. U.S. Bank, Nat'l Ass'n v. Koenig, 2002 ND 137, ¶ 8, 650 N.W.2d 820, 822 (citing N.D.C.C. §47-09-11). "Contracts are construed to give effect to the parties' mutual intent at the time of contracting." Koenig, 2002 ND 137 at ¶ 8 (citing N.D.C.C. §9-07-03). Intent of the parties is ordinarily determined by looking only to the deed and no further. Gilbertson v. Gilbertson, 452 N.W.2d 79 (ND 1990). See also N.D.C.C. §9-07-04. "A contract must be construed as a whole to give effect to each provision, if reasonably practicable." Kuperus v. Willson, 2006 ND 12, ¶ 11, 709 N.W.2d 726, 731 (quoting Lire, Inc. v. Bob's Pizza Inn Rests., Inc., 541 N.W.2d 432, 433-34 (N.D. 1995)). "The parties' intent must be ascertained from the entire instrument, and every clause, sentence, and provision should be given effect consistent with the main purpose of the contract." Koenig, 2002 ND 137 at ¶ 8. "Particular clauses of a contract are subordinate to its general intent." N.D.C.C. § 9-07-15. Under N.D.C.C. § 9-07-17, "[r]epugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purpose of the whole contract." Koenig, 2002 ND 137 at ¶ 8. "When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone if possible, subject, however, to the other provisions of this chapter." N.D.C.C. § 9-07-04.

34 The general intent of Grantor, George Tank, supports this interpretation, as the language in the Deeds show that the entire reservation was to be limited to the Grantor's life. First, the instruments are named "**QUIT CLAIM DEED (Life Estate Reserved)**," which indicates the entire reservation was to be limited to Grantor's life only. (A. at 42-

45). The parenthetical to the title, (Life Estate Reserved), does not indicate it applies to certain parts, but not to others. Rather, just as titles ordinarily do, it applies to describe the entire document. This shows the general intent of the whole document is to be limited to the Grantor's life.

35 Second, the language of the actual reservation indicates the same. The second paragraph of the reservation begins "FURTHER EXCEPTING and RESERVING." (A. at 42-45). Words are to be construed in their ordinary and popular sense. N.D.C.C. § 9-07-02. The Supreme Court of North Dakota looks to the dictionary to ascertain the ordinary meaning of a term in a contract, that is, "the definition a non law-trained person would attach to the term." Martin v. Allianz Life Ins. Co. of N. Am., 573 N.W.2d 823, 826 (N.D.1998). According to Merriam Webster's online dictionary, "further" means "in addition: moreover: to a greater degree or extent." Definition from the Merriam-Webster Online Dictionary, <http://www.merriam-webster.com/dictionary/further> (last visited May 10, 2013). Under this construction, "further" designates that the second paragraph is an addition to the first paragraph; it indicates a greater degree of the reservation or greater extent of the reservation.

36 A parcel only contains one mineral estate; there cannot be two separate reservations. The second paragraph is a continuation of the first paragraph, not an entirely separate reservation Debora Rolla PR suggests. (T. at 97-98). As the second paragraph is a continuation of the first paragraph to make one reservation, the final words, "for and during Grantor's natural life," applies to the entire reservation. (A. at 42-45). The general intent is that the Grantor here was to reserve mineral interests for his natural life. This general intent should govern when interpreting the Deeds.

37 Gregory Tank’s interpretation, that the two paragraphs are part of one complete reservation, is consistent with the rules of construction. The intention of the parties to a contract must be gathered from the entire instrument and not from isolated clauses. Spagnolia v. Monasky, 2003 ND 65 ¶ 11, 660 N.W.2d 223. See also N.D.C.C. § 9-07-06. As shown above, the two paragraphs a part of one reservation give effect to and are consistent with the general intent of the contract. See N.D.C.C. § 9-07-03 (stating contracts must be construed to give effect to the parties’ mutual intent at the time of contracting); see also Koenig, 2002 ND 137 at ¶ 8. This interpretation is ascertained by the writing alone. See N.D.C.C. § 9-07-03. This interpretation construes the Deeds as a whole and gives effect to each provision. See Kuperus, 2006 ND 12 at ¶ 11. Under this interpretation, no repugnancy exists. See Koenig, 2002 ND 137 at ¶ 8. Even if a repugnancy existed, this interpretation resolves the repugnancy and gives effect to the alleged repugnant clause which is consistent with the general intent. See id. The interpretation asserted by Gregory Tank follows each primary rule of construction.

38 As shown above, the general intent of the contract, as evidenced by the Title language and the language in the actual reservation, was to reserve mineral interests only for Grantor’s natural life. The District Court interpretation that there are two separate reservations of the Deeds, one reservation reserving the minerals and a second reserving a life estate interest in the surface property, is contrary to the general intent of the contract. (A. at 38)

39 Third, the District Court erroneously ignores language contained in the Title, “(Life Estate Reserved)”, and the entire second paragraph of the reservation. The plain language of the second paragraph of the Deeds states:

FURTHER EXCEPTING and RESERVING to the Grantor, the full use, control, income and possession of the described property, including without limitation, the right to lease and receive the bonuses, rentals and royalties therefrom, without liability for depletion or waste, for and during Grantor's natural life.

(A. at 42-45). The plain language here in no way suggests the reservations are limited to the surface estate. In fact, the language indicates the opposite. Bonuses, rentals, and royalties most always refer to subsurface oil and gas rights. See sworn affidavit of Attorney Dwight Eiken (A. at 90).

40 Fourth, the District Court incorrectly concluded that all of the mineral interests had already been reserved and thus the second reservation could only apply to the surface interest, places utmost importance on the order the provisions are arranged. The first controls the second. This has no basis in the rules of construction. In fact, it runs directly contrary to those rules. Each of the Deeds must be interpreted as a whole and must give effect to each provision. Kuperus, 2006 ND 12 at ¶ 11. "Furthermore, it is a well-accepted rule of contract interpretation that when a conflict exists between a specific provision and a general provision in a contract, the specific provision ordinarily prevails over the general provision." Fortis Benefits Ins. Co. v. Hauer, 2001 ND 186, ¶ 17, 636 N.W.2d 200, 205.

41 Some background regarding mineral estates is appropriate. The Texas Court of Appeals in, Veterans Land Bd., 281 S.W.3d 602, has set forth the mineral estate attributes, which is helpful to this case: "[a] mineral estate consists of five attributes: (1) the right to develop (the right of ingress and egress); (2) the right to lease (the executive right); (3) the right to receive bonus payments; (4) the right to receive delay rentals; and (5) the right to receive royalty payments." Id. at 615. "Each attribute is an independent

property right, may be severed into a separate interest, and may be separately conveyed or reserved by the owner.” Id. “When an owner conveys a mineral estate, all attributes are impliedly transferred as well unless they are specifically reserved to the grantor.” Id. at 616.

42 Here, while the first reservation paragraph refers to the general mineral estate, the second severs each attribute into a separate interest:

EXCEPTING and RESERVING to the Grantor, his successors and assigns, all oil, gas and other minerals now owned by Grantor, including coal, in and under the above-described land, or any part thereof, together with the right of ingress and egress and the use of so much of the surface of the land as is reasonably necessary for the purposes of exploring for, mining, drilling, excavating, operating, developing, storing, handling, transporting and marketing such minerals. Sand, gravel and clay shall be considered part of the surface.

FURTHER EXCEPTING and RESERVING to the Grantor, the full use, control, income and possession of the described property, including without limitation, the right to lease and receive the bonuses, rentals and royalties therefrom, without liability for depletion or waste, for and during Grantor’s natural life.

(A. at 42-45).

43 The second paragraph reserves certain individual attributes of the mineral estate, it reserves a subset of the first paragraph. The second paragraph excepts and reserves four of the five total attributes described in Veterans Land Bd., 281 S.W.3d at 615: 1) the right to lease (the executive right); 2) the right to receive bonus payments; 3) the right to receive delay rentals; and 4) the right to receive royalties. Id. The only attribute which is not specifically delineated by the second paragraph is the right to develop (the right of ingress and egress). The first paragraph is general; the second is specific.

44 “Deeds are interpreted as a whole to give effect to every part.” N.D.C.C. § 9-07-

06. Furthermore, if a conflict exists between a specific provision and a general provision, the specific provision qualifies the general provision. Kortum v. Johnson, 2008 ND 154, ¶ 44, 755 N.W.2d 432. As a result, under the rules of construction, the second paragraph prevails over the first. More likely, the second paragraph intended to restate all five attributes, as Gregory Tank was granted the surface rights, and therefore, possesses the right to ingress and egress.

45 Fifth, the Deeds contain no repugnancy, as the reservation paragraphs are one complete Reservation which do not conflict. The District Court erroneously disregarded the general intent of the Deeds and disregarded the plain language contained in the second paragraph for what amounts to an alleged irreconcilable repugnancy. Under N.D.C.C. § 9-07-17, a repugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the alleged repugnant clause. Gregory Tank's interpretation is not repugnant, and even if it was, the interpretation gives the proper effect to the alleged repugnant clause.

46 The Grantor's intention can be ascertained by the writing alone subject to these rules of construction. If the Supreme Court is to look at the competing interpretations, Gregory Tank's interpretation must be found to be consistent with the rules of construction.

B. Even if the Reservations Paragraphs Conflict, under the Rules of Construction, the Second Paragraph Prevails over the First.

47 Even if this Court does not interpret the two paragraphs as one continuous and complete reservation, and instead interprets them as two separate provisions, the second paragraph prevails over the first. Under this interpretation, the individual attributes listed

in the second paragraph would be reserved for Grantor's natural life, and the attributes not listed would be reserved without limitation. See Veterans Land Bd., 281 S.W.3d 602, 615 (each attribute is an independent property right, may be severed into a separate interest, and may be separately conveyed or reserved by the owner).

48 Under the rules of construction, the second paragraph must prevail over the first. “[I]t is a well-accepted rule of contract interpretation that when a conflict exists between a specific provision and a general provision in a contract, the specific provision ordinarily prevails over the general provision.” Hauer, 2001 ND 186 at ¶ 17. The second paragraph refers to the sum of the parts of the entire estate. The first paragraph is the general blanket reservation. The second paragraph, then, must prevail over the first. Under this formulation, the right to lease (executive right), the right to receive bonus payments, the right to receive delay rentals, and the right to receive royalties are to be reserved for Grantor's natural life. The right to develop (the right to ingress and egress) is not limited to Grantor's natural life. The rules of construction must be followed over the District Court's erroneous interpretation.

C. If the Court Finds a Repugnancy and Finds Such Repugnancy Irreconcilable, the Deeds Must Be Construed against the Party who Prepared Them, in this Case, the Grantor.

49 If the North Dakota Supreme Court applies the primary rules of construction, the reservation paragraphs should be limited to Grantor's natural life. If this Court cannot reconcile these paragraphs, the second paragraph must prevail over the first. If the Court still finds these provisions irreconcilable, the secondary rules of construction require the reservation, both paragraphs, to be limited to Grantor's natural life.

50 Gregory Tank characterizes certain rules of construction as “secondary” because

the Legislature or the North Dakota Supreme Court has directed they only be used where the uncertainty is not removed by other rules of construction. Two secondary rules are relevant here if the Court finds the uncertainty is not removed by ordinary rules of construction: N.D.C.C. § 9-07-19 and N.D.C.C. §47-09-13. North Dakota Century Code Section 9-07-19 provides:

In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist. The promisor is presumed to be such party, except in a contract between a public officer or body, as such, and a private party, and in such case it is presumed that all uncertainty was caused by the private party.

North Dakota Century Code Section 47-09-13 provides:

A grant shall be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.

51 The North Dakota Supreme Court in Webster v. Regan, 2000 ND 89, ¶ 11, 609 N.W.2d 733, 736, held this rule is a “last resort rule of construction, applied when all other means of ascertaining the parties’ intent have failed.” Id.

52 The rule of construction under N.D.C.C. § 9-07-19 should be given priority over the rule outlined in N.D.C.C. § 47-09-13. First, the plain language of Section 9-07-19 provides that it is secondary only to the other rules preceding it under N.D.C.C. ch. 9-07. Second, Webster dictates that N.D.C.C. § 47-09-13 is a “last resort” of construction. 2000 ND 89 at ¶ 11. Lastly, and perhaps most importantly, the Supreme Court of North Dakota in Mueller, 340 N.W.2d at 454, applied N.D.C.C. §9-07-19 in the context of a mineral reservation instead of applying N.D.C.C. § 47-09-13. Id. (pursuant to N.D.C.C. § 9-07-19 the uncertainty of the deed "should be interpreted most strongly against the party

who caused the uncertainty to exist”). This Court should only employ N.D.C.C. § 47-09-13 if every other rule of construction, including N.D.C.C. § 9-07-19, fails to remove uncertainty.

53 Using N.D.C.C. § 47-09-13 is not called for here, as any uncertainty is removed by N.D.C.C. § 9-07-19. Under N.D.C.C. § 9-07-19, the language of the Deeds should be interpreted most strongly against the party who caused the uncertainty to exist, i.e., the party who drafted the agreement. Id. See Oakes Farming Association v. Martinson Brothers, 318 N.W.2d 897, 908 (N.D. 1982). Here, it is undisputed that the Grantor prepared this document. If any uncertainty remains as to whether the life estate clause applies to both paragraphs in the Deeds, the issue must be resolved in favor of the grantee. In other words, the entire reservation, both paragraphs, must be limited to Grantor’s natural life. In this case before the Court, if the other rules of construction do not remove the uncertainty, the entire reservation must be found to be limited to Grantor’s natural life.

CONCLUSION

54 For the foregoing reasons, consistent with the facts, evidence, and applicable law, and for those reasons to be submitted during oral argument in this matter, Gregory Tank respectfully requests that the Supreme Court reverse the Trial Court’s decision and determine that the Quit Claim Deed (Life Estate Reserved) executed December 7, 2007, and Recorded on December 11, 2007 as Document Number 374078, and (Corrective) Quit Claim Deed (Life Estate Reserved) executed on March 2, 2008, and recorded on March 5, 2008 as Document Number 376301 both conveyed the surface and mineral estates to Gregory Tank.

RESPECTFULLY SUBMITTED this 16th day of May, 2013.

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CERTIFICATE OF COMPLIANCE

The undersigned, as the attorney representing Appellant hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that it contains 5,241 words from the portion of the brief entitled “Statement of the Issues” through the signature block. This word count was done with the assistance of the undersigned’s computer system, which also counts abbreviations as words.

Dated this 16th day of May, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief of Defendant/Appellant, Gregory G. Tank, together with the Appendix, was served via electronic mail on this 16th day of May, 2013 addressed to:

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