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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Jack M. Peterson, Eugene Peterson, Plaintiffs/Appellees, vs. Lester Jasmanka and all other persons unknown claiming any estate or interest in or lien or encumbrance upon, the property described in the Complaint, Defendant/Appellant.	**SUPREME COURT NO. 20130162** Civil No. 31-1990-cv-07556

ON APPEAL FROM ORDER DENYING MOTION TO VACATE JUDGMENT APRIL 1, 2013
STATE OF NORTH DAKOTA
NORTHWEST JUDICIAL DISTRICT
COUNTY OF MOUNTRAIL

AMICUS CURIAE BRIEF OF WHITING OIL AND GAS CORPORATION FOR AFFIRMANCE AND IN SUPPORT OF APPELLEES

John W. Morrison (#03502)
Paul J. Forster (#07398)
CROWLEY FLECK PLLP
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, ND 58502-2798
Telephone: 701.223.6585
jmorrison@crowleyfleck.com
pforster@crowleyfleck.com

Attorneys for Whiting Oil and Gas Corporation

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iii

Paragraph No.

STATEMENT OF IDENTITY AND INTEREST 1

RULE 29(c)(4) STATEMENT 3

STATEMENT OF THE FACTS 4

ARGUMENT 6

A. The Judgment is Not Void Under Rule 60(b)(4), Because Plaintiffs Completed Proper Service of Process by Publication. 8

B. The Time for a Rule 60(b)(3) Motion Has Expired, and Appellant Has in Any Case Introduced No Evidence of Fraud or Misrepresentation. 17

C. Discretionary Considerations Further Support the District Court's Denial of Appellant's Motion to Vacate. 21

CONCLUSION 23

CERTIFICATE OF SERVICE 14

TABLE OF AUTHORITIES

Paragraph No.

Cases

Anderson v. Heinze, 2002 ND 60, 643 N.W.2d 24 9

Basin Electric Power Cooperative v. Lang, 221 N.W.2d 719 (N.D. 1974) 11

Halvorson v. Starr, 2010 ND 133, 785 N.W.2d 248 10

Johnson v. Taliaferro, 2011 ND 34, 793 N.W.2d 804 12

Kuehl v. Lippert, 401 N.W.2d 523 (N.D. 1987) 22

Lang v. Bank of N.D., 377 N.W.2d 575 (N.D. 1985) 18

McComb v. Aboelessad, 535 N.W.2d 744 (N.D. 1995) 11

Soli v. Soli, 534 N.W.2d 21 (N.D. 1995) 6, 19

Sorenson v. Felton, 2011 ND 33, 793 N.W.2d 799 ..... 12, 13

Spring Creek Ranch, LLC v. Svenberg, 1999 ND 113, 595 N.W.2d 323 11

State v. $33,000.00 U.S. Currency, 2008 ND 96, 748 N.W.2d 420 21

State v. Red Arrow Towbar Sales Co., 298 N.W.2d 514 (N.D. 1980) 6, 9

United States v. Dalman, 5 F.3d 532, 1993 WL 349410 (8th Cir. 1993) 22

Statutes

N.D.C.C. § 1-02-03 13

N.D.C.C. § 32-15-17 11

N.D.C.C. § 32-17-06 8

N.D.C.C. ch. 38-18.1 10

N.D.C.C. § 38-18.1-02 10

N.D.C.C. § 38-18.1-06 ..... 10, 11, 12, 13

Rules

N.D. R. App. P. 29 2

N.D. R. Civ. P. 4(e) 8, 9, 11

N.D. R. Civ. P. 24(a) 1

N.D. R. Civ. P. 60 ..... 2, 4, 6, 21

N.D. R. Civ. P. 60(b) 21, 22

N.D. R. Civ. P. 60(b)(3) 6, 7, 17, 20

N.D. R. Civ. P. 60(b)(4) 6, 7, 9, 16

N.D. R. Civ. P. 60(c)(1) 17

N.D. R. Civ. P. 61 15

STATEMENT OF IDENTITY AND INTEREST

[¶1] Whiting Oil and Gas Corporation ("Whiting") has acquired several oil and gas leases from mineral owners who derived their interests from Plaintiffs/Appellees in this action. Whiting thus seeks to protect its leasehold estate in the disputed minerals and has a real interest in the outcome of this appeal. In the event that this Court reverses the District Court and orders judgment vacated, Whiting will have a right to intervene in the quiet title action pursuant to Rule 24(a) of the North Dakota Rules of Civil Procedure.

[¶2] Whiting, although not a named party in the underlying quiet title action, was served with the Rule 60 motion that forms the basis for this appeal, and was captioned as a Respondent to the motion before Appellant's restyling the caption at the request of the District Court. ROA No. 34, Motion to Vacate Default Judgment; ROA No. 36, Affidavit of Service by Mail. Whiting participated in the briefing below. ROA No. 52, Brief in Opposition to Motion to Vacate Default Judgment. Whiting is also listed as an interested party in the Notice of Filing the Notice of Appeal and has been served with the filings before this Court. *See* ROA No. 58, Notice of Filing the Notice of Appeal. As such, Whiting believes that it is a proper appellee. Nevertheless, out of an abundance of caution, Whiting has chosen to file its brief as an amicus curiae brief pursuant to Rule 29 of the North Dakota Rules of Appellate Procedure.

RULE 29(c)(4) STATEMENT

[¶3] This brief was authored in whole by Whiting's counsel, and not the counsel for any other party. No other party, party's counsel, or any person other than Whiting contributed money to fund preparing or submitting this brief.

STATEMENT OF THE FACTS

[¶4] The Order below provided an excellent summary of the facts and procedural history relevant to Appellant's Rule 60 motion:

> On September 20, 1990, the plaintiffs, Jack Peterson and Eugene Peterson, hereafter Petersons, obtained a judgment from Lester Jasmanka, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon, the property described in the Complaint, hereafter, Jasmanka.
>
> The Findings of Fact in the action recited that the Petersons were the surface owners of the following described real property:
>
> A Township 152 North, Range 92 West
> Section 1: Lots 1, 2, 3, and 4, SW¼ NE¼, S½NW¼, W½ SW¼
> Section 2: S½
> Section 11: Lots 1 and 2, NE¼
> Section 12: NE¼, W½ NW¼
>
> Jasmanka owned fifty percent of the minerals beneath this land. Jasmanka had reserved the minerals in a warranty deed dated September, 1952, and recorded on June 10, 1959. In 1959, Jasmanka also leased the minerals to Hunt Oil for a term of 10 years. In the 20 years immediately prior to January 24, 1990, Jasmanka made no "use" of the minerals.
>
> Petersons, owners of the surface, published a notice of lapse of mineral interest on January 24, 31, and on February 7, 1990, in the Mountrail County Reporter. Petersons also mailed to Jasmanka a notice of lapse of mineral interest on February 13, 1990. That notice was mailed to Jasmanka's address, as shown on the 1959 leases filed with the register of deeds.
>
> In March 1990, Petersons started a quiet title action seeking judgment against Jasmanka, and quieting title to the mineral interest. The action was initiated by service by publication. No answer or other appearance was made by Jasmanka, or any unknown defendants claiming an interest through him. As noted above, judgment was ultimately entered in favor of the Petersons on September 20, 1990. The judgment awarded quiet title in the minerals to Petersons.
>
> Twenty-two years and one day passed.
>
> On September 21, 2012, Hanna Boys Center, hereafter HBC, a devisee of the estate of Lester Jasmanka, made a motion to vacate the judgment on

> September 20, 1990. Lester Jasmanka died on November 18, 1963. (See, File 31-2011-PR-313, Estate of Lester Jasmanka.)
>
> According to Jasmanka's will, HBC is to receive all property not specifically accounted for under his will. This would presumably have included the mineral interest which is at the heart of this litigation. HBC asserts that the default judgment of September 20, 1990, must be vacated because Petersons did not properly serve the notice of lapse of mineral interest as required by Section 38-18.1-06, NDCC. Accordingly, HBC argues that Rule 60(b), NDRCivPro, entitles HBC to an order vacating the judgment in the 1990 quiet title action.

ROA No. 53, Order Denying Motion to Vacate Judgment at 1-3. The District Court denied the motion, concluding that Appellant's theory for vacating the 1990 judgment "misses the mark." *Id.* at 3.

[¶5] Appellant's recitation of the facts and procedural history is designed to obscure the critical fact in this case: the Notice of Lapse in the underlying abandoned mineral proceedings, as well as the Summons and Complaint in this quiet title action, were mailed to Lester Jasmanka at his most recent address of record. They were mailed to Jasmanka at "5505 Modoc Avenue" in Richmond, California. ROA No. 4, Affidavit of Service by Mail (regarding Summons and Complaint); ROA No. 11, Affidavit of Charles L. Donlin (attaching Affidavit of Service by Mail regarding Notice of Lapse). This address was Jasmanka's most recent address of record in the relevant chain of title, appearing on two oil and gas leases dating to 1959. ROA No. 35, Exhibit 9, Memorandum of Title, "Unreleased Oil and Gas Leases" Nos. 2, 4. Appellant misleadingly refers to 5505 Modoc Avenue as the "wrong" address, pointing instead to a slightly different address (5506 Modoc Avenue, Richmond, CA) that appeared on earlier documents in the chain of title for the lands at issue. *See id.* at "Date and How Acquired" Nos. 40-42.

ARGUMENT

[¶6] This is an appeal of an order that denied Rule 60 relief. As such, the real question before the Court is whether valid service of process was lacking such that the judgment below must be vacated under Rule 60(b)(4), or whether the judgment was obtained through fraud or misrepresentation, such that the District Court abused its discretion in denying relief under Rule 60(b)(3). Appellant bears the burden of establishing sufficient grounds for disturbing the finality of the judgment. *State v. Red Arrow Towbar Sales Co.*, 298 N.W.2d 514, 515 (N.D. 1980); *see also Soli v. Soli*, 534 N.W.2d 21, 23 (N.D. 1995) (movant under Rule 60(b)(3) must establish fraud, misconduct, or misrepresentation by clear and convincing evidence). Although a void judgment must be vacated, the denial of a Rule 60 motion is otherwise left to the trial court's discretion. *Red Arrow Towbar Sales Co.*, 298 N.W.2d at 515-16.

[¶7] As explained below, Appellant's Rule 60(b)(4) argument fails because there was proper service of process by publication, and so the District Court had jurisdiction to enter its 1990 judgment. Appellant's Rule 60(b)(3) argument is barred by the one-year time limit for motions brought under subsection (3), and in any event Appellant has produced no evidence of fraud or misrepresentation.

A. The Judgment is Not Void Under Rule 60(b)(4), Because Plaintiffs Completed Proper Service of Process by Publication.

[¶8] Rule 4(e) of the North Dakota Rules of Civil Procedure governs service of process by publication and therefore controls whether proper service of process occurred here. Appellant does not dispute that service by publication was a method of service available to the Petersons in this case, or question their method of publishing the Summons and Complaint. Nor does Appellant attempt to argue that the Petersons failed

to comply with Rule 4(e)'s mailing requirement, which requires that a plaintiff must mail the summons and complaint "to the defendant's last reasonably ascertainable address."[1] N.D. R. Civ. P. 4(e)(4) (emphasis added). Nor does Appellant question that the Hanna Boys Center was properly included in the action as an "unknown persons" defendant, given that its purported interest in the subject property did not appear of record. *See* N.D.C.C. § 32-17-06 (allowing joinder of unknown "heirs, devisees, legatees, or personal representative of a deceased person" as "unknown persons" defendants in a quiet title action); § 32-17-06 (allowing service by publication upon unknown defendants in a quiet title action); N.D. R. Civ. P. 4(e)(1)(B) and 4(e)(2)(D) (same).

[¶9] In short, Appellant has abandoned any argument regarding service of process by publication under Rule 4(e). *See Anderson v. Heinze*, 2002 ND 60, 643 N.W.2d 24, 28 (issue not briefed before this Court is waived on appeal). Since the Petersons accomplished proper service of process by publication, the District Court acquired personal jurisdiction, and the judgment cannot be void for lack of jurisdiction. *See Red Arrow Towbar Sales Co.*, 298 N.W.2d at 515. This should be the end of Appellant's Rule 60(b)(4) argument.

[¶10] Instead, Appellant attempts to argue that the notice of lapse procedure under North Dakota's abandoned minerals statute somehow governed the District Court's jurisdiction over the quiet title action below. Appellant has conflated the requirements for service of process under the North Dakota Rules of Civil Procedure (through which

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[1] The Petersons complied with this requirement by mailing the summons and complaint to Jasmanka's most recent address of record—the "5505 Modoc Avenue" address shown on two oil and gas leases dating to 1959. *See* ROA No. 4, Aff. of Service by Mail; ROA No. 35, Exhibit 9, Memorandum of Title, "Unreleased Oil and Gas Leases" Nos. 2, 4.

the court obtains personal jurisdiction) with the procedures for a notice of lapse under North Dakota's abandoned minerals statute (which constituted the merits of the quiet title action here). The two procedures may bear some similarities, but they serve distinct purposes. The notice of lapse procedure outlined in N.D.C.C. chapter 38-18.1 is a self-executing statutory procedure by which a surface owner may "succeed to the ownership of a mineral interest upon its lapse." N.D.C.C. § 38-18.1-06(1). "Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment." N.D.C.C. § 38-18.1-02. The surface owner may, but need not, bring a quiet title action to confirm that title to the minerals has passed. As noted by this Court in *Halvorson v. Starr*, the notice of lapse procedure does "does not begin a civil action." 2010 ND 133, 785 N.W.2d 248, 252 (emphasis added) (rejecting argument that Rules of Civil Procedure apply to the timing requirement for mailing the notice of lapse). The mailing requirement "is not part of a procedure in the district court." *Id.* Because the statutory notice of lapse procedure is distinct from the procedure for commencing a civil action, service of the notice of lapse does not bear on the District Court's personal jurisdiction in a later quiet title action seeking to confirm the lapse of a mineral interest.

[¶11] Appellant cites several cases for the proposition that the notice of lapse has a jurisdictional effect in a subsequent quiet title action, but none of the cases are apt. *See* Appellant's Br. at ¶¶28-29. First, *McComb v. Aboelessad* dealt with service by publication under Rule 4(e) and did not involve any statutory notice provision. *See* 535 N.W.2d 744, 747-48 (N.D. 1995). Second, *Spring Creek Ranch, LLC v. Svenberg* simply stated that the "reasonable inquiry" requirement for serving a notice of lapse "is similar to

the personal service requirement under N.D. R. Civ. P. 4(e)(2)(A)," which requires "diligent inquiry." 1999 ND 113, 595 N.W.2d 323, 328. The issue presented was whether the plaintiff "made a reasonable inquiry to ascertain the addresses of the mineral interest owners"; no jurisdictional issue was presented. *Id.* Finally, *Basin Electric Power Cooperative v. Lang* dealt with a statutory requirement for serving a notice of trial in eminent domain actions. *See* 221 N.W.2d 719, 721-22 (N.D. 1974) (interpreting N.D.C.C. § 32-15-17). Unlike the abandoned minerals statute at issue here, the statute in *Basin Electric* was codified in Title 32 regarding "Judicial Remedies" and dictated procedures in a civil action. *See id.* None of these cases suggest that a notice of lapse under § 38-18.1-06 is relevant to a personal jurisdiction analysis.

[¶12] Regardless, even if the statutory notice of lapse procedure does somehow affect the District Court's personal jurisdiction in a later quiet title action, the Petersons complied with the notice of lapse procedure here. Appellant has questioned only whether the Petersons complied with the statute's mailing requirement. As of 1990, the statute required: "[I]f the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made." N.D.C.C. § 38-18.1-06(2). This Court's recent cases interpreting that provision have clarified that the surface owner is "required to conduct a reasonable inquiry only if [the mineral owner's] address was not shown of record." *Sorenson v. Felton*, 2011 ND

33, 793 N.W.2d 799, 803 (emphasis added); *Johnson v. Taliaferro*, 2011 ND 34, 793 N.W.2d 804, 806.[2]

[¶13] Here, the parties agree that Jasmanka's address appeared in the relevant chain of title, so Appellant cannot argue that Plaintiffs were required to conduct any reasonable inquiry into Jasmanka's address beyond looking to the relevant title records. *See Sorenson*, 793 N.W.2d at 803. The Petersons mailed the notice of lapse to Jasmanka's last address of record in the relevant chain of title (5505 Modoc Avenue), which appeared on two recorded oil and gas leases dating to 1959.[3] Though Appellant points to a slightly different address (5506 Modoc Avenue) that appeared on earlier documents of record,[4] there was no requirement that the notice be sent to every address appearing of record. The statute speaks in the singular, not the plural, when it requires mailing "a copy" of the notice if "the address of the mineral interest owner" appears of record. N.D.C.C. § 38–18.1–06(2) (emphasis added). Where multiple addresses for a mineral interest owner appear of record, the natural reading of this provision is that the surface owner shall mail "a copy of the notice to the owner of the mineral interest" at the mineral owner's most recent address of record. *Id.* (emphasis added); *see also* N.D.C.C. § 1-02-03

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[2] Those cases interpreted the provision as it existed before recent amendments to the abandoned minerals statute. *See Sorenson*, 793 N.W.2d at 802. The 2007 and 2009 amendments to the statute were not made retroactive. *Id.* The pre-amendment provision is likewise relevant here, since the Petersons issued their notice of lapse in 1990.

[3] 5505 Modoc Avenue, Richmond, CA. ROA No. 35, Exhibit 9, Memorandum of Title, "Unreleased Oil and Gas Leases" Nos. 2, 4.

[4] 5506 Modoc Avenue, Richmond, CA. ROA No. 35, Exhibit 9, Memorandum of Title, "Date and How Acquired" Nos. 40-42.

(nontechnical words and phrases "must be construed according to the context and the rules of grammar and the approved usage of the language").

[¶14] Because Appellant cannot dispute that the notice of lapse was mailed to Jasmanka's most recent address "of record" with the register of deeds, it is reduced to complaining that proof of this most recent address was not actually filed with the trial court at the time of the 1990 judgment.[5] According to Appellant, the 1990 order for judgment mistakenly relied on the 1952 warranty deed as the source of the "5505 Modoc Avenue" address. Contrary to Appellant's contention, however, the 1990 order for judgment did not expressly cite a source for the "5505 Modoc Avenue" address, but simply found that the Petersons mailed the notice of lapse "to the Defendants . . . at Defendant's address, as shown on the records of the Register of Deeds for the County in which the mineral estate and interest described in paragraph 2 above is located." ROA No. 13 ¶ 11. The trial court cited the 1952 deed for the original source of Jasmanka's mineral interest, not his street address. *Id.* ¶ 2. Likewise, an affidavit of the Petersons' attorney stated that the notice of lapse had been mailed to "the only address known by the affiant for such Defendant" and referenced an attached Affidavit of Service by Mail setting forth service upon the "5505 Modoc Avenue" address, without citing the source of the address. ROA No. 11, Affidavit of Charles L. Donlin.

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[5] It is unclear whether or not documentation of the 1959 oil and gas leases was filed with the trial court in 1990. The Memorandum of Title filed in 1990 that appears in the electronic Register of Actions (ROA No. 6) is for some reason missing the page that refers to the 1959 oil and gas leases, but Appellant's brief to the trial court attached a copy of this same Memorandum of Title (including the 1990 filing stamp) that does include this page and provides the "5505 Modoc Avenue" address. *Compare* ROA No. 6 *with* ROA No. 35, Ex. 9, "Unreleased Oil and Gas Leases" Nos. 2, 4.

[¶15] But even assuming that the trial court erroneously believed that the 1952 warranty deed was the source of the "5505 Modoc Avenue" address, this was classic harmless error. The North Dakota Rules of Civil Procedure require that "[a]t every stage of the proceeding, the court must disregard all errors and defects that do not affect any party's substantial rights." N.D. R. Civ. P. 61. Here, even if the trial court in 1990 mistakenly believed that the 1952 deed was the source of the "5505 Modoc Avenue" address, the error did not affect any party's substantial rights, because this address was in fact Jasmanka's most recent address of record. In other words, the notice of lapse actually complied with statutory requirements. Indeed, one must wonder how Appellant plans to proceed should it prevail on appeal, given that Appellant has identified no way in which it can win its case on the merits. Is this Court to order the 1990 judgment vacated simply so that the District Court may enter a new order for judgment that relies on the 1959 oil and gas leases rather than the 1952 warranty deed?

[¶16] For all the reasons set forth above, the 1990 judgment was valid, and Appellant's Rule 60(b)(4) argument is meritless.

B. The Time for a Rule 60(b)(3) Motion Has Expired, and Appellant Has in Any Case Introduced No Evidence of Fraud or Misrepresentation.

[¶17] Appellant argues in the alternative that the 1990 judgment should be vacated pursuant to Rule 60(b)(3) as one obtained through fraud or misrepresentation. As an initial matter, the time limit for such a motion has lapsed. N.D. R. Civ. P. 60(c)(1) (limiting the time for a motion under Rule 60(b)(3) to "one year after a default judgment has been entered"). Appellant offers no explanation in its brief for how its Rule 60(b)(3) motion survives this limitation.

[¶18] Appellant argued below that the one-year time limit was tolled, but has apparently abandoned this argument on appeal. In any event, the argument lacks merit, not least because Appellant has produced no evidence regarding when it became aware of the 1990 judgment. *Cf. Lang v. Bank of N.D.*, 377 N.W.2d 575, 578 (N.D. 1985) (holding that even without service of notice of entry of judgment a defendant's actual knowledge of entry of the judgment commences the running of the time for appeal).

[¶19] Even aside from the time bar, there is no evidence of fraud or misrepresentation. Appellant was charged with proving fraud or misrepresentation by clear and convincing evidence. *Soli*, 534 N.W.2d at 23. Appellant attempts to support its allegation of fraud by noting that Plaintiffs mailed notice to the 5505 Modoc Avenue address. But, once again, this address is Jasmanka's most recent address of record in the relevant chain of title; that the Petersons mailed the notice to this address is evidence of good faith, not fraud. Moreover, though the Petersons may have mistakenly referred to the "5505 Modoc Avenue" address Jasmanka's "only" address of record, this is understandable given its similarity to the "5506 Modoc Avenue" address. Without more, such a minor discrepancy is no evidence of fraud or misrepresentation. By way of illustration, Appellant's own brief at times refers to the relevant street name in this case as "Mondoc" rather than "Modoc." *See* Appellant's Br. at Table of Contents and ¶¶ 4, 12-13, 20, 22-24, 26-27, 32-33. Surely this discrepancy suggests only a careless error, not fraud or misrepresentation. There is no evidence of fraud or misrepresentation in this case.

[¶20] The District Court did not abuse its discretion in denying relief under Rule 60(b)(3).

C. Discretionary Considerations Further Support the District Court's Denial of Appellant's Motion to Vacate.

[¶21] Insofar as the District Court's Rule 60 determination was discretionary, at least two additional considerations support the District Court's decision to deny relief. First, the existence or lack of a meritorious defense is relevant to a Rule 60(b) motion to set aside a default judgment. *State v. $33,000.00 U.S. Currency*, 2008 ND 96, 748 N.W.2d 420, 426. As explained above, the Petersons satisfied the statutory notice of lapse requirements, so Appellants do not have a meritorious defense.

[¶22] Second, "[i]n ruling on 60(b) motions, courts carefully consider the hardship that a modification of judgment might visit on other parties." *Kuehl v. Lippert*, 401 N.W.2d 523, 525 (N.D. 1987) (internal quotations and citation omitted) (affirming denial of Rule 60(b)(v) motion). Cases interpreting the analogous federal rule make clear that a party seeking relief from a default judgment under Rule 60(b) "must show lack of prejudice to the plaintiff." *United States v. Dalman*, 5 F.3d 532, 1993 WL 349410, at *2 (8th Cir. 1993) (noting that "relief from judgment is an extraordinary remedy" and affirming denial of a motion to set aside default judgment). Here, Whiting and other parties who have relied upon the 1990 judgment would be prejudiced should the Court set aside the default judgment now. Because of the long lapse in time since the judgment was entered, much of the evidence relevant to the underlying action has likely disappeared or grown stale. As the District Court noted, "it appears that most of those involved in the earlier transactions are now dead, including attorney Charles Donlin, the lawyer who handled all of the 1990 proceedings." ROA No. 45, Letter from Judge Lee to Parties dated February 14, 2013. As a result, Plaintiffs would likely be prejudiced in their ability to prosecute

the action should Appellant attempt to introduce factual issues beyond the existing filings.

CONCLUSION

[¶23] For the reasons set forth above, Whiting respectfully requests that this Court AFFIRM the April 1, 2013 Order of the District Court.

DATED this 12th day of September, 2013.

CROWLEY FLECK PLLP
Attorneys for Whiting Oil and Gas Corporation
400 East Broadway, Suite 600
P.O. Box 2798
Bismarck, North Dakota 58502
701.223.6585

By: */s/ John W. Morrison*
JOHN W. MORRISON (ND ID #03502)
PAUL J. FORSTER (ND ID #07398)
jmorrison@crowleyfleck.com
pforster@crowleyfleck.com

CERTIFICATE OF SERVICE

[¶24] I hereby certify that a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF WHITING OIL AND GAS CORPORATION FOR AFFIRMANCE AND IN SUPPORT OF APPELLEES** was on the 12th day of September, 2013, served electronically to the following:

Charles L. Neff
cneff@nefflawnd.com

Sandra B. Dittus
sandradittus@northdakotalaw.net

Zachary E. Pelham
zep@pearce-durick.com

Joshua A. Swanson
jswanson@vogellaw.com

Richard P. Olson
Andrew T. Forward
olsonpc@minotlaw.com
atforward@minotlaw.com

H. Patrick Weir Jr.
hpweir@vogellaw.com

I also certify that copies of the following document were sent via U.S. mail to the following:

Yvonne Hilbern
4724 NE 107th
Portland, OR 97220

Billie C. Blake
2121 South Pantano Rd., #16
Tucson, AZ 85710

Robert E. Zimmerman, Jr.
PO Box 570174
Houston, TX 77257

Cody Oil & Gas Corporation
PO Box 597
Bismarck, ND 58502

Montana Oil Properties, Inc.
PO Box 3194
Billings, MT 59103

Albert G. Metcalfe III
550 West Texas, Suite 640
Midland, TX 79701-4241

ZRC Minerals, LP
PO Box 570174
Houston, TX 77257-0174

/s/ John W. Morrison
JOHN W. MORRISON (ND ID #03502)