IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sundance Oil & Gas, LLC, Plaintiff and Appellee, v. Hess Corporation, Defendant and Appellant, and Barbara B. Corwin and Patricia B. Goldberg, Defendants.	Supreme Court No. 20170148 Mountrail Co. No. 31-2014-CV-00064

Appeal from Judgment dated February 28, 2017, Order for Partial Summary Judgment dated May 11, 2016, and Order for Entry of Judgment dated February 28, 2017.
District Court, North Central Judicial District, Mountrail County, North Dakota
The Honorable Stacey J. Louser

APPELLEE'S BRIEF
and Addendum

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a. Whether the district court correctly concluded that uncontested affidavit testimony by Sundance's president stating he had personal knowledge that Sundance paid a bonus for its lease accompanied by a copy of a check signed by Sundance's president showed Sundance paid consideration.

b. Whether the district court erred by failing to apply the version of the race-notice statute in effect when the Sundance lease was recorded, under which constructive notice was not relevant.

    i. If constructive notice is relevant, whether the district court correctly concluded that Hess' out-of-chain-of-title recordings did not provide notice of Hess' claim.

    ii. If constructive notice is relevant, whether the record evidence of Hess' drilling activity was insufficient to show constructive notice of Hess' claim to a fractional share of the mineral estate.

[¶2] 2. Whether this Court should refuse to consider Hess' constitutional challenge to the notice requirements of the unlocatable mineral interest owner trust statutes because Hess raises the argument for the first time on appeal and because Hess cannot collaterally attack the validity of the separate trust action in this quiet title proceeding.

a. If this Court considers the constitutional argument, whether constitutional due process required Sundance to provide actual notice of the unlocatable mineral interest owner trust action to every owner of a mineral, leasehold, or royalty interest under the same tracts as the fractional share of the mineral estate leased by Sundance.

STATEMENT OF THE CASE

[¶3] This is a quiet title action involving competing leasehold interests to a fractional share of the mineral estate under certain real property. (App., pp. 7-11). Specifically, Appellee Sundance Oil & Gas, LLC ("Sundance") and Appellant Hess Corporation ("Hess") hold leases covering a 50/2000ths, or 2.5 percent, interest in the mineral estate under certain real property in Mountrail County, North Dakota. ("Subject Minerals"). (Id. at pp. 7-18 & 36). Defendants Barbara B. Corwin ("Corwin") and Patricia B. Goldberg ("Goldberg") own the Subject Minerals. (Id. at pp. 37-38). Corwin and Goldberg have not taken a position as to which lease has priority, and all parties agree they are entitled to the benefits of the superior lease. (Id. at pp. 201, ¶ 29; Doc ID# 72, ¶ 5).

[¶4] Sundance initiated this action in May 2014 by serving a summons and complaint. (Doc ID# 3). In addition to seeking a judgment quieting title in its favor, Sundance sought to recover from Hess the revenues generated from the Subject Minerals. (App., pp. 10-11). Hess answered and brought a counterclaim seeking a judgment quieting title in its favor or, in the alternative, a judgment requiring Sundance to pay the expenses for development of the Subject Minerals if the Sundance's claim was superior. (Id. at pp. 42-45).

[¶5] In February 2016, Sundance and Hess filed competing summary judgment motions. (App., pp. 65-184). Sundance argued it had priority under North Dakota's race-notice recording statute as a first-to-record subsequent good faith purchaser for value because the Hess lease documents were recorded out of the chain of title and Sundance did not have the requisite notice of Hess' claim. (Id. at pp. 65-79). Sundance obtained its lease using the N.D.C.C. ch. 38-13.1 procedure for leasing from an unlocatable mineral owner trust. Hess argued Sundance's lease could not "invalidate" Hess' leases because N.D.C.C. § 38-13.1-01 and N.D.R.Civ.P. 19 required Sundance to provide Hess notice of or join Hess as a party in the N.D.C.C. ch. 38-13.1 action. (Id. at pp. 139-42, ¶¶ 17-25). Hess did not make any constitutional arguments. (Id.).

[¶6] In April 2016, the district court held a hearing on the summary judgment motions. (Doc ID# 75). In May 2016, the district court issued an Order for Partial Summary Judgment quieting title in the leasehold interest in the Subject Minerals in Sundance. (App., pp. 265-77). The issue of revenues owed to Sundance and expenses owed to Hess remained. In February 2017, the parties executed a stipulation resolving that issue. (Id. at pp. 278-81). The revenue and expense amounts change daily during production which made it impossible to determine the exact amounts owing as of the date of entry of final judgment by the district court. (Id. at p. 279, ¶ 6). Because it was not possible to agree to amounts certain, the parties agreed to a mechanism for calculating the revenues and expenses upon entry of a final and non-appealable judgment on the quiet title issue. (Id. at pp. 279-80, ¶ 8). The district court concluded the Order for Partial Summary Judgment and the stipulation fully resolved all issues and ordered entry of final judgment.

(Id. at pp. 282-83). On February 28, 2017, the district court entered final judgment. (Id. at pp. 284-85). On April 17, 2017, Hess appealed. (Id. at pp. 286-87).

STATEMENT OF THE FACTS

[¶7] Hess omits key facts from its Appellant's Brief related to the status of record title when the competing lease documents were recorded. The Subject Minerals were acquired by Edward J. Brown by a mineral deed recorded in Mountrail County on March 27, 1952. (App., p. 36). Edward J. Brown died intestate in Florida in 1977. (Id. at p. 47, ¶ 2). He was survived by his wife, Janet G. Brown, and his daughters, Corwin and Goldberg. (Id.). Janet G. Brown died intestate in New York in 2000. (Id. at p. 49, ¶ 2). She was survived by Corwin and Goldberg. (Id.). Personal representative's mineral deeds transferring record title to the Subject Minerals from the Estate of Edward J. Brown to the Estate of Janet G. Brown and from the Estate of Janet G. Brown to Corwin and Goldberg ("Personal Representative's Mineral Deeds") were recorded in Mountrail County on November 18, 2013. (Id. at pp. 28-35).

[¶8] Corwin and Goldberg executed separate oil and gas leases leasing their interests in the Subject Minerals to Hess effective March 7, 2011. (Id. at pp. 53-54 & 57-58). On May 27, 2011, memoranda of the leases ("Hess Memoranda") were recorded in Mountrail County. (Id. at pp. 51-52 & 55-56). The Hess Memoranda identified the lessors as "Barbara B. Corwin" and "Patricia B. Goldberg" and did not indicate that Corwin and Goldberg were the heirs of Edward J. Brown. (Id.). The Hess Memoranda were recorded before the Personal Representative's Mineral Deeds. (Id. at pp. 28-35, 51-52 & 55-56). As a result, Edward J. Brown remained the record title owner and the Hess Memoranda

identifying "Barbara B. Corwin" and "Patricia B. Goldberg" as lessors were recorded out of the chain of title.

[¶9] On May 1, 2013, Sundance filed a petition to create an unlocatable mineral owner trust for Edward J. Brown under N.D.C.C. § 38-13.1-01. ("Trust Action"). (App., pp. 20-22 & 153-55). Sundance published notice of the Trust Action in the Mountrail County Promoter on May 15, 22, and 29, 2013, and otherwise satisfied the N.D.R.Civ.P. 4(e) service by publication requirements. (App., pp. 127-28, 164-65, 166 at ¶ 3 & 203-06). On July 9, 2013, Sundance filed a motion for default requesting the district court to establish an unlocatable mineral owner trust for Edward J. Brown and to direct the trustee to execute an oil and gas lease on his behalf. (Id. at 156-165). On July 16, 2013, the district court issued an order creating a trust for Edward J. Brown, appointing the Mountrail County Treasurer as trustee, authorizing the trustee to execute and deliver an oil and gas lease to Sundance, and directing Sundance to all pay bonuses, rentals, and royalties to the trustee. (Id. at 23-25 & 166-68). Sundance paid a lease bonus to the Mountrail County Treasurer. (Id. at 258-264).

[¶10] On July 31, 2013, the Mountrail County Treasurer, as Trustee for Edward J. Brown, executed an oil and gas lease leasing the Subject Minerals to Sundance ("Sundance Lease"). (Id. at 12-15). On August 8, 2013, the Sundance Lease was recorded in Mountrail County. (Id.). The Sundance Lease identified the lessor as "Mountrail County Treasurer, Trustee for Edward J. Brown." (Id. at 14). The Sundance Lease was recorded before the Personal Representative's Mineral Deeds. (Id. at pp. 15 & 28-35). As a result, Edward J. Brown remained the record title owner and the Sundance Lease identifying the "Mountrail

County Treasurer, Trustee for Edward J. Brown" as the lessor was the first lease recorded in the chain of title.

STANDARD OF REVIEW

[¶11] Whether the district court properly granted summary judgment is a question of law that this Court reviews de novo on the entire record. Hokanson v. Zeigler, 2017 ND 197, ¶ 14, 900 N.W.2d 48.

ARGUMENT

[¶12] The district court correctly concluded that the race-notice recording statute controls which lease has priority. The district court also correctly concluded that the undisputed facts establish that under the race-notice statute, Sundance has priority as a first-to-record subsequent good faith purchaser for value. Hess' argument that there is a genuine issue whether Sundance paid consideration fails because the uncontested affidavit made on the personal knowledge of Sundance's president and supporting documents show that Sundance paid consideration. Hess' argument that there is a genuine issue whether Sundance had constructive notice of Hess' claim fails because constructive notice was not relevant under the version of the race-notice statute in effect when the Sundance Lease was recorded. If constructive notice is considered, Hess' notice arguments fail because the recording of the out-of-chain-of-title Hess Memoranda and Hess' drilling activities did not provide notice as a matter of law.

[¶13] This Court should not consider Hess' argument that it had a constitutional right to actual notice of the Trust Action because Hess did not make that argument in the district court and because the doctrines of collateral estoppel and res judicata bar Hess from collaterally attacking the validity of the Trust Action in this quiet title proceeding. If this

Court considers the argument, it should be rejected because due process did not require Sundance to provide Hess and all other owners of minerals, leases, or royalties in same parcels as the Subject Minerals actual notice of the Trust Action.

1. The Sundance Lease has priority under the race-notice statute because Sundance was a first-to-record subsequent good faith purchaser for value.

[¶14] North Dakota's record title statutes, which Hess fails to discuss or cite in its brief, control the outcome of this case. See N.D.C.C. ch. 47-19. The race-notice statute, provides, in part, "An unrecorded conveyance of real estate is void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any part of the same real estate . . . before the recording of the conveyance." N.D.C.C. § 47-19-41. The statute gives the first-recorded claim of a subsequent purchaser in good faith and for value priority over a prior purchaser's unrecorded claim. Id. A subsequent purchaser must act without the requisite notice of a prior purchaser's claim to obtain "good faith" status. Swanson v. Swanson, 2011 ND 74, ¶ 9, 796 N.W.2d 614.

[¶15] The effect of instruments recorded out of the chain of title is established by N.D.C.C. § 47-19-46 which provides, in part, "An unrecorded instrument is valid as between the parties thereto and those who have notice thereof. Knowledge of the record of an instrument out of the chain of title does not constitute such notice[.]" Id. Section 47-19-46, N.D.C.C., impacts both the "race" and "notice" components of N.D.C.C. § 47-19-41. It impacts the "race" component because a purchaser cannot satisfy the first-to-record requirement by recording an out-of-chain-of-title instrument. N.D.C.C. § 47-19-46; Simonson v. Wenzel, 27 N.D. 638, 147 N.W. 804, 806-07 (1914). It impacts the "notice" component because the recording of an out-of-chain-of-title instrument does not provide notice of the prior purchaser's claim. N.D.C.C. § 47-19-46; Simonson, 147 N.W. at 806

("[M]ere knowledge of the record of an instrument out of the chain of title does not constitute notice thereof."). The district court correctly concluded that Sundance has priority under the race-notice statute because the undisputed facts establish that Sundance recorded the first lease in the chain of title, paid consideration, and took its lease without the requisite notice of Hess' claim.

a. The undisputed facts show that Sundance satisfied the "race" component by recording the first lease in the chain of title.

[¶16] The district court correctly concluded, and Hess does not dispute, that Sundance satisfied the N.D.C.C. § 47-19-41 race component by recording the first instrument in the chain of title. (App., pp. 276, ¶ 38). A purchaser cannot satisfy the first-to-record requirement by recording an instrument out of the chain of title. N.D.C.C. §§ 47-19-41 & 47-19-46. Whether an instrument is in the chain of title is determined by whether it can be traced through the grantors, not by whether it can be located by property description. Swanson, 2011 ND 74, ¶¶ 16-17, 796 N.W.2d 614; see N.D.C.C. §§ 47-19-11 & 47-19-12 (establishing a process for recording affidavits addressing variations of *the name of any person* in the chain of title). The Hess Memoranda identifying "Barbara B. Corwin" and "Patricia B. Goldberg" as lessors and recorded while Edward J. Brown was the record title owner were out of the chain of title because there was no recorded instrument linking Edward J. Brown, as a grantor, to Corwin and Goldberg, as grantees. (App., pp. 16-19 & 28-35). The recording of the Hess Memoranda under the correct descriptions in the tract index did not bring the memoranda into the chain of title. The Sundance Lease identifying the lessor as "Mountrail County Treasurer, Trustee for Edward J. Brown" and recorded while Edward J. Brown was the record title owner was the first

lease recorded in the chain of title. (Id. at pp. 12-15 & 28-35). The undisputed facts establish that Sundance satisfied the "race" component of N.D.C.C. § 47-19-41.

b. The undisputed facts show that Sundance satisfied the consideration requirement by paying a lease bonus.

[¶17] The district court correctly concluded that Sundance's evidence shows Sundance paid consideration for its lease. (App., pp. 267-69, ¶¶ 14-17). Sundance's evidence includes an affidavit of Sundance's President, Thomas J. O'Brien. ("O'Brien Affidavit"). (Id. at pp. 258-64). The O'Brien Affidavit was made on Thomas J. O'Brien's personal knowledge and states that O'Brien Resources, LLC ("O'Brien Resources") on behalf of Sundance paid a $75,000.00 bonus in consideration for the Sundance Lease; that the bonus was paid by check dated July 17, 2013; and that the bonus was paid from an O'Brien Resources account because Sundance was acting as an agent for O'Brien Resources when Sundance took its lease. (Id. at pp. 258-59). A copy of the check signed by Thomas J. O'Brien is attached as an exhibit to the O'Brien Affidavit. (Id. at p. 264). Hess did not submit contradictory evidence.

[¶18] Hess argues the O'Brien Affidavit is "conclusory" because it does not provide sufficient information about the relationship between Thomas J. O'Brien, O'Brien Resources, and Sundance and relies on this Court's decision in Rooks v. Robb, 2015 ND 274, 871 N.W.2d 468, to support its argument. (Appellant's Brief, ¶¶ 59-61). In Rooks, this Court considered whether an affidavit established that a promissory note had been assigned to a trust. 2015 ND 274, ¶¶ 1-5, 871 N.W.2d 468. Unlike in this case, the affidavit in Rooks did not state it was made on the affiant's personal knowledge and no supporting documentation showing the assignment was submitted. Id. at ¶¶ 3, 8.

[¶19] The O'Brien Affidavit satisfies the N.D.R.Civ.P. 56(e) requirement that it be made on the affiant's personal knowledge because it states that Thomas J. O'Brien made the affidavit based on his personal knowledge. (App., p. 258, ¶ 1). The fact that the check attached to the affidavit was signed by Thomas J. O'Brien is further evidence that he had personal knowledge of the payment described in his affidavit. (Id. at p. 264). Nothing in Rooks or N.D.R.Civ.P. 56(e) requires additional information about the relationship between Thomas J. O'Brien, O'Brien Resources, and Sundance to establish that Thomas J. O'Brien had personal knowledge of the statements in his affidavit. Rooks, 2015 ND 274, 871 N.W.2d 468. Sundance's uncontested evidence shows that Sundance paid consideration.

c. The undisputed facts show that Sundance took its lease without actual notice of Hess' claim.

[¶20] The district court correctly concluded, and Hess does not dispute, that the undisputed evidence establishes that Sundance did not have actual notice of Hess' claim. (App., pp. 269-70, ¶¶ 19-21). Actual notice is "express information of a fact." N.D.C.C. § 1-01-23. Sundance showed it did not have actual notice through affidavit testimony of Sundance President Thomas J. O'Brien stating that when Sundance took its lease, Sundance was not aware of the relationship between Edward J. Brown, Janet G. Brown, Corwin, and Goldberg, was not aware of Corwin and Goldberg's interest in the Subject Minerals, and was not aware that Hess claimed an interest in the Subject Minerals. (Id. at pp. 114-15). Hess did not submit contradictory evidence. Whether Sundance reviewed the Hess Memoranda before obtaining its lease is irrelevant to actual notice because the out-of-chain-of-title memoranda themselves could not provide notice. N.D.C.C. § 47-19-46. The undisputed facts show that Sundance did not have actual notice of Hess' claim.

d. The 2013 version of N.D.C.C. § 47-19-41 in effect when the Sundance lease was recorded applies.

[¶21] The district court incorrectly applied the version of the race-notice statute in effect when the Sundance Lease was executed rather than the version of the statute in effect when the Sundance Lease was recorded because Sundance's claim for priority accrued when the Sundance Lease was recorded. (App., pp. 266-67, ¶¶ 8-12). Unless a statute is retroactive, the version of the statute in effect when a plaintiff's claim accrues applies. White v. Altru Health Sys., 2008 ND 48, ¶ 10-11, 746 N.W.2d 173. A claim accrues when it "comes into existence as a legally enforceable right." Wehner v. Schroeder, 335 N.W.2d 563, 567 (N.D. 1983) (quotation omitted); see Black's Law Dictionary (10th ed. 2014) (defining "accrue" as "to come into existence as an enforceable claim or right; to arise").

[¶22] In cases involving competing claims to real property, this Court has concluded a party's claim accrues when the facts supporting the claim arise. For example, in Wehner v. Schroeder, this Court concluded the plaintiffs' claim to reform a deed and quiet title to certain minerals accrued "not at the time the instrument in question [was] executed, but at the time the facts which constitute[d] the mistake and form[ed] the basis for reformation ha[d] been, or in the exercise of reasonable diligence should have been, discovered by the party applying for relief." 335 N.W.2d at 567 (quotation omitted). Similarly, in a quiet title action in Johnson v. Taliaferro, this Court concluded the version of the N.D.C.C. ch. 38-18.1 abandoned mineral interest statutes in effect when the surface owner's claim to the minerals "vested" under the statutes applied. Johnson, 2011 ND 34, ¶¶ 11-16, 793 N.W.2d 804. Sundance's claim for priority under N.D.C.C. § 47-19-41 "vested" or "accrued" when the Sundance Lease was recorded because prior to recording,

Sundance did not have a legally enforceable claim as first-to-record subsequent good faith purchaser for value.

[¶23] The district court's reliance on Northern Oil & Gas, Inc. v. Creighton, 2013 ND 73, 830 N.W.2d 556, to determine which version of N.D.C.C. § 47-19-41 applied was misplaced because this Court did not consider claim accrual in that case. Creighton involved competing oil and gas leases obtained from the same lessor. 2013 ND 73, ¶¶ 2-5, 830 N.W.2d 556. The first purchaser obtained and recorded a lease that erroneously stated it covered minerals in the S½SE¼ rather than the N½SE¼. Id. at ¶¶ 2 & 4. A subsequent purchaser obtained and recorded a lease covering the minerals in the N½SE¼. Id. at ¶ 3. After the subsequent purchaser's lease was executed, but before it was recorded, the first purchaser recorded an affidavit identifying the property description error in its lease. Id. at ¶ 4.

[¶24] The issue in Creighton was whether the first purchaser could reform its lease under N.D.C.C. § 32-04-17, which permits reformation "so far as it can be done without prejudice to rights acquired by third persons in good faith and for value." Creighton, 2013 ND 73, ¶¶ 13-16, 830 N.W.2d 556. More specifically, this Court considered whether the subsequent purchaser's good faith status should be determined based on the information available when the subsequent purchaser's lease was obtained (precluding consideration of the prior purchaser's affidavit) or based on the information available when the lease was recorded (permitting consideration of the affidavit). Id. at ¶ 13. This Court concluded the subsequent purchaser "*acquired* any rights to the property under the lease when it became an enforceable contract between the parties and not when the lease was recorded" and

stated that the relevant inquiry was whether the subsequent purchaser "was a good faith purchaser when he *acquired* rights under the lease." Id. at ¶ 14 (emphasis added).

[¶25] The holding in Creighton that the subsequent purchaser *acquired* his rights to the property when his lease was obtained was not equivalent to a holding that a subsequent purchaser's claim for priority *accrues* before the recording of his lease. See Black's Law Dictionary (10th ed. 2014) (defining "acquire" as "to gain possession or control of; to get or obtain"). Sundance's claim for priority under N.D.C.C. § 47-19-41 did not accrue, or come into existence as a legally enforceable right, until the Sundance Lease was recorded. The 2013 version of N.D.C.C. § 47-19-41 that was in effect from August 1, 2013, until August 1, 2015, including when the Sundance Lease was recorded on August 8, 2013, applies in this case. N.D. Const. art. IV, § 13; (App., p. 15).

i. Sundance was a good faith purchaser under the 2013 version of N.D.C.C. § 47-19-41 because Sundance took its lease without actual notice of Hess' claim.

[¶26] Constructive notice was not relevant to the good faith inquiry under the 2013 version of N.D.C.C. § 47-19-41. The good faith requirement was altered by amendments enacted during the 2013 and 2015 legislative sessions. Prior to 2013, a subsequent purchaser acted in good faith by acting without actual or constructive notice. Swanson, 2011 ND 74, ¶ 9, 796 N.W.2d 614. In 2013, the following sentence was added to N.D.C.C. § 47-19-41: "The holder of an unrecorded conveyance may not question the good faith of the first recording party unless it can be established that the first recording party had actual knowledge of the existence of the unrecorded conveyance" ("2013 Amendment"). 2013 N.D. Sess. Laws ch. 350, § 1, attached at Addendum, p. 1. In 2015, that sentence was removed. 2015 N.D. Sess. Laws ch. 314, § 1, attached at Addendum, p. 2.

[¶27] The effect of the 2013 Amendment is a question of law. Indus. Contractors, Inc. v. Taylor, 2017 ND 183, ¶ 11, 899 N.W.2d 680. This Court's primary objective in statutory interpretation is determining legislative intent. Id. This Court first attempts to determine legislative intent by looking to the plain language of the statue and giving words their plain, ordinary, and commonly understood meaning, unless defined by statute or unless a contrary intention plainly appears. Id.; N.D.C.C. § 1-02-02. If a statute is ambiguous, the Court may rely on extrinsic aids, including legislative history, to determine intent. Indus. Contractors, at ¶ 11; N.D.C.C. § 1-02-39.

[¶28] The plain language of the statute and the legislative history show that constructive notice was not relevant under the 2013 version on N.D.C.C. § 47-19-41. The 2013 Amendment removed constructive notice from the good faith analysis by providing that a prior purchaser could not question a first-recording party's good faith "unless it can be established that the first recording party had actual knowledge of the existence of the unrecorded conveyance." 2013 N.D. Sess. Laws ch. 350, § 1, attached at Addendum, p. 1. To the extent the 2013 Amendment was ambiguous, the 2015 legislative history confirms the intent of removing the 2013 Amendment was to reenact the constructive notice requirement. In testimony during the 2015 legislative session, the director of the State Bar Association explained that the 2013 Amendment "actually eliminated the duty of inquiry that has existed forever." Hearing on S.B. 2180 Before House Political Subdivisions Comm., 64th Legis. Sess. (Mar. 6, 2015) (testimony of Tony Weiler, Executive Director of SBAND); (App., pp. 103-04). Constructive notice is not relevant in this case because the 2013 version of N.D.C.C. § 47-19-41 applies. Sundance was a good faith purchaser

under the 2013 version of N.D.C.C § 47-19-41 because the undisputed facts show that Sundance took its lease without actual notice of Hess' claim.

ii. Sundance was a good faith purchaser under the pre-2013 version of N.D.C.C. § 47-19-41 because Sundance took its lease without actual or constructive notice of Hess' claim.

[¶29] If this Court concludes the pre-2013 version of N.D.C.C. § 47-19-41 applies, the district court's conclusion that Sundance did not have constructive notice should be affirmed because the district court correctly concluded the undisputed facts establish that Sundance did not have constructive notice. Hess argues there is a genuine issue on constructive notice (1) because before Sundance obtained its lease, the Hess Memoranda were recorded in the tract index and (2) because Hess obtained drilling permits and started drilling wells. (Appellant's Brief, ¶ 51). When accepted as true and construed in the light most favorable to Hess, Hess' evidence is insufficient to show constructive notice as a matter of law.

1. The Hess Memoranda themselves did not provide constructive notice.

[¶30] The district court correctly concluded the recording of the Hess Memoranda did not provide constructive notice. Hess misconstrues the district court's order when it states the district court failed to consider whether the recording the of the Hess Memoranda in the tract index provided constructive notice. The district court noted Hess' tract index argument and correctly concluded that recording in the tract index alone did not provide constructive notice because there was no record evidence showing Sundance had knowledge of the relationship between Edward J. Brown, the record title owner, and Corwin and Goldberg, the lessors identified in the Hess Memoranda. (App., pp. 273-75, ¶¶ 26 & 30-33).

[¶31] Constructive notice is "notice imputed by the law to a person not having actual notice." N.D.C.C. § 1-01-24. The standard for establishing constructive notice is described in N.D.C.C. § 1-01-25, which provides, "Every person who has actual notice of circumstances sufficient to put a prudent person upon inquiry as to a particular fact and who omits to make such inquiry with reasonable diligence is deemed to have constructive notice of the fact itself." Purchasers of real property are generally charged with constructive notice of the information in properly recorded instruments. N.D.C.C. § 47-19-19. However, an out-of-chain-of-title recording itself does not provide notice. N.D.C.C. § 47-19-46.

[¶32] Hess' argument that there is a genuine issue whether recording the Hess Memoranda in the tract index provided constructive notice fails because the Hess Memoranda alone could not provide constructive notice as a matter of law. In McCoy v. Davis, this Court rejected the argument that an out-of-chain-of-title instrument itself can provide constructive notice if the instrument is recorded under the correct description in the tract index. 38 N.D. 328, 164 N.W. 951, 954 (1917). That long-standing rule is recognized in Title Standard 2-01 which provides, in part, "Conveyances by strangers to the chain of title may be disregarded, unless a title examiner has actual notice or knowledge (*through sources other than the record*) of the interest of the grantor[.]" Title Standard 2-01 (State Bar Ass'n of North Dakota 2011), attached at Addendum, pp. 3-4 (emphasis added). The caveat to the title standard also recognizes that information requiring a purchaser to inquire must arise from "information not appearing [sic] record." Id. The rule that an out-of-chain-of-title-recording itself cannot provide constructive notice is well-established in North Dakota.

[¶33] The only authority Hess cites to support its contention that the Hess Memoranda themselves provided constructive notice is the Minnesota Supreme Court's decision in Miller v. Hennen, 438 N.W.2d 366 (Minn. 1989), which Hess claims this Court cited with approval in Swanson. (Appellant's Brief, ¶ 53). In Miller, the Minnesota court considered the Minnesota title standard on conveyances from strangers to the chain of title which provided, "if such instrument [from a stranger to record title to another stranger] has not been of record for more than 15 years, inquiry should be made to ascertain the interest claimed." 438 N.W.2d at 371. Minnesota law on the notice provided by an out-of-chain-of-title recording differs from North Dakota law. This Court did not implicitly overrule century-old precedent and invalidate a North Dakota Title Standard in Swanson by citing to Miller and including a parenthetical describing the case's facts. See Swanson, 2011 ND 74, ¶ 17, 796 N.W.2d 614. Under North Dakota law, the Hess Memoranda themselves could not provide constructive notice of Hess' claim.

2. Hess' drilling activity did not provide constructive notice.

[¶34] Besides the Hess Memoranda themselves, the only evidence Hess argues raises a genuine issue on constructive notice is evidence of Hess' drilling activities. To the extent the district court erred by failing to explicitly address Hess' drilling evidence, this Court should affirm because Hess' drilling activity did not provide constructive notice. Schmidt v. City of Minot, 2016 ND 175, ¶ 16, 883 N.W.2d 909 (quotation omitted) ("[W]e will not set aside a correct result merely because the district court's reasoning is incorrect if the result is the same under the correct law and reasoning."). "A party's status as a good faith purchaser without notice of a competing interest is a mixed question of fact and law." Swanson, 2011 ND 74, ¶ 9, 796 N.W.2d 614 (quotation omitted). The factual

circumstances necessary to determine whether a party was a good-faith purchaser without notice constitute findings of fact. Id. "[The] ultimate determination a party acted in good faith constitutes a conclusion of law because the determination describes the legal effect of the underlying factual circumstances." Id. (quotation omitted). It is appropriate for this Court to conclude Hess' drilling activity did not provide constructive notice because the facts related to the drilling activity are undisputed and those facts are insufficient to show notice as a matter of law.

[¶35] Information providing constructive notice must provide a "reasonable ground to believe that a conflicting right exists as a fact." Chornuk v. Nelson, 2014 ND 238, ¶ 14, 857 N.W.2d 587 (quoting Swanson, 2011 ND 74, ¶ 12, 796 N.W.2d 614). The possession required to provide constructive notice of the occupant's claim must be open, notorious, and adverse to the purchaser's claim. Chornuk, at ¶ 21; see 3 Joyce Palomar, Patton and Palomar on Land Titles § 674 (3d ed. database updated Nov. 2016) (footnotes omitted) ("The occupier's possession must be sufficiently open, exclusive, and inconsistent with a title in the record owner to place a prudent person on inquiry by indicating that someone other than the record owner claims some right in the premises."). Hess' drilling activities were not adverse to Sundance's claim to a leasehold interest in a fractional share of the mineral estate and did not provide notice that Edward J. Brown was not the owner of the Subject Minerals.

[¶36] The competing leases cover 2.5 percent of the mineral estate. Hess' drilling permits authorized Hess to extract oil and gas from the entire mineral estate, including the Subject Minerals and the other 97.5 percent of the minerals. See N.D.C.C. ch. 38-08. Hess' drilling activity was not adverse to Sundance or any other leaseholder because it is common

practice for one operator to obtain permits and drill wells extracting minerals leased by other leaseholders. By arguing Sundance had constructive notice based on Hess' drilling activity, Hess essentially argues it was entitled to a presumption that it had leased one hundred percent of the minerals under its wells. Accepting that argument would establish that Hess, unlike all other lessees, was not required to comply with the record title statutes to protect its leasehold interests. Hess is not entitled to additional protection based on its status as an operator. Hess' drilling activity did not provide constructive notice because the activity was not adverse to Sundance's leasehold interest and did not provide notice that Hess, Corwin, or Goldberg had an interest in the Subject Minerals.

[¶37] Even if drilling activity could provide constructive notice, the specific activity Hess relies on did not provide notice because it occurred after Sundance made its inquiry. Hess mispresents its drilling evidence in its Appellant's Brief. Hess' brief includes a table of "key facts" in which Hess asserts that in April 2013, before Sundance commenced the Trust Action, Hess acquired permits and began drilling three wells. (Appellant's Brief, ¶¶ 7 & 11). Hess' assertion that it started drilling in April 2013 is contrary to statements in Hess' district court briefing and to the record evidence. Hess' response to Sundance's summary judgment motion included a table similar to the table in Hess' Appellant's Brief in which Hess indicated it began drilling in June 2013. (App., pp. 210-211, ¶ 5). Hess' evidence of when it started drilling consists of affidavit testimony by a Hess land manager stating that Hess began drilling wells on June 12, 15, and 17, 2013. (App., pp. 227-28, ¶¶ 1 & 5). The record evidence shows that Hess started drilling in June 2013, after Sundance commenced the Trust Action.

[¶38] Sundance cannot be charged with constructive notice based on actions occurring after it completed its inquiry. The statute establishing the requirements for creating an unlocatable mineral owner trust requires a petitioner to show "that a diligent but unsuccessful effort to locate the absent owner or claimant has been made." N.D.C.C. § 38-13.1-01. Sundance satisfied that requirement by submitting an affidavit of Jeffrey O'Brien dated April 23, 2013. (App., pp. 120-123). Sundance initiated the Trust Action approximately one week later, on May 1, 2013. (Id. at pp. 20-25). Hess obtained its drilling permits on April 24, 2013, after Sundance completed its inquiry, and started drilling in June 2013, after Sundance completed its inquiry and initiated the Trust Action. (Id. at 227-32).

[¶39] Sundance disputes that drilling activity could provide notice of a leasehold interest in a fractional share of the mineral estate. However, to the extent drilling activity could provide notice, the specific activity Hess relies on is insufficient because it occurred after Sundance completed its diligent inquiry and nothing in N.D.C.C. ch. 38-13.1 or N.D.C.C. § 47-19-41 required Sundance to continue to inquire through to date of the filing of its petition or during the pendency of the Trust Action. See Creighton, 2013 ND 73, ¶ 17, 830 N.W.2d 556 ("This Court has said a good faith purchaser must not have notice of the alleged problematic situation before the purchase."). Hess' drilling evidence is insufficient to show constructive notice as a matter of law. Sundance was a good faith purchaser under the pre-2013 version of N.D.C.C. § 47-19-41 because the undisputed facts, when construed in the light most favorable to Hess, show that Sundance did not have constructive notice of Hess' claim. Sundance's claim has priority under both the pre-2013 and 2013 versions of N.D.C.C. § 47-19-41 because the undisputed facts establish that

Sundance recorded the first instrument in the chain of title, paid valuable consideration, and took its lease with actual or constructive notice of Hess' claim.

2. This Court should not consider whether Hess had a constitutional right to actual notice of the Trust Action because Hess raises the argument for the first time on appeal and because Hess cannot collaterally attack the validity of the Trust Action in this case.

[¶40] The district court did not consider whether constitutional due process required Sundance to provide Hess actual notice of the Trust Action because Hess did not make that argument in the district court. This Court does not consider constitutional arguments raised the for the first time on appeal. McCoy, 38 N.D. 328, 164 N.W. at 952 ("It is a general rule, supported by the unanimous weight of authority, that the constitutionality of a statute cannot be first questioned on appeal in a civil action."). Hess did not raise constitutional arguments in the district court or notify the Attorney General it was challenging the constitutionality of a statute in the district court proceedings. N.D.R.Civ.P. 24(c)(2); (App., pp. 139-42, ¶¶ 17-25). This Court should not consider Hess' constitutional argument for the first time on appeal.

[¶41] In addition, this Court should refuse to consider Hess' constitutional argument because the doctrines of res judicata and collateral estoppel bar Hess from challenging the sufficiency of notice provided in the separate Trust Action in this quiet title proceeding. "[R]es judicata claim preclusion prevents relitigation of claims that were raised or could have been raised in a prior action between the same parties." Riverwood Commercial Park, L.L.C. v. Standard Oil Co., Inc., 2007 ND 36, ¶ 15, 729 N.W.2d 101. "Collateral estoppel bars relitigation of issues which were necessarily litigated and decided, or which by implication must have been litigated and decided, in a prior action." Id. at ¶ 20. The district court correctly refused to consider the validity of orders issued by another

district court judge in the Trust Action. (App., pp. 273-47, ¶¶ 26-29). The validity of the Sundance Lease as between Sundance and other persons owning or claiming a mineral, leasehold, or royalty interest in the Subject Minerals under N.D.C.C. § 38-13.1-01 was decided by the district court in the Trust Action.

[¶42] Sundance denies Hess' status as the owner of leases recorded out of the chain of title entitled Hess to relief in the Trust Action. Sundance also denies it failed to comply with the notice requirements for creating an unlocatable mineral owner trust. However, to the extent Hess was entitled to relief as a leasehold owner under N.D.C.C. § 38-13.1-01 or based on Sundance's failure to comply with the N.D.C.C. § 38-13.1-01 notice requirements, Hess was required to seek that relief in the Trust Action. See N.D.C.C. § 38-13.1-04 ("A person claiming an interest in the mineral, leasehold, or royalty interest underlying a tract of land that is the subject of a trust proceeding under section 38-13.1-01 may record with the recorder of each county in which the land is located a notice. . . ."); N.D.C.C. § 38-13.1-03 ("A trust in favor of unlocatable owners must be kept in force until the unlocatable owners of the mineral interests in question have successfully claimed their share of the funds held in trust and have filed the notice as provided in section 38-13.1-04."); (App., pp. 173-83) (Notice of Mineral Interest by Corwin and Goldberg in Trust Action).

[¶43] Hess did not seek relief in the Trust Action. Hess now attempts to avoid the applicability of the race-notice statute and to deprive Sundance of the protections the record title statutes provide to all purchasers of real property by collaterally attacking the Trust Action in this quiet title proceeding. Hess cannot establish the priority of its leases through

a constitutional challenge to the sufficiency of notice provided in a separate proceeding. This Court should refuse to consider Hess' constitutional argument.

a. Hess did not have a constitutional right to actual notice of the Trust Action.

[¶44] If this Court considers Hess' constitutional argument, it should be rejected because Hess was not a "reasonably ascertainable" property owner that could be identified through "reasonably diligent efforts."[1] Hess claims "Hess's name and address were reasonably ascertainable because Hess's Leases were indexed in the tract index system for each portion of the Tract." (Appellant's Brief, ¶ 35). As discussed above, the fact that the Hess Memoranda were recorded in the tract index did not provide notice that Hess was an owner of the Subject Minerals because the memoranda were recorded out of the chain of title.

[¶45] Accepting Hess's argument that it was an "interested party" entitled to actual notice of the Trust Action because the Hess Memoranda were recorded in the tract index would require a petitioner requesting creation of an unlocatable mineral owner trust to personally serve notice on all mineral, lease, and royalty interest owners identified in any instrument recorded under the relevant descriptions in the tract index. That would require service on hundreds, and potentially thousands, of "interested parties" due to the fractionation of mineral estates. For example, in this case, Edward J. Brown owned a 2.5 percent interest that was further fractionated when Corwin and Goldberg each inherited a

[1] Sundance agrees with the North Dakota Attorney General that Hess is not an "interested party" under N.D.C.C. § 38-13.1-01. (Amicus Brief, ¶¶ 6-7). However, determining whether Hess is an "interested party" does not require factual findings. Hess claims it was an "interested party" based solely on the recording of the Hess Memoranda. Hess' status as the holder of leases recorded out of the chain of title did not make Hess an "interested party" as a matter of law.

1.25 percent share. (App., pp. 26-36). The Subject Minerals are located in several smaller parcels under four sections of real property. (App., p. 7). Many owners likely hold a percentage of the mineral estate in each quarter-quarter section and the ownership likely differs across the parcels. There could be hundreds of owners of the relevant mineral acres. In addition, there could be hundreds of leases covering those interests and hundreds more owners of fractional shares of royalty interests. Neither the due process clause of the Constitution nor N.D.C.C. § 38-13.1-01 requires a petitioner in an unlocatable mineral owner trust action to identify every mineral, lease, and royalty interest owner of any portion of the mineral estate at issue and personally serve those owners with notice of a trust proceeding affecting a fractional share of the mineral estate.

[¶46] The line of United States Supreme Court cases Hess cites to support its constitutional argument establishes that due process guarantees property owners *reasonable* notice of actions affecting their rights. The cases do not establish that property owners have the right to actual notice of every action that may affect their rights. Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478, 484 & 489 (1988) (holding notice by publication of estate action was sufficient for creditors whose identities were not reasonably ascertainable). The cases establish that what constitutes reasonable notice depends on the particular circumstances and practicalities of each case and requires balancing the State's interest against the individual interest protected by the Fourteenth Amendment. Id.; Mennonite Bd. of Missions v. Adams, 462 U.S. 791, 798-99 (1983); Mullane v. Cent. Hanover Bank & Tr. Co., 339 U.S. 306, 313-14 (1950).

[¶47] Due process does not require "impracticable and extended searches" to locate property owners whose rights may be affected. Pope, 485 U.S. at 490 (quoting Mullane,

339 U.S. at 317-18). It requires only "reasonably diligent efforts" to locate "reasonably ascertainable" property owners. Pope, 485 U.S. at 484 & 489; In re Estate of Elken, 2007 ND 107, ¶ 9, 735 N.W.2d 842. A property owner's failure to take steps to safeguard his interests does not waive due process. Mennonite, 462 U.S. at 798-99; Davis Oil Co. v. Mills, 873 F.2d 774, 787 (5th Cir. 1989). However, the failure to protect interests is a relevant factor in determining what constitutes reasonable notice for due process purposes. Davis Oil Co., 873 F.2d at 790.

[¶48] Balancing the relevant interests and considering the practicalities related to the creation of unlocatable mineral owner trusts shows that Hess was not entitled to actual notice of the Trust Action. The trust statutes further the State's interest in encouraging the development of oil and gas by allowing leasing and production of minerals owned by individuals who cannot be located. See N.D.C.C. § 38-08-01. Hess had a leasehold interest that it could have protected in several ways including by identifying the lessors in the Hess Memoranda "individually and as heirs to the Estates of Edward J. Brown and Janet G. Brown," by recording affidavits of heirship linking Corwin and Goldberg to Edward J. Brown, or by requiring the administration of the Brown estates. Property owners who fail to comply with State recording statutes are not "reasonably ascertainable" for due process purposes. Cornelius v. Rosario, 138 Conn. App. 1, 17, 51 A.3d 1144, 1154 (2012) (holding that property owner who was not record owner due to his own failure to record a deed was not "reasonably ascertainable" despite his occupation of the property and city employees' knowledge of his name and address and collecting supporting cases). Hess was not "readily ascertainable" because it failed to comply with the record title requirements. N.D.C.C. §§ 47-19-41 & 47-19-46.

[¶49] In addition, interpreting N.D.C.C § 38-13.1-01 as requiring petitioners to provide actual notice to all owners of minerals, leases, and royalties in the relevant mineral estate would necessitate an "impracticable and extended search" beyond due process requirements. The necessary efforts to review all relevant instruments in the tract index in this case are similar to efforts the Fifth Circuit determined were beyond "reasonable diligence" in Davis Oil Co. v. Mills where it concluded requiring a search for all conveyances of mineral interests would be unduly burdensome and explained that "[f]ar from being a simple . . . undertaking, a search of the conveyance records for the mineral interests on a single piece of property could resemble a rather large tree with several limbs and innumerable branches." 873 F.2d at 789. Contrary to Hess' argument, the complexity of the search described in Davis Oil Co. was not the result of Louisiana using a grantor-grantee index rather than a tract index. (Appellant's Brief, n. 6). The complexity was caused by the fractionation of the mineral estate. As in Davis Oil Co., reviewing every instrument recorded under the same property description as the Subject Minerals would have required much more than a "simple search." It would have required the review of hundreds of documents, because like the mineral estate in Davis Oil Co., the mineral estate here "has been divided and assigned to different entities." 873 F.2d at 789. Due process did require not Sundance to conduct an "impractical and extended search" for every owner of minerals, leases, and royalties in the parcels containing the Subject Minerals to protect Hess from its failure to satisfy the record title requirements. Service by publication provided reasonable notice. Hess did not have a constitutional due process right to receive actual notice of the Trust Action.

CONCLUSION

[¶50] North Dakota's race-notice statute has been in effect and has been applied by this Court to determine the priority of competing claims to real property since statehood. The race-notice statute controls the priority determination and under that statute, Sundance has priority as a first-to-record subsequent good faith purchaser for value. This Court should affirm the judgment of the district court.

DATED this 11th day of September, 2017.

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ADDENDUM

CHAPTER 350

SENATE BILL NO. 2170

(Senators Holmberg, Hogue, Triplett)
(Representative Delmore)

AN ACT to amend and reenact section 47-19-41 of the North Dakota Century Code, relating to the effect of recording.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 47-19-41 of the North Dakota Century Code is amended and reenacted as follows:

47-19-41. Effect of not recording - Priority of first record - Constructive notice - Limitation and validation.

~~Every~~An unrecorded conveyance of real estate ~~not recorded shall be~~is void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate~~,~~ or any part ~~or portion thereof~~of the same real estate, ~~whose conveyance,~~regardless of whether recorded in the form of a warranty deed~~, or deed of bargain and sale,~~ or deed of quitclaim and release~~, of~~ or the form in common use ~~or otherwise,~~ first is ~~deposited with the proper officer for record and subsequently~~ recorded~~, whether entitled to record or not,~~ or as against an attachment ~~levied thereon~~on the property or ~~any~~ judgment ~~lawfully obtained, at the suit of any party~~, against the ~~person in whose name the title to such land appears~~owner of record, ~~prior to~~before the recording of ~~such~~the conveyance. The fact that ~~such~~the first ~~deposited and~~ recorded conveyance ~~of such subsequent purchaser for a valuable consideration is in the form, or contains the terms, of a deed of~~is a quitclaim ~~and release aforesaid~~, ~~shall~~deed does not affect the question of good faith of the subsequent purchaser, or be of itself notice ~~to the subsequent purchaser~~ of any unrecorded conveyance of the same real estate or any part ~~thereof~~of the same real estate. This section ~~shall be legal~~is notice to all who claim under unrecorded instruments that prior recording of later instruments ~~not entitled to be recorded~~ may nullify their ~~right,~~ title ~~interest,~~ to or lien~~, to, in, or upon~~ on affected real property. ~~No~~An action affecting any ~~right,~~ title to~~, interest,~~ or lien~~, to, in, or upon~~ on real property ~~shall~~may not be commenced ~~or maintained~~ or defense or counterclaim asserted ~~or recognized in court~~ on the ground that a recorded instrument was not entitled to be recorded. The record of all instruments whether or not ~~the same were~~ entitled to be recorded ~~shall be~~is deemed valid and sufficient as the legal record ~~thereof~~of the instruments. The holder of an unrecorded conveyance may not question the good faith of the first recording party unless it can be established that the first recording party had actual knowledge of the existence of the unrecorded conveyance.

Approved April 8, 2013
Filed April 8, 2013

CHAPTER 314

SENATE BILL NO. 2180

(Senator Holmberg)

AN ACT to amend and reenact section 47-19-41 of the North Dakota Century Code, relating to unrecorded conveyances.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 47-19-41 of the North Dakota Century Code is amended and reenacted as follows:

47-19-41. Effect of not recording - Priority of first record - Constructive notice - Limitation and validation.

An unrecorded conveyance of real estate is void as against any subsequent purchaser in good faith, and for a valuable consideration, of the same real estate or any part of the same real estate, regardless of whether recorded in the form of a warranty deed or deed of quitclaim and release or the form in common use first is recorded or as against an attachment on the property or judgment, against the owner of record, before the recording of the conveyance. The fact that the first recorded conveyance is a quitclaim deed does not affect the question of good faith of the subsequent purchaser, or be of itself notice of any unrecorded conveyance of the same real estate or any part of the same real estate. This section is notice to all who claim under unrecorded instruments that prior recording of later instruments may nullify their title to or lien on affected real property. An action affecting any title to or lien on real property may not be commenced or defense or counterclaim asserted on the ground that a recorded instrument was not entitled to be recorded. The record of all instruments whether or not entitled to be recorded is deemed valid and sufficient as the legal record of the instruments. ~~The holder of an unrecorded conveyance may not question the good faith of the first recording party unless it can be established that the first recording party had actual knowledge of the existence of the unrecorded conveyance.~~

Approved March 13, 2015
Filed March 13, 2015

Notice should be taken of the interest of a person joining with the record owner in a contract, mortgage, lease, plat or easement, other than a spouse joining for possible homestead interest under NDCC 47-18-05. Conveyances by strangers to the chain of title may be disregarded, unless a title examiner has actual notice or knowledge (through sources other than the record) of the interest of the grantor, or unless subsequent to such conveyance there is recorded a deed or other conveyance vesting title in such stranger.

Authority: Basye, Clearing Land Titles, Sec.42 (2d ed. 1970).
NDCC 47-19-41, 47-19-45, and 47-19-46.
Doran v. Dazes, 64 NW 1023 (ND 1895).
Simonson v. Wenzel, 147 NW 804 (ND 1914).
McCoy v. Davis, 164 NW 951 (ND 1917).

Note: If the conveyance can be disregarded, liens against parties to that conveyance may also be disregarded.

Caveat: In order to ignore conveyances from a "stranger" the "good faith" test of the Recording Act (NDCC 47-19-41) must be met. Any circumstances which should cause further inquiry to be made as to the status of the "stranger" which inquiry would disclose the unrecorded interest of the "stranger" preclude ignoring the "strangers" conveyance. Possession inconsistent with the record title execution of a mortgage and other information suggesting an interest in a third person not appearing record have been held to preclude "good faith" status. Conveyance or other instruments

from a "stranger" to the chain of title which contain erroneous legal descriptions may be ignored.

Cross-Reference: NDTS 14-02.

See: Swanson v. Swanson 2011 ND74, 796 NW2d 614, for the Supreme Court's rejection of the trial court's application of this standard to a mortgage from someone not in title but as to which the Supreme Court found the title claimants had notice from comments made by the mortgagor 32 year later but still not a record owner

Source: NDTS 1950 as amended in 1953, 1961, 1980, 1988, 1989, 1994, 1995 and 2011.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sundance Oil & Gas, LLC, Plaintiff and Appellee, v. Hess Corporation, Defendant and Appellant, and Barbara B. Corwin and Patricia B. Goldberg, Defendants.	)	Supreme Court No. 20170148 Mountrail County No. 31-2014-CV-00064 **AFFIDAVIT OF MAILING**

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 11 day of September, 2017, she mailed a copy of the foregoing *Appellee's Brief* by placing a true and correct copy thereof in an envelope, addressed to the following:

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Annette Kirschenheiter

Annette Kirschenheiter

Subscribed and sworn to before me this 11 day of September, 2017.

DAYNA FREDRICKSON
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

Dayna Fredrickson

Notary Public