

## IN THE SUPREME COURT

## STATE OF NORTH DAKOTA

Siana Oil & Gas Co., LLC,	)	
	)	
Plaintiff and Appellee,	)	
	)	
v.	)	Supreme Court Case No.: 20180009
	)	
Dublin Co.; Greg and Nancy Vance Family	)	
LP; Richard Lyons Moore; Michael Harrison	)	
Moore; William Joy Charitable Trust;	)	
Stephens Scott Moore Test; Kasmer &	)	McKenzie County District Court Case
Aafedt Oil, Inc; Doris Muggli Trust; Kirby	)	No.: 27-2011-CV-00146
Family Trust; Ashley Resources; Evelyn	)	
Margaret Rauch; Brenda Hecht Chupp;	)	
Daniel McCarthy Trust; Perrine 850II Trust;	)	
Cheryl Miltonberger; Rollin A. Warner;	)	
Robert J. Kellogg; Joseph R. Kellogg; James	)	
L. Taylor; Edgar J. Cooper; William H.	)	
Wallraff; Dana C. Eckenback; O.H. Olson;	)	
O.B. Herigstad; Marsha R. Butler	)	
McGovern; Craig McGovern; Kirk	)	
McGovern; Oscar Herum; Rensch Family	)	
Mineral Trust; Larry R. Swan; Lisa M.	)	
Swan; Scott M. Swann; Avalon North LLC;	)	
Dakota West Energy LLC; Terry L. Harris;	)	
Timothy P. Olson; Barbara A. Kelly;	)	
Gregory F. Olson; John M. Landry; Laura	)	
Conzet; Donna Landry Sorenson; Hazel Jean	)	
Babier Life Estate; Gregory G. Tank; Lary	)	
& Fay Moberg; James Moberg; Belden	)	
Moberg; Tyrell Moberg; John Moberg;	)	
Kerry Stone; Melissa Fevold; Chandra	)	
Stone; Alletta Stone, Jenica Stone; Celeste	)	
Stonecipher; Marilyn Querciagrossa;	)	
Anthony Querciagrossa; Kimberly	)	
Querciagrossa; Michael Querciagrossa;	)	
Gerry Hammond; Corrina Beesley	)	
Hammond; Kimberly Murillo; Joseph Paul	)	
Huber; Kathleen Patricia Huber Garvin; and	)	
Kelly H. Baxter Estate,	)	
	)	
Defendants.	)	

Greggory G. Tank,	)	
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	McKenzie County District Court Case
	)	No.: 27-2014-CV-00202
ABH Baxter LP aka Baxtro LLC aka	)	
Blairbax LLC aka Buffy Energy LLC, Sarah	)	
Anderson, Ashley Resources, Inc., Avalon	)	
North LLC, Hazel Jean Bahler, Sandra	)	
Bahler Byrd, Corrina Beesley-Hammond,	)	
The Bishop of Bismarck Diocese, Lucille	)	
Broyles, Chaparral Energy LLC, Brenda	)	
Hecht a/k/a Brenda Hecht Chupp, Laura	)	
Conzet, Edgar J. Cooper a/k/a Edgar J.	)	
Couper, Dakota West Energy LLC, The	)	
Dublin Company, Dana Eckenbeck, Melissa	)	
Fevold, Kathleen P. Huber-Garvin, Gerry	)	
Hammond, Terry L. Harris, Brenda Hecht,	)	
Carol Ann Hedberg-Nayes, Elaine Lenore	)	
Hedberg-Anderson, Laurenitus Arthur	)	
Hedberg, Greg W. Hennessy, James R.	)	
Herigstad, Oscar Herum, H. H. Hester,	)	
Pringle Family Mineral Trust, Jane F. Hirst,	)	
Trustee, The Personal Representative of the	)	
Estate of Bernice Huber, Joseph Paul Huber,	)	
The Personal Representative of the Estate of	)	
Paul J. Huber, 4M Minerals, LLLP, Douglas	)	
C. Jarrett, Kasmer & Aafedt Oil, Inc.,	)	
Joseph R. Kellogg, Robert J. Kellogg,	)	
Barbara A. Kelly, Kirby Family Trust,	)	
Virginia J. Kirby and Jerry L. Kirby as Co-	)	
Trustees, Trust B created by Last Will and	)	
Testament of Ward M. Kirby dated August	)	
30, 1984, Virginia J. Kirby and Jeffrey K.	)	
Kirby, as Co-Trustees, J. H. Kline, Kathy J.	)	
Kuntz, John M. Landry, Susan Manning,	)	
Daniel McCarthy Trust U/A dated July 9,	)	
1976, American Bank & Trust Company,	)	
Trustee, Daniel T. McCarthy Trust, Bremer	)	
Trust, N.A., Trustee, Craig McGovern, Kirk	)	
McGovern, Marsha R. Butler McGovern,	)	
Cheryl Miltonberger, Belden Moberg, James	)	
Moberg, John Moberg, Larry Moberg and	)	
Fayann a/k/a Fay Moberg, Tyrell Moberg,	)	
Kevin Moore SSMTT GTES Exempt Trust	)	

as revised and restated on December 22, )  
 2008, Kevin Moore, Trustee, Kevin Moore )  
 SSMTT Nonexempt Trust as revised and )  
 restated on December 22, 2008, Kevin )  
 Moore, Trustee, Michael Harrison Moore, )  
 Richard Lyons Moore, Ryan Moore SSMTT )  
 OST Exempt Trust as revised and restated )  
 on December 22, 2008, Ryan Moore, )  
 Trustee, Ryan Moore SSMTT Nonexempt )  
 Trust as revised and restated on December )  
 22, 2008, Ryan Moore, Trustee, Doris )  
 Muggli Trust U/T/A DDT 7/18/85, Mary )  
 Ann Muggli Haws and John Muggli Co- )  
 Trustees, Trust Agreement dated 8-21-81, )  
 Doris Muggli, Trustee, Kimberly Murillo, C. )  
 M. Nelson, Gregory F. Olson, O. H. Olson, )  
 Timothy P. Olson, Trust Agreement dated )  
 December 22, 1937 S. Alden Perrine and )  
 Verne E. Joy, Trustees, Perrine 850II Trust, )  
 William S. Perrine and John A. Perrine, as )  
 Co-Trustees, William Joy Charitable Trust, )  
 U/D/T/DTD 11-30-88-ARI, Alden J. )  
 Perrine, Trustee, Michael Purdy, Anthony )  
 Querciagrossa, Kimberly Querciagrossa, )  
 Marilyn Querciagrossa, Michael )  
 Querciagrossa, EMR Revocable Trust dated )  
 January 25, 1978 Lloyd R. Rauch and Evelyn )  
 Margaret Rauch, Co-Trustees, Evelyn Jean )  
 Reneer, Rensch Family Mineral Trust, )  
 Harold J. Rensch, Trustee, Brian Sorenson )  
 and Donna L. Sorenson Revocable Living )  
 Trust by declaration of trust dated November )  
 9, 2011, Brian Sorenson and Donna Landry )  
 Sorenson, Trustees, Alletta Stone, Chandra )  
 Stone, Jenica Stone, Kerry Stone, Celeste )  
 Stonecipher, The Personal Representative of )  
 the Estate of Ann L. Swan, Lisa M. Swan, )  
 Scott M. Swan, Helen Webster, Personal )  
 Representative of the Estate of James L. )  
 Taylor, Greg and Nancy Vance Family )  
 Limited Partnership, Jeffrey Vanlaningham, )  
 William H. Wallraff, Rollin A. Warner, J. C. )  
 Zeller, Sharon Sketting, Personal )  
 Representative of the Estate of J.H. Klein, )  
 Joan R. Toohey, Personal Representative of )  
 the Estate of J.C. Zeller and Ruth Wallrath

and Executrix of the Estate of J.C. Zeller, )  
The Personal Representative of the Estate of )  
H.H. Hester, Stephen W. Pollard, Personal )  
Representative of the Estate of Rollin A. )  
Warner, The Personal Representative of the )  
Estate of James L. Taylor, Charger )  
Resources LLC, Siana Oil & Gas Co., LLC, )  
and all other persons unknown claiming any )  
estate or interest in, or lien or encumbrance )  
upon, the property described in the )  
complaint, )  
)  
)  
Defendants and Appellees. )

## BRIEF OF APPELLANT

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## **I. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

- [¶1] Whether sufficient undisputed facts exist after making all inferences in favor of the Defendants to determine that summary judgment should have been granted to Plaintiff because this action is not time barred under the statute of limitations; not barred by the Marketable Record Title Act not barred by adverse possession because it cannot be proven by clear and convincing evidence, and not barred by the doctrine of laches.
- [¶2] Whether sufficient undisputed facts exist after making all inferences in favor of the Plaintiff to determine that this action is: time barred under the statute of limitations, barred by the Marketable Record Title Act, barred because adverse possession has been proven by clear and convincing evidence, or barred by the doctrine of laches.
- [¶3] Whether a remand to the District Court is necessary to weigh evidence, resolve material factual disputes, and draw inferences.

## **II. STATEMENT OF THE CASE**

- [¶4] On August 25, 2011, Chaparral Energy, L.L.C. applied to the District Court of McKenzie County for an order designating depository of disputed royalty proceeds from the production of minerals from the Property. Appx. 13; Case No. 27-2011-CV-00146 (“the Deposit Action”) Doc ID # 1 of Deposit Action.
- [¶5] As the case developed, it became apparent to the parties that the action would not settle the issue of title to the minerals that were producing the royalty proceeds.
- [¶6] Mr. Tank commenced a quiet title action against the named defendants on July 11, 2014. Appx. 38.
- [¶7] The Defendants answered, requesting that title be quieted in them. Appx. 47–73.
- [¶8] The Deposit Action and quiet title action were then consolidated. Appx. 24.



[¶9] Mr. Tank filed a motion for summary judgment and brief in support of his motion based on his record title. Quiet Title Action<sup>1</sup>, Doc ID Nos. 114, 115.

[¶10] Robert Kellogg, Joseph Kellogg (“the Kelloggs”), Terry Harris (“Harris”), Baxto LLC and Buffy Energy LLC (“the Baxters”) opposed the motion and filed a cross motion for summary judgment based on a statute of limitations, the Marketable Record Title Act, adverse possession, and laches. Doc ID Nos. 128-9, 151-2, 124-5, respectively.

[¶11] Judge Daniel El-Dweek denied Mr. Tank’s motion and granted the cross motions in an email dated April 6, 2017 (The District Court never docketed Judge El-Dweek’s ruling issued via email and it is therefore not a part of the record herein).

[¶12] Pursuant to Judge El-Dweek’s email, one of the defendants drafted an opinion for the District Court. Mr. Tank objected to a party drafting a memorandum opinion on summary judgment, but Judge El-Dweek subsequently adopted the opinion and order drafted by the Baxter Defendants on May 23, 2017. Appx. 79.

[¶13] Mr. Tank subsequently moved to amend the judgment because the initial judgment entered by the District Court did not address the majority of the mineral interest which was later quieted in Tank because the majority of the defendants in the underlying quiet title action either stipulated to Mr. Tank’s mineral ownership or defaulted. Appx. 74.

[¶14] It was later discovered that 4M Minerals (“4M”) had not been served with the competing motions and cross motions. With the aim of conserving judicial resources, Mr. Tank and 4M stipulated that 4M’s defenses were identical to those of the other

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<sup>1</sup> Unless otherwise noted, all citations to document ID numbers are to the Quiet Title Action.

Defendants and stipulated to an entry of an amended judgment based on the prior order drafted by the Baxter Defendants while reserving rights of appeal. Doc ID No. 229.

[¶15] An amended judgment was issued on November 8, 2017. Appx. 88.

[¶16] A Notice of Appeal was filed on January 5, 2018. Appx. 90.

### **III. STATEMENT OF THE FACTS**

#### **The Tank Chain of Title**

[¶17] On March 7, 1917, Ellis Bjorklund was issued a federal patent to the SE 1/4 of Section 3 of Township 150 North, Range 96 West (“the Property”). This patent title became vested in his heirs upon his death. Appx 93.

[¶18] On December 8, 1931, the property was sold to McKenzie County at a tax sale for unpaid taxes accrued in the year 1930. Appx 95.

[¶19] On December 8, 1941, an Auditor’s Tax Deed to the County was issued. The deed referenced the 1930 tax sale and the expiration of the period of redemption. Appx 96.

[¶20] On October 3, 1945, McKenzie County deeded the Property to John W. Tiegs. Appx 97.

[¶21] On November 21, 1955, John W. Tiegs secured a judgment quieting title to the property in him in fee simple absolute as against the heirs of Ellis Bjorklund. Appx.99–105.

[¶22] On December 16, 1955, John W. Tiegs issued a warranty deed over the Property to George Tank, Rose Tank, and Austin Tank. Appx 106.

[¶23] On May 13, 1959, Austin Tank quitclaimed his interest in the Property to George and Rose Tank. Appx 108.

[¶24] On March 16, 1976, George Tank and Rose Tank conveyed “the full interest” of minerals under the Property to George Tank via warranty deed. Appx. 109.

[¶25] On December 7, 2007, George Tank quitclaimed all of his interest in the Property to Gregory G. Tank with a reserved life estate which terminated upon his death on June 14, 2008. Appx. 112, 113.

[¶26] It is uncontested that Gregory Tank owns 160 acres of the surface and 160 mineral acres of the Property.

Defendants’ Untethered Chains of Title

[¶27] On February 3, 1938, Hagen J. Carlson and Esther Carlson (“the Carlsons”) conveyed “all of [their] right, title, and interest in 11% of” royalties from the Property and certain other tracts to W.R. Olson (“Olson”). Appx. 117. Each of the defendants’ competing claims are rooted in this deed. Case No. 27-2014-CV-00202 (“the Quiet Title Action”) Doc. ID #s 125, 129, 152, 218. There is nothing in the record even referencing a conveyance of the Property to the Carlsons (and indeed, no reference to them at all prior to their assignment to Olson). The record demonstrates that the Property was owned by McKenzie County from December 8, 1931 until October 3, 1945. Appx. 95–98. The record also demonstrates that the Carlsons did not own the Property when they issued the royalty assignment to Olson. *Id.*

The Baxter Claim

[¶28] On August 16, 1956, Olson conveyed all of “his right, title, and interest in” 1/2 of 1% of royalties from the Property and certain other tracts to Wilma Higgins (“Higgins”). Appx. 119.

[¶29] On August 29, 1956, Higgins conveyed all of her “right, title, and interest in and to 1/4 of 1% royalty from the Property and certain other tracts to D.B. and Fanny Perrine.

Appx. 121

[¶30] This interest was assigned mesne through various Perrine trust entities in 1984 and 1998. Appx. 123, 125.

[¶31] On March 5, 1999, the David Perrine GST Residuary Trust conveyed “its interest in and to” the Property to Kelly H. Baxter. Appx 130.

[¶32] On September 8, 2010, the estate of Kelly H. Baxter conveyed all of “her right, title, and interest” in the Property to Ashley, Abbie, and Kelly Baxter. Appx. 132.

[¶33] This interest was conveyed through various Baxter entities on February 28, 2011; June 20, 2013; and as of January 29, 2015 purports to be vested undivided in Baxsto, LLC and Buffy Energy, LLC. 135, 139, 141.

*The Kellogg Claim*

[¶34] On July 23, 1955, Olson purported to convey a 1% royalty in the Property to Lena Olson. Appx. 144.

[¶35] On July 7, 1955, Lena Olson purported to convey a 35/400 of 1% royalty to Theodore Kellogg. Appx. 146.

[¶36] On November 2, 1992, the purported interest of Theodore Kellogg was transferred to Robert and Joseph Kellogg by means of a PR deed of distribution. Appx. 149.

*The Harris Claim*

[¶37] On March 7, 1938, Olson conveyed all of his “right, title, and interest in and to 1% royalty” from the Property and certain other tracts to Matt Miller. Appx. 152.

[¶38] On February 14, 1952, Matt Miller conveyed all of his “right, title, and interest in and to 1% royalty” from the Property and certain other tracts to Clara and Jesse Miller. Appx. 154.

[¶39] On September 18, 2006, Jesse Miller assigned all of his “interest in and to all oil, gas, and other minerals” underlying the Property to Terry Harris. Appx. 155.

*The Claim of 4M Minerals*

[¶40] On March 23, 1938, Olson conveyed his “right, title, and interest in and to 2% royalty” from the Property and certain other tracts to James J. Craig. Appx. 157.

[¶41] On April 22, 1938, Craig conveyed his “right, title, and interest in and to 1% royalty” from the Property and certain other tracts to H. H. Hester. Appx. 158.

[¶42] On November 29, 1941, Hester conveyed his “right, title, and interest in and to 1/4 of 1% royalty” from the Property and certain other tracts to Frank Traynor. Appx. 160.

[¶43] On December 17, 1984, Traynor’s “right, title, and interest” was transferred by means of a PR deed of distribution to Mary Ellen Iverson and Gloria White. Appx. 161.

[¶44] On June 12, 1999, Gloria White conveyed “an undivided 100% mineral and royalty acre interest in and to all of the oil, gas, casinghead gas, casinghead gasoline, all liquid hydrocarbons, and other minerals, including, but not limited to, sulphur, coal, gravel, clay, uranium . . .” in and under 25,400 acres spanning three North Dakota counties as well as Montana to Mary Ellen Iverson by means of a warranty deed. Appx. 165.

[¶45] On March 24, 2014, conveyed “all of her interest in” the Property to 4M Minerals. Appx. 171.

#### IV. STANDARD OF REVIEW

[¶46] The standard of review of a decision on summary judgment is well rehearsed:

Summary judgment is a procedural device used to promptly resolve a controversy on the merits without a trial if either party is entitled to judgment as a matter of law and the material facts are undisputed or if resolving the disputed facts would not alter the result. The moving party bears the initial burden of showing there are no genuine issues of material fact in dispute and the case is appropriate for judgment as a matter of law. If the motion is properly made and supported, the opposing party must set forth specific facts by presenting competent, admissible evidence, by affidavit or by directing the court to other evidence in the record, showing there is a genuine issue of material fact. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial.

In deciding whether to grant summary judgment, the district court may consider the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence. Summary judgment is inappropriate if neither party is entitled to judgment as a matter of law or if reasonable differences of opinion exist as to the inferences to be drawn from the undisputed facts. The district court's role is limited to determining whether the evidence and inferences to be drawn therefrom, when viewed in the light most favorable to the party opposing summary judgment, demonstrate that there are no genuine issues of material fact. Deciding an issue on summary judgment is not appropriate if the court must draw inferences and make findings on disputed facts. The court may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter....

Whether the district court has properly ruled on a motion for summary judgment is a question of law, which we review de novo on appeal. In reviewing the court's decision, we view the evidence in a light most favorable to the party opposing the motion and give the opposing party all favorable inferences.

*N. Oil & Gas, Inc. v. Creighton*, 2013 ND 73, ¶¶ 10-12 (quotations, citations omitted).

“[U]ndisputed facts do not justify summary judgment if reasonable differences of opinion may exist as to the inferences to be drawn from the undisputed facts.” *Norman Jessen &*

*Assocs., Inc. v. Amoco Prod. Co., Denver, Colo.*, 305 N.W.2d 648, 650 (N.D. 1981); *Farmers Union Oil Co. of Garrison v. Smetana*, 2009 ND 74 ¶ 10 (collecting cases).

## **V. SUMMARY OF THE ARGUMENT**

[¶47] The Plaintiff and Defendants each assert ownership of a royalty interest in the Property. The Plaintiff's title is rooted in sovereign grants, and those of the Defendants are rooted in a quitclaim conveyance from a party who is not an owner of record. Their claims are irreconcilable, each reaches back over 20 years, and one chain of title must be deemed superior to the other.

[¶48] Without reaching the issue of the superiority of title to the Subject Property, the District Court erroneously concluded that four affirmative defenses asserted by Defendants—a statute of limitations, the Marketable Record Title Act, adverse possession, and laches applied to bar Plaintiff's claims to the property as to them. Essentially, the District Court disregarded the fundamental importance of the Defendants' requests for a decree quieting title in them and that such a claim is in the nature of a counterclaim, and Defendants therefore had a burden to prove the superiority of their title over Plaintiff's.

[¶49] The statute of limitations asserted by Defendants, N.D.C.C. § 28-01-05, requires that the adverse party be neither seized nor possessed of the interest for twenty years in order for a party to successfully assert it as an affirmative defense. This statute of limitations does not bar Plaintiff's claim because he has been both well seized of and has possessed the Property continuously. Plaintiff is well seized of the property by means of a unitary sovereign grant that excludes Defendants' chain of title. Mr. Tank has been possessed of the property through his occupancy of the surface, record title,

and exercise of his executory rights by which authorization Tank's lessee is occupying the minerals through Tank's title and lease.

[¶50] Adverse possession and the Marketable Record Title Act do not apply because they both require actual possession. Proof of actual possession of minerals is itself difficult to prove, but here Defendants are asserting that they possess a mere royalty interest, which is even more difficult. An unaccrued royalty interest is an interest in real property. It is an undivided interest in minerals that are to be captured and brought to the surface. Specifically, a royalty interest is a nonpossessory expectancy that accrues, becomes quantifiable, and capable of physical possession only upon production—when the minerals are captured, severed from the realty, and become personalty. While oil royalty is an interest in real property, royalty oil is personal, moveable property. It is impossible to be in actual possession of unaccrued royalties because it is an incorporeal hereditament.

[¶51] Additionally, the Marketable Record Title Act, after 2013 requires that Affidavits of Possession be filed, and none have been (and presumably, prior to 2013, possession of interests such as those in dispute here was a questionable proposition at best). To the extent that filing an affidavit of possession is a requirement under the Act, no party has complied with it. Most importantly, Mr. Tank also has an unbroken chain of title to the interests claimed by Defendants that spans more than twenty years.

[¶52] Laches does not apply because it would be inequitable to apply the doctrine to divest an owner of superior title. Additionally, all Defendants have been on notice as to the infirmity of their titles and could have sought the appropriate judicial remedy. Essentially, Defendants are seeking to have the court quiet title in them based not on



the strength of their own claims, but by asserting that the record owner is barred from seeking a decision on the merits. Further, none of the Defendants are in a position to assert a defense in equity because they acquired their interests by means of quitclaims without inquiring into the source of the title. Some acquired their interests after this consolidated action commenced. Finally, the application of the equitable doctrine of laches to an action which has been addressed by the legislative assembly by statute also raises separation of powers concerns and violates N.D.C.C. § 1-01-06.

[¶53] Contrary to the established standard for competing motions for summary judgment, the ruling and judgment of the District Court relied upon disputed material facts and drew inferences on both disputed and undisputed material facts that were adverse to Plaintiff when it granted Defendants’ cross-motions. Even if the Court does not find that Tank is entitled to summary judgment, it should remand this matter to the District Court for proceedings in which it is permitted to resolve factual disputes, weigh the evidence, and make appropriate inferences from it.

## **VI. ARGUMENT**

### **A. This Action Is Not Time Barred**

[¶54] The District Court ruled that this consolidated action was barred by the affirmative defense of the statute of limitations. This is a quiet title dispute over the title to unaccrued royalty interests in minerals. An unaccrued royalty interest is an interest in real property. *GeoStar Corp. v. Parkway Petroleum, Inc.*, 495 N.W.2d 61, 67 (N.D. 1993). The statute of limitations asserted by Defendants, N.D.C.C. § 28-01-05, bars a claim “founded upon title to real property, or to rents or service” of the property unless that person (or predecessor in title) was seized or possessed of the premises within

twenty years.” (emphasis added). In order for Tank’s claims to be barred, he must have been neither seized nor possessed of the property. “Seizure” refers to actual or constructive possession of the holder of legal title. *Wehner v. Schroeder*, 335 N.W.2d 563, 566 (1983). Possession refers to actual, physical possession. *Id.*

1. Tank Possesses a Unitary Estate in the Property

[¶55] Tank has been continuously seized of the Property because he and his predecessors have held legal title since 1941, when the Auditor of McKenzie County issued a tax deed to the county pursuant to an unpaid tax lien for the year 1930. Appx. 95. Constructive possession follows legal title. *Bull v. Beiseker*, 16 N.D. 290, 113 N.W. 870, 871 (1907). A tax deed passes absolute property in fee to the county free from all encumbrances whatsoever. This is a unitary title in the surface and mineral estates. *Payne v. A.M. Fruh Co.*, 98 N.W.2d 27, 28, 31-32 (1959). “A tax deed founded upon a tax lien, to which every interest in the land described in the deed was subject, conveys a single, new, and paramount title to every interest in the land, which has nothing to do with the former chain of title. The new title is one from which no interests have ever been severed”. *Id.* Here, just as in *Payne*, the purported mineral severance occurred after the tax lien had attached but before the tax deed had been issued. *Id.* at 32. The title that issued from the County is not burdened by any purported encumbrance that occurred after the lien attached. Here, there is no record that Carlson was ever granted an interest in the property. Even putting aside the fact that the tax deed would wipe out any purported encumbrance, a conveyance of such an encumbrance from someone without ownership and no privity with the owner cannot burden his true title.

[¶56] The only time the surface and mineral estates were severed was in March of 1976 when Rose and George Tank transferred “the full interest” of minerals and royalties (as opposed to quitclaim language of “his full interest”) to George Tank. Appx 109. These estates were reunited upon the death of Rose Tank. This title is now seized in Mr. Tank, and his undisputed possession of the surface is deemed to be possession of the minerals.

2. Tank Possesses the Mineral Estate of the Property through his Lessee

[¶57] Mr. Tank also remains in actual possession of the mineral estate—by use of his sole and uncontested executive right as a lessor, it is on his behalf that production of the minerals occurs. the lessor of the mineral interest (the only entity to invade the mineral estate and actually possess the minerals), the actual occupation by the lessee of the mineral estate is deemed to be his act of possession and dominion. *Burlington Northern v. Hall*, 322 N.W.2d 233, 241 (actual possession accomplished by drilling or conducting mining operations); *See, e.g.*, N.D.C.C. § 28-01-12; *Wehner v. Schroeder*, 335 N.W.2d 563, 566 (quoting Black’s Law Dictionary for the premise that “[a] person who, although not in actual possession, knowingly has both the power and intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it.”).

[¶58] Tank and his forebears have been both seized and possessed of the Property within the statutory period, and his action to remove the clouds on his title are not time barred. *Yttredahl v. Fed. Farm Mortg. Corp.*, 104 N.W.2d 705, 708 (N.D. 1960) (“The right to maintain an action to remove a cloud upon an interest in real property by one in possession thereof is a continuing right which cannot be barred by limitation.”).

## **B. Defendants Have Not Complied with the Marketable Record Title Act**

[¶59] The District Court erroneously concluded that the Defendants could shelter under the Marketable Record Title Act (“MRTA”). The MRTA deems any person who has an unbroken chain of title to an interest in real estate that has been of record for at least twenty years, and is in possession of the interest, to have marketable record title, subject to other provisions of Chapter 47-19.1. N.D.C.C. § 47-19.1-1 (emphasis added).

[¶60] As an initial matter, it is Mr. Tank who has possession and a title that spans the requisite time period, and whose record title is directly at odds with the claims of the Defendants. *See e.g.* Appx 93–116. It is Mr. Tank who is deemed by the MRTA to have marketable record title. Even if the MRTA applied to Defendants, however, this Court would still have to determine whether their claims are to the Property or to the (nonexistent) interest that Carlson conveyed in 1938. Further, the MRTA does not affect any statute of limitations or give rights to receive royalties. N.D.C.C. § 47-19.1-08; N.D. Op. Atty. Gen. No. L-11, 4 (2012).

[¶61] Application of the MRTA to bar disputes as to purportedly competing chains of title is also a problematic proposition. For example, the deed issued on June 12, 1999 from Gloria White to Mary Iverson purports to convey 100% of the minerals as well as gravel, clay, and scoria in a tract of over 25,000 acres. Appx. 6. While her successor in title, 4M Minerals, does not claim that the warranty deed actually transferred such an expansive interest, the premise of their MRTA claim against Tank necessitates such an illogical conclusion. In other words, if Defendants are correct about the operation of the MRTA, then all mineral owners must be vigilant against obvious overgrants such as this one. If titles such as this are allowed to be sheltered from judicial scrutiny under

the MRTA as the District Court did here, every mineral owner will effectively be charged with frequent visits to the Recorder's office to verify that their titles are not encroached upon by innocent or malicious overgrants. *See Catto v. Hollister*, 39 N.D. 1, 166 N.W. 506, 506 (1918) ("A party who has a good title to real property under recorded deeds has no occasion to keep watch of his title").

1. The Defendants Have Not Shown Possession of Real Property

[¶62] One element of the MRTA that prevents the possibility of an overgrant blooming into a marketable title is the requirement that a person be in possession of the claimed interest. N.D.C.C. § 47-19.1-1. Defendants, however, claim to own a nonpossessory interest in real property that is by definition incapable of being possessed.

[¶63] The Defendants claim to own an interest in royalties in oil and gas produced from the Property. "Royalties in gas or oil, until brought to the surface and reduced to possession, are interests in real estate and not personal property." *Corbett v. La Bere*, 68 N.W.2d 211, 214 (N.D. 1955) (emphasis added) (quoting *Arrington v. United Royalty Co.* 65 S.W.2d 38 (1933)). While unaccrued royalties remain in the ground, they have not been 'captured' and are not possessed. Royalties are only possessed once severed, and then they are no longer real property, but personal property that is distinct from the land. Royalties only accrue once minerals have been brought to the surface and reduced to possession. *Id.* Severance of minerals "marks a change in the nature of any interest therein" and they become personal property. *Finstrom v. First State Bank of Buxton*, 525 N.W.2d 675, 677 (N.D. 1994) (citing *Federal Land Bank of St. Paul v. State*, 274 N.W.2d 580, 583 (N.D.1979) (deciding for tax purposes that "'produced' or 'severed' minerals are personal property, not real estate"); NDCC § 41-09-05(1)(h)

(defining “goods” for UCC purposes to include “all things which are movable at the time the security interest attaches,” and not including “minerals or the like (including oil and gas) *before* extraction”) (emphasis added by the *Finstrom* court); 58 C.J.S. Mines and Minerals § 213 (1948) (stating that “it has usually been held that oil and gas rents and royalties are profits issuing out of the land; and, while they become personal property after they have accrued, until they accrue they are part of the estate remaining in the lessor”)). Oil royalty is real property, but royalty oil is personal property.

[¶64] While the Defendants did receive payment for a fraction of the minerals that were produced and sold from the Property, at no time did any of them enter or actually possess the Property. Their relationship to the Property and its minerals was at best third-hand—first, Tank authorized a lessee to enter, explore, and sever oil from the Property, then the minerals were transported and sold, and then the Operator paid the Defendants a sum of money. Once the oil was produced, it was no longer real property, but personal property, and Defendants never even possessed that, only a portion of the proceeds from its sale. The Defendants received payment for royalties, but not because they ever possessed or captured the minerals. Since the Defendants are not in possession of the premises, they cannot assert marketable title under the MRTA.

## 2. The Defendants have not Filed Affidavits of Possession

[¶65] An owner of a valid royalty interest can be sheltered under the MRTA after 2013 if he both uses the minerals as defined in N.D.C.C. § 38-18.1-03 and records an affidavit of possession. N.D.C.C. § 47-19.1-07. *Black Stone Minerals Co., L.P. v. Brokaw*, 2017 N.D. 110, ¶ 14, 893 N.W.2d 498. None of the Defendants filed such an affidavit provided for in Section 7 and have therefore not complied with the MRTA.

### C. The Defendants Have Not Shown Adverse Possession

[¶66] The District Court also ruled that the defense of adverse possession applied in this action. Under N.D.C.C. § 28-01-08, a claimant must continuously occupy and possess the premises for twenty years. Adverse possession requires, among other things, actual possession. *Id.* at ¶11; *Bilby v. Wire*, 1956, 77 N.W.2d 882 (“Without actual possession, there can be no adverse possession”).

[¶67] As explained *supra* in paragraphs 63-65, it is impossible to be in actual possession of unaccrued royalties, which are by nature a nonpossessory interest. None of the Defendants ever entered the Property. None of the Defendants ever even exercised an executive right over the Property, and this Court has repeatedly determined that even this falls short of adverse possession. *See, e.g., Sickler v. Pope*, 326 N.W.2d 86, 94. The receipt by Defendants of personal property or payment therefor amounts neither to occupation nor actual possession of the Property.

[¶68] Adverse possession furthers the social policy that all tangible things must have an owner so that, for example, fields do not lay fallow when someone would put them into production. We require actual possession of a thing because it will be put to use when it would otherwise lay dormant. These considerations are totally absent as to a nonpossessory and passive interest such as one in unaccrued royalties. There is no legitimate reason to relax the established standard of requiring actual possession to acquire title to such an interest—there will not be any less production of resources or dormant minerals if the Court continues to apply the same standard it has used for decades—adverse possession requires actual possession. This ensures that valid titles will be protected.

#### **D. Laches Does Not Apply**

[¶69] Laches is an equitable remedy that does not arise by the passage of time alone, but requires that the party invoking laches changed its position in good faith during the other party's delay and cannot be restored to their former position. *Diocese of Bismarck Trust v. Ramada, Inc.*, 553 N.W.2d 760, 767 (1996). A party that is not a good faith purchaser cannot assert the equitable defense of laches because one who seeks equity must have clean hands. *Fredericks v. Fredericks*, 2016 ND 234, ¶ 29, 888 N.W.2d 177. Laches is also generally a question of fact. *Wms. Cnty. Social Services Bd. v. Falcon*, 367 N.W.2d 170, 174 (1985).

##### **1. It Would Be Inequitable to Apply Laches to Mr. Tank**

[¶70] The District Court also applied the equitable doctrine of laches to bar Mr. Tank's claim and vest title in Defendants. The District Court effectively sanctioned the use of laches as an offensive weapon to divest Mr. Tank of his well-seized and perfected title. Title to real property is at its simplest a recognition by the government of rights in land. This recognition can be as an immediate grantor (in the case of a patent or tax deed) or through any number of intervening buyers and sellers. NDTs 1-01 (2017). Without a basis in government recognition, a chain of title is nothing more than a series of unfounded claims for which there is no remedy. That Defendants' chains of title are trace back to 1938 is no reason to validate them and divest the true owner in the process.

[¶71] It is inequitable to hold that encumbrances arising out of stray titles and void quitclaim conveyances can bloom into perpetuities in property when the world was on notice that Tank and his predecessors claimed and held the Property through sovereign grants above and below the earth that should be adjudged unencumbered by grants



outside of his chain of title. See N.D.C.C. § 47-10-08 (grant vests title as to those subsequently claiming under him); *Hoffer v. Crawford*, 65 N.W.2d 625, 626 (1954) (when one of two persons must suffer, loss should not fall on person wholly unconnected with the transaction (here, the stray deeds)). Granting Defendants' equitable plea is unwarranted given the facts of this case that show that Defendants acquired their interests with constructive notice of Tank's competing claims to the Property and their titles' infirmity would have been revealed had they ascertained the basis for the purported interests that they acquired. See *N.D. Workers Comp. Bur. v. General Inv. Corp.*, 2000 ND 196, ¶12, 619 N.W.2d 869 ("The use of a quitclaim deed can be regarded as notice to the purchaser that there may be outstanding equities against the grantor's title."). Defendants acquired exactly what they bargained for, and the Court should not divest Tank of his interest due to their lack of care.

2. Defendants Cannot Avail Themselves of Laches because they Have Not Detrimentially Changed their Positions Based on Reliance

[¶72] The Kelloggs have not changed their position during Plaintiff's supposed delay in prosecuting this action. The Kelloggs acquired their interest by means of a PR deed of distribution in 1992 and did not purchase their interest. Appx. 149. Theodore Kellogg acquired the interest in 1955, years before any claim could even arise regarding the awareness or delay of the Tanks as to the Kellogg claims. Appx. 146. Laches does not apply to the Kelloggs because they did not detrimentally change their position based on any action or inaction of Tank. See *Imperial Oil of North Dakota, Inc. v. Consolidated Crude Oil Co.*, 851 F.2d 206, 212 (8<sup>th</sup> Cir. 1988) (laches requires a change in position based in reliance).

[¶73] 4M Minerals and the Baxter entities acquired their interests after the commencement of the dispute. N.D.C.C. § 9-05-10; *Anderson v. Anderson*, 435 N.W.2d 687, 689 (1989); Appx. 1 (Deposit Action Filed) Deposit Action Doc. ID No. 28 (Baxter Answer); Appx. 141 (Baxto LLC and Buffy Energy LLC acquired interest on January 29, 2015); Appx. 171 (4M Minerals acquired interest on Mar. 24, 2014). They acquired their interests with actual knowledge of the deposit action and Tank's assertion of his lawful claim. They cannot assert a delay that ended prior to their acquisition of their claim and cannot claim to be good faith purchasers. *Desert Partners IV, L.P. v. Benson*, 2016 ND 37 ¶¶ 13, 14, 875 N.W.2d 510.

[¶74] Finally, the claims of Harris, the Baxters (prior to the 2010 PR distribution), and 4M arise out of quitclaim conveyances, which places each on notice as to exactly what interest (or lack thereof) they might receive. *General Inv. Corp.*, 2000 ND at ¶12. The Baxter and Harris chains of title are "turtles all the way down" with each conveyance only transferring the interest of the prior grantor, never purporting to seize any grantee with anything other than whatever was held by the previous claimant all the way back to Carlson, who was never an owner of record. 4M is in the same position but for a warranty deed issued in 1999 that provides a warranty to 100% of all minerals in over 25,000 acres. This deed is clearly slanderous in that no claimant in this action other than Tank has asserted ownership of the minerals in the Property.

[¶75] Even if Defendants did qualify as bona fide purchasers, the doors to the courts of equity are closed as to their claims divesting Tank of his interest by operation of laches. A deed that passes no title is a nullity, and is therefore void, and "a void deed passes no title and cannot be made the foundation of a good title even under the application of

the equitable doctrine that protects *bona fide* purchasers.” *Dixon v. Kaufman*, 79 N.D. 633, 651, 58 N.W.2d 797 (1953). Each quitclaim deed in each of the Defendants’ chains of title, beginning with Carlson, only purported to pass their claims and interests in royalties from oil severed from the Property. *Gilbertson v. Gilbertson*, 452 N.W.2d 79, 81. All of the Defendants are entitled to that portion of royalties accruing to their piece of the interest owned by Carlson in 1938—11% of nothing. See *Valley Honey Co., v. Graves*, 2003 ND 125, ¶9, 666 N.W.2d 453 (grantees of a deed receive nothing if the grantor did not have title to convey). When Carlson conveyed 11% of his interest in royalties from the Property, he did not sever anything from the surface estate because nothing was transferred. The Defendants must carry a burden in order to be granted relief in their request to have title quieted in them, and all that they have shown is that they are entitled to varying portions of 11% of the (nonexistent) royalty interest owned by Carlson in 1938.

[¶76] The record is unequivocal that the property was bid by McKenzie County in 1931, the County was issued its deed pursuant to the sale in 1941, and then conveyed to John Tiegs. Even if there were any unrecorded grant to Carlson that showed his ownership before he executed the assignment to Olson, that interest would have been subject to the 1930 tax lien and extinguished in 1941. *Payne*, 98 N.W.2d at 27. No such deed has been uncovered by any Defendants hereto, however. None of the deeds in the Defendants’ chains of title allow them to claim an equitable defense because none of the deeds have passed title to anything. It is inequitable to divest an owner of mineral interests because of the acts of others who lack any near or remote privity with his claims to the Property. *Black Stone* 2017 ND at ¶16; *Catto*, 39 ND at 1.

### 3. Laches Has Been Displaced by the Century Code under the Facts of this Case

[¶77] Application of laches would also be contrary to the will of the Legislative Assembly. This is an action founded upon title to real estate, and the coordinate branch in charge of lawmaking has determined the limitations period to be twenty years after seizure and possession have ended. N.D.C.C. § 28-01-05. “In this state there is no common law in which the law is declared by the code.” N.D.C.C. § 1-01-06. “Laches is a gap-filling doctrine, and where there is a statute of limitations, there is no gap to fill.” *SCA Hygiene Prod. Aktiebolag v. First Quality Baby Prod., LLC*, 580 U.S. \_\_\_, 137 S. Ct. 954 (2017). Although Tank recognizes that this has not previously been the judicial perspective in North Dakota, it follows from the sound logic of the U.S. Supreme Court that because the Century Code supplies a statutory limitations period, the equitable limitation of laches is unavailable to the Defendants.

### E. The District Court did not Base its Ruling on the Correct Standard of Review

[¶78] A party moving for summary judgment must show that there are no undisputed material facts and that it is entitled to disposition as a matter of law. *Benson*, 2016 ND at ¶ 9. All reasonable inferences drawn from facts on the record must be drawn in favor of the nonmoving party. *Id.* Summary judgment is not a mini-trial, and the court may not weigh the evidence or make findings on disputed facts. *Id.* at ¶10. When “facts are not in dispute but permit the drawing of different inferences, the drawing of one such permissible inference is said to be a finding of fact.” *Nygaard v. Robinson*, 341 N.W.2d 349 (1983) (quoting *Fettig v. Whitman*, 285 N.W.2d 517 (1979)). The District Court did not apply this standard in ruling for Defendants.

[¶79] The opinion that was drafted by the Baxters and adopted by the District Court contained a “Statement of Undisputed Facts” which amounts to a recitation of conclusory statements and inferences favorable to Defendants, and which completely disregard the competing evidence and inferences proffered by Mr. Tank. *See Smetana*, 2009 ND ¶¶ 10–12; *see also* Appx. 79. There is no means of discerning the reasoning as to how the District Court reached its decision as a matter of law (while making all reasonable inferences in favor of the Plaintiffs) on issues such as whether Defendants had actual or constructive notice of Tanks competing claims (and their defective claims), the legal significance of an operator’s title opinion, whether Defendants in any way relied on anyone’s purported delay, or whether Carlson owned an interest in the Property when he quitclaimed a royalty interest to Olson. *See* Appx. 74, 79; *cf.* *Holverson v. Lundberg*, 2016 ND 103, ¶ 15; *cf. Maragos v. Newfield Production Co.*, 2017 ND 191, ¶ 12; *cf. Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476, 485 (1991); *cf. Valley Honey Co.*, 2003 ND at ¶9. Because the District Court applied the wrong standard of review to the arguments and state of the record, this matter should be remanded with instructions if this Court does not find that the Plaintiff is entitled to summary judgment.

## VII. CONCLUSION

[¶80] At its core, this case is an attempt by Mr. Tank to clear clouds on his record title.

That Defendants have hung their hats on a series of inapplicable affirmative defenses rather than the strength of their own title illustrates the weakness of any actual claims to title they might have. Plaintiff therefore requests that this Court find that, as a matter of law, the affirmative defenses relied upon by Defendants do not apply and the Plaintiff is entitled to summary judgment because he continues to possess the Property, Defendants have never been in actual possession of the Property, and the defense of laches is inapplicable under the facts of this case. In the alternative, Plaintiff requests that the cause be remanded for findings of fact, particularly with respect to application of a laches defense.

DATED this 20th day of February, 2017.

### **BAUMSTARK BRAATEN LAW PARTNERS**

/s/ Derrick Braaten

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David Keagle, ND Bar # 08502

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IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

Siana Oil & Gas Co., LLC,	)	
	)	
	)	
Plaintiff and Appellee,	)	
	)	
v.	)	Supreme Court Case No.: 20180009
	)	
Dublin Co.; Greg and Nancy Vance Family	)	
LP; Richard Lyons Moore; Michael Harrison	)	
Moore; William Joy Charitable Trust;	)	
Stephens Scott Moore Test; Kasmer &	)	McKenzie County District Court Case
Aafedt Oil, Inc; Doris Muggli Trust; Kirby	)	No.: 27-2011-CV-00146
Family Trust; Ashley Resources; Evelyn	)	
Margaret Rauch; Brenda Hecht Chupp;	)	
Daniel McCarthy Trust; Perrine 850II Trust;	)	
Cheryl Miltonberger; Rollin A. Warner;	)	
Robert J. Kellogg; Joseph R. Kellogg; James	)	
L. Taylor; Edgar J. Cooper; William H.	)	
Wallraff; Dana C. Eckenback; O.H. Olson;	)	
O.B. Herigstad; Marsha R. Butler	)	
McGovern; Craig McGovern; Kirk	)	
McGovern; Oscar Herum; Rensch Family	)	
Mineral Trust; Larry R. Swan; Lisa M.	)	
Swan; Scott M. Swann; Avalon North LLC;	)	
Dakota West Energy LLC; Terry L. Harris;	)	
Timothy P. Olson; Barbara A. Kelly;	)	
Gregory F. Olson; John M. Landry; Laura	)	
Conzet; Donna Landry Sorenson; Hazel Jean	)	
Babier Life Estate; Gregory G. Tank; Lary	)	
& Fay Moberg; James Moberg; Belden	)	
Moberg; Tyrell Moberg; John Moberg;	)	
Kerry Stone; Melissa Fevold; Chandra	)	
Stone; Alletta Stone, Jenica Stone; Celeste	)	
Stonecipher; Marilyn Querciagrossa;	)	
Anthony Querciagrossa; Kimberly	)	
Querciagrossa; Michael Querciagrossa;	)	
Gerry Hammond; Corrina Beesley	)	
Hammond; Kimberly Murillo; Joseph Paul	)	
Huber; Kathleen Patricia Huber Garvin; and	)	
Kelly H. Baxter Estate,	)	
	)	
Defendants.	)	
	)	

Greggory G. Tank,	)	
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	McKenzie County District Court Case
	)	No.: 27-2014-CV-00202
ABH Baxter LP aka Baxtro LLC aka	)	
Blairbax LLC aka Buffy Energy LLC, Sarah	)	
Anderson, Ashley Resources, Inc., Avalon	)	
North LLC, Hazel Jean Bahler, Sandra	)	
Bahler Byrd, Corrina Beesley-Hammond,	)	
The Bishop of Bismarck Diocese, Lucille	)	
Broyles, Chaparral Energy LLC, Brenda	)	
Hecht a/k/a Brenda Hecht Chupp, Laura	)	
Conzet, Edgar J. Cooper a/k/a Edgar J.	)	
Couper, Dakota West Energy LLC, The	)	
Dublin Company, Dana Eckenbeck, Melissa	)	
Fevold, Kathleen P. Huber-Garvin, Gerry	)	
Hammond, Terry L. Harris, Brenda Hecht,	)	
Carol Ann Hedberg-Nayes, Elaine Lenore	)	
Hedberg-Anderson, Laurenitus Arthur	)	
Hedberg, Greg W. Hennessy, James R.	)	
Herigstad, Oscar Herum, H. H. Hester,	)	
Pringle Family Mineral Trust, Jane F. Hirst,	)	
Trustee, The Personal Representative of the	)	
Estate of Bernice Huber, Joseph Paul Huber,	)	
The Personal Representative of the Estate of	)	
Paul J. Huber, 4M Minerals, LLLP, Douglas	)	
C. Jarrett, Kasmer & Aafedt Oil, Inc.,	)	
Joseph R. Kellogg, Robert J. Kellogg,	)	
Barbara A. Kelly, Kirby Family Trust,	)	
Virginia J. Kirby and Jerry L. Kirby as Co-	)	
Trustees, Trust B created by Last Will and	)	
Testament of Ward M. Kirby dated August	)	
30, 1984, Virginia J. Kirby and Jeffrey K.	)	
Kirby, as Co-Trustees, J. H. Kline, Kathy J.	)	
Kuntz, John M. Landry, Susan Manning,	)	
Daniel McCarthy Trust U/A dated July 9,	)	
1976, American Bank & Trust Company,	)	
Trustee, Daniel T. McCarthy Trust, Bremer	)	
Trust, N.A., Trustee, Craig McGovern, Kirk	)	
McGovern, Marsha R. Butler McGovern,	)	
Cheryl Miltonberger, Belden Moberg, James	)	
Moberg, John Moberg, Larry Moberg and	)	
Fayann a/k/a Fay Moberg, Tyrell Moberg,	)	
Kevin Moore SSMTT GTES Exempt Trust	)	



as revised and restated on December 22, )  
 2008, Kevin Moore, Trustee, Kevin Moore )  
 SSMTT Nonexempt Trust as revised and )  
 restated on December 22, 2008, Kevin )  
 Moore, Trustee, Michael Harrison Moore, )  
 Richard Lyons Moore, Ryan Moore SSMTT )  
 OST Exempt Trust as revised and restated )  
 on December 22, 2008, Ryan Moore, )  
 Trustee, Ryan Moore SSMTT Nonexempt )  
 Trust as revised and restated on December )  
 22, 2008, Ryan Moore, Trustee, Doris )  
 Muggli Trust U/T/A DDT 7/18/85, Mary )  
 Ann Muggli Haws and John Muggli Co- )  
 Trustees, Trust Agreement dated 8-21-81, )  
 Doris Muggli, Trustee, Kimberly Murillo, C. )  
 M. Nelson, Gregory F. Olson, O. H. Olson, )  
 Timothy P. Olson, Trust Agreement dated )  
 December 22, 1937 S. Alden Perrine and )  
 Verne E. Joy, Trustees, Perrine 850II Trust, )  
 William S. Perrine and John A. Perrine, as )  
 Co-Trustees, William Joy Charitable Trust, )  
 U/D/T/DTD 11-30-88-ARI, Alden J. )  
 Perrine, Trustee, Michael Purdy, Anthony )  
 Querciagrossa, Kimberly Querciagrossa, )  
 Marilyn Querciagrossa, Michael )  
 Querciagrossa, EMR Revocable Trust dated )  
 January 25, 1978 Lloyd R. Rauch and Evelyn )  
 Margaret Rauch, Co-Trustees, Evelyn Jean )  
 Reneer, Rensch Family Mineral Trust, )  
 Harold J. Rensch, Trustee, Brian Sorenson )  
 and Donna L. Sorenson Revocable Living )  
 Trust by declaration of trust dated November )  
 9, 2011, Brian Sorenson and Donna Landry )  
 Sorenson, Trustees, Alletta Stone, Chandra )  
 Stone, Jenica Stone, Kerry Stone, Celeste )  
 Stonecipher, The Personal Representative of )  
 the Estate of Ann L. Swan, Lisa M. Swan, )  
 Scott M. Swan, Helen Webster, Personal )  
 Representative of the Estate of James L. )  
 Taylor, Greg and Nancy Vance Family )  
 Limited Partnership, Jeffrey Vanlaningham, )  
 William H. Wallraff, Rollin A. Warner, J. C. )  
 Zeller, Sharon Sketting, Personal )  
 Representative of the Estate of J.H. Klein, )  
 Joan R. Toohey, Personal Representative of )  
 the Estate of J.C. Zeller and Ruth Wallrath

and Executrix of the Estate of J.C. Zeller, )  
The Personal Representative of the Estate of )  
H.H. Hester, Stephen W. Pollard, Personal )  
Representative of the Estate of Rollin A. )  
Warner, The Personal Representative of the )  
Estate of James L. Taylor, Charger )  
Resources LLC, Siana Oil & Gas Co., LLC, )  
and all other persons unknown claiming any )  
estate or interest in, or lien or encumbrance )  
upon, the property described in the )  
complaint, )  
)  
Defendants and Appellees. )

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Appeal from Judgment Entered on November 8, 2017  
Case Nos.: 27-2011-CV-00146 and 27-2014-CV-00202  
County of McKenzie, Northwest Judicial District  
The Honorable Daniel El-Dweek, Presiding

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### **CERTIFICATE OF SERVICE**

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I hereby certify that on February 20, 2018, I electronically filed with the Clerk of the North Dakota Supreme Court the following documents:

1. Brief of Appellant and
2. Appendix of Appellant

and served the same electronically upon the following:

Amy M. Oster  
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and certify the same was served via U.S. Mail upon the following:

Donna L. Sorenson  
1836 Chatham Terrace  
New Brighton, MN 55112

Dated this 20<sup>th</sup> day of February, 2018.

/s/ Derrick Braaten  
By: Derrick Braaten (ND ID 06394)

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

	)	
Siana Oil & Gas Co., LLC,	)	
	)	
Plaintiff and Appellee,	)	
	)	
v.	)	Supreme Court Case No.: 20180009
	)	
Dublin Co.; Greg and Nancy Vance Family	)	
LP; Richard Lyons Moore; Michael Harrison	)	
Moore; William Joy Charitable Trust;	)	
Stephens Scott Moore Test; Kasmer &	)	McKenzie County District Court Case
Aafedt Oil, Inc; Doris Muggli Trust; Kirby	)	No.: 27-2011-CV-00146
Family Trust; Ashley Resources; Evelyn	)	
Margaret Rauch; Brenda Hecht Chupp;	)	
Daniel McCarthy Trust; Perrine 850II Trust;	)	
Cheryl Miltonberger; Rollin A. Warner;	)	
Robert J. Kellogg; Joseph R. Kellogg; James	)	
L. Taylor; Edgar J. Cooper; William H.	)	
Wallraff; Dana C. Eckenback; O.H. Olson;	)	
O.B. Herigstad; Marsha R. Butler	)	
McGovern; Craig McGovern; Kirk	)	
McGovern; Oscar Herum; Rensch Family	)	
Mineral Trust; Larry R. Swan; Lisa M.	)	
Swan; Scott M. Swann; Avalon North LLC;	)	
Dakota West Energy LLC; Terry L. Harris;	)	
Timothy P. Olson; Barbara A. Kelly;	)	
Gregory F. Olson; John M. Landry; Laura	)	
Conzet; Donna Landry Sorenson; Hazel Jean	)	
Babier Life Estate; Gregory G. Tank; Lary	)	
& Fay Moberg; James Moberg; Belden	)	
Moberg; Tyrell Moberg; John Moberg;	)	
Kerry Stone; Melissa Fevold; Chandra	)	
Stone; Alletta Stone, Jenica Stone; Celeste	)	
Stonecipher; Marilyn Querciagrossa;	)	
Anthony Querciagrossa; Kimberly	)	
Querciagrossa; Michael Querciagrossa;	)	
Gerry Hammond; Corrina Beesley	)	
Hammond; Kimberly Murillo; Joseph Paul	)	
Huber; Kathleen Patricia Huber Garvin; and	)	
Kelly H. Baxter Estate,	)	
	)	
Defendants.	)	
	)	

Greggory G. Tank,	)	
	)	
Plaintiff and Appellant,	)	
	)	
v.	)	McKenzie County District Court Case
	)	No.: 27-2014-CV-00202
ABH Baxter LP aka Baxtro LLC aka	)	
Blairbax LLC aka Buffy Energy LLC, Sarah	)	
Anderson, Ashley Resources, Inc., Avalon	)	
North LLC, Hazel Jean Bahler, Sandra	)	
Bahler Byrd, Corrina Beesley-Hammond,	)	
The Bishop of Bismarck Diocese, Lucille	)	
Broyles, Chaparral Energy LLC, Brenda	)	
Hecht a/k/a Brenda Hecht Chupp, Laura	)	
Conzet, Edgar J. Cooper a/k/a Edgar J.	)	
Couper, Dakota West Energy LLC, The	)	
Dublin Company, Dana Eckenbeck, Melissa	)	
Fevold, Kathleen P. Huber-Garvin, Gerry	)	
Hammond, Terry L. Harris, Brenda Hecht,	)	
Carol Ann Hedberg-Nayes, Elaine Lenore	)	
Hedberg-Anderson, Laurenitus Arthur	)	
Hedberg, Greg W. Hennessy, James R.	)	
Herigstad, Oscar Herum, H. H. Hester,	)	
Pringle Family Mineral Trust, Jane F. Hirst,	)	
Trustee, The Personal Representative of the	)	
Estate of Bernice Huber, Joseph Paul Huber,	)	
The Personal Representative of the Estate of	)	
Paul J. Huber, 4M Minerals, LLLP, Douglas	)	
C. Jarrett, Kasmer & Aafedt Oil, Inc.,	)	
Joseph R. Kellogg, Robert J. Kellogg,	)	
Barbara A. Kelly, Kirby Family Trust,	)	
Virginia J. Kirby and Jerry L. Kirby as Co-	)	
Trustees, Trust B created by Last Will and	)	
Testament of Ward M. Kirby dated August	)	
30, 1984, Virginia J. Kirby and Jeffrey K.	)	
Kirby, as Co-Trustees, J. H. Kline, Kathy J.	)	
Kuntz, John M. Landry, Susan Manning,	)	
Daniel McCarthy Trust U/A dated July 9,	)	
1976, American Bank & Trust Company,	)	
Trustee, Daniel T. McCarthy Trust, Bremer	)	
Trust, N.A., Trustee, Craig McGovern, Kirk	)	
McGovern, Marsha R. Butler McGovern,	)	
Cheryl Miltonberger, Belden Moberg, James	)	
Moberg, John Moberg, Larry Moberg and	)	
Fayann a/k/a Fay Moberg, Tyrell Moberg,	)	
Kevin Moore SSMTT GTES Exempt Trust	)	

as revised and restated on December 22, )  
2008, Kevin Moore, Trustee, Kevin Moore )  
SSMTT Nonexempt Trust as revised and )  
restated on December 22, 2008, Kevin )  
Moore, Trustee, Michael Harrison Moore, )  
Richard Lyons Moore, Ryan Moore SSMTT )  
OST Exempt Trust as revised and restated )  
on December 22, 2008, Ryan Moore, )  
Trustee, Ryan Moore SSMTT Nonexempt )  
Trust as revised and restated on December )  
22, 2008, Ryan Moore, Trustee, Doris )  
Muggli Trust U/T/A DDT 7/18/85, Mary )  
Ann Muggli Haws and John Muggli Co- )  
Trustees, Trust Agreement dated 8-21-81, )  
Doris Muggli, Trustee, Kimberly Murillo, C. )  
M. Nelson, Gregory F. Olson, O. H. Olson, )  
Timothy P. Olson, Trust Agreement dated )  
December 22, 1937 S. Alden Perrine and )  
Verne E. Joy, Trustees, Perrine 850II Trust, )  
William S. Perrine and John A. Perrine, as )  
Co-Trustees, William Joy Charitable Trust, )  
U/D/T/DTD 11-30-88-ARI, Alden J. )  
Perrine, Trustee, Michael Purdy, Anthony )  
Querciagrossa, Kimberly Querciagrossa, )  
Marilyn Querciagrossa, Michael )  
Querciagrossa, EMR Revocable Trust dated )  
January 25, 1978 Lloyd R. Rauch and Evelyn )  
Margaret Rauch, Co-Trustees, Evelyn Jean )  
Reneer, Rensch Family Mineral Trust, )  
Harold J. Rensch, Trustee, Brian Sorenson )  
and Donna L. Sorenson Revocable Living )  
Trust by declaration of trust dated November )  
9, 2011, Brian Sorenson and Donna Landry )  
Sorenson, Trustees, Alletta Stone, Chandra )  
Stone, Jenica Stone, Kerry Stone, Celeste )  
Stonecipher, The Personal Representative of )  
the Estate of Ann L. Swan, Lisa M. Swan, )  
Scott M. Swan, Helen Webster, Personal )  
Representative of the Estate of James L. )  
Taylor, Greg and Nancy Vance Family )  
Limited Partnership, Jeffrey Vanlaningham, )  
William H. Wallraff, Rollin A. Warner, J. C. )  
Zeller, Sharon Sketting, Personal )  
Representative of the Estate of J.H. Klein, )  
Joan R. Toohey, Personal Representative of )  
the Estate of J.C. Zeller and Ruth Wallrath )

and Executrix of the Estate of J.C. Zeller,  
The Personal Representative of the Estate of  
H.H. Hester, Stephen W. Pollard, Personal  
Representative of the Estate of Rollin A.  
Warner, The Personal Representative of the  
Estate of James L. Taylor, Charger  
Resources LLC, Siana Oil & Gas Co., LLC,  
and all other persons unknown claiming any  
estate or interest in, or lien or encumbrance  
upon, the property described in the  
complaint,

Defendants and Appellees.

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Appeal from Judgment Entered on November 8, 2017  
Case Nos.: 27-2011-CV-00146 and 27-2014-CV-00202  
County of McKenzie, Northwest Judicial District  
The Honorable Daniel El-Dweek, Presiding

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**CERTIFICATE OF SERVICE**

---

I hereby certify that on February 14, 2018, I electronically filed with the Clerk of  
the North Dakota Supreme Court the following documents:

1. Brief of Appellants; and
2. Appendix of Appellants,

and served the same electronically upon the following:

Amy M. Oster  
aoster@crowleyfleck.com

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Thomas B. Bair  
tbair@bairlawfirm.com

Bryan Lee Van Grinsven  
bvangrinsven@mcgeelaw.com

and certify the same was served via U.S. Mail upon the following:

Donna L. Sorenson  
1836 Chatham Terrace  
New Brighton, MN 55112

Dated this 14<sup>th</sup> day of February, 2018.

/s/ *Derrick Braaten*

By: Derrick Braaten (ND ID 06394)