20210060

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STATE OF NORTH DAKOTA

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Continental Resources, Inc., Plaintiff and Appellee

v.

Phillip Armstrong, Defendant and Appellant
and
Citation 2002 Investment Limited Partnership, Paragon Oil & Gas LLC, Poplar Energy Company LLC, Grandhaven Energy LLC, Goldline Creek LLC, Dakota Ventures I LLC, Geo Resource Management LLC,
Defendants

Supreme Court No. 20210060

Appeal from judgment entered January 8, 2021 by the District Court for the Southwest Judicial District, Dunn County, North Dakota, William A. Herauf, District Judge, Civil No. 13-2017-CV-00123.

APPELLANT'S BRIEF

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STATEMENT OF THE ISSUES

[1] The issues presented are:

1. Did the trial court err in concluding Armstrong did not own and could not possess interests under the Skachenko oil and gas lease?

2. Did the trial court err in failing to conclude that the statute of limitations barred quiet title and that Citation was not a good faith purchaser, and did the court err in concluding Citation had standing?

3. Did the trial court misinterpret record title, misinterpret the Apache to Key assignments, and err in quieting title in Citation to 97.82% of the Hartman wells overriding royalty interest?

4. Did the trial court err in concluding Armstrong's working interests are burdened by the lessors' royalty and by overriding royalty interests?

5. Did the trial court err in dismissing Armstrong's counterclaim against Continental for underpaid well revenues, and in not ordering accountings?

6. Did the court err in concluding Citation proved its unjust enrichment claim?

7. Did the court err in concluding that a title dispute existed?

STATEMENT OF THE CASE

[2] Armstrong owns working interests and overriding royalty interests in twenty five wells under the 1/8th Skachenko lease, including ten Hartman wells. Continental is the operator. In 1993 Apache assigned 1.03422% of its 2% Hartman override to Key Production Company, a predecessor in the chain of title to Armstrong and the "Grandhaven" defendants. The assignment was corrected in 1995, but it caused no change in Hartman override. The remainder was assigned to Citation 1994. In 2010 Continental began paying production revenues from the Hartman wells per executed division orders. In mid-2015 Continental used a title opinion that changed the payments of override to all defendants. New division orders weren't issued.

Payments to Armstrong and the Grandhavens increased for five production months in mid-2015, then were eliminated by Continental's decision that Citation owned all the override. Override payments to all defendants were suspended circa 2016.

[3] Continental sued Armstrong in 2017 to recover previous payments of Hartman override. Continental amended the complaint to add Citation and the Grandhavens as defendants on its allegation of ownership dispute, and added an interpleader for determination of ownership of the payments of override, called disputed proceeds by Continental. Armstrong counterclaimed for recovery of the underpayments on his well working interests and overrides, and for accountings.

[4] The Grandhavens crossclaimed. Citation crossclaimed against them and Armstrong for an unjust enrichment recovery of all disputed proceeds.

[5] On the initial day of trial in December 2019, the court announced that it would figure out who owned the minerals before going into other issues. The issues of unjust enrichment and Armstrong's counterclaim were heard in 2020. The court interpreted the assignment of override that was made in 1993 and corrected in 1995, and quieted title in Citation to 97.82% of the Hartman override. The court extended its order quieting title to Citation's unjust enrichment claim and ordered recovery. Armstrong's counterclaim for underpayment was dismissed. Continental's claims were dismissed, except for costs. Armstrong appealed the entire judgment.

STATEMENT OF THE FACTS

1. Record Ownership.

[6] Record title consists of assignments of working interests and overrides beginning with the 1972 Skachenko Lease. Doc ID #459-479, stipulated per Doc ID

#387 (Joint Exhibit List). The interests in the chain of title are undivided. No party owns minerals. Commencing in 2008, wells were drilled on the leased tracts in 1280 and 2560 acre spacing units, ten named Hartman (NW/4 section 28-146-95), ten named Bice and Dolezal (NE/4, SW/4 section 29-146-95), and five Skachenko and Meadowlark (section 30-146-95). All the wells and lease tracts are pooled. Division orders were signed for section 28 and 29 wells, FF/CL App 126, paragraph 21 end, whch are the Hartman, Bice, and Dolezal wells. Doc ID #498, 401, 402, 403.

[7] Amoco first operated the lease. Amoco retained 50% of the leasehold in sections 28 and 29, and Apache, Snyder, and Concise Oil acquired the other 50% in those two sections and all of section 30. Doc ID #459-463, 471-479.

[8] The initial assignments of overriding royalty interests for all tracts were made to Apache and Snyder Oil in 1990 -- Doc ID #462 for the tracts in sections 28 and 29, Doc ID #476 for the north half of section 30, and Doc ID #477 for the south half. For section 28 (Hartman wells) the Assignment of Overriding Royalty Interest underlying the wells, Doc ID #462, assigned a 4% override, then reduced it to 2%. See page 2, paragraph 4, first sentence. Citation agreed -- "So either you call it a four percent override and reduce it by 50%, or you call it a two percent override. It's the same thing". TT 336:4 - 7. The trial court agreed that the override assigned was two percent: "4% of the 50% owned by Apache, Concise, and Snyder, this is 2% of the entire premises". Doc ID #538 (February 2020 Order), paragraph 9.

[9] The 2% is the override for both section 28 and 29 tracts per Doc ID #462.

[10] In 1993 Snyder conveyed all its interests to Apache. Doc ID #463. In 1993 Apache owned 100% of the overrides and owned working interests of 47.25% in the

tracts in sections 28 and 29, 70.875% in the north half of section 30, and 95.875% in the south half of 30. Doc ID #461, 471-475, 478, 479. Concise owned the balance.

[11] In 1993 Apache assigned to Key Production Company a 0.01034222 decimal (i.e., 1.034222%) of its working interests and overrides in sections 28 and 29, and slightly larger interests in section 30. Doc ID #464. The assignment was amended by the Correction Instrument, Doc ID #465, in 1995 in ways that didn't change the original 1993 interests in sections 28 and 29. The Correction Instrument ratified and confirmed the 1993 assignment (Section 1.2, page 5). Section 30 interests increased. Key's interests went to Wilbanks, Doc ID #467, then from there 51.875% to Miller Oil et al., Doc ID #468, and finally 48.125% to Armstrong, Doc ID #469. Apache assigned its remaining interests in the lease to Citation 1994 Investment Limited Partnership. Doc ID #466. Miller Oil assigned to the Grandhavens, Doc ID #397.

[12] Involved in Citation's claims is a recorded agreement it made with Key wherein they recited that Apache made its assignment to Citation subsequent to the effective dates of the assignments to Key. Doc ID #490, Clarification of Interests.

2. Facts Associated with Errors of Law.

[13] **A. Real Property Law -- Vesting.** The 1993 assignment, Doc ID #464, from Apache to Key conveyed working interests and overriding royalty interests, "as described in Exhibit A" of decimal 0.01034222, i.e., 1.034222%, in tracts in sections 28 and 29 plus interests in section 30. The Correction Instrument, dated August 1, 1995, ratified and confirmed the 1993 assignment with some amending. Doc ID #465, page 5, Section 1.2. The assignments included the leased tracts that were developed into the Hartman, Bice, Dolezal, Skachenko, and Meadowlark wells.

[14] **B. Quiet Title; Statute of Limitations.** The subject matter of the amended complaint and Citation's crossclaim is payments of overriding royalty interest revenues, the so-called disputed proceeds: ". . . those proceeds from the Hartman Wells attributable to the Disputed Minerals (the "Disputed Proceeds")". Pleadings App 28, paragraph 18; Crossclaim App 108, paragraph 17. ". . dispute . . . relates to production from the Hartman wells." FF/CL App 125, paragraph 19.

[15] The court's interpretation of the Correction Instrument used 75.6 acres. FF/CL App 133, paragraph 36. The 75.6 acres comes from the total of the 47.25% interests assigned to Apache and Snyder Oil by the 1990 assignment, Doc ID #461 (32.25% to Snyder Oil and 15% to Apache), as a proportion of the 160 acres in the northwest quarter of section 28: 47.25% of 160 acres equals 75.6 acres.

[16] Statute of Limitations. Key acquired its interests in 1993 and August 1, 1995. Doc ID #464, 465. Citation 1994 acquired its interest on August 31, 1995. Doc ID #466. Citation 2002 filed its crossclaim January 9, 2019. Doc ID #192. Armstrong pleaded the statute of limitations in his answer. Pleadings App 114, paragraph 14.

[17] **C. Constructive Notice.** The court found that no party can claim lack of notice as to either of the assignments to Key. FF/CL App 130, paragraph 29. The 1993 assignment was recorded before Citation 1994 acquired its assignment August 31, 1995.

[18] In the hearing on the motion for reconsideration of the February 2020 Order, Armstrong raised issues of burden of proof, statute of limitations, constructive notice, and standing. Motion Hearing T 4:19 - 7:13. (The court referred to constructive notice in terms of good faith purchaser). The court stated:

> I do not see that there's a statute of limitations problem, nor do I see that there is any problem with a good faith purchaser. Motion Hearing T 14:5 - 7.
>
> Well, he actually did raise it in his Post Trial Brief and also his Pretrial Brief. Motion Hearing T 9:21-22. (referring to statute of limitations).

(Briefs are Doc ID #362, paragraphs 140-145, Doc ID #531, paragraphs 26, 29-32).

[19] **D. Standing.** Citation 1994 Investment Limited Partnership is record owner of the assignment from Apache. Doc ID #466. No assignment appears of record from Citation 1994 to Citation 2002. They merged in 2007. See Doc ID #490.

[20] Following the hearing in December 2019 the trial court instructed the parties to file a statement of issues that remained for hearing. Armstrong raised the issue of standing in his Statement of Remaining Matters, Doc ID #569, paragraph 3, and in his motion to dismiss the unjust enrichment claim, Doc ID #579, paragraph 2.

[21] **E. Misinterpretation of Assignment of Override.** Record documents describe override as production and production value. The Assignments of Overriding Royalty Interest conveyed "all oil, gas, and associated substances produced, saved and sold from the leases . . . The overrides shall be free and clear of the costs and expenses of production". Doc ID #462, 476, 477. The 1993 assignment and the Correction Instrument assigned overriding royalty interests "as described in Exhibit A out of or measured by the value of oil and gas production". Doc ID #464, 465.

[22] Armstrong testified that his interpretation of the Correction Instrument is essentially that it provided for the same payment for overrides and working interests. TT 53:17 - 54:2. Citation's interpretation is essentially that the override assigned to Key is the ratio of working interest acres Apache conveyed over the acres Apache owned, 1.65/75.6, and that the amount of override Citation owns is the ratio

of the acres Apache owned after the assignment to Key over 75.6 acres, i.e., 75.6-1.65 over 75.6 acres, or 2.18% and 97.82% respectively. TT 291:15 - 292:16; 297:3 - 300:5.

[23] The Correction Instrument described the corrections made to the original 1993 assignment, Doc ID #464. Preamble paragraph A stated that Exhibits A and B to the 1993 assignment contained incorrect or misleading information. Preamble paragraph D(1) explained Exhibit A of the 1993 assignment was changed from gross acres to lease net acres. Gross acres was misleading on whether working interests were to be calculated per gross acres or the actual net acres owned by the lessors. Language was added instructing that Key's interests were to be calculated from net acres: "To calculate the interest in each lease assigned, multiply the Key Working Interest by the Lease Net Acres". The conveying language in the 1993 assignment became "an undivided interest" in the Correction Instrument. Section 1.2 on page 5, Correction and Cross Conveyance, stated that Exhibits A and B of the 1993 assignment were replaced. Section 1.2 ratified and confirmed the 1993 assignment. The new Exhibit A made a slight increase in the Key Working Interests for section 30 (Skachenko and Meadowlark wells). The Key Working Interests for the tracts in section 28 and 29 were unchanged (Hartman, Bice, and Dolezal wells). Exhibit B, a list of then-existing wells, is not relevant.

4. Burdens on Working Interests.

[24] Division orders were executed for Hartman, Bice, and Dolezal wells. Doc ID #498, 401, 402, 403. WI and/or NRI is the payment rate for working interests. JIB (Joint Interest Billing) is the invoice rate, i.e., gross working interest. The rate of payment for ORRI (Overriding Royalty interest) is the same rate as the gross working

interest, because overrides aren't reduced for burdens. Doc ID #403 is for six of the Bice-Dolezal wells in the 2560 acre spacing unit; division orders for two more Dolezal wells were not issued. The division orders specified a like payment rate for working interests and overrides -- working interests weren't reduced for burdens. Division orders weren't signed for the Skachenko and Meadowlark wells. Doc ID #609. They deviated from record title. Armstrong advised his disagreement. Doc ID #610.

5. Underpayment and Withholding Revenues From Armstrong's Wells.

[25] Continental underpaid Armstrong's Hartman, Skachenko, and Meadowlark well revenues before the case was filed and during the case. Withholding of revenues for the Bice and Dolezal wells began during the case. Acceptable payments for all of Armstrong's well interests ceased after the April 2018 check, Doc ID #404.

[26] Withhholding of Hartman override began October 2015.

[27] In May 2018 Continental tendered a check for Hartman working interest only. Doc ID #405. That check and future checks didn't include payment for all the wells, and weren't cashed. Armstrong requested correction of the payments. Doc ID #406 (letter). Doc ID #491 contains cashed checks returned to Continental, and it shows the last accepted payment. That last payment, the second-to-last check in the exhibit is the April 2018 check, Doc ID #404. (The final check in the exhibit is a late payment for November 2017 through January 2018 production, Doc ID #432).

[28] Armstrong prepared an estimate of the underpayments, Doc ID #612, mostly based on the April 2018 check, extrapolated to the original time of trial.

[29] Armstrong pleaded and described accountings. App 73, paragraphs h, i, j ; Doc ID #362, paragraph 67-68; Doc ID #621, paragraphs 60, 64. The pleadings

didn't include Bice and Dolezal wells, since that withholding began during the case.

[30] **Hartman Wells & Working Interest.** Continental's letter proposing to drill the first Hartman well, Doc ID #398, and the Hartman operating agreement, Doc ID # 411 (last two pages), declared that Armstrong's working interest is 0.062215%. The Correction Instrument conveyed override in like percentage. The division order didn't burden working interests, and set a payment rate of 0.00062215 for working interests and overrides. Doc ID #498. Payments pursuant to the division order were made from 2010 through mid-2015. See for example Doc ID #433 (May 2015 revenue check).

[31] The check dated July 29, 2015, Doc ID #415, reversed all payments of working interest and reissued them 16.5% lower. To illustrate using the Hartman 1-28H well, Continental began reversing the payments on page 11, and beginning at page 14 the payments were restated. The reversed payments had been paid at the division order rate of 0.00062215; the restated payments were paid 16.5% lower at a rate of 0.00051949. There is only a 2% override, but Continental burdened for 4%. Continental disregarded the division order beginning with the July 2015 check.

[32] **Hartman Wells Overriding Royalty Interest.** In July 2015 Continental implemented the admittedly incorrect 2014 Lear & Lear title opinion, Doc ID #519. It changed the payment rates of the Hartman wells:

> The implementation of the 2014 Lear & Lear opinion resulted in the issuance of larger revenue checks to the non-Citation defendants in mid-2015. The implementation of the 2014 Lear & Lear opinion also resulted in the reversal of money previously paid to Citation in mid-2015. Doc ID #572, paragraph 2. (Continental brief).

Amended division orders were not issued. Continental increased Armstrong's override rate to 0.001203, Doc ID #418, and paid Armstrong in excess of the division

order rate for the sales/production months of May through September 2015. The revenue checks to Armstrong, Doc ID #415, 455-457, show the payments. Other checks show the beginning and end of the overpayments. The check for April 2015 production, Doc ID #433, shows the increased payment rate had not begun. The payment for October 2015 thru January 2016 production, Doc ID #428, shows the increased rate of payment had ended because the check included no payment for Hartman override. Continental explained the change after the fact in December and acknowledged error in the 2014 Lear & Lear title opinion. Doc ID #416, 418 (e-mails).

[33] Continental reversed and reissued payments of Hartman override as it did with working interest on the July check, Doc ID #415, from first payment in 2010. Payments at the division order rate of 0.00062215 were reversed, then restated at the rate of 0.001203. Amounts previously paid per the division order rate were double-counted into the July check. The net production from the Hartman wells for the five months of overpayment totaled $10,224,946. Doc ID #614. Payments to Armstrong during the five months at the 0.001203 rate totaled $12,300 (0.001203 * $10,224,946).

[34] Continental eliminated payment of Hartman override to Armstrong after the October 2015 check, Doc ID #457: "your entire override was credited to another entity". Doc ID #418 (e-mail). Beginning circa 2015-2016 Continental suspended all parties' payments of override, totalling $61,098 in 2020. Doc ID #558, page 2 (Accounting Summary). See Doc ID #424 and #524 (letters advising of suspending).

[35] **Bice and Dolezal Wells Working Interest and Override.** Continental paid working interests and overrides for the Bice and Dolezal wells pursuant to division orders, Doc ID #401, 402, and 403. The April 2018 check illustrates. Doc ID #404. The

Bice and Dolezal well division orders specify a like payment rate for working interests and overrides. Working interests aren't burdened.

[36] Acceptable payments ceased after the April 2018 check, Doc ID #404.

[37] Two wells were completed during the case, the Dolezal 5-5H and 6-5H1. Doc ID #377, paragraph 7 lists them. Continental didn't issue division orders for them. Payments tendered for these wells were on unacceptable checks that weren't cashed. The two wells are included in the estimate of underpayments, Doc ID #612.

[38] **Skachenko and Meadowlark Wells.** Underpayment began with sales of first production in 2008. See Doc ID #611 for payment history. Continental submitted division orders to Armstrong. Doc ID #609. Armstrong didn't sign them. Armstrong detailed his disagreement in a letter to Continental. Doc ID #610.

[39] Continental answered interrogatories that asked for the gross working interests of the Skachenko and Meadowlark wells. Doc ID #613, pages 19-20, Interrogatories 13A and 14A. It answered decimal 0.005627 gross working interest for the first Skachenko well (1280 spacing) and decimal 0.00281372 for the other four wells (2560 spacing). Armstrong agrees with the decimals stated.

[40] Gross working interest is the working interest unreduced for burdens. It's the payment rate for overrides, because overrides aren't reduced for burdens.

[41] The April 2018 revenue check, Doc ID #404, illustrates underpayment of override. It shows payment rates under the column "Disb Decimal". For the first well, Skachenko 1-31H, the payment rate for override is 0.00023818. For the other four Skachenko and Meadowlark wells the payment rate is 0.00011910. The payment rates are only 4.2% of the rates stated by Continental in its answers to interrogatories

of 0.005627 and 0.00281372 -- i.e., 0.00023818/0.005627 and 0.0001191/0.00281372, instead of equal to the gross working interests.

[42] Doc ID #611 is a summary prepared by Armstrong that shows cumulative difference between payments of working interest and payments of override. Notice was duly served, Doc ID #348. The revenue checks from Continental were used to prepare it. For each production month the difference in the payments of working interests and overrides were added to the prior cumulative difference to show a running total. The differences increased in 2011 when four new wells were drilled. The override underpayment is actually 16.5% more because the summary was prepared using working interest payments from the revenue checks, which were paid 16.5% less than record title gross working interest, i.e., burdened 16.5%. "Withheld" on the summary means payments were withheld from Armstrong after the April 2018 revenue check. June 2020 Trial T 53:11 - 17.

[43] The estimate of underpayment, Doc ID #612, shows the underpayment for the Skachenko and Meadowlark wells and others as of the original trial date.

6. Citation's Unjust Enrichment Claim.

[44] Key vested in 1.03% of the 2% Hartman override in 1993. Doc ID #464.

[45] Armstrong filed a motion to dismiss Citation's unjust enrichment claim on grounds including lack of standing and adequate remedy at law. Doc ID #579.

[46] Citation's witness testifed that its exhibit of the amount it can recover, Doc ID #608, was calculated from the court's award of 97.82%. June 2020 Trial T 34:4 - 8. Citation introduced three of their revenue check statements, Doc ID #605, 606, and 607, for July 2015, December 2015, and March 2016, which show the history

of its Hartman override payments, and adjustments, beginning in 2010.

[47] Citation executed a Hartman division order that specified a payment rate of 0.00370722 for override. Doc ID #458, Exhibit A115. (The exhibit is incorrectly described in the docket sheets). The 2% Hartman override in the 1280 spacing unit is a decimal 0.0025 payment rate, calculated as 0.02 * 160 acres/1280 acres.

[48] The July 2015 check statement, Doc ID #605, shows the 0.00370722 rate was included in payments through mid-2015. Continental reversed and took back these payments, Doc #605, then reissued them at the 0.0025 payment rate, Doc #606.

[49] Significant to Citation's unjust enrichment claim is that 0.0025 is the total payment rate for the Hartman wells. The check statements show Citation's payments included no less than the 0.0025 rate. Doc ID #605, 606. Citation agreed that 0.0025 is the rate of payment for the Hartman wells. Pleadings App 41, paragraph 19; TT 334:23 - 335:3.

[50] Continental used an incorrect title opinion, Doc ID #519, in mid-2015 to change the payments for Hartman well revenues. See Doc ID #415, 455-457, 605, 606 (revenue check statements). Continental acknowledged it was in error -- "The reason for the adjustment was due to a revised title opinion . . . We were then notifed of an error in this opinion". Doc ID #418. The error was paying Armstrong and the Grandhavens the full 2% override, 0.0025 decimal, for five months in mid-2015. New or amended division orders weren't issued by Continental for the changes.

[51] Doc ID #614 shows net production proceeds for those five months in 2015 totaled $10,224,946. The exhibit was prepared from Continental's checks to Armstrong, Doc ID #415, 455-457. Notice was served, Doc ID #348. Checks to Dakota

Ventures confirm the same net proceeds. Doc ID #496.

[52] The court relied on Continental's Accounting Summary in deciding Citation's unjust enrichment claim. FF/CL App 133, paragraph 38. Armstrong had filed an objection on grounds it didn't include payments to Citation. Doc ID #564.

STANDARD OF REVIEW

[53] When there is no dispute in the evidence, the district court faces only a question of law on whether the statute of limitations bars a claim. Western Energy Corp. v. Stauffer, 2019 ND 26, paragraph 6; Abel v. Allen, 2002 ND 147, paragraph 11.

[54] The ultimate determination that a party is not a good faith purchaser is a conclusion of law. Swanson v. Swanson, 2011 ND 74, paragraph 9.

[55] The determination of a quiet title are conclusions of law. See e.g., Farmers Union Oil Company v. Smetana, 2009 ND 74.

[56] Standing is a question of law which is reviewed de novo on appeal. Finstad v. Gord, 2014 ND 72, paragraph 23.

[57] The interpretation of a contract is a question of law. Miller v. Schwartz, 354 NW2d 685, 689 (ND 1984). Documents that convey oil and gas interests are interpreted like contracts. Ibid.

[58] A determination of unjust enrichment is a conclusion of law and fully reviewable. Ritter, Laber and Associates v. Koch Oil Inc., 2004 ND 117, paragraph 26.

[59] In an appeal from a bench trial, the district court's findings of fact are reviewed under the clearly erroneous standard, and its conclusions of law are fully reviewable. Western Energy Corporation v. Stauffer, 2019 ND 26, paragraph 5.

LAW AND ARGUMENT

1. Ownership of Working Interests and Overriding Royalty Interests; Calculation of Payment Rates

[60] "The public is entitled to rely upon the record title to property". Finstad v. Gord, 2014 ND 72, paragraph 20, 844 NW2d 913. Armstrong relied on record title throughout. The record title documents in evidence largely determine the issues in this appeal. The Correction Instrument assigned working interests and overrides in like percentage, so Armstrong has record title ownership of gross working interests and overriding royalty interests that calculate to payment rates of 0.00062215 in the Hartman wells, 0.0012443 in the two Bice-Dolezal wells drilled in the 1280 acre spacing unit, 0.00062215 in the eight Bice-Dolezal wells drilled in the 2560 acre spacing unit, 0.005627 in the Skachenko well drilled in the 1280 acre spacing unit, and 0.00281372 for the four wells in the 2560. The court misinterpreted record title documents.

[61] The court erred in determining Hartman override ownership as 97.82% Citation, 2.18% the other defendants. The court confused override with working interest when it concluded, "1.65 acres is 2.18% of Apache's total overriding acreage . . . which is 75.6 acres". FF/CL App 133, paragraph 36. The 2.18% is merely a comparison of Apache's 1.65 working interest acres assigned to Key with the 75.6 acres it owned before the transfer, and has nothing to do with the assignment of override. Contrast an assignment of override which is the transfer of a percentage of oil and gas produced by the working interest. The percentage of override assigned does not require calculation. That percentage was established by Apache and Key in their contract of assignment, expressed as a decimal. The number that is required to

be calculated is the payment rate. Division orders express calculated payment rates. Following is the calculation for the Hartman wells. (Also briefed in Doc ID #531, paragraphs 35-40). Payment rates for the other wells are calculated later at paragraphs 96 and 105. The calculations of payment rates are identical for overrides and working interests under the Apache to Key assignment.

[62] Producing acres from the lessee's interest in a lease is the primary factor in determining payment rate, the other factor is spacing unit size. Apache assigned to Key 1.034222% of its undivided working interest in the 160 acre tract in section 28 (Hartman wells), 1.65 producing acres (rounded). Apache assigned to Key 1.034222% from its 2% override in the 160 acre tract, which is also 1.65 producing acres (1.03*160). Key's interest was split 51.875% - 48.125% to the Grandhavens and Armstrong. Citation 1994's producing acres for override equal (0.02 - 0.01034222) * 160. Fast forward to the Hartman wells drilled in a pooled 1280 acre spacing unit.

[63] Armstrong is entitled to a 48.125% share from Key's producing acres (1.03% of 160 acres), now pooled into 1280 producing acres, and proportionately reduced -- 160 acres over 1280 acres. The net result is a smaller piece of a larger pie. His payment rate for override is 0.48125 * 0.01034222 * 160 acres/1280 acres = 0.00062215. For each $1 of production, Armstrong's payment rate would earn him $0.00062215. Grandhavens' rate is 0.51875 * .01034222 * 160/1280 = 0.00067063. Citation's payment rate is (.02 - 0.01034222) * 160/1280 = 0.00120722.

[64] The sum is 0.00062215 + 0.00067063 + 0.00120722 = 0.0025. This total of Hartman override is the 2% override in the 160 acre tract proportioned into the spacing unit: 0.02 * 160 acres/1280 acres = 0.0025. This payment rate is one-fourth

of one percent of the value of the production proceeds from the Hartman wells.

[65] Regarding the $61,098 of suspended payments of override, Armstrong's share is 0.00062215/0.0025 = 0.24886 or 24.886%, Grandhavens' is 0.00067063/0.0025 = 0.26825 or 26.825%, Citation's share is 0.00120722/0.0025 = 0.48289 or 48.289%.

[66] The 2010 Hartman title opinion illustrates the calculations of payment rates of override from record ownership. See Doc ID #517, page 12. The calculation of Armstrong's override corresponds to the 0.00062215 division order payment rate, Doc ID #498. Note the error in the calculation for Citation 1994, where 4% instead of 2% was used: 0.04- 0.01034222 was used instead of 0.02 - 0.01034222. There is only a 2% override. Also note the calculation for Citation 2002 is for an override reserved from its 2009 wellbore assignment to Continental, Doc ID #470. Armstrong demonstrated the calculation of Hartman working interest payment rate, TT 50:23 - 51:20, in conformity with Continental's drilling proposal letter, Doc ID #398. It's the same calculation for the like override. See Doc ID #517, page 13 (2010 title opinion).

2. Errors of Law; Misinterpretations.

[67] **A. Key Vested in 1.034222% of Apache's 2% Override, as the Parties Intended.** Key vested in title to 1.034222% of the 2% Hartman override in 1993, as well as the other interests described in Exhibit A of the 1993 assignment. NDCC Section 47-09-16, Transfer Vests Actual Title. This should have ended the trial court's review of ownership of Hartman override. However, the court erred in failing to recognize that Apache had divested itself of the 1.03%, and consequently that Apache couldn't convey to Citation any more override than it owned, i.e., 2% minus the 1.034222%. See Seccombe v. Rohde, 2019 ND 13, paragraph 27, 921 NW2d 413:

"Once the estate was divested of the title . . . there was no title remaining to convey". And pursuant to NDCC Section 47-10-08, Grant Conclusive Against Whom, Apache's transfer of the 1.03% is conclusive against Apache and everyone subsequently claiming under it, except a purchaser in good faith. Citation claims under Apache, but is not a good faith purchaser. Citation didn't own 1.03% of the Hartman override in 1993 and couldn't own payments from it later.

[68] The court initially misinterpreted the parties' intent to assign 1.03% by failing to interpret the whole of the assignment. "A contract must be read and construed in its entirety to determine the true intent of the parties". Miller v. Schwartz, 354 NW2d 685, 689 (ND 1984). The trial court erred in disregarding the 1993 assignment language that transferred override "as described in Exhibit A". Exhibit A stated the Key Working Interest of 0.01034222, which is applied in the calculation of the payment rates. Then the court disregarded the Correction Instrument provision that ratified the 1993 assignment. Doc ID #465, Section 1.2.

[69] The court's quest was "to resolve who owns the overriding royalty interest". Motion Hearing T 13:20 - 21. That was resolved in 1993 when Key vested.

[70] **B. The Quiet Title is Time Barred and is Not Within the Law.** Facts for the statute of limitations issue are undisputed. The parties stipulated the title documents in their Joint Exhibit List. Doc ID #387, page 14, Exhibits A122, A123 (Doc ID #464, 465; Duplicates #485, 486). The trial court stated the 1993 and 1995 dates of the two Key assignments. FF/CL App 121, paragraphs 13-14. Citation filed its cross-claim in January 2019, more than 20 years after the recording of the assignments.

However, when there is no dispute of material fact, the district court faces

only a question of law on whether the statute of limitations bars a claim. Western Energy Corporation v. Stauffer, 2019 ND 26, paragraph 6, 921 NW2d 431 (submitted on stipulated facts); accord Abel v. Allen, 2002 ND 147, paragraph 1, 651 NW2d 635.

[71] NDCC Section 28-01-04 applies in quiet title actions. E.g., Hageness v. Davis, 2017 ND 132, paragraphs 19-20, 25, 896 NW2d 251. The twenty year period is measured back from the commencement of the action, ibid, i.e., January 2019, more than 20 years after the recording of the Apache to Key assignments, which conveyed the crucial 1.03% Hartman overriding royalty interest. Citation could not be seized or possessed of the 1.03% interest at any time after 1993. Rather than showing it was seized or possessed of the 1.03% overriding royalty interest within the twenty year statute, Citation attacked the 1990's assignments to Key. Similarly in Hageness, paragraph 22, the unsuccessful plaintiffs attacked old transfers. The court erred in quieting title to override as real property.

[72] The trial court cannot quiet title to the payments of override. Oil and gas in place is real property, but when extracted is personal property. Northern Trust Co. v. Buckeye Petroleum Co., Inc., 389 NW2d 616, 620 (ND 1986) Quiet title applies to parcels of property, disputes concerning land, not personal property. Farmers Union Oil Company v. Smetana, 2009 ND 74, paragraph 27, 764 NW2d 665. Further, the judgment is deficient to quiet title. NDCC Section 32-17-04 requires that "the property must be described in the complaint with such certainty as to enable an officer upon execution to identify it" . . . "the judgment must precisely describe the property". Ibid. The judgment broadly described a lease. App 145, paragraph 1 (sic).

(The crossclaim described a 1280 acre spacing unit. App 110, paragraph 24).

[73] **C. Citation Had Constructive Notice and Is Not a Good Faith Purchaser.**

The recorded 1993 assignment gave constructive notice to all persons. NDCC Section 47-19-19, Effect of Recording. Desert Partners IV. v. Benson, 2016 ND 37, paragraph 13, 875 NW2d 510. When Citation 1994 acquired its interest, it had constructive notice of Key's 1993 record interest. It was not a good faith purchaser, and neither it nor Citation 2002 can take an interest free of Key's prior interest.

> We believe Albert and Genevieve Tormaschy had constructive notice of a possible claim by the Wehners through recorded instruments and as a result, they are not third party bona fide purchasers.

Wehner v. Schroeder, 335 NW2d 563, 566 (ND 1983); see Swanson v. Swanson, 2011 ND 74, paragraph 15, 796 NW2d 614 (subsequent purchaser has a duty to examine the tract index).

> Because the Schnaidts had constructive notice of the possibility of other outstanding claims they cannot argue that they were innocent purchasers who should be able to take free of other claims.

Schulz v. Hauck, 312 NW2d 360, 362 (ND 1981).

> A good faith purchaser must acquire rights without actual or constructive notice of another's rights.

Desert Partners IV v. Benson, supra paragraph 13. Constructive notice defeats a claim for quiet title. E.g., Swanson v. Swanson, 2011 ND 74. 796 NW2d 614.

[74] The recorded 1993 assignment put Citation 1994 upon inquiry. In addition to what record title disclosed, a reasonable inquiry would have disclosed from both Apache and Key Production Company the fact of the making of the Correction Instrument dated August 1, 1995, with effective date of January 1, 1993,

which predated the August 31, 1995 assignment to Citation 1994.

[75] The court failed to conclude Citation was not a good faith purchaser.

[76] **D. Citation 2002 Does Not Have Standing.** The court erred in concluding Citation has standing. Key vested in 1.03% of the override. Armstrong and the Grandhavens succeeded to it. Citation has no interest in the 1.03% and has no standing to challenge the assignment of the override or seek payments from the 1.03%.

> Finstads do not have any interest in the property and therefore do not have standing to challenge the Beresford-Gord deed.

Finstad v. Gord, supra, paragraph 24. Likewise, Citation has no interest in the 1.03% override vested in Key et al. included in Citation's unjust enrichment claim.

[77] The court erred in ruling that merger records (not in evidence) filed with the secretary of state proved standing. FF/CL 136, paragraph 44. Records at the secretary of state are not the equivalent of a recorded assignment in the courthouse. ". . . title is traced by searching for instruments". Swanson, supra, paragraph 15.

[78] **E. The Trial Court Misinterpreted the Assignment of Override.** Record documents described the assignment of override as production and production value -- "all oil, gas, and associated substances produced, saved and sold from the leases " . . . "out of or measured by the value of oil and gas production".

> An overriding royalty interest is a right to share in the production value of mineral rights leased from the owner of land without any obligation for the cost of exploration or development of the land.

Zuhone v. Commissioner, 883 F.2d 1317, 1328 footnote 4 (7th Cir. 1989).

[79} The trial court's conclusions were in error for interpreting Hartman override in terms of Apache's working interest acres: "1.65 acres is 2.18% of Apache's

total *overriding* acreage . . . which is 75.6 acres". FF/CL 133, paragraph 36. A correct statement is, 1.65 acres is *1.034222% of Apache's 160 acre undivided working interest*. The flawed conclusion, "Thus, Apache would have conveyed to Key 2.18% of its overriding royalty interest and retained for itself 97.82% of its overriding royalty interest", only makes sense if the term working interest replaces overriding royalty interest. A correct statement is, Apache conveyed to Key 1.03% of its 2% override. The override isn't measured by Apache's working interest, it's measured by the value of oil and gas produced by the working interest. The court conflated working interest and override.

[80] The court failed to recognize that the assignment of override transferred production out of the working interest and is a separate and distinct conveyance.

> However, a lessee may transfer out of his working interest an OVERRIDING ROYALTY . . . leaving himself still as owner of the working interest . . . but as owner of very little production and the recipient of a small fraction of the income from the property.

Minex Resources v. Morland, 467 NW2d 691, n.3 (ND 1991). (Citing a treatise).

[81] The significance of the amount of Apache's working interests is that the production derived from them was sufficient to satisfy the assignments of overrides.

> But clearly, an overriding royalty may be carved out of a working interest in an oil and gas lease, and satisfied out of the oil attributed to that working interest. (Cites omitted). Cockburn et al. through their operating agreement owned a 50% working interest in the production from the leasehold. Out of this interest they could assign and convey an overriding royalty.

Brenimer v. Cockburn, 254 F.2d 821, 824 (10th Cir. 1958). Apache owned sufficient working interest to satisfy all assignments of override to Key Production Company, including 47.25% working interest in section 28 of the Skachenko Lease (Hartman wells). Out of this 47.25% Apache assigned and conveyed overriding royalty; out

of this interest comes the production to satisfy the conveyance of override. Ibid.

[82] Apache owned leasehold interests of 70.875% in the north half of section 30 and 95.875% in the south half. These working interests were sufficient to satisfy assignments of override of 1.9386% and 2.7347%, respectively. Working interest is synonomous with leasehold. Miller v. Schwartz, 354 NW2d 685, 689 (ND 1984).

3. The Correct Interpretation of the Correction Instrument.

[83] The Correction Instrument conveyed 2.18% of Apache's 47.25% working interest (1.65/75.6) and 1.03% of Apache's 2% override. The court's and Citation's interpretations of the Correction Instrument that a transfer of a 1.65/75.6th of Apache's working interest was the assignment of override to Key aren't reasonable. They're more an analysis of Apache's working interest than the transfer of override.

[84] The Correction Instrument is interpreted with its own words. Words are given their plain, ordinary meaning, unless a contrary intent appears. Kittleson et al. v. Grynberg Petroleum Company et al., 2016 ND 44, paragraph 10, 876 NW2d 44.

"Together" means in one group; as a group; simultaneously; in harmony. Merriam-Webster's Collegiate Dictionary (10th ed. 2000).

"Like" as an adjective means the same or nearly the same, as in appearance, character, or quantity. Ibid.

"Percentage" is a part of a whole expressed in hundredths; proportion. Ibid.

[85] Both percentages and decimals are used in the oil and gas industry.

> An interest either decimal or percentage (usually decimal), in a revenue stream, net of all other interests burdening that stream.

Minex Resources v. Morland, 467 NW2d 691, footnote 2, subpart 4 (ND 1991),

from a treatise describing net revenue interest.

[86] The language conveying working interests together with a like percentage of all overriding royalty interests means both that override is assigned in the same percentage as working interest and that working interest is assigned in the same percentage as override. The Correction Instrument plainly (1) instructed that working interest is to be calculated by multiplying the Key Working Interest times the Lease Net Acres, and (2) assigned working interests and overrides in like percentage. It thus prescribed the treatment to be given to both revenue interests -- since overrides are cost free and aren't reduced for burdens, and since working interests are in like percentage with overrides, working interests aren't reduced for burdens. The division orders for the Hartman, Bice, and Dolezal wells followed the Correction Instrument and specified like payment rates for working interests and overrides.

[87] Grants are interpreted in favor of the grantee. NDCC Section 47-09-13.

4. Working Interests in the Hartman and Other Wells are Unburdened.

[88] The issue was raised by Continental. It should have the burden of proof.

> The court now continues onto the next group of issues all raised by Continental Resources, Inc. Continental seeks to have the court address two issues starting with whether Armstrong's working interest under the Skachenko Lease is burdened. Doc ID #624, paragraph 23.

The issue is, what amount of net revenue is to be paid on working interests.

[89] The trial court erred in finding that Armstrong identified nothing to suggest working interests are not burdened. FF/CL App 140, paragraph 47. Record title identified Armstrong's working interests as not to be burdened -- the language in the Correction Instrument.

[90] Division orders resolve the issue, to date, in Armstrong's favor for the Hartman, Bice, and Dolezal wells. The division orders specified the same payment rate for working interest and override, which means the working interest isn't reduced for burdens. Division orders are binding until revoked. This rule from Texas law was adopted in the Acoma case, Acoma Oil Corporation v. Wilson, 471 NW2d 476, 484-485 (ND 1991). "The general rule is that division orders are binding until revoked". Heritage Resources, Inc. v. Nations Bank, 939 SW2d 118, 123 (TX 1996). Division orders are considered contracts. See Ritter, Laber and Associates v. Koch Oil, Inc., 2004 ND 117, paragraph 3, 859 NW2d 930 ("written contracts called division orders"). Armstrong briefed division orders. Doc ID #362, paragraphs 69-73, Doc ID #531, paragrah 46.

[91] The Acoma case gave a poignant illustration of the binding effect of a division order. Acoma Oil requested recovery of underpaid revenues from the operator, but was denied because it had been paid pursuant to an executed division order, even though the division order was incorrect. Acoma at 485.

[92] Division orders weren't executed for the Skachenko and Meadowlark wells. However, the Correction Instrument transferred working interests and overrides in like percentage. Overrides aren't reduced for burdens, and to be in like percentage with override, working interests aren't to be reduced for burdens. This same reason applies equally to all of Armstrong's working interests. Grants are interpreted in favor of the grantee. NDCC Section 47-09-13.

[93] The trial court concluded that the Hartman working interest is burdened because it is derived from the Skachenko Lease wherein the lessors retained a 1/8th

royalty and because assignments of overrides also are a burden. FF/CL 139, paragraph 47. But Apache had assumed the burden of overrides, Doc ID #462 for sections 28 and 29, Doc ID #476 and 477 for section 30. And in error, the court disregarded that all the assumption of burden provisions in its cited title documents predated the Correction Instrument. FF/CL App 117, paragraphs 6-13. In error, the court disregarded the language of the Correction Instrument and the right of alienation.

[94] Parties are free to alienate their property in any way they choose. "Generally, one of the incidents of ownership of property is the right to convey it". Dennison v. ND Dept of Human Services, 2002 ND 39, paragraph 14, 640 NW2d 447.

> Apache and Key were permitted to clarify and amend the Original Assignment as they saw fit. FF/CL App 131, paragraph 33.

The parties saw fit to assign working interests to Key in a way to be paid without burdens. Their purpose was accomplished with the language of the Correction Instrument wherein working interests and overrides were conveyed in like percentage. Again, to be in like percentage with override, working interests aren't to be paid burdened. The language also means working interests aren't burdened for overrides. And the override is only 2% for section 28 and 29 wells. Every finding, conclusion, and the judgment are wrong regarding an override and/or burden of 4%.

[95] The court committed several other errors: (1) In FF/CL 121, paragraph 13 the court cited the Dissolution Agreement, Doc ID #395, in nebulous connection with the burdening of working interests. There is nothing in the Agreement about burdens on well working interests; it deals with undefined Partnership Properties. Paragraph 20 of the Agreement provides that only Apache, Key, and APCOP have a

right to a remedy, e.g., enforcement. (2) In FF/CL 124, paragraph 18 the court stated Douglas Ward testified as an expert witness. He was not qualified or offered as an expert. No witness was. (3) FF/CL App 123, paragraph 16 stated that pursuant to Armstrong's 2006 assignment, he agreed to bear royalty burdens on the Skachenko Lease. A passage out of the Assumption Provision was quoted: ". . . to pay and deliver royalties and other burdens." That describes the obligations of a well operator to pay lessors and other payments out of production. There is no evidence that Armstrong's assignor was an operator. In fact, Continental had not drilled wells before 2008, and without wells, Wilbanks had no such obligations for Armstrong to assume. And the statute of limitations to enforce contract provisions has run.

5. The Dismissal of Armstrong's Counterclaim for Underpaid and Withheld Revenues was Error.

[96] Continental underpaid override 96% on the Skachenko and Meadowlark wells, underpaid Skachenko, Meadowlark, and Hartman working interest by 16.5 %, withheld Hartman override, and tendered unacceptable payments for Bice, Dolezal, and all of Armstrong's wells after April 2018. Payments for the two new Dolezal wells were on unacceptable checks. Calculation of the payment rate for the Bice and Dolezal wells in the 1280 acre spacing unit is 0.48125 * (0.01034222 * 320 acres)/1280 acres = 0.0012443, and for the 2560 acre spacing unit is 0.48125 * (0.01034222 * 320)/2560 = 0.00062215. These calculations match division order payment rates.

[97] An estimate of underpayment for all wells is in evidence, Doc ID #612. "If a reasonable basis for computing the approximate amount of damages is provided, that is all that the law requires". North American Pump v. Clay Equipment,

199 NW2d 888, 895-896 (1972). Accountings would supplement the estimates. For all the wells having executed division orders, their payments of working interests and overrides are owing until their division order is revoked.

[98] The trial court committed errors in dismissing Armstrong's counterclaim and in not ordering Continental to make accountings. The court misinterpreted record title, didn't credit Armstrong with any record ownership, then expanded its erroneous prior order as grounds: ". . . pursuant to the court's order (Doc ID #538) he does not own this overriding royalty". FF/CL 141, paragraph 49. That order dealt only with Hartman override, but the judgment dismissed claims for underpayment on all the overrides plus working interests on all of Armstrong's well properties.

[99] Trial court errors in dismissing the countercaim include conclusions that (1) Armstrong's legal theory is conversion, and he waived his right to payment and possession by signing division orders, and (2) Armstrong does not own and cannot possess what he claims has been converted. FF/CL 141, paragraphs 49-50. First, Armstrong holds record ownership of overrides and working interests with the concomitant right to possession of their revenues, Doc ID #459-479. Next, Armstrong didn't sign division orders for the Skachenko and Meadowlark wells. Next, division orders for the other wells, Doc ID #498, 401, 402, 403, contain no waiver provision, merely providing that Continental may withhold payments during resolution of a title dispute. The executed division orders authorize possession of payments.

[100] Conversion is one legal theory. The payments withheld after the April 2018 check from Hartman, Bice, and Dolezal wells, and Hartman working interest commencing in July 2015, constitute breach of division order contract and conversion.

". . . claims for conversion may arise under the same facts as claims for breach of contract". Ritter, Laber and Associates v. Koch Oil, Inc., supra, paragraph 12.

[101] Also the revenues withheld from the Skachenko and Meadowlark wells are recoverable as in Maragos' claim in Maragos v. Newfield Production Company, 2017 ND 191, 900 NW2d 44 -- document ownership and request an accounting. The Court stated,". . . but in situations where a signed division order is not present, the underpaid party can seek payments from the oil company". Maragos, paragraph 9.

[102] Armstrong briefed Maragos. Doc ID #621, paragraph 53 (post trial brief); Doc ID #362, paragraphs 24, 61-63 (pretrial brief).

[103] NDCC Section 38-08-08 is applicable. Armstrong briefed it. Doc ID #362, paragraphs 17-19; Doc ID #621, paragraphs 38-39. Continental cited the statute in its proposal letter to drill "pursuant to the provisions of Section 38-08-08". Doc ID #398. The statute provides for pooling interests into a spacing unit and gives the owner of each interest the opportunity to recover or receive their just and equitable share without unnecessary expense. Continental acknowledged its duty to pay just and equitable shares to each interest owner, Doc ID #255, paragraph 2:

> As operator of oil and gas wells, Continental is obligated to pay owners of an interest therein according to each owner's just and equitable share.

[104] Just and equitable shares are determined by record ownership. The division-order-title-opinion industry calculates payment rates from record ownership, and see Slawson v. ND Industrial Commission, 339 NW2d 772, 777 (ND 1983):

> Any share less than that to which a mineral owner is entitled because of his ownership of minerals is not just and equitable.

[105] Continental's division orders for the Skachenko and Meadowlark wells

are incorrect. Following is the calculation of payment rates from record ownership. (Also briefed in Doc ID #621, paragraph 49). For the first Skachenko well, Armstrong's 48.125% share of Key's 0.019386 and 0.027347 interests assigned in the Correction Instrument in the north half and south half of section 30 in the 1280 spacing unit:

N/2 is 0.48125 * 0.019386 * 320 acres/1280 acres = 0.0023323
S/2 is 0.48125 * 0.027347 *320.56 acres /1280.56 acres = 0.0032945
Total = 0.005627 rounded

For the four Skachenko and Meadowlark wells in the 2560 acre spacing unit:

N/2 is 0.48125 * 0.019386 * 320 acres /2560 acres = 0.00116618
S/2 is 0.48125 * 0.027347 *320.56 acres/2560.56 acres = 0.00164761
Total = 0.00281379

[106] The acreages stated on Exhibit A of the Correction Instrument were used in the calculations. The decimal 0.005627 and 0.00281379 correspond 99.99% to Continental's answers to interrogatories stating gross working interests of .005627 and .00281372 (.00281372/.00281379). These decimals are the payment rates for overrides and working interests. Overrides aren't reduced for burdens, so the gross working interest is the payment rate for override. The revenue checks show payment rates for override of 0.00023818 for the first Skachenko well and 0.0001191 for the other four Skachenko and Meadowlark wells. Continental paid only 4.2% of the override revenues owing, i.e., 0.00023818/0.005627 and 0.0001191/0.00281372.

6. Citation Didn't Prove Unjust Enrichment; Evidence Disproved It.

[107] Continental made a finite amount of overpayment of Hartman override to Armstrong, but not at Citation's expense. The court committed errors in concluding Citation proved its claim for unjust enrichment. First, record title. Citation has no ownership in 1.03% of the 2% Hartman override. Key vested in

1993. Citation has no claim to payments of override from the 1.03%. Next, Citation conceded Key had priority in interest, Doc ID #490, Clarification of Interests. Next, Continental abandoned executed division orders and used an incorrect title opinion to alter payments, Doc #519. This is not the scenario from the Acoma case approving unjust enrichment recovery by an underpaid owner where operators, "following division orders pay out the correct total of proceeds owed". Acoma at 484-485. Finally, Citation has a remedy at law if it believes it was underpaid -- enforce its division order (Doc #458) or alternatively sue Continental per *Maragos*.

[108} The court used its erroneous February 2020 order in proof of unjust enrichment -- "The Court's determination of title in Citation's favor, coupled with the fact that Citation has not been paid any proceeds . . . demonstrate that Citation has been impoverished". FF/CL 136, paragraph 43. Citation's checks, Doc ID #605 and 606, establish that Citation was paid in full, not impoverished.

[109] The check statements and more show the error in the trial court's conclusion that "Citation has been paid nothing for its share of the overriding royalty interest". FF/CL 135, paragraph 41. Citation's July 2015 check, Doc ID #605, shows the history of substantial payments that began in 2010 and continued into 2015. Payments had begun as each well was drilled. This check deleted those previously paid revenues. See pages 2-9, 12-16, 24-27, 28-30, and 41-47. (Oil is Product Code 100, gas is 203; override is OR). Then the December 2015 check, Doc ID #606, reissued payments. And more, Citation's division order required payments and Continental advised the court that previous payments had in fact been made to Citation:

> The implementation of the 2014 Lear & Lear opinion resulted in the issuance of larger revenue checks to the non-Citation defendants in mid-

> 2015. The implementation of the 2014 Lear & Lear opinion also resulted in the reversal of money previously paid to Citation in mid-2015. Doc ID #572, paragraph 2.

(Note -- this is the incorrect opinion used to alter payment rates, Doc ID #519). The July check shows Citation was being paid pursuant to its division order rate of 0.00370722. The rate is stated under column heading Legal Decimal (Disb. Dec.). This shows clearly, for example in the Hartman #2 well beginning at page 12. An additional override of 0.00202194 was paid for wells #1, 5, and 7 to total 0.00572916, which resulted from Citation's reservation of override in wellbore assignments.

[110] The significance of the full Hartman override of 0.0025 now emerges -- Citation was overpaid during its history of payments. It was paid a decimal 0.00370722, whereas the total override is 0.0025. The difference in 0.00370722 minus 0.0025 is 0.00120722, which is the same number Armstrong calculated as Citation's payment rate. See paragraph 63 above. There is only a two percent override for the Hartman wells. Citation had been paid the 2% override, 0.0025 decimal, and more. The court erred in concluding Citation had been paid nothing.

[111] More with the 0.0025 decimal Hartman override shows up in Citation's check for December 2015, Doc ID #606. The payments taken back by the July check at the rate of 0.00370722 were reissued at the rate of 0.0025 -- Continental had thereby taken back the overpayments made to Citation at the 0.00370722 rate. Pages 1-9, 12-17, 19-23, 27-35 show the 0.0025 replacement payments. Adjustments for the additional override now being paid at 0.00202195 in wells 1, 5, and 7 show up in the December check at rates of 0.00452195, i.e., 0.0025 plus 0.00202195.

[112] Continental knew in 2015 it had overpaid Citation with the payments

at the 0.00370722 rate, because it had recovered them before it sued Armstrong.

[113] In addition to the reissued payments, the December check paid the 0.0025 rate for sales months May through October 2015. The May through October oil sales are on pages 5, 15, 20, 22, 29, 31, 32, 33, 34-35. (The #5 well was taken out of production in mid-2015). Again, Citation wasn't underpaid since it received the full 0.0025 Hartman override through October 2015. And Armstrong wasn't enriched at the expense of Citation because Citation was paid in full, at least.

[114] The third Citation check, Doc ID #607, March 2016, is between Citation and Continental. If Citation was underpaid or if Continental took back payments after September 2015 sales, Armstrong didn't get the money. He was paid zero Hartman override after September sales. See Doc ID #428 (late revenue check for October 2015 through January 2016 sales showing no payment of Hartman override).

[115] The findings and conclusions that Armstrong was overpaid $91,118 and Citation was paid nothing came from Continental's Accounting Summary, Doc ID #558. FF/CL 133, paragraph 38. The court erred in relying on it. It is misleading and objectionable for not including payments to Citation. Materially, if Citation were entitled to the five months of overpayment (May through September) to Armstrong and the Grandhavens, it would be only $25,562, i.e., 0.0025 times the $10,224,946 net revenues. (Doc ID #614 summarizes the $10,224,946 net revenues in the five months).

[116] Armstrong has conceded overpayment, but the overpayment is owing only to Continental. Continental made the payments voluntarily outside of the reliance on a division order. Armstrong suggested repaying, but Continental wanted $95,877. Doc ID #417. This was wrong. Much of Armstrong's July 2015 $44,003 check

(Doc ID #415) double-counted override paid previously per the division order, and included sales for both May and June. The total paid to him for the five overpayment months was only $13,200 (0.001203 times $10,224,946). Armstrong's record ownership entitles him to a payment rate of 0.00062215. So the $13,200 amount would be reduced by 0.00062215 * $10,224,946.

7. A Legitimate Title Dispute Didn't Exist.

[117] Armstrong disputed existence of title dispute. Doc ID #43, paragraph 42; Answer 45, paragraph 6; Doc ID #259, paragraph 8; Doc ID #362, paragraphs 93-95, 142-144. Finding title dispute was error. FF/CL 142, paragraph 50. No evidence shows an oral or written promise to convey, a trade or services rendered in exchange for a conveyance, unrecorded deed, mistake, or the like that may alter record title. Citation's evidence, an unexpected way to calculate payments of Hartman override, doesn't appear to be adequate grounds for a title dispute.

[118] Record title in this case was fixed and immutable at the time the complaint and Citation's cross claim were filed. And pursuant to statements in the recorded Clarification of Interests, Doc ID #490, there could be no real title dispute.

[119] In the 2010 Clarification of Interests, Citation and Key recited the facts of the making and recording of the 1993 assignment and of the Correction Instrument, then they recited that Citation's assignment was subsequent to Key's:

> WHEREAS, subsequent to the effective dates of the Original Assignment and the Correction Instruments, Apache assigned to Citation 1994 Investment Limited Partnership all of its right, title and interest in and to the leases covered by the instruments referred to above.

[120] Citation's recitals confirmed constructive notice and conceded priority

in interest to Key.

[121] In its letter to Grandhavens, Continental stated that Citation claimed ownership and had provided a copy of the Correction Instrument to support its claim. Doc ID #524, paragraph 2. Contrary to support, the Correction Instrument defeats the claim of ownership. Conveyance to Key is manifested twice -- in Section 1.1 and again in Section 1.2 where the 1993 assignment was ratified and confirmed.

8. Conclusion.

[122] The judgments for Continental and Citation should be reversed. The dismissal of Armstrong's counterclaim should be reversed, and the case remanded for accountings to date of underpaid working interests and overrides acccording to the payment rates stated in the executed division orders (Doc ID #498, 401, 402, 403), as stated in paragraph 60, and as calculated at paragraphs 63, 96, and 105. The suspended payments of Hartman override should be distributed as calculated at paragraph 65.

Dated June 2, 2021.

/s/ Tom P. Slorby
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Attorney for Appellant

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Continental Resources, Inc., Plaintiff and Appellee

v.

Phillip Armstrong, Defendant and Appellant
and
Citation 2002 Investment Limited Partnership, Paragon Oil & Gas LLC, Poplar Energy Company LLC, Grandhaven Energy LLC, Goldline Creek LLC, Dakota Ventures I LLC, Geo Resource Management LLC,
Defendants

Supreme Court No. 20210060

CERTIFICATE OF COMPLIANCE

Appellant's Brief complies with N.D.R.App.P. 32(a)(8). The brief is 38 pages in length.

Dated June 2, 2021

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Defendants

Supreme Court No. 20210060

CORRECTED CERTIFICATE OF SERVICE

[¶1] I certify that a true and correct copy of the Appellant's Brief and Appellant's Appendix were served via email on this __10th_____ day of June, 2021 on:

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Defendants

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2nd CORRECTED CERTIFICATE OF SERVICE

[¶1] I certify that a true and correct copy of the Appellant's Brief and Appellant's Appendix were served via the United States Postal Service on this __10th_____ day of June, 2021 on:

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