

In the Supreme Court of the State of North Dakota

Northwest Landowners Association,

Plaintiff/Appellee,

v.

State of North Dakota, North Dakota
Industrial Commission, Hon. Douglas
Burgum in his official capacity as Governor
of the State of North Dakota, and Hon.
Wayne Stenehjem in his official capacity as
Attorney General of North Dakota,

Defendants/Appellants,

and

Board of University and School Lands of
the State of North Dakota,

Defendant,

and

Continental Resources, Inc.,

Intervenor-Defendant/Appellant.

Supreme Ct. No. 20210148

Civil No. 05-2019-CV00085

**Appeal from Judgment, District
Court, Northeast Judicial District,
County of Bottineau**

APPELLANT CONTINENTAL RESOURCES, INC.'S ~~CORRECTED~~ REPLY
BRIEF

ORAL ARGUMENT REQUESTED

Respectfully submitted,

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ARGUMENT

[1] NWLA asserts “S.B. 2344 authorizes a physical invasion” of surface owners’ pore space. Br. of Appellee Nw. Landowners Assoc. ¶ 25 (Jan. 21, 2022) (“NWLA Br.”). *See also id.* ¶ 31 (statute takes away the right to exclude). But NWLA concedes “the mineral owner has certain rights to use the surface estate, including the pore space.” *Id.* ¶ 5. *See, e.g.,* N.D.C.C. § 41-31-08; *Twin City Tech. LLC v. Williams Cty*, 2019 ND 128, ¶ 9, 927 N.W.2d 467.¹ SB2344 “authorizes” no “physical invasion”; prior mineral deeds and oil and gas leases do. NWLA’s “takings” claims fail.

[2] This Court has held only that “pore space is part of the surface owner’s interest in the land *for purposes of* N.D.C.C. § 38-11.1-04.” NWLA Br. ¶ 16 (quoting *Mosser v. Denbury Res., Inc.*, 2017 ND 169, ¶ 24, 898 N.W.2d 406) (emphasis added). *Mosser* concerned this statutory remedy only. NWLA argues repealing the remedy is unconstitutional, ignoring the cases rejecting takings and due process challenges to the removal of legislative remedies. The Surface Damage Act provides “a statutory right created by the state, which the state is free to take away.” *Tri Cty. Wholesale Distribs., Inc. v. Labatt USA Operating Co.*, 828 F.3d 421, 429 (6th Cir. 2016).

[3] The district court ignored several constitutional applications of SB2344 when applying *Larimore Public School District Number 44 v. Aamodt*, 2018 ND 71, 908 N.W.2d 442. NWLA argues those examples “are all instances where 2344 does not apply.” NWLA Br. Arg. § IV.A. “S.B. 2344,” it claims, “quite simply goes too far. Its overreach means there is no circumstance where it could ever be constitutionally applied.” *Id.* ¶ 60. The

¹ The surface estate has never had the power to exclude a mineral estate’s use of the pore space. Continental spelled out the case law. Appellant Cont’l Res., Inc.’s Opening Br. ¶¶ 42-51 (Nov. 8, 2021) (“Cont’l Br.”). NWLA ignores it.

plaintiffs in *Larimore* felt the same. This Court still found a constitutional application, and one example was enough. 2018 ND 17, ¶ 38, 908 N.W.2d 442. Among other things, SB2344 denies compensation for reasonably conducted operations in a NDIC-approved unit. That is constitutional. *Continental Resources, Inc. v. Farrar Oil Co.*, 1997 ND 31, 559 N.W.2d 841. NWLA says the statute does not apply to units even though the statute and the district court both say it does. NWLA cannot rewrite the statute to avoid *Larimore*.

[4] Eventually, NWLA concedes its takings claims are only about compensating the surface owner, not excluding the mineral owner. NWLA Br. ¶ 37 (“What *is new*” is no more statutory compensation and no more tort remedy.). Argument I below proves the Legislature’s constitutional power to repeal what it created. As for tort claims, N.D.C.C. § 47-31-09(1) provides NDIC-authorized use of pore space “by itself” is not a tort. North Dakota now follows other jurisdictions that require actual interference with surface uses.

[5] Continental showed the district court abused its discretion in denying discovery. NWLA never responds. *Schue v. Jacoby*, 162 N.W.2d 377, 383 (N.D. 1968) (waiver).

I. SB2344 Removed Statutory Remedies That Can be Legislatively Removed.

[6] The Legislature can constitutionally remove statutory remedies. NWLA errs to focus on just one case concerning a procedural remedy. NWLA Br. ¶ 67.

[7] In *Mosser*, this Court linked the Surface Damage Act and the Pore Space Statute, finding that “pore space” was “land” under the former.² 2017 ND 169, ¶ 24, 898 N.W.2d 406. This Court emphasized: “The legislature has not amended the relevant statutes since the 2015 [judicial] interpretations of [the Surface Damage Act].” *Id.*

[8] The Legislature provided the missing amendment in SB2344, decoupling the two

² See Cont’l Br. ¶¶ 11-20 (outlining legislative and judicial updates from 1979 and the Surface Damage Act to 2019 and SB2344).

statutes. *See* N.D.C.C. §§ 38-08-25(5), 38-11.1-03(3). A legislature can remove both procedural and substantive remedies. The Supreme Court rejected a takings claim when Congress reduced welfare payments. *See, e.g., Bowen v. Gilliard*, 483 U.S. 587, 604-05 (1987). Ultimately, “Congress is not, by virtue of having instituted a social welfare program, bound to continue it at all, much less at the same benefit level.” *Id.* at 604. The Sixth Circuit rejected a takings claim where an alcohol distributor had a statutory right to an exclusive distribution agreement that a supplier canceled under a statutory exemption. *Tri Cty. Wholesale Distribs.*, 828 F.3d at 429-30. The court held the distributors had a right that “is a statutory right created by the state, which the state is free to take away.” *Id.* The Seventh Circuit rejected takings claims to Illinois’s removal of statutory tenure for school principals. *Pittman v. Chicago Bd. of Educ.*, 64 F.3d 1098, 1104-05 (7th Cir. 1995). The court reasoned: “A statute is not a commitment by the legislature never to repeal the statute.” *Id.* at 1104. And if it were not so “[s]tatutes would be ratchets, creating rights that could never be retracted or even modified without buying off the groups upon which the rights had been conferred.” *Id.* SB2344’s removal of a remedy is constitutional.

II. *Larimore* Requires Reversal of the District Court.

[9] NWLA argues the district court’s *Larimore* analysis is “unassailable.” NWLA Br. ¶ 60. It attempts to distinguish the constitutional applications of SB2344 raised by Continental and the State by claiming those scenarios “are all instances where 2344 does not apply.” *Id.* Arg. § IV.A. NWLA’s position is demonstrably wrong.

[10] The district court specifically concluded SB2344 “plainly applies within units.” J.A. at 156, ¶ 24. The court *never* held that SB2344 *unconstitutionally* applies to units. It instead moved beyond units, holding the law unconstitutionally “applies to land with any other NDIC-authorized operation under Chap. 38-08.” *Id.* Turning *Larimore* on its head,

the court required the State to prove the law constitutional in all applications.

[11] NWLA next challenges Continental’s assertion that the State’s police powers allow SB2344 to constitutionally apply outside of units. NWLA Br. ¶ 63. NWLA once again ignores Continental’s prior mineral deed and lease rights. If the police power properly applies to NDIC-approved operations within unitized leases, it properly applies to leases not unitized. NWLA responds a “cursory reading of the cited cases” proves its point. *Id.* Other jurisdictions, however, have limited the reach of property rights and upheld the state’s police powers, even outside of units.³ NWLA provides no contrary case.

[12] NWLA then contends SB2344 would not apply to a saltwater disposal contract that clearly articulates the developer’s rights. *Id.* ¶ 64. NWLA’s statement directly contradicts its own example.⁴ One of its members has a saltwater disposal contract that articulated the developer’s rights, but the contract expired after the NDIC approved a unit. *See* J.A. at 36-38, ¶¶ 120-34. NWLA claims that member fears SB2344 leaves them “vulnerable.” *Id.* at 37-38, ¶ 133. But Continental showed SB2344 specifically protects this member. Cont’l Br. ¶¶ 37-40. SB2344’s disposal well protection is another constitutional application.

[13] Finally, NWLA denies SB2344’s constitutional application to estates severed before April 9, 2009. NWLA Br. ¶ 61. NWLA cannot explain why the Pore Space Statute exempts from its reach “transactions before April 9, 2009, that severed pore space from the title to the surface.” Cont’l Br. ¶ 16 (quoting N.D.C.C. § 47-31-07). Nor does it mention that this Court in *Mosser* agreed the statute applied “in the absence of a severance” of the pore space. *Id.* ¶¶ 18-19 (citing *Mosser*, 2017 ND 169, ¶ 23, 898 N.W.2d 406).

³ *See* Cont’l Br. ¶¶ 30-33 (collecting persuasive cases upholding the state’s police powers under oil and gas conservation statutes and limited tort and property remedies).

⁴ *See* Cont’l Br. ¶¶ 39-40.

[14] Instead, NWLA responds *ad hominem*. In Continental’s suit against two NWLA members, the Fishers, Continental sought summary judgment because the Fishers claimed only the statutory remedy, and that remedy was unavailable because the minerals were severed from the Fishers’ surface long before 2009. Federal Magistrate Judge Miller believed Continental’s counsel had “shamelessly” taken the words of Judge Hovland and of this Court “out-of-context” by urging that mineral estates were also excluded from the statutory remedy. NWLA Br. ¶ 61 (quoting *Cont’l Res., Inc. v. Fisher*, No. 1:18-cv-00181-CSM, ECF No. 61 (D.N.D. Feb. 19, 2021)).

[15] While the magistrate judge’s characterization of Continental’s counsel is a matter for the Eighth Circuit Court of Appeals, NWLA’s adoption of his view as its sole response does not help it here. The statute itself, as construed in *Mosser*, clearly excludes severances of pore space estates before April 9, 2009. Courts do not read duly enacted legislation to adopt superfluous provisions. *Indus. Contractors, Inc. v. Taylor*, 2017 ND 183, ¶ 12, 891 N.W.2d 760. SB2344 can lawfully remove the remedy for pre-2009 severances: NWLA has no claim. For a facial challenge, NWLA must show no pre-2009 severances exist.

[16] Disregarding N.D.C.C. § 47-31-07, NWLA and the district court believe the ownership of pore space derives from the state constitution. J.A. at 155, ¶ 18 (Pore Space Act “confirmed a property right *created in the state constitution* and laws that formed the Dakota Territory” (emphasis added)). Constitutions protect property rights, they do not create them—“Property interests arise from statutes or other independent sources of law.” *Arenegard v. Arnegard Twp.*, 2018 ND 80, ¶ 31, 908 N.W.2d 737. The private property rights asserted by NWLA arise from deeds. None are before the Court. Here, compensation arises not from any deed, but from statute. The Legislature can limit it.

[17] NWLA misconstrues the property rights derived from section 47-01-12. NWLA Br. ¶ 4. *Mosser* interpreted the statutory remedy. 2017 ND 169, ¶ 24, 898 N.W.2d 406. In so doing, this Court observed treating “pore space” as a part of “land” was consistent with N.D.C.C. § 47-01-12 in that the owner of “the land in fee” owned everything above and beneath the surface. *Mosser*, 2017 ND 169, ¶¶ 16-17, 898 N.W.2d 406. Relying on this statement, which this Court appeared to use only as a guide to interpretation, the district court and NWLA read *Mosser* also to create a rule of property law for severed estates. But on the question of property rights, the Court was presented with a case in which the “parties did not seriously contest” ownership of the pore space for the land in question. *Id.* ¶ 7 (quoting *Mosser v. Denbury Res., Inc.*, 112 F. Supp. 3d 906, 918-19 (D.N.D. 2015)). This Court rarely decides questions of statewide import without first receiving adversarial briefing. *State v. Runck*, 418 N.W.2d 262, 265 n.4 (N.D. 1987) (“We decline to consider this issue without the benefit of an adversarial briefing.”). *See also Bostock v. Clayton Cty.*, 140 S.Ct. 1731, 1753 (2020) (“we have not had the benefit of adversarial testing about the meaning of their [statutory] terms”).

[18] Adversarial briefing shows ample support belying NWLA’s assertion. One is the complete absence of precedent before *Mosser* finding the reservation of minerals failed to reserve rights to the pore space containing the minerals.⁵ North Dakota judges are

⁵ With no deeds before it now, this Court cannot analyze how mineral deed construction statutes impact pre-2009 conveyances. Deeds transferring or reserving mineral rights must be interpreted in favor of the party receiving or reserving those rights. N.D.C.C. § 47-09-13. And those transfers “shall be construed to grant or convey to the grantee thereof all minerals . . . except minerals specifically excluded by name.” *Id.* § 47-10-24; *see also id.* § 47-10-25. The surface estate is only deemed to retain “gravel, clay, or scoria unless specifically included by name in the deed, grant, or conveyance.” *Id.* § 47-10-24. Absent is any mention of the surface estate retaining the pore space containing the minerals.

“originalists” in interpretation of both constitutions and statutes. *Sorum v. State*, 2020 ND 175, ¶ 20, 947 N.W.2d 382; *see Wilkens v. Westby*, 2019 ND 186, ¶ 8, 931 N.W.2d 229 (using dictionaries “close in time to the enactment of a statute”). Section 47-01-12, unchanged since 1877, must be viewed from the standpoint of its enactment.

[19] Three significant indications from the Territorial Code suggest “pore space” was not a contemplated attribute of surface ownership. First, of course, is the Code does not mention pore space (and no decision did before *Mosser*). Second is the Code, as the statutes still do today, looked at “property” as something that could be created or reduced to possession, including “all inanimate things which are capable of appropriation or of manual delivery.” Territorial Code § 160; *see also* N.D.C.C. § 47-01-08. By statutory definition, “pore space” is the void. N.D.C.C. § 47-31-02. One can appropriate and deliver the fluids from the pore space or one can grind up and deliver the rock containing the pore space, but one cannot reduce to possession or deliver “pore space” in any sense understood in 1877. Third, and most important, from Territory to today, ownership means the power to exclude. “The ownership of a thing shall mean the right of one or more persons to possess and use it to the exclusion of others.” N.D.C.C. § 47-01-01; *see also* Territorial Code § 159. NWLA concedes the rights of mineral interests to use pore space. NWLA Br. ¶ 5. This Court has held a mineral severance creates an estate distinct from the surface estate “as if they constituted two different parcels of land.” *Beulah Coal Min’g Co. v. Heihn*, 180 N.W. 787, 790 (N.D. 1920). When N.D.C.C. § 47-01-12 says the pore space belongs to the owner in fee, it does not address which of the two estates. Neither the district court nor NWLA responded to cases interpreting statutes identical to section 47-01-12 that reject the sweeping interpretation adopted below. Cont’l Br. ¶ 43-49.

[20] North Dakota abandoned a literal reading of “everything permanently situated beneath or above it” as early as 1923 by announcing ownership of the sky rests with the surface below “subject to the right of flight.” N.D.C.C. §§ 2-03-02, -03. North Dakota anticipated by twenty-three years *United States v. Causby*, 328 U.S. 256 (1946). “It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe . . . [b]ut that doctrine has no place in the modern world.” *Id.* at 261. Only when frequent low flights “affect the use of the surface of the land itself” have the surface owner’s property interests been taken. *Id.* at 265; *see also* N.D.C.C. § 2-03-04 (flight lawful unless so low “as to interfere with” the surface owner’s then existing use).

[21] SB2344 codified these limiting principles. *See* N.D.C.C. §§ 38-08-25(5), 47-31-09(1). NWLA argues these sections violate the “open courts” provision of the North Dakota Constitution and impermissibly rebalance property law. *See* NWLA Br. ¶¶ 56-59, 65-66. Under NWLA’s theory, the sky is part of “land in fee” under section 47-01-12. But the sky is subject to use without compensation except for actual interference. The Supreme Court added “[w]ere that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea.” 328 U.S. at 260-61.

[22] “[T]he common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.” *Lembke v. Unke*, 171 N.W.2d 837, 842 (N.D. 1969). As it is for the sky above, so for the pore space beneath. The common law has adapted to regulatory powers in the contexts of both property rights and subsurface trespass.⁶ “[O]wnership rights in today’s world are not so clear-cut as they were before the advent of

⁶ *See* Cont’l Br. ¶¶ 30-33 (collecting cases that have limited traditional property law concepts for subsurface development activities under the state’s police powers).

airplanes and injection wells.” *Chance v. BP Chems., Inc.*, 670 N.E.2d 985, 992 (Ohio 1996). In *Chance*, the Ohio Supreme Court found the surface owner could not bar the injection of waste unless it would “actually interfere” with her “reasonable and foreseeable use” of the subsurface. *Id.* SB2344 simply extends these limitations to pore space.

III. SB2344 is Not a Private Transfer to a Private Party.

[23] NWLA errs to invoke *Murphy v. Amoco. Prod. Co.*, 729 F.2d 552 (8th Cir. 1984). It argues SB2344 unconstitutionally benefits the oil and gas industry, NWLA Br. ¶¶ 49-52, yet the Surface Damage Act’s purpose is to benefit the agricultural industry. 1979 N.D. Sess. Laws ch. 396, at 952; *Murphy*, 729 F.2d at 555. The Eighth Circuit stated “the mere fact that a government act benefits a private party does not necessarily mean it does not also advance the public welfare.” *Murphy*, 729 F.2d at 555. “[T]he state can legitimately exercise its police power to protect the interest that matters most to the public welfare, even at the cost of an uncompensated destruction of other interests.” *Id.* SB2344 does nothing more for oil and gas than the Surface Damage Act did for agriculture. Striking down SB2344 on this ground opens a like challenge to the Surface Damage Act.

Respectfully submitted February 10, 2022,

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THE
REVISED CODES
OF THE
TERRITORY OF DAKOTA.
A. D. 1877.

COMPRISING THE CODES AND GENERAL STATUTES PASSED AT THE TWELFTH
SESSION OF THE LEGISLATIVE ASSEMBLY, AND ALL OTHER
GENERAL LAWS REMAINING IN FORCE.

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DIVISION SECOND.

PROPERTY.

PART I. Property in General.

- II. Real, or Immovable Property.
- III. Personal, or Movable Property.
- IV. Acquisition of Property.

PART 1.

PROPERTY IN GENERAL.

TITLE I. Nature of Property.

- II. Ownership.
- III. General Definitions.

TITLE I.

NATURE OF PROPERTY.

§ 159. OWNERSHIP DEFINED.] The ownership of a thing is the right of one or more persons to possess and use it to the exclusion of others. In this code, the thing of which there may be ownership, is called property.

§ 160. WHAT MAY BE OWNED.] There may be ownership of all inanimate things which are capable of appropriation, or of manual delivery; of all domestic animals; of all obligations; of such products of labor or skill, as the composition of an author, the good will of a business, trade-marks and signs, and of rights created or granted by statute.

§ 161. WILD ANIMALS.] Animals, wild by nature, are the subjects of ownership while living only when on the land of the person claiming them, or when tamed, or taken and held in possession, or disabled and immediately pursued.

§ 162. PROPERTY CLASSED.] Property is either :

- One—Real or immovable: or,
- Two—Personal or movable.

§ 163. REAL DEFINED.] Real or immovable property consists of:

1. Land.
2. That which is affixed to land.
3. That which is incidental or appurtenant to land.
4. That which is immovable by law.

§ 164. LAND DEFINED.] Land is the solid material of the earth, whatever may be the ingredients of which it is composed, whether soil, rock or other substance.

§ 165. FIXTURES.] A thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts or screws.

§ 166. APPURTENANCES.] A thing is deemed to be incidental or appurtenant to land, when it is by right used with the land for its benefit, as in the case of a way or watercourse, or of a passage for light, air or heat, from or across the land of another. Sluice boxes, flumes, hose, pipes, railway tracks, cars, blacksmith shops, mills, and all other machinery or tools used in working or developing a mine, are to be deemed affixed to the mine.

§ 167. PERSONAL PROPERTY DEFINED.] Every kind of property that is not real is personal.

CHAPTER I.

OWNERS.

§ 168. OWNERSHIP—LIMITATION.] The legislative assembly can pass no law interfering with the primary disposal of the soil. All property in this territory has an owner, whether that owner is the United States, or the territory, and the property public; or the owner, an individual, and the property private. The territory may also hold property as a private proprietor.

§ 169. LAND BELOW HIGH WATER MARK.] The ownership of land below ordinary high water mark, and of land below the water of a navigable lake or stream, is regulated by the laws of the United States or by such laws as, under authority thereof, the legislative assembly may enact. The territory is the owner of all property lawfully appropriated or dedicated to its own use; and of all property of which there is no other owner.

§ 170. WHO MAY CONVEY.] Any person, whether citizen or alien, may take, hold and dispose of property, real or personal, within this territory.

CHAPTER II.

MODIFICATIONS OF OWNERSHIP.

ARTICLE I.—INTERESTS IN PROPERTY.

§ 171. OWNERSHIP CLASSED.] The ownership of property is either:

1. Absolute; or,
2. Qualified.

§ 172. ABSOLUTE.] The ownership of property is absolute when a single person has the absolute dominion over it, and may use it or dispose of it according to his pleasure, subject only to general laws.

§ 173. QUALIFIED.] The ownership of property is qualified:

1. When it is shared with one or more persons.
2. When the time of enjoyment is deferred or limited; or,
3. When the use is restricted.

§ 174. SOLE OWNERSHIP.] The ownership of property by a single person is designated as a sole or several ownership.

§ 175. OWNERSHIP OF PROPERTY.] The ownership of property by several persons is either:

1. Of joint interests.
2. Of partnership interests; or,
3. Of interests in common.

§ 176. JOINT TENANCY.] A joint interest is one owned by several persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy, or when granted or devised to executors or trustees as joint tenants.

§ 177. PARTNERSHIP.] A partnership interest is one owned by several persons, in partnership, for partnership purposes.

§ 178. COMMON TENANCY.] An interest in common is one owned by several persons not in joint ownership or partnership.

§ 179. DEFINITION.] Every interest created in favor of several persons in their own right is an interest in common, unless acquired by them in partnership, for partnership purposes, or unless declared in its creation to be a joint interest, as provided in section 176.

§ 180. COMMENCEMENT AND DURATION.] In respect to the time of enjoyment, an interest in property is either:

1. Present or future; and,
2. Perpetual or limited.

§ 181. PRESENT.] A present interest entitles the owner to the immediate possession of the property.

§ 182. FUTURE.] A future interest entitles the owner to the possession of the property only at a future period.

§ 183. PERPETUAL.] A perpetual interest has a duration equal to that of the property.

§ 184. LIMITED. A limited interest has a duration less than that of the property.

§ 185. FUTURE ESTATES CLASSED.] A future interest is either :

- One—Vested; or
Two—Contingent.

§ 186. WHEN THEY VEST.] A future interest is vested when there is a person in being who would have a right, defeasable or indefeasable, to the immediate possession of the property, upon the ceasing of the intermediate or precedent interest.

§ 187. HOW CONTINGENT.] A future interest is contingent whilst the person in whom, or the event upon which, it is limited to take effect, remains uncertain.

§ 188. ALTERNATIVE CONTINGENCIES.] Two or more future interests may be created to take effect in the alternative, so that if the first in order fails to vest, the next in succession shall be substituted for it, and take effect accordingly.

§ 189. NOT VOID.] A future interest is not void merely because of the improbability of the contingency on which it is limited to take effect.

§ 190. POSTHUMOUS HEIR.] When a future interest is limited to successors, heirs, issue or children, posthumous children are entitled to take in the same manner as if living at the death of their parent.

§ 191. FUTURE ESTATES PASS.] Future interests pass by succession, will and transfer, in the same manner as present interests.

§ 192. POSSIBILITIES.] A mere possibility, such as the expectancy of an heir-apparent, is not to be deemed an interest of any kind.

§ 193. ESTATES OF REALTY.] In respect to real or immovable property, the interests mentioned in this chapter are denominated estates, and are specially named and classified in part 2 of this division.

§ 194. APPLIES TO PERSONAL, ONLY.] The names and classification of interests in real property have only such application to interests in personal property as is in this division of the code expressly provided.

§ 195. FUTURE INTEREST LIMITED.] No future interest in property is recognized by the law, except such as is defined in this division of the code.

ARTICLE II.—CONDITION OF OWNERSHIP.

§ 196. CONDITIONS DEFINED.] The time when the enjoyment of property is to begin or end may be determined by computation, or be made to depend on events. In the latter case, the enjoyment is said to be upon condition.

§ 197. CLASSED.] Conditions are precedent or subsequent. The former fix the beginning, the latter the ending of the right.

§ 198. ILLEGAL CONDITIONS VOID.] If a condition precedent requires the performance of an act wrong of itself, the instrument containing it is so far void, and the right cannot exist. If it requires the performance of an act not wrong of itself, but otherwise unlawful, the instrument takes effect and the condition is void.

§ 199. MARRIAGE LIMITATIONS.] Conditions imposing restraints upon marriage, except upon the marriage of a minor, or of the widow of the person by whom the condition is imposed, are void; but this does not affect limitations where the intent was not to forbid marriage, but only to give the use until marriage.

§ 200. RESTRAINT ON ALIENATION.] Conditions restraining alienation, when repugnant to the interest created, are void.

ARTICLE III.—RESTRAINTS UPON ALIENATION.

§ 201. EXTENT OF LEGAL LIMIT.] The absolute power of alienation cannot be suspended by any limitation or condition whatever, for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in the single case mentioned in section 229.

§ 202. FUTURE LIMITATION VOID.] Every future interest is void in its creation, which, by any possibility, may suspend the absolute power of alienation for a longer period than is prescribed in this chapter. Such power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed.

§ 203. LEASES LIMITED.] No lease or grant of agricultural land for a longer period than ten years, in which shall be reserved any rent or service of any kind, shall be valid. No lease or grant of any town or city lot, for a longer period than twenty years, in which shall be reserved any rent or service of any kind, shall be valid.

ARTICLE IV.—ACCUMULATIONS.

§ 204. INCOME—FUTURE INTEREST.] Dispositions of the income of property to accrue and to be received at any time subsequent to the execution of the instrument creating such disposition, are governed by the rules prescribed in this title in relation to future interests.

§ 205. ILLEGAL ACCUMULATION.] All directions for the accumulation of the income of property, except such as are allowed by this title, are void.

§ 206. INCOME HOW DIRECTED.] An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing, sufficient to pass the property out of which the fund is to arise, as follows:

1. If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or,

2. If such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority.

§ 207. VOID BEYOND MINORITY.] If, in either of the cases mentioned in the last section, the direction for an accumulation is for a longer term than during the minority of the beneficiaries, the direction only, whether separable or not from other provisions of the instrument, is void as respects the time beyond such minority.

§ 208. PROBATE POWER.] When a minor, for whose benefit an accumulation has been directed, is destitute of other sufficient means of support and education, the probate court, upon application, may direct a suitable sum to be applied thereto, out of the fund.

CHAPTER III.

RIGHTS OF OWNERS.

§ 209. OWN INCLUDES GAIN.] The owner of a thing owns also all its products and accessions.

§ 210. UNDIRECTED INCOME.] When, in consequence of a valid limitation of future interest, there is a suspension of the power of alienation or of the ownership, during the continuation of which the income is undisposed of, and no valid direction for its accumulation is given, such income belongs to the persons presumptively entitled to the next eventual interest.

CHAPTER IV.

TERMINATION OF OWNERSHIP.

§ 211. SUCCESSION DEFEATS CONTINGENCY.] A future interest, depending on the contingency of the death of any person without successors, heirs, issue, or children, is defeated by the birth of a posthumous child of such person, capable of taking by succession.

§ 212. FUTURE INTEREST DEFEATED.] A future interest may be defeated in any manner, or by any act or means, which the party creating such interest provided for or authorized in the creation thereof; nor is a future interest, thus liable to be defeated, to be on that ground adjudged void in its creation.

§ 213. WHEN NOT.] No future interest can be defeated or barred by any alienation or other act of the owner of the intermediate or precedent interest, nor by any destruction of such precedent interest by forfeiture, surrender, merger or otherwise, except as provided by the next section, or where a forfeiture is imposed by statute as a penalty for the violation thereof.

§ 214. SAME.] No future interest, valid in its creation, is defeated by the determination of the precedent interest before the happening of the contingency on which the future interest is limited to take effect; but should such contingency afterwards happen, the future interest takes effect in the same manner and to the same extent as if the precedent interest had continued to the same period.

ADDENDUM

PROPERTY IN GENERAL.

CIVIL CODE.

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TITLE III.

GENERAL DEFINITION.

§ 215. INCOME INCLUDES.] The income of property, as the term is used in this part of the code, includes the rents and profits of real property, the interest of money, dividends upon stock, and other produce of personal property.

§ 216. WHAT CREATES LIMITATION.] The delivery of the grant, where a limitation, condition, or future interest is created by grant, and the death of the testator, where it is created by will, is to be deemed the time of the creation of the limitation, condition, or interest within the meaning of this part of the code.

PART 2.
REAL OR IMMOVABLE PROPERTY.

- TITLE I. General Provisions.
II. Estates in Real Property.
III. Rights and Obligations of Owners.
IV. Uses and Trusts.
V. Powers.
-

TITLE I.

GENERAL PROVISIONS.

§ 217. LAW GOVERNING.] Real property within this territory is governed by the law of this territory, except where the title is in the United States.

TITLE II.

ESTATES IN REAL PROPERTY.

- CHAPTER I. Estates in General.
II. Termination of Estates.
III. Servitudes.

CHAPTER I.

ESTATES IN GENERAL.

§ 218. DURATION CLASSED.] Estates in real property, in respect to the duration of their enjoyment, are either:

1. Estates of inheritance, or perpetual estates.
2. Estates for life.
3. Estates for years; or,
4. Estates at will.

ADDENDUM

§ 219. FEE DEFINED.] Every state of inheritance is a fee, and every such estate, when not defeasible or conditional, is a fee simple or an absolute fee.

§ 220. ESTATES TAIL ARE FEES.] Estates tail are abolished; and every estate which would be at common law adjudged to be a fee tail is a fee simple, and if no valid remainder is limited thereon, is a fee simple absolute.

§ 221. LIMITATION OF.] Where a remainder in fee is limited upon any estate, which would by the common law be adjudged a fee tail, such remainder is valid as a contingent limitation upon a fee, and vests in possession, on the death of the first taker, without issue living at the time of his death.

§ 222. FREEHOLD DEFINED.] Estates of inheritance and for life are called estates of freehold; estates for years are chattels real; and estates at will are chattel interests, but are not liable as such to sale on execution.

§ 223. SAME.] An estate during the life of a third person, whether limited to heirs or otherwise, is a freehold.

§ 224. FUTURE HOW LIMITED.] A future estate may be limited by the act of the party to commence in possession at a future day, either without the intervention of a precedent estate, or on the termination, by lapse of time, or otherwise, of a precedent estate, created at the same time.

§ 225. REVERSION DEFINED.] A reversion is the residue of an estate left, by operation of law, in the grantor, or his successors, or in the successors of a testator, commencing in possession on the determination of a particular estate granted or devised.

§ 226. REMAINDER.] When a future estate, other than a reversion, is dependent on a precedent estate, it may be called a remainder, and may be created and transferred by that name.

§ 227. SUSPENSION.] The absolute ownership of a term of years cannot be suspended for a longer period than the absolute power of alienation can be suspended in respect to a fee.

§ 228. FURTHER DEFINED.] The suspension of all power to alienate the subject of a trust, other than a power to exchange it for other property to be held upon the same trust, or to sell it and reinvest the proceeds to be held upon the same trust, is a suspension of the power of alienation within the meaning of section 201.

§ 229. REMAINDER IN FEE.] A contingent remainder in fee may be created on a prior remainder in fee, to take effect in the event that the persons to whom the first remainder is limited die under the age of twenty-one years, or upon any other contingency by which the estate of such persons may be determined, before they attain majority.

§ 230. SAME ON OTHER ESTATES.] Subject to the rules of this title, and of part 1 of this division, a freehold estate, as well as a chattel real, may be created to commence at a future day; an estate for life may be created in a term of years, and a remainder limited thereon; a remainder of a freehold or chattel real, either contingent or vested, may be created, expect-

ant on the determination of a term of years; and a fee may be limited on a fee, upon a contingency, which, if it should occur, must happen within the period prescribed in this title.

§ 231. **SUBSEQUENT LIFE ESTATES VOID.**] Successive estates for life cannot be limited, except to persons in being at the creation thereof, and all life estates subsequent to those of persons in being are void; and upon the death of those persons, the remainder, if valid in its creation, takes effect in the same manner as if no other life estate had been created.

§ 232. **REMAINDER ON SUCCESSIVE LIVES.**] No remainder can be created upon successive estates for life, provided for in the preceding section, unless such remainder is in fee; nor can a remainder be created upon such estate in a term for years unless it is for the whole residue of such term.

§ 233. **ON TERM VOID, UNLESS.**] A contingent remainder cannot be created on a term of years, unless the nature of the contingency on which it is limited is such, that the remainder must vest in interest during the continuance or at the termination of lives in being at the creation of such remainder.

§ 234. **TO PERSONS IN BEING.**] No estate for life can be limited as a remainder on a term of years, except to a person in being at the creation of such estate.

§ 235. **CONDITIONAL LIMITATION.**] A remainder may be limited on a contingency which, in case it should happen, will operate to abridge or determine the precedent estate; and every such remainder is to be deemed a conditional limitation.

§ 236. **TO HEIRS OF BODY.**] When a remainder is limited to the heirs, or heirs of the body, of a person to whom a life estate in the same property is given, the persons who, on the termination of the life estate, are the successors or heirs of the body of the owner for life, are entitled to take by virtue of the remainder so limited to them, and not as mere successors of the owner for life.

§ 237. **ON DEATH OF FIRST TAKER.**] When a remainder, on an estate for life or for years, is not limited on a contingency defeating or avoiding such precedent estate, it is to be deemed intended to take effect only on the death of the first taker, or the expiration, by lapse of time, of such term of years.

§ 238. **UNEXECUTED POWER.**] A general or special power of appointment does not prevent the vesting of a future estate, limited to take effect in case such power is not executed.

CHAPTER II.

TERMINATION OF ESTATES.

§ 239. **OF ESTATE AT WILL.**] A tenancy or other estate at will, however created, may be terminated by the landlord's giving notice to the tenant, in the manner prescribed by the next section, to remove from the premises within a period specified in the notice, of not less than one month.

§ 240. **NOTICE SERVED.**] The notice prescribed by the last section must

be in writing, and must be served by delivering the same to the tenant, or to some person of discretion residing on the premises, or if neither can, with reasonable diligence, be found, the notice may be served by affixing it on a conspicuous part of the premises, where it may be conveniently read.

§ 241. SUBSEQUENT ACTION.] After the notice prescribed by sections 239 and 240 has been served in the manner therein directed, and the period specified by such notice has expired, but not before, the landlord may re-enter or proceed according to law to recover possession.

§ 242. THREE DAYS' NOTICE.] Whenever the right of re-entry is given to a grantor or lessor in any grant or lease, or otherwise, such re-entry may be made at any time after the right has accrued, upon three days' previous written notice of intention to re-enter, served in the mode prescribed by section 240.

§ 243. WITHOUT NOTICE.] An action for the possession of real property leased or granted, with a right of re-entry, may be maintained at any time after the right to re-enter has accrued, without the notice prescribed in section 242.

CHAPTER III.

SERVITUDES.

§ 244. EASEMENTS ATTACHED TO OTHER LANDS.] The following land burdens or servitudes upon land, may be attached to other land as incidents or appurtenances, and are then called easements:

1. The right of pasture.
2. The right of fishing.
3. The right of taking game.
4. The right of way.
5. The right of taking water, wood, minerals and other things.
6. The right of transacting business upon land.
7. The right of conducting lawful sports upon land.
8. The right of receiving air, light or heat from or over, or discharging the same upon or over, land.
9. The right of receiving water from or discharging the same upon land.
10. The right of flooding land.
11. The right of having water flow without diminution or disturbance of any kind.
12. The right of using a wall as a party wall.
13. The right of receiving more than natural support from adjacent land or things affixed thereto.
14. The right of having the whole of a division fence maintained by a coterminous owner.
15. The right of having public conveyances stopped, or of stopping the same on land.
16. The right of a seat in church.
17. The right of burial.

§ 245. OTHERS NOT ATTACHED.] The following land burdens or servitudes upon land, may be granted and held, though not attached to land:

One—The right to pasture, and of fishing and taking game.

Two—The right of a seat in church.

Three—The right of burial.

Four—The right of taking rents and tolls.

Five—The right of way.

Six—The right of taking water, wood, minerals, or other things.

§ 246. DOMINANT TENEMENT.] The land to which an easement is attached is called the dominant tenement; the land upon which a burden or servitude is laid is called the servient tenement.

§ 247. WHO CAN CREATE.] A servitude can be created only by one who has a vested estate in the servient tenement.

§ 248. WHO NOT HOLD.] A servitude thereon cannot be held by the owner of the servient tenement.

§ 249. EXTENT OF.] The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired.

§ 250. PARTITION OF.] In case of partition of the dominant tenement, the burden must be apportioned, according to the division of the dominant tenement, but not in such a way as to increase the burden upon the servient tenement.

§ 251. RIGHT OF FUTURE OWNER.] The owner of a future estate in a dominant tenement may use easements attached thereto, for the purpose of viewing waste, demanding rent, or removing an obstruction to the enjoyment of such easements, although such tenement is occupied by a tenant.

§ 252. RIGHT OF ACTION.] The owner of any estate in a dominant tenement, or the occupant of such tenement, may maintain an action for the enforcement of an easement attached thereto.

§ 253. SAME.] The owner in fee of a servient tenement, may maintain an action for the possession of the land, against any one unlawfully possessed thereof, though a servitude exists thereon in favor of the public.

§ 254. EXTINGUISHMENT.] A servitude is extinguished.

One—By the vesting of the right to the servitude and the right to the servient tenement in the same person.

Two—By the destruction of the servient tenement.

Three—By the performance of any act upon either tenement, by the owner of the servitude, or with his assent, which is incompatible with its nature or exercise; or,

Four—When the servitude was acquired by enjoyment, by disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment.

TITLE III.

RIGHTS AND OBLIGATIONS OF OWNERS.

CHAPTER I.

RIGHTS OF OWNERS.

ARTICLE I. Incidents of Ownership.

II. Boundaries.

ARTICLE I.—INCIDENTS OF OWNERSHIP.

§ 255. LAND INCLUDES WATER.] The owner of the land owns water standing thereon, or flowing over or under its surface, but not forming a definite stream. Water running in a definite stream, formed by nature over or under the surface, may be used by him as long as it remains there; but he may not prevent the natural flow of the stream, or of the natural spring from which it commences its definite course, nor pursue nor pollute the same.

§ 256. INHERITANCE PROTECTED.] The owner of a life estate may use the land in the same manner as the owner of a fee simple, except that he must do no act to the injury of the inheritance.

§ 257. RIGHTS OF TENANT.] A tenant for years or at will, unless he is a wrong doer by holding over, may occupy the building, take the annual products of the soil, work mines and quarries open at the commencement of his tenancy, and cultivate and harvest the crops growing at the end of his tenancy.

§ 258. LIMITED BY INSTRUMENT.] A tenant for years, or at will, has no other rights to the property than such as are given to him by the agreement or instrument by which his tenancy is acquired, or by the last section.

§ 259. SUCCESSION TO RIGHTS.] A person to whom any real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for recovery of rent, for non-performance of any of the terms of the lease, or for any waste or cause of forfeiture, as his grantor or deviser might have had.

§ 260. ASSIGNEES OF LESSOR OR LESSEE.] Whatever remedies the lessor of any real property has against his immediate lessee for the breach of any agreement in the lease, or for recovery of the possession, he has against the assignees of the lessee, for any cause of action accruing while they are such assignees, except where the assignment is made by way of security for a loan, and is not accompanied by possession of the premises. Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have

against the assigns of the lessor, and the assigns of the lessee may have against the lessor and his assigns, except upon covenants against incumbrances, or relating to the title or possession of the premises.

§ 261. NOTICE TO CHANGE TERMS.] In all leases of lands or tenements, or of any interest therein, from month to month, the landlord may, upon giving notice in writing at least fifteen days before the expiration of the month, change the terms of the lease, to take effect at the expiration of the month. The notice, when served upon the tenant, shall of itself operate and be effectual to create and establish as a part of the lease, the terms, rent and conditions specified in the notice, if the tenant shall continue to hold the premises after the expiration of the month.

§ 262. LIFE LEASE RENT.] Rent due upon a lease for life may be recovered in the same manner as upon a lease for years.

§ 263. AFTER DEATH.] Rent dependent on the life of a person may be recovered after, as well as before, his death.

§ 264. RIGHT OF ACTION.] A person having an estate in fee, in remainder or reversion, may maintain an action for any injury done to the inheritance, notwithstanding an intervening estate for life or years, and although, after its commission, his estate is transferred, and he has no interest in the property at the commencement of the action.

ARTICLE II.—BOUNDARIES.

§ 265. ABOVE AND BELOW SURFACE.] The owner of land in fee has the right to the surface, and to everything permanently situated beneath or above it.

§ 266. BANKS AND BEDS OF STREAMS.] Except where the grant under which the land is held indicates a different intent, the owner of the upland when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark, and all navigable rivers shall remain and be deemed public highways. In all cases where the opposite banks of any streams, not navigable, belong to different persons, the stream and the bed thereof shall become common to both.

§ 267. HIGHWAYS.] An owner of land, bounded by a road or street, is presumed to own to the center of the way, but the contrary may be shown.

§ 268. LATERAL SUPPORT.] Each coterminous owner is entitled to the lateral and subjacent support which his land receives from the adjoining land, subject to the right of the owner of the adjoining land to make proper and usual excavations on the same for purposes of construction, on using ordinary care and skill, and taking reasonable precautions to sustain the land of the other, and giving previous reasonable notice to the other of his intention to make such excavations.

§ 269. TREES ON LAND.] Trees whose trunks stand wholly upon the land of one owner, belong exclusively to him, although their roots grow into the land of another.

§ 270. SAME ON LINE.] Trees whose trunks stand partly on the land of two or more coterminous owners belong to them in common.

CHAPTER II.

OBLIGATIONS OF OWNERS.

§ 271. REPAIRS AND TAXES.] The owner of a life estate must keep the buildings and fences in repair from ordinary waste, and must pay the taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance.

§ 272. BOUNDARIES—FENCES.] Coterminous owners are mutually bound equally to maintain:

1. The boundaries and monuments between them.
2. The fences between them, unless one of them chooses to let his land lie open as a public common, in which case, if he afterwards incloses it, he must refund to the other a just proportion of the value, at that time, of any division fence made by the latter.

TITLE IV.

USES AND TRUSTS.

§ 273. LIMITATION.] Uses and trusts, in relation to real property, are those only which are specified in this title.

§ 274. LEGAL ESTATE CONFIRMED.] Every estate which is now held as a use, executed under any former statute of this territory, is confirmed as a legal estate.

§ 275. DEFINITION.] Every person who, by virtue of any transfer or devise, is entitled to the actual possession of real property, and the receipt of the rents and profits thereof, is to be deemed to have a legal estate therein, of the same quality and duration, and subject to the same conditions, as his beneficial interest.

§ 276. TRUST VALID.] The last section does not divest the estate of any trustee in a trust heretofore existing, where the title of such trustee is not merely nominal, but is connected with some power of actual disposition or management in relation to the real property, which is the subject of the trust.

§ 277. DIRECT TRANSFER.] Every disposition of real property, whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other, to the use of or in trust for such person; and if made to any person, to the use of or in trust for another, no estate or interest vests in the trustee: but he must execute a release of the property to the beneficiary on demand, the latter paying the expense thereof.

§ 278. LIMITATION OF PRECEDING.] The preceding sections of this title do not extend to trusts arising or resulting by implication of law, nor prevent or affect the creation of such express trusts as are hereinafter authorized and defined.

ADDENDUM

§ 279. REQUISITES OF TRUSTS.] No trust in relation to real property is valid, unless created or declared:

1. By a written instrument, subscribed by the trustee, or by his agent thereto authorized by writing.

2. By the instrument under which the trustee claims the estate affected; or,

3. By operation of law.

§ 280. TRUST PRESUMED.] When a transfer of real property is made to one person, and the consideration therefor is paid by or for another, a trust is presumed to result in favor of the person by or for whom such payment is made.

§ 281. INNOCENT PURCHASER.] No implied or resulting trust can prejudice the rights of a purchaser or incumbrancer of real property, for value and without notice of the trust.

§ 282. PURPOSES OF TRUSTS.] Express trusts may be created for any of the following purposes:

One—To sell real property, and apply or dispose of the proceeds in accordance with the instrument creating the trust.

Two—To mortgage or lease real property for the benefit of annuitants or other legatees, or for the purpose of satisfying any charge thereon.

Three—To receive the rents and profits of real property, and pay them to or apply them to the use of any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family, during the life of such person, or for any shorter term, subject to the rules of title two of this part; or,

Four—To receive the rents and profits of real property, and to accumulate the same for the purposes and within the limits prescribed by the same title.

§ 283. A TRUST POWER.] A devise of real property to executors or other trustees, to be sold or mortgaged, where the trustees are not also empowered to receive the rents and profits, vests no estate in them; but the trust is valid as a power in trust.

§ 284. LIABILITY OF SURPLUS.] Where a trust is created to receive the rents and profits of real property, and no valid direction for accumulation is given, the surplus of such rents and profits, beyond the sum that may be necessary for the education and support of the person for whose benefit the trust is created, is liable to the claims of the creditors of such person, in the same manner as personal property which cannot be reached by execution.

§ 285. CERTAIN TRUST A POWER.] Where an express trust in relation to real property is created for any purpose not enumerated in the preceding sections, such trust vests no estate in the trustees; but the trust, if directing or authorizing the performance of any act which may be lawfully performed under a power, is valid as a power in trust, subject to the provisions in relation to such powers, contained in title 5 of this part.

§ 286. POWER IN TRUST.] Nothing in this title prevents the creation of a power in trust for any of the purposes for which an express trust may be created.

ADDENDUM

REAL PROPERTY.

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§ 287. REALTY PASSES.] In every case where a trust is valid as a power in trust, the real property to which the trust relates, remains in or passes by succession to, the persons otherwise entitled, subject to the execution of the trust as a power in trust.

§ 288. ESTATE IN TRUSTEES LIMITED.] Except as hereinafter otherwise provided, every express trust in real property, valid as such, in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust.

§ 289. CONTINGENT TRUST.] Notwithstanding anything contained in the last section, the author of a trust may, in its creation, prescribe to whom the real property to which the trust relates shall belong, in the event of the failure or termination of the trust, and may transfer or devise such property, subject to the execution of the trust.

§ 290. LEGAL ESTATE.] The grantee or devisee of real property subject to a trust acquires a legal estate in the property, as against all persons except the trustees and those lawfully claiming under them.

§ 291. UNDISPOSED ESTATES.] Where an express trust is created in relation to real property, every estate not embraced in the trust, and not otherwise disposed of, is left in the author of the trust, or his successors.

§ 292. LIMITED DISPOSAL.] The beneficiary of a trust for the receipt of the rents and profits of real property, or for the payment of an annuity out of such rents and profits, may be restrained from disposing of his interest in such trust during his life, or for a term of years, by the instrument creating the trust.

§ 293. GRANT SEPARATE FROM TRUST.] Where an express trust is created in relation to real property, but is not contained or declared in the grant to the trustee, or in an instrument signed by him, and recorded in the same office with the grant to the trustee, such grant must be deemed absolute in favor of the subsequent creditors of the trustee not having notice of the trust, and in favor of purchasers from such trustee without notice, and for a valuable consideration.

§ 294. NOT SEPARATE.] Where a trust in relation to real property is expressed in the instrument creating the estate, every transfer or other act of the trustees, in contravention of the trust, is absolutely void.

§ 295. TRUST CEASES.] When the purpose for which an express trust was created ceases, the estate of the trustee also ceases.

TITLE V.

POWERS.

§ 296. SPECIFIED ONLY.] Powers, in relation to real property, are those only which are specified in this title.

§ 297. EXCLUSION.] The provisions of this title do not extend to a simple power of attorney to convey real property in the name of the owner and for his benefit.

§ 298. DEFINITION.] A power, as the term is used in this title, is an authority to do some act in relation to real property, or to the creation or revocation of an estate therein, or a charge thereon, which the owner granting or reserving such power might himself perform for any purpose.

§ 299. AUTHOR DEFINED.] The author of a power, as the term is used in this title, is the person by whom a power is created, whether by grant or devise; and the holder of a power is the person in whom a power is vested, whether by grant, devise or reservation.

§ 300. POWERS CLASSED.] Powers are general or special, and beneficial or in trust.

§ 301. GENERAL POWERS.] A power is general when it authorizes the alienation or incumbrance of a fee in the property embraced therein, by grant, will or charge, or any of them, in favor of any person whatever.

§ 302. SPECIAL.] A power is special:

1. When a person or class of persons is designated, to whom the disposition of property under the power is to be made; or,
2. When it authorizes the alienation or incumbrance, by means of a grant, will, or charge, of only an estate less than a fee.

§ 303. BENEFICIAL.] A power is beneficial when no person other than its holder has, by the terms of its creation, any interest in its execution.

§ 304. POWER IN TRUST.] A power is in trust when any person or class of persons, other than its holder, has, by the terms of its creation, an interest in its execution.

§ 305. GENERAL—SAME.] A general power is in trust when any person or class of persons, other than its holder, is designated as entitled to the proceeds of the disposition or charge authorized by the power, or to any portion of the proceeds or other benefits to result from its execution.

§ 306. SPECIAL—SAME.] A special power is in trust:

1. When the disposition or charge which it authorizes is limited to be made to any person or class of persons other than the holder of the power; or,
2. When any person or class of persons, other than the holder, is designated as entitled to any benefit from the disposition or charge authorized by the power.

§ 307. CAPACITY TO CREATE.] No person is capable of creating a power who is not at the same time capable of granting some estate in the property to which the power relates.

§ 308. VESTS IN WHOM.] A power may be vested in any person.

§ 309. HOW CREATED.] A power may be created only:

1. By a suitable clause contained in a grant of some estate in the real property to which the power relates, or in an agreement to execute such a grant; or,
2. By a devise contained in a will.

§ 310. RESERVED POWER.] The grantor in any conveyance may reserve to himself any power, beneficial or in trust, which he might lawfully grant to another; and every power thus reserved is subject to the provisions of this title in the same manner as if granted to another.

§ 311. IRREVOCABLE UNLESS.] Every power, beneficial or in trust, is irrevocable unless an authority to revoke it is given or reserved in the instrument creating the power.

§ 312. LIEN OF POWER DEFINED.] A power is a lien upon the real property which it embraces from the time the instrument in which it is contained takes effect; except that against creditors, purchasers and incumbrancers, in good faith and without notice, from any person having an estate in such real property, the power is a lien only from the time the instrument in which it is contained is duly recorded.

§ 313. POWER A SECURITY.] Where a power to sell real property is given to a mortgagee, or other incumbrancer, in an instrument intended to secure the payment of money, the power is to be deemed a part of the security and vests in any person who, by assignment, becomes entitled to the money so secured to be paid, and may be executed by him whenever the assignment is duly acknowledged and recorded.

§ 314. CAPACITY LACKING.] A power cannot be executed by any person not capable of disposing of real property.

§ 315. MARRIED WOMAN.] A married woman may execute a power during her marriage, without the concurrence of her husband, unless otherwise prescribed by the terms of the power.

§ 316. SAME—ACKNOWLEDGMENT.] No power can be executed by a married woman before she attains her majority, nor without being acknowledged by her in the manner prescribed by the chapter on recording transfers.

§ 317. EXECUTION OF POWER.] A power can be executed only by a written instrument which would be sufficient to pass the estate or interest intended to pass under the power, if the person executing the power was the actual owner.

§ 318. MANY—SURVIVOR.] Where a power is vested in several persons, all must unite in its execution; but in case any one or more of them is dead, the power may be executed by the survivor or survivors, unless otherwise prescribed by the terms of the power.

§ 319. EXECUTION BY WILL.] Where a power to dispose of real property is confined to a disposition by devise or will, the instrument of execution must be a will duly executed according to the provisions of the title on wills.

§ 320. SAME BY GRANT.] Where a power is confined to a disposition by grant, it cannot be executed by will, even though the disposition is not intended to take effect until after the death of the person executing the power.

§ 321. PECULIAR EXECUTION.] Where the author of a power has directed or authorized it to be executed by an instrument which would not be suf-

ficient in law to pass the estate, the power is not void, but its execution is to be governed by the rules before prescribed in this title.

§ 322. FORMALITIES—SURPLUSAGE.] Where the author of a power has directed any formalities to be observed in its execution, in addition to those which would be sufficient to pass the estate, the observance of such additional formalities is not necessary to a valid execution of the power.

§ 323. TRIVIAL CONDITIONS.] Where the conditions annexed to a power are merely nominal, and evince no intention of actual benefit to the party to whom, or in whose favor, they are to be performed, they may be wholly disregarded in the execution of the power.

§ 324. BINDING CONDITIONS.] With the exceptions contained in the preceding sections, the intentions of the author of a power as to the mode, time and conditions of its execution must be observed, subject to the power of a district court to supply a defective execution in the cases provided in sections 333 and 357.

§ 325. CONSENT HOW EXPRESSED.] When the consent of a third person to the execution of a power is requisite, such consent must be expressed in the instrument by which the power is executed, or be certified in writing thereon. In the first case the instrument of execution, in the second, the certificate, must be subscribed by the party whose consent is required; and to entitle the instrument to be recorded, such signature must be duly proved or acknowledged, according to the chapter on recording transfers.

§ 326. CONSENT OF ALL SURVIVORS.] Where the consent of several persons to the execution of a power is requisite, all must consent thereto; but, in case any one or more of them is dead, the consent of the survivors is sufficient, unless otherwise prescribed by the terms of the power.

§ 327. VALIDITY WITHOUT RECITAL.] Every instrument executed by the holder of a power, conveying an estate or creating a charge which such holder would have no right to convey or create except by virtue of his power, is to be deemed a valid execution of the power, even though not recited or referred to therein.

§ 328. CONVEYANCES, EXCEPT WILL.] Every instrument except a will, in execution of a power, even though the power is one of revocation only, is to be deemed a conveyance within the meaning of the chapter on recording transfers.

§ 329. VALID TO EXTEND POWER.] A disposition of charge, by virtue of a power, more extensive than was authorized thereby, is not therefore void; but every estate or interest so created, so far as it is embraced by the terms of the power, is valid.

§ 330. TIME RUNS FROM.] The period during which the absolute right of alienation may be suspended by an instrument in execution of a power, must be computed, not from the date of the instrument, but from the time of the creation of the power.

§ 331. LEGALITY OF ESTATE.] No estate or interest can be given or limited to any person, by an instrument in execution of a power, which could not have been given or limited at the time of the creation of the power.

§ 332. MARRIED WOMAN'S POWER.] When a married woman, entitled to an estate in fee, is authorized by a power to dispose of such estate during her marriage, she may, by virtue of such power, create any estate which she might create if unmarried.

§ 333. RELIEF FROM DEFECTS.] Purchasers for a valuable consideration, claiming under a defective execution of a power, are entitled to the same relief as similar purchasers claiming under a defective conveyance from an actual owner.

§ 334. FRAUD.] Instruments in execution of a power are effected by fraud in the same manner as like instruments executed by owners or trustees.

§ 335. POWER TO WOMAN.] A general and beneficial power is valid, which gives to a married woman power to dispose, during her marriage, and without the concurrence of her husband, of a present or future estate in real property conveyed or devised to her in fee.

§ 336. POWER BECOMES DUE.] Where an absolute power of disposition, not accompanied by any trust, is given to the owner of a particular estate for life or years, such estate is changed into a fee, absolute in favor of creditors, purchasers and incumbrancers, but subject to any future estates limited thereon, in case the power should not be executed, or the property should not be sold for the satisfaction of debts.

§ 337. SAME.] Where an absolute power of disposition, not accompanied by any trust, is given to any person to whom no particular estate is limited, such person also takes a fee, subject to any future estate that may be limited thereon, but absolute in favor of creditors, purchasers and incumbrancers.

§ 338. SAME.] In all cases where an absolute power of disposition is given, not accompanied by any trust, and no remainder is limited on the estate of the holder of the power, he is entitled to an absolute fee.

§ 339. SAME.] Where a general and beneficial power to devise the inheritance is given to the owner of an estate for life or for years, he is deemed to possess an absolute power of disposition, within the meaning of the last three sections.

§ 340. POWER ABSOLUTE.] Every power of disposition is deemed absolute, by means of which the holder is enabled in his lifetime to dispose of the entire fee, in possession or in expectancy, for his own benefit.

§ 341. SAME RESERVED.] Where the grantor in any conveyance reserves to himself, for his own benefit, an absolute power of revocation, such grantor is still to be deemed the absolute owner of the estate conveyed, so far as the rights of creditors and purchasers are concerned.

§ 342. VALID BENEFICIAL POWER.] A special and beneficial power is valid which is granted:

One--To a married woman to dispose, during the marriage, of any estate less than a fee, belonging to her, in the property to which the power relates; or,

Two—To the owner of a life estate in the property embraced in the power to make leases, commencing in possession during his life.

§ 343. POWERS TO LEASE.] A special and beneficial power to make leases of agricultural land for more than ten years, or of town or city lots for more than twenty years, is void only as to the time beyond ten or twenty years, and authorizes leases for those terms or less.

§ 344. ANNEXED TO ESTATE.] The power of the owner of a life estate to make leases is not transferable as a separate interest, but is annexed to his estate, and will pass, unless specially excepted, by any grant of such estate. If specially excepted in any such grant, it is extinguished.

§ 345. EXTINGUISHING GRANT.] The power of the owner of a life estate to make leases may be released by him to any person entitled to a future estate in the property, and is thereupon extinguished.

§ 346. MORTGAGE BINDS POWER.] A mortgage executed by the owner of a life estate having a power to make leases, or by a married woman, by virtue of any beneficial power, does not extinguish or suspend the power; but the power is bound by the mortgage in the same manner as the real property embraced therein.

§ 347. EFFECTS OF SAME.] The effects on the power, of a lien by mortgage, such as is mentioned in the last section, are:

1. That the mortgagee is entitled to an execution of the power, so far as the satisfaction of his lien may require it; and,
2. That any subsequent estate created by the owner, in execution of the power, becomes subject to the mortgage in the same manner as if in terms embraced therein.

§ 348. CREDITOR'S CLAIMS.] Every special and beneficial power is liable to the claims of creditors, in the same manner as other interests that cannot be reached by execution, and the execution of the power may be adjudged for the benefit of the creditors entitled.

§ 349. OTHER POWERS VOID.] No beneficial power, general or special, not already specified and defined in this title, can hereafter be created.

§ 350. ENFORCEABLE POWERS.] Every trust power, unless its execution is made expressly to depend on the will of the trustee, is imperative, and imposes a duty on the trustee the performance of which may be compelled for the benefit of the parties interested.

§ 351. SAME.] A trust power does not cease to be imperative where the trustee has the right to select any, and exclude others, of the persons designated as the beneficiaries of the trust.

§ 352. EQUAL SHARES.] Where a disposition under a power is directed to be made to, among, or between several persons, without any specification of the share or sum to be allotted to each, all the persons designated are entitled in equal proportion.

§ 353. DISCRETIONARY POWER.] Where the terms of a power import that the estate or fund is to be distributed among several persons designated, in such manner or proportions as the trustee of the power may think

ADDENDUM

proper, the trustee may allot the whole to any one or more of such persons in exclusion of the others.

§ 354. DEATH OF TRUSTEE.] If the trustee of a power, with the right of selection, dies, leaving the power unexecuted, its execution must be adjudged for the benefit equally of all the persons designated as objects of the trust.

§ 355. DISTRICT COURT.] Where a power in trust is created by will, and the testator has omitted to designate, expressly or by necessary implication, by whom the power is to be executed, its execution devolves on the district court.

§ 356. CREDITORS.] The execution, in whole or in part, of any trust power, may be adjudged for the benefit of the creditors or assignees of any person entitled, as one of the beneficiaries of the trust, to compel its execution, when his interest is transferable.

§ 357. DEFECTS CURED.] Where the execution of a power in trust is defective, in whole or in part, under the provisions of this title, its proper execution may be adjudged in favor of the persons designated as the objects of the trust.

§ 358. CERTAIN LAW APPLIES.] The provisions of the title on trust, saving the rights of other persons from prejudice by the misconduct of trustees and authorizing the court to remove and appoint trustees; the provisions of the title on succession, devolving express trusts upon the court on the death of the trustee; and the provisions of section 295, in title on uses and trusts, apply equally to power, in trust, and the trustees of such powers.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Northwest Landowners Association,
Plaintiff/Appellee,

v.

State of North Dakota, North Dakota
Industrial Commission, Hon. Douglas
Burgum in his official capacity as Governor
of the State of North Dakota, and Hon.
Wayne Stenehjem in his official capacity as
Attorney General of North Dakota,

Defendants/Appellants,
and

Board of University and School Lands of
the State of North Dakota,

Defendant,

and

Continental Resources, Inc.,

Intervenor-Defendant/Appellant.

CERTIFICATE OF COMPLIANCE

**Supreme Ct. No. 20210148
Civil No. 05-2019-CV00085**

**Appeal from Judgment, District
Court, Northeast Judicial District,
County of Bottineau**

[¶1] The undersigned certifies pursuant to N.D. R. App. P. 32(a)(8)(A), that the Intervenor/Appellant's Corrected Reply Brief contains 12 pages, excluding the Addendum.

[¶2] This brief has been prepared in a proportionally spaced typeface using Microsoft Office 365 word processing software in Times New Roman 12 point font.

Dated this 10th day of February, 2022.

By: /s/ L. Poe Leggette
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and

Board of University and School Lands of the
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**CERTIFICATE OF SERVICE BY
ELECTRONIC MAIL**

Supreme Ct. No. 20210148

Civil No. 05-2019-CV00085

**Appeal from Judgment, District
Court, Northeast Judicial District,
County of Bottineau**

[¶1] I hereby certify that on February 10, 2022, the following document: APPELLANT CONTINENTAL RESOURCES, INC.'s CORRECTED REPLY BRIEF was filed electronically with the Clerk of Supreme Court and served upon Plaintiff/Appellee Northwest Landowners Association, by and through its attorneys, Derrick Braaten at derrick@braatenlawfirm.com and Todd Sattler at todd@braatenlawfirm.com; State Defendants/Appellants, by and through their attorneys, Matthew A. Sagsveen at masagsve@nd.gov and Steven B. Nelson at stnelson@nd.gov; and North Dakota Petroleum Council by and through its attorneys, Lawrence Bender at lbender@fredlaw.com and Tanner Pearson at tpearson@fredlaw.com.

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