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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Patricia R. Capps, f/k/a Patricia Anderson, Terrel A. Anderson, a/k/a Terral Anderson, Gerald C. Wools, Penny Brink, Michael Lee, Gwen Hassan, Melissa Kellor, and the Estate of Ruth A. Nelson, Deceased,	)	
Plaintiffs and Appellees,	)	
v.	)	
Colleen L. Weflen, et al.,	)	Supreme Court No. 20120184
Defendants,	)	
_____	)	
Colleen L. Weflen, a/k/a Colleen Weflen, a single woman, Marleen Weflen, f/k/a Marleen W. Tiedt, Sharon Kruse, a/k/a Sharon O. Kruse f/k/a Sharon Weflen, a married woman dealing in her sole and separate property, Catherine Harris, Cathy Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLC, a Delaware Limited Liability Company, Gulfport Energy Corporation, and EOG Resources, Inc.,	)	
Appellants.	)	

Appeal from Summary Judgment entered on February 8, 2012
Civil No. 31-10-C-00009
County of Mountrail, Northwest Judicial District
Honorable David W. Nelson, Presiding

BRIEF OF DEFENDANT/APPELLANT EOG RESOURCES, INC.

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STATEMENT OF THE CASE

[¶ 1] Appellees Patricia R. Capps, f/k/a/ Patricia Anderson and Terrel A. Anderson, a/k/a Terral Anderson (hereinafter referred to as the "Capps Appellees") commenced the instant action by filing their Summons and Complaint with the Mountrail County District Court in the State of North Dakota on or about January 18, 2010. (*See* Appellant Weflens' Appendix ("App."), 23–32.) In their Complaint, the Capps Appellees sought to quiet title against Appellants Colleen L. Weflen, a/k/a Colleen Weflen, Marleen Weflen, f/k/a/ Marleen W. Tiedt, Sharon Kruse, a/k/a Sharon O. Kruse, f/k/a Sharon Weflen, Catherine Harris, Cathy Gunderson, and Norris Weflen, a/k/a Norris L. Weflen (hereinafter collectively referred to as the "Weflen Appellants") in and to the minerals in and under the following real property located in Mountrail County, North Dakota:

Township 153 North, Range 90 West
Section 4: Lots 3 and 4, S/2NW/4, SW/4
Section 9: NW/4

(the "Subject Property"). (*See* App. 25–35.)

[¶ 2] The Capps Appellees claimed that the Weflen Appellants failed to comply with the notice requirements of the Termination of Mineral Interest Act, codified at

Chapter 38-18.1 of the North Dakota Century Code (the "Act"), because the Weflen Appellants did not conduct a reasonable inquiry and failed to properly provide notice under the Act. (*See* App. 130–31.) Specifically, the Capps Appellees alleged that, because the mineral interest owner of record, Ruth A. Nelson, was deceased at the time the Weflen Appellants served the Notice of Lapse, the notice was invalid. (*Id.*) The Capps Appellees claimed that the Weflen Appellants were therefore not entitled to ownership of the Subject Minerals and asked the court to quiet title to the minerals in and under the Subject Property in the Capps Appellees. (*See* App. 28, 131.)

[¶ 3] The Weflen Appellants removed the action to federal court. (*See* Supplementary Appendix of Appellant EOG Resources, Inc. ("EOG App."), 1–5.) The Capps Appellees moved for remand, and the action was remanded to state court pursuant to the federal district court's Order of March 4, 2010. (*See* EOG App. 6–10.)

[¶ 4] On or about July 30, 2010, the Weflen Appellants moved to join Appellant EOG Resources, Inc. ("EOG"), as well as Gulfport Energy Corporation ("Gulfport"), and Windsor Bakken, LLC ("Windsor") as defendants who claim a leasehold interest in the minerals in and under the Subject Property. (*See* EOG App. 14.) The Capps Appellees opposed the motion. (*See* EOG App. 16.) On or about August 27, 2010, the Weflen Appellants moved to join the Estate of Ruth A. Nelson. (*See* EOG App. 14.) The Capps Appellees opposed this motion as well. (*See* EOG App. 17.)

[¶ 5] On or about September 14, 2010, the Capps Appellees moved to amend their Complaint to add Gwen Hassan, Penny Brink, Michael Lee, and Melissa Kellor, heirs of Ruth A. Nelson, (hereinafter collectively referred to as the "Hassan Appellees")

(along with the Capps Appellees, collectively referred to herein as the "Appellees") as parties to this action. (*See* EOG App. 14–15.)

[¶ 6] On or about September 29, 2010, the Weflen Appellants moved for summary judgment. (*See* App. 127.) The Capps Appellees filed a cross-motion for summary judgment on or about November 1, 2010. (*Id.*) Oral arguments on the motions were heard on December 15, 2010. (*See* App. 128.) Following arguments, in early 2011, the North Dakota Supreme Court issued three opinions relevant to the parties' claims. (*Id.*) In light of these decisions, the court allowed supplemental briefing on the issues. (*Id.*)

[¶ 7] On February 17, 2011, the court granted the Weflen Appellants' motion to join EOG, Gulfport, Whiting, and the Estate of Ruth A. Nelson as parties. (*See* EOG App. 18–19.) In the same order, the court granted the Capps Appellee's motion to amend the Complaint to add the Hassan Appellees. (*Id.*)

[¶ 8] On March 25, 2011, the court granted the Weflen Appellants' motion for summary judgment and denied the Capps' Appellees cross-motion for summary judgment (the "Original Order"). (*See* App. 135.) The issue before the court was "whether the Weflens were required to make a 'reasonable inquiry' under N.D.C.C. § 38-18.1-06(2) [the Act]." (*See* App. 131.) The Court held that, pursuant to recent case law issued by the North Dakota Supreme Court, "the mortality of the mineral interest owner of record" was irrelevant and an inquiry was not required because Ruth A. Nelson's address appeared of record. (*See* App. 132.) Thus, the Court granted the Weflen Appellants' motion for summary judgment and denied the Capps Appellees' motion, dismissing the Capps Appellees' quiet title claim. (*See* App. 135.)

[¶ 9] On or about May 4, 2011, the Weflen Appellants filed their Supplemental Pleading to Complaint to Add Parties, adding EOG, Whiting, and Gulfport as defendants and adding the Hassan Appellees as plaintiffs in the action. (*See* App. 172–83.)

[¶ 10] On or about July 28, 2011, the Weflen Appellants filed a Motion for Summary Judgment against the Hassan Appellees. (*See* EOG App. 21–22.) The Weflen Appellants argued that the factual circumstances and issues of law were identical to those determined in the Weflen Appellants' favor in the Original Order and thus, the Original Order should likewise apply to the newly-added parties.

[¶ 11] In response to the Weflen Appellants' motion, the Capps Appellees filed a Response Brief to Weflens' Second Motion for Summary Judgment and Request for Reconsideration of Court's Denial of Capps Summary Judgment Motion. (*See* EOG App. 23–27.) The Capps Appellees did not file a motion to alter or amend the judgment pursuant to Rule 59(j) of the North Dakota Rules of Civil Procedure, nor did they file a motion for relief from the judgment pursuant to Rule 60(a). Rather, the Capps Appellees simply filed a brief in response to the Weflen Appellants' motion, restating the exact facts and arguments the court considered in issuing the Original Order. (*Id.*) The parties essentially re-briefed the same issues and oral argument was held on November 14, 2011.

[¶ 12] In the meantime, the district court severed the previously consolidated cases into separate actions. (*See* EOG App. 28.)

[¶ 13] On February 2, 2012, the court issued its Order Denying Weflens' Motion for Summary Judgment, Granting Capps' Motion for Reconsideration and Rule 54(b) Certification ("Second Order"). (*See* App. 282–94.) In the Second Order, the court agreed with the Weflen Appellants that the facts and circumstances had not altered since

the court issued its Original Order. (*See* App. 284.) Despite this, and despite the fact that no new legal arguments were presented, the district court reversed itself and denied the Weflen Appellants' motion for summary judgment and granted the Capps Appellees' earlier motion for summary judgment. (*See* App. 292–93.) The court listed three rationale for reversing the Original Order. First, the court held that mailing notice to a dead person at their address of record is absurd. (*See* App. 287.) Second, the court held that mailing notice via certified mail, restricted delivery guaranteed the mineral owner would not receive the notice. (*See* App. 287–88.) Third, the court held that, because Ruth Nelson was deceased, she was not the mineral owner and therefore the mineral owner's address did not appear of record. (*See* App. 288–92.)

[¶ 14] On or about April 5, 2012, the Weflen Appellants filed their Notice of Appeal. (*See* App. 299.) On or about April 13, 2012, EOG filed its Notice of Appeal. (*See* EOG App. 33.) On or about April 19, 2012, Windsor Bakken, LLC and Gulfport filed their Notice of Appeal.[1] (*See* EOG App. 29.) No other parties have appealed the district court's decision.

[¶ 15] The district court's decision was erroneous and must be overturned by this Court for several reasons. First, the district court's reasoning in the Second Order ignores this Court's recent holdings regarding the Act. Second, contrary to the district court's reasoning, the Capps Appellees would not have received actual notice of the lapse of their mineral interest via mail regardless of the fact (1) that the owner of record was

[1] In their summary judgment briefs, the Appellees also asserted that the Act was unconstitutional. The district court, in its Original Order, found that the Appellees had failed to present the "heavy artillery" necessary to succeed on such a claim. (*See* App. 279.) The district court did not reverse this holding, or even address it, in the Second Order. (*See* App. 282–94.) The Appellees have not appealed the issue and it is not on appeal before this Court.

deceased, (2) that delivery of the Notice of Lapse was via certified mail, restricted delivery, and (3) that the actual mineral owner's address was not "of record." In other words, the Capps Appellees were not harmed by either the mailing to a deceased person or its restricted delivery since they do not claim under the Estate of Ruth Nelson but rather under a mineral deed they failed to record for thirty years and have made no showing that they would have received actual notice but for these alleged infirmities. Further, the court's determination that the "true" mineral owner was not of record, thereby necessitating a reasonable inquiry, is erroneous because the "true" mineral owners at the time of the first Notice of Lapse were the Capps Appellees, who received their interests via deed, rather than as heirs of Ruth Nelson. Finally, the district court's Second Order must be overturned because the Capps Appellees (1) have only themselves to blame for failing to record their thirty year-old mineral deed, (2) had constructive notice of the Notice of Lapse by publication and did not timely respond, and (3) have made no showing that they would have received actual notice via mail if the Weflen Appellants had provided notice via a different form of mailing.

STATEMENT OF THE FACTS

[¶ 16] The following are the undisputed material facts that were presented to the district court in connection with the various motions for summary judgment:

[¶ 17] Prior to March 24, 1975, Ruth A. Nelson was the owner of the entire Subject Property. (*See* App. 273.) On or about March 24, 1975, via Warranty Deed ("1975 Warranty Deed"), Ruth A. Nelson conveyed to Olav and Rose Weflen the entire surface of the Subject Property and one-half of the minerals in and under the Subject Property. (*See* App. 272, 308–09.) The Warranty Deed was recorded with the Mountrail County Recorder on April 16, 1975, as Document No. 219971. (*See* App. 308–09.) The

Weflen Appellants are the successors-in-interest to Olav and Rose Weflen and the owners of the entire surface of the Subject Property and at least one-half of the minerals in and under the Subject Property. (*See* App. 273.)

[¶ 18] On or about November 2, 2004, Defendant Colleen L. Weflen, a/k/a Colleen Folven, individually and as heir of Rose M. Weflen, deceased, executed an oil and gas lease in favor of Strata Resources, Inc. covering the Subject Property ("Weflen Lease"). (*See* App. 206–09.) The Weflen Lease was recorded with the Mountrail County Recorder on March 17, 2005, in Book 719, Page 528, as Document No. 315265. (*Id.*) In December 2004, Berry Ventures, Inc. acquired the Weflen Lease via assignment from Strata Resources, Inc. (*See* App. 210–20.) The Assignment was recorded with the Mountrail County Recorder on April 25, 2005, in Book 723, Page 142, as Document No. 315927. (*See* App. 220.)

[¶ 19] On December 28, 2005, the Weflen Appellants published in the Mountrail County Promoter a Notice of Lapse of Mineral Interest dated November 29, 2005. Subsequent notices were published on January 4, 2006 and January 11, 2006. (*See* App. 313.) On January 13, 2006, the Weflen Appellants mailed a copy of the Notice of Lapse to the last two known addresses of record for Ruth A. Nelson. (*See* App. 314–16.) The addresses were obtained from the 1975 Warranty Deed and an Oil and Gas Lease, dated January 12, 1973. (*See* App. 308, 317.) The Weflen Appellants then recorded a copy of the Notice of Termination of Mineral Interest with the Mountrail County Recorder on or about March 6, 2006. (*See* App. 319–20.) Finally, on March 6, 2006, the Weflen Appellants recorded the Notice of Termination of Mineral Interest, Affidavit of

Publication, Affidavit of Mailing, and Notice of Lapse of Mineral Interest with the Mountrail County Recorder, as Document No. 320668. (*Id.*)

[¶ 20] On or about January 1, 2006, after the Weflen Appellants published the first Notice of Lapse, EOG acquired an interest in the Weflen Lease via assignment from Berry Ventures, Inc. (*See* App. 221–53.) Said Assignment was recorded with the Mountrail County Recorder on March 17, 2006, in Book 740, Page 456, as Document No. 320878. (*See* App. 253.)

[¶ 21] At the time the Weflen Appellants recorded and published the Notices of Lapse, Ruth A. Nelson was deceased. (*See* App. 274.) However, there was no publicly available evidence of her death. No Affidavit of Heirship, death certificate, or probate documents were on record in Mountrail County. (*See* App. 325–26.) Nothing in the record in this case indicates that there was anything of record to put the Weflen Appellants on notice of Ruth Nelson's death, nor is there any evidence in the record indicating the Weflens had actual knowledge of Ruth Nelson's death. Prior to her death, Ruth Nelson conveyed her remaining one-half interest in the minerals in and under the Subject Property to the Capps Appellees via a Mineral Deed dated June 6, 1979.[2] (*See* App. 321–22.) The Mineral Deed was not filed with the Mountrail County Recorder until March 31, 2009, thirty years later, and more than three years after the Notice of Lapse. (*See id.*) In fact, the Capps Appellees made no effort at all to provide notice of the transfer of Ruth Nelson's mineral interest until October 30, 2008, when the Capps Appellees filed Statements of Claim of Mineral Interests with the Mountrail County

[2] The district court appears to have made an erroneous factual finding that the Capps Appellees obtained the mineral interest via distribution of Ruth Nelson's estate. (*See* App. 288.) However, it is undisputed that the interest was transferred via a Mineral Deed executed by Ruth Nelson. (*See* App. 321–22.)

Recorder. (*See* App. 323–24.) The Statements of Claim of Mineral Interest were filed twenty-nine years after the execution of Mineral Deed and nearly three years after the Weflen Appellants first published and recorded their Notice of Lapse. (*See id.*)

LAW AND ARGUMENT

I. Statement of the Standard of Review.

[¶ 22] On appeal from an order granting a motion for summary judgment, the North Dakota Supreme Court examines the "pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence" to determine whether the district court's decision was proper. *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 11, 785 N.W.2d 164, 171. A district court's order granting summary judgment is "reviewed anew on the entire record." *Halvorson v. Sentry Ins.*, 2008 ND 205, ¶ 5, 757 N.W.2d 398, 399. Particularly, "[t]he question of how to interpret and apply chapter 38-18.1, N.D.C.C., [the Act], is a question of law; therefore the standard of review is de novo." *Johnson v. Taliaferro*, 2011 ND 34, ¶ 9, 793 N.W.2d 804, 806.

[¶ 23] Courts "may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment." *Saltsman v. Sharp*, 2011 ND 172, ¶ 18, 803 N.W.2d 553, 560 (citations omitted). However, where the nonmoving party does not present sufficient evidence to support its claims, summary judgment is proper. *Barbie v. Minko Const., Inc.*, 2009 ND 99, ¶ 6, 766 N.W.2d 458, 460-61. Mere speculation will not defeat a motion for summary judgment and a "scintilla of evidence is not sufficient to support a claim." *Id.* at 461 (citations omitted). If a party fails to present competent, admissible evidence to support its claim, "it is presumed such evidence does not exist." *Halvorson*, 2008 ND 205, ¶ 5, 757

N.W.2d at 400. Summary judgment must therefore be entered against a party who fails to present evidence establishing an essential element of its claim. *Id.*

II. Rule 54(b) Certification was Proper.

[¶ 24] The Supreme Court's determination whether it has jurisdiction over an appeal in a case where there are unresolved claims remaining before the trial court is a two-step analysis. *Sargent Cnty. Bank v. Wentworth*, 434 N.W.2d 562, 563 (N.D. 1989) (citations omitted). The first step is whether the appeal falls under Section 28-27-02 of the North Dakota Century Code, which lists the orders that may be carried to the Supreme Court. *Id.* at 563; N.D.C.C. § 28-27-02. "An order which involves the merits of the action or some part thereof" is appealable. N.D.C.C. § 28-27-02(5). Here, the district court, in granting the Capps Appellees' motion for summary judgment, quieted title to the minerals in and under the Subject Property in the Appellees. (*See* App. 292–93.) Because this is a quiet title action, the district court's Second Order quieting title to the real property at issue involved the merits of the action.

[¶ 25] The second step in determining whether the Supreme Court has jurisdiction over an appeal is whether the lower court certified the order as final under Rule 54(b) of the North Dakota Rules of Civil Procedure. *Mann v. N.D. Tax Comm'r*, 2005 ND 36, ¶ 7, 692 N.W.2d 490, 493. In an action with multiple claims or parties, Rule 54(b) gives courts power to "direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay." N.D.R.Civ.P. 54(b). If judgment in a multi-claim litigation is certified under Rule 54(b), it may be appealed although there are unadjudicated claims remaining in the trial court. *Mann*, 2005 ND 36, ¶ 8, 692 N.W.2d at 494. A determination to certify a judgment as final under Rule 54(b) will not be overturned unless the district court

abused its discretion. *Gissel v. Kenmare Twp.*, 479 N.W.2d 876, 877 (N.D. 1992). Here, the district court granted the Capps Appellees' motion for summary judgment, quieting title in the minerals in and under the Subject Property. (*See* App. 292–93.) The court granted Rule 54(b) certification because "the ancillary claims in this case depend upon final resolution" of the quiet title dispute. (*See* App. 292.) The "ancillary claims" include the various cross-claims and counterclaims by the various mineral lessees, including EOG. The Capps Appellees' quiet title claim must be resolved before the ancillary claims may be determined. Rule 54(b) certification was therefore proper.

III. The History and Purpose of the Termination of Mineral Interest Act.

[¶ 26] A review of the language and legislative history of the Act demonstrates that the primary purpose of the Act is to promote the productive use of oil, gas, and other minerals in the state of North Dakota. This is important because when interpreting a statute, the primary objective is to ascertain and give effect to the intent of the legislature. *Harter v. N.D. Dept. of Transp.*, 2005 ND 70, ¶ 7, 694 N.W.2d 677, 679; *Public Serv. Comm'n v. Wimbledon Grain*, 2003 ND 104, ¶ 20, 663 N.W.2d 186, 193; *Holtz v. N.D. Workers Comp. Bureau*, 479 N.W.2d 469, 470 (N.D. 1992).

[¶ 27] "Rights of property . . . may be waived, surrendered, or lost by neglect in the cases provided by law." N.D.C.C. § 1-01-08. The Act, Chapter 38-18.1 of the North Dakota Century Code, is one example of how the North Dakota legislature intended that property rights may be surrendered by neglect. Under the Act, where a mineral interest is unused for at least twenty years, the interest is deemed abandoned immediately when the surface owner publishes a notice of lapse in the official county newspaper where the property is located. N.D.C.C. § 38-18.1-02; N.D.C.C. § 38-18.1-06. At that time, the mineral interest vests in the surface owner. *Id.* A mineral interest is "used" when (1) the

minerals are produced or operations are conducted to produce the minerals under the interest, (2) the interest is subject to a lease, (3) taxes are paid on the interest, or (4) the mineral interest owner records a statement of claim. N.D.C.C. § 38-18.1-03(1).

[¶ 28] A review of the legislative history of the Act shows that the legislature's primary purpose was to ensure that minerals were put into productive hands. Testimony before the House committee demonstrates that North Dakota legislators and citizens alike supported the notion of putting abandoned minerals to productive use. *See Hearing on H.B. 1045 before the House Natural Res. Comm.*, 60th N.D. Leg. Sess. (Feb. 13, 1983) (testimony of Rep. Murphy) ("[W]e need to get the minerals back into the hands of the people who would use it to the best of its ability."); *see also id.* (testimony of Jim Moend) (stating that "the mineral rights should be given to someone who can manage them"); *see also id.* (testimony of Emil Wigenbach) (stating that he did not "believe that the mineral, something so valuable, should be left unattended by the owner"). The Senate committee agreed. *See Hearing on H.B. 1045 before the Senate Finance & Taxation Comm.*, 60th N.D. Leg. Sess. (March 8, 1983) (summarized testimony of Rep. Murphy)[3] ("Would get the royalty back into hands who will make better use of it. If don't use for 20 years–lose it."); *see also id.* (summarized testimony of Arthur Bauer) ("If don't use . . . then lose it."); (summarized testimony of Rep. Murphy) ("Reason for getting mineral interest back into surface owner, to get some use out of it.")

[¶ 29] One way to encourage surface owners to locate and use abandoned minerals is to allow surface owners to obtain the mineral interests without overly

[3] The Senate committee testimony was paraphrased for the written record, rather than recorded verbatim. The quoted language herein is verbatim from the written record.

burdensome procedural requirements or unnecessary litigation. As the Michigan Supreme Court held in interpreting Michigan's abandoned mineral statute:

> [T]he act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years. The statutory approach to these issues has the added advantage of eliminating uncertainty and minimizing litigation.

Van Slooten v. Larsen, 299 N.W.2d 704, 713-14 (Mich. 1980). The North Dakota legislature also expressed this view:

> My comment was that attorneys are needed many a time. I don't believe our Century Code should be used as job security for attorneys, and that the law should be plain enough so if a person wishes to do their own paperwork they can.

Hearing on H.B. 1045 before the Senate Judiciary Comm., 60th N.D. Leg. Sess. (Feb. 13, 1983) (testimony of Rep. Drovdahl); *see also Hearing on H.B. 1084 before the Sen. Finance and Taxation Comm.*, 60th N.D. Leg. Sess. (March 8, 1983) (statement of Arthur Bauer) ("I don't think that it's very favorably felt in the legislature to burden the citizens of North Dakota with more legal actions.").

[¶ 30] Another way to encourage the efficient transfer of minerals to surface owners who will put those minerals to productive use is to disregard the subjective concepts of actual notice or knowledge, and allow the parties to rely on record title. The deletion of a proposed "actual notice" provision from the Act evinces the North Dakota legislature's intent in this regard. Local attorney Arthur Bauer suggested deleting or altering the phrase allowing a mineral owner to file a statement of claim "within sixty days after receiving actual notice that the mineral interest has lapsed." *See* Proposed Amendments to House Bill 1084, submitted by Arthur C. Bauer (emphasis added). Mr. Bauer stated that making the sixty-day period contingent on the mineral owner's actual

notice of lapse "would provide a legal loophole in the bill large enough to hold a Greyhound bus." *Id.* In other words, under the proposed language, every mineral owner who abandoned their mineral interest could bring suit against the surface owner and claim that the mineral owner did not receive actual notice of the lapse. Such a policy would create a question of fact that would generally require resolution by trial. The legislature agreed, as they deleted the "actual notice" provision, and simply required the mineral owner to file a statement of claim within sixty days of after first date of publication of the notice of lapse. N.D.C.C. § 38-18.1-05. By allowing the parties to rely on recording dates that are publicly available, rather than another's subjective knowledge or intent, the likelihood of litigation is reduced and the process is greatly simplified. *See also Texaco, Inc. v. Short*, 454 U.S. 516, 528 (1982) (noting the similarity between abandoned mineral statutes and recording statutes, in that both essentially "provide that a valid transfer of property may be defeated by a subsequent purported transfer if the earlier transfer is not properly recorded")).

[¶ 31] The legislative history, as well as the language of the Act as it existed in 2005 and 2006 when the Weflen Appellants mailed and published the Notices of Lapse, shows that the legislature's primary intent was to encourage the productive use of abandoned minerals. This was accomplished by enacting a statute that allows the surface owner to obtain abandoned minerals without the need for an attorney or onerous legal proceedings. This purpose has been promoted by the Court in recent cases, discussed below, where the Court continued to apply the bright line rules that the legislature adopted, thus facilitating the surface owner's ability to put abandoned minerals to productive use.

[¶ 32] As discussed in detail below, the district court did not consider the legislative intent or properly apply recent case law in reversing the Original Order. The district court's holdings in its Second Order are therefore erroneous and should be overturned by this Court.

IV. The District Court Erred in Holding that Mailing Notice to a Dead Person at their Address of Record Violates the Termination of Mineral Interest Act.

[¶ 33] The district court erred in holding that mailing notice to a dead person at their address of record is absurd and that the Weflen Appellants were required to conduct a reasonable inquiry to locate the true mineral owners. In *Sorenson v. Felton*, 2011 ND 33, ¶¶13-14, 793 N.W.2d 799, 802-03, this Court held, under the plain language of the Act, a reasonable inquiry to determine the mineral owner's address is required only when the mineral owner's address does not appear of record. *See also Sorenson v. Alinder*, 2011 ND 36, ¶ 6, 793 N.W.2d 797, 799 (applying this principle despite the fact that the mineral owners of record were deceased). The surface owner in *Felton* argued that this interpretation would lead to an absurd result "because a surface owner with knowledge of a mineral owner's correct mailing address could send notice to an incorrect address." *Felton*, 2011 ND 33, ¶ 14, 793 N.W.2d at` 804. However, because those facts were not present in *Felton*, the Court declined to address the issue directly. *Id.*

[¶ 34] Here, the district court discussed *Felton* but then held that "mailing notice to a dead person would be absurd. A party who fails to make a reasonable inquiry must accept the consequences when the owner of record is dead . . . ." (*See* App. 287.) This holding is erroneous for two reasons. First, the court made an incorrect factual finding when it found that the Weflen Appellants "had knowledge" that Ruth A. Nelson was

deceased. Second, the court's holding completely ignores the holdings of this Court in *Alinder* and *Felton*.

A. The District Court Relied on the Incorrect Assumption that the Weflen Appellants had Personal Knowledge that Ruth A. Nelson was Deceased.

[¶ 35] In holding that mailing notice to a dead person is absurd, the district court made an erroneous assumption that the Weflen Appellants "had knowledge" that Ruth A. Nelson was deceased. In the evidentiary context, "knowledge" means a witness perceived an event with his own senses. Fed.R.Ev. 602 Advisory Committee's Note; *see also* Cal.Ev. Code 702 Law Revision Commission Comment (defining personal knowledge as "a present recollection of an impression derived from the exercise of the witness' own senses"); *Argo v. Blue Cross and Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (holding that a witness must have "actually perceived or observed that which he testifies to" while "statements of mere belief" are not considered).[4] Similar to the definition of actual or personal knowledge, statutory law in North Dakota defines actual notice as the "express information of a fact." N.D.C.C. § 01-01-23.

[¶ 36] At his deposition, Defendant/Appellant Norris Weflen testified that he assumed Ruth Nelson was dead, because she would have been old at the time the Notice of Lapse was sent to her last known address:

> Q: Now, at the time that this lawsuit was filed, do you have any idea whether Herman or Ruth were alive?
>
> A: No. I knew they were passed away at that time, yeah, when this was—this was in, you know—I don't know. This was many years

[4] The North Dakota Rules of Evidence contain the same knowledge requirement for witnesses, but do not contain a definition of the term "personal knowledge." *See* N.D.R.Ev. 602.

later. They would have had to have been extremely old that that time, so—

Q: This is in 2005.

A: Right.

Q: November of 2005.

A: Exactly. So they would have had to have been extremely old to still be alive at that time.

Q: So you assumed they were dead.

A: Yeah.

(EOG App. 37–38.) The deposition of Jackie Nelson is consistent with Mr. Weflen's testimony that the Weflens thought Ruth Nelson was likely deceased because of her approximate age:

Q: Did Colleen [Weflen] know anything about Ruth Nelson?

A: She indicated to me that she thought she was dead and—but she had moved to Washington and I don't remember all of the details. I have a reference that she didn't have any kids, so maybe I had—maybe she had mentioned she didn't think she had any kids.

Q: Okay. And when—when she said she thought she was dead, did she say—did she give any reason why she thought she was dead or anything like that?

A: Well, she would have been old.

(EOG App. 42.)

[¶ 37] Based on this deposition testimony, the district court determined that *Felton* did not apply, and a reasonable inquiry was required, because "there is evidence that the Weflens had knowledge that Ruth Nelson was dead at the time they mailed the Notice of Lapse to her address of record." (*See* App. 287.) However, this testimony establishes two facts, neither of which supports the court's conclusion. First, the Weflen Appellants were not aware of Ruth Nelson's exact age, but rather knew that she was

"old." Second, the Weflen Appellants thought Ruth Nelson was likely deceased due to her advanced age. The testimony does not establish that the Weflen Appellants had express information of the fact that Ruth Nelson was deceased. In fact, the deposition testimony, which is undisputed and the only evidence of the Weflen Appellants' knowledge in this regard, shows that the Weflen Appellants had very little knowledge regarding Ruth Nelson— they knew she was old but not how old and they thought she might not have had children. The undisputed facts show that the Weflen Appellants lacked express information of whether Ruth Nelson was alive or dead.

[¶ 38] Further, the Appellees' argument, that knowledge a mineral owner of record is "old" and therefore may be deceased requires a reasonable inquiry, ignores the obvious purpose of the Act and would invite a landslide of litigation. Because twenty years with no activity must pass before minerals may be deemed abandoned, it is very likely in many cases that the mineral owner of record will be of advanced age.[5] Thus, if a record owner is deceased, and its heirs are permitted to bring a quiet title action on the premise that the record owner was of advanced age, and therefore likely deceased, such an action could be brought in countless cases. Further, the factual issue in these cases would be whether the mineral owner of record was "old enough" that it would be likely he or she was deceased, so as to put the surface owner on notice that they must conduct a reasonable inquiry. This application of the Act would place an unreasonable burden on the court system, the parties, and jurors. A better policy is to continue to follow the plain

[5] For example, in *Alinder*, fifty years passed without any use or recorded transfer of the minerals. *Alinder*, 2011 ND 36, ¶ 2, 793 N.W.2d at 798. Thus, the mineral owners in *Alinder* would have been rather old. This did not create a duty to conduct a reasonable inquiry, neither did the fact that the mineral owners were actually deceased. *Id.* at ¶ 6, p. 799.

language of the Act and the case law interpreting it, and require a reasonable inquiry only where the record owner's address does not appear of record. To hold otherwise will place an unfair burden on the surface owner and invite a wealth of litigation.

B. The District Court's Holding that Mailing Notice to a Dead Person is Absurd Ignores the *Felton* Holding.

[¶ 39] Further, even if there were some evidence that the Weflen Appellants had actual, personal knowledge that Ruth Nelson was deceased at the time they mailed the Notice of Lapse, the district court erred in holding that *Felton* was inapplicable. As discussed above, the surface owner in *Felton* argued that the Court's bright line rule, requiring a reasonable inquiry only where the mineral owner's address does not appear of record, would create an absurd result where the surface owner had actual knowledge regarding the mineral owner's whereabouts and purposefully mailed the notice of lapse to an incorrect address of record. *Felton*, 2011 ND 33, ¶ 14, 793 N.W.2d at 803. The Court, declining to issue an advisory opinion, noted that its role was limited to interpreting the statute set forth by the legislature. *Id.* The Court added that when the Act was applied to the particular set of facts in *Felton*, "there [was] not an absurd result because Felton would have received notice if she had kept her address of record current." *Id.* The United States Supreme Court, in interpreting an analogous abandoned minerals statute, has similarly held that property owners are responsible for taking some minimal action to preserve their rights: "What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Texaco*, 454 U.S. at 526 (quoting *Hawkins v. Barney's Lessee*, 30 U.S. 457, 466 (1831)).

[¶ 40] This rationale applies equally to this case. The Capps Appellees claim their interest through a Mineral Deed dated June 6, 1979. (*See* App. 284, 321–22.) Ruth

Nelson passed away a few years later. (See EOG App. 15.) The Weflen Appellants completed the notice requirements under the Act in late 2005 and early 2006. (*See* App. 310–16.) The Capps Appellees filed Statements of Claim of Mineral Interests with the Mountrail County Recorder on October 30, 2008. (*See* App. 323–24.) The Statements of Claim of Mineral Interest were filed twenty-nine years after the execution of the Mineral Deed and nearly three years after the Weflen Appellants obtained a vested interest in the minerals. The Mineral Deed was not recorded until 2009. (*See* App. 321–22.) The Capps Appellees did not take a single further step in three decades to utilize or protect their rights, or ensure the public property records were current. Thus, there is no absurd result, because if the Capps Appellees had kept record title current at any time in the thirty years leading up to this action, they would have received notice that their mineral interest had lapsed.

[¶ 41] Based on the foregoing, it is clear the district court's finding that *Felton* does not apply because the Weflen Appellants had knowledge of Ruth Nelson's death is erroneous. The undisputed record shows that, rather than having actual notice or personal knowledge, the Weflen Appellants "thought" or "assumed" Ruth Nelson was deceased, due to the fact that she was likely of advanced age. The Weflen Appellants could not have had actual knowledge via the public record. Further, as this Court noted in *Felton*, it was the mineral owners' failure to preserve their rights, rather than any actions by the Weflen Appellants, that caused the mineral interest to lapse. As to the failure to receive notice, if the Appellees had kept the record current, they would have received actual notice of the lapse (as discussed in Section V, below, the Appellees received constructive notice of the lapse when it was published). The Weflen Appellants

fully complied with the notice provisions of the Act. The district court declined to follow this Court's holding in *Felton* and offered no support for its conclusion that the Weflen Appellants failed to comply with the Act in mailing the Notices of Lapse to Ruth Nelson's address of record. This Court must therefore overturn the district court's decision.

C. The District Court's Holding that Mailing Notice to a Dead Person is Absurd Ignores the *Alinder* Holding.

[¶ 42] Finally, the district court's holding that mailing notice to a dead person is absurd ignores this Court's holding in *Alinder*. In its first rationale for denying the Weflen Appellants' motion for summary judgment, the district court asserted that "mailing notice to a dead person would be absurd. A party who fails to make a reasonable inquiry must accept the consequences when the owner of record is dead." (*See* App. 287.) This statement completely ignores the facts and holding of *Alinder*. In *Alinder*, the mineral owners acquired their interest via a mineral deed recorded in November 1953. *Alinder*, 2011 ND 36, ¶ 2, 793 N.W.2d at 798. After more than fifty years of non-use, the plaintiff published the notice of lapse in January 2007. *Id.* The plaintiff also mailed the notice of lapse to the mineral owners at their address of record, pursuant to the Act. *Id.* However, the mineral owners, a husband and wife, had been dead for twenty-seven and eight years, respectively. *Id.* Approximately one year after the plaintiff mailed the notice of lapse to the mineral owners' address of record, the mineral owners' children filed statements of claim. *Id.* at ¶ 3, p. 798. The plaintiff brought a quiet title action to clear title to the mineral interests. *Id.* The only issue on appeal was whether the plaintiff was required to conduct a reasonable inquiry, or whether the plaintiff was correct in simply mailing the notice to the mineral owners' address of

record. *Id.* at ¶ 4, p. 798-99. Relying on *Felton*, the Court issued a very brief opinion. Regardless of the fact that the mineral owners had both been deceased for many years, the plaintiff was not required to conduct a reasonable inquiry. *Id.* at ¶ 6, p. 799. Rather, the Court asserted a bright line rule: because the former mineral owners' address was shown of record, further inquiry was not required. *Id.* The Court apparently did not find it "absurd" that the plaintiff mailed the notice of lapse to the deceased former mineral owners, as the former owners remained the owners of record. *See id.*

[¶ 43] Here, the district court held that "mailing notice to a dead person would be absurd" and that a party who did not conduct a reasonable inquiry, despite the fact that the mineral owners' address appeared of record, "must accept the consequences when the owner of record is dead." This holding ignores the *Alinder* case, as well as the purpose of the Act. First, it is clear that the fact that the record mineral owner is deceased does not cause otherwise proper notice under the Act to fail. This is evidenced by the facts and unambiguous holding in the *Alinder* case. In *Alinder*, the mineral owners of record had been deceased for many years and the Court held the notice was proper under the Act. Second, the point of *Alinder*, and the underlying rationale of the Act, is that where the successors-in-interest of record mineral owners fail for many years to take a single step to protect their interest, that interest may be forfeited. As here, the successors-in-interest in *Alinder* for many years failed to record probate documents, affidavits of heirship, a mineral deed showing succession of the interest, or even a statement of claim. As here, the surface owner in *Alinder* mailed the notice of lapse to the last known address of the record mineral owners, who happened to be deceased. The facts of this case are virtually identical to those in *Alinder* and the Court's holding in that case applies: because Ruth

Nelson was the record owner of the minerals, and her address was shown of record, the Weflen Appellants were correct in simply mailing the Notice of Lapse to Ruth Nelson's address of record. The district court's decision to the contrary is erroneous and should be overturned.

V. The District Court Erred in Holding that Mailing Notice Via Certified, Restricted Delivery Violates the Termination of Mineral Interest Act.

[¶ 44] The district court erred in holding that mailing notice via certified mail, restricted delivery violates the Act, as this holding ignores the plain, unambiguous language of the Act.

[¶ 45] The district court held that the Act does not require a notice of lapse be mailed by certified mail, return receipt, restricted delivery. (*See* App. 287.) EOG does not dispute this. The Act does not require a particular type of mailing, but merely requires the notice be mailed to the mineral owner's last address of record. However, the district court went on to hold that "when the addressee is dead or even believed to be dead, notice mailed" in this manner "prevents any possibility that an heir of the addressee might receive the notice." This holding was in error for three reasons.

[¶ 46] First, the ruling is once again based on the erroneous findings that (1) the Weflen Appellants had personal knowledge that Ruth Nelson is deceased, and (2) Ruth Nelson's death was relevant to the court's analysis. As discussed in detail above, the record shows that the Weflen Appellants did not actually know whether Ruth Nelson was dead, and because she was the record mineral owner, her mortality is irrelevant as it was irrelevant in *Alinder*. The Court made clear in *Alinder* that what is relevant is record title, not actual title.

[¶ 47] Second, the Act requires that notice be made "by mailing a copy of the notice to the owner of the mineral interest." N.D.C.C. § 38-18.1-06. Neither the Act, nor any other provision of the North Dakota Century Code, defines what forms of mailing are appropriate. However, where a statute does not specify how service is to be made, service may be made as provided in the North Dakota Rules of Civil Procedure. N.D.R.Civ.P. 4(m); *see also* N.D.R.Civ.P. 4, Explanatory Note. The North Dakota Supreme Court has stated that service of the notice under the Act "is similar to the personal service requirement" of Rule 4 of the North Dakota Rules of Civil Procedure. *Spring Creek Ranch, LLC v. Svenberg*, 1999 ND 113, ¶ 18, 595 N.W.2d 323, 328. The Weflen Appellants' notice by mail fully complied with Rule 4. The North Dakota Supreme Court has found that service was properly made under Rule 4 when delivered by certified mail, restricted delivery. *See Bank Center First v. Kostelecky*, 2000 ND 84, ¶ 2, 609 N.W.2d 721, 721; *see also Peplinksi v. Cnty. of Richland*, 2000 ND 156, ¶ 21, 615 N.W.2d 546, 553 (holding that notice of expiration of redemption period was properly made by registered mail, restricted delivery, despite the fact that delivery was unsuccessful).

[¶ 48] The Act does not specify how to serve notice on a mineral interest owner, other than requiring it to be mailed, and thus guidance is found in Rule 4 of the North Dakota Rules of Civil Procedure. Notice via certified mail, restricted delivery, requires the signature of the recipient, who must be a designated individual. United States Postal Service, Mail with Extra Services, https://www.usps.com/send/insurance-and-extra-services.html (last accessed July 25, 2012). The district court re-characterized notice in this case from a prudent method to ensure and prove that service is made on the intended

recipient, to a method that "prevents any possibility that an heir of the addressee might receive notice." (*See* App. 287–88.) The Appellees claim that this made notice ineffective because it was not in line with the Act. However, as stated above, the Act merely states that notice must be mailed. There are several methods of delivery via United States mail. The Weflen Appellants chose a method that was perfectly consistent with Rule 4 and approved by this Court in earlier cases. Further, it was the Appellees' thirty year-long failure to record the Mineral Deed from Ruth Nelson in the Mountrail County property records that prevented them from receiving actual notice of the lapse, not the method of mailing utilized by the Weflen Appellants. In fact, the Appellees, while complaining of the method of mailing the Notice of Lapse, have not asserted that a different method would have ensured they would have received actual notice.

[¶ 49] Third, while notice via mail did not result in actual notice to the Capps Appellees, the Capps Appellees received constructive notice of the lapse, which is in itself sufficient under the Act. The Act requires that surface owners "intending to succeed to the ownership of a mineral interest upon its lapse shall give notice of the lapse of the mineral interest by publication." N.D.C.C. § 38-18.1-06(1). The Act continues, "however, if the address of the mineral owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made." N.D.C.C. § 38-18.1-06(2). Thus, notice must be given primarily by publication, and only by mailing if the mineral owner's address is located. The purpose of mailing notice is to give the "actual notice, if possible, in addition to the constructive notice given by publication." *Chester v. Einarson*, 34 N.W.2d 418, 433 (N.D. 1948) (discussing notice to

affected landowners of county board's actions). Mailing is an attempt to provide actual notice, although only constructive notice by publication is required for a surface owner to obtain title to the lapsed mineral interest. *See* N.D.C.C. § 38-18.1-02 (stating that title vests in the surface owners when the notice of lapse is first published); *see also* Proposed Amendments to House Bill 1084, submitted by Arthur C. Bauer (requiring actual notice under the Act would greatly increase litigation and prevent productive use of minerals). The Weflen Appellants published the notice of lapse three times in the appropriate county newspaper in accordance with the Act. (*See* App. 313.) By virtue of this publication, the Capps Appellees received constructive notice of the lapse, and the mineral interest vested in the Weflen Defendants. The Weflen Defendants then mailed the Notice of Lapse to the two last known addresses of the owner of record, Ruth Nelson. (*See* App. 314–16.) The Capps Appellees did not receive actual notice by mail, because they failed to record their Mineral Deed. This was not the fault of the Weflen Defendants, who properly relied on the public property records in compliance with the Act. The Notice of Lapse was properly published and mailed pursuant to the Act. The district court's decision to the contrary is erroneous and must be overturned.

VI. The District Court Erred in Holding the Mineral Owner's Address Did Not Appear of Record.

[¶ 50] The district court erred in holding the mineral owner's address did not appear of record. For its third and final rationale for granting the Capps Appellees' motion for summary judgment and denying and overturning its previous decision regarding the Weflen Appellants' motion, the district court engaged in a lengthy discussion of the process that occurs when a person's property passes to his or her heirs upon death. (*See* App. 288–92.) EOG does not dispute the underlying principles of the

Uniform Probate Code, or the legal principle that a person's property automatically devolves to his or her heirs upon death, subject to administration. However, EOG does dispute the district court's ultimate conclusion that because Ruth Nelson was deceased, she was not the "owner" of the minerals at issue for purposes of the Act and therefore the mineral owner's address did not appear of record and a reasonable inquiry was required.

[¶ 51] As a preliminary matter, the holding is incorrect because the Capps Appellees did not receive their interests via distribution of Ruth Nelson's estate. Rather, they received their interests via a 1979 Mineral Deed, executed by Ruth Nelson. (*See* App. 312–22.) At that point, they became the actual owners of the interest at issue, although they were not the record owners of said interest. However, regardless of how the Appellees originally received their interests, the district court's main contention—that because Ruth Nelson was not the actual owner of the minerals, the "owner's address" was not of record and the Weflen Appellants were therefore required to make a reasonable inquiry—is erroneous.

[¶ 52] The Weflen Appellants were entitled to rely on the real property records in the Mountrail County Recorder's office when searching for the mineral interest owner and the owner's address. This principle is clear from the plain language of the Act, which states "if the address of the mineral owner is shown of record or can be determined by a reasonable inquiry," notice must be given by mail. N.D.C.C. § 38-18.1-06(2); *see also Chester*, 34 N.W.2d at 434 (holding the clerk "performed his duty" under a similar notice statute by mailing notice only to the names and addresses listed in the register of deeds). It is also clear from *Alinder*, where the mineral interest owners of record were deceased, it is proper and, in fact, required that the surface owner mail notice to the

mineral interest owners of record if their address appears of record. *See Alinder*, 2011 ND 36, ¶ 6, 793 N.W.2d at 799. Clearly, in that case, the record owners were not the actual owners because they were deceased. Despite that, this Court held that the surface owner was entitled to rely on the deceased owners' address of record, and was not required to conduct a reasonable inquiry. *Id.* Further, in *Felton* this Court held that mailing to the address of record was proper, even when that address was outdated and incorrect. *Felton*, 2011 ND 33, ¶ 15, 793 N.W.2d at 803. All of the above supports the underlying principle that the mineral owner is responsible for keeping the record current, and the surface owner is entitled to rely on the record, even where the mineral owner neglects his interest. Here, for over thirty years, the Capps Appellees failed to record the Mineral Deed by which they received their interest in the Subject Property and neglected their interest. As the Supreme Court found in *Texaco, supra*, "a valid transfer of property may be defeated by a subsequent purported transfer if the earlier transfer is not properly recorded." *Texaco*, 454 U.S. at 528.

[¶ 53] Finally, as a practical matter, the district court's holding would place an impossible burden on surface owners in situations such as this, where a property transfer is not recorded, whether via distribution of an estate or ordinary mineral deed. Consider the situation if the Capps Appellees had assigned their mineral interest and that assignment was also not recorded, then the assignee subsequently assigned the interest to another party and that assignment was not recorded, and so on. Surface owners such as the Weflen Appellants have no means of tracking the unrecorded assignments in order to serve the notice of lapse on the actual, current mineral interest owner. Thus, the district court's rationale that a reasonable inquiry is required where the record owner is not the

actual owner ignores the practical consequences of such a rule. The North Dakota legislature's solution to this problem was simply to require the mineral owner to take minimal steps every twenty years to protect his interest. *See* N.D.C.C. § 38-18.1-02; *see also Texaco*, 454 U.S. at 528-29. Because the district court ignored the legislature's intent, this Court's legal precedent, and the practical consequences in issuing its Second Order, this Court should overturn the decision in its entirety, granting the Weflen Appellants' motion for summary judgment and denying the Capps Appellees' motion.

CONCLUSION

[¶ 54] For the reasons set forth above, EOG respectfully requests this Court to overturn the district court's judgment that granted Capps Appellees' motion for reconsideration and denied Weflen Appellants' motion for summary judgment.

DATED this 10th day of August, 2012.

FREDRIKSON & BYRON, P.A.

By */s/ Amy L. De Kok*

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ADDENDUM

N.D.C.C. § 1-01-08 (2011). Rights of property and person - How waived.

Rights of property and of person may be waived, surrendered, or lost by neglect in the cases provided by law.

N.D.C.C. § 38-18.1-02 (2005). Statement of claims - Recording - Reversion.

Any mineral interest is, if unused for a period of twenty years immediately preceding the first publication of the notice required by section 38-18.1-06, deemed to be abandoned, unless a statement of claim is recorded in accordance with section 38-18.1-04. Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment. The owner of the surface estate in the land in or under which the mineral interest is located on the date of abandonment may record a statement of succession in interest indicating that the owner has succeeded to ownership of the minerals under this chapter.

N.D.C.C. § 38-18.1-03 (2005). When mineral interest deemed to be used.

1. A mineral interest is deemed to be used when:
   a. There are any minerals produced under that interest.
   b. Operations are being conducted thereon for injection, withdrawal, storage, or disposal of water, gas, or other fluid substances.
   c. In the case of solid minerals, there is production from a common vein or seam by the owners of such mineral interest.
   d. The mineral interest on any tract is subject to a lease, mortgage, assignment, or conveyance of the mineral interest recorded in the office of the recorder in the county in which the mineral interest is located.
   e. The mineral interest on any tract is subject to an order or an agreement to pool or unitize, recorded in the office of the recorder in the county in which the mineral interest is located.
   f. Taxes are paid on the mineral interest by the owner or the owner's agent.
   g. A proper statement of claim is recorded as provided by section 38-18.1-04.
   h. The owner or lessee utilizes the mineral interest in a manner pursuant to, or authorized by, the instrument creating the mineral interest.

N.D.C.C. § 38-18.1-05 (2005). Failure to record the statement of claim.

Failure to record the statement of claim within the time period provided in section 38-18.1-04 will not cause a mineral interest to be extinguished if the owner of the mineral interests meets all of the following requirements:

1. Owns on or more mineral interest in the county in which the mineral interest in question is located at the time of the expiration of the time period provided in section 38-18.1-04.
2. Has failed to preserve the mineral interest in question.

3. Within sixty days after the first publication of the notice provided for in section 38-18.1-06, recorded a statement of claim . . . .

N.D.C.C. § 38-18.1-06 (2005). Notice of lapse of mineral interest — Method.

1. Any person intending to succeed to the ownership of a mineral interest upon its lapse shall give notice of the lapse of the mineral interest by publication.

2. The publication provided for in subsection 1 must be made once each week for three weeks in the official county newspaper of the county in which the mineral interest is located; however, if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made.

3. The notice must state:

   a. The name of the record owner of the mineral interests;

   b. A description of the land on which the mineral interest involved is located; and

   c. The name of the person giving the notice.

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Patricia R. Capps, f/k/a Patricia Anderson, Terrel A. Anderson, a/k/a Terral Anderson, Gerald C. Wools, Penny Brink, Michael Lee, Gwen Hassan, Melissa Kellor, and the Estate of Ruth A. Nelson, Deceased,	)	
Plaintiffs and Appellees,	)	Supreme Court No. 20120184
v.	)	
Colleen L. Weflen, et al.,	)	
Defendants,	)	**CERTIFICATE OF SERVICE**
Colleen L. Weflen, a/k/a Colleen Weflen, a single woman, Marleen Weflen, f/k/a Marleen W. Tiedt, Sharon Kruse, a/k/a Sharon O. Kruse f/k/a Sharon Weflen, a married woman dealing in her sole and separate property, Catherine Harris, Cathy Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLC, a Delaware Limited Liability Company, Gulfport Energy Corporation, and EOG Resources, Inc.,	)	
Appellants.	)	

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

I hereby certify that on August 10, 2012, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

1. BRIEF OF DEFENDANT/APPELLANT EOG RESOURCES, INC.; and,

2. SUPPLEMENTAL APPENDIX OF DEFENDANT/APPELLANT EOG RESOURCES, INC.

and served the same electronically as follows:

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