20120184

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
October 3, 2012
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., 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, f/k/a Cathy Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLLC, a Delaware Limited Liability Company, Gulfport Energy Corporation, and EOG Resources, Inc., Appellants.	)	Supreme Court No. 20120184

Appeal from Summary Judgment entered on February 8, 2012
Civil No. 31-10-C-0009
County of Mountrail, Northwest Judicial District
Honorable Judge David W. Nelson, Presiding

BRIEF OF PLAINTIFFS/APPELLEES PENNY BRINK, MICHAEL LEE, GWEN HASSAN AND MELISSA KELLOR

Sheldon A. Smith, ND Bar No.04062
David J. Smith, ND Bar No. 06610
SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
Telephone: (701) 258-0630
Fax: (701) 258-6498
dsmith@smithbakke.com

Attorneys for Appellees Penny
Brink, Michael Lee, Gwen Hassan,
and Melissa Kellor

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PARAGRAPH

CASES:

STATUTES AND RULES:

STATEMENT OF ISSUES

(1.) Whether the District Court correctly determined that mailing a *Notice of Lapse* to a dead person at their address of record is absurd and violates the intent of the Termination of Mineral Interest Act?

(2.) Whether the District Court correctly determined the method utilized by the Weflens to mail the Notice of Lapse was improper and prevented delivery of the Notice of Lapse?

(3.) Whether the District Court correctly determined that the mineral owner's address did not appear of record?

STATEMENT OF THE CASE

(4.) On January 18, 2010, Appellees Patricia Capps ("Capps") and Terrel Anderson ("Anderson") commenced a quiet title action against Appellants Colleen Weflen, Marleen Weflen, Sharon Kruse, Catherine Harris, and Norris Weflen (collectively the "Weflens") in Mountrail County, North Dakota. (App. 23-32) The underlying premise of Capps and Anderson's claim was that the Weflens failed to comply with the terms of N.D.C.C. § 38-18.1, otherwise known as the *Termination of Mineral Interest Act*, and that title to certain mineral interests should be quieted to Capps and Anderson. (Id.)

(5.) The Weflens filed a *Motion for Summary Judgment* against Capps and Anderson on September 29, 2010. (Docket No. 129) Capps and Anderson filed a *Cross-Motion for Summary Judgment* on November 1, 2010. (Docket No. 139) Oral arguments on both motions were heard on December 15, 2010, along with several other motions. On February 17, 2011, the District Court granted a motion by the Welfens to join Appellants

EOG Resources, Inc. ("EOG"), Gulfport Energy Corporation ("Gulfport"), and the Estate of Ruth A. Nelson. (EOG App. 14-19) Within the same order, the District Court granted a motion by Capps and Anderson to amend their complaint to include Gwen Hassan, Penny Brink, Michael Lee, and Melissa Kellor (collectively the "Hassan Defendants") to the action. (Id.)

(6.) On March 25, 2011, the District Court granted the Weflens' *Motion for Summary Judgment* against Capps and Anderson. (App. 127-137) On July 28, 2011, the Weflens filed a second *Motion for Summary Judgment* against the Hassan Defendants asserting the same rationale that persuaded the District Court to grant summary judgment against Capps and Anderson. (EOG App. 21-22) In response, Capps and Anderson filed a *Request for Reconsideration* on August 29, 2011, and the Hassan Defendants filed their response opposing summary judgment on August 31, 2011. (EOG App. 23-27; Docket No. 223) Oral arguments were heard on these motions on November 14, 2011. On February 2, 2011, the District Court issued its order that denied the Weflens' *Motion for Summary Judgment* against the Hassan Defendants, granted Capps and Anderson's *Request for Reconsideration*, vacated its own March 22, 2011 order that granted summary judgment to the Weflens, and certified the order under N.D.R.Civ.P. Rule 54(b) as a final resolution. (App. 282-294) The Weflens, EOG, Gulfport and Windsor Bakken have filed timely *Notices of Appeal* of *Judgment* entered on February 8, 2012. (App. 299; EOG App. 29, 33)

STATEMENT OF FACTS

(7.) On March 24, 1975, Ruth A. Nelson executed a warranty deed transferring the following real property located in Mountrail County, North Dakota to Olav and Rose Weflen:

Township 153 North, Range 90 West:
Section 4: Lots 3, 4, S1/2NW1/4, SW1/4[1]
Section 9: NW1/4

(the "subject property"). (App. 25-26) Within the 1975 warranty deed, Ruth A. Nelson reserved one-half of all minerals. (App. 308) The deed was recorded on April 16, 1975, in the Mountrail County Office of Register of Deeds. (App. 308)

(8.) Between November 29 and December 8, 2005, Colleen Weflen, Sharon Krause, Norris Weflen, Marleen Tiedt, and Catherine Gunderson executed a *Notice of Lapse of Mineral Interests*, directed to Ruth A. Nelson at two addresses: Lyons, Oregon, which is Ruth A. Nelson's address listed on a 1973 oil and gas lease (App. 317), and Tacoma, Washington, which is Ruth A. Nelson's address listed on the 1975 deed (App. 308). (App. 310) This *Notice of Lapse* was subsequently published in the *Mountrail County Promoter* on December 28, 2005, January 13, 2006, and January 11, 2006. (App. 313) On January 13, 2006, Karen Riekeman, an employee of the attorney for the Weflens', mailed the *Notice of Lapse* to the two addresses listed for Ruth A. Nelson within the *Notice of Lapse*. (App. 314) Both copies of the *Notice of Lapse* were mailed by Restricted Delivery with Return Receipt Requested. (App. 315-316).

(9.) A *Notice of Termination of Mineral Interests* was executed by the Weflens'

[1] The actual legal description for Section 4 contained on the warranty deed differs slightly due to measurement anomalies; however, the description above has been universally accepted by the parties.

attorney, Dwight Eiken, on March 3, 2006 and recorded on March 6, 2006. (App. 319) Also recorded with the *Notice of Termination* at Document No. 320668 were (1) the *Affidavit of Publication* dated January 13, 2006; (2) Karen Riekeman's *Affidavit of Mailing* dated March 2, 2006; (3) copies of the envelopes addressed to Ruth A. Nelson at the Oregon and Washington addresses listed on the *Notice of Lapse* (both marked Return to Sender); (4) the *Notice of Lapse* dated November 29, 2005. (App. 310-316)

(10.) On October 27, 2008, Patricia Capps ("Capps") executed a *Statement of Claim of Mineral Interest*, claiming an interest in the minerals underlying the subject property. (App. 323) This *Statement of Claim* was recorded on October 30, 2008. (App. 323) On October 28, 2008, Terrel Anderson ("Anderson") executed a similar statement of claim, which was recorded October 31, 2008. (App. 324) On March 31, 2009, Capps and Anderson recorded a *Mineral Deed* executed by Ruth A. Nelson on June 6, 1979. (App. 321) This *Mineral Deed* purports to transfer a one-half interest in the remaining minerals belonging to Ruth A. Nelson and underlying the subject property. (App. 321)

(11.) Capps and Anderson subsequently commenced a quiet title action against the Welfens on January 18, 2010. (App. 23-32) By their summons and complaint, Capps and Anderson were seeking to quiet title against the Weflens in one-half of the mineral interests underlying the subject property. (Id.) The Weflens removed the lawsuit to U.S. District Court of North Dakota on January 19, 2010. (EOG App. 1) Capps and Andersons moved the U.S. District Court to remand the matter to North Dakota state district court on January, 28, 2010, and the U.S. District Court granted that motion on March 4, 2010. (EOG App. 6-10)

(12.) On July 28, 2010, the Weflens moved the court to add EOG, Gulfport, and

Whiting Oil and Gas ("Whiting") as defendants in this action due to their status as purported leaseholders in the subject property. (EOG App. 14) The Weflens filed a second joinder motion on August 27, 2010, requesting that the Estate of Ruth A. Nelson also be joined as a defendant. (Id.) Capps and Anderson subsequently requested to amend their complaint to add the Hassan Defendants as plaintiffs. (EOG App. 15) The District Court granted all three requests on February 17, 2011. (EOG App. 18)

(13.) On September 29, 2010, the Weflens moved for summary judgment against Capps and Anderson. (App. 127) Capps and Anderson filed a cross-motion for summary judgment on November 1, 2010 and oral arguments for both motions (as well as the joinder motions above) were heard by the District Court on December 15, 2010. (App. 127-128) The parties were permitted to file supplemental briefs because of the North Dakota Supreme Court's decisions in Sorenson v. Felton, 2011 ND 33, 793 N.W.2d 799; Johnson v. Taliaferro, 2011 ND 34, 793 N.W.2d 804; and Sorenson v. Alinder, 2011 ND 36, 793 N.W.2d 797. (App. 128)

(14.) The District Court granted the Weflen's motion for summary judgment and denied Capps and Anderson's cross-motion for summary judgment on March 25, 2011. (App. 135) On May 4, 2011, the Weflens filed a Supplemental Pleading to add EOG, Gulfport and Whiting as defendants and the Estate of Ruth A. Nelson and the Hassan Defendants as plaintiffs. (App. 172) The Hassan Defendants filed a N*otice of Appearance* on May 4, 2011 (***See*** Docket No. 187) and filed their *Answer* to Capps and Anderson's *Complaint* on May 23, 2011. (Docket No. 207)

(15.) The Weflens filed a Motion for Summary Judgment against the Hassan Defendants on July 28, 2011. (EOG App. 21) The Weflens asserted the same arguments

against the Hassan Defendants that had persuaded the District Court to grant *Summary Judgment* against Capps and Anderson. (Docket No. 215) Capps and Anderson filed their *Response Brief to Weflens' Second Motion for Summary Judgment and Request for Reconsideration of Court's Denial of Capps' Summary Judgment Motion* on August 29, 2011. (EOG App. 23) The Hassan Defendants filed their brief in opposition to the Weflens' second *Motion for Summary Judgment* on August 31, 2012. (Docket No. 223) The District Court held oral arguments on the motions on November 14, 2011.

(16.) On February 2, 2011, the District Court issued its order that denied the Weflens' *Motion for Summary Judgment* against the Hassan Defendants, granted Capps and Anderson's *Request for Reconsideration*, vacated its own March 22, 2011 order that granted summary judgment to the Weflens, and certified the order under N.D.R.Civ.P. Rule 54(b) as a final resolution. (App. 282) The court provided three separate bases for its change in position: (1) mailing notice to a dead person at their address of record is absurd; (2) mailing notice certified, restricted delivery is not required and mailing notice to a dead person by certified, restricted delivery guarantees notice will not be received by the mineral owner; and (3) the owner's address did not appear of record because the record owner was not the actual owner because property devolves to the decedent's heirs upon death. (Id.)

(17.) The Weflens filed their *Notice of Appeal* on April 5, 2012. (App. 299) EOG filed its *Notice of Appeal* on April 13, 2012. (EOG App. 33) Windsor and Gulfport filed their *Notice of Appeal* on April 19, 2012. (EOG App. 29)

LAW AND ARGUMENT

I. Standard of Review.

(18.) The judgment that is being appealed is the District Court's *Judgment* dated February 14, 2012, which was certified under Rule 54(b) as a final judgment by the District Court. (App. 297) Under that *Judgment*, the District Court: (1) vacated its own March 22, 2011 *Amended Order Granting Weflen's Motion for Summary Judgment and Denying Capps' Cross-Motion for Summary Judgment* and (2) granted Capps and Anderson's *Request for Reconsideration* dated August 29, 2011. Motions to reconsider are treated like motions to amend a judgment under N.D.R.Civ.P. 59(j), which are reviewed under the abuse of discretion standard. Langer v. Pender, 2009 ND 51, ¶12, 764 N.W.2d 159, 163. However, motions under N.D.R.Civ.P. 59(j) "may be reversed if the trial court misinterpreted or misapplied the law." White v. Altru Health Sys., 2008 ND 48, ¶7, 746 N.W.2d 173, 176. The interpretation of a statute, including N.D.C.C. §38-18.1, is a question of law, reviewed under the de novo standard. Johnson v. Taliaferro, 2011 ND 34, ¶ 9, 793 N.W.2d 804, 806. Because this appeal deals with the interpretation of N.D.C.C. § 38-18.1-06(2), the standard of review on appeal is de novo.

II. The District Court's Rule 54(b) Certification was proper.

(19.) The District Court certified its February 2, 2012 order as a final resolution of the abandoned mineral claim between the various parties under N.D.R.Civ.P. Rule 54(b). (App. 282) Rule 54(b) states:

> If an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim, or if multiple parties are involved, ***the court may 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***. Otherwise, any order or other decision, however

> designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(emphasis added). A general rule regarding the Supreme Court's jurisdiction as a court of appeals is that "[o]nly those judgments and decrees which constitute a final judgment of the rights of the parties to the action and orders enumerated by statute are appealable." In re A.B., 2005 ND 216, ¶ 5, 707 N.W.2d 75, 77. N.D.R.Civ.P. Rule 54(b) paves an alternative avenue for a matter to be reviewed by the Supreme Court by permitting the District Court "to enter a final judgment adjudicating fewer than all of the claims of all of the parties if the court expressly determines that there is no just reason for delay and expressly directs the entry of judgment." Brummund v. Brummund, 2008 ND 224, ¶ 5, 758 N.W.2d 735, 737.

(20.) The Supreme Court utilizes the abuse of discretion standard in determining whether the District Court's election to enter a final judgment under N.D.R.Civ.P. Rule 54(b) was proper. Id. "A district court abuses its discretion if it acts in an unreasonable, arbitrary, or unconscionable manner, if its decision is not the product of a rational mental process leading to a reasoned decision, or if it misinterprets or misapplies the law." City of Mandan v. Strata Corp., 2012 ND 173, ¶6, 819 N.W.2d 557, 560 (quoting Citizens State Bank–Midwest v. Symington, 2010 ND 56, ¶ 8, 780 N.W.2d 676).

(21.) The District Court outlined the need for N.D.R.Civ.P. Rule 54(b) certification in its February 2, 2012 *Order*:

> The parties all urge that final resolution of the Dormant Mineral Act dispute should be reached before the ancillary claims are addressed, because the relationship between the

> dormant minerals dispute and the ancillary claims is such that resolution of the latter first requires resolution of the former… the Court agrees there is no just reason to delay the judgment on the main claim.

(App. 292) We assert the District Court conclusion is well-reasoned and permits the efficient administration of all claims between the parties and cannot be categorized as an abuse of discretion. Therefore, the District Court's Rule 54(b) certification was proper.

III. The District Court correctly determined that mailing a Notice of Lapse to a dead person at their address of record is absurd and violates the Termination of Mineral Interest Act.

(22.) The particular provision in the Termination of Mineral Interest Act (N.D.C.C. § 38-18.1) that is at issue in this matter is § 38-18.1-06(2), which details the method and requirements of the surface owner to provide the *Notice of Lapse* of the mineral interest. This Court briefly summarized the legislative history of the Termination of Mineral Interest Act in Sorenson v. Felton, 2011 ND 33, ¶ 9, 793 N.W.2d 799, 802, which includes amendments to § 38-18.1-06 in both 2007 and 2009. Neither the 2007 nor the 2009 amendments were made retroactive. Id. The Weflens commenced publication under § 38-18.1-06 in December 2005 and mailed notices to Ruth A. Nelson in 2006, before those amendments were effective. Accordingly, neither the 2007, nor the 2009 amendment is applicable to this case. In December 2005, § 38-18.1-06(2) read as follows:

> 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***.

(Emphasis added).

(23.) In its February 2, 2012 *Order Denying Weflens' Motion for Summary Judgment; Granting Capps' Motion for Reconsideration and Rule 54(b) Certification*, the District Court recognized this Court's interpretation of § 38-18.1-06(2) in Felton and in Sorenson v. Alinder, 2001 ND 36, 793 N.W.2d 797. Specifically, the District Court cited this Court's holding that § 38-18.1-06(2) requires a "reasonable inquiry" only when the mineral owner's address does not appear of record. The possibility that the Court's interpretation of § 38-18.1-06(2) leads to an absurd result was made by Felton, who argued that "a surface owner with knowledge of a mineral owner's correct mailing address could send notice to an incorrect mailing address." Felton at ¶14. However, the Court indicated it would not issue an advisory opinion on a set of facts that was not actually before the Court on appeal. Id. We assert that the application of the facts of this particular case do in fact result in an absurdity.

(24.) The North Dakota Supreme Court has long held that "[s]tatutes must be construed to avoid absurd results." Felton at ¶14; Toso v. Workforce Safety & Ins., 2006 ND 70, ¶ 25, 712 N.W.2d 312; Ness v. St. Aloisius Hospital, 313 N.W.2d 781, 782–83 (N.D.1981). "Statutes are not to be 'read in isolation or applied in a vacuum,'" and the Court "must consider the practical effects of a particular construction and avoid absurd or ludicrous results." In re D & P Terminal, Inc., 2012 ND 149, ¶ 17, 819 N.W.2d 491, 497, reh'g denied (Aug. 20, 2012). While the Court has previously parsed this same version of § 38-18.1-06(2) in Felton, that review was limited to the specific fact pattern of Felton and did not foreclose the possibility that a separate, distinguishable set of facts could produce an absurdity under the Court's construction in Felton. ***See*** Felton at ¶ 14.

(25.) Here, the District Court relied on evidence that the Weflens had knowledge, at the time they published and mailed their *Notice of Lapse*, that Ruth A. Nelson was deceased. Norris Weflen testified at his deposition that he knew Herman and Ruth Nelson were deceased at the time the lawsuit was filed and assumed they were dead in November 2005. (EOG App. 37-38) Jackie Nelson testified at her deposition that Colleen Weflen indicated she thought Ruth was dead. (EOG App. 42) At the time the Court issued its February 2, 2012 *Order*, no party had presented evidence to rebut that evidence. None of the Appellants has cited any fact in the record to rebut that evidence.

(26.) Essentially, the evidence before the District Court was that the Weflens mailed the *Notice of Lapse* to an individual whom they knew or assumed or thought to be dead. By taking this action, it allowed them to gain title to valuable mineral interests and potentially exploit an unintended loophole in the Termination of Mineral Interest Act. If this behavior was permitted, the mailing of the notice would serve no legitimate or rational purpose whatsoever. The District Court was absolutely correct in determining that this sequence of facts results in an absurdity, especially when a reasonable inquiry would have undoubtedly resulted in finding the correct owner of the minerals. Accordingly, the District Court was persuaded by this evidence to deny the Weflen's July 28, 2010 *Motion for Summary Judgment* and grant Capps and Anderson's *Motion to Reconsider*.

(27.) "When adherence to the letter of the law would cause an absurd result, we give effect to the legislative intent even though contrary to the letter of the law." Samdahl v. N. Dakota Dept. of Transp. Dir., 518 N.W.2d 714, 717 (N.D. 1994). When examining the factual situation present in this case, permitting surface owners to mail a *Notice of*

Intent to a mineral owner of record, whom they knew or believed or assumed to be dead, is absurd; surely it was not the intent of the legislature to characterize this as notice.

(28.) According to EOG, the primary purpose of the Termination of Mineral Interest Act "is to ensure that minerals were put into productive hands." ***See*** EOG's Appellant Brief at ¶ 28. EOG also asserts that legislative intent indicates that this process should not require the use of attorneys. Id. at ¶29. What is missing from this argument is evidence that the minerals would be unproductive if they remained with the mineral owner after the filing of a *Notice of Lapse*. There are a great number of individuals who own minerals but no surface estate in North Dakota. These individuals are fully capable of executing oil and gas leases, and many do. Regarding the use of attorneys in this process, that rationale is contradicted by subsequent amendments to the Act, including the enactment of N.D.C.C. § 38-18.1-06.1. Additionally, none of provisions of § 38-18.1-06(2) require employing an attorney.

(29.) Instead, we assert the obvious intent of the legislature in crafting § 38-18.1-06(2) was to provide notice under due process of law for the forfeiture of mineral interests. To render that notice provision irrelevant, then permit the surface owner to complete a taking is absurd. The remedy is to give effect to legislative intent, the letter of the law notwithstanding. Samdahl at 717. Permitting the Weflens to mail Notice of Lapse to a dead person is absurd. This Court can give effect to the notice provision of § 38-18.1-06(2) simply by requiring the second step of the statute: conducting a reasonable inquiry.

IV. The District Court correctly determined the method utilized by the Weflens to mail the Notice of Lapse was improper and prevented delivery of the Notice of Lapse.

(30.) In 2005, § 38-18.1-06(2) established a two-step process to provide notice to a mineral owner of the surface owner's *Notice of Lapse*: (1) publication of the *Notice of Lapse* in the official county newspaper where the mineral interest is located; and (2) "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.*** (emphasis added). The Weflens' actions related to publication are not at issue here. However, in its February 2, 2012 order, the District Court correctly identifies that the controlling statute does not require certified mail, return receipt, or restricted delivery.

(31.) "Interpretation of statutes is a question of law." Meier v. N. Dakota Dept. of Human Services, 2012 ND 134, ¶ 6, 818 N.W.2d 774, 776. "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." N.D.C.C. § 1-02-02. "If statutory language is ambiguous or doubtful in meaning, courts may consider extrinsic aids, such as legislative history, to determine legislative intent." Kaspari v. Olson, 2011 ND 124, ¶ 13, 799 N.W.2d 348.

(32.) The Appellees have made comments in their briefs about the legislative intent of the Termination of Mineral Interest Act and § 38-18.1-06(2). However, the statute is not ambiguous and this court has already indicated in Felton that "the purpose and meaning of the statute can be understood when looking at the whole provision," and "section 38–18.1–06(2) requires notice by mail 'if the address of the mineral interest owner is shown

of record or can be determined upon reasonable inquiry.'" Felton at ¶11. It is undisputed that "[t]he surface owner must comply with the notice provisions in section 38–18.1–06, N.D.C.C., to claim the abandoned minerals." Id. But the Weflens did not simply mail a copy of notice to the owner within 10 days of publication, as required by § 38-18.1-06(2). The mailing was done in a manner significantly more restrictive, and blatantly to the advantage of the surface owner.

(33.) According to the United States Postal Service ("USPS), "Certified Mail Service" permits a sender to track the delivery (or attempted delivery) of their item; "Return Receipt" provides proof that an item was delivered in the form of a postcard or e-mail bearing the signature of the recipient; and "Restricted Delivery" permits the sender to specify who can sign and receive the item. ***See*** USPS.COM, https://www.usps.com/send/insurance-and-extra-services.htm (last visited Oct. 2, 2012). We assume these services were employed to provide documentation of the mailing, similar to utilizing these services under N.D.R.Civ.P. Rule 4. However, by adding these extra mail services, the Weflens made it more difficult to accomplish notice to the mineral owner of record. If there was a forwarding address, the notice may not have reached the owner. If the owner of record was incapacitate or, as in this case, deceased, no other individual could receive the Notice of Lapse and forward it onto heirs of the mineral owner of record, such as the Hassan Defendants. In fact, the act of mailing the *Notice of Lapse* with these extra services attached would be an exercise in futility and would all but assure that the Notice would never reach its recipient and the surface owner could succeed on their claim for minerals that were never truly abandoned. The Weflens altered the method by which notice was provided and did not comply with § 38-18.1-

06(2); accordingly, the Weflens, as surface owners should not be able to claim the abandoned minerals.

V. The District Court correctly determined that the mineral owner's address did not appear of record.

(34.) The third reason the District Court provided for reversing its earlier position and granting Capps and Anderson's *Request for Reconsideration* was that the "owner" of the mineral interest's address did not appear of record and the record owner (Ruth A. Nelson) was no longer the actual owner under North Dakota law. The District Court cited N.D.C.C. § 30.1-12-01, which states:

> Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to the decedent's heirs…

The importance of this analysis is due to mailing requirement of § 38-18.1-06(2), which again states in pertinent part:

> 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***.

(Emphasis added). Under N.D.C.C. § 30.1-12-01, Ruth A. Nelson is no longer the owner of the mineral interest. Ownership devolved to Ruth A. Nelson's heirs at law. The notice requirement in effect in 2005 did not simply require the surface owner to provide notice

to the owner of record. "Property passes upon death, not distribution." Feickert v. Frounfelter, 486, N.W.2d 131, 132 (N.D. 1991).

(35.) The strict interpretation of § 38-18.1-06(2) requires mailing of notice to the "owner of the mineral interest." If the actual owner's address was not of record, then the second prong (the reasonable inquiry) should have been conducted. The trial court logically continues this argument with the analysis that the critical question is not whether the Weflens knew Ruth A. Nelson was deceased, but rather whether Ruth A. Nelson actually was deceased. The Weflens knowledge is irrelevant if she is in fact dead. Upon her death, Ruth A. Nelson ceases to own any minerals underlying the subject property and cannot abandon any minerals underlying the subject property.

(36.) EOG has argued that providing notice to the actual owner, as opposed to the record owner, would put an impossible burden on the surface owner. ***See*** EOG's Appellant Brief at ¶ 53. EOG employs an analogy of successive assignments to illustrate potential difficulty in enforcing the District Court's conclusion. Id. This argument is incorrect for two reasons: first, an assignment does not transfer ownership, which is what is at issue under § 38-18.1; and second, there would be no reason to include a reasonable inquiry requirement in the statute. Whether it stems from the issued patent or some successive deed, a surface owner will almost always be able to identify a record mineral owner to whom to send a Notice of Lapse. There can be a district difference between an actual owner and a record owner. Whether the record owner is the actual owner may very well be uncovered by a reasonable inquiry.

(37.) In this case, the Weflens mailed the *Notice of Lapse* to Ruth A. Nelson at a time when she was in fact deceased and under North Dakota law was not the owner of any

mineral interest underlying the subject property. Accordingly, the Hassan Defendants contend the Weflens actions did not comport with the requirements of § 38-18.1-06(2) by failing to conduct a reasonable inquiry.

CONCLUSION

(38.) For the foregoing reasons, the Hassan Defendants respectfully request this Court affirm the District Court's *Judgment* denying the Weflens' Motion for Summary Judgment, granting Capps and Anderson's *Request for Reconsideration*, and vacating the March 22, 2011 *Amended Order Granting Weflen's Motion for Summary Judgment and Denying Capps' Cross-Motion for Summary Judgment*.

Dated this 3rd day of October, 2012.

SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG

By: s/ David J. Smith

Sheldon A. Smith, ND Bar No.04062
David J. Smith, ND Bar No. 06610
SMITH BAKKE PORSBORG
SCHWEIGERT & ARMSTRONG
122 East Broadway Avenue
P.O. Box 460
Bismarck, ND 58502-0460
Telephone: (701) 258-0630
Fax: (701) 258-6498

Attorneys for Appellees Penny Brink, Michael Lee, Gwen Hassan, and Melissa Kellor

CERTIFICATE OF SERVICE

(39.) I hereby certify that a true and correct copy of the foregoing corrected brief was on the 4th day of October, 2012, electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed to the following:

Richard P. Olson
Wanda Fischer
OLSON & BURNS, P.C.
17 First Avenue SE
P.O. Box 1180
Minot, ND 58702-1180
olsonpc@minotlaw.com
wandafischer@cableone.net

Lawrence Bender
Amy DeKok
Jillian Rupnow
FREDRIKSON & BYRON, P.A.
200 N. 3rd Street, Ste. 150
P.O. Box 1855
Bismarck, ND 58502-1855
lbender@fredlaw.com
adekok@fredlaw.com
jrupnow@fredlaw.com

S. Thomas Throne
James Mowry
Jacob T. Haseman
THRONE LAW OFFICE
2 North Main Street, Ste. 402
P.O. Box 1056
Sheridan, WY 82801
tthrone@thronelaw.com
jmowry@thronelaw.com
jhaseman@thronelaw.com

Monte L. Rogneby
VOGEL LAW FIRM
200 N. 3rd Street, Ste. 201
P.O. Box 2097
Bismarck, ND 58502-2097
mrogneby@vogellaw.com

Patrick W. Durick
Zachary E. Pelham
PEARCE & DURICK
314 East Thayer Avenue
P.O. Box 400
Bismarck, ND 58502-0400
pwd@pearce-durick.com
zep@pearce-durick.com

Peter H. Furuseth
FURUSETH LAW FIRM
P.O. Box 417
Williston, ND 58802-0417
pete@furusethlaw.com

Kristin Bjella How
Wade C. Mann
CROWLEY FLECK, PLLP
P.O. Box 2798
Bismarck, ND 58502-2798
kbjellahow@crowleyfleck.com
wmann@crowleyfleck.com

and served by U.S. Mail, postage prepaid, addressed to the following:

Gerald C. Wools
111 S. Camas Avenue
Forks, WA 98331

By: s/ David J. Smith
David J. Smith