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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

REPLY BRIEF OF DEFENDANT/APPELLANT EOG RESOURCES, INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES……..... iv

Paragraph

LAW AND ARGUMENT ……... 1

I. The Argument that Mailing Notice to a Deceased Person is Absurd Ignores the Plain Language of the Act and this Court's Holdings in *Alinder* and *Felton* ……..... 1

A. Pursuant to *Felton*, the Result in this Case is Not Absurd Because the Appellees would have Received the Notice of Lapse if they had Kept the Record Current ……....….. 2

B. Pursuant to *Alinder*, the Result in this Case is Not Absurd Because the Appellees' Failure to Record their Interests Caused the Notice of Lapse to be Mailed to a Deceased Record Owner ……..……. 4

II. The Argument that Certified Mail Restricted Delivery Caused the Notice to Fail Shifts the Burden under the Act ……..…… 6

III. The Argument that the Mineral Owner's Address Did Not Appear of Record Ignores *Felton* and *Alinder* ……...……... 8

IV. The Capps Appellees' Constitutional Argument Fails as a Matter of Law Because the Act is Not Self-Executing ……..... 10

CONCLUSION …….. 13

ADDENDUM ……..... ADD-1

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Paragraph

STATE CASES

North Dakota State Cases

Bank Center First v. Kostelecky, 2000 ND 84, 609 N.W.2d 721 ……. 8

Johnson v. Taliaferro, 2001 ND 43, 798 N.W.2d 804 …….. 10, 11

Peplinksi v. Cnty. of Richland, 2000 ND 156, 615 N.W.2d 546 …….. 8

Sorenson v. Alinder, 2011 ND 36, 793 N.W.2d 797 ……..... 1, 5, 8, 9

Sorenson v. Felton, 2011 ND 33, 793 N.W.2d 799 ……..……... 1, 2, 3, 4, 8, 9, 11

Spring Creek Ranch, LLC v. Svenberg, 1999 ND 113, 595 N.W.2d 323 ……. 7

FEDERAL CASES

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) ……... 11

Texaco, Inc. v. Short, 454 U.S. 516 (1982) ……... 11, 12

STATE STATUTES AND RULES

N.D.C.C. § 38-18.1-02 (2005) ……. 10

N.D.C.C. § 38-18.1-06 (2005) ……..……. 7

N.D.R.Civ.P. 4 ……... 7, 11, 12

N.D.R.App.P. 44 ……..... 10

OTHER AUTHORITIES

Letter Op'n Att'y Gen., 95-L-44 ……. 10

LAW AND ARGUMENT

I. The Argument that Mailing Notice to a Deceased Person is Absurd Ignores the Plain Language of the Act and this Court's Holdings in *Alinder* and *Felton*.

[¶ 1] The Appellees' argument that mailing notice to a deceased person is absurd ignores the plain language of North Dakota's Termination of Mineral Interest Act, codified at Chapter 38-18.1 of the North Dakota Century Code (the "Act") and this Court's holdings in *Sorenson v. Alinder*, 2011 ND 36, 793 N.W.2d 797 and *Sorenson v. Felton*, 2011 ND 33, 793 N.W.2d 799. The Appellees ignore the distinction between an actual owner and a record owner. The Weflen Appellants complied with the Act in mailing the Notice of Lapse to the record mineral owner.

A. Pursuant to *Felton*, the Result in this Case is Not Absurd Because the Appellees would have Received the Notice of Lapse if they had Kept the Record Current.

[¶ 2] The mineral owner in *Felton* argued that the Court's interpretation of the Act could lead to an absurd result where the surface owner mails a notice of lapse to an address the surface owner knows to be incorrect. *Felton*, 2011 ND 33, ¶ 14, 793 N.W.2d at 803. While the *Felton* Court declined to issue an advisory opinion, it noted that in the case before it, "there [was] not an absurd result because Felton would have received notice if she had kept her address of record current." *Id.* This was true even though the surface owner had notice that the record address was not the actual address. *Felton*, 2011 ND 33, ¶ 4, 793 N.W.2d at 800 (surface owner mailed notice to record address in Florida, even though internet search revealed the mineral owner did not appear to live in Florida). The Court, rather than holding the surface owner should have realized the address was outdated and conducted further inquiry, held an inquiry was not required because the mineral owner's address was of record. *Felton*, 2011 ND 33, ¶ 14, 793 N.W.2d at 803.

[¶ 3] Similarly, although the Weflen Appellants thought the record mineral owner may have been deceased, the Weflen Appellants properly relied on the record. The record showed that Ruth Nelson was the mineral owner and provided her record address. Because Ruth Nelson's address was of record, the Weflen Appellants were not required to conduct an inquiry to verify it was the correct address. The result, that the Notice of Lapse was sent to an incorrect address, is not absurd because the Appellees, like the mineral owner in *Felton*, would have received the Notice of Lapse if they had kept the record current.

B. Pursuant to *Alinder*, the Result in this Case is Not Absurd Because the Appellees' Failure to Record their Interests Caused the Notice of Lapse to be Mailed to a Deceased Record Owner.

[¶ 4] The *Felton* rationale was applied and the same result was reached in *Alinder*, where both record mineral owners were deceased. *Alinder*, 2011 ND 36, ¶¶ 2, 6, 793 N.W.2d at 798–99. The Hassan Appellees do not address *Alinder*. *See* Brief of Plaintiffs/Appellees Penny Brink, Michael Lee, Gwen Hassan, and Melissa Kellor ("Hassan Brief"), ¶¶ 23–30, pp. 9–12. The Capps Appellees' "distinguish" *Alinder* by claiming that this Court failed to consider the facts, and ruled without realizing the record owners were deceased. Brief of Appellees Patricia R. Capps and Terrell A. Anderson ("Capps Brief"), p. 16. The Capps Appellees claim that *Alinder* "does not address the effect [the mineral owners'] deaths had on the notice requirement under" the Act. *Id.* However, in *Alinder*, the fact that the record mineral owners were deceased was irrelevant. *See Alinder*, 2011 ND 36, ¶ 6, 797 N.W.2d at 799. The mineral owners' death had no effect on the notice requirement, because they remained the record mineral owners. Similarly, Ruth Nelson's death had no effect on the notice requirement because

she remained the record mineral owner.[1] While the Appellees were the actual mineral owners at the time the Notice of Lapse was mailed, the Appellees did not receive the Notice because they failed to ensure that they were the record mineral owners. The Notice of Lapse was properly mailed to the record mineral owner.

[¶ 5] The Capps Appellees next argue that if this Court did realize that the record mineral owners in *Alinder* were deceased, "the precedential effect of a determination that dead people can own property is revolutionary." Capps Brief, p. 16. The Capps Appellees again ignore the distinction between record owner and actual owner. It is undisputed that Ruth Nelson was the record owner, and not the actual owner, when the Notice of Lapse was published and mailed; however, whether she was the actual owner is irrelevant. What is relevant is the Appellees' failure to record their interests, which caused the record to be outdated. The Weflen Appellants followed the Act and the *Alinder* holding in mailing the Notice of Lapse to the record mineral owner.

II. The Argument that Certified Mail Restricted Delivery Caused the Notice to Fail Shifts the Burden under the Act.

[¶ 6] The argument that notice sent via certified mail restricted delivery is inappropriate shifts the burden under the Act from the mineral owner to the surface owner. The Hassan Appellees argue that "by adding these extra mail services, the [Weflen Appellants] made it more difficult to accomplish notice to the mineral owner of record." Hassan Brief, ¶ 34, p. 14. This argument fails for two reasons. First, it was impossible for the record mineral owner to receive the Notice of Lapse via any form of

[1] The same rationale applies to the 1979 conveyance of the minerals from Ruth Nelson to the Capps Appellees because the 1979 Mineral Deed was never recorded and Ruth Nelson remained the record mineral owner.

mail because she was deceased. The method of mailing therefore had no effect on the record owner's receipt of the Notice. Second, the Weflen Appellants did not make "it more difficult to accomplish" notice by using certified mail. Rather, the Appellees made it more difficult by failing to record the 1979 Mineral Deed, notice of Ruth Nelson's death, or a Statement of Claim for thirty years. The Appellees' inaction prevented notice from reaching them, not the Weflen Appellants' actions.

[¶ 7] The Capps Appellees' argument relies on the fact that the Act does not require a notice of lapse be sent by certified mail. *See* Capps Brief, pp. 11–13. However EOG has never argued that the Act requires a notice be sent by certified mail. The Act does not require a particular method of mailing, nor does it prohibit any method of mailing. *See* N.D.C.C. § 38-18.1-06(2). This Court has held that service of the notice of lapse "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. Personal service under Rule 4 may be completed by certified mail, restricted delivery. *See Bank Center First v. Kostelecky*, 2000 ND 84, ¶ 2, 609 N.W.2d 721, 721; *Peplinksi v. Cnty. of Richland*, 2000 ND 156, ¶ 21, 615 N.W.2d 546, 553. The Weflen Appellants chose a method that is permitted by the Act, in compliance with Rule 4, approved by this Court, and prudent in that it provided proof of mailing beyond that offered by regular mail.

III. The Argument that the Mineral Owner's Address Did Not Appear of Record Ignores *Felton* and *Alinder*.

[¶ 8] The argument that the "mineral owner's address" did not appear of record because the record owner was deceased completely ignores *Felton* and *Alinder*. In *Alinder*, the record mineral owners were both deceased. *Alinder*, 2011 ND 36, ¶ 2, 793

N.W.2d at 798. The surface owner mailed the notice of lapse to the address of the deceased record mineral owners. *Id.* This Court held that a reasonable inquiry was not required and the surface owner complied with the Act by mailing notice to the record mineral owners. *Alinder*, 2011 ND 36, ¶ 6, 793 N.W.2d at 799. In *Felton*, the record address was outdated. *Felton*, 2011 ND 33, ¶ 12, 793 N.W.2d at 802. The mineral owner argued that the language "address of the mineral owner" meant the actual address of the mineral owner, and where the record address was incorrect, a reasonable inquiry was required. *Felton*, 2011 ND 33, ¶ 15, 793 N.W.2d at 803. The Court held that the Act required the notice be sent to the record address, even if it was not the actual address. *Id.*

[¶ 9] Thus, *Alinder* stands for the proposition that the notice of lapse should be sent to the record owner, even if the record owner is not the actual owner. *Felton* stands for the proposition that the notice of lapse should be mailed to the address of record, even if the address of record is not the actual address of the mineral owner. The Appellees ignore these holdings and continue to insist that the fact that Ruth Nelson was the record, but not actual, owner is relevant. The Weflen Appellants mailed the Notice of Lapse to the record mineral owner at her record address. The Weflen Appellants therefore complied with the notice provisions under the Act.

IV. The Capps Appellees' Constitutional Argument Fails as a Matter of Law Because the Act is Not Self-Executing.

[¶ 10] The Capps Appellees' argument that the Act is unconstitutional as applied rests entirely on their incorrect assumption that the Act is not self-executing.[2] The North

[2] Because the Capps Appellees question the constitutionality of the Act, they were required to notify the attorney general "as soon as the question [was] raised." *See*

Dakota Attorney General and the North Dakota Supreme Court have both held that the Act is self-executing. *See* Letter Op'n Att'y Gen., 95-L-44; *see also Johnson v. Taliaferro*, 2011 ND 34, ¶¶ 13, 17, 793 N.W.2d 804, 807–08. The *Johnson* Court, citing the Act, held that title to the abandoned mineral interests automatically vested in the surface owners upon the first publication of the notice of lapse. *Johnson*, 2011 ND 34, ¶ 17, 793 N.W.2d at 808. The Court then held that the quiet title provisions of the Act, added in 2009, "cannot be used to deprive the [surface owners] of an interest in the minerals that has already vested under N.D.C.C. § 38-18.1-02." *Id.* Thus, the Act is self-executing and the quiet title provisions merely serve to allow a surface owner to remove a cloud on the title.

[¶ 11] The Capps Appellees miss this conclusion by confusing the notice of lapse requirements with the notice requirements for a subsequent quiet title action.[3] As the United States Supreme Court held, "it is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur." *Texaco, Inc. v. Short*, 454 U.S. 516, 533 (1982). The Court further stated that "[t]he reasoning in *Mullane* is applicable to a judicial proceeding

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N.D.R.App.P. 44. At the very least, the Capps Appellees were required do so by October 3, 2012, when their brief was filed. *See* Affidavit of Mailing [Capps Brief]. The Capps Appellees mailed this notice over two weeks late, in violation of Rule 44, and as a result, this constitutional argument should be disregarded.

[3] The 2005 version of the Act that is applicable to this case is silent as to the procedures for a quiet title action. *See Johnson*, 2011 ND 34, ¶ 13, 793 N.W.2d at 807. The Capps Appellees, without citation to authority, claim that the 2009 amendments to the Act are retroactive and that a quiet title claim triggering due process requirements is required. Capps Brief, p. 23. However, both the *Felton* and *Johnson* opinions state that the amendments are not retroactive. *Felton*, 2011 ND 33, ¶ 9, 793 N.W.2d at 802; *see also Johnson*, 2011 ND 34, ¶ 12, 793 N.W.2d at 806–07.

brought to determine whether a lapse of a mineral estate did or did not occur . . . . The due process standards of *Mullane* apply to an 'adjudication' that is 'to be accorded finality.'" *Id.* at 535 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). The Court upheld Indiana's dormant minerals statute, which required no notice of lapse at all. *Id.* at 538. The *Mullane* analysis is therefore inapplicable to the sufficiency of notice required to cause an abandoned mineral interest to vest in the surface owners, but rather would apply to determine whether sufficient notice of a quiet title action was given. This distinction is demonstrated in *Johnson*, where the surface owners did not conduct an inquiry, mailing the notice of lapse to the mineral owner's outdated record address, which was permissible under the Act. *Johnson*, 2011 ND 34, ¶¶ 4–5, 793 N.W.2d at 805. When the surface owners later brought a quiet title action to perfect their interest in the minerals, they did conduct a more thorough inquiry and mailed the summons and complaint to the mineral owner's current address, in compliance with Rule 4 of the North Dakota Rules of Civil Procedure. *Johnson*, 2011 ND 34, ¶ 6, 793 N.W.2d at 806.

[¶ 12] The Capps Appellees claim that "to be constitutional, the statute must set forth a procedure by which a surface owner may give notice that the mineral interest has lapsed." Capps Brief, 19 (citing *Short*, 454 U.S. at 520). This citation to *Short* is incorrect. Page 520 of the opinion states that the statute does not require any specific notice of a lapse, but that it does set forth a procedure by which a surface owner may give notice of a lapse if he so chooses. *Short*, 454 U.S. at 520. As stated above, *Short* upheld the statute despite the lack of a notice requirement. It therefore cannot be said that *Short* stands for the proposition that a statutory notice procedure is required. Further, the Capps

Appellees miss the distinction between the notice of lapse and notice of adjudication to quiet title. If the Weflen Appellants had initiated a quiet title action to perfect their interests, due process would have required that they serve all interest owners with the summons and complaint pursuant to Rule 4. However, in mailing the Notice of Lapse, the Weflen Appellants were not initiating an adjudication "to be accorded finality," but were simply attempting to notify the record mineral owner that her mineral interest was abandoned on the date of the first publication of the Notice of Lapse. Due process was not implicated by the mailing and the Capps Appellees' argument to the contrary fails as a matter of law.

CONCLUSION

[¶ 13] EOG respectfully requests this Court overturn the district court's judgment granting Capps Appellees' motion for reconsideration and denying Weflen Appellants' motion for summary judgment.

DATED this 22nd day of October, 2012.

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ADDENDUM

N.D.C.C. § 38-18.1-02 (2005). Statement of claim – 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. § 38-18.1-06 (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.

N.D.R.Civ.P. 4. Persons Subject to Jurisdiction; Process; Service

(a) Definition of Person. As used in this rule, "person", whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state, includes:

(1) an individual, executor, administrator or other personal representative;
(2) any other fiduciary;
(3) any two or more persons having a joint or common interest;
(4) a partnership;
(5) an association;
(6) a corporation; and
(7) any other legal or commercial entity.

(b) Personal Jurisdiction.

(1) Personal Jurisdiction Based on Presence or Enduring Relationship. A court of this state may exercise personal jurisdiction over a person found within, domiciled in, organized under the laws of, or maintaining a principal place of business in, this state as to any claim for relief.

(2) Personal Jurisdiction Based on Contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this

state that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:

(A) transacting any business in this state;
(B) contracting to supply or supplying service, goods, or other things in this state;
(C) committing a tort within or outside this state causing injury to another person or property within this state;
(D) committing a tort within this state, causing injury to another person or property within or outside this state;
(E) having an interest in, using, or possessing property in this state;
(F) contracting to insure another person, property, or other risk within this state;
(G) acting as a director, manager, trustee, or officer of a corporation organized under the laws of, or having its principal place of business within, this state;
(H) enjoying any other legal status or capacity within this state; or
(I) engaging in any other activity, including cohabitation or sexual intercourse, within this state.

(3) Limitation on Jurisdiction Based on Contacts. If jurisdiction over a person is based solely on paragraph (2) of this subdivision, only a claim for relief arising from bases enumerated in paragraph (2) may be asserted against that person.

(4) Acquisition of Jurisdiction. A court of this state may acquire personal jurisdiction over any person through service of process as provided in this rule or by statute, or by voluntary general appearance in an action by any person either personally or through an attorney or any other authorized person.

(5) Inconvenient Forum. If the court finds, in the interest of substantial justice, the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just.

(c) Process.

(1) Contents of Summons. The summons must:

(A) specify the venue of the court in which the action is brought;
(B) contain the title of the action specifying the names of the parties;
(C) be directed to the defendant;
(D) It must state the time within which these rules require the defendant to appear and defend;
(E) notify the defendant that, if the defendant fails to appear and defend, default judgment will be rendered against the defendant for the relief demanded in the complaint; and
(F) be dated and subscribed by the plaintiff or the plaintiff's attorney and include the post office address of the plaintiff or plaintiff's attorney.

(G) If the action involves real estate and service is by publication, include the additional information required by Rule 4(e)(8).

(2) Summons Served With Complaint. A copy of the complaint must be served with the summons, except when service is by publication under Rule 4(e).

(3) Summons Served and Complaint Not Filed; Demand to File the Complaint. The defendant may serve a written demand on the plaintiff to file the complaint as follows:

(A) service of the demand must be made under Rule 5(b) on the plaintiff's attorney or under Rule 4(d) on the plaintiff if the plaintiff is not represented by an attorney;

(B) in cases with multiple defendants, service of a demand by one defendant is effective for all the defendants;

(C) if the plaintiff does not file the complaint within 20 days after service of the demand, service of the summons is void; and

(D the demand must contain notice that if the complaint is not filed within 20 days, service of the summons is void under this rule, unless, after motion made within 60 days after service of the demand for filing, the court finds excusable neglect.

(4) The defendant may file the summons and complaint, and the costs incurred on behalf of the plaintiff may be taxed as provided in Rule 54(e).

(d) Personal Service.

(1) By Whom. Service of all process may be made:

(A) within the state by any person of legal age and not a party to nor interested in the action; and

(B) outside the state by any person who may make service under the law of this state or under the law of the place where service is made, or by a person who is designated by a court of this state.

(2) How Service Made Within the State. Personal service of process within the state must be made as follows:

(A) Serving an Individual Fourteen Years of Age and Older. Service must be made on an individual 14 or more years of age by:

(i) delivering a copy of the summons to the individual personally;

(ii) leaving a copy of the summons at the individual's dwelling or usual place of residence in the presence of a person of suitable age and discretion who resides there;

(iii) delivering, at the office of the process server, a copy of the summons to the individual's spouse if the spouses reside together;

(iv) delivering a copy of the summons to the individual's agent authorized by appointment or by law to receive service of process; or

(v) any form of mail or third-party commercial delivery addressed to the individual to be served and requiring a signed receipt and resulting in delivery to that individual.

(B) Serving an Individual Under the Age of Fourteen. Service must be made on an individual under the age of 14 by delivering a copy of the summons to:

(i) the individual's guardian, if the individual has one within the state;

(ii) the individual's parent or any person or agency having the individual's care or control, or with whom the individual resides, if the individual does not have a guardian within the state; or

(iii) the person designated by court order, if service cannot be made under (i) or (ii).

(C) Serving an Incompetent Individual or Appointed Guardian. Service must be made on an individual who has been judicially adjudged incompetent or for whom a guardian of the individual's person or estate has been appointed in this state, by delivering a copy of the summons to the individual's guardian. If a general guardian and a guardian ad litem have been appointed, both must be served.

(D) Serving a Corporation, Partnership, or Association. Service must be made on a domestic or foreign corporation or on a partnership or other unincorporated association, by:

(i) delivering a copy of the summons to an officer, director, superintendent or managing or general agent, or partner, or associate, or to an agent authorized by appointment or by law to receive service of process on its behalf, or to one who acted as an agent for the defendant with respect to the matter on which the plaintiff's claim is based and who was an agent of the defendant at the time of service;

(ii) if the sheriff's return indicates no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons at any office of the domestic or foreign corporation, partnership, or unincorporated association within this state with the person in charge of the office; or

(iii) any form of mail or third-party commercial delivery addressed to any of the foregoing persons and requiring a signed receipt and resulting in delivery to that person.

(E) Serving a Municipal or Public Corporation. Service must be made on a city, township, school district, park district, county, or any other municipal or public corporation, by delivering a copy of the summons to any member of its governing board.

(F) Serving the State and Its Agencies.

(i) State. Service must be made on the state by delivering a copy of the summons to the governor or attorney general or an assistant attorney general.

(ii) State Agency. Service must be made on an agency of the state, such as the Bank of North Dakota or the North Dakota Mill and Elevator Association, by delivering a copy of the summons to the managing head of the agency or to the attorney general or an assistant attorney general.

(G) Serving an Agent Not Authorized to Receive Process. If service is made on an agent who is not expressly authorized by appointment or by law to receive service of process on behalf of the defendant, a copy of the summons and complaint must be mailed or delivered via a third-party commercial carrier to the defendant with return receipt requested not later than ten days after service by depositing a copy of the summons and complaint, with postage or shipping prepaid, in a post office or with a commercial carrier in this state and directed to the defendant to be served at the defendant's last reasonably ascertainable address.

(3) How Service of Process is Made Outside the State. Service on any person subject to the personal jurisdiction of the courts of this state may be made outside the state:

(A) in the same manner as service within this state, with the force and effect as though service had been made within this state;

(B) under the law of the place where service is made for service in that place in an action in any of its courts of general jurisdiction; or

(C) as directed by court order.

(e) Service by Publication.

(1) When Service by Publication Permitted. A defendant, whether known or unknown, who has not been served personally under subdivision (d) of this rule may be served by publication in one or more of the following situations only if:

(A) the claim for relief is based on one or more grounds for the exercise of personal jurisdiction under paragraph (2) of subdivision (b) of this rule;

(B) the subject of the action is real or personal property in this state, and:

(i) the defendant has or claims a lien or other interest in the property, whether vested or contingent,

(ii) the relief demanded against the defendant consists wholly or partly in excluding the defendant from that lien or interest or in defining, regulating, or limiting that lien or interest, or

(iii) the action otherwise affects the title to the property;

(C) the action is to foreclose a mortgage, cancel a contract for sale, or to enforce a lien on or a security interest in real or personal property in this state;

(D) the plaintiff has acquired a lien on the defendant's property or credits within this state by attachment, garnishment, or other judicial processes

and the property or credit is the subject matter of the litigation or the underlying claim for relief relates to the property or credits;

(E) the action is for divorce, separation, or annulment of a marriage of a state resident;

(F) the action is to determine parenting rights and responsibilities of an individual subject to the court's jurisdiction; or

(G) the action is to award, partition, condemn, or escheat real or personal property in this state.

(2) Filing of Complaint and Affidavit for Service by Publication. Before service of the summons by publication is authorized, a complaint and affidavit must be filed with the clerk of court where the action is venued. The complaint must set forth a claim in favor of the plaintiff and against the defendant and be based on one or more of the situations specified in paragraph (e)(1). The affidavit must be executed by the plaintiff or the plaintiff's attorney and must state one or more of the following:

(A) that after diligent inquiry personal service of the summons cannot be made on the defendant in this state to the best knowledge, information, and belief of the affiant;

(B) that the defendant is a domestic corporation that has forfeited its charter or right to do business in this state or has failed to file its annual report as required by law;

(C) that the defendant is a domestic or foreign corporation and has no officer, director, superintendent, managing agent, business agent, or other agent authorized by appointment or by law on whom service of process can be made on its behalf in this state; or

(D) that all persons having or claiming an estate or interest in, or lien or encumbrance on, the real property described in the complaint, whether as heirs, devisees, legatees, or personal representative of a deceased person, or under any other title or interest, and not in possession, nor appearing of record in the office of the register of deeds, the clerk of the district court, or the county auditor of the county in which the real property is situated, to have such claim, title or interest in the property, are proceeded against as unknown persons defendant under N.D.C.C. Chs. 32-17 or 32-19, and stating facts necessary to satisfy the requirements of those chapters.

(3) Number of Publications. Service of the summons by publication may be made by publishing the summons three times, once each week for three successive weeks, in a newspaper published in the county where the action is pending. If no newspaper is published in that county, publication may be made in a newspaper having a general circulation in the county.

(4) Mailing or Delivering Summons and Complaint. A copy of the summons and complaint, at any time after the filing of the affidavit for publication and no later than 14 days after the first publication of the summons, must be deposited in a post office or with a third-party commercial carrier in this state, postage or shipping prepaid, and directed to the defendant to be served at the defendant's last reasonably ascertainable address.

(5) Personal Service Outside State is Equivalent to Publication. After the affidavit for publication and the complaint in the action are filed, personal service of the

summons and complaint on the defendant out of state is equivalent to and has the same force and effect as the publication and mailing or delivery provided for in paragraphs (e)(3) and (4).

(6) Time When First Publication or Service Outside State Must Be Made. The first publication of the summons, or personal service of the summons and complaint on the defendant outside the state, must be made within 60 days after the filing of the affidavit for publication. If not made, the action is considered discontinued as to any defendant not served within that time.

(7) When Defendant Served by Publication is Permitted to Defend.

(A) The defendant who is served by publication, or the defendant's representative, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action.

(B) Except in an action for divorce, the defendant who is served by publication, or the defendant's representative, on just terms, may be allowed to defend at any time within three years after entry of judgment if the defendant files an affidavit with the court that states:

(i) the defendant has a good and meritorious defense to the action; and

(ii) the defendant had no actual notice or knowledge of the action to enable the defendant to make application to defend before the entry of judgment.

(C) If the defense is successful and the judgment, or any part of the judgment, has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold under the judgment to a purchaser in good faith may not be affected.

(D) A defendant is considered to have had notice of the action and of the judgment if the defendant:

(i) receives a copy of the summons in the action by mail or delivery under paragraph (e)(4); or

(ii) is personally served the summons outside the state under paragraph (e)(5).

(8) Additional Information to be Published for Real Property. In all cases in which publication of summons is made in an action that the title to, or an interest in or lien on, real property is involved, the publication must also contain a description of the real property and a statement of the object of the action.

(f) Serving a Person in a Foreign Country. Unless otherwise provided by law, an individual, other than a minor or an incompetent person, may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:

(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
(B) as the foreign authority directs in response to a letter rogatory or letter of request; or
(C) unless prohibited by the foreign country's law by
(i) delivering a copy of the summons and the complaint to the individual personally; or
(ii) using any form of mail or third-party commercial delivery that the clerk addresses and sends to the individual and that requires a signed receipt; or
(iii) by other means not prohibited by international agreement, as the court orders.

(4) Serving a Minor or Incompetent Person. Unless otherwise provided by law, service must be made on a minor or an incompetent person in a place not within any judicial district of the United States in the manner prescribed by paragraphs (2)(A), (2)(B), and (3).

(5) Serving a Foreign Corporation, Partnership, or Association. Unless otherwise provided by law, service must be made on a foreign corporation, partnership or other unincorporated association, that is subject to suit under a common name, in a place not within any judicial district of the United States in the manner prescribed for individuals in this subdivision except personal delivery under paragraph (2)(C)(i).

(g) When Service by Publication or Outside State Complete. Service by publication is complete fifteen days after the first publication of the summons. Personal service of the summons and complaint upon the defendant outside the state is complete fifteen days after the date of service.

(h) Amendment of Process or Proof of Service. The court may allow any process or proof of service to be amended at any time on notice and just terms, unless it clearly appears that the substantial rights of the party against whom the process was issued would be materially prejudiced.

(i) Proof of Service. Proof of service of the summons and of the complaint or notice, if any, accompanying the summons or of other process, must be made as follows:

(1) if served by the sheriff or other officer, by the officer's certificate of service;
(2) if served by any other person, by the server's affidavit of service;
(3) if served by publication, by an affidavit made as provided in N.D.C.C. § 31-04-06 and an affidavit of mailing or an affidavit of delivery via a third-party commercial carrier of a copy of the summons and complaint under paragraph (e)(4) of this rule, if the summons and complaint has been deposited;
(4) in any other case of service by mail or delivery via a third-party commercial carrier resulting in delivery under paragraph (d)(2) or (d)(3), by an affidavit of mailing or an affidavit of delivery of a copy of the summons and complaint or other process, with return receipt attached; or
(5) by the written admission of the defendant.

(j) Contents of Proof of Service.

(1) The certificate, affidavit or admission of service mentioned in subdivision (i) must state the date, time, place, and manner of service.

(2) If the process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service must also state that:

(A) the server is of legal age and not a party to the action nor interested in the action, and

(B) the server knew the person served to be the person named in the papers served and the person intended to be served.

(k) Contents of Affidavit of Mailing or Delivery via a Third-party Commercial Carrier. An affidavit of mailing or delivery required by this rule must:

(1) state a copy of the process, pleading, order of court, or other paper to be served was deposited by the affiant, with postage or shipping prepaid, in the mail or with a third-party commercial carrier and directed to the party shown in the affidavit to be served at the party's last reasonably ascertainable address;

(2) contain the date and place of deposit;

(3) indicate the affiant is of legal age; and

(4) contain the return receipt, if any, attached to the affidavit.

(l) Effect of Mail or Delivery Refusal. If a summons and complaint or other process is mailed or sent with delivery restricted and requiring a receipt signed by the addressee, the addressee's refusal to accept the mail or delivery constitutes delivery. Return of the mail or delivery bearing an official indication on the cover that delivery was refused by the addressee is prima facie evidence of the refusal.

(m) Service Under Statute. If a statute requires service and does not specify a method of service, service must be made under this rule.

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 October 22, 2012, I electronically filed with the Clerk of the North Dakota Supreme Court the Reply Brief of Defendant/Appellant EOG Resources, Inc., and served the same electronically as follows:

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