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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 Brinks, Michael Lee, Gwen Hassan, Melissa Kellor, and the Estate of Ruth A. Nelson, Deceased, Plaintiffs and Appellees, vs. Colleen L. Weflen, et al., Defendants.	**SUPREME COURT NO. 20120184** District Court No. 31-10-C-00009
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 Catherine 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, EOG Resources, Inc., Defendants and Appellants.	

ON APPEAL FROM SUMMARY JUDGMENT ENTERED ON
FEBRUARY 8, 2012
STATE OF NORTH DAKOTA
MOUNTRAIL COUNTY DISTRICT COURT
HONORABLE DAVID W. NELSON

REPLY BRIEF OF DEFENDANTS/APPELLANTS WINDSOR BAKKEN, LLC AND GULFPORT ENERGY CORPORATION

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LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT CONCLUDED THE WEFLENS FAILED TO PROPERLY MAIL NOTICE UNDER THE TERMINATION OF MINERAL INTEREST ACT.

[¶1] **A. Ruth Nelson is the owner for purposes of notice under the Act.**

The Recorder in every county maintains a record "of each patent, deed, mortgage, bill of sale, security agreement, judgment, decree, lien, certificate of sale, and other instrument required to be filed or admitted to record…." N.D.C.C. §11-18-01. The records maintained by the Recorder include the identity of the owner of record of all minerals located in the county.

[¶2] There is no dispute that Ruth Nelson was listed as the owner of record with the Recorder of the minerals at issue in this case at the time the Weflens acted to reclaim the minerals under the Act.[1]

[¶3] **B. The Recorder's records listed two addresses for Ruth Nelson.**

[¶4] There is no dispute the Recorder's records listed two addresses for Ruth Nelson.

[¶5] A plain reading of the Act results in two requirements concerning giving notice of lapse under the Act. The first requirement is publication of the notice for three weeks in the official county newspaper.

[¶6] The second notice requirement concerning mailing is a contingent requirement, stated in the alternative. The surface owner is required to determine whether the address of the mineral owner is shown of record or not. If the address is shown of record the surface owner is required to mail the notice that the interest has

[1] At the time of notice, Ruth Nelson no longer owned the minerals because she transferred all of them to the Capps via a mineral deed. (A at 321.) The Hassan Appellees have no interest in the property.

lapsed by operation of law to the address of record. If the address of the mineral owner is not shown of record, then the surface owner is required to make reasonable inquiry to try to determine the owner's address and then mail notice based on that inquiry.

[¶7] Here, because two addresses were listed in the Recorder's records, the Weflens were not required to make inquiry. They were only required to mail notice to Nelson at the listed address. See Sorenson v. Felton, 2011 ND 33, ¶¶ 13-14, 793 N.W.2d 799, 802-803; Sorenson v. Alinder, 2011 ND 36, ¶ 6, 793 N.W.2d 797, 799.

[¶8] **C. The Act does not impose additional inquiry requirements if the surface owner suspects the mineral owner of record is deceased.**

[¶9] The Appellees urge this Court to abandon its holdings in Felton and Alinder and add additional inquiry requirements that are not contained in the Act if the surface owner suspects the mineral owner of record is dead. The Capps Appellees contend such additional requirements are proper because they claim the Act is in derogation of the common law and therefore it must be strictly construed. The Capps Appellees have incorrectly recited the law:

> The rule of the common law that statutes in derogation thereof are to be construed strictly has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions and all proceedings under it are to be construed liberally, with a view to effecting its objects and to promoting justice.

N.D.C.C. § 1-02-01.

[¶10] The objects of the abandoned mineral statute are to promote mineral development in the state of North Dakota, prevent uncertainties in title, and minimize litigation. The plain language of the Act advances these objectives by providing that a Notice of Lapse is properly sent to the mineral owner of record at his or her address of record.

[¶11] The Capps Appellees assert "because Nelson was not living and could not possibly be [classified] as an 'owner,' the Weflens were required to make reasonable inquiry." This assertion is contrary to the plain meaning of the Act. Nelson was properly classified as the "owner" under the Act and the Weflens properly mailed here notice at her addresses of record.

[¶12] The Appellees also contend it is an idle or absurd act to publish notice if the surface owner suspects the mineral owner of record is deceased. In this regard, the Appellees misunderstand how the Act works. As is explained in more detail below, the Act operates like a statute of limitations. The Act automatically divests a mineral owner of rights to minerals if the minerals are abandoned as set forth in the Act. The divestiture occurs as a result of the operation of the Act, not as a result of providing notice. Nonetheless, the Capps Appellees' arguments concerning notice by mail and publication are consistent in that the statute directs notice, via mail or publication, to the owner of record. If the Act is interpreted in the manner urged by the Capps Appellees as to mailing notice there is no logical reason why it should be interpreted different concerning publishing notice. Such an interpretation, however, would void the Act. The Act will not operate as intended if the inquiry is shifted from whether the minerals are abandoned to the subjective belief of the surface owner concerning mailing notice to the mineral owner at the time notice is given of the lapse.

[¶13] The Act, however, does not require the surface owner to determine whether the owner of record is still the owner, still alive, or still competent. The Act only requires notice be published and, if an address is listed for the record owner, that notice be mailed to that address.

[¶14] **D. The Act does not require that notice be mailed by regular mail.**

[¶15] The Appellees also urge this Court to impose additional requirements not contained in the Act concerning the meaning of "mailing." As part of this contention, the Capps Appellees mischaracterize the Appellants' argument concerning mailing. Appellants have not argued "the statutory requirement of 'mailing' should mean sending notice by certified, restricted delivery, mail." Rather, Appellants simply argue the "mailing" requirement in the Act includes certified mail. It is the Appellees that urge this Court to define "mailing" under the Act to mean something other than its plain meaning.

[¶16] The Appellees presume the Act requires regular mail rather than allowing any form of "mailing." Nothing in the Act, however, requires the use of a particular form of mailing. It is undisputed that the Weflens mailed notice. They satisfied the mailing requirement.

II. THE ACT IS NOT UNCONSTITUTIONAL.

[¶17] The Appellees contend that if the Act is not interpreted in the manner they urge it is unconstitutional. The Appellees, however, failed below to give notice of their constitutional argument as required by law and therefore are barred from raising it on appeal. Furthermore the Act is not unconstitutional.

[¶18] **A. Because the Appellees failed to give notice to the Attorney General when they raised their constitutional challenge before the District Court they are precluded from raising this issue on appeal.**

[¶19] Both the North Dakota Rules of Civil Procedure and the North Dakota Rules of Appellate Procedure impose specific notice requirements upon a party challenging the constitutionality of a state statute. See N.D. R. Civ. P. 24(c)(2) and Moszer v. Witt, 2001 ND 30, ¶ 22, 622 N.W.2d 223 (holding the plaintiff's constitutional challenge of a statute

precluding use of certain recorded statements in civil proceedings was not properly before the Court, as the plaintiff had failed to give notice to the Attorney General of the challenge). The record does not disclose that notice was given when the constitutional argument was raised before the District Court.

[¶20] Similar requirements are imposed under the North Dakota Rules of Appellate Procedure. N.D. R. App. P. 44.

[¶21] Initially, the Appellees failed to give notice under Rule 44. After this issue was raised by Appellants, however, Appellees did provide notice to the Attorney General. That notice may satisfy Rule 44, but the failure to provide proper notice below is controlling. The Constitutional issue is not properly before the Court on appeal.

[¶22] **B. The Act is Constitutional under Texaco v. Short.**

[¶23] In 1971 the Indiana Legislature enacted a statue providing that a severed mineral interest that is not used for a period of 20 years automatically lapses and reverts to the current surface owner of the property, unless the mineral owner files a statement of claim in the local county recorder's office. Texaco v. Short, 454 U.S. 516, 518-519. The Indiana statute in question did not require any specific notice be given to a mineral owner prior to a statutory lapse of a mineral estate. The statute, however, set forth a procedure by which a surface owner who has succeeded to the ownership of a mineral estate pursuant to the statute may give notice that the mineral interest had lapsed.[2] Id. at 520. That procedure is very similar to the procedure contained in North Dakota's Act.

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[2] "Any person who will succeed to the ownership of any mineral interest, upon the lapse thereof, may give notice of the lapse of such mineral interest by publishing the same in a newspaper of general circulation in the county in which such mineral interest is located, and, if the address of such mineral interest owner is shown of record or can be determined upon reasonable inquiry, by mailing within ten days after such publication a

[¶24] At all stages of the proceedings, appellants challenged the constitutionality of the Act claiming, among other things, that the lack of prior notice of the lapse of their mineral rights deprived them of property without due process.

[¶25] The Supreme Court determined Indiana had the power to condition the retention of a property right upon the performance of an act within a limited period of time and the power to mandate that as a result of the failure of the property owner to perform the statutory condition, an interest in fee was deemed as a matter of law to be abandoned and to lapse. Id. at 529.

[¶26] In determining the due process question, the Court noted the difference between a self-executing statute and a statute which requires a subsequent judicial determination:

> In answering this question, 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. As noted by appellants, no specific notice need be given of an impending lapse. If there has been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse — whether or not the surface owner, or any other party, is aware of that use. Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice. It is undisputed that, before judgment could be entered in a quiet title action that would determine conclusively that a mineral interest has reverted to the surface owner, the full procedural protections of the Due Process Clause — including notice reasonably calculated to reach all interested parties and a prior opportunity to be heard — must be provided.

Id. at 534.

[¶27] In upholding the statutes, the Court distinguished its holding in Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950):

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copy of such notice to the owner of such mineral interest...." Ind. Code § 32-5-11-6 (1976). Texaco v. Short, 454 U.S. at 520, FN9.

> The reasoning in Mullane is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. The due process standards of Mullane apply to an "adjudication" that is "to be accorded finality.…
>
> As emphasized above, appellants do not challenge the sufficiency of the notice that must be given prior to an adjudication purporting to determine that a mineral interest has not been used for 20-years. Appellants simply claim that the absence of specific notice prior to the lapse of a mineral right renders ineffective the self-executing feature of the Indiana statute. That claim has no greater force than a claim that a self-executing statute of limitations is unconstitutional. The Due Process Clause does not require a defendant to notify a potential plaintiff that a statue of limitations is about to run, although it certainly would preclude him from obtaining a declaratory judgment that his adversary's claim is barred without giving notice of that proceeding.

Texaco v. Short, 454 U.S. at 537.

[¶28] The Appellants cannot avoid the holding of Texaco v. Short. The Capps Appellants claim Indiana's Act is self-executing and that North Dakota's is not. Under the Court's holding, however, both statutes are properly classified as being self-executing because neither statute is an "adjudication" that is "to be accorded finality."

[¶29] North Dakota's Act places a very minimal burden on the owner of a mineral interest to preserve his interest by filing a statement of claim every 20 years. As explained by the Supreme Court: "It is the part of common prudence for all those who have any interest in a thing, to guard that interest[.]" Id. at 536, FN 28 (citations and internal quotations omitted). Despite this obligation, neither Nelson or the Capps Appellants filed a Statement of Claim or recorded the mineral deed prior to the Weflens' publication of Notice of Lapse. The Capps Appellants were not vigilant in asserting their rights to the minerals.

[¶30] By operation of law, the Capps Appellants automatically lost any interest they had in the minerals upon the first publication of the Notice. N.D.C.C. §38-18.1-02.

In Texaco v. Short, like here, the mineral interest owners failed to "use" the mineral interest within the requisite time period, and the surface owner published and mailed a notice that the mineral interests had lapsed. 454 U.S. at 521. The Supreme Court upheld the automatic extinguishment of the mineral interests without requiring notice. The Court did not consider the publication and mailing requirements of the statute to be a prerequisite for the lapse to occur. Instead, the Court considered the lapse to have occurred as a matter of law based on the non-use of the minerals. The publication and notice requirements were deemed procedural requirements for giving notice that the minerals had lapsed by operation of law so that that the mineral owner could either redeem the minerals by filing a proof of claim or contest that the conditions precedent for lapse were present. Id. at 533-34.

[¶31] Due process is not implicated under North Dakota's Act because, like Indiana's statute, notice is not a prerequisite for the lapse. The Appellants are free to contend that the prerequisites for a lapse are not present, but they are not able to contend that they were deprived of pre-deprivation notice because no such notice is required by the Constitution.

CONCLUSION

[¶32] This Court should reverse the District Court's Summary Judgment and grant Summary Judgment in favor of the Weflens.

Dated this 24th day of October, 2012.

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CERTIFICATE OF SERVICE

STATE OF NORTH DAKOTA)
)ss.
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I hereby certify that on October 24, 2012, I electronically filed with the clerk of the North Dakota Supreme Court the following:

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