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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Wenco, a North Dakota Limited Partnership Plaintiff/Appellant, vs. EOG Resources, Inc., QEP Energy Company, John Doe Defendants 10, claiming any estate or interest in, or lien or encumbrance upon, the property described in numbered paragraph 29 of the complaint, Defendants/Appellees.	)	Supreme Court No. 20120194

Appeal from Summary Judgment entered on February 8, 2012
Civ. No. 31-10-C-00162
County of Mountrail, Northwest Judicial District
Honorable Todd L. Cresap, Presiding

BRIEF OF DEFENDANT/APPELLEE EOG RESOURCES, INC.

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STATEMENT OF THE CASE

[¶ 1] Appellant Wenco ("Wenco"), commenced this lawsuit against Appellees EOG Resources, Inc. ("EOG") and QEP Energy Company ("QEP") in August 2010. (*See* Appellant's Appendix ("Wenco App."), 5-15.) Initially, Wenco brought claims to quiet title to certain property against QEP, for unjust enrichment against QEP, for conversion against EOG, and for breach of a purported "implied covenant of good faith and fair dealing" against EOG. (Wenco App. 11-15.) EOG answered and brought a Counterclaim against Wenco to quiet title. (Wenco App. 30-48.) In October 2010, Wenco filed its First Amended Complaint, which included an additional claim against QEP. (Wenco App. 63-73.) Wenco then filed a Second Amended Complaint, which included additional claims against EOG for breach of a purported "duty to communicate" under an oil and gas lease. (Wenco App.126-37.)

[¶ 2] EOG moved for summary judgment in this case on or about September 26, 2011. (*See* Defendant EOG Resources, Inc.'s Motion for Summary Judgment, Docket No. 54.) Wenco brought its own motion for partial summary judgment on or about October 3, 2011. (*See* Motion for Partial Summary Judgment and Request for Oral Argument, Docket No. 61.) QEP also brought a motion for summary judgment on or about October 4, 2011. (*See* QEP Energy Company's Motion for Summary Judgment with Certificate of Service, Docket No. 66.) Briefing was completed in November of

2011 and a hearing was held on the parties' motions on December 6, 2012.

[¶ 3] On or about February 8, 2012, the district court entered an Order and Judgment Granting Defendants' Motions for Summary Judgment (the "Order"). (*See generally* Wenco App. 138-177.) The district court determined that the *Duhig* rule, as applied by the North Dakota Supreme Court in *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991), applied to the facts of this case. (Wenco App. 142, 145.) Specifically, the district court held that, by operation of *Acoma* and other North Dakota cases applying the *Duhig* rule, the outstanding royalty interest burdened Wenco's interest alone, and not QEP's interest. (Wenco App. 145-46.) The district court also held that neither QEP nor EOG had waived any rights. (Wenco App. 153-59.) Thus, the district court dismissed all of Wenco's claims with prejudice.[1]

[¶ 4] Wenco filed its Notice of Appeal on or about April 11, 2012. (Wenco App. 179.) In its appeal, Wenco argues that *Duhig*, as applied by this Court in *Acoma*, does not apply to the facts of this case. Wenco seeks to evade the effect of *Duhig* and *Acoma* and asks the Court to alter the effect of property conveyances executed over fifty years ago. However, this case presents a classic *Acoma* fact pattern. Perhaps recognizing this, Wenco argues that this Court should instead apply the concurring opinion from *Acoma*, and, if necessary, overrule *Acoma* completely. Wenco offers no convincing reason for the Court to do so. In effect, Wenco asks the Court to overturn not only binding precedential law, but also to undo the effect of property conveyances that took place over

[1] Wenco has abandoned its claim that EOG breached an implied covenant of the parties' lease due to an alleged failure to communicate. Wenco has therefore waived its right to obtain relief from this Court as to that claim. *Darby v. Swenson, Inc.*, 2009 ND 103, ¶ 23, 767 N.W.2d 147, 154.

fifty years ago, to which Wenco was not a party. This Court should uphold the *Duhig* and *Acoma* doctrines and the valid property conveyances at issue in this action by affirming the district court's decision to dismiss Plaintiff's claims in their entirety.

STATEMENT OF THE FACTS

[¶ 5] EOG is a corporation organized and existing pursuant to the laws of the State of Delaware, has its principal place of business at 1111 Bagby Street, Sky Lobby 2, Houston, Texas, and is duly authorized to conduct business in the State of North Dakota. (Wenco App. 41, 126.)

[¶ 6] QEP is a corporation organized and existing pursuant to the laws of the State of Texas, and has its principal place of business at 1050 17th Street, Suite 500, Denver, Colorado. (Wenco App. 42, 127.) Wenco is a limited partnership organized and existing pursuant to the laws of the State of North Dakota. (Wenco App. 126.)

[¶ 7] Wenco brought the instant action allegedly to determine the rights of the parties in and to the oil, gas and other mineral interests in and under the following described lands in Mountrail County, North Dakota:

> Township 153 North, Range 89 West
> Section 30: Lots 2 and 3, E/2NW/4

(hereinafter the "Subject Lands"). (*See* Wenco App. 42, 126-37.)

[¶ 8] On November 30, 1954, Raymond and Jewell P. Dockter, as husband and wife (the "Dockters"), executed a royalty deed in favor of Northwestern National Bank of Minneapolis (the "Bank"), a banking corporation, conveying "an undivided sixty-four/one hundred sixtieths (64/160ths) interest in and to all of the oil royalty, gas royalty, and royalty in casinghead gas, gasoline, and royalty in other minerals in and under, and

that may be produced and mined from" the Subject Lands. (*See* Wenco App. 217.) The royalty deed was dated November 30, 1954, and recorded with the Mountrail County Recorder on November 30, 1954, in Book 325, Page 29, as Document No. 171308. (*Id.*)

[¶ 9] On March 4, 1957, the Dockters executed a mineral deed in favor of Wm. F. Grinnan ("Grinnan"), conveying "an undivided one-half interest in and to all of the oil, gas and other minerals in and under and that may be produced from" the Subject Lands. (*See* Wenco App. 218.) Said mineral deed was dated March 4, 1957, and recorded with the Mountrail County Recorder on April 11, 1957, in Book 326, Page 350, as Document No. 176108. (*Id.*)

[¶ 10] The deed to Grinnan did not reference the royalty interest previously conveyed to the Bank and contained a full warranty clause, a portion of which states as follows:

> Grantor does hereby warrant said title to Grantee[,] his heirs[,] executors, administrators, personal representatives, successors and assigns forever and does hereby agree to defend all and singular the said property unto the said Grantee herein[,] his heirs, successors, executors, personal representatives, and assigns against every person whomsoever claiming or to claim the same or any part thereof.

(*Id.*) By this provision, the Dockters warranted to Grinnan an undivided fifty percent (50%) mineral interest in the Subject Lands and conveyed this interest unencumbered by the previously conveyed royalty interest to the Bank.

[¶ 11] QEP is the successor in interest to Grinnan as to the Subject Lands and likewise received its interest unencumbered by the previously conveyed royalty interest held by the Bank. (*See* Wenco App. 181.)

[¶ 12] On or about July 31, 2003, the Dockters executed a warranty deed in favor of Wenco conveying all of their remaining interest in certain real property, including the Subject Lands subject to "prior mineral reservations . . . now of record." (*See* Wenco App. 322-23.) Said Warranty Deed was recorded with the Mountrail County Recorder on August 5, 2003, as Document No. 309243. (*Id.*)

[¶ 13] On March 18, 2006, Wenco executed an oil and gas lease in favor of Contex Energy Company ("Contex"), which purported to cover a portion of the minerals in and under the Subject Lands ("the Wenco Lease"). (*See* Wenco App. 342-27.) The Wenco Lease was recorded with the Mountrail County Recorder on April 27, 2006, in Book 741, Page 536, as Document No. 321416. (*Id.*)

[¶ 14] EOG acquired the Wenco Lease via an Assignment from Contex, dated May 17, 2006, and recorded with the Mountrail County Recorder on July 5, 2006, in Book 745, Page 458, as Document No. 322346 whereunder Wenco was to be paid a royalty. (*See* Defendant/Appellee EOG Resources, Inc.'s Appendix ("EOG App.") 12-14.)

[¶ 15] In or about 2007, EOG drilled and completed a well on the Subject Lands named the Wenco #1-30H well ("the Wenco Well"). (*See* Wenco App. 127.)

[¶ 16] In or about November 2007, EOG submitted an application with the North Dakota Industrial Commission ("Commission"), requesting that the Commission enter an order pursuant to Section 43-02-03-88.1 of the North Dakota Administrative Code pooling all interests in a spacing unit for the Wenco Well described as Section 30, Township 153 North, Range 89 West, Parshall-Bakken Pool, Mountrail County, North Dakota. (*See* Wenco App. 44, 127.)

[¶ 17] By Order dated January 18, 2008, the Commission granted EOG's request for an order pursuant to Section 43-02-03-88.1 of the North Dakota Administrative Code pooling all interests in a spacing unit for the Wenco Well described as Section 30, Township 153 North, Range 89 West, Parshall-Bakken Pool, Mountrail County, North Dakota. (*See* Wenco App. 44, 128.)

[¶ 18] On February 11, 2008, attorney Denise Linford of Crowley, Haughey, Hanson, Toole & Dietrich, P.L.L.P., prepared a division order title opinion ("Original DOTO") in connection with the Wenco Well at the request of EOG. (*See* Wenco App. 418-44.)

[¶ 19] On February 19, 2008, based on the Original DOTO prepared by Ms. Linford, EOG issued division orders to the working and royalty interest owners in the Wenco Well, including Wenco (the "Original Division Order"). (*See* Wenco App. 445-47.) The Original Division Order indicated that Wenco held a 0.03335841 royalty interest in the oil and gas produced from the spacing unit for the Wenco Well. (*Id.*)

[¶ 20] In or about May 2008, EOG began making royalty payments to Wenco in accordance with the terms of the Wenco Lease and pursuant to the interest reflected in the Original Division Order. (*See* Wenco App. 128.)

[¶ 21] At the same time, EOG also began making payments to QEP, as well as to others who held an interest in the spacing unit for the Wenco Well, based on the interests as set forth in the Original DOTO prepared by Ms. Linford. (*See* Wenco App. 44, 129.)

[¶ 22] In or about June 2008, QEP contacted EOG regarding its interest in the Wenco Well and as reflected in the division order it received from EOG. QEP informed EOG that it believed its interest had been improperly burdened by the severed royalty

interest held by the Bank. (*See* EOG App. 24-28, 31.)

[¶ 23] In response, EOG contacted Ms. Linford, the outside title attorney who prepared the Original DOTO relating to the Wenco Well, regarding QEP's inquiry involving its interest and the effect of the Bank's severed royalty interest. (*Id.*)

[¶ 24] After reviewing her notes and the relevant documents upon which she relied in preparing the Original DOTO, Ms. Linford discovered that there was an error in the calculation of QEP's and Wenco's interests as set forth in the Original DOTO. (*Id.*) Specifically, there had been a miscalculation of the effect of the Bank's severed royalty interest on QEP's and Wenco's interests. (*Id.*) Ms. Linford determined that pursuant to the *Duhig* doctrine as applied by the North Dakota Supreme Court in *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991), Wenco's interest was burdened by the entire severed royalty interest held by the Bank and that QEP's interest was unencumbered by said interest. (*Id.*)

[¶ 25] Ms. Linford informed EOG of the error and provided EOG with a revised DOTO for the Wenco Well ("Corrected DOTO"), to reflect the correct calculation of QEP's and Wenco's interest. (*Id.*)

[¶ 26] Shortly thereafter, EOG informed the general partner of Wenco, Mr. Thomas A. Wentz, Jr. ("Wentz"), of the error and the correct interest of Wenco in the spacing unit for the Wenco Well. (*See* EOG App. 3-8, 15-19.) Wentz confirmed that he understood the reason for and rationale underlying the reduction of Wenco's royalty interest and he did not voice any objection at that time. (*See* EOG App. 9-11, 20-21.)

[¶ 27] On or about September 22, 2008, as a result of the Corrected DOTO, EOG issued a corrected division order ("Corrected Division Order"), to Wenco setting forth its

proper interest.[2] (*See* Wenco App. 448-49.) The Corrected Division Order indicated that Wenco held a 0.02505015 royalty interest rather than a 0.03335841 royalty interest in the spacing unit for the Wenco Well. (*Id.*) Thereafter, EOG began making royalty payments to Wenco in accordance with the interest set forth in the Corrected Division Order.[3]

[¶ 28] In or about March 2010, approximately eighteen months following the issuance of the Corrected Division Order, Wentz, in his capacity as the general partner of Wenco, contacted Denise Linford, the outside title attorney who had prepared both the Original DOTO and Corrected DOTO for EOG, regarding Wenco's interest in the spacing unit for the Wenco Well. (*See* EOG App. 22-23.) For the first time, Wentz indicated that he disagreed that the *Duhig* doctrine applied in this instance and asserted that the interests held by Wenco and QEP should be proportionately burdened by the severed royalty interest held by the Bank. (*Id.*) Wentz asked that Ms. Linford reconsider her opinion in this regard. (*Id.*) Ms. Linford informed Wentz that she disagreed with his

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[2] EOG generally prepares and issues division orders to interest owners based on and in reliance on the interests reflected and set forth in division order title opinions prepared by outside title attorneys at its request. A division order is an authorization to one who has a fund for distribution from persons entitled to the fund directing how the fund is to be distributed. 8 *Williams & Meyers*, p. 273. In the oil and gas industry, division orders are entered into by both working interest owners and royalty owners to sell oil and to give instructions for payments under a lease. *Id.* at pp. 272-73; *see also* John S. Lowe, Oil and Gas Law in a Nut Shell, 446 (5th ed. 2010). EOG issued the Original Division Order and the Corrected Division Order relating to the Wenco Well in reliance on and in accordance with the interests as determined by Ms. Linford in both the Original DOTO and Corrected DOTO.

[3] Because Wenco had been paid according to an improper and incorrect royalty interest over the previous months, EOG initially withheld payments from the production of the Wenco Well from Wenco in order to recover the overpayment. (*See* Wenco App. 129.) Once the overpayment was recovered, Wenco was paid in accordance with the interest set forth in the Corrected Division Order.

analysis and that the Corrected DOTO and Corrected Division Order were issued as a result of and in order to correct her error. Wenco commenced this action soon thereafter.

LAW AND ARGUMENT

I. Statement of the Standard of Review.

[¶ 29] On appeal from an order granting a motion for summary judgment, the North Dakota Supreme Court examines the "pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence" to determine whether the district court's decision was proper. *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 11, 785 N.W.2d 164, 171. A district court's order granting summary judgment is "reviewed anew on the entire record." *Halvorson v. Sentry Ins.*, 2008 ND 205, ¶ 5, 757 N.W.2d 398, 399.

[¶ 30] Courts "may not weigh the evidence, determine credibility, or attempt to discern the truth of the matter when ruling on a motion for summary judgment." *Saltsman v. Sharp*, 2011 ND 172, ¶ 18, 803 N.W.2d 553, 560 (citations omitted). However, where the nonmoving party does not present sufficient evidence to support its claims, summary judgment is proper. *Barbie v. Minko Const., Inc.*, 2009 ND 99, ¶ 6, 766 N.W.2d 458, 460-61. Mere speculation will not defeat a motion for summary judgment and a "scintilla of evidence is not sufficient to support a claim." *Id.* at 461 (citations omitted). If a party fails to present competent, admissible evidence to support its claim, "it is presumed such evidence does not exist." *Halvorson*, 2008 ND 205, ¶ 5, 757 N.W.2d at 400. Summary judgment must therefore be entered against a party who fails to present evidence establishing an essential element of its claim. *Id.*

[¶ 31] Under Rule 56(e) of the North Dakota Rules of Civil Procedure, an affidavit may be submitted as evidence in opposition to a motion for summary judgment. N.D.R.Civ.P. 56(e)(1). Such an affidavit must be supported by personal knowledge and must contain facts that would be admissible at trial. *Id.*; *Hummel v. Mid Dakota Clinic, P.C.*, 526 N.W.2d 704, 708 (N.D. 1995). An affidavit containing only conclusory allegations is insufficient to raise a genuine issue of material fact and therefore cannot defeat a properly supported motion for summary judgment. *BTA Oil Producers v. MDU Res. Group, Inc.*, 2002 ND 55, ¶ 49, 642 N.W.2d 873, 887; *see also* N.D.R.Civ.P. 56(e)(2).

II. EOG was Entitled to Summary Judgment Dismissing Wenco's Quiet Title Claim.

[¶ 32] EOG was entitled to summary judgment on Wenco's claim for quiet title as a matter of law. By operation of the *Duhig* doctrine as adopted by this Court in *Kadrmas v. Sauvageau*, 188 N.W.2d 753 (N.D. 1971), and as specifically applied by this Court in *Acoma*, Wenco's interest alone is burdened by the entire severed royalty interest held by the Bank in the Subject Lands.

A. The District Court Correctly Held that the Majority Opinion in *Acoma* Dictates the Application of the *Duhig* Rule in this Case.

[¶ 33] The district court was correct in applying *Acoma* to this case. Wenco claims that *Acoma* is not applicable to the facts of this case, or alternatively, that this Court should overrule *Acoma*. However, *Acoma* is analogous and therefore applicable to the facts of this case. Further, Wenco has not provided a valid reason for this Court to ignore the role of *stare decisis* and overturn a decision that has been good law in North Dakota, and other jurisdictions, for decades. This Court should uphold the district court's

decision that applied the principles of *Duhig* and *Acoma* and dismissed Wenco's quiet title claim.

1. The Rationale of the *Duhig* Rule.

[¶ 34] The North Dakota Supreme Court's application of the *Duhig* doctrine is based on estoppel by warranty, a subset of estoppel by deed, which precludes a warrantor of title, or his successors, from questioning the title warranted. *Miller v. Kloeckner*, 1999 ND 190, ¶ 13, 600 N.W.2d 881, 885 (N.D. 1999) (citing *Mau v. Schwan*, 460 N.W.2d 131, 134 (N.D. 1990)); *see also Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476, 479-80 (N.D. 1991); *Sibert v. Kubas*, 357 N.W.2d 495, 497 (N.D. 1984). The *Duhig* doctrine was first enunciated by the Supreme Court of Texas in *Duhig v. Peavy-Moore Lumber Company*, 144 S.W.2d 878 (Tex. 1940). In *Duhig*, a third party owned an outstanding one-half mineral interest in certain land, and the grantor owned the surface and the remaining one-half mineral interest. The grantor conveyed the surface to the grantee by warranty deed but reserved one-half of all the minerals under the land. *Id*. The grantor and the grantee both claimed the one-half mineral interest that was not owned by the third party. *Id.* at 879. The Texas Supreme Court concluded the grantee owned the surface and a one-half mineral interest, the third party owned the outstanding one-half mineral interest, and the grantor owned nothing. *Id.* at 880.

[¶ 35] In reaching that conclusion, the court employed a two-step analysis under principles of estoppel. *Id.* The court observed the granting clause gave the grantee the entire surface and a one-half mineral interest but the reservation clause reserved a one-half mineral interest in the grantor. *Id.* Because the grantor purported to retain a one-half mineral interest and the other one-half mineral interest was owned by a third party, the

grantor breached the clause warranting title to a one-half mineral interest. *Id.* By analogy to the doctrine of estoppel by deed, the court held the grantor was estopped to assert the reservation of a one-half mineral interest. *Id.*

[¶ 36] The effect of the *Duhig* doctrine is that a grantor cannot grant and reserve, expressly or impliedly, the same mineral interest. *Gawryluk v. Poynter*, 2002 ND 205, ¶ 13, 654 N.W.2d 400, 405; *see also Acoma*, 471 N.W.2d at 482. Therefore, if a grantor does not own a large enough mineral interest to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation. *Id.* As the Court in *Miller* explained:

> The *Duhig* rule says that where a grantor conveys land in such a manner as to include 100% of the minerals, and then reserves to himself 50% of the minerals, the reservation is not operative where the grantor owns only 50% of the minerals. The deed is construed as undertaking the transfer of 50% of the minerals to the grantee. Both this grant and the reservation cannot be given effect, so the grantor loses because the risk of title loss is on him.

Miller, 600 N.W.2d at 884 (quoting 1 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 311, p. 580.39 (1998)). In other words, "*Duhig* causes an undivided interest reserved by the grantor to pass under a deed to the extent necessary to give the grantee the undivided interest purported to be conveyed to him by the deed." 1 *Williams & Meyers*, at p. 582.3 (emphasis added).

2. The North Dakota Supreme Court's application of *Duhig* in *Acoma*.

[¶ 37] In *Acoma*, the North Dakota Supreme Court applied the *Duhig* rule to a dispute very similar to the one at issue here. In *Acoma*, H.O. Moen, the fee owner of a 160-acre tract of land, made three separate royalty conveyances in 1937, cumulatively

transferring to third parties a 6.5% royalty of all oil and gas produced from the 160 acres. *Acoma*, 471 N.W.2d at 477. Subsequently, Moen and his wife conveyed the 160 acres to Clayton Wilson by warranty deed. *Id.* Moen's warranty deed did not reserve any mineral interests or mention the prior 6.5% royalty conveyances. *Id.* In 1952, by separate mineral deeds, Clayton Wilson and his wife conveyed to Thomas Leach an "undivided 35/320th" and an "undivided 5/320th" interest in and to the oil, gas, and other minerals in and under the property at issue.[4] *Id.* Neither mineral deed in favor of Leach indicated that the interests conveyed were burdened by the outstanding 6.5% royalty and both deeds included a warranty provision. *Id.*

[¶ 38] After receiving the mineral interests, Leach acquired a title opinion that noted the outstanding 6.5% royalty. *Id.* at 478. Leach later executed a mineral deed to United Properties Incorporated, conveying an undivided 18/320th interest in the minerals in and under the property at issue. *Id*. The deed indicated that Leach agreed to "warrant and defend title." *Id.* In 1966, United conveyed that interest to Acoma Oil Corporation by mineral deed that included a similar warranty. *Id.* The deeds from Leach to United and from United to Acoma did not refer to the outstanding 6.5% royalty interest. *Id.* Leach also conveyed an undivided 9/320th interest in the minerals in and under the property at issue to Clarke Bassett by mineral deed dated June 24, 1952. *Id*. The mineral deed stated that Leach agreed to "warrant and defend title" and did not refer to the

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[4] Wenco repeatedly relies on its assumption that a set number of mineral acres, rather than an undivided fractional interest, were conveyed in *Acoma*. (*See e.g.*, Wenco Br., ¶ 57, p. 18.) In fact, the interest transferred in *Acoma* was an undivided fractional interest, although the deed also expressed the number of mineral acres the grantor intended to convey. *See Acoma*, 471 N.W.2d at 477.

outstanding 6.5% royalty. *Id.* Following the death of Clayton Wilson and his wife, their remaining interest in the property at issue went to their children, defendants in the action. *Id.*

[¶ 39] A dispute arose between the parties as to whether the burden of the 6.5% royalty should be shared proportionately by Acoma, Bassett, and the Wilson children, or entirely by the Wilson children. *Id.* On appeal, the North Dakota Supreme Court, applying the *Duhig* rule, concluded that the 6.5% royalty should be born entirely by the Wilson children. *Id.* at 484. To determine the applicability of *Duhig*, the Court examined the conveyance from the Wilson parents to Leach, by which the plaintiffs eventually obtained their mineral interests. *Id.* at 481. The court stated that "like *Duhig*, in cases where a grantor conveys some mineral interests while keeping some mineral interests in the same tract of land <u>without an explicit reservation</u>, the focus is on whether or not the grantor has enough mineral interests in that tract of land to satisfy the conveyance." *Id.* at 482 (emphasis added). Because the Wilson parents warranted title to the conveyance to Leach, and following the conveyance, owned enough royalty interest in that tract of land to satisfy the previous 6.5% royalty assignments without burdening the interest conveyed to Leach, the court concluded that the interests of Leach, and therefore Leach's successors in interest, were not burdened by the 6.5% royalty. *Id.* at 484.

3. Wenco's royalty interest as set forth in the Corrected Division Order was calculated in accordance with the *Duhig* rule as applied by the Court in *Acoma*.

[¶ 40] The Court's application of *Duhig* in the *Acoma* case operates to burden Wenco's royalty interest by the entire outstanding royalty interest held by the Bank. In

Acoma, the Court examined the first conveyance following the conveyance of the outstanding royalty interest, namely, the conveyance from the Wilsons to Leach. *Acoma*, 471 N.W.2d at 481. Here, the district court similarly examined the first conveyance following the conveyance of the outstanding royalty interest, namely, the conveyance from the Dockers to Grinnan. (Wenco App. 145.)

[¶ 41] On November 30, 1954, the Dockters executed a royalty deed in favor of the Bank conveying an undivided 64/160ths (40%) royalty interest. (*See* Wenco App. 217.) In 1957, following the conveyance of the royalty interest to the Bank, the Dockters conveyed to Grinnan "an undivided one-half interest in and to all of the oil, gas and other minerals" in and under the Subject Lands. (*See* Wenco App. 218.) The mineral deed to Grinnan contained a full warranty clause and did not refer to the outstanding royalty interest held by the Bank. (*Id.*) At the time of the conveyance to Grinnan, the Dockters, like the Wilson parents in *Acoma*, retained sufficient mineral interests in the Subject Lands (50%) to fully satisfy the outstanding royalty interest held by the Bank (40%) without a reduction of any royalty from the mineral interests conveyed to Grinnan.

[¶ 42] Thus, the conveyances here are directly analogous to those in *Acoma*. In *Acoma*, the interest retained by the Wilson parents, following the conveyance of an undivided fractional mineral interest to Leach, bore the burden of the entire outstanding royalty interest. When the Wilson parents' interest was transferred to the Wilson children, the Wilson children's interest bore the entire burden of the outstanding royalty interest. The interest held by Acoma, successor in interest to Leach, as warranted by the deed, was not burdened by the outstanding royalty interest. In this case, the interest retained by the Dockters, following the conveyance by Warranty Deed of an undivided

fractional mineral interest to Grinnan, bore the burden of the entire outstanding royalty interest previously conveyed to the Bank. When the Dockters conveyed their remaining mineral interest to Wenco in July 2003, the burden of the Bank's royalty interest was transferred to and is born entirely by Wenco. The interest held by QEP, successor in interest to Grinnan, continues to be unencumbered by the outstanding royalty interest held by the Bank.

[¶ 43] Wenco spends much time attempting to shift the Court's focus from the relevant conveyances discussed above to later conveyances that are irrelevant and do not involve any of the parties to this action. (Wenco Br., ¶¶ 19-25.) This Court has made very clear that the conveyance from the original grantor should be the focus of a *Duhig* determination. *Acoma*, 471 N.W.2d at 481 ("We thus look to that conveyance to determine the applicability of *Duhig* . . . ."); *see also Sibert*, 357 N.W.2d at 495 ("The disposition of this case requires us to construe the legal effect of the 1970 deed."). The chain of title from Grinnan to QEP is therefore irrelevant to whether *Duhig* applies to this case. As held by the district court in its Order, "[t]he focus in cases of this nature is not on subsequent conveyances, but it is on the conveyance where the interests of the parties diverged." In this case, the relevant conveyance is from the Dockters to Grinnan and an analysis of this conveyance under *Duhig* and *Acoma* shows that the Dockters retained the entire burden of the Bank's outstanding royalty. As successor in interest to the Dockters, Wenco now bears the entire burden of the Bank's outstanding royalty.

4. The concurring opinion in *Acoma* is not controlling and does not alter the outcome of this case.

[¶ 44] "A majority of the supreme court is necessary to pronounce a decision." N.D. Const. art. VI, § 4. This constitutional requirement was applied in *Stout v. N.D. Workmen's Comp. Bureau*, 253 N.W.2d 429, 432 (N.D. 1977), where the Workmen's Compensation Bureau applied a statute as interpreted by a concurring opinion of former Justice Sand. The North Dakota Supreme Court held that the Bureau had no right to apply a concurring opinion as law, stating that "[t]he majority opinion is the law of the case and binding on the parties." *Id.*

[¶ 45] Wenco claims that "[a] careful reading of *Acoma* and *Acoma's* concurring opinion shows that Wenco is entitled to judgment as a matter of law." (Wenco Br., ¶ 49, p. 15.) However, the concurring opinion is not law and Wenco offers no rationale for applying the concurring opinion, rather than the unambiguous, oft-cited, and clearly analogous majority opinion in *Acoma*.

[¶ 46] Even if the concurring opinion had precedence over the majority opinion, a careful reading of Justice Vande Walle's concurrence does not support the conclusion that the *Duhig* rule is inapplicable in this case. Wenco claims three factual distinctions are pointed out by Justice Vande Walle that, if any of the three were present, would preclude application of the *Duhig* rule. First, the concurring opinion stated "that as a matter of equity heirs who take through the original grantor should bear the burden of the royalty interest in contrast to purchasers for value from the original grantor . . . ." *Acoma*, 471 N.W.2d at 478 (J. Vande Walle's concurring opinion). It may be true in some cases that, as a matter of equity, a court should favor purchasers for value over heirs. The

consideration is irrelevant to this case, however, as none of the parties are heirs; rather, they are all purchasers for value. Further, as the district court noted, the Court in *Acoma* made "no distinction as to how successors in interest receive their interest." (Wenco App. 147 (citing *Acoma*, 471 N.W.2d at 481).) Rather, the Court stated that a grantor and his privies were estopped from asserting against another party any right in derogation of the deed. *Acoma*, 471 N.W.2d at 481. The Court has applied *Duhig* in several cases where, as here, both parties were purchasers for value. The distinction between heirs and purchasers was irrelevant to the *Acoma* decision and has no bearing on this case.

[¶ 47] Second, the concurring opinion discussed the difference between the conveyance of a fractional mineral interest and the conveyance of a discrete number of mineral acres. *Id.* Justice Vande Walle quoted a secondary legal source that argued for a different treatment of the two methods of quantifying minerals and then hypothesized that "[t]he same rationale *might* be applied here." *Id.* (quoting Robert Sullivan, *Handbook of Oil and Gas Law* 216 (1955))(emphasis added). This rationale was adopted by the North Dakota Supreme Court in *Hild v. Johnson*, 2006 ND 217, ¶¶ 8-9, 723 N.W.2d 389, 392-383. However, this analysis was not applied to a failure of title due to an outstanding interest. *See id.*; Sullivan, 217. Rather, the distinction only applies when the grantor owned fewer or more mineral acres than the number of mineral acres he purported to own. *Hild*, 2006 ND 217, ¶¶ 8-9, 723 N.W.2d at 392-383; Sullivan, 217. For example: a grantor purporting to own 160 mineral acres conveys an undivided 50% interest. *See Hild*, 2006 ND 217, ¶¶ 8-9, 723 N.W.2d at 392-383. Then the grantee takes 80 acres. *See id.* However, if it is later discovered the grantor only owned 150 acres, the grantee receives 50% of the smaller acreage—only 75 acres. *See id.* Conversely, if in the same

situation the grantor conveyed 80 acres, and it was later revealed that he owned only 150 acres, the grantee would still receive his promised 80 acres. *See id.* Note that the proportional deduction in the case of the percentage interest did not refer to proportioning a failure of title among multiple grantees, as Wenco urges that the Court do here. Further, the "proportioning" rule has never been applied where, as here, the issue was an outstanding royalty interest and not a reduction in mineral acres; the rule was not applied in *Acoma*, or in any other case found discussing or applying the *Duhig* rule. Finally, and most importantly, the North Dakota Supreme Court has repeatedly applied *Duhig* to a situation where an undivided mineral interest was conveyed. *See Acoma*, 471 N.W.2d at 477; *Melchior v. Lystad*, 2010 ND 140, ¶ 2, 786 N.W.2d 8, 9; *Miller*, 1999 ND 190, ¶¶ 2-4, 600 N.W.2d at 882-883; *Mau*, 460 N.W.2d at 132; *Sibert*, 357 N.W.2d at 496. In fact, *Duhig* itself was based on the overconveyance of an undivided interest. *Duhig*, 144 S.W.2d at 880. Although Justice Vande Walle hypothesized that such a rule might be applied to an *Acoma* fact pattern, it is clear that North Dakota jurisprudence has dictated otherwise.

[¶ 48] Third, the concurring opinion states that if, after conveying the royalty interest, the grantor conveyed "mineral acres to the extent that the grantor no longer retains sufficient interest to satisfy the previously conveyed royalty interest," the outcome might be different. *Id.* The facts of this do not fit into Justice Vande Walle's hypothetical because, after conveying to Grinnan, the Dockters retained a "sufficient interest to satisfy the previously conveyed royalty interest" held by the Bank. In raising this argument, Wenco fails to understand that the relevant conveyance is the original conveyance with warranty that failed to mention the outstanding royalty interest—the

1957 conveyance from the Dockters to Grinnan. The fact that the Dockters conveyed their remaining interest to Wenco nearly fifty years later is irrelevant to this analysis; what is relevant is whether the Dockters had a sufficient mineral interest to fully satisfy the conveyance to Grinnan. As the grantors in *Acoma*, the Dockters did retain a sufficient interest, and the Dockters and their successors in interest therefore bore the entire burden of the Bank's royalty interest.

[¶ 49] In short, the three "distinctions" that Wenco cites from the concurring opinion in *Acoma* are irrelevant or inapplicable to this case. The concurring opinion does not support the conclusion that the *Duhig* rule is inapplicable in this case. As such, Wenco's contention in this regard fails as a matter of law.

B. This Court Should Not Overrule *Acoma*.

[¶ 50] *Acoma* has been binding precedent in North Dakota for over twenty years. Because Wenco realizes the fact situation in *Acoma* is analogous to this case, Wenco urges this Court to overrule *Acoma*. However, Wenco's reasoning ignores the underlying rationale and purpose of the *Duhig* rule, and is based on a lack of understanding of the relationship between a royalty interest and a mineral interest. *Duhig* need not be limited to situations where the grantor purports to convey more than he owns, as the estoppel principles are equally applicable to an *Acoma* fact pattern where an outstanding royalty interest exists and a grantor conveys by warranty deed.

[¶ 51] Wenco argues that this Court should overrule *Acoma* because it does not limit the *Duhig* rule to situations where "the grantor is conveying more than he owns, or purporting to reserve an interest that is already conveyed." (Wenco Br., ¶ 70.) One underlying rationale of the *Duhig* rule is that a grantor who warrants that he is conveying

a certain undivided mineral interest is estopped from claiming otherwise. *See Duhig*, 144 S.W.2d at 880. Thus, "*Duhig* causes an undivided interest . . . to pass under a deed to the extent necessary to give the grantee the undivided interest purported to be conveyed to him by the deed." 1 *Williams & Meyers*, § 311, p. 582.3 (emphasis added). In *Acoma*, this rule was applied to cause the fifty percent interest to pass unburdened by the royalty because this was the "extent necessary" to give Leach the interest promised to him in the deed. *See Acoma*, 471 N.W.2d at 481-82. A Texas court applied this rule to an *Acoma* fact pattern in *Selman v. Bristow*, 402 S.W.2d 520, 524 (Tex. Civ. App. Tyler, 1966), *aff'd Bristow v. Selman*, 406 S.W.2d 869 (Tex. 1966).[5] In *Selman*, the district court held that the outstanding royalty interest proportionately burdened the parties' interests. *Id.* The appellate court reversed, holding that "[s]uch a construction would be contrary to the very language used in the granting clause because the deed by its express terms purported to convey all the interest in the land . . . ." *Id.* Burdening the grantee's interest with an outstanding royalty would breach the grantor's warranty to convey all that the granting clause purports to convey. *See id.* Because the grantors retained a sufficient interest to satisfy the grant and bear the burden of the outstanding royalty, *Duhig* applied and the outstanding royalty interest burdened the grantor's interest alone. *Id.*; *see also Atlantic Refining Co. v. Beach*, 436 P.2d 107, 112 (N.M. 1968) (holding that, because the grantors

[5] Wenco spends much time discussing the difference between a royalty interest and a mineral interest, focusing on the fact that Texas recognizes the distinction. (Wenco Br., ¶¶ 63-65, pp. 20-21.) Because the *Selman* court held that *Duhig* applies to an *Acoma* fact pattern, and the Texas Supreme Court affirmed the application of *Duhig* in that case, the distinction clearly has no bearing on the application of the *Duhig* rule under Texas law. In fact, the *Selman* court discussed the royalty/mineral interest distinction in its analysis and held that *Duhig* applied. *See Selman*, 402, S.W.2d at 524.

warranted a 15/32 mineral interest, and had the ability to fulfill the grant, they would be "held to that undertaking" and bear the burden of the outstanding royalty interest themselves). Similarly, under *Acoma*, and here, it was necessary for the promised one-half mineral interest unburdened by the royalty interest to pass under the deed to give the grantee the undivided interest purported to be conveyed to him and warranted under the deed. Because the grantor, the Dockters, retained a sufficient mineral interest to satisfy the grant and bear the burden of the outstanding royalty, *Duhig* applies. To hold otherwise would cause the grantors, the Dockters, to breach their warranty to convey the entire one-half mineral interest.

[¶ 52] If it is unclear why an outstanding royalty interest could cause the grantor to breach his warranty to convey a mineral interest, it may be helpful to consider the effect of the outstanding royalty interest when the parties execute oil and gas leases, as they have in this case. A typical oil and gas lease provides the mineral owner with a 1/8 royalty.[6] *Williams & Meyers*, § 317, p. 650. If, as here, two parties each own an undivided fifty percent of the minerals at issue, each party will be entitled to a 1/16 (50% x 1/8) royalty interest upon leasing their minerals. *Id.* at § 317, p. 651. However, if an outstanding royalty interest exists, one party's interest will be "burdened," *i.e.*, reduced by the amount of that interest. *Id.* Thus, in *Acoma* where a 6.5% outstanding royalty existed, one party's royalty upon leasing was reduced by that 6.5% royalty. Similarly, in this case, where a 64/160ths outstanding royalty interest exists, either Wenco's or QEP's

[6] The Wenco Lease provides for a 1/6 royalty, which has become common in North Dakota in recent years. However, the rationale of the *Williams & Meyers* hypothetical is still helpful.

interest must bear the burden of that royalty. If the Dockters warranted a fifty percent interest to Grinnan (now QEP), and that interest is burdened by the Bank's outstanding 64/160ths royalty, the Dockters have breached their warranty to convey a full fifty percent mineral interest to Grinnan. *Duhig* and *Acoma* prevent this from happening and cause the grantors and their successors (Wenco) to bear the burden of the outstanding royalty interest.

[¶ 53] Further, *Duhig* provides a bright line rule that saves subsequent grantees from dealing with issues such as constructive notice, actual knowledge, or the parties' subjective intent. Wenco claims that a "bright line, certainty of title standard" is not required in a situation where the grantor "did not over-convey his mineral interest." (Wenco Br., ¶ 68, pp. 22-23.) However, the bright line rule is equally helpful in an *Acoma* fact situation where the outstanding interest is a royalty interest. As held in *Acoma*, *Selman*, and *Atlantic Refining Co.*, an outstanding royalty interest cannot burden the original grantee's or his successor's title, because to do so "would be contrary to the very language used in the granting clause . . . ." *Selman*, 402 S.W.2d at 524; *see also Williams & Meyers*, § 311, p. 580.43 (discussing the benefits of a bright line rule in an *Acoma* fact situation). Therefore, whether the outstanding interest is a royalty or a mineral interest, the original grantee and his successors must be able to rely on the language of the granting clause to determine what a deed actually conveyed.

[¶ 54] Wenco's argument in favor of overruling *Acoma* is without merit. The North Dakota Supreme Court, the highest courts of two other states, and preeminent oil and gas scholars have all found that an outstanding royalty interest should burden the grantor's interest alone, and not the interest of the grantee or his successors in interest.

These decisions have been based on (1) the underlying estoppel principle of *Duhig*, and (2) the advantages of a bright line rule to subsequent grantees, title examiners, and judicial finders of fact.

III. Wenco Is Not Entitled to a Trial on the Issue of Whether QEP Waived its Right to Assert that the Outstanding Royalty Conveyance Burdens Wenco's Interest Alone.[7]

A. Wenco has Failed to Establish the Existence of a Genuine Issue of Material Fact.

[¶ 55] Wenco is not entitled to a trial on the issue of whether QEP waived its right to assert that the Bank's outstanding royalty interest burdens Wenco's interest alone because Wenco has failed to establish the existence of a genuine issue of material fact. The party moving for summary judgment has the burden of showing that there are no genuine issues of material fact. *Halvorson*, 2008 ND 205, ¶ 5, 757 N.W.2d at 400. Once this burden is met, the nonmoving party must present "competent, admissible evidence" to raise an issue of material fact. *Id.* The evidence may be in the form of an affidavit or "other comparable means," but the party may not rely on "speculation or unsupported, conclusory allegations." *Id.*; N.D.R.Civ.P. 56(e)(2). Further, although a trial court may not "weigh" conflicting evidence, where the nonmoving party does not present sufficient evidence, summary judgment is proper. *Barbie*, 2009 ND 99, ¶ 6, 766 N.W.2d at 461.

[¶ 56] Wenco claims that it is entitled to a trial on the issue of whether QEP waived its right to assert that the Bank's outstanding royalty interest does not burden

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[7] The district court held that Wenco did not have standing to assert QEP waived its rights. (App. 157.) The district court further held that even if Wenco had standing, QEP and EOG were entitled to summary judgment. (App. 158.) Because EOG did not address the issue of standing below, it will not do so here. However, regardless of standing, EOG and QEP were entitled to summary judgment on Wenco's waiver claim.

QEP's interest. Waiver is generally an issue of fact; however, like other issues of fact it becomes an issue of law where only one reasonable inference may be made from the undisputed facts. *Gale v. N.D. Bd. of Podiatric Medicine*, 2001 ND 141, ¶ 14, 632 N.W.2d 424, 429. The only alleged factual dispute here is whether, upon receiving the Original DOTO, QEP had sufficient knowledge of its rights to make it possible for QEP to knowingly waive those rights. (Wenco Br., ¶ 86, p. 29.)

[¶ 57] As the district court noted, the Original DOTO did not provide notice to QEP as to the effect of the Bank's royalty interest on QEP's or Wenco's interests. (*See* Wenco App. 158.; *see also* Wenco App. 418-44.) In fact, the Original DOTO lists QEP's interest as a full fifty percent mineral interest. (Wenco App. 420.) There is nothing in the Original DOTO to give QEP knowledge, or even put QEP on notice, that an outstanding royalty interest might burden its mineral interest. Wenco points to nothing in the Original DOTO, but simply makes the assertion that "QEP's knowledge is a question of fact . . . ." (Wenco Br., ¶ 86, p. 30.) However, where a set of facts leads to only one reasonable inference, the issue becomes one of law. Wenco cannot point to a single fact that leads to a reasonable inference that QEP had knowledge of the effect of the Bank's royalty interest. EOG and QEP were therefore entitled to summary judgment on Wenco's waiver claim.

[¶ 58] Further, an affidavit submitted by QEP to the district court shows that QEP did not have knowledge of the alleged effect of the Bank's outstanding royalty interest until after QEP received the Original Division Order.[8] (*See* EOG App. 34-42.) This

[8] In fact, prior to its receipt of the Original Division Order, QEP had in its possession a title opinion completed by R.O. Smith, dated May 2, 1957, which determined that the

affidavit also explicitly states that QEP did not intend to waive any rights or interests in the Subject Property. (*Id.*) Wenco has not submitted evidence to refute these claims. Rather, Wenco has essentially asserted that QEP has been untruthful, and that QEP had knowledge of the alleged effect of the Bank's outstanding royalty interest upon receiving the Original DOTO. (*See* Wenco Br., 87.) Wenco asserts that the district court speculated as to QEP's knowledge when, in fact, the Court relied on the unambiguous language of the Original DOTO as well as QEP's affidavit stating that it did not have knowledge of the outstanding royalty upon reviewing the Original DOTO. Thus, there is no issue of material fact as to QEP's knowledge and summary judgment in QEP's and EOG's favor in this regard was appropriate.

B. The Undisputed Facts and Relevant Law Show that QEP Did Not Waive any Right.

[¶ 59] "A person may waive contractual rights and privileges to which that person is legally entitled." *Sanders v. Gravel Products, Inc.*, 2008 ND 161, ¶ 10, 755 N.W.2d 826, 831 (citing *Lawrence v. Delkamp*, 2006 ND 257, ¶ 8, 725 N.W.2d 211, 213). Waiver occurs when a person voluntarily and intentionally relinquishes any "known advantage, benefit, claim, right, or privilege." *Id.* (citation omitted). "Ignorance of a material fact negates waiver, and waiver cannot be established by a consent given under a mistake or misapprehension of fact." 28 Am. Jur. 2d Estoppel and Waiver § 188. "[W]aiver depends on what one party intended to do, regardless of the other party." *Sanders*, 2008 ND 161, ¶ 10, 755 N.W.2d at 831 (citation omitted). In a commercial

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interest held by The American Metal Company (QEP's predecessor) was unburdened by the severed royalty interest held by the Bank and that the interest retained by the Dockters bore the entire burden of said severed royalty interest. (*See* EOG App. 26-28.)

context, especially where the right allegedly waived is an important one, the North Dakota Supreme Court requires "a high degree of specificity for upholding waivers." *Stuart v. Stammen*, 1999 ND 38, ¶¶ 12-13, 590 N.W.2d 224, 228; *see also* 28 Am. Jur. 2d Estoppel and Waiver § 183 (stating that "to establish a waiver of a legal right, there must be a clear, unequivocal, and decisive act").

[¶ 60] Wenco alleges that QEP waived its right to challenge its or Wenco's interest as initially determined by EOG's outside title attorney because (1) QEP had an opportunity to review the Original DOTO prepared by Denise Linford, EOG's outside title attorney, and (2) EOG and QEP consummated their working interest agreement with knowledge that QEP's interest, as calculated pursuant to the Original DOTO, was burdened by the Bank's severed royalty interest. However, Wenco is neither a party nor a third-party beneficiary to the working interest agreement between QEP and EOG and therefore, has no basis to assert what rights flow from said agreement. Further, as discussed above, Wenco can point to nothing in the Original DOTO that would give QEP knowledge, or even put QEP on notice, that its interest might be burdened by an outstanding royalty interest.

[¶ 61] Finally, Wenco's entire argument regarding waiver completely ignores *Duhig*, as well as *Acoma* and its progeny. It is undisputed that in *Acoma* and subsequent cases, a party's constructive or even actual knowledge of a grantor's failure of title did not prevent the application of the *Duhig* rule. *See Sibert*, 357 N.W.2d at 498; *Miller*, 1999 ND 190, ¶ 12, 600 N.W.2d at 885; *see also Williams & Meyers*, § 311.4, p. 598; *Williams & Meyers*, § 311, p. 580.33. The fact situation in *Mau* is particularly relevant here. In *Mau*, the plaintiff had actual notice of a third party's outstanding interest, and

testified in court "that he decided not to pursue the matter because 70 mineral acres was close enough" to the 80 acres he had been promised in the deed. *Mau*, 460 N.W.2d at 133. The defendants tried to use this to estop the plaintiff from later bringing a quiet title action. *Id.* The Court allowed the action and granted judgment in the plaintiff's favor. *Id.*

[¶ 62] Thus, even if there exists a genuine issue of fact as to QEP's knowledge of the potential or alleged effect of the Bank's royalty interest, that knowledge is irrelevant. Wenco's waiver argument fails as a matter of law and the district court was correct in granting EOG's and QEP's motions for summary judgment.

CONCLUSION

[¶ 63] For the reasons set forth above, the District Court's judgment dismissing Wenco's claims on summary judgment should be affirmed.

DATED this 20th day of June, 2012.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Wenco, a North Dakota Limited Partnership Plaintiff/Appellant, vs. EOG Resources, Inc., QEP Energy Company, John Doe Defendants 10, claiming any estate or interest in, or lien or encumbrance upon, the property described in numbered paragraph 29 of the complaint, Defendants/Appellees.	)	Supreme Court No. 20120194 **CERTIFICATE OF SERVICE**

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

I hereby certify that on June 20, 2012, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

1. BRIEF OF DEFENDANT/APPELLEE EOG RESOURCES, INC.; and,
2. DEFENDANT/APPELLEE EOG RESOURCES, INC.'S APPENDIX

and served the same electronically as follows:

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