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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 1-10, 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 District Court No. 31-10-C-00162

BRIEF OF APPELLEE QEP ENERGY COMPANY

On Appeal from Judgment entered February 8, 2012 pursuant to an
Order of the District Court dated February 2, 2012
The Honorable Todd L. Cresap
Mountrail County District Court, Northwest Judicial District
Supreme Court No. 20120194
District Court No. 31-10-C-00162

COUNSEL FOR APPELLEE QEP ENERGY COMPANY:

John W. Morrison, ID # 03502
Wade C. Mann, ID # 05871
CROWLEY FLECK PLLP
400 East Broadway, Suite 600
Post Office Box 2798
Bismarck, North Dakota 58502-2798
Phone: 701-223-6585

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STATEMENT OF THE ISSUES

[¶ 1] I. Whether the district court correctly granted summary judgment applying the *Duhig* rule, as applied in *Acoma Oil Corporation v. Wilson*, 471 N.W.2d 476 (N.D.1991), and the interest of QEP Energy Company ("QEP") is not burdened by the royalty interest owned by Northwestern National Bank.

[¶ 2] II. Whether the district court properly granted summary judgment holding that QEP did not waive its right to a one-half mineral interest unburdened by the outstanding royalty interest.

STATEMENT OF THE CASE

[¶ 3] This lawsuit presents a relatively straight-forward legal dispute as to the interpretation and application of several conveyances of interests in oil and gas underlying certain lands in Mountrail County, North Dakota. Wenco and QEP are both mineral owners in the lands in question. EOG Resources, Inc. ("EOG") owns an oil and gas lease from Wenco and is the operator of an oil and gas well known as the Wenco 1-30H well. QEP owns an unleased mineral interest in the lands included in the spacing unit for the well. The dispute before this Court on appeal relates to how a royalty interest owned by the Northwestern National Bank of Minneapolis (the "Bank") affects the mineral interests owned by Wenco and QEP. QEP and EOG believe that the royalty interest burdens, or affects, only the interest of Wenco, while Wenco believes that the royalty interest burdens, or affects, the interests of both Wenco and QEP. By summons and complaint dated August 5, 2010, Wenco sought to quiet title against QEP and asserted claims of unjust enrichment against QEP, conversion against EOG, and a breach

of "implied covenant of good faith and fair dealing" against EOG. Wenco Appendix, pps. 5-15.

[¶ 4] After service of the summons and complaint, QEP filed a motion to dismiss asserting that the complaint failed to state a cause of action upon which relief can be granted. Docket ID No. 5. After briefing and argument, the Court denied the motion because it had insufficient information and other facts necessary to make a determination. Docket ID No. 23. Discovery was completed and thereafter Wenco, QEP and EOG each moved for summary judgment. Docket ID Nos. 66 and 54, respectively.

[¶ 5] QEP and EOG both asserted that this issue is determined by the North Dakota Supreme Court decision in *Acoma*. Wenco disagreed and urged that a concurring opinion in *Acoma* be extended and that the majority opinion in *Acoma* be distinguished and, in part, overruled. In its February 2, 2012 order, the district court, the Honorable Todd L. Cresap, presiding, denied Wenco's motion for summary judgment and granted summary judgment in favor of QEP and EOG. Wenco Appendix, pps. 138-177. The district court held that the *Duhig* rule, as applied in *Acoma*, governed the issues. Wenco Appendix, pps. 142-151.The district court also granted summary judgment in favor of QEP on Wenco's assertion of waiver by QEP. Wenco Appendix, pps. 155-159.

[¶ 6] The Notice of Appeal was filed on April 11, 2012. Wenco Appendix, p. 179.

STATEMENT OF THE FACTS

[¶ 7] Prior to November 30, 1954, Raymond Dockter and Jewell P. Dockter (the "Dockters") owned one-hundred percent of the oil and gas interests underlying the E/2 NW/4 and Lots 2 and 3 of Section 30, Township 153 North, Range 89 West, Mountrail

County, North Dakota (the "Subject Lands"), having acquired the same by tax deed from Mountrail County in 1948.

[¶ 8] By royalty deed dated November 30, 1954, and recorded that same day, the Dockters conveyed "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" the Subject Lands to the Bank. Wenco Appendix, page 217.

[¶ 9] Several years later, the Dockters, by mineral deed, conveyed "an undivided one-half interest in and to all the oil, gas and other minerals in and under" the Subject Lands and other lands to Wm. F. Grinnan. Wenco Appendix, page 218. The Dockters warranted title to the one-half interest they sold to Mr. Grinnan. This mineral deed was dated March 4, 1957 and recorded on April 11, 1957. *Id.*

[¶ 10] In 1993, Wenco purchased the Dockters' remaining interest in the Subject Lands and other lands by Contract for Deed, dated July 30, 1993 and Warranty Deed dated July 31, 2003. Wenco Appendix, pages 318-323. Both the contract for deed and the warranty deed are "subject to prior mineral reservations … of record." *Id.* In 2006, Wenco leased its mineral interest to Contex Energy Company and that lease was later assigned to EOG. Wenco Appendix, pps. 324-327.

[¶ 11] QEP is now the owner of the one-half mineral interest conveyed by the Dockters to Mr. Grinnan. Wenco Appendix, pps. 193-196, 219-311. After the Wenco 1-30H well was drilled by EOG, a dispute arose between Wenco and QEP as to their respective interests in the Subject Lands and the well. QEP's position is that it owns a full one-half interest in the oil and gas underlying the Subject Lands, that its interest is not subject to

the 64/160ths of royalty owned by Northwestern National Bank, and that Wenco's interest is subject to Northwestern's royalty share. EOG Appendix, p. 31. Wenco takes the position that both QEP's fifty percent interest and its own fifty percent interest should be subject to Northwestern's royalty share. EOG Appendix, pps. 22-23. In other words, Wenco asserts that when the Dockters conveyed and warranted a one-half mineral interest to Grinnan, they really only conveyed and warranted a one-half mineral interest less 32/160ths (i.e., ½ X 64/160ths) of the royalty.

ARGUMENT

I. Standard of Review.

[¶ 12] The North Dakota Supreme Court has stated its standard of review for summary judgment as follows:

> [¶ 13] We review this appeal under our standards for summary judgment, which is a procedure for promptly resolving an action on the merits without a trial if there are no disputed issues of material fact or inferences to be drawn from undisputed facts and if a party is entitled to judgment as a matter of law. Whether a trial court properly grants summary judgment is a question of law, which we review de novo on the entire record. A party seeking summary judgment bears the initial burden of showing there are no genuine disputes regarding the existence of material facts. On appeal, we view the evidence in the light most favorable to the party opposing the motion.

[¶ 14] *Nationwide Mut. Ins. Cos. v. Lagodinski*, 2004 ND 147, ¶ 6, 683 N.W.2d 903 (citations omitted). Rule 56 requires the entry of summary judgment against a party who fails to establish the existence of a material factual dispute as to an essential element of the claim and on which the party will bear the burden of proof. *Halvorson v. Sentry Ins.*, 2008 ND 205, ¶5, 757 N.W.2d 398. Mere speculation will not defeat a motion for summary judgment and a scintilla of evidence is not enough to support a claim. *State v. North Dakota State University*, 2005 ND 75, ¶8, 694 N.W.2d 225.

II. The District Court properly determined that the outcome in this case is controlled by the Court's opinion in *Acoma Oil Corporation v. Wilson*.

[¶ 15] The *Duhig* rule, named for the decision of the Texas Supreme Court in *Duhig et al v. Peavey-Moore Lumber Co.,* 135 Tex. 503, 144 S.w.2d 878 (1940), is by now a familiar issue in North Dakota cases involving mineral rights. The *Duhig* rule holds that "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." *Acoma Oil, supra,* 471 N.W.2d at 480. In *Duhig,* the grantor owned the surface and a one-half mineral interest in a tract of land and conveyed the surface to the grantee by a warranty deed with a reservation of one-half of the minerals. The issue was, after this conveyance, who owned the one-half mineral interest owned by the grantor before the grant. Did the grantor own the interest by virtue of the reservation of a one-half mineral interest? Or did the grantee own the interest by virtue of receiving a deed which on its face conveyed the surface and one-half the minerals? The Texas Supreme Court held that the grantee owned the one-half mineral interest in question. "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… [and] was estopped to assert the reservation of a one-half mineral interest." *Id.*

[¶ 16] In 1971, the North Dakota Supreme Court first applied *Duhig* in *Kadrmas v. Sauvageau,* 188 N.W.2d 753 (N.D.1971). With the exception of *Gilbertson v. Charlson,* 301 N.W.2d 144 (N.D. 1981), where the Court declined to follow the rule in a case where the grantee, prior to the disputed conveyance, owned an outstanding mineral interest in the property conveyed, the Supreme Court has uniformly applied *Duhig* for 40 years.

See, Sibert v. Kubas, 357 N.W.2d 495, 496 (N.D.1984); *Mau v. Schwan*, 460 N.W.2d 131, 133 (N.D.1990); *Miller v. Kloeckner,* 1999 ND 190, ¶18, 600 N.W.2d 881; *Gawryluk v. Pointer,* 2002 ND 205, ¶15, 654 N.W.2d 400; and *Melchior v. Lystad,* 2010 ND 140, ¶19, 786 N.W.2d 8. The Court has clearly held that a grantee's notice, actual or constructive, of a third party's outstanding mineral interest does not jeopardize his rights against a grantor who has made a conveyance to him by warranty deed. *Sibert*, *supra,* at 497.

[¶ 17] The facts in this case vary slightly from those presented in *Duhig*. Instead of an outstanding conveyance of one-half of their mineral interest before conveying the surface and mineral estate by warranty deed to Grinnan, there was an outstanding conveyance of a 64/160ths of the Dockter's royalty interest before conveying a one-half mineral interest to Grinnan. The question is the same - is the one-half mineral interest conveyed to Grinnan reduced by a proportionate part of the outstanding royalty interest owned by the Bank, or is the one-half mineral estate reserved or retained by the Dockters (and later sold to Wenco) reduced by the entire outstanding royalty interest?

[¶ 18] In *Acoma,* the North Dakota Supreme Court answered this question by applying the *Duhig* rule. The Court first noted that several North Dakota statutes reinforce *Duhig*. 471 N.W.2d at 480. Section 47-09-13, N.D.C.C. provides that grants are interpreted in favor of the grantee. Section 47-09-16, N.D.C.C. provides that a transfer vests in the transferee all the actual title which the transferor has unless a different intention is expressed or necessarily implied. Section 47-10-08, N.D.C.C. provides that every grant is conclusive against the grantor and everyone subsequently claiming under him, other than a subsequent purchaser for value who records his grant first. The *Acoma* court

further noted that the relevant conveyance to determine the applicability of *Duhig* and these statutes was the equivalent of the conveyance from the Dockters to Grinnan. *Id.* at 481. The rights of successors in interest, like QEP to the interest of Grinnan and Wenco to the interest of the Dockters, are determined by the original conveyance.

[¶ 19] In *Acoma,* the Court recognized that a mineral interest is a property interest which includes the right to sell the estate, the right to explore and develop the estate, the right to execute leases, and the right to create fractional shares of the mineral estate. *Id.* A royalty interest is a "smaller interest in a mineral estate which is a share of the product or proceeds reserved to the owner for permitting another to develop or use the property." They are "separate property interests with different characteristics." *Id.* The court recognized that conveyance of either "mineral acres" or "interests in oil, gas and other minerals 'in and under' described land" have been construed to convey full mineral interests. Therefore, the Court applied *Duhig* to a situation identical in substance to the one before the Court in this case. Because of the provisions of Section 47-09-13, N.D.C.C., and the general rule of law that a conveyance without any exception or reservation constitutes a conveyance of 100 percent of the minerals, the Court held that *Duhig* would be applied even where there was no explicit reservation. Because grants are interpreted in favor of the grantee and because a conveyance of land constitutes a conveyance of 100% of the minerals as well as the surface, the conveyance from the Dockters to Grinnan of a one-half mineral interest conveyed a 100 percent interest in that one-half of the minerals without reduction for the outstanding royalty.

[¶ 20] The *Acoma* court further noted that at least two other courts had reached the same conclusion – *Selman v. Bristow*, 402 S.W.2d 520 (Tex. Civ. App. 1966) and *Atlantic Refining v. Beach*, 78 N.M.634, 436 P.2d 107 (1968).

In concluding its discussion of *Duhig*, the *Acoma* court stated as follows:

> When the [Dockters] … conveyed the mineral acres to [Grinnan] … they retained ownership of enough mineral interests… to satisfy the prior … royalty assignment without burdening the interest conveyed to [Grinnan]. Because the [Dockters] … owned enough mineral interests in the … tract of land to fully satisfy their conveyances to [Grinnan], we conclude that the interests of [Grinnan's] successor in interest … [is] not burdened by the [64/160ths] royalty.

Acoma, 471 N.W.2d at 484 (substituting names with the corresponding names in this matter).

[¶ 21] The clear authority of *Acoma* has been recognized by the North Dakota Mineral Title Standards prepared by the Mineral Title Standards Committee and approved by the Section of Real Property, Probate and Trust Law and by the Board of Governors of the State Bar Association of North Dakota. North Dakota's Mineral Title Standards "are based on the relevant statutes of the State of North Dakota, decisions of the North Dakota Supreme Court, and the collective experience of the members of the Mineral Title Standards Committee." North Dakota Mineral Title Standards, Introduction. The North Dakota Supreme Court has recognized and cited the Mineral Title Standards in connection with the interpretation of mineral conveyances. *Hild v. Johnson*, 2006 ND 217, ¶8, 723 N.W. 2d 389.

[¶ 22] North Dakota Mineral Title Standard 7-05 ("Allocation of Royalty Burdens") and North Dakota Mineral Title Standard 7-05.1 ("Allocation of Royalty Burdens Among Mineral Interests") both provide as follows:

> Standard: If a mineral owner who owns a mineral interest subject to an outstanding royalty interest executes a mineral deed (with a warranty clause) to a party conveying mineral acres or "interests in oil, gas and other minerals in and under" without any reference to the outstanding royalty interest, the retained mineral interest of the mineral owner alone bears the outstanding royalty if the interest is large enough to satisfy the royalty interest. Under all circumstances, the title examiner should exercise extreme caution in determining the ownership of all royalty within the lands with particular attention to the burden on each mineral interest.

The authority cited is *Acoma*, together with *Atlantic Refining Company, supra, Selman, supra,* and *Duhig.*

[¶ 23] The facts in this case are squarely within Mineral Title Standard 7-05 and 7-05.1:

- in 1957, the Dockters were mineral owners who owned a mineral interest subject to the outstanding royalty interest owned by the Bank;
- the Dockters executed a mineral deed with a warranty clause;
- the mineral deed covered an interest in oil, gas and other minerals in and under the lands;
- the mineral deed made no mention of or reference to the outstanding royalty;
- the mineral interest retained by the Dockters was large enough to satisfy the Bank's royalty interest.

The result is that the mineral interest of the Dockters, which is now owned by Wenco, "alone bears the outstanding royalty."

III. Wenco's reliance on the concurring opinion in *Acoma* is misplaced.

[¶ 24] In arguing that *Acoma* does not apply, Wenco relies almost entirely on the concurring opinion in *Acoma.* Wenco's argument erroneously assumes that the concurring opinion is part of the *Acoma* decision and constitutes the law in North Dakota. In North Dakota, only a decision joined in by a majority of the Supreme Court is binding precedent. *Desautel v. North Dakota Workmen's Compensation Bureau,* 28 N.W.2d 378,

382-383 (N.D. 1947); *Stout v. N.D. Workmen's Comp. Bureau,* 253 N.W.2d 429, 432 (N.D.1977). The concurring opinion is not binding precedent and the District Court properly applied the majority opinion. In any event, Wenco's argument misapplies the concurring opinion.

[¶ 25] First, Wenco argues that Wenco is a "purchaser for value" and suggests that the result would have been different in *Acoma* if the Wilson heirs, who were the successors in interest to the grantor in the conveyance to which the *Acoma* court applied the *Duhig* rule, had been purchasers for value. The concurring opinion notes that the author concurs with the conclusion that heirs who take through the original grantor should bear the royalty, but does not state that the result would be different if they had been purchasers for value. The majority opinion, however, holds that any such distinction is immaterial to the outcome:

> In this case the plaintiffs obtained their mineral interests by conveyances originating from the Wilson parents' transfer to Leach. We thus look to that conveyance to determine the applicability of *Duhig* and those statutes to this case because estoppel by deed precludes a party to a deed **and privies** any right or title in derogation of the deed, or from denying the truth of any material facts asserted in the deed. [citation omitted] That analysis is supported by the language of Section 47-10-08, N.D.C.C., that "every grant of an estate in real property is conclusive against the grantor **and everyone subsequently claiming under him."** 471 N.W.2d at 481

It is the conveyance from Dockters to Grinnan that determines the applicability of *Duhig* and that grant is binding upon Wenco as a party "subsequently claiming under" the Dockters, regardless of whether Wenco acquired the interest as an heir or through a purchase for value.

[¶ 26] Second, Wenco argues that in this action the conveyance from the Dockters to Grinnan was of "an undivided one-half interest in and to all of the oil, gas and other

minerals in and under" the property, rather than a conveyance of "80 net mineral acres." Again, the concurring opinion notes that the concurrence was limited to purchasers "of a specified number of mineral acres." The majority opinion in *Acoma,* however, did not distinguish between a grant of a fraction of the minerals in and under a tract and a grant of a specified number of mineral acres. In *Hild v. Johnson, supra,* a unanimous Supreme Court affirmatively recognized that there is no difference between the two types of mineral conveyances. "[I]n a tract containing 160 acres, an 80 acre mineral interest would be the same as an undivided ½ mineral interest. It makes no difference which form of description is used so long as the tract contains the assumed number of acres." 2006 ND 217, ¶9, quoting 1 E Kuntz Oil and Gas §16.3 at 492-493 (1987).

[¶ 27] Finally, Wenco misconstrues the concurring opinion and argues that the concurring opinion would recognize a different result because the grantors (the Dockters) subsequently conveyed all of their interest to Wenco. In his concurring opinion, Justice VandeWalle queried whether a different result might be obtained if "the original grantor, after conveying a royalty interest conveys all of the grantor's remaining mineral acres or conveys mineral acres to the extent the grantor no longer retains sufficient interest to satisfy the previously conveyed royalty interest." 471 N.W.2d at 487. The conveyance contemplated by Justice VandeWalle was clearly the conveyance in which the *Duhig* issue arose – in this case, the conveyance to Grinnan, not the later conveyance to Wenco. The Dockters did not convey all of their remaining mineral acres to Grinnan, nor did they convey mineral acres to the extent they could no longer satisfy the previously conveyed royalty. After conveying a full one-half mineral interest to Grinnan, the Dockters retained "sufficient interest to satisfy the previously conveyed royalty interest."

[¶ 28] Thus, of the three "distinguishing" factors Wenco relies upon, one was rejected by the majority opinion in *Acoma*, one was rejected by the Court's explicit recognition in *Hild v. Johnson* that "it makes no difference which form of description is used so long as the tract contains the assumed number of acres," and one exists only if the plain language of Justice VandeWalle's concurring opinion is ignored. exists only if the plain language of Justice VandeWalle's concurring opinion is ignored.

IV. *Acoma* should not be overruled.

[¶ 29] Recognizing the applicability of *Acoma* and its effect on the outcome of this dispute, Wenco urges the Court to overrule *Acoma*, arguing that *Acoma* "unnecessarily expands the Duhig rule to fact patterns beyond the underlying equitable principle of *Duhig*." Appellant's Brief, p. 23.

[¶ 30] "The rule of stare decisis is grounded upon the theory that when a legal principle is accepted and established rights may accrue under it, security and certainty require that the principle be recognized and followed thereafter." *Dickie v. Farmers Union Oil Co. of LaMoure*, 2000 ND 111, ¶13, 611 N.W.2d 168, citing *Ottertail Power Company v. Von Bank*, 8 N.W.2d 599, 607 (N.D.1942). While the rule is not sacrosanct, the Court should recognize the validity of the "security and certainty" resulting from consistent application of legal principles. Wenco offers no cogent reason for overruling *Acoma.* It cites no authority from other jurisdictions or legal commentators to directly support its assertion that *Duhig* should not apply to an outstanding royalty interest. As noted in *Acoma*, the same result has been reached by courts in Texas and New Mexico.

IV. The District Court properly rejected Wenco's waiver claim.

[¶ 31] As an alternative to its argument that *Acoma* and the Duhig rule should be ignored, Wenco argues that QEP waived its right to assert that the outstanding royalty burdens only the Wenco mineral interest and argues that there is some issue or claim that should "proceed to trial." Appellant's Brief, ¶ 72. In its summary judgment motion at the District Court, Wenco argued that both EOG and QEP waived any claim that the outstanding royalty burdened only the Wenco mineral interest. Appellant's Appendix p. 212. On appeal, Wenco appears to drop its claim as against EOG and asserts only that "there is a factual question as to whether QEP waived any claim." Appellant's Brief ¶73.

[¶ 32] With respect to QEP, the District Court found that (1) Wenco does not have standing to assert a waiver claim against QEP (Appellant's Appendix pps. 156-157) and (2) the undisputed facts established that there was no "knowing waiver" by QEP (Wenco Appendix pps. 157-158).

[¶ 33] In determining that Wenco did not have standing, the District Court found that, assuming for the sake of argument that QEP's actions in signing a joint operating agreement after being provided a copy of the December 11, 2006 drilling title opinion constituted a voluntary, intentional relinquishment of a known existing right, QEP was not directly injured by such action. Instead, the District Court reasoned, EOG, as the operator and the disburser of revenue payments, was the party directly affected by QEP's actions.

[¶ 34] Wenco's primary claim for relief is a quiet title action. Now that Wenco has abandoned its "good faith" claims against EOG, it has a quiet title claim against QEP and EOG, an unjust enrichment claim against QEP based on the assumption that it succeeds

in the quiet title claim, and a conversion claim against EOG, again based on the assumption that it succeeds in the quiet title claim. Wenco Appendix, pps. 126-137. It is black letter law that a plaintiff suing to quiet title must rely on the strength of its own title and not the weakness of the adversary. *Gajewski v. Bratcher,* 221 N.W.2d 614, 637 (N.D.1974); *Hogue v. Bourgois*, 71 N.W.2d 47, 53 (N.D.1955). Therefore, assuming for the sake of argument, that QEP did waive its claim to the 50% mineral interest it acquired from the Dockters, unburdened by the Northwestern royalty interest, Wenco could not acquire an interest it did not otherwise own simply on the weakness of QEP's title but would be restricted to its own title, which, in accordance with *Acoma*, is burdened by the Northwestern royalty. As the District Court determined, Wenco's "injury," if any, from any such waiver is indirect.

[¶ 35] A different result might be obtained if Wenco had a valid estoppel claim against QEP. In *Hanson v. Hulett,* 22 N.W.2d 209 (N.D.1946), the plaintiffs, having defaulted on a purchase contract, executed a deed with the name of the grantee left blank. After the deed was delivered to the defendant, the defendant inserted his wife's name in the deed, agreed that the plaintiffs could continue their occupancy as tenants, and the defendant's wife quitclaimed the property to the defendant. After paying rent for more than three years, the plaintiffs claimed the deed was obtained by fraud and deceit. The Court said "[s]ince the plaintiffs, by their conduct, have precluded themselves from asserting title to the premises <u>as against the defendant</u> it is proper that the judgment afford the defendant the affirmative relief" of quieting title in the defendant. 22 N.W.2d at 211. In this case, Wenco pled estoppel against QEP (Appellant's Appendix p. 132) but recognizing the

obvious absence of any detrimental reliance or prejudice, Wenco did not argue estoppel in its summary judgment motion.

[¶ 36] The existence of standing is a question of law, to be reviewed de novo on appeal. *Flatt v. Kantak*, 2004 ND 173, 687 N.W.2d 208. The District Court properly found that, assuming QEP had voluntarily and intentionally relinquished a known existing right by entering into a joint operating agreement with EOG after being afforded the opportunity to review the drilling title opinion, Wenco was not injured or otherwise affected by such action and has no standing to assert a claim of waiver.

[¶ 37] Additionally, however, the District Court expressly found that the actions raised by Wenco did not constitute a waiver. At the District Court, and in this appeal, Wenco relies upon the following:

1. On April 4, 2007, QEP agreed to participate in the Wenco 1-30-H well "subject to review and approval of a Title Opinion."
2. EOG provided a title opinion to QEP which Wenco asserts indicated QEP's interest was burdened by the outstanding royalty.
3. QEP signed a joint operating agreement on May 4, 2007 agreeing to participate in the well.

Waiver is a "voluntary and intentional relinquishment of a known right or privilege. *Gale v. North Dakota Board of Podiatric Medicine*, 2001 ND 141, 632 N.W.2d 424. Waivers are never presumed but must be established with certainty. *Federal Land Bank of St. Paul v. State*, 274 N.W.2d 580 (N.D.1979). A waiver can be inferred from conduct. *Id.* "If the intention to waive is to be implied from conduct, the conduct should speak the intent clearly." 28 Am Jur 2d Estoppel and Waiver §209. Mere silence or passivity is

not a waiver. *Id.* at §210; *Moore v. First Sec. Cas. Co.,* 568 N.W.2d 841 (Mich. App. 1997). Inaction must be accompanied by other circumstances, such as an unreasonable length of time, to evidence intent. *Id.*

[¶ 38] While waiver is typically a question of fact, if the circumstances of a claimed waiver are admitted or clearly established and reasonable persons can draw only one conclusion from those circumstances, the existence or absence of waiver is a question of law. *Gale, supra,* ¶14. Even assuming that the facts alleged by Wenco are accurate and are the only relevant facts, they simply fail as a matter of law to establish that QEP intended to voluntarily and intentionally give up its proper claim to the unreduced 50% working interest it is entitled to under *Acoma.* And, in any event, other undisputed facts clearly negate any inference that might be raised by these three facts.

[¶ 39] First, while the title opinion upon which Wenco relies provides that "the mineral interests of WENCO and Universal Resources Corporation[1]… are subject to a severed landowner royalty interest" the opinion also expressly provides that "in the event of production, all issues related to this royalty must be determined and considered." Wenco Appendix, p. 398. Second, the title opinion Wenco relies upon properly reflects both QEP's "working interest" and its "net revenue interest" in the Subject Lands as 50.000000% and its "working interest" and "net revenue interest" in the spacing unit as 25.000000% without indicating that the net revenue interest is subject to any potential royalty burden. Wenco Appendix, p. 392-393.

[¶ 40] On appeal, Wenco addresses these facts by asserting that the District Court "is simply speculating about how representatives of QEP comprehended the Linford

[1] In the opinion, QEP's interest is shown as Universal Resources Corporation.

opinion." Wenco fails to address the other uncontested facts identified by the District Court. On February 19, 2008, EOG provided QEP a division order that credited QEP with .24376880 (or 24.37688%), rather than the full 25%. EOG's Appendix, p. 36. Upon receiving the division order burdening QEP's interest with a portion of the outstanding royalty, QEP's landman almost immediately contacted EOG to obtain further information. EOG's Appendix, p. 41. QEP did not sign the division order because it did not correctly reflect QEP's interest. EOG's Appendix, p. 40. On June 13, 2008, QEP formally requested that EOG correct QEP's interest to reflect the 25.000000% interest shown in the title opinion on which Wenco now relies. EOG's Appendix, p. 42.

[¶ 41] Wenco does not contest the facts found by the District Court. Wenco offers no additional uncontested facts to support its claim of a waiver. The circumstances of the claimed waiver are clearly established and reasonable persons can draw only one conclusion from these uncontested facts – that QEP did not intend to and did not "voluntarily and intentionally relinquish" that portion of its interest attributable to any portion of the outstanding royalty interest. As such, the absence of a waiver is a question of law. *Gale, supra.*

CONCLUSION

[¶ 42] Construction of the unambiguous conveyances involved in this case is a question of law and there are no material facts which are disputed. Under existing North Dakota law, the conveyance from the Dockters to Grinnan was not subject to the outstanding royalty interest owned by the Bank and therefore QEP's interest is not burdened by the Bank's royalty. The undisputed facts before the Court, and the only reasonable conclusion which can be drawn from such undisputed facts, is that QEP did not waive its

right to receive the benefits of its mineral interest, undiluted by the outstanding royalty conveyance. For these reasons, the District Court properly granted summary judgment dismissing Wenco's complaint and its decision should be affirmed.

Dated at Bismarck, North Dakota, this 3rd day of July, 2012.

CROWLEY FLECK PLLP
Attorneys for Defendant/Appellee QEP Energy Company
400 East Broadway, Suite 600
Post Office Box 2798
Bismarck, North Dakota 58502-2798
Phone: (701) 223-6585
Fax: (701) 222-4853

By____*/s/ John W. Morrison*_____
JOHN W. MORRISON
ND Bar ID# 03502
WADE C. MANN
ND Bar ID# 05871

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the revised Appellee's Brief was, on the 3rd day of July, 2012, served upon the following by Electronic Mail:

Lawrence Bender
Amy L. De Kok
Fredrikson & Byron, P.A.
200 North Third Street, Suite 150
P.O. Box 1855
Bismarck, ND 58501
adekok@fredlaw.com
lbender@fredlaw.com

David J. Hogue
Pringle & Herigstad, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
dhogue@srt.com

/s/ John W. Morrison
JOHN W. MORRISON