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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20120194
Ward County Civil No. 31-10-C-00162

Wenco, a North Dakota Limited Partnership,	)
	)
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,	)
	)
Appellee.	)

APPEAL OF THE ORDER DATED FEBRUARY 2, 2012
AND JUDGMENT DATED FEBRUARY 8, 2012
IN MOUNTRAIL COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT

THE HONORABLE TODD L. CRESAP, PRESIDING

APPELLANT'S BRIEF

David J. Hogue (ID #04486)
PRINGLE & HERIGSTAD, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
Attorneys for Plaintiff/Appellant

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¶ 2 **Statement of Issues on Appeal**

¶ 3 1. Whether the district court correctly concluded that the mineral interest owned by defendant QEP Energy Company ("QEP") is unburdened by a royalty assignment that was executed and recorded before QEP (and its predecessors in interest) acquired title to its mineral interest. Stated another way, the sole issue raised by appellant Wenco is whether the district court correctly concluded that only Wenco's mineral estate is burdened by the royalty assignment executed and recorded prior to Wenco's and QEP's acquisition of their respective mineral interests.

¶ 4 **Wenco's position**: The district court erred. The *Duhig* rule is not applicable to the facts of this case nor is the majority opinion of this Court in *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991).

¶ 5 Whether the district court correctly concluded Wenco lacked standing to assert QEP waived its right to deny the Dockter Royalty Conveyance burdened only the Wenco mineral interest.

¶ 6 **Wenco's Position**: The district court erred. Wenco possesses standing to assert QEP's waiver of its right.

¶ 7 **<u>Statement of the Case</u>**

¶ 8 Plaintiff/appellant Wenco, a North Dakota limited partnership ("Wenco") initiated this claim for relief against defendant/appellees EOG Resources, Inc. ("EOG") and QEP as a quiet title action under Chapter 32-17, NDCC. (App. 11-12). The quiet title action relates only to the mineral estate of the disputed acreage.

¶ 9 Wenco and QEP have competing claims for the same mineral interest. Their claims are adverse to one another. EOG has only a working interest in a producing well, and is the well operator that Wenco contends is improperly disbursing royalty proceeds by overpaying QEP and underpaying Wenco. EOG drilled and completed a well on the disputed acreage in 2007 and began making disbursements of royalty revenue to mineral owners, including Wenco, in May 2008. (App. 43, ¶ 55; App. 44, ¶ 58). QEP shares a royalty interest with Wenco, among others, in the disputed acreage. In addition to the quiet title claim, Wenco sought relief from EOG and QEP because Wenco alleges EOG's mistaken view of the law causes EOG as well operator to overpay QEP and underpay Wenco. Accordingly, Wenco asserted a claim for unjust enrichment against QEP for wrongfully receiving royalty proceeds belonging to Wenco. (App. 12-13). Wenco asserted a conversion claim against EOG as the well operator for wrongfully diverting Wenco's royalty revenue to QEP. (App. 13-14).

¶ **10** QEP and EOG denied that Wenco was underpaid. (App. 46, 84). EOG asserted a counterclaim, arguing that title to the disputed acreage should be quieted in the manner that is consistent with EOG and QEP's understanding of the law and EOG's division order. (App. 41-44). After written and deposition discovery, all three parties moved for summary judgment, arguing there were no material facts in dispute and that each respective party was entitled to judgment as a matter of law under Rule 56(c), N.D.Civ.P.

¶ **11** The district court, the Honorable Todd L. Cresap, presiding, denied Wenco's motion for summary judgment and granted the countervailing motions for summary judgment made by EOG and QEP. (App. 176). In its February 2, 2012 decision, the district court adopted the argument of EOG and QEP that the dispute was governed by the "*Duhig* rule" and this Court's decision in *Acoma Oil Corporation v. Wilson*, 471 N.W.2d 476 (N.D. 1991). (App. 176). Accordingly, the district court dismissed Wenco's quiet title, conversion, and unjust enrichment claims. *Id*. The district court summarized its ruling on Wenco's claims as follows:

> "Therefore, the *Duhig* rule is applicable to the present case and is determinative on the following Wenco's claims:
>
> 1. Quiet title - because Wenco's interest is solely burdened by the Bank's royalty interest, title in the Subject Property should be quieted to reflect such;
>
> 2. Conversion - because Wenco did not have any interest in the disputed royalties, EOG could not convert them; and

3. Unjust enrichment - because QEP has received royalty payments based upon its interest in the Subject Property and not based upon Wenco's interest, QEP has not been unjustly enriched." (App. 151).

¶ 12 The district court also dismissed Wenco's claim for an alleged breach of the covenant of good faith and fair dealing against EOG. (App. 177). Wenco does not raise dismissal of its claim against EOG for breach of the duty of good faith and fair dealing on appeal.

¶ 13 Judgment was entered by the Clerk of Court of Mountrail County on February 8, 2012. (App. 177). EOG served notice of entry of order and judgment February 13, 2012. (App. 178). EOG did not file a statement of costs and disbursements with its notice of entry of judgment as required by Rule 54(e)(1), N.D.Civ.P. Wenco filed its notice of appeal April 11, 2012. (App. 180).

¶ 14 **<u>Statement of the Facts</u>**

¶ 15 This is a quiet title claim related to the mineral estate in a tract of land in Mountrail County, North Dakota. Wenco brought this action against EOG and QEP in order to determine the rights of the parties in and to the oil and gas mineral interests in and under the following described lands:

> **<u>Township 153 North, Range 89 West, Mountrail County, North Dakota:</u>**
> **Section 30: Lots 2 and 3, E1/2NW1/4**

(herein "the Disputed Property"). (App. 11-12). Raymond and Jewel P. Dockter ("Dockters") are the predecessors in interest to both Wenco and QEP. In the early

1950s, the Dockters owned the surface and 100% of the minerals, including all royalties.

¶ 16 A. The Northwestern National Bank Royalty Assignment.

¶ 17 The crux of this case is whether a royalty assignment given by the Dockters to Northwestern National Bank of Minneapolis, and duly recorded prior in time to the mineral conveyances to Wenco and QEP, should burden the mineral estate of Wenco but not QEP. On November 30, 1954, the Dockters granted to Northwestern National Bank of Minneapolis ("Bank") a "64/160ths interest in and to all of the oil royalty, gas royalty…in and under" the Disputed Property (herein "Dockters Royalty Conveyance" or "Royalty Conveyance"). On November 30, 1954, this Royalty Conveyance was recorded as document number 171308 in the Mountrail County Register of Deeds.

¶ 18 B. Defendant QEP's Chain of Title.

¶ 19 After the Royalty Conveyance in 1954, on March 4, 1957, the Dockters, by way of Mineral Deed, conveyed to Wm. F. Grinnan an "undivided one-half interest in and to all of the oil, gas and other minerals in and under" the Disputed Property. (App. 11). On April 11, 1957, this Mineral Deed was recorded as document number 176108 in the Mountrail County Register of Deeds. *Id.*

¶ 20 On March 11, 1957, Wm. F. Grinnan, by way of Mineral Deed, conveyed his "one-half interest in and to all the oil, gas, casinghead gas, casinghead gasoline

and other minerals" in and under the Disputed Property to The American Metal Company, Limited. (App. 219). On May 13, 1957, this Mineral Deed was recorded as document number 176351 in the Mountrail County Register of Deeds. *Id*. The American Metal Company, Limited changed its name to American Metal Climax, Inc. (App. 221).

¶ 21 Pursuant to a Confirmatory Conveyance and Assignment, which was executed on July 22, 1958, and was effective on January 1, 1958, American Metal Climax, Inc., formerly known as The American Metal Company, Limited, conveyed its interest in the Disputed Property to American Climax Petroleum Corporation. *Id*. This conveyance was "subject, however, to all royalties, overriding royalties, … of record to the extent that they may affect or relate to said properties and interests of Grantor." *Id*. On July 25, 1958, this conveyance was recorded in the Mountrail County Register of Deeds. *Id*. By way of merger, American Climax Petroleum Corporation merged to become American Metal Climax, Inc (hereinafter both American Climax Petroleum Corporation and American Metal Climax, Inc. are referred to as "American Climax"). (App 228-30).

¶ 22 On June 13, 1962, American Climax, by way of Assignment and Conveyance, conveyed its interest in the property to Amax Petroleum Corporation. (App. 232-233). This conveyance was "subject, however, to all royalties,

overriding royalties … and other burdens of record to the extent that they may affect or relate to said properties and interests of Assignor." *Id.* On August 26, 1982, this Assignment and Conveyance was recorded as document number 248789 in the Mountrail County Register of Deeds. *Id.* Amax Petroleum Corporation became Amax Oil & Gas, Inc (hereinafter both Amax Petroleum Corporation and Amax Oil & Gas, Inc. are referred to as "AMAX").

¶ 23 On March 31, 1994, AMAX, by way of General Conveyance, conveyed its interest in the property to Universal Resources Corporation (herein Universal). (App. 235-50). Universal is now known as Defendant QEP.[1] This conveyance was subject to "any Title Defects that Assignee may have expressly waived in writing or which are deemed to have been waived under Article 5.02(b) of the Agreement." *Id.* at Section 2.2(v).

¶ 24 The "agreement" being referred to is the Asset Sale and Purchase Agreement dated as of March 18, 1994, by and between Union Pacific Resources Company, as Seller, and Universal, as Buyer ("Agreement"). (App. 235). In the Agreement, Universal was required to object, by way of a "Title Defect Notice" to title defects; pursuant to the Agreement, failure to object to a title defect resulted in the title defect to "be deemed conclusively [a] Permitted [Encumbrance]." (App. 263-64).

[1] Universal Resources Corporation's name was legally changed to Questar Exploration and Production Company (herein Questar) on March 26, 1999. (App 30-07). Questar's name was legally changed to QEP Energy Company (i.e., Defendant QEP) on June 14, 2010. (App. 308-311).

Defendant QEP failed to object to any title defects for the Disputed Property, including the Dockters Royalty Conveyance. (App. 313).

¶ 25 As seen in the above-described chain of title, QEP's remote grantor was the Dockters. Two of QEP's predecessors in interest received their interest subject to royalties of record.

¶ 26 C. Wenco's Chain of Title.

¶ 27 On July 30, 1993, Wenco entered into a contract for deed with the Dockters in which Wenco would purchase the surface and the balance of mineral interest owned by the Dockters for the Disputed Property. The contract for deed also included additional real property unrelated to the present claim. (App. 318). On July 31, 2003, the Dockters deeded the Disputed Property to Wenco, which, based on record title, included the surface and a one-half interest in the oil, gas, and other minerals. (App. 322).

¶ 28 D. Royalties for the Disputed Property.

¶ 29 Wenco leased its mineral estate interest in the Disputed Property to Contex Energy Company. ("Wenco lease") (App. 324). Contex Energy Company assigned the Wenco lease to Defendant EOG. QEP did not lease its interest in the property; rather, QEP entered into a working interest agreement with EOG in which QEP has a working interest in addition to its royalty interest. (App. 328). ("working interest agreement").

¶ **30** EOG's title attorney, in her December 11, 2006, drilling title opinion, opined that the Dockters Royalty Conveyance burdened both Wenco and QEP. (App. 391, 398). Additionally, EOG's title attorney's Division Order Title Opinion dated February 11, 2008, confirmed that the Dockters Royalty conveyance burdened Wenco and QEP's interests. (App. 420).

¶ **31** EOG began making royalty payments to Wenco under the terms of the Wenco lease pursuant to the division order issued by EOG on February 18, 2008, (herein "Original Division Order"); the Original Division Order represented that Wenco held a 0.03335841 royalty interest and paid Wenco accordingly. (App. 447).

¶ **32** Then, on September 22, 2008, EOG issued another division order (herein "Second Division Order") that conflicted with the Original Division Order; the Second Division Order represented that Wenco held only a 0.0250515 royalty interest and reduced Wenco's payment while increasing QEP's. (App. 448). EOG's Second Division Order reversed the Original Division Order, concluding that that the Dockters Royalty Conveyance burdened only Wenco's mineral interest and not Defendant QEP's mineral interest. (App. 450).

¶ **33** If Wenco and EOG's Original Division Order are correct, Defendant QEP has been unjustly enriched in the amount of $211,059.01 through June of 2011. *Id.*

This is the royalty payment that Wenco is entitled to and that was wrongly paid to QEP by EOG.

¶ **34** Unbeknownst to Wenco, codefendants EOG and QEP were engaged in on-going negotiations before drilling operations began on the Wenco 1-30H well. (App. 422). EOG's landsman informed QEP that EOG's "economics only work if Questar [QEP] participates or leases its minerals." *Id.* To support its decision to participate with EOG, QEP requested and EOG provided a "technical presentation" regarding the Wenco 1-30H. *Id.*

¶ **35** During these negotiations, QEP insisted on the right to review EOG's drilling title opinion before investing in the Wenco 1-30H (the "Well"). (App. 454). QEP's agreement to participate in the Well was expressly subject to QEP's "review and approval of a Title Opinion covering" the property in question. (App. 456). EOG and QEP eventually reached formal written agreement, and formed a cost sharing partnership through which the Well would be developed. (App. 325).

¶ **36** After EOG and QEP developed the Well, after QEP received and reviewed the drilling opinion it insisted on receiving before investing in the Well, and after EOG began making monthly distributions of royalty revenue on the Well, QEP initiated further discussions with EOG concerning the payment of royalties. Wenco, as a mere lessor without a working interest, was not privy to these discussions.

¶ 37 In short, QEP told EOG that contrary to the opinion it had previously reviewed and accepted, EOG miscalculated QEP's interest. QEP insisted that only Wenco should be burdened by the Dockter Royalty Conveyance. (App. 459-4). EOG acceded to its business partner's request, thus lowering Wenco's royalty interest and raising QEP's royalty in the Wenco 1-30H well. Wenco commenced this claim shortly after learning about EOG and QEP's changed position.

¶ 38 ARGUMENT

¶ 39 I. WENCO IS ENTITLED TO SUMMARY JUDMENT BECAUSE THE DISTRICT COURT MISAPPLIED THE LAW RELATED TO AN OVERCONVEYANCE OF A MINERAL INTEREST.

¶ 40 A. The Summary Judgment Standard.

¶ 41 There is no dispute between the parties that someone is entitled to a summary judgment pursuant to Rule 56(c), N.D.Civ.P. relative to the claim of whether the Dockter Royalty Conveyance burdens both Wenco and QEP's mineral interest in the Disputed Property. Summary judgment is appropriate "[i]f the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to judgment as a matter of law." N.D.R.Civ.P. 56(c). In *Arndt v. Maki,* 2012 *ND 55, ¶ 10, ___ N.W.2d* ___ this Court explained its standard for review of summary judgments:

> "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law."

See also, Come Big or Stay Home, LLC v. EOG Res., Inc., 2012 ND 91, ¶ 6, ___ N.W.2d ___. *Hasper v. Center Mut. Ins. Co.*, 2006 ND 220, ¶ 5, 723 N.W.2d 409. Summary judgment is appropriate against parties who fail to establish the existence of a factual dispute on an essential element of a claim on which they will bear the burden of proof at trial. *In Re Estate of Richmond,* 2005 ND 145, ¶ 12, 701 N.W.2d 897 (quotations and citations omitted).

¶ 42 B. The District Court Misapplied the *Duhig* Rule Because There is No Over Conveyance in This Case.

¶ 43 In cases involving an over-conveyance of minerals, this Court has applied what is commonly called the *Duhig* rule. *See, Gawryluk v. Poynter,* 2002 ND 205, ¶ 11, 654 N.W.2d 400; *Miller v. Kloeckner,* 1999 ND 190, ¶ 9, 600 N.W.2d 881; *Mau v. Schwan,* 460 N.W.2d 131 (N.D.1990); *Sibert v. Kubas,* 357 N.W.2d 495 (N.D.1984); *Kadrmas v. Sauvageau,* 188 N.W.2d 753 (N.D.1971). This Court explained that the *Duhig* rule applies when 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,* at ¶ 9 (quoting 1 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 311, p. 580.39 (1998)). In *Melchior v. Lystad*, 2010 ND 140 ¶ 8, 786 N.W.2d 8, this Court again restated the basic rule:

> 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. 1 William[s] & Meyers, Oil and Gas Law, § 311, p. 580.39 (2001).

The effect of *Duhig* is that a grantor cannot grant and reserve the same mineral interest, and 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. The interpretation of deeds within the framework of the *Duhig* rationale provides certain and definite guidelines in the interpretation of property conveyances and in title examinations. *See* 1 *Williams & Meyers*, at § 313, p. 616-616.1. This Court's application of *Duhig* has been based on estoppel by warranty, a subset of estoppel by deed, which precludes a warrantor of title from questioning the title warranted. *Miller v. Kloeckner,* 1999 [ND] 190, ¶ 13, 600 N.W.2d 881 (citing *Mau v. Schwan,* 460 N.W.2d 131, 134 (N.D.1990)). *Sibert v. Kubas,* 357 N.W.2d 495, 497 (N.D.1984).

¶ 44 *Duhig* assumes the grantor conveys and attempts to reserve more than he owns and uses the equitable principle of estoppel to reconcile the conflict between the grant and reservation clause of the mineral conveyance instrument. When applied, the *Duhig* principle causes the reservation clause in the conveying instrument to fail.

¶ 45 In the instant case, however, the Dockters owned 100% of the mineral acres of the Disputed Property and conveyed 50% of the mineral acres to Wm. F. Grinnan. (App. 218). There was no over-conveyance to resolve. QEP is Grinnan's successor in interest.

¶ 46 *Duhig* is not implicated when there is no conflict to resolve among the grant and reservation clause of the mineral deed. There is no reason to invoke equity when the grantor actually owns and conveys the mineral acres he purports to convey. *Hawkins v. Texas Oil & Gas Corp*., 724 S.W.2d 878, 888 (Tex. App. 1987). Accordingly, *Duhig* is inapposite. *Id*.

¶ 47 Notwithstanding this threshold factual requirement for applying the equitable principle of *Duhig*, the district court nonetheless concluded that the *Duhig* rule applies in this case. (App. 142). Relying on *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991), the district court concluded the Dockters Royalty Conveyance burdens only Wenco's mineral interest. While *Acoma* is

factually similar to the present case, *Acoma's* reasoning for applying *Duhig* is not present here, and the district court erred in applying the majority opinion in *Acoma* to the conveyance dispute this case.

¶ 48 C. *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476 (N.D. 1991) requires that summary judgment be granted in Wenco's favor.

¶ 49 A careful reading of *Acoma* and *Acoma's* concurring opinion shows that Wenco is entitled to judgment as a matter of law.

¶ 50 In *Acoma*, in 1915, H.O. Moen obtained fee simple to 160 acres. 471 N.W.2d at 477. In 1937, H.O. Moen "made three separate royalty conveyances, cumulatively transferring a 6.5% royalty of all oil and gas produced from the 160 acres, to third parties." *Id.* In 1944, Moen conveyed by warranty deed the 160 acres to Clayton Wilson, Sr. *Id.* Clayton Wilson, Sr. then conveyed the property to himself and his wife, Alma Wilson, as joint tenants. *Id.* "The parties to [Acoma] all obtained their interest in the 160 acres through conveyances originating from Clayton Wilson, Sr. and Alma Wilson." *Id.*

¶ 51 In two mineral deeds, both dated June 17, 1952, Clayton Wilson, Sr. and Alma Wilson deeded 35 and 5 mineral acres, respectively, to Thomas Leach; both deeds contained warranty language and neither deed mentioned the outstanding royalty interest. *Id.* at 477-78. Leach's interest, after different conveyances, eventually came to be held by Acoma and the Bassett Trust. *Id.*

¶ 52 When Clayton Wilson, Sr. died in 1978, his interest passed to Alma Wilson, as joint tenant. Alma Wilson died on 184, and, by probate of her estate, her interest passed to her two sons, Clayton Wilson, Jr and Allen Wilson. *Id.*

¶ 53 A quiet title action was commenced to determine whether the burden of the 6.5% royalty should be shared proportionately by Acoma, the Bassett Trust, and the Wilson interests, or entirely by the Wilsons. *Id.* The *Acoma* decision recognized that mineral and royalty interests are separate property interests with different characteristics, but then applied the *Duhig* rationale even though there was no over conveyance of minerals, and held that the outstanding royalty conveyance only burdened the Wilson interests (i.e. the burden was not proportionately shared amongst the owners). *Id.* at 484.

¶ 54 Chief Justice Vande Walle's concurring opinion in *Acoma*, began by acknowledging that the *Acoma* district court had reasonably concluded that the royalty assignment was to burden all the mineral owners. *Acoma Oil Corp. v. Wilson*, 471 N.W.2d 476, 486-87 (N.D. 1991) (J. Vande Walle concurring specifically) (although Justice Vande Walle believed the district court's decision was reasonable, he ultimately concurred with the majority because of the specific facts present in *Acoma*).

¶ 55 Justice Vande Walle, however, then went on to quote Sullivan's Handbook of Oil and Gas Law, which states:

> When the conveyance is of a specified undivided fractional interest, **the grant is made with respect to each part of the described premises**[, which is present in this instant action], and a failure of title to a part of the land **will decrease proportionately** the interest acquired by the grantee. On the other hand, where the conveyance is of a specified number of mineral acres[, which is present in *Acoma*, but not the instant case], the grantee would be entitled to the full number of mineral acres out of whatever the grantor owned.

Id. at 487 (**Vande Walle's emphasis**). After making the above observation, Justice Vande Walle stated that he concurred "with the majority 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 **of a specified number of mineral acres**." (**emphasis added**). *Id.*

Vande Wall concludes his concurring opinion as follows:

> Under a different set of facts, for example where the original grantor, after conveying a royalty interest **conveys all the grantor's remaining mineral acres** or conveys mineral acres to the extent that the grantor no longer retains sufficient interest to satisfy the previously conveyed royalty interest, **the result would be different**. **I write separately to note that the majority opinion does not, nor does it purport to resolve those factual situations.** In such instances, depending upon the facts, the burden of the previously conveyed royalty interest might well be shared proportionately by the present mineral owners.

Id. at 487 (**emphasis in original and added**).

¶ 56 Vande Walle sets forth three separate factors that, if present, would have changed the result in *Acoma*. Each factor, standing alone, in Justice Vande Walle's concurring opinion, would have changed the outcome (i.e., the royalty

assignment would have proportionately burdened all the mineral owners). These factors are underlined and set forth below.

1. Purchasers for Value (vs. Grantor or grantor's heirs continuing to hold an interest in the minerals);

2. Specified undivided fractional interest (vs. Specified number of mineral acres);

3. Grantor conveying all of the grantor's remaining mineral acres (vs. Original grantor or his heirs still owning minerals).

¶ 57 In *Acoma*, the grantor's heirs (i.e. Clayton Wilson, Jr. and Allan Wilson, who ultimately bore the entire royalty burden) inherited the minerals from the original grantor, Clayton Wilson, Sr. and Alma Wilson; thus, the Wilson heirs were not purchasers for value. *Id*. at 477-78. Additionally, Clayton Wilson, Sr. and Alma Wilson, when deeding minerals to Thomas Leach, deeded a specific number of mineral acres (i.e. 35 and 5 mineral acres). *Id.* Lastly, the grantor's heirs still owned the minerals; thus, the grantor did not convey all of the grantor's remaining mineral acres. *Id.*

¶ 58 In this instant action, not only is one of Justice Vande Walle's factors present, but all three are present, making it clear that the holding in *Acoma* should not be applicable. Here, unlike in *Acoma*, all grantees, Wenco and QEP, are purchasers for value. (App. 221-27, 232-34, 235-250, 312-17, 322-23).

¶ 59 Also, unlike in *Acoma* where Clayton and Alma Wilson deeded 35 and 5 mineral acres to Leach, the Dockters deeded an "undivided one-half interest in and

to all of the oil, gas and other minerals in and under" the property at issue to Wm. F. Grinnan, QEP's predecessor. (App. 218). This is a conveyance of a "specified undivided fractional interest" in the whole property. *Acoma*, 471 N.W.2d at 487. This does and logically should cause the burden of the royalty to be borne proportionately by the mineral owners. *Id.* (stating that "when the conveyance is of a specified undivided fractional interest, the grant is made with respect to each part of the described premises, and a failure of title to a part of the land will decrease proportionately the interest acquired by the grantee"). Such result is logical. The royalty assignment burdens the whole property; thus, a conveyance of a specified undivided fractional mineral interest in the whole property must be burdened by the royalty assignment.

¶ 60 Finally, the Dockters, after conveying a royalty interest, conveyed all of their remaining minerals (i.e., Wenco is the Dockters' successor in interest). Justice Vande Walle clearly stated that "where the original grantor, after conveying a royalty interest conveys all the grantor's remaining mineral acres … the result would be different", which means that the royalty assignment would burden proportionately all the mineral owners (i.e. Wenco and QEP). *Acoma*, 471 N.W.2d at 487.

¶ 61 Thus, *Acoma* is not on point (i.e. the facts are not the same) and is not applicable to the present facts. The reasoning in Justice Vande Walle's concurring

opinion (as described above) requires that the burden created by the Dockters Royalty Conveyance be borne proportionately by the mineral owners, including QEP. Thus, summary judgment should be granted in Wenco's favor declaring that the Royalty Deed burdens Wenco and QEP, rather than just Wenco.

¶ 62 II. IF THE REASONING OF THE MAJORITY OPINION IN *ACOMA* IS ON POINT HERE, THEN IT SHOULD BE EXPLICITLY OVERRULED TO THE EXTENT IT TREATS ROYALTY INTERESTS AS THOUGH THEY ARE THE LEGAL EQUIVALENT OF FULL MINERAL INTERESTS.

¶ 63 The *Acoma* Court acknowledged it was presented with facts different than previous *Duhig* cases. Like the present case, *Acoma* did not involve the traditional conflict between the granting and reservation clauses in the conveying instrument. Like the present case, *Acoma* involved reconciliation of a prior royalty reservation with subsequent conveyances of the plenary mineral interest.

¶ 64 *Acoma* explained the difference between a full mineral interest and a royalty interest. The majority opinion in *Acoma* explained that royalty interests and mineral interests are "separate property interests with different characteristics." *Acoma* at 481. A royalty interest is a smaller interest in a mineral estate and is generally limited to a share of the product or proceeds of mineral production. *Id*. On the other hand, the full mineral interest includes all of the rights of a mineral owner including the "right to explore and develop the estate, the right to execute oil and gas leases, and the right to create fractional shares of the mineral estate."

Id. A royalty interest is an interest in real property. *GeoStar Corp. v. Parkway Petroleum, Inc.*, 495 N.W.2d 61, 67 (N.D. 1993) ("disavow[ing]" "dictum" language in *Texaro Oil Co. v. Mosser*, 299 N.W.2d 191, 194 (N.D. 1980) suggesting royalty interest is personal property).

¶ 65 Texas common law, the source of the *Duhig* rule, recognizes the same distinction between a full mineral interest and a royalty interest. Under Texas law, the five essential attributes of a severed mineral estate are: (1) the right to develop (the right of ingress and egress); (2) the right to lease (the executive right); (3) the right to receive bonus payments; (4) the right to receive delay rentals; and (5) the right to receive royalty payments. *Altman v. Blake,* 712 S.W.2d 117, 118 (Tex.1986). A royalty interest under Texas law is a nonpossessory interest, which does not include the full "bundle of rights" associated with a severed mineral estate. *Concord Oil Co. v. Pennzoil Exploration and Production Co.*, 966 W.W. 2d 451, 459 (Tex. 1998). A royalty interest derives from the grantor's mineral interest and is a nonpossessory interest in minerals that may be separately alienated. *Luckel v. White*, 819 S.W.2d 459, 463 (Tex. 1991). Montana common law is similar. *Stokes v. Tutvet*, 134 Mont. 250, 328 P.2d1096, 1100 (Mont. 1958) (royalty interest creates right only to participate in share of production and not five incidents of mineral ownership).

¶ **66** In the Dockters Royalty Conveyance, the Dockters conveyed to Bank the right to receive royalty revenue if oil, gas, or other minerals were ever produced from the Disputed Property. (App. 217). The Dockters did not convey to Bank a full mineral interest and the Royalty Conveyance made clear Bank has no right to "participate in the making of future oil and gas mining leases . . . nor of participating in the bonus or bonuses which grantor herein shall receive . . . nor of participating in any rental to be paid for the privilege of deferring the commencement of a well under any lease, ..." (App. 217). Bank received a right to receive income and nothing more.

¶ **67** The Dockters Royalty Conveyance burdened all future production of minerals from the Disputed Property the moment it was delivered to Bank. § 47-09-06, NDCC. Its recording in May 1954 provided notice of the Bank's right to participate in any future production of minerals from the Disputed Property.

¶ **68** The majority opinion in *Acoma* is illogical because it treats a royalty burden, the mere right to receive a share of the income, as though it were the full mineral interest. It purports to dispense equity when no equity is required. The grantor in *Acoma*, like the grantor in the instant case, carved off a royalty interest and made that interest of record. The grantor in *Acoma*, like the Dockters in the instant case,

did not over-convey his mineral interest that requires an equitable "tie-goes-to-the-runner" rule that yields a bright line, certainty of title standard.

¶ **69** When Dockters conveyed an undivided "one half interest" to Wm. F. Grinnan, Mr. Grinnan received one half the mineral interests on the Disputed Property. His reception of the full mineral interest grant should be subject to the prior in time, recorded Dockter Royalty Conveyance. Dockters did not convey more than they owned, they did not grant and reserve an interest that is inconsistent to their ownership.

¶ **70** The majority in *Acoma* unnecessarily expands the Duhig rule to fact patterns beyond the underlying equitable principle of *Duhig*: a grantor who conveys and reserves in the same instrument more than he owns. *Mau v. Schwan*, 460 N.W.2d 131, 133 (N.D. 1990)[2]. The Court should limit application of *Duhig* to fact patterns when the grantor is conveying more than he owns, or purporting to reserve an interest that is already conveyed.

¶ **71** The Dockters did not breach any promise to the Bank or Mr. Grinnan, QEP's predecessor in interest.

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[2] The Court's April 2012 calendar contains another "classic" *Duhig* case in which eight deeds from eight grantors attempt to reserve a mineral interest greater than the mineral interest the grantors purport to convey. *Nichols et al v. Goughnour*, et al, Supreme Court No. 20110336, Mountrail County Case No. 31-11-C-00028.

¶ 72 III. IF WENCO IS NOT ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW WITH RESPECT TO MISAPPLICATION OF THE *DUHIG* RULE AND ACOMA, WENCO'S CLAIM SHOULD PROCEED TO TRIAL ON THE QUESTION OF WHETHER DEFENDANTS WAIVED THEIR RIGHT TO ASSERT THAT THE NORTHWESTERN ROYALTY CONVEYANCE BURDENED ONLY WENCO'S INTEREST.

¶ 73 Wenco asserts it is entitled to summary judgment as a matter of law because the district court misapplied the law regarding conveyances and the *Duhig* rule. If the Court disagrees with Wenco, however, that does not end the inquiry. As set forth in the facts portion of this brief, there is a factual question as to whether QEP waived any claim it now asserts that the Dockter Royalty Conveyance burdens only the Wenco estate.

¶ 74 Property rights may be "waived, surrendered, or lost by neglect in the cases provided by law." § 1-01-08, NDCC. *See also*, *Lawrence v. Delkamp,* 2006 ND 257, ¶ 8, 725 N.W.2d 211. QEP may waive its right regardless of whether the right is "secured by contract, conferred by statute, or guaranteed by the constitution, provided such rights and privileges rest in the individual who has waived them and are intended for his benefit." *Toni v. Toni*, 2010 ND 84, ¶ 10, 636 N.W. 2d 396, *citing Gajewski v. Bratcher*, 221 N.W. 2d 614, 628 (N.D. 1974). Wenco may also prevail in this case because QEP affirmatively waived its right to claim that the

Dockter Royalty conveyance did not burden its acquired mineral estate. As explained below, QEP's waiver will require a factual determination on the merits.

¶ 75 As explained in the facts section, QEP and EOG entered into an agreement to share costs for the development of and working interest revenues from any production from the Wenco 1-30H well. (App. 325-87). The agreement was a product of back and forth negotiations in which actual title to the mineral estate of the Disputed Property was a material term of the proposed transaction. (App. 456-58).

¶ 76 On April 4, 2007, Mr. Chad Matney of QEP informed EOG that QEP's participation in the Wenco 1-30-H was "subject to review and approval of a Title Opinion covering the established temporary spacing unit. . . ." *Id.* [Underlining added.] In response to Mr. Matney's correspondence, Ty Stillerman of EOG provided the Linford drilling opinion to QEP. *Id.* Ultimately, EOG and QEP consummated their working interest agreement, both with actual knowledge that QEP's would be burdened by the Dockter Royalty Conveyance.

¶ 77 A finding of waiver is a finding of fact reviewed under the clearly erroneous standard. *First Intern. Bank & Trust v. Peterson*, 2009 ND 207, ¶ 13, 776 N.W.2d 543; *Paulson v. Paulson*, 2005 ND 72, ¶ 6, 694 N.W.2d 681; *Sabot v. Fox*, 272 N.W.2d 280, 281 (N.D.1978). For a waiver to be effective, the waiver must be a voluntary and intentional relinquishment of a known existing advantage, right,

privilege, claim, or benefit. *First Intern*. at ¶ 13; *Steckler v. Steckler*, 492 N.W.2d 76, 79 (N.D.1992) (citing *Production Credit Ass'n v. Henderson*, 429 N.W.2d 421, 423 (N.D.1988) and *Gajewski v. Bratcher*, 221 N.W.2d 614, 628 (N.D.1974)).

¶ 78 The present controversy leaves little room for factual dispute about whether QEP and EOG "voluntary[ily] and intentionally" waived their claim to assert a mineral estate greater than what they each bargained for. The condition of the mineral estate was a material fact relative to QEP's decision to enter into a working interest agreement, (App. 388-417), for the Wenco 1-30H. QEP demanded to see the status of the mineral estate to learn what QEP's return on investment might be if it invested in the Wenco 1-30H. When parties engage in an activity which clearly constitutes a waiver, they cannot later claim they did not know their actions amounted to a voluntary and intentional waiver of their rights, because, "he who consents to an act is not wronged by it." *Beck v. Lind*, 235 N.W.2d 239, 251-52 (N.D.1975) (citing N.D.C.C. § 31-11-05(6)).

¶ 79 QEP not only made specific demand for the right to inspect the Linford opinion, but such right was part of the form operating agreement QEP signed with EOG. (App. 325-87). The operating agreement provides QEP the right to examine title and provides that no well may be drilled until QEP and all other working interest participants "approve" title. *Id., ¶ IV A*.

¶ 80 North Dakota waiver law also holds that the right, claim, privilege, or benefit must be one the party could have enjoyed, but for the waiver. *Steckler*, 492 N.W.2d at 79. Once the right is waived, the right or privilege is "gone forever and cannot be recalled." *Meyer v. National Fire Ins. Co. of Hartford Conn.*, 67 N.D. 77, 269 N.W. 845, 852 (1936). A waiver cannot be extracted, recalled or expunged. *Steckler*, 492 N.W.2d at 79.

¶ 81 Before entering into the working interest agreement with EOG, QEP might have received the Linford drilling opinion and persuaded EOG that Ms. Linford was mistaken about the facts or the law. Or, QEP might have entered into the agreement with EOG subject to QEP's right to later challenge the conclusion of Linford and EOG through a quiet title action that would clarify the rights of the competing owners, as Chapter 32-17, NDCC explicitly provides. But QEP did neither.

¶ 82 QEP and EOG accepted and expressly adopted both Linford opinions, drilled the well, shared working interest revenues, and distributed royalties pursuant to the Linford opinions. Wenco and other royalty owners likewise accepted the payments they were receiving based on the computation of their percentage of royalty revenue. If the finder of fact concludes QEP voluntarily and knowingly waived its claim that the Royalty Conveyance only burdens the Wenco

mineral estate, QEP cannot now "recall or expunge" its voluntary waiver and Wenco is entitled to the *status quo ante* it seeks. *Steckler* at 79.

¶ 83 The district court rejected Wenco's argument that QEP could have waived its right to assert the Dockter Royalty Conveyance burdened only Wenco's mineral interest. Relying principally on the Connecticut decision of *Gain v. Smith and Wesson Corp*, 780 A.2d 98, 120 (Conn. 2001), the district court concluded Wenco lacked standing to assert QEP's waiver. (App. 156). *Gain* involved an attempt by the city of Bridgeport, Connecticut and its mayor to sue handgun manufacturers and gun retail sellers under products liability law. *Id*., 108. The *Gain* Court concluded the City of Bridgeport lacked standing to assert products liability claims against the gun makers. *Id*. at 120.

¶ 84 The district court also relied on *In Re Disciplinary Action Against Overboe*, 2009 ND 40, ¶ 20, 763 N.W. 2d 776, to conclude Wenco lacked standing to assert waiver by QEP. This Court in *Overboe* concluded an attorney who was the subject of disciplinary proceedings lacked standing to assert an equal protection challenge with regard to recovering costs for a prevailing attorney in a disciplinary proceeding because the attorney was not a prevailing attorney. *Id*., ¶ 21. Overboe restated this Court's two part analysis for assessing whether a party has standing:

> "First, the plaintiff must have suffered some threatened or actual injury resulting from the putatively illegal action. Secondly, the asserted harm must not be a generalized grievance shared by all or a large class of citizens; the plaintiff generally must assert his own legal

> rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties."

In Re Disciplinary Action Against Overboe, 2009 ND 40, ¶ 20, 763 N.W.2d 776, 782-83.

¶ 85 There is no dispute in this case that Wenco suffered an actual injury when QEP and EOG changed their agreement and concluded that only Wenco's mineral interest was burdened by the Dockter Royalty Conveyance. (App. 450-51). Further, the harm suffered by Wenco was not the "generalized grievance shared by all or a large class of citizens; ..." Overboe, ¶ 20. Rather, Wenco was the one and only party harmed by QEP's action. No other mineral interest holder suffered a loss in royalty income. In view of undisputed fact that Wenco is the only party harmed by the offending conduct, the district court clearly erred in concluding Wenco lacked standing to assert a waiver.

¶ 86 After concluding Wenco lacked standing to raise the waiver issue, the district court also concluded that, based in the court's review of the Linford opinion, QEP could not have made a "knowing" waiver of its interest. (App. 158). Here, the district court is clearly improperly weighing facts about whether QEP "knowingly" waived its right. The district court reviewed the Linford title opinion and concluded it would not have put QEP on notice that the Dockter Royalty Conveyance burdens QEP's interest. *Id*. The district court is simply speculating about how representatives of QEP comprehended the Linford opinion. The district

court opined that "[b]ased upon the language included in these provisions [of the Linford drilling opinion] QEP could not have made a knowing waiver of its rights in regard to this royalty when it entered the operating agreement on May 4, 2007, largely because its impact had not yet been determined and the Drilling Title Opinion contained conflicting information." *Id.* However, QEP's knowledge is a question of fact, as is the finding of waiver. *First Inter.*, ¶ 13, *Tormaschy v. Tormaschy*, 1997 ND 2, ¶ 19, 559 N.W.2d 813.

¶ 87 The district court erred when it granted QEP summary judgment because there is a genuine dispute of fact about whether QEP waived its right to assert the Dockter Royalty Conveyance burdened only the Wenco mineral interest. For this additional reason, the district court order and judgment should be reversed.

¶ 88 **CONCLUSION**

¶ 89 The *Duhig* rule is not implicated by the facts of this case because this case does not involve an over-conveyance of a mineral interest. While factually similar (but not identical) to *Acoma*, this case requires a different result than the majority opinion in *Acoma* because of the reasons specified in the concurring opinion in *Acoma*. If the Court nonetheless concludes that *Acoma* is on point, this Court should overrule *Acoma* because it incorrectly treats full mineral interests the same as a royalty conveyance. Finally, if the Court does not grant Wenco relief as argued above, this Court should reverse the district court's decision that Wenco

lacks standing to that assert QEP waived its right to deny that its mineral interest in the Disputed Property is burdened by the Dockter Royalty Conveyance. This Court should reverse and remand for a factual determination by the finder of fact regarding the waiver issue.

Dated this 21st day of May, 2012.

Pringle & Herigstad P.C.

/s/ David J. Hogue
David J. Hogue (ID #04486)
PRINGLE & HERIGSTAD, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
Attorneys for Plaintiff/Appellant

¶ 90 <u>CERTIFICATE OF COMPLIANCE ON WORD COUNT</u>

¶ 91 I hereby certify that this brief complies with NDAPP 32(a)(7)(A); the word count is 7,184.

Dated this 21st day of May, 2012.

Pringle & Herigstad P.C.

/s/ David J. Hogue
David J. Hogue (ID #04486)
PRINGLE & HERIGSTAD, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
Attorneys for Plaintiff/Appellant

¶ 92 CERTIFICATE OF WORD PROCESSING PROGRAM

¶ 93 The word-processing program is Microsoft Office Word 2003.

Dated this 21st day of May, 2012.

Pringle & Herigstad P.C.

/s/ David J. Hogue
David J. Hogue (ID #04486)
PRINGLE & HERIGSTAD, P.C.
2525 Elk Drive
P.O. Box 1000
Minot, ND 58702-1000
(701) 852-0381
Attorneys for Plaintiff/Appellant

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the ***Appellant's Brief*** and ***Appellant's Appendix*** were, on the 21st day of May, 2012 served upon the following by Electronic Mail:

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

John W. Morrison
Wade C. Mann
Crowley Fleck, PLLP
400 East Broadway Avenue, Ste. 600
P.O. Box 2798
Bismarck, ND 58502-2798
jmorrison@crowleyfleck.com
wmann@crowleyfleck.com

/s/ Kristi L. Bailie
Kristi L. Bailie