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JUNE 27, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lawrence A. Hamilton, Philip B. Hamilton and Judy H. Kasper,

Plaintiffs/Appellees,

v.

Larry G. Woll, Cynthia J. Woll, Tracy J. Holiday, Robert V. Holiday, Philip Knolyn Hatch II, Jacki DeMay, R. Craig Woll, Dorothy Jean Griswold, Russell Rapp, Jeffery R. Carius, Michael Carius, Mark S. Rapp, Tandals Farm Inc., James H. Bragg, Julie K. McKinley, J. Michael Gleason DBA Gleason Land Co., Strata Minerals, Inc., Frances A. Hannifin, Alan R. Hannifin, Desert Partners II L.P., Value Petroleum Inc., J. Kyle Jones, Margaret J. Hannifin, Fall River Resources, Chatfield Company, Walter E. Opper, Emma Smart, John M. Schattyn, Lloyd S. Schattyn, Noel L. Schattyn Soren, Avalon North LLC, Dakota West Energy LLC, Ronald Rowland, Lee LaBarre, Terry Aronson, Burlington Resources Oil & Gas Company LP; Peyton Woll, Jr., Trust dated June 8, 1993, Peyton H. Woll, Trustee, Dana G. Woll, Successor Trustee; John H. Woll and Dorothea E. Woll, Trustees of the John & Dorothea Woll Trust Agreement dated 1-31-90; Helen F. Rapp, Trustee of the Helen F. Rapp Declaration of Trust dated 8-17-2004; Alvin C. Schopp, Trustee; and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint,

Defendants,

Ronald Rowland,

Appellant.

Supreme Court No. 20140011
Bowman County Civ. No. 06-10-C-00043

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ENTERED NOVEMBER 12, 2013, AND JUDGMENT ENTERED NOVEMBER 18, 2013, IN BOWMAN COUNTY DISTRICT COURT, SOUTHWEST JUDICIAL DISTRICT

THE HON. DANN E. GREENWOOD, PRESIDING

BRIEF OF APPELLANT RONALD ROWLAND

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I. STATEMENT OF THE ISSUES

[¶1] Whether the district court erred in finding as fact that "Finlay would not have inserted the term 'royalty' on those fourteen (14) documents conveying interests to the grantees if he intended to convey the mineral interest."

[¶2] Whether the district court erred by interpreting the deeds in question to convey royalty interests only and not full mineral interests.

II. STATEMENT OF THE CASE

[¶3] Plaintiffs Lawrence A. Hamilton, et al., initiated this action seeking a declaratory judgment against Defendants on July 7, 2010. (App. 13–16). On September 1, 2010, Defendant Ronald Rowland filed his Answer asserting numerous defenses, along with his Counterclaim and Crossclaim to quiet title. (App. 20–26).

[¶4] In August, 2011, Plaintiffs moved for summary judgment against the Defendants, including Defendant Ronald Rowland, which motion was granted on January 17, 2012. (App. 5). On appeal, the North Dakota Supreme Court reversed the district court's grant of summary judgment and remanded the case back to the district court for further proceedings because "[r]easonable differences of opinion exist as to the inferences to be drawn from the language in the deeds and about Finlay Hamilton's intent from the extrinsic evidence presented." Hamilton v. Woll, 2012 ND 238, ¶ 14, 823 N.W.2d 754.

[¶5] A bench trial was held on August 23, 2013. On October 2, 2012, the district court issued its Memorandum Opinion. (App. 167–81). On November 12, 2013, the district court entered its Findings of Fact, Conclusions of Law and Order for

Judgment. Judgment was entered on November 18, 2013. On January 9, 2014, Defendant Ronald Rowland filed a Notice of Appeal. (App. 182–94).

III. STATEMENT OF THE FACTS

[¶6] During the 1950s, Finlay F. Hamilton ("Finlay") bought and sold minerals in western North Dakota. During this time, Finlay acquired a one-fourth undivided mineral interest by a mineral deed recorded on January 13, 1953 to the following lands:

> Township 130 North, Range 105 West, Bowman County, ND
> Section 21: SW1/4 SE1/4
>
> Township 131 North, Range 105 West, Bowman County, ND
> Section 29: NW1/4

(App. 37–38). Between March 1953 and February 1956, Finlay conveyed portions of his mineral interest by executing fourteen mineral deeds. (App. 39–50, 52–53). All fourteen deeds were titled "Mineral Deed" and were prepared on a mineral deed form. See id. Each deed contained all the language that normally indicates the conveyance of mineral rights, including the right of ingress and egress, the right to all bonuses, rentals, and royalties, and complete operating rights. See id. Each deed also identified the interest being conveyed in the form of a fraction, with the denominator of the fraction representing the total number of acres in the tract or tracts of land from which the conveyed portion was taken (for example "---2/320ths." from several tracts containing 320 acres and "---1/160th." from a tract containing 160 acres). See id. In each of the fourteen deeds, the fraction indicating the interest being granted was typed into a blank on the mineral deed form. See id. Immediately following the typed fraction on the fourteen deeds in question, the word "Royalty" is typed in the blank. Id.

[¶7] Each deed also contained portions that were struck out by typing X's over the existing text or lining through the existing text on the deed form. Id. In each of the fourteen deeds in question, the warranty clause is struck out with X's or otherwise crossed out. Id. Moreover, on 13 of the 14 deeds a brief provision stating "(Give exact postoffice address)" is struck out near the blanks where the parties' names and addresses are to be typed in. Id.

[¶8] Some of Finlay's grantees later executed oil and gas leases covering property they received from Finlay to an unrelated third party in 1982. (App. 102–15).

[¶9] Defendant Ronald Rowland is a successor in interest of Finlay's grantees under the deeds in question. Rowland is both a mineral owner and a working interest owner of the land in question. Rowland received his mineral interests from the following grantees of Finlay or their immediate successors: Myrle A. Ekin, Gladys Ekin, Robert L. Glidden, and Arthur C. Baue. (App. 67–74). Rowland received his working interest by taking oil and gas leases from the following grantees of Finlay or their immediate successors: Russell G. Trummel and/or Grace I. Trummel, Samuel W. Rapp, Jr., Myrle A. Ekin, Gladys B. Ekin, and William E. Opper. (App. 75–86).

[¶10] Plaintiffs/Appellees are heirs of Finlay, and by this action they are attempting to acquire ownership of mineral interests that Finlay conveyed away over 50 years ago.

IV. LAW AND ARGUMENT

A. Standard of review

[¶11] "Construction of a written contract to determine its legal effect presents a question of law, which is fully reviewable." Bakken v. Duchscher, 2013 ND 33, ¶ 13, 827

N.W.2d 17. "The construction of a written contract to determine its legal effect is a question of law for the court to decide and, on appeal, [the North Dakota Supreme Court will] independently examine and construe the contract to determine if the trial court erred in its contract interpretation." Moen v. Meidinger, 547 N.W.2d 544, 546 (N.D. 1996).

[¶12] However, when a contract is ambiguous, as in the present case, "the resolution of an ambiguity with extrinsic evidence requires the trier of fact to make a finding fact." Bendish v. Castillo, 2012 ND 30, ¶16, 812 N.W.2d 398; Moen, 547 N.W.2d at 547. "An ambiguity resolved by use of extrinsic evidence is a question of fact for the trier of fact to decide." Nat'l Bank of Harvey v. Int'l Harvester Co., 421 N.W.2d 799, 803 (N.D. 1988). "A conclusion of law is fully reviewable on appeal but a finding of fact is not set aside unless clearly erroneous." Id.; N.D.R.Civ.P. 52(a)(6).

B. The district court erred in finding as a matter of fact that "Finlay would not have inserted the term 'royalty' on those fourteen (14) documents conveying interests to the grantees if he intended to convey the mineral interest."

[¶13] Under North Dakota law, "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing the evidence, we are left with a definite and firm conviction a mistake has been made." Knorr v. Norberg, 2014 ND 74, ¶ 9, 844 N.W.2d 919. "The party contending that the trial court's findings are erroneous must present and point out evidence in the record supporting the contention." Owan v. Kindel, 347 N.W.2d 577, 579 (N.D. 1984).

[¶14] As this Court will likely recall from the previous appeal in 2012, this case was remanded to the district court for further proceedings because "[r]easonable differences of opinion exist as to the inferences to be drawn from the language in the

deeds and about Finlay Hamilton's intent from the extrinsic evidence presented." Hamilton, 2012 ND 238, ¶ 14, 823 N.W.2d 754.

[¶15] In this case, the vast majority of the facts are undisputed between the parties, and this is evidenced by the Joint Statement of Stipulated Facts, which was stipulated to by the parties prior to trial, and which comprises most of the findings of fact contained in the district court's Findings of Fact, Conclusions of Law and Order for Judgment. (App. 87–98, 182–91). However, as this Court ruled, because the deeds that are the subject of this litigation are, as a matter of law, ambiguous, it is necessary for the district court to resolve the ambiguity by examining extrinsic evidence and then making a finding of fact based on that evidence as to what the parties intended to accomplish through the execution of the deeds in question. Hamilton, 2012 ND 238, ¶ 14, 823 N.W.2d 754.

[¶16] At trial, the parties presented various pieces of extrinsic evidence to assist the district court in ascertaining the intent of the parties to the deeds in question. The Plaintiffs primarily relied on Plaintiff Lawrence Hamilton's testimony that Finlay Hamilton, Lawrence Hamilton's grandfather, was an experienced oil properties broker. (App. 122). The Plaintiffs attempted to support this claim by presenting several instruments covering lands in Texas, predating the deeds in question, in which Finlay Hamilton was a party to conveyances of both mineral interests and royalty interests. (App. 99–101).

[¶17] Defendant Ronald Rowland primarily relied on oil and gas leases executed by some of Finlay's grantees, evidencing a belief on their part that they received from Finlay a full mineral interest consistent with the right to lease those mineral rights to a

developer. (App. 102–15, 148). Rowland presented this evidence at trial because, under North Dakota law, "the parties' conduct in the course of performance after the contract's formation can help determine the meaning of ambiguous language." Nat'l Bank of Harvey, 421 N.W.2d at 803. Also, in this case's 1988 predecessor case, Williams Co. v. Hamilton, the North Dakota Supreme Court specifically stated that "[Finlay's] grantees may have evidence of and insight into Finlay's ambiguously expressed intentions." 427 N.W.2d 822, 824 (N.D. 1988). Unlike the extrinsic evidence relied on by the Plaintiffs, which is highly speculative and attenuated from the actual parties to the deeds in question, the extrinsic evidence presented and relied on by Rowland constitutes direct evidence of the intent of Finlay's grantees, evidence which the North Dakota Supreme Court has identified as particularly important for interpreting the legal effect of the deeds in question. Id.; (App. 102–15, 148).

[¶18] Following trial, the district court made a total of 52 findings of fact. (App. 182–191). Of those 52 findings of fact, most were drawn directly from the Joint Statement of Stipulated Facts. (Compare App. 182–191 with App. 87–98). Only one of the district court's findings of fact addressed extrinsic evidence of a party's intent with respect to the deeds in question—Finding of Fact 18, which states, "Finlay would not have inserted the term "royalty" on those fourteen (14) documents conveying interests to the grantees if he intended to convey the mineral interest." (App. 185). The district court also states this finding in paragraph 13 of its Memorandum Opinion. (App. 170–71).

[¶19] In support of Finding of Fact 18, the district court cited Plaintiff Lawrence Hamilton's testimony that his grandfather was "very active and knowledgeable in the area of buying and selling interests in oil and gas and that he most certainly knew the

difference between mineral interests, in general, and royalty interests, in particular." (App. 170). The district court also based its finding on the fact that, prior to the execution of the deeds in question, "Finlay had been involved with conveyances of both royalty interests and mineral interests in the past," referencing the earlier Texas deeds to which Finlay had been a party. (App. 99–101, 170).

[¶20] However, the evidence upon which the district court based its Finding of Fact 18 is contradicted by the undisputed facts of this case. Specifically, it is undisputed that the deeds in question were drafted by Finlay. (See App. 88). Further, as a matter of law the deeds in question are ambiguous because they contain language that clearly evidences an intent to convey mineral interests, but also include the word "royalty," creating confusion about precisely what interest was intended to be conveyed. See Williams Co., 427 N.W.2d at 824. In short, the deeds are ambiguous because Finlay caused the deeds to be ambiguous. Testimony that Finlay was "active and knowledgeable" about oil and gas conveyances is contradicted by the very deeds that are the subject of this litigation.

[¶21] Finlay's purported knowledgeability did not prevent him from drafting fourteen (14) deeds, each with the same glaring ambiguity. How then can his purported knowledgeability have any bearing on his intent with respect to those deeds, or support a finding that he wouldn't have inserted the word "royalty" if he intended to convey a mineral interest? Despite his purported "knowledgeability," he still drafted a series of ambiguous deeds. The fact that he may have been "knowledgeable" about oil and gas conveyances does not make his intent to convey a mineral interest or a royalty interest any more or less ascertainable.

[¶22] Nor do the earlier Texas deeds relied upon by the district court provide a defensible basis for Finding of Fact 18. The Texas deeds are totally without probative value except to show that Finlay Hamilton, being a party to the deeds, may have had knowledge of the difference between a Royalty Deed and a Mineral Deed. There is no supporting evidence in this case showing any judicial determination as to the meaning or legal effect of those deeds. If anything, the Texas Royalty Deed received by Finlay demonstrates the fact that Finlay knew that a different form, and therefore different language, should be used when conveying a royalty interest as opposed to a mineral interest, which would evidence an intent on his part to convey a mineral interest in this case. (App. 101). However, these deeds simply have no bearing on Finlay's intent for the deeds in question and are not a sound evidentiary basis for the district court's Finding of Fact 18.

[¶23] The evidence of the subsequent conduct of some of Finlay's grantees presented at trial by Defendant Ronald Rowland provide the only direct evidence available of the intent of a party to the deeds in question. (App. 67–86, 102–15). And it should be noted that the oil and gas leases presented at trial by Rowland are not instruments drafted by Rowland himself for Finlay's grantees to execute, but were executed in some cases more than a decade prior to Rowland's involvement in the area and were granted in favor of an unrelated third party. (App. 102–15). Without exception, each of Finlay's grantees or immediate successors executed an instrument consistent with a belief of ownership of a full mineral interest. (App. 67–86, 102–15). Not one of those instruments purports to convey a royalty interest only. Id. From this evidence, it is clear

that those grantees of Finlay believed that they received a full mineral interest from Finlay.

[¶24] However, despite the admission of this extrinsic evidence at trial, and despite its probative value under North Dakota law, and despite its thorough explanation in Rowland's Post-trial Brief, the district court gave this evidence literally no analysis or consideration in either its Memorandum Opinion or its Findings of Fact. (167–81, 182–91). It is not the case that the district court weighed and considered this evidence and, ultimately, found it unpersuasive for various reasons. Instead, the district court ignored this extrinsic evidence altogether. See id. In other words, the extrinsic evidence offered by Defendant Ronald Rowland, which is recognized by North Dakota law to be helpful in determining the intent of the parties to ambiguous contracts, and was specifically mentioned by this Court as being helpful for interpreting deeds identical to those in question here, was not considered or weighed by the district court in any way whatsoever. See id. This was error. When the full record of evidence in this case is examined, it is clear and definite that the district court's Finding of Fact 18 is not supported by the evidence and that the district court erred in making that finding of fact.

C. The district court erred by failing to apply North Dakota's rules of contract interpretation.

1. *The district court failed to apply N.D.C.C. § 9-07-06 and N.D.C.C. § 9-07-17*.

[¶25] Under North Dakota law, "deeds that convey mineral interests are subject to general rules governing contract interpretation . . ." Rolla v. Tank, 2013 ND 175, ¶ 5, 837 N.W.2d 907. "In construing a deed, the primary purpose is to ascertain and effectuate the grantor's intent, and deeds are construed in the same manner as contracts." Carkuff v.

Balmer, 2011 ND 60, ¶ 8, 795 N.W.2d 303 (citing Williams Co., 427 N.W.2d at 823 (internal quotations omitted)). "The construction of a written contract to determine its legal effect is a question of law for the court to decide and, on appeal, [the North Dakota Supreme Court will] independently examine and construe the contract to determine if the trial court erred in its contract interpretation." Moen, 547 N.W.2d at 546.

[¶26] The interpretation of private contracts is governed by the rules set forth in N.D.C.C. ch. 9-07. See N.D.C.C. § 9-07-01. The primary guiding principle of contract interpretation is that "[a] contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as the same is ascertainable and lawful." N.D.C.C. § 9-07-03. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-02. "The intention of the parties should be ascertained from the writing alone if possible." N.D.C.C. § 9-07-04. However, "[f]or the purpose of ascertaining the intention of the parties to a contract, if otherwise doubtful, the rules given in [N.D.C.C. ch. 9-07] are to be applied. N.D.C.C. § 9-07-03 (emphasis added).

[¶27] "When the terms of a contract are ambiguous, extrinsic evidence of the parties' intent may be considered." Moen, 547 N.W.2d at 547 (internal quotations omitted). "[A] contract is ambiguous when reasonable arguments can be made for different positions on its meaning." Id. In the case of ambiguous contracts, certain rules of contract interpretation in N.D.C.C. ch. 9-07 are to be applied. Specifically, N.D.C.C. § 9-07-06 requires that "[t]he whole of the contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret others."

[¶28] In the present case, the North Dakota Supreme Court has held that deeds identical to those at issue in this case and executed by the same grantor, Finlay Hamilton, are ambiguous as a matter of law, stating that "Finlay's 'ambiguously expressed intentions, . . . are questions of fact to be determined with the aid of extrinsic evidence." Williams Co., 427 N.W.2d at 824. Therefore, this Court's interpretation of the deeds in question begins with the understanding that the deeds are ambiguous and that extrinsic evidence and the statutory rules of contract interpretation must be applied to determine the legal effect of the deeds in question.

[¶29] In 1973, the Supreme Court of Arkansas, another Eighth Circuit jurisdiction, was faced with facts that very closely mirror those in the present case. In Wynn v. Sklar & Phillips Oil Co., 493 S.W.2d 439, 441 (Ark. 1973), the Arkansas Supreme Court interpreted the legal effect of a deed that contained language entirely consistent with the conveyance of a mineral interest, but in which a portion of language was inserted, which stated: "(being all the Royalty retained by us)". The deed contained all of the classic elements of a mineral interest, such as a conveyance of an interest in the oil, gas and minerals "in and under" the described land, and the rights of ingress and egress for the purpose of developing and removing oil and gas from the premises. See id. However, the court found that the inserted "Royalty" language created an ambiguity. Id. at 443. Regarding the "Royalty" language, the court stated, "There would be no ambiguity in the deed except for the parenthetical clause. . . . If this clause were omitted, the deed would simply constitute a conveyance of 1/8 of the oil, gas and minerals. The insertion, however, makes the granting clause ambiguous." Id. at 443 (internal citations omitted). The court in that case noted:

> The difficulties presented in determining whether a mineral fee or royalty interest is conveyed by an instrument arise from justifiably different understandings of the meaning of the word 'royalty' and from lack of precise terminology to describe the interest intended, and the courts can only arrive at the correct meaning in any particular instrument by considering it from its four corners and by resort to other aids commonly employed to construe ambiguous contracts and arrive at the intention of the parties.

Id. at 444.

[¶30] In its effort to determine the legal effect of that ambiguous deed, the Arkansas Supreme Court applied that state's rules of contract interpretation, many of which are identical in effect to those applied in North Dakota. Specifically, the Supreme Court of Arkansas applied the rule of contract interpretation which states that a court "must give all parts of a deed such a construction, if possible, that they may stand together." Id.; accord N.D.C.C. § 9-07-06.

[¶31] The Arkansas Supreme Court also applied the rule of contract interpretation that interprets technical words as they are understood in an industry, but noted that the term " 'royalty' has a more varied and less specific meaning, when all of the common usages of the terms [in the deed] are compared." Wynn, 493 S.W.2d at 448; accord N.D.C.C. § 9-07-10.

[¶32] The Arkansas Supreme Court also applied the rule of contract interpretation that, in seeking to harmonize different clauses of a contract, the court "should not give effect to one to the exclusion of another even though they seem conflicting or contradictory, or adopt a construction which neutralizes a provision, if the various clauses can be reconciled." Wynn, 493 S.W.2d at 444; accord N.D.C.C. § 9-07-17.

[¶33] The Arkansas Supreme Court also applied the rule of contract interpretation that allows the court to "consider circumstances existing at the time of the execution of a contract and the situation of the parties who made it," including evidence of the subsequent statements, acts, and conduct of the parties to the contract. Wynn, 493 S.W.2d at 445; accord N.D.C.C. § 9-07-12; Nat'l Bank of Harvey, 421 N.W.2d at 803.

[¶34] The Arkansas Supreme Court also applied the rule of contract interpretation that "an ambiguous deed will be construed most favorably to the grantee," though that rule of construction is "one of last resort." Wynn, 493 S.W.2d at 448; accord N.D.C.C. § 9-07-19.

[¶35] In its effort to apply the above-described rules of contract interpretation and give meaning to the word "Royalty" inserted in that deed which otherwise would have conveyed minerals, the Arkansas Supreme Court identified at least five different potential meanings of the word "Royalty," each with a different legal effect. See Wynn, 493 S.W.2d at 442. In concluding that the deed in question in that case conveyed a mineral interest and not a royalty interest, the court stated:

> The construction of the deed depends to a great extent upon the sense in which the parties used the word 'royalty.' The word cannot be so precisely defined as to enable us to say that what would otherwise be a deed for one-eighth of all oil, gas and minerals became a conveyance of one-eighth of the oil and gas produced, as appellants contend.

Id. at 443. Instead, the court in that case harmonized the seemingly conflicting language by recognizing that the word "Royalty" was, at the time the deed in that case was executed, routinely used to convey a full mineral interest in a number of oil and gas producing jurisdictions. Id. at 446 (citing Longino v. Machen, 232 S.W.2d 826 (Ark.

1950); Mabee Oil Co. v. Hudson, 156 F.2d 450 (10th Cir. 1946); Melton v. Sneed, 109 P.2d 509, 512–13 (Okla. 1940); Elliott v. Berry, 245 P.2d 726 (1952)).

[¶36] The Arkansas Supreme Court was correct in recognizing that the word "royalty" was frequently used in a number of oil producing jurisdictions to convey mineral interests prior to its decision in the Wynn case. In Melton, the Supreme Court of Oklahoma stated, "That the word [royalty] is frequently used in this State to denote an interest in the mineral rights is a matter of common knowledge." 109 P.2d at 513; see also Meyers v. Cent. Nat. Bank of Okmulgee, 80 P.2d 584, 586 (Okla. 1937) (holding that a conveyance of "an undivided one half interest in and to the oil and gas royalty rights" conveyed a one-half interest in the oil and gas mineral rights); Burns v. Bastien, 50 P.2d 377, 382 (Okla. 1935) (holding that the reservation of an undivided interest "in and to all the royalties of oil and gas under and pertaining to said premises" reserved ownership of the minerals). In Marias River Syndicate v. Big W. Oil Co., the Supreme Court of Montana held that a deed "Reserving unto the said parties of the first part a 12 ½ per cent. interest and royalty in and to all oil and gas and other minerals of whatsoever nature, found in or located upon or under said land or premises above described, or that may be produced therefrom" reserved a mineral interest in the grantor, and not a royalty interest. 38 P.2d 599, 601–02 (Mont. 1934); see also Corlett v. Cox, 333 P.2d 619, 622 (Colo. 1958) (adopting the reasoning in Marias River Syndicate).

[¶37] North Dakota law also recognizes that the word "royalty" is subject to differing interpretations and, consequently, differing legal effects. In Corbett v. La Bere, 68 N.W.2d 211, 215 (N.D. 1955), the North Dakota Supreme Court interpreted the following language in an Assignment of Royalty: "[Grantors] do hereby sell, assign,

transfer, convey, and set over unto the said assignee, all of his right, title and interest in and to One Per Cent (1%) Royalty, of all the oil and of all the gas produced and saved from the hereinafter described lands . . .” In interpreting that clause, the Court recognized the multiple possible interpretations of the word “royalty,” stating, “This clause is subject to two constructions. It may be an assurance that the granting clause includes the royalty under the outstanding lease, or, on the other hand, it may be said to limit the granting clause to a conveyance of the royalty that would accrue under the outstanding lease.” Id.

[¶38] In Wynn, the Arkansas Supreme Court acknowledged that the word “Royalty” has a generally applicable technical definition as “a share of the product or profit, to be paid to the grantor or lessor by those who are allowed to develop the property.” 493 S.W.2d at 443. However, the court in that case simply could not justify giving the word “Royalty” its generally applicable technical meaning when doing so would cause it to so plainly contradict other language contained in the deed. The court stated, “The only way that all of the words in the deed . . . can be given a harmonious effect is by according the word ‘royalty’ a non-technical meaning consistent with the remainder of the granting clause” Id. at 448. “This result is the only one that is consistent with all pertinent rules of construction of ambiguous deeds.” Id. (emphasis added).

[¶39] Just as in the Wynn case, the word “Royalty” inserted in the Finlay deeds is subject to multiple different yet reasonable interpretations. It may have been included in the deeds for the purpose of conveying to the grantees the right to receive royalties to which Finlay was entitled under a previous lease, in addition to the mineral conveyance also contained in the deed, although no previous lease was referenced on the deeds. It may have been included to grant a non-participating royalty interest in addition to an

interest in the minerals. It may have been inserted to clarify that the grantee was to receive the royalty rights that were included in the overall mineral estate, and that the royalty interest was not being reserved. See Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 481 (N.D. 1991). The word "Royalty" may have been included in the deeds for a mischievous purpose, causing grantees to believe they were receiving a full mineral interest by using a mineral deed form, but subtly inserting the word "Royalty" in the deed in an attempt to convey a lesser interest.

[¶40] To be clear, Rowland is not arguing that the term "royalty," as it is commonly used today, routinely carries with it all of the possible meanings stated above. North Dakota law defining and distinguishing mineral and royalty interests is clear and should not be disturbed. See Acoma, 471 N.W.2d at 481. However, as in Wynn, when a must interpret a deed with ambiguous language indicative of both a mineral conveyance and a royalty conveyance—particularly a deed executed in the mid-1950s when the law was less clear than it is now—the Court should look to the possible meanings of the word "royalty" at the time the deed was executed to harmonize that single term with the remainder of the instrument.

[¶41] N.D.C.C. § 9-07-06 requires that "[t]he whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." Just as in Wynn, the inserted word "Royalty" in the Finlay deeds should be taken together with the surrounding clauses in those deeds, and those other clauses should aid this Court in giving the word "Royalty" its proper meaning. The interpretation advanced by the Plaintiffs in this matter would have the Court do precisely the opposite by isolating a singular, ambiguous word, subject to multiple interpretations,

each with a differing legal effect, and by ignoring prominent and specifically worded portions of the deeds evidencing an intent to convey a mineral interest. Such an interpretation is plainly contrary to North Dakota law. See Haag v. Noetzelman, 1999 ND 157, ¶ 6, 598 N.W.2d 121 ("The intention of the parties to a contract must be gathered from the entire instrument, not from isolated clauses, and every clause, sentence, and provision should be given effect consistent with the main purpose of the contract."). Just as in Wynn, the word Royalty inserted in the Finlay deeds cannot be so precisely defined as to say that what would have undoubtedly been a conveyance of minerals must now become a conveyance of only a fractional share of the oil and gas produced.

[¶42] The same type of analysis applied by the Arkansas Supreme Court in Wynn was also applied by the Texas Supreme Court in French v. Chevron U.S.A. Inc., 896 S.W.2d 795, 797 (Tex. 1995). In that case, the Texas Supreme Court harmonized ambiguous clauses in a deed containing both mineral and royalty language, and concluded that the deed conveyed a mineral interest. Id. at 797–98.[1]

[¶43] N.D.C.C. § 9-07-06 requires that "[t]he whole of the contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret others." N.D.C.C. § 9-07-17 requires that a "[r]epugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purposes of the whole contract." The same harmonizing analysis applied in the French case is required under North Dakota law in the present case. Here, it is "reasonably practicable" to give effect to the whole of the contract by interpreting the word "Royalty" to reference one of the interests contained in the overall mineral estate. This would harmonize that word with all of the

[1] For a complete analysis of the French case, see (App. 145–47).

other language in the deed clearly conveying the remaining interests of the mineral estate, such as ingress and egress, and development rights. To the extent the word "Royalty" is a repugnancy to the other language in the deed, it is possible to reconcile that word with the deed's overall purpose, as clearly established by the deed's remaining language, to convey a mineral interest. The district court erred by failing to apply this rule of contract interpretation.

2. *The district court failed to apply N.D.C.C. § 9-07-12 and consider the evidence pertaining to the later conduct of Finlay's grantees*.

[¶44] The district court also erred by failing to apply North Dakota's rule of contract interpretation regarding the subsequent conduct of the parties to the contract. N.D.C.C. § 9-07-12 states, "A contract may be explained by reference to the circumstances under which it was made and the matter to which it relates." The North Dakota Supreme Court has also stated that "the parties' conduct in the course of performance after the contract's formation can help determine the meaning of ambiguous language." Nat'l Bank of Harvey, 421 N.W.2d at 803.

[¶45] In this case, the subsequent conduct of Finlay's grantees evidences that the grantees believed they received mineral interests. Each and every deed that Defendant Ronald Rowland received, either from Finlay's grantees or such grantees' immediate successors, granted a full mineral interest. (App. 67–74). Additionally, those who did not convey their interests outright to Rowland executed oil and gas leases with warranty clauses to Rowland, a right which only mineral interest owners possess. (App. 75–86).

[¶46] This is not true only for the interests granted directly to Rowland, but for others as well. As noted above, some of Finlay's grantees executed oil and gas leases to an unrelated third party more than a decade before Rowland became involved in the area.

(App. 102–15). Without exception, each of Finlay's grantees or immediate successors identified in the instruments submitted to the district court executed an instrument consistent with a belief of ownership of a full mineral interest. (App. 67–86, 102–15). Not one of those instruments purports to convey a royalty interest only. See id. From this evidence, it is clear that those grantees of Finlay believed that they received a full mineral interest from Finlay. The district court's failure to apply North Dakota's rule of contract interpretation regarding the subsequent conduct of the parties to an ambiguous contract was error. On review, this Court should apply that rule of construction and hold that the deeds in question conveyed a mineral interest, consistent with the belief of Finlay's grantees as evidenced by the subsequent instruments executed by those grantees. (App. 67–86, 102–15).

3. *The district court misapplied N.D.C.C. § 9-07-16 by excluding all mineral conveyance language from its interpretation of the deeds*.

[¶47] In its Memorandum Opinion, the district court identified as the basis of its interpretation of the deeds in question the rule of contract interpretation that typewritten parts of a contract control the printed parts. (App. 174) (citing N.D.C.C. § 9-07-16). In its Findings of Fact, Conclusions of Law and Order for Judgment, the court concluded as a matter of law that "[t]he deeds with the word 'Royalty' inserted in them are ambiguous. The typewritten 'royalty' term controls over preprinted provisions included within the form of the deeds in question." (App. 190).

[¶48] N.D.C.C. § 9-07-16 states in relevant part: "When a contract is partly written and partly printed . . . the written parts control the printed parts . . . and if the two are absolutely repugnant the latter must be disregarded insofar as such repugnancy exists." N.D.C.C. § 9-07-16 (emphasis added). The district court erred by applying

N.D.C.C. § 9-07-16 to mean that the typewritten word "Royalty" controls the interpretation of the deeds in question to the exclusion of all the other language of the deeds consistent with a conveyance of a mineral interest. This application of N.D.C.C. § 9-07-16 is inconsistent with North Dakota law interpreting that statute.

[¶49] In Knox v. Krueger, 145 N.W.2d 904, 908 (N.D. 1966), the North Dakota Supreme Court was called upon to interpret an ambiguous assignment of oil and gas royalties that was prepared on a pre-printed form. In that assignment form, the grantor inserted a parenthetical phrase in the granting clause, which stated "(1 1/4% Of all the)". The Court in that case found that the parenthetical phrase was inconsistent with the remainder of the granting clause around it and disregarded the parenthetical phrase in construing the operative words of the grant. Id. at 909. The Court stated that the words of the granting clause, with the parenthetical phrase omitted, were "the operative words of the grant; they are not doubtful, but clear and distinct." Id. at 908. In construing the assignment, the Court stated, "Since the words contained within the parentheses, intended to be explanatory, are repugnant and not reconcilable with the written words, which are clear and distinct, we must disregard the parenthetical phrase in construing the operative words of the grant." Id. at 909.

[¶50] The Knox case demonstrates that the provisions of N.D.C.C. § 9-07-16, which favor typewritten terms of a contract over pre-printed terms of the same contract, do not operate to totally nullify pre-printed language merely because a vague or seemingly contradictory word or phrase is inserted in the form. See id. To the contrary, N.D.C.C. § 9-07-16 applies when the added, typewritten words show the "deliberate agreement of the parties." See McGraw-Edison Co. v. Haverluk, 130 N.W.2d 616, 620

(N.D. 1964) ("[I]t is a rule of construction, established in this jurisdiction, that typewritten words of a provision in a contract prevail over printed words, as showing deliberate agreement of the parties."); see also Kern v. Kelner, 27 N.W.2d 567 (N.D. 1947) (emphasis added).

[¶51] In the present case, the meaning of the word "Royalty", inserted in the mineral deed form, is far from certain and appears to be in conflict with the surrounding language in the deed. (App. 39–50, 52–53). Just as in Knox, in this case N.D.C.C. § 9-07-16 does not cause the insertion of one vague, uncertain term, which is subject to multiple reasonable interpretations, to nullify all of the surrounding language in the deed that clearly and distinctly manifests an intent to convey a full mineral interest. N.D.C.C. § 9-07-16 is meant to be applied when the added, typewritten words show the "deliberate agreement of the parties." McGraw-Edison Co., 130 N.W.2d at 620. Far from showing the "deliberate agreement of the parties," the insertion of the word "Royalty" in the deeds in this case only introduces ambiguity as to the parties' intentions for the deeds. See Williams Co., 427 N.W.2d at 823–24.

[¶52] When, as in this case, an ambiguity exists between the typewritten word "Royalty" and the printed mineral language, N.D.C.C. § 9-07-16 requires that the Court only disregard the other language of the deed if it is "absolutely repugnant" to the written portions, and even then, the other language is only disregarded "insofar as such repugnancy exists." See N.D.C.C. § 9-07-16 (emphasis added). As stated above, there are multiple interpretations of the word "Royalty," each with differing legal effects which are not "absolutely repugnant" to the grant of a mineral interest. Indeed, royalty interests in North Dakota are recognized as being a smaller portion of the overall mineral estate,

such that the grant of a mineral interest is not mutually exclusive of the grant of a royalty interest. See Acoma, 471 N.W.2d at 481. Furthermore, N.D.C.C. § 9-07-06 requires that "[t]he whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D.C.C. § 9-07-17 requires that "[r]epugnancy in a contract must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purposes of the whole contract."

[¶53] Here, it is reasonably practicable to give meaning to the word "Royalty" without totally ignoring the other language in the deed, as the district court did. This is particularly true when considering that Finlay reviewed the deed closely enough to take notice of the warranty clause and a portion of fine print requesting that the parties "Give exact post office address" and to strike out those portions of the deed, while leaving entirely intact the portions of the deed conveying the rights of ingress and egress, development rights, and all the other classic elements of a full mineral interest. (App. 39–50, 52–53).

[¶54] Because the insertion of the word "Royalty" can be taken together with the other language of the deeds conveying a full mineral interest so that it is not "absolutely repugnant" to that other language in the deeds, and because it is "reasonably practicable" to give meaning to the mineral language along with the word "Royalty", the provisions of N.D.C.C. § 9-07-16 should not be applied to disregard all the remaining language in the deed consistent with the conveyance of a full mineral interest. See N.D.C.C. § 9-07-06. Moreover, to the extent the word "Royalty" is a repugnancy to the remainder of the deed, that word can be reconciled and given effect to the overall purpose of the deed to convey

a full mineral interest. See N.D.C.C. § 9-07-17. Therefore, the whole of the contract should be given effect and interpreted to convey a full mineral interest. The district court's failure to apply or even consider these rules of interpretation was error.

4. *The district court failed to apply N.D.C.C. § 9-07-19 and N.D.C.C. § 47-09-13, which require that ambiguous contracts and instruments be interpreted most strongly against the party who caused the ambiguity to exist*.

[¶55] Under North Dakota law, "[a] grant shall be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor." N.D.C.C. § 47-09-13. Because deeds are to be construed in the same manner as contracts, N.D.C.C. § 9-07-19 also applies, which states in relevant part: "In cases of uncertainty not removed by the preceding rules, the language of a contract should be interpreted most strongly against the party who caused the uncertainty to exist." N.D.C.C. § 9-07-19. "[A] contract which is ambiguous and not clear should be construed most strongly against the party who caused the uncertainty to exist-the party 'who presumably looked out for his best interests in the process.' " Cavalier Cnty. Mem'l Hosp. Ass'n v. Kartes, 343 N.W.2d 781, 784 (N.D. 1984). "However, interpretation of ambiguities in a grantee's favor is a last resort rule of construction, applied when all other means of ascertaining the parties' intent have failed." Webster v. Regan, 2000 ND 89, ¶ 11, 609 N.W.2d 733.

[¶56] It is clear from the plain language of N.D.C.C. § 9-07-19 that, for a court not to apply the rule interpreting an ambiguous contract against the party responsible for the ambiguity, the court must have "certainty" as to the ambiguous terms, as provided by the other rules of contract interpretation. N.D.C.C. § 9-07-19 (emphasis added). In other

words, there must be no remaining uncertainty in the Court's mind as to the ambiguous terms. See id.

[¶57] As stated above, even if the word "Royalty" is given meaning, questions still remain as to the intended legal effect of the insertion of that word in the deeds. North Dakota case law close in time to the execution of the deeds demonstrates that the word "royalty" is subject to differing interpretations and, consequently, differing legal effects. See Corbett 68 N.W.2d at 215. In the Wynn case, the Arkansas Supreme Court recognized five different plausible interpretations of the parenthetical phrase "(being all the Royalty retained by us)." 493 S.W.2d at 442.

[¶58] In the present case, the word "Royalty" is the only word in each of the deeds in question that raises the possibility that something other than, or in addition to, a mineral interest is being conveyed. (App. 39–50, 52–53). There is no clarifying intent language, and the record of this case does not disclose with certainty what meaning the word "Royalty" was supposed to have in the deeds in question. Therefore, the word "Royalty" that was inserted in the deeds in question is subject to multiple reasonable interpretations, each with differing legal effects, just as the ambiguous "royalty" phrase was in the Wynn case. Id. After all the evidence is examined and the rules of contract interpretation are applied, unless the Court has certainty about the meaning of the inserted word "Royalty," despite the total absence of evidence explaining the intended meaning of that word, and despite the fact that the entirety of the deeds' remaining language undoubtedly conveys a mineral interest, then the Court should have interpreted the deeds most strongly against the party responsible for the uncertainty. N.D.C.C. § 9-07-19

[¶59] In this case, it is undisputed that Finlay Hamilton drafted the deeds in question. (See App. 88). This is established by the fact that each of Finlay's grantees received the same mineral deed form with the same precise ambiguity. (App. 39–50, 52–53). As the grantor under those deeds, it can be presumed that Finlay was "look[ing] out for his best interests in the process." See Cavalier, 343 N.W.2d at 784.

[¶60] As demonstrated above, the rules of contract interpretation do not allow an interpretation of the deeds in question whereby all the language of the deed, other than the word "Royalty," is entirely disregarded. Such a conclusion is forestalled by the rules requiring that the contract be interpreted as a whole, if reasonably practicable, and that seemingly repugnant terms be reconciled, if possible, and that words in a contract that are inconsistent with its nature be rejected. See N.D.C.C. § 9-07-06; N.D.C.C. § 9-07-17; N.D.C.C. § 9-07-18. Even if such an interpretation was allowed under the rules of contract interpretation, the Court would still be left to determine exactly what the word "Royalty" means in the context of the deed. The applicable case law and the facts of the present case demonstrate that the word "Royalty" is subject to multiple interpretations, each with a differing legal effect. See Corbett, 68 N.W.2d at 214; Wynn, 493 S.W.2d at 442. There is no evidence, from the deeds or otherwise, identifying with certainty the nature of the interest intended to be conveyed by the use of the word "Royalty" in the deeds in question. Therefore, uncertainty still exists with regard to the legal effect of the deeds in question, and the deeds must be interpreted most strongly against Finlay, and in favor of the grantees. See N.D.C.C. § 9-07-19.

[¶61] Moreover, it is well established that the provisions of N.D.C.C. § 9-07-19 and N.D.C.C. § 47-09-13 exist to protect non-drafting parties from the self-interested and

potentially unscrupulous motivations of the drafting party. See Cavalier, 343 N.W.2d at 784. The insertion of the word "Royalty" in the deeds in this case raises the question of mischief on the part of the grantor and drafting party, Finlay Hamilton. Finlay may have inserted the word Royalty, but left the other mineral granting language intact to convince the buyers of those interests that they would have the full slate of mineral rights available to them, including the rights to any bonuses or delay rentals if their interest was ever leased. At the same time, if Finlay was ever approached about his interests in the Property, he would be able to convince a developer that his previous conveyances were only royalty interests and that he maintained ownership of the mineral rights along with the right to enter leases or participate in development. The potential for this kind of underhanded dealing is precisely why ambiguous deeds should be construed against the drafting party.

[¶62] In this case, the persistent uncertainty of the meaning of the word "Royalty" and the potential for mischief require the application of N.D.C.C. § 9-07-19 and N.D.C.C. § 47-09-13. The present litigation stems directly from Finlay's ambiguously drafted deeds, the intent of which still remains uncertain. Finlay's heirs should not be allowed to benefit from an ambiguity that was caused by Finlay in the first place. The district court's failure to apply this last resort rule of contract interpretation was error.

CONCLUSION

[¶63] For the reasons stated above, Appellant Ronald Rowland respectfully requests that this Court set aside the district court's Finding of Fact 18 and determine as a matter of law that the deeds in question convey full mineral interests.

Dated this 27th day of June, 2014.

_____

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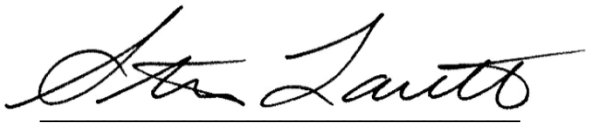
CERTIFICATE OF COMPLIANCE ON WORD COUNT

[¶64] I hereby certify that this brief complies with N.D.R.App.P. 32(a)(7)(A); the word count is 7,994.

Dated this 27th day of June, 2014.



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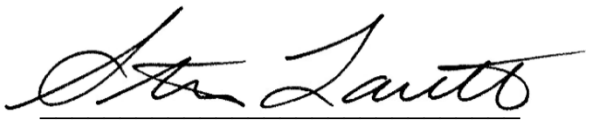
CERTIFICATE OF WORD PROCESSING PROGRAM

[¶65] The word-processing program is Microsoft Office Word 2013.

Dated this 27th day of June, 2014.



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20140011
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IN THE OFFICE OF THE
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JULY 2, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Lawrence A. Hamilton, Philip B. Hamilton and Judy H. Kasper,

Plaintiffs and Appellees,

v.

Larry G. Woll, Cynthia J. Woll, Tracy J. Holiday, Robert V. Holiday, Philip Knolyn Hatch II, Jacki DeMay, R. Craig Woll, Dorothy Jean Griswold, Russell Rapp, Jeffery R. Carius, Michael Carius, Mark S. Rapp, Tandals Farm Inc., James H. Bragg, Julie K. McKinley, J. Michael Gleason DBA Gleason Land Co., Strata Minerals, Inc., Frances A. Hannifin, Alan R. Hannifin, Desert Partners II L.P., Value Petroleum Inc., J. Kyle Jones, Margaret J. Hannifin, Fall River Resources, Chatfield Company, Walter E. Opper, Emma Smart, John M. Schattyn, Lloyd S. Schattyn, Noel L. Schattyn Soren, Avalon North LLC, Dakota West Energy LLC, Ronald Rowland, Lee LaBarre, Terry Aronson, Burlington Resources Oil & Gas Company LP; Peyton Woll, Jr., Trust dated June 8, 1993, Peyton H. Woll, Trustee, Dana G. Woll, Successor Trustee; John H. Woll and Dorothea E. Woll, Trustees of the John & Dorothea Woll Trust Agreement dated 1-31-90; Helen F. Rapp, Trustee of the Helen F. Rapp Declaration of Trust dated 8-17-2004; Alvin C. Schopp, Trustee; and all other persons unknown claiming any estate or interest in or lien or encumbrance upon the property described in the Complaint,

Defendants,

Ronald Rowland,

Appellant.

Supreme Court No. 20140011
Bowman County Civ. No. 06-10-C-00043

APPEAL FROM THE FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FOR JUDGMENT ENTERED NOVEMBER 12, 2013, AND JUDGMENT ENTERED NOVEMBER 18, 2013, IN BOWMAN COUNTY DISTRICT COURT, SOUTHWEST JUDICIAL DISTRICT

THE HON. DANN E. GREENWOOD, PRESIDING

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MaLaura Sorensen, being first duly sworn, deposes and says:

That she is a citizen of the United States of America, of legal age and is not a party to nor interested in the above entitled action; that on the 2nd day of July, 2014, she electronically served a true and correct copy of the following document in this action:

Corrected title page for Brief of Appellant Ronald Rowland and
Corrected title page for Appendix of Appellant Ronald Rowland

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MaLaura Sorensen

Subscribed and sworn to before me this 2nd day of July, 2014.

VICKI L JOHNSON
Notary Public
State of North Dakota
My Commission Expires Feb. 12, 2015

Notary Public
For the State of North Dakota

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Brief of Appellant Ronald Rowland

That said documents were emailed to the following persons at their known email addresses as follows:

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MaLaura Sorensen

Subscribed and sworn to before me this 2nd day of July, 2014.

ASHLEY D SORENSEN
Notary Public
State of North Dakota
My Commission Expires Jan. 21, 2020

Notary Public
For the State of North Dakota

20140011
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JUNE 27, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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v.

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Lee LaBarre
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Avalon North, LLC
P.O. Box 815
Bismarck, ND 58502-0815

MaLaura Sorensen

Subscribed and sworn to before me this 27th day of June, 2014.

LARAE A THOMAS
Notary Public
State of North Dakota
My Commission Expires Nov. 24, 2015

Notary Public
For the State of North Dakota