IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Patricia R. Capps, f/k/a Patricia Anderson, Terrel A. Anderson, a/k/a Terral Anderson,

Plaintiffs, Appellants and Cross-Appellees,

and

The Estate of Ruth A. Nelson, Deceased,

Plaintiff and Appellee,

v.

Colleen L. Weflen, a/k/a Colleen Weflen, a single woman, Marleen Weflen, f/k/a Marleen W. Tiedt, Sharon Kruse, a/k/a Sharon O. Kruse, a married woman dealing in her sole and separate property, Catherine Harris, f/k/a Cathy Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLC, a Delaware Limited Liability Company,

Defendants, Appellees and Cross-Appellants,

and

John H. Holt Oil Properties, Inc., Atomic Oil & Gas, a Colorado Limited Liability Company,

Defendants and Appellees,

and

Gulfport Energy Corporation, EOG Resources, Inc., Whiting Oil and Gas Corporation,

Defendants, Appellees and Cross-Appellants,

and

Cade Oil and Gas, LLC, Gerald C. Wools, Penny Brinks, Michael Lee, Gwen Hassan, and Melissa Kellor,

Defendants and Appellees.

Supreme Court No. 20140110

BRIEF OF APPELLANTS AND CROSS-APPELLEES PATRICIA R. CAPPS AND TERREL A. ANDERSON

PEARCE & DURICK
PATRICK W. DURICK, ND #03141
ZACHARY E. PELHAM, ND #05904
BENJAMIN W. KEUP, ND #07013
314 East Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890
Attorneys for Appellants and Cross-Appellees Patricia Capps and Terrel Anderson

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

NORTH DAKOTA CENTURY CODE

OTHER AUTHORITIES

RULES

STATEMENT OF THE ISSUES

1. Whether attempted notice of lapse of mineral interests sent certified, restricted delivery, mail to a person believed to be deceased, and who was in fact deceased, satisfied the requirements of N.D.C.C. § 38-18.1-06 (2004);
2. Alternatively, whether N.D.C.C. § 38-18.1-06 (2004) is unconstitutional as violative of due process as applied;
3. Whether language in a mineral deed granted all of the minerals owned by the grantor to the grantees or excepted or reserved half of the minerals in the grantor.

STATEMENT OF THE CASE

Due to the manner in which this appeal has reached the Court, the only issue that is procedurally proper to be argued by the Capps Appellants and Cross-Appellees' in this brief is issue 3. The Court is advised, however, that a determination on issues 1 and 2 is a prerequisite to a decision on issue 3. Because all three issues are so factually and procedurally interrelated, the Capps Appellants and Cross-Appellees have included the relevant procedural and factual history of this case in the Statement of the Case and Statement of the Facts sections. The Capps Appellants and Cross-Appellees will properly address arguments presented by the Cross-Appellants involving issues 1 and 2 in their answer brief to the Cross-Appellants.

The Complaint of Patricia R. Capps and Terrel A. Anderson (together "Capps") was filed with the district court on January 18, 2010. Appendix ("App.") 11. The Complaint sought to quiet title against Cross-Appellants Colleen L. Weflen, Marleen

Weflen, Sharon Kruse, Catherine Harris, Cathy Gunderson, Norris Weflen (together "Weflens"), Windsor Bakken, LLC, John H. Holt Oil Properties, Inc., and Atomic Oil & Gas, LLC, in and to the minerals in the and under the following described real property located in Mountrail County, North Dakota:

Township 153 North, Range 90 West
Section 4: Lots 3 and 4, S/2NW/4, SW/4
Section 9: NW/4

("Subject Property").

The Weflens moved to join Gulfport Energy Corporation, EOG Resources, Inc., and Whiting Oil and Gas Corporation as defendants on or about July 30, 2010. App. 13. On or about August 27, 2010, the Weflens moved to join the Estate of Ruth A. Nelson. *Id.* On February 17, 2011, the district court granted the Weflens' motion to join EOG, Gulfport, Whiting, and the Estate of Ruth A. Nelson. App. 14.

On or about September 14, 2010, Capps moved to amend their Complaint to add Gwen Hassan, Penny Brink, Michael Lee, Melissa Kellor (together "Hassans"), and Gerald C. Wools. App. 13. On February 17, 2011, the district court granted the Capps' motion to add the Hassans and Wools. App. 14.

On or about September 29, 2010, the Weflens moved for summary judgment to quiet title in the Subject Property. App. 13. The Capps filed a cross-motion for summary judgment to quiet title on or about November 1, 2010. *Id.* Oral argument on the motions was heard on December 15, 2010. App. 5. The district court initially granted Weflens summary judgment motion on March 25, 2011. App. 14, 99-109.

After the Hassans were joined, the Weflens moved for summary judgment against them on or about July 28, 2011. App. 15. The Capps filed a response dated August 29,

2011, opposing the motion for summary judgment and seeking reconsideration of the district court's March 25, 2011, order. *Id.* Oral argument on the motion was heard by the district court on November 14, 2011. App. 16. The district court granted the Capps' motion for reconsideration, denied the Weflens' summary judgment motion, and certified the order as final pursuant to N.D.R.Civ.P. Rule 54(b) on February 2, 2012. App. 17, 110-122.

The first appeal on this matter followed, resulting in dismissal by this Court. *Capps v. Weflen*, 2013 ND 16, 826 N.W.2d 605.

Following dismissal, the district court took up competing motions for summary judgment filed by the Capps and Hassans on interpreting the meaning of a 1979 mineral deed. The Capps moved for summary judgment on or about June 28, 2013, and took the position that Ruth A. Nelson ("Nelson") conveyed her remaining one-half interest in the Subject Property to them. App. 18. The Hassans cross-moved for summary judgment on or about September 3, 2013, and took the position that Nelson conveyed only one-half of her remaining one-half interest in the Subject Property to the Capps. *Id.* The district court granted the Hassans' motion for summary judgment on October 29, 2013. App. 150-54. The Capps moved to partially reconsider the district court's order as to how the minerals would be distributed between the Capps and Hassans on or about October 31, 2013. App. 19. The district court granted the Capps' motion for reconsideration on January 13, 2014. App. 155-56. Because the district court quieted title in the Subject Property to the Capps and Hassans, the remaining disputes were made moot.

Judgment was entered on March 21, 2014. App. 30-31. Notice of entry of judgment was served on March 27, 2014. App. 38. Notices of appeal were filed by Capps, Weflens, EOG, Windsor, Gulfport, and Whiting. App. 32-37.

STATEMENT OF THE FACTS

A. Background

In 1975 Ruth A. Nelson conveyed the Subject Property to Olav Weflen and Rose Weflen. App. 123-24. Nelson reserved one-half of the minerals in the Subject Property. *Id.* In 1979, Nelson executed a mineral deed conveying her mineral interests to the Capps. App. 157-58. While Patricia Capps testified she believed the mineral deed had been recorded, the mineral deed to the Capps was not recorded until 2009. App. 45-47. Nelson died in 1979.

In 2008, while on a hunting trip, Patricia Capps' husband and her brother, Gerald Wools, happened to venture to "the old homestead." They immediately noticed oil wells on the adjacent property. Patricia Capps contacted an attorney who informed her to file a statement of claim, which was done. Motion Hearing Tr., Dec. 15, 2010, pp. 19-20. Unbeknownst to the Capps, the surface owners of the subject property, the Weflens, who already own one-half of the minerals in the subject property, sought to claim the remaining minerals as abandoned. The Weflens allege they are the owners of all of the minerals under the Subject Property by virtue of alleged compliance with North Dakota's Termination of Mineral Interest chapter, N.D.C.C. ch. 38-18.1. The Capps claim ownership of one-half of the mineral interests within the Subject Property by virtue of the 1979 Mineral Deed from Nelson. App. 157-58. Other heirs of Nelson, the Hassans,

claim that the 1979 mineral deed only conveyed half of Nelson's interests to the Capps and the Hassans are entitled to certain interests.

B. 1979 Mineral Deed

On June 6, 1979, a Mineral Deed was executed by Nelson as Grantor conveying minerals to the Capps as Grantees. App. 157-58. The Mineral Deed's granting clause conveyed an undivided ½ mineral interest in and to all of the oil, gas and other minerals. *Id.* Nelson had previously reserved a ½ mineral interest in the Subject Property in the 1975 conveyance to Olav and Rose Weflen.

The granting clause of this deed provides in relevant part:

> . . . the receipt of which is hereby acknowledged, do hereby grant, bargain, sell, convey, transfer, assign and deliver unto Terrel A. Anderson and Patricia Anderson of _____, hereinafter called Grantee (whether one or more) an undivided ½ mineral interest in and to all of the oil, gas and other minerals in and under and that may be produced from the following described lands situated in Mountrail County, State of North Dakota, to wit:
>
> Township 153 North, Range 90 West:
> Section 4: Lots 3 and 4, S½NW¼ , SW¼
> Section 9: NW¼

Id. Although the granting clause conveyed an undivided ½ mineral interest, there is also a subsequent clause below the land description that states:

> It is the intent hereof to transfer a ½ interest in and to the remaining minerals, including oil, gas and coal, but not limited thereto, in, on or under the above described premises, with the right of ingress and egress for the purpose of mining, drilling and exploring for the same.

Id. The deed also contains language stating that the Grantor warranted the title to the Grantee and did "agree to defend all and singular the said property unto the said Grantee . . ." *Id.*

Even though this deed was issued to the Capps in June of 1979, it was not recorded until March 31, 2009. *Id.* Patricia Capps explained that she was told at the time she received the deed that everything had been taken care of legally and the only action required of her would be to inform Citco Oil of Ruth A. Nelson's death in order to transfer the lease payments. App. 43, 47. Patricia Capps sent a certified copy of the deed to Citco, but she was unaware that it had never been recorded. *Id.* at 47.

C. Attempted Termination of Mineral Interests by the Surface Owners

The Weflens claim by publishing notice of lapse of mineral interests in December 2005 and January 2006, attempting to deliver a copy of the notice in January 2006 by certified, restricted delivery, mail to Nelson, who would have been 108 years old had she not died in 1979, that they fulfilled the requirements of N.D.C.C. § 38-18.1-06(2). App. 125-136. The attempted notices addressed to Nelson were returned undelivered to the Weflens. App. 135-36.

Evidence exists of the Weflens belief that Nelson was deceased when notice was attempted. App. 142-49. The attorney the Weflens retained to prepare the documents to attempt to claim the minerals was made aware he was attempting to mail notice to a deceased person. App. 144.[1] Be all as this may be, it is undisputed Nelson was no longer living at the time of attempted notice.

[1] The Capps attempted to schedule the attorney's deposition, but the Weflens sought a protection order and the district court determined this issue was moot when it first denied Capps' motion for summary judgment. (App. 107). While the Capps have consistently asked the district court to make a legal determination based on the state of the record, whether a factual issue remains has been left open as an alternative argument concerning communication between the Weflens and their attorney as to what was said to him concerning whether Nelson was deceased. (Motion Hearing Tr., Nov. 14, 2011, pp. 8-9).

STANDARD OF REVIEW

The Court reviews questions of law de novo. *In re Estate of Conley*, 2008 ND 148, ¶ 15, 753 N.W.2d 384.

LAW AND ARGUMENT

There are three broad issues on appeal: 1) whether Weflens failed to strictly comply with the requirements of N.D.C.C. § 38-18.1-06 (2004); 2) whether N.D.C.C. § 38-18.1-06 (2004) is unconstitutional as applied; and 3) whether the 1979 Mineral Deed conveyed all of Nelson's interest to the Capps or only half of Nelson's interest to the Capps with the remainder held by the Estate of Ruth A. Nelson subject to distribution. Because the Capps are Cross-Appellees as to issues one and two, and are Appellants as to issue three, only issue three is addressed at this time.

I. The Intent of the Parties is to be Construed from the Deed and the Intent is Expressed in the Initial Granting Clause.

The language in the granting clause of the 1979 Mineral Deed conveys a one-half (½) mineral interest in and to all of the oil, gas and other minerals to the Capps. App. 157-58. Determining the intention of the parties to a deed is the goal when construing deeds and the plain language of the deed at issue supports the argument that the Capps own a one-half (½) mineral interest in the entire property described. In *Waldock v. Amber Harvest Corp.*, 2012 ND 180, ¶¶ 1, 10, 820 N.W.2d 755, this Court held that the plain language of an administrator's deed was equivalent to a quit claim deed and that the specific granting language of the deed was clear and unambiguous. The Court also stated that "deeds are construed in the same manner as contracts" and that if there is no ambiguity present it would determine intent from the instrument itself or, in other words,

"from the four corners of the deed, if possible." *Id.* at ¶ 6; *see also Gawryluk v. Poynter*, 2002 ND 205, ¶ 8, 654 N.W. 2d 400.

Waldock explicitly provides that "the specific language of the granting clause of the deed controls the interest the grantor purported to give the grantee." *Waldock*, 2012 ND 180 at ¶ 13. Specifically, the deed in *Waldock* was one "granting, bargaining, selling, and conveying 'all the right, title, estate and interest of [Edwardson], at the time of his death.'" *Id.* Similarly, the Mineral Deed currently at issue states the Grantor did "grant, bargain, sell, convey, transfer, assign and deliver . . . an undivided ½ mineral interest in and to all of the oil, gas and other minerals . . . ." App. 157 (emphasis added). The intent of the Grantor in the present case was clearly and unambiguously stated in the granting clause: Nelson intended to convey a one-half mineral interest in *all* of the minerals under the described tracts. Therefore, it should be determined that the Capps now own a one-half interest in the entire property described in the deed, and not one-half of Nelson's previously owned one-half interest.

In analyzing N.D.C.C. § 9-07-06, *Waldock* held, in the absence of an ambiguity, the intent of the parties would be determined "from the four corners of the deed, if possible." *Waldock*, 2012 ND 180 at ¶ 6 (citations omitted). After reviewing the deed in *Waldock* in its entirety, including "excepting and reserving" language, the Court concluded that "the specific language of the granting clause of the deed controls the interest the grantor purported to give the grantee." *Id.* at ¶¶ 2, 13. Here, in reading the Mineral Deed as a whole, the granting clause being read with a subsequent clause below the property description, it is clear and unambiguous that the intent of Nelson was to

convey a full one-half (½) interest, *i.e.*, the one-half (½) interest that remained after she had conveyed a one-half (½) interest to Olav and Rose Weflen in 1975.

A lack of reservation or exception clause in the deed should vest the entire one-half interest in the Capps. Just as mineral reservations or exceptions are commonly made, minerals can also be conveyed in their entirety without a reservation or exception. Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers, Oil and Gas Law Abridged Fourth Edition,* § 311 (LexisNexis Matthew Bender 2010); *see also Whitman v. Harrison*, 327 P.2d 680, 683 (Okla. 1958) (stating that "[t]here were no apt words used in this deed which would indicate there was any intent on the part of grantor to reserve or take back unto herself any interest in said property. There appears to be no reason why proper words should not have been used if such were the intent of the parties"); *Rose v. Cook*, 250 P.2d 848, 852 (Okla. 1952) (stating that "[t]o create a reservation it must appear from the instrument that the grantor intended to and by appropriate words expressed the intent to reserve an interest in himself").

Additionally, *Williams & Meyers* explains that a commonly ignored rule regarding reservations and exceptions is that "a reservation or exception not contained in the granting clause or the reddendum clause of a deed is void as being repugnant to the grant." *Id.* at § 311. This is not to admit that the clause subsequent to the property description in the Mineral Deed is a reservation or exception; rather, this supports the argument that the repugnancy in the subsequent clause should be deemed void because, under the definition of "repugnancy," it is an "inconsistency or contradiction between two or more parts" of the instrument. BLACK'S LAW DICTIONARY, 1419 (9th ed. 2011). And, although this Court stated in *U.S. Bank, National Association v. Koenig*, 2002 ND

137, ¶ 8, 650 N.W.2d 820, that "[t]he parties' intent must be ascertained from the entire instrument," it also held that if there is any repugnancy in a contract, it "must be reconciled, if possible, by such an interpretation as will give some effect to the repugnant clause subordinate to the general intent and purpose of the whole contract." *Id.* (quoting *Haag v. Noetzelman*, 1999 ND 157, ¶ 6, 598 N.W.2d 121); *see also* N.D.C.C. §§ 9-07-17, 47-09-11, and 47-09-13; *Priest v. Ernest W. Ball & Associates*, 62 So. 3d 1013, 1018-20 (Ala. 2010). In light of these interpretations, the question often becomes, "does the language of the deed reflect an intention to withhold the minerals (or part of them) from the grantee?" *See Williams & Meyers*, § 310. In the present case, neither a reddendum (reservation) nor exception clause exist; thus, there can be no intent of a reservation or exception found. And, in the event the intent clause is construed to be a reservation, it should nevertheless be deemed subordinate to the granting clause due to its repugnancy and because it does not appear in the granting clause.

If a deed is read to be ambiguous, the terms stated earlier in an agreement are favored over subsequent terms. In *Voyager Life Ins. Co., Inc. v. Whitson*, 703 So. 2d 944, 947 (Ala. 1997), there was a dispute over conflicting interest rates in a contract. The court concluded that, in the event of an ambiguity, it must apply the rule of construction that "[a]ny inconsistencies between clauses or conditions that cannot be reconciled must be resolved in favor of the first clause." *Id.* at 949 (citing *City of Fairhope v. Town of Daphne*, 208 So. 2d 917 (Ala. 1968)); *see also* 17A C.J.S. *Contracts*, § 412 (2013) ("the first of two conflicting provisions prevails over the second provision, and inconsistencies between the clauses that cannot be reconciled must be resolved in favor of the first clause, unless the inconsistency is so great as to find that the contract is unenforceable for

uncertainty, or an intention that the subsequent clause qualify the prior is plainly expressed"). If it is concluded in this case that the initial grant and the clause immediately after the land description are inconsistent or cause ambiguity, the result under *Whitson* is that the initial grant of a full one-half interest in all the oil, gas and other minerals must be what was conveyed since that was the first clause.

II. When a Lesser Quantity of Interest is Recited than what is First Specified, Title in the Amount of the Lesser Quantity does not Pass.

When there is a subsequent clause that states a lesser interest than what is first specified, the title passes as to the greater interest. In *Costello v. Graham*, 80 P. 336, 337 (Ariz. 1905), the appellant argued that only a one-half interest was conveyed due to the qualifying words, "'being an undivided one-half.'" The appellant made this argument despite the fact that "it purported to be a conveyance of all his right, title, and interest." *Id.* The court denied the appellant's argument, stating:

> [t]here is abundant authority to sustain the proposition that such a conveyance is in fact a conveyance of the whole interest owned by the grantor, and that a qualifying clause of similar import to the one in question is not to be construed as limiting the general clause of the grant and of excepting from the conveyance any part of the interest held by the grantor.

Id. Similarly, the Mineral Deed in question conveyed an undivided one-half mineral interest in and to all of the oil, gas and other minerals. A later clause stated that it was a one-half interest in and to the remaining minerals that was to be conveyed. App. 157. Under *Costello*, a subsequent clause should not be construed as limiting the conveyance to one-half of Nelson's one-half interest. Rather, it should be construed as conveying her entire one-half interest because of the general clause in the grant. Moreover, when the drafter of the instrument has caused the uncertainty, "the language of a contract should be

interpreted most strongly against the party who caused [it] to exist." N.D.C.C. § 9-07-19; *see also Thompson v. Thompson*, 391 N.W.2d 608 (N.D. 1986); *Mueller v. Strangeland*, 340 N.W.2d 450 (N.D. 1983). Therefore, the interest conveyed should be a full one-half mineral interest in the property described in the deed.

When a granting clause makes an absolute conveyance of an interest, that is what is conveyed. In *Kerr-McGee Corp. v. Henderson*, 763 P.2d 92, 93 (Okla. 1988), the petitioner argued that there was no ambiguity in a deed since the granting clause did not limit the estate. The court agreed: "[t]he granting clause of the deed in question makes an absolute conveyance [in the subject property] . . . . This instrument makes no reservation, and excepts only the easements, reservations and encumbrances previously recorded." *Id.* The court explained that it was not limited to construing the granting clause, but did not need to examine other portions of it absent ambiguity and without "a direct conflict in the words of the granting clause and another repugnant portion, containing words expressly limiting the estate described in the granting clause. *Id.* Further, the court noted, "a declaration of purpose in a deed will not, on its own without more, suffice to limit the estate granted thereby." *Id.*

III. The Absence of an Express Reservation or Exception Results in the Granting Clause Prevailing.

When there are ambiguities in a deed, as the Hassans contend, N.D.C.C. § 47-09-13 provides that, unless there is a reservation in a grant, the grant is to be interpreted in favor of the grantee (Capps). This is in line with the rule that contracts are to be construed against the drafter. *See Webster v. Regan*, 2000 ND 89, ¶ 10, 609 N.W.2d 733 (stating that "[a]mbiguous grants are interpreted in a grantee or its successor's favor"). The Hassans argue that because a form deed was used that this interpretation in favor of

the grantee does not apply here. According to the Hassans, because there was language added after the property description, that language provides the only intent of Nelson. But the Hassans fail to acknowledge that there is a large area in the granting portion of the Mineral Deed in which to manually insert the quantum of interest that is to be conveyed. App. 157. If there is no apparent reason for apt words to be omitted that would make a reservation (or exception)—if that was the grantor's intent—the intent should be based on the granting language. *Whitman v. Harrison*, 327 P.2d 680, 683 (Okla. 1958).

Absent express words of a reservation or exception, no such reservation or exception exists. This Court has stated that, "[a]lthough a court may look to the circumstances under which a deed was made to explain ambiguous language, we have said that exceptions or reservations of property in a deed should be set forth with the same prominence as the property granted and *should be so explicit as to leave no room for doubt.*" *North Shore, Inc. v. Wakefield*, 530 N.W.2d 297, 300 (N.D. 1995) (emphasis added); *see also* 4 Tiffany Real Prop § 372 (3d ed.) (explaining "[e]xceptions or exclusions of property should be set forth in the granting clause with the same prominence as the property granted, or, if placed elsewhere, should be so explicit as to leave no room for doubt"). "In order to promote certainty from the four corners of the deed and from the record title, our rules for construing deeds thus *express a preference for clear and explicit reservations or exceptions* in a deed. *North Shore*, 530 N.W.2d at 300 (citing OWEN L. ANDERSON & CHARLES T. EDIN, *The Growing Uncertainty of Real Estate Titles*, 65 N.D.L.Rev. 1 (1989)) (emphasis added). The Mineral Deed in question lacks any clear and explicit reservation or exception. App. 157. The granting clause

should control and it should be deemed that a full one-half (½) interest was conveyed to Capps.

This Court explained in *Burlington Northern R. Co. v. Fail*, 2008 ND 114, ¶7, 751 N.W.2d 188, that "it is a long-standing principle that a reservation must be clearly expressed in a deed and described with enough certainty so it can be identified as to its location." This Court further confirmed that "we have said that exceptions or reservations of property in a deed should be set forth with the same prominence as the property granted and should be so explicit as to leave no room for doubt." *Id.* Requiring less "would be encouraging practices which would lend themselves readily to fraud and deception." *Id.*; *see also* 26A C.J.S. Deeds § 353 (stating "[i]n order to create a reservation or exception, the intent to do so must be clearly disclosed by apt words, although no specific form or technical phraseology is required"); 4 Tiffany Real Prop § 372 (3d ed.) (stating "[r]eservations must be expressly set out for they will not arise by implication"). The language in the Mineral Deed makes an absolute conveyance of the grantor's entire one-half mineral interest in the granting clause. The granting clause's absolute and clear conveyance of an undivided one-half mineral interest must be construed to convey the entire one-half interest that Ruth A. Nelson owned.

IV. If the Clause Subsequent to the Property Description is Read to be a Reservation, *Duhig* Applies and all of Nelson's Interest Passed to the Capps.

When there is a conveyance and a reservation, and both cannot be satisfied due to the amount owned by the grantor, the amount in the grant must prevail. In *Nichols v. Goughnour*, 2012 ND 178, ¶ 15, 820 N.W. 2d 740, this Court re-iterated the application

of the rule set out and consistently followed from *Duhig v. Peavy–Moore Lumber Co., Inc.*, 144 S.W.2d 878 (Tex. 1940):

> 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.

Id. Nichols went on to state that the effect of *Duhig* is that when a grantor does not own a large enough mineral interest to satisfy the grant and the reservation, then the reservation fails because the grant is superior to the reservation. *Id.*

In the current case, Nelson only owned one-half of the minerals at the time of the deed in question. App. 123, 157. When the Mineral Deed was drafted to include a conveyance of "an undivided ½ mineral interest in and to all of the oil, gas and other minerals," it immediately conveyed a one-half interest in *all* of the minerals under the described tracts—and warranted the title to such as well. App. 157. To subsequently include a reservation of a one-half interest of the remaining minerals was a moot point: they were already conveyed in the granting clause and, under *Duhig*, there was nothing left to satisfy this "reservation." As well, if there was an intention to reserve one-half of the minerals to Nelson, "[b]oth intentions cannot be effected; therefore the grantee wins and the grantor loses, because the risk of title loss was placed on the grantor by [her] warranty." *Williams & Meyers*, § 311. Thus, even if the subsequent clause is read to be a reservation, it cannot be satisfied because *Duhig* precludes such a reservation when there is nothing remaining.

Conclusion

For the reasons set forth above, the granting clause should control the amount conveyed and the Capps should be vested with the full one-half interest that Ruth A. Nelson owned. Even if the subsequent clause is read to be a reservation or exception, *Duhig* would apply and the granting clause would still prevail. The district court's order denying the Capps' summary judgment motion should be reversed and title should be quieted in favor of the Capps.

Dated this 6th day of May, 2014.

PEARCE & DURICK

PATRICK W. DURICK, ND #03141
ZACHARY E. PELHAM, ND #05904
BENJAMIN W. KEUP, ND #07013
314 East Thayer Avenue
P. O. Box 400
Bismarck, ND 58502-0400
(701) 223-2890

Attorneys for Appellants and Cross-Appellees Patricia R. Capps and Terrel A. Anderson

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Patricia R. Capps, f/k/a Patricia Anderson, Terrel A. Anderson, a/k/a Terral Anderson,

Plaintiffs, Appellants and Cross-Appellees,

and

The Estate of Ruth A. Nelson, Deceased,

Plaintiff and Appellee,

v.

Colleen L. Weflen, a/k/a Colleen Weflen, a single woman, Marleen Weflen, f/k/a Marleen W. Tiedt, Sharon Kruse, a/k/a Sharon O. Kruse, a married woman dealing in her sole and separate property, Catherine Harris, f/k/a Cathy Gunderson, a single woman, Norris Weflen, a/k/a Norris L. Weflen, a single man, Windsor Bakken, LLC, a Delaware Limited Liability Company,

Defendants, Appellees and Cross-Appellants,

and

John H. Holt Oil Properties, Inc., Atomic Oil & Gas, a Colorado Limited Liability Company, Defendants and Appellees,

and

Gulfport Energy Corporation, EOG Resources, Inc., Whiting Oil and Gas Corporation,

Defendants, Appellees and Cross-Appellants,

and

Cade Oil and Gas, LLC, Gerald C. Wools, Penny Brinks, Michael Lee, Gwen Hassan, and Melissa Kellor,

Defendants and Appellees.

Supreme Court No. 20140110

AFFIDAVIT OF SERVICE

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

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 6th day of May, 2014, she mailed a copy of the foregoing *Brief of Appellants and Cross-Appellees Patricia R. Capps and Terrel A. Anderson* and *Appellants and Cross-Appellees Appendix*, by placing a true and correct copy thereof in an envelope, addressed to the following:

Peter Furuseth
FURUSETH LAW FIRM
P.O. Box 417
Williston, ND 58802-0417

Monte L. Rogneby
VOGEL LAW FIRM
P.O. Box 2097
Bismarck, ND 58502-2097

Lawrence Bender
Amy L. DeKok
FREDRIKSON & BYRON, P.A.
P.O. Box 1855
Bismarck, ND 58502-1855

Sheldon A. Smith
David J. Smith
SMITH BAKKE PORSBORG SCHWEIGERT & ARMSTRONG
P.O. Box 460
Bismarck, ND 58502-0460

Richard P. Olson
Andrew Forward
OLSON & BURNS, P.C.
P.O. Box 1180
Minot, ND 58702-1180

Paul J. Forster
CROWLEY FLECK PLLP
P.O. Box 2798
Bismarck, ND 58502-2798

S. Thomas Throne
THRONE LAW OFFICE, P.C.
P.O. Box 1056
Sheridan, WY 82801-1056

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 6th day of May, 2014.

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

Dayna Barone
Notary Public