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STATE OF NORTH DAKOTA

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

Appeal from Summary Judgment entered on March 21, 2014
Civil No. 31-10-C-00009
County of Mountrail, Northwest Judicial District
Honorable David W. Nelson, Presiding

BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT EOG RESOURCES, INC.

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STATEMENT OF THE CASE

[¶ 1] Appellees Patricia R. Capps and Terrel A. Anderson (hereinafter, the "Capps Appellees") commenced the instant action in Mountrail County District Court on or about January 18, 2010. (*See* Appellants' Appendix ("App."), 1–10.)[1] By their Complaint, the Capps Appellees sought to quiet title against Appellants Colleen L. Weflen, Marleen Weflen, Sharon Kruse, Catherine Harris, Cathy Gunderson, and Norris Weflen, (hereinafter, the "Weflen Appellants") in and to the minerals in and under the following 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

(the "Subject Property"). (*See* App. 3–6.)

[¶ 2] The Capps Appellees claim the Weflen Appellants failed to comply with the notice requirements of the Termination of Mineral Interest Act, codified at Chapter 38-

[1] The Capps Appellees' Appendix failed to include several required items under Rule 30(a)(1) of the North Dakota Rules of Appellate Procedure. EOG, the Weflen Appellants, and Windsor Bakken, LLC therefore conferred to compile the attached Appellants' Appendix.

18.1 of the North Dakota Century Code (the "Act"), because the Weflen Appellants did not conduct a reasonable inquiry and failed to properly provide notice under the Act. (*See* App. 105–06.) Specifically, the Capps Appellees allege because the mineral interest owner of record, Ruth A. Nelson, was deceased at the time the Weflen Appellants served the Notice of Lapse, the notice was invalid. (*Id.*) The Capps Appellees claim the Weflen Appellants were therefore not entitled to ownership of the minerals and asked the district court to quiet title to the minerals in and under the Subject Property in the Capps Appellees. (*Id.*)

[¶ 3] On July 30, 2010, the Weflen Appellants moved to join EOG Resources, Inc. ("EOG"), as well as Gulfport Energy Corporation ("Gulfport"), and Windsor Bakken, LLC ("Windsor") as defendants who claim a leasehold interest in the minerals in and under the Subject Property. (*See* App. 84.) On August 27, 2010, the Weflen Appellants moved to join the Estate of Ruth A. Nelson. (*See* App. 85.)

[¶ 4] On September 14, 2010, the Capps Appellees moved to amend their Complaint to add Gwen Hassan, Penny Brink, Michael Lee, and Melissa Kellor, heirs of Ruth A. Nelson, (hereinafter, the "Hassan Appellees" and along with the Capps Appellees, hereinafter the "Appellees") as parties to this action. (*Id.*)

[¶ 5] On September 29, 2010, the Weflen Appellants moved for summary judgment. (*See* App. 79–80.) The Capps Appellees filed a cross-motion for summary judgment on November 1, 2010. (*See* App. 81–83.) Oral arguments on the motions were heard on December 15, 2010. (*See* App. 103.) Following arguments, in early 2011, the North Dakota Supreme Court issued three opinions relevant to the parties' claims. (*Id.*)

In light of these decisions, the district court allowed supplemental briefing on the issues. (*Id.*)

[¶ 6] On February 17, 2011, the district court granted the Weflen Appellants' motion to join EOG, Gulfport, Whiting, and the Estate of Ruth A. Nelson as parties. (*See* App. 88.) The district court also granted the Capps Appellee's motion to join the Hassan Appellees. (*Id.*)

[¶ 7] On March 25, 2011, the district court granted the Weflen Appellants' motion for summary judgment and denied the Capps' Appellees cross-motion for summary judgment (the "Original Order").[2] (*See* App. 110.) The issue before the district court was "whether the Weflens were required to make a 'reasonable inquiry' under N.D.C.C. § 38-18.1-06(2) [the Act]." (*See* App. 106.) The district court held pursuant to recent case law issued by the North Dakota Supreme Court, "the mortality of the mineral interest owner of record" was irrelevant and an inquiry was not required because the address of Ruth A. Nelson appeared of record. (*See* App. 106–08.)

[¶ 8] On May 4, 2011, the Weflen Appellants filed their Supplemental Pleading to Complaint to Add Parties, adding EOG, Whiting, and Gulfport as defendants and adding the Hassan Appellees as plaintiffs in the action. (*See* App. 128.)

[¶ 9] On July 28, 2011, the Weflen Appellants filed a Motion for Summary Judgment against the Hassan Appellees. (*See* App. 223.) The Weflen Appellants argued the factual circumstances and issues of law were identical to those determined in the

[2] Even though the district court granted the parties' various motions to join additional parties, including EOG, at that time, the additional parties did not have an opportunity to weigh in on the Motions for Summary Judgment prior to the district court issued the Original Order.

Weflen Appellants' favor in the Original Order and thus, the Original Order should likewise apply to the newly-added parties. (*Id.*)

[¶ 10] The Capps Appellees filed a Response Brief to Weflens' Second Motion for Summary Judgment and Request for Reconsideration of Court's Denial of Capps Summary Judgment Motion, restating the exact facts and arguments the district court considered in issuing the Original Order. (*See* App. 225–29.) The parties essentially re-briefed the same issues and oral argument was held on November 14, 2011.

[¶ 11] On February 2, 2012, the district court issued its Order Denying Weflens' Motion for Summary Judgment, Granting Capps' Motion for Reconsideration and Rule 54(b) Certification ("Second Order"). (*See* App. 256.) The district court agreed with the Weflen Appellants that the facts and circumstances had not altered since the district court issued its Original Order. (*See* App. 258.) Despite this, the district court reversed itself and denied the Weflen Appellants' motion for summary judgment and granted the Capps Appellees' earlier motion for summary judgment. (*See* App. 267.) The district court listed three rationale. First, the district court held mailing notice to a dead person at their address of record is absurd. (*See* App. 261.) Second, the district court held mailing notice via certified mail, restricted delivery guaranteed the mineral owner would not receive the notice. (*See* App. 261–62.) Third, the district court held because Ruth Nelson was deceased, she was not the mineral owner and therefore the mineral owner's address did not appear of record. (*See* App. 262–65.)

[¶ 12] In or about April 2012, the Weflen Appellants, EOG, Windsor Bakken, LLC, and Gulfport filed their Notices of Appeal. (*See* App. 273–81.) On appeal, the North Dakota Supreme Court determined that the judgment of the district court was

improperly certified as final under Rule 54(b), and remanded the case to the district court for consideration of the remaining issues. (*See* App. 289.)

[¶ 13] The remaining issue, a dispute between the Hassan Appellees and the Capps Appellees, was whether a 1979 mineral deed from Ruth Nelson to the Capps Appellees conveyed all the mineral interest held by Ruth Nelson, or only one-half of her interest. (*See* Appellants and Cross-Appellees' Appendix ("Capps App."), 151.) The district court held the mineral deed conveyed to the Capps Appellees only one-half of the mineral interest held by Ruth Nelson. (*See* Capps App. 154–56.) The remaining one-half interest passed to the heirs of Ruth Nelson upon her death, namely, the Appellees. (*See* App. 156.) Final judgment was entered on March 21, 2014. (*See* Capps App. 30–31.) In March and April 2014, EOG, the Weflen Appellants, EOG, Windsor Bakken, LLC, Gulfport, Whiting Oil and Gas, and the Capps Appellees filed their Notices of Appeal.[3] (*See* Capps App. 32–37.)

[¶ 14] The district court's decision in its Second Order was erroneous and must be overturned by this Court for several reasons. First, the district court ignored established precedent applying the Act. Second, the Capps Appellees were not harmed by either the mailing to a deceased person or its restricted delivery. Third, the district court's determination that the "true" mineral owner was not of record, thereby necessitating a reasonable inquiry, is erroneous because the "true" mineral owners at the time of the first Notice of Lapse were the Capps Appellees, who received their interests via an unrecorded

[3] EOG challenges only the determinations made by the district court in its Second Order, particularly the issue of whether the Weflen Appellants complied with the terms of the Act. EOG does not take a position on the issue of ownership between the Capps Appellees and Hassan Appellees.

deed and as heirs of Ruth Nelson, and the Hassan Appellees, who are also heirs of Ruth Nelson. Finally, the determinations made by the district court erred in its Second Order must be overturned because the Appellees (1) have only themselves to blame for failing to record their thirty year-old mineral deed, (2) had constructive notice of the Notice of Lapse by publication and did not timely respond, and (3) have made no showing they would have received actual notice via mail if the Weflen Appellants had provided notice via a different method.

STATEMENT OF THE FACTS

[¶ 15] Prior to March 24, 1975, Ruth A. Nelson was the owner of the entire Subject Property. (*See* App. 258.) On March 24, 1975, via Warranty Deed, Ruth A. Nelson conveyed to Olav and Rose Weflen the entire surface of the Subject Property and one-half of the minerals in and under the Subject Property ("1975 Warranty Deed"). (*See* Capps App., 123–24.) The Warranty Deed was recorded with the Mountrail County Recorder on April 16, 1975, as Document No. 219971. (*See id.*) The Weflen Appellants are the successors-in-interest to Olav and Rose Weflen and are the owners of the entire surface of the Subject Property and at least one-half of the minerals in and under the Subject Property. (*See* App. 258.)

[¶ 16] On November 2, 2004, Defendant Colleen L. Weflen, a/k/a Colleen Folven, individually and as heir of Rose M. Weflen, deceased, executed an oil and gas lease in favor of Strata Resources, Inc. covering the Subject Property ("Weflen Lease"). (*See* App. 162–63.) The Weflen Lease was recorded with the Mountrail County Recorder on March 17, 2005, as Document No. 315265. (*See* App. 165.) In December 2004, Berry Ventures, Inc. acquired the Weflen Lease via assignment from Strata Resources, Inc.

(*See* App. 166, 170.) The Assignment was recorded with the Mountrail County Recorder on April 25, 2005, as Document No. 315927. (*See* App. 176.)

[¶ 17] On December 28, 2005, the Weflen Appellants published in the Mountrail County Promoter a Notice of Lapse of Mineral Interest dated November 29, 2005. Subsequent notices were published on January 4, 2006 and January 11, 2006, respectfully. (*See* Capps App. 125–31.) On January 13, 2006, the Weflen Appellants mailed a copy of the Notice of Lapse to the last two known addresses of record for Ruth A. Nelson. (*See* Capps App. 134–36.) The addresses were obtained from the 1975 Warranty Deed and an Oil and Gas Lease dated January 12, 1973. (*See* Capps App. 123–24, 137.) Finally, on March 6, 2006, the Weflen Appellants recorded the Notice of Termination of Mineral Interest, Affidavit of Publication, Affidavit of Mailing, and Notice of Lapse of Mineral Interest with the Mountrail County Recorder, as Document No. 320668. (*See* Capps App. 125–34.)

[¶ 18] On January 1, 2006, EOG acquired an interest in the Weflen Lease via assignment from Berry Ventures, Inc. (*See* App. 177–180, 196.) The Assignment was recorded with the Mountrail County Recorder on March 17, 2006, as Document No. 320878. (*See* App. 209.)

[¶ 19] At the time the Weflen Appellants recorded and published the Notices of Lapse, Ruth A. Nelson was deceased. (*See* App. 260.) However, there was no publicly available evidence of her death. No Affidavit of Heirship, death certificate, or probate documents were of record in Mountrail County. (*See* App. 299–300.) In short, there was nothing of record to put the Weflen Appellants on notice of Ruth Nelson's death, nor is there any evidence indicating the Weflens had actual knowledge of Ruth Nelson's death.

Prior to her death, Ruth Nelson conveyed one-half of her remaining one-half interest in the minerals in and under the Subject Property to the Capps Appellees via a Mineral Deed dated June 6, 1979.[4] (*See* Capps App. 157–58.) Said Mineral Deed was not filed with the Mountrail County Recorder until March 31, 2009, thirty years after it was executed, and more than three years after the Notice of Lapse. (*See id.*) The Capps Appellees made no effort to provide notice of their interest until October 30, 2008, when the Capps Appellees filed Statements of Claim of Mineral Interests with the Mountrail County Recorder. (*See* Capps App. 139–40.)

[¶ 20] Upon the death of Ruth Nelson, her remaining mineral interest passed via intestacy to the Appellees. (*See* Capps App. 156.) There is nothing in the record to indicate the Hassan Appellants have placed anything of record to evidence their purported mineral interest.

LAW AND ARGUMENT

I. Statement of the Standard of Review.

[¶ 21] On appeal from an order granting a motion for summary judgment, the North Dakota Supreme Court examines the entire record to determine whether the district court's decision was proper. *Burris Carpet Plus, Inc. v. Burris*, 2010 ND 118, ¶ 11, 785 N.W.2d 164, 171. A district court's order granting summary judgment is reviewed *de novo*. *Halvorson v. Sentry Ins.*, 2008 ND 205, ¶ 5, 757 N.W.2d 398, 399. Particularly,

[4] In the Second Order, the district court made an erroneous factual finding that the Capps Appellees obtained the mineral interest via distribution of Ruth Nelson's estate. (*See* App. 262.) However, it is undisputed that the interest was originally transferred via a Mineral Deed executed by Ruth Nelson, although the Capps Appellees and Hassan Appellees later received further mineral interests upon Ruth Nelson's death. (*See* Capps App. 157.)

"[t]he question of how to interpret and apply chapter 38-18.1, N.D.C.C., [the Act], is a question of law; therefore the standard of review is de novo." *Johnson v. Taliaferro*, 2011 ND 34, ¶ 9, 793 N.W.2d 804, 806.

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

II. History and Purpose of the Act.

[¶ 23] A review of the language and legislative history of the Act demonstrates the primary purpose of the Act is to promote the productive use of minerals in the State of North Dakota. This is important because when interpreting a statute, the primary objective is to ascertain and give effect to the intent of the legislature. *Harter v. N.D. Dept. of Transp.*, 2005 ND 70, ¶ 7, 694 N.W.2d 677, 679.

[¶ 24] "Rights of property . . . may be waived, surrendered, or lost by neglect in the cases provided by law." N.D.C.C. § 1-01-08. The Act, Chapter 38-18.1 of the North Dakota Century Code, is one example of how the North Dakota legislature intended that property rights may be surrendered by neglect. Under the Act, where a mineral interest is unused for twenty years, the interest is deemed abandoned when the surface owner publishes a notice of lapse in the official county newspaper where the property is located.

N.D.C.C. § 38-18.1-02; N.D.C.C. § 38-18.1-06. At that time, the mineral interest vests in the surface owner. *Id.* A mineral interest is "used" when (1) the minerals are produced or operations are conducted to produce the minerals under the interest, (2) the interest is subject to a lease, (3) taxes are paid on the interest, or (4) the mineral interest owner records a statement of claim. N.D.C.C. § 38-18.1-03(1).

[¶ 25] A review of the legislative history of the Act shows that the legislature's purpose was to ensure minerals were put into productive hands. Testimony before the House committee demonstrates North Dakota legislators and citizens alike supported the notion of putting abandoned minerals to productive use. *See Hearing on H.B. 1045 before the House Natural Res. Comm.*, 60th N.D. Leg. Sess. (Feb. 13, 1983) (testimony of Rep. Murphy) ("[W]e need to get the minerals back into the hands of the people who would use it to the best of its ability."); *see also id.* (testimony of Jim Moend) (stating "the mineral rights should be given to someone who can manage them"); *see also id.* (testimony of Emil Wigenbach) (stating he did not "believe that the mineral, something so valuable, should be left unattended by the owner"). The Senate committee agreed. *See Hearing on H.B. 1045 before the Senate Finance & Taxation Comm.*, 60th N.D. Leg. Sess. (March 8, 1983) (summarized testimony of Rep. Murphy)[5] ("Would get the royalty back into hands who will make better use of it. If don't use for 20 years–lose it."); *see also id.* (summarized testimony of Arthur Bauer) ("If don't use . . . then lose it."); (summarized testimony of Rep. Murphy) ("Reason for getting mineral interest back into surface owner, to get some use out of it.").

[5] The Senate committee testimony was paraphrased for the written record, rather than recorded verbatim. The quoted language herein is verbatim from the written record.

[¶ 26] One way to encourage surface owners to locate and use abandoned minerals is to allow surface owners to obtain title to the mineral interests without overly burdensome procedural requirements or unnecessary litigation. As the Michigan Supreme Court held in interpreting Michigan's analogous abandoned mineral statute:

> [T]he act is designed to increase the marketability and development of severed mineral interests by creating a rule of substantive law which requires owners to undertake minimal acts indicative of ownership at least every 20 years. The statutory approach to these issues has the added advantage of eliminating uncertainty and minimizing litigation.

Van Slooten v. Larsen, 299 N.W.2d 704, 713-14 (Mich. 1980). The North Dakota Legislature also expressed this view:

> My comment was that attorneys are needed many a time. I don't believe our Century Code should be used as job security for attorneys, and that the law should be plain enough so if a person wishes to do their own paperwork they can.

Hearing on H.B. 1045 before the Senate Judiciary Comm., 60th N.D. Leg. Sess. (Feb. 13, 1983) (testimony of Rep. Drovdahl); *see also Hearing on H.B. 1084 before the Sen. Finance and Taxation Comm.*, 60th N.D. Leg. Sess. (March 8, 1983) (statement of Arthur Bauer) ("I don't think that it's very favorably felt in the legislature to burden the citizens of North Dakota with more legal actions.").

[¶ 27] Another way to encourage the efficient transfer of minerals to those who will put those minerals to productive use is to disregard the subjective concepts of actual notice or knowledge, and allow the parties to rely on record title. The deletion of a proposed "actual notice" provision from the Act evinces the intent of the North Dakota Legislature in this regard. Local attorney Arthur Bauer suggested deleting or altering the phrase allowing a mineral owner to file a statement of claim "within sixty days after receiving <u>actual notice</u> that the mineral interest has lapsed." *See* Proposed Amendments

to House Bill 1084, submitted by Arthur C. Bauer (emphasis added). Mr. Bauer stated making the sixty-day period contingent on the mineral owner's actual notice of lapse "would provide a legal loophole in the bill large enough to hold a Greyhound bus." *Id.* In other words, under the proposed language, every mineral owner who abandoned their mineral interest could bring suit against the surface owner and claim the mineral owner did not receive actual notice of the lapse. Such a policy would create a question of fact that would generally require resolution by trial. The Legislature agreed, deleted the "actual notice" provision, and required the mineral owner to file a statement of claim within sixty days of after first date of publication of the notice of lapse. N.D.C.C. § 38-18.1-05. By allowing the parties to rely on public record, rather than another's subjective knowledge or intent, the likelihood of litigation is reduced and the process is greatly simplified. *See also Texaco, Inc. v. Short*, 454 U.S. 516, 528 (1982) (noting the similarity between abandoned mineral statutes and recording statutes, in that both "provide that a valid transfer of property may be defeated by a subsequent purported transfer if the earlier transfer is not properly recorded")).

[¶ 28] The legislative history, as well as the language of the Act as it existed when the Weflen Appellants mailed and published the Notices of Lapse, shows the primary intent of the Legislature was to encourage the productive use of abandoned minerals. This is accomplished by allowing the surface owner to obtain abandoned minerals without the need for an attorney or onerous legal proceedings. This purpose has been promoted by this Court in recent cases, discussed herein, where the Court applied the bright line rules the Legislature adopted, facilitating the ability of the surface owner to put abandoned minerals to productive use.

[¶ 29] The district court did not consider the legislative intent or properly apply recent case law in reversing the Original Order. The holdings of the district court in its Second Order are therefore erroneous and should be overturned by this Court.

III. The District Court Erred in Holding Mailing Notice to a Dead Person at their Address of Record Violates the Act.

[¶ 30] The district court erred in holding mailing notice to a dead person at their address of record is absurd and the Weflen Appellants were required to conduct an inquiry to locate the true mineral owners. In *Sorenson v. Felton*, 2011 ND 33, ¶¶13-14, 793 N.W.2d 799, 802-03, this Court held a reasonable inquiry to determine the mineral owner's address is required only when the address of the mineral owner does not appear of record. *See also Sorenson v. Alinder*, 2011 ND 36, ¶ 6, 793 N.W.2d 797, 799 (applying this principle where the record mineral owners were deceased). The surface owner in *Felton* argued this interpretation would lead to an absurd result "because a surface owner with knowledge of a mineral owner's correct mailing address could send notice to an incorrect address." *Felton*, 2011 ND 33, ¶ 14, 793 N.W.2d at 804. However, because those facts were not present in *Felton*, the Court declined to address the issue directly. *Id.*

[¶ 31] Here, the district court discussed *Felton* but then held "mailing notice to a dead person would be absurd. A party who fails to make a reasonable inquiry must accept the consequences when the owner of record is dead . . . ." (*See* App. 261.) The district court erred for two reasons. First, the district court incorrectly found the Weflen Appellants "had knowledge" Ruth A. Nelson was deceased. Second, the district court completely ignored the holdings of this Court in *Alinder* and *Felton*.

A. The Weflen Appellants did not know Ruth A. Nelson was Deceased.

[¶ 32] In holding that mailing notice to a dead person is absurd, the district court made an erroneous assumption the Weflen Appellants "had knowledge" Ruth A. Nelson was deceased. In the evidentiary context, "knowledge" means a witness perceived an event with his own senses. Fed.R.Ev. 602 Advisory Committee's Note; *see also* Cal.Ev. Code 702 Law Revision Commission Comment (defining personal knowledge as "a present recollection of an impression derived from the exercise of the witness' own senses"); *Argo v. Blue Cross and Blue Shield of Kan., Inc.*, 452 F.3d 1193, 1200 (10th Cir. 2006) (a witness must have "actually perceived or observed that which he testifies to" while "statements of mere belief" are not considered).[6] Similarly, statutory law in North Dakota defines actual notice as the "express information of a fact." N.D.C.C. § 01-01-23.

[¶ 33] At his deposition, Defendant/Appellant Norris Weflen testified he assumed Ruth Nelson was dead, because she would have been elderly:

> Q: Now, at the time that this lawsuit was filed, do you have any idea whether Herman or Ruth were alive?
>
> A: No. I knew they were passed away at that time, yeah, when this was—this was in, you know—I don't know. This was many years later. They would have had to have been extremely old that that time, so—
>
> Q: This is in 2005.
>
> A: Right.
>
> Q: November of 2005.

[6] The North Dakota Rules of Evidence contain the same knowledge requirement for witnesses, but do not define the term "personal knowledge." *See* N.D.R.Ev. 602.

A: Exactly. So they would have had to have been extremely old to still be alive at that time.

Q: So you assumed they were dead.

A: Yeah.

(EOG App. 304–05.) The deposition of Jackie Nelson is consistent with Mr. Weflen's testimony:

Q: Did Colleen [Weflen] know anything about Ruth Nelson?

A: She indicated to me that she thought she was dead and—but she had moved to Washington and I don't remember all of the details. I have a reference that she didn't have any kids, so maybe I had—maybe she had mentioned she didn't think she had any kids.

Q: Okay. And when—when she said she thought she was dead, did she say—did she give any reason why she thought she was dead or anything like that?

A: Well, she would have been old.

(App. 304.)

[¶ 34] Based on this deposition testimony, the district court determined *Felton* did not apply, and a reasonable inquiry was required, because "there is evidence that the Weflens had knowledge that Ruth Nelson was dead at the time they mailed the Notice of Lapse to her address of record." (*See* App. 261.) However, this testimony establishes two facts, neither of which supports the district court's conclusion. First, the Weflen Appellants were not aware of the exact age of Ruth Nelson, but assumed she was "old." Second, the Weflen Appellants thought Ruth Nelson was likely deceased due to her advanced age. The testimony does not establish the Weflen Appellants had express information of the fact that Ruth Nelson was deceased. In fact, the deposition testimony, which is undisputed and the only evidence of the Weflen Appellants' knowledge in this regard, shows the Weflen Appellants had very little knowledge regarding Ruth Nelson—

they knew she was likely old but not how old and they thought she might not have had children. The undisputed facts show the Weflen Appellants lacked express information of whether Ruth Nelson was alive or dead.

[¶ 35] Further, the Appellees' argument that knowledge a mineral owner of record is probably "old" and therefore may be deceased requires a reasonable inquiry, ignores the obvious purpose of the Act and would invite a landslide of litigation. Because twenty years with no activity must pass before minerals may be deemed abandoned, it is likely in most cases the record mineral owner will be of advanced age. For example, in *Alinder*, fifty years passed without any use of the minerals. *Alinder*, 2011 ND 36, ¶ 2, 793 N.W.2d at 798. Thus, the surfaces owners in *Alinder* likely assumed the mineral owners were elderly and potentially deceased. This did not create a duty to conduct a reasonable inquiry, nor did the fact that the mineral owners were actually deceased. *Id.* at ¶ 6, p. 799. If a mineral owner is deceased, and its successors are permitted to bring a quiet title action on the premise the mineral owner was of advanced age, and therefore likely deceased, such an action could be brought in countless cases. The factual issue in these cases would be whether the mineral owner of record was "old enough" that it would be likely he or she was deceased, so as to put the surface owner on notice that they must conduct a reasonable inquiry.[7] Applying the Act in this regard would place an unreasonable burden on the court system. A better policy is to follow the plain language of the Act and the case law interpreting it, and require a reasonable inquiry only where the address of the mineral owner does not appear of

[7] This reasoning could be further extended to any situation in which the surface owners may have known of an illness, or heredity condition that could potentially cut short the life of a mineral owner, allowing even more onerous litigation.

record. To hold otherwise will place an unfair burden on the surface owner and invite a wealth of litigation.

B. The District Court's Holding that Mailing Notice to a Dead Person is Absurd Ignores *Felton*.

[¶ 36] Even if there was evidence the Weflen Appellants had actual knowledge Ruth Nelson was deceased at the time they mailed the Notice of Lapse, the district court erred in holding *Felton* was inapplicable. The Court in *Felton* held when the Act was applied to the facts at issue, "there [was] not an absurd result because Felton would have received notice if she had kept her address of record current." *Id.* The United States Supreme Court, in interpreting an analogous abandoned minerals statute, has similarly held property owners are responsible for taking some minimal action to preserve their rights: "What right has any one to complain, when a reasonable time has been given him, if he has not been vigilant in asserting his rights?" *Texaco*, 454 U.S. at 526 (quoting *Hawkins v. Barney's Lessee*, 30 U.S. 457, 466 (1831)).

[¶ 37] This rationale applies equally to this case. The Capps Appellees first obtained an interest in the minerals in and under the Subject Property in June 6, 1979. (*See* Capps App. 157.) Ruth Nelson passed away a few years later, passing via intestacy any remaining mineral interest to the Capps Appellees and Hassan Appellees. (*See* Capps App. 156.) The Weflen Appellants completed the notice requirements under the Act in late 2005 and early 2006. (*See* Capps App. 125–39.) The Capps Appellees filed Statements of Claim of Mineral Interests on October 31, 2008, twenty-nine years after the execution of the Mineral Deed and nearly three years after the Weflen Appellants obtained a vested interest in the minerals. (*See* Capps App. 140.) The Mineral Deed was not recorded until 2009. (*See* Capps App. 158.) There is no evidence in the record the

Hassan Appellees took any steps to protect their mineral interest prior to joining this action. The Appellees did not take a single step in three decades to utilize or protect their rights, or ensure the public property records were current. Thus, there is no absurd result, because if the Appellees had kept record title current at any time in the thirty years leading up to this action, they would have received notice their mineral interest had lapsed.

[¶ 38] Based on the foregoing, it is clear the finding of the district court that *Felton* does not apply, because the Weflen Appellants had knowledge of the death of Ruth Nelson, is erroneous. The undisputed record shows, rather than having actual notice or personal knowledge, the Weflen Appellants "thought" or "assumed" Ruth Nelson was probably deceased, due to the fact she was likely of advanced age. The Weflen Appellants could not have had actual knowledge via the public record. Further, as this Court noted in *Felton*, it was the mineral owners' failure to preserve their rights, rather than any actions by the Weflen Appellants, that caused the mineral interest to lapse. As to the failure to receive notice, if the Appellees had kept the record current, they would have received both constructive and actual notice of the lapse. The Weflen Appellants fully complied with the notice provisions of the Act. The district court declined to follow this Court's holding in *Felton* and offered no support for its conclusion the Weflen Appellants failed to comply with the Act in mailing the Notices of Lapse to the addresses of record for Ruth Nelson. This Court must therefore overturn the decision of the district court.

C. The District Court Ignored *Alinder* in Holding that Mailing Notice to a Dead Person is Absurd.

[¶ 39] Finally, the district court ignored *Alinder* in holding that mailing notice to a dead person is absurd. The district court asserted "mailing notice to a dead person would be absurd. A party who fails to make a reasonable inquiry must accept the consequences when the owner of record is dead." (*See* App. 287.) This statement ignores the facts and holding of *Alinder*. In *Alinder*, the mineral owners acquired their interest via a mineral deed recorded in November 1953. *Alinder*, 2011 ND 36, ¶ 2, 793 N.W.2d at 798. After more than fifty years of non-use, the plaintiff published the notice of lapse in January 2007. *Id.* The plaintiff also mailed the notice of lapse to the mineral owners at their address of record, pursuant to the Act. *Id.* However, the mineral owners, a husband and wife, had been dead for twenty-seven and eight years, respectively. *Id.* Approximately one year after the plaintiff mailed the notice of lapse to the mineral owners' address of record, the mineral owners' children filed statements of claim. *Id.* at ¶ 3, p. 798. The plaintiff brought a quiet title action to clear title to the mineral interests. *Id.* The only issue on appeal was whether the plaintiff was required to conduct a reasonable inquiry, or whether the plaintiff was correct in simply mailing the notice to the mineral owners' address of record. *Id.* at ¶ 4, p. 798–99. Relying on *Felton*, the Court issued a very brief opinion. Regardless of the fact that the mineral owners had both been deceased for many years, the plaintiff was not required to conduct a reasonable inquiry. *Id.* at ¶ 6, p. 799. Rather, this Court asserted a bright line rule: because the former mineral owners' address was of record, further inquiry was not required. *Id.* This Court did not find it "absurd" that the plaintiff mailed the notice of lapse to the deceased former mineral owners, who remained the owners of record. *See id.*

[¶ 40] Here, the district court held "mailing notice to a dead person would be absurd" and a party who did not conduct a reasonable inquiry, despite the fact that the mineral owners' address appeared of record, "must accept the consequences when the owner of record is dead." (App. 261) This holding ignores the *Alinder* case, as well as the purpose of the Act. First, the fact the record mineral owner is deceased does not cause otherwise proper notice under the Act to fail. This was conclusively determined in *Alinder*, where the mineral owners of record had been deceased for many years and the Court held the notice was proper under the Act. Second, the point of *Alinder*, and the rationale underlying the Act, is where property owners fail for many years to take a single step to protect their interest, that interest may be forfeited. As here, the successors-in-interest in *Alinder* for many years failed to record probate documents, affidavits of heirship, a mineral deed showing succession of the interest, or even a statement of claim. Likewise, the surface owner in *Alinder* had reason to know the record mineral owners were of advanced age. Finally, the surface owner in *Alinder* mailed the notice of lapse to the last known address of the record mineral owners, who happened to be deceased. The facts of this case are virtually identical to those in *Alinder* and this Court's holding in that case applies: because Ruth Nelson was the record owner of the minerals, and her address was shown of record, the Weflen Appellants were correct in mailing the Notice of Lapse to her address of record. The district court's decision to the contrary is erroneous and should be overturned.

IV. Mailing Notice Via Certified, Restricted Delivery Does Not Violate the Act.

[¶ 41] The district court erred in holding mailing notice via certified mail, restricted delivery violates the Act, as this holding ignores the plain, unambiguous

language of the Act.[8] Specifically, the court held "when the addressee is dead or even believed to be dead, notice mailed" in this manner "prevents any possibility that an heir of the addressee might receive the notice." This was in error for three reasons.

[¶ 42] First, the ruling is based on the erroneous conclusions that (1) the Weflen Appellants had actual knowledge Ruth Nelson is deceased, and (2) Ruth Nelson's death was relevant to the court's analysis. The record clearly shows the Weflen Appellants did not know whether Ruth Nelson was dead, and because she was the record mineral owner, her mortality is irrelevant as it was irrelevant in *Alinder*. The Court made clear in *Alinder* what is relevant is record title, not actual title.

[¶ 43] Second, the Act requires notice be made "by mailing a copy of the notice to the owner of the mineral interest." N.D.C.C. § 38-18.1-06. Neither the Act, nor any other provision of the North Dakota Century Code, defines what forms of mailing are appropriate. However, where a statute does not specify how service is to be made, service may be made as provided in the North Dakota Rules of Civil Procedure. N.D.R.Civ.P. 4(m); *see also* N.D.R.Civ.P. 4, Explanatory Note. As stated by the North Dakota Supreme Court, service of the notice under the Act "is similar to the personal service requirement" of Rule 4 of the North Dakota Rules of Civil Procedure. *Spring Creek Ranch, LLC v. Svenberg*, 1999 ND 113, ¶ 18, 595 N.W.2d 323, 328. The Weflen Appellants' notice by mail complied with Rule 4. This Court has held service was properly made under Rule 4 when delivered by certified mail, restricted delivery. *See*

[8] Notice via certified mail, restricted delivery, requires the signature of the recipient, who must be a designated individual. United States Postal Service, Mail with Extra Services, https://www.usps.com/ship/insurance-and-extra-services.htm (last accessed May 28, 2014).

Bank Center First v. Kostelecky, 2000 ND 84, ¶ 2, 609 N.W.2d 721, 721; *see also Peplinksi v. Cnty. of Richland*, 2000 ND 156, ¶ 21, 615 N.W.2d 546, 553 (notice of expiration of redemption period was properly made by registered mail, restricted delivery, although delivery was unsuccessful).

[¶ 44] The district court re-characterized notice in this case from a prudent method to ensure and prove service is made on the intended recipient, to a method that "prevents any possibility that an heir of the addressee might receive notice." (*See* App. 262.) However, the Act merely states notice must be "mailed." There are several methods of delivery via U.S. mail. The Weflen Appellants chose a method consistent with Rule 4 and approved by this Court. Further, it was the thirty year-long failure of the Appellees to record any evidence of ownership, rather than the method of mailing utilized by the Welfen Appellants, that prevented them from receiving actual notice of the lapse. In fact, the Appellees, while complaining of the method of mailing, have not asserted a different method would have ensured they would have received actual notice.

[¶ 45] Third, while notice via mail did not result in actual notice, the Appellees received constructive notice of the lapse, which is sufficient under the Act. The Act requires that surface owners "intending to succeed to the ownership of a mineral interest upon its lapse shall give notice of the lapse of the mineral interest by publication." N.D.C.C. § 38-18.1-06(1). The Act continues, "however, if the address of the mineral owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made." N.D.C.C. § 38-18.1-06(2). Thus, notice must be given primarily by publication, and only by mailing if the address of the mineral owner is

of record. The purpose of mailing notice is to give "actual notice, if possible, in addition to the constructive notice given by publication." *Chester v. Einarson*, 34 N.W.2d 418, 433 (N.D. 1948) (discussing notice to affected landowners of county board's actions). Mailing is an attempt to provide actual notice, although only constructive notice by publication is required for a surface owner to obtain title to the lapsed mineral interest. *See* N.D.C.C. § 38-18.1-02; *see also* Proposed Amendments to House Bill 1084, submitted by Arthur C. Bauer (requiring actual notice under the Act would greatly increase litigation and prevent productive use of minerals).

[¶ 46] The Weflen Appellants published notice of lapse three times in the appropriate county newspaper in accordance with the Act. (*See* Capps App. 128.) By virtue of this publication, the Appellees received constructive notice of the lapse, and the mineral interest automatically vested in the Weflen Defendants. The Weflen Defendants then mailed the Notice of Lapse to the two last known addresses of the record owner, Ruth Nelson. (*See* Capps App. 129–36.) The Appellees did not receive actual notice by mail, because they failed to use or even record evidence of their interest for thirty years. This was not the fault of the Weflen Defendants, who relied on the public records in compliance with the Act. Notice of lapse was published and mailed pursuant to the Act. The district court's decision to the contrary is erroneous and must be overturned.

V. The District Court Erred in Holding the Mineral Owner's Address Did Not Appear of Record.

[¶ 47] The district court erred in holding the mineral owner's address did not appear of record. Because the record mineral owner in this case was deceased, the district court engaged in a lengthy discussion of the process that occurs when a person's property passes to his or her heirs upon death. (*See* App. 262–66.) EOG does not dispute

the underlying principles of the Uniform Probate Code, or the legal principle that a person's property automatically devolves to his or her heirs upon death, subject to administration. However, EOG does dispute the district court's ultimate conclusion that because Ruth Nelson was deceased, she was not the "owner" of the minerals at issue for purposes of the Act, the mineral owner's address did not appear of record, and therefore, a reasonable inquiry was required.

[¶ 48] As a preliminary matter, the holding is partially incorrect because the Capps Appellees did not receive their original mineral interests via distribution of the estate of Ruth Nelson. Rather, they received their interests via a 1979 Mineral Deed, executed by Ruth Nelson. (*See* Capps App. 123.) At that point, they became the actual owners of the interest. However, regardless of how the Appellees received their interests, the district court's main contention—because Ruth Nelson was not the actual owner of the minerals, the "owner's address" was not of record and the Weflen Appellants were therefore required to make a reasonable inquiry—is erroneous.

[¶ 49] The Weflen Appellants were entitled to rely on the real property records in the Mountrail County when searching for the mineral interest owner and the owner's address. This principle is clear from the plain language of the Act, which states "if the address of the mineral owner is shown of record or can be determined by a reasonable inquiry," notice must be given by mail. N.D.C.C. § 38-18.1-06(2); *see also Chester*, 34 N.W.2d at 434 (holding a clerk "performed his duty" under a similar statute by mailing notice only to the addresses listed in the register of deeds). It is also clear from *Alinder* that even where the mineral interest owners of record are deceased, it is proper and, in fact, required the surface owner mail notice to the record owners if their address appears

of record. *See Alinder*, 2011 ND 36, ¶ 6, 793 N.W.2d at 799. Clearly, in that case, the record owners were not the actual owners because they were deceased. Despite that, this Court held the surface owner was entitled to rely on the deceased record owners' address of record, and was not required to conduct a reasonable inquiry. *Id.* Further, in *Felton* this Court held that mailing to the address of record was proper, even when that address was outdated and incorrect. *Felton*, 2011 ND 33, ¶ 15, 793 N.W.2d at 803. All of the above supports the underlying principle that the mineral owner is responsible for keeping the record current, and the surface owner is entitled to rely on the record. Here, for thirty years, the Appellees neglected their interest. As the U.S. Supreme Court found in *Texaco*, "a valid transfer of property may be defeated by a subsequent purported transfer if the earlier transfer is not properly recorded." *Texaco*, 454 U.S. at 528.

[¶ 50] Finally, the district court's holding would place an impossible burden on surface owners in situations such as this, where a property transfer is not recorded, whether via distribution of an estate or *inter vivos* mineral deed. Consider the situation if the Appellees had assigned their mineral interests and that assignment was also not recorded, then the assignee subsequently assigned the interests to another party and that assignment was not recorded, and so on. Surface owners such as the Weflen Appellants have no means of tracking the unrecorded assignments in order to serve the notice of lapse on the actual, current mineral interest owner. The North Dakota Legislature's solution to this problem was to require the mineral owner to take minimal steps every twenty years to protect his interest. *See* N.D.C.C. § 38-18.1-02; *see also Texaco*, 454 U.S. at 528–29. Because the district court ignored the Legislature's intent, this Court's legal precedent, and the practical consequences in issuing its Second Order, this Court

should overturn the decision in its entirety, granting the Weflen Appellants' motion for summary judgment and denying the Appellees' motion.

CONCLUSION

[¶ 51] Based on the foregoing, EOG respectfully requests this Court overturn the district court's judgment granting the Appellees' Motion for Reconsideration and denying the Weflen Appellants' Motion for Summary Judgment.

DATED this 13th day of June, 2014.

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ADDENDUM

N.D.C.C. § 1-01-08 (2011). Rights of property and person - How waived.

Rights of property and of person may be waived, surrendered, or lost by neglect in the cases provided by law.

N.D.C.C. § 38-18.1-02 (2005). Statement of claims - Recording - Reversion.

Any mineral interest is, if unused for a period of twenty years immediately preceding the first publication of the notice required by section 38-18.1-06, deemed to be abandoned, unless a statement of claim is recorded in accordance with section 38-18.1-04. Title to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment. The owner of the surface estate in the land in or under which the mineral interest is located on the date of abandonment may record a statement of succession in interest indicating that the owner has succeeded to ownership of the minerals under this chapter.

N.D.C.C. § 38-18.1-03 (2005). When mineral interest deemed to be used.

1. A mineral interest is deemed to be used when:
   a. There are any minerals produced under that interest.
   b. Operations are being conducted thereon for injection, withdrawal, storage, or disposal of water, gas, or other fluid substances.
   c. In the case of solid minerals, there is production from a common vein or seam by the owners of such mineral interest.
   d. The mineral interest on any tract is subject to a lease, mortgage, assignment, or conveyance of the mineral interest recorded in the office of the recorder in the county in which the mineral interest is located.
   e. The mineral interest on any tract is subject to an order or an agreement to pool or unitize, recorded in the office of the recorder in the county in which the mineral interest is located.
   f. Taxes are paid on the mineral interest by the owner or the owner's agent.
   g. A proper statement of claim is recorded as provided by section 38-18.1-04.
   h. The owner or lessee utilizes the mineral interest in a manner pursuant to, or authorized by, the instrument creating the mineral interest.

N.D.C.C. § 38-18.1-05 (2005). Failure to record the statement of claim.

Failure to record the statement of claim within the time period provided in section 38-18.1-04 will not cause a mineral interest to be extinguished if the owner of the mineral interests meets all of the following requirements:

1. Owns on or more mineral interest in the county in which the mineral interest in question is located at the time of the expiration of the time period provided in section 38-18.1-04.
2. Has failed to preserve the mineral interest in question.

3. Within sixty days after the first publication of the notice provided for in section 38-18.1-06, recorded a statement of claim . . . .

N.D.C.C. § 38-18.1-06 (2005). Notice of lapse of mineral interest — Method.

1. Any person intending to succeed to the ownership of a mineral interest upon its lapse shall give notice of the lapse of the mineral interest by publication.

2. The publication provided for in subsection 1 must be made once each week for three weeks in the official county newspaper of the county in which the mineral interest is located; however, if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made.

3. The notice must state:

   a. The name of the record owner of the mineral interests;

   b. A description of the land on which the mineral interest involved is located; and

   c. The name of the person giving the notice.

N.D.R.Civ.P. 4

(a) Definition of Person. As used in this rule, "person", whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state, includes:
(1) an individual, executor, administrator or other personal representative;
(2) any other fiduciary;
(3) any two or more persons having a joint or common interest;
(4) a partnership;
(5) an association;
(6) a corporation; and
(7) any other legal or commercial entity.

(b) Personal Jurisdiction.

(1) Personal Jurisdiction Based on Presence or Enduring Relationship. A court of this state may exercise personal jurisdiction over a person found within, domiciled in, organized under the laws of, or maintaining a principal place of business in, this state as to any claim for relief.
(2) Personal Jurisdiction Based on Contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person's having such contact with this state that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:
(A) transacting any business in this state;
(B) contracting to supply or supplying service, goods, or other things in this state;
(C) committing a tort within or outside this state causing injury to another person or property within this state;

(D) committing a tort within this state, causing injury to another person or property within or outside this state;
(E) having an interest in, using, or possessing property in this state;
(F) contracting to insure another person, property, or other risk within this state;
(G) acting as a director, manager, trustee, or officer of a corporation organized under the laws of, or having its principal place of business within, this state;
(H) enjoying any other legal status or capacity within this state; or
(I) engaging in any other activity, including cohabitation or sexual intercourse, within this state.
(3) Limitation on Jurisdiction Based on Contacts. If jurisdiction over a person is based solely on paragraph (2) of this subdivision, only a claim for relief arising from bases enumerated in paragraph (2) may be asserted against that person.
(4) Acquisition of Jurisdiction. A court of this state may acquire personal jurisdiction over any person through service of process as provided in this rule or by statute, or by voluntary general appearance in an action by any person either personally or through an attorney or any other authorized person.
(5) Inconvenient Forum. If the court finds, in the interest of substantial justice, the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just.

(c) Process.

(1) Contents of Summons. The summons must:
(A) specify the venue of the court in which the action is brought;
(B) contain the title of the action specifying the names of the parties;
(C) be directed to the defendant;
(D) It must state the time within which these rules require the defendant to appear and defend;
(E) notify the defendant that, if the defendant fails to appear and defend, default judgment will be rendered against the defendant for the relief demanded in the complaint; and
(F) be dated and subscribed by the plaintiff or the plaintiff's attorney and include the post office address of the plaintiff or plaintiff's attorney.
(G) If the action involves real estate and service is by publication, include the additional information required by Rule 4(e)(8).
(2) Copy of Complaint. A copy of the complaint must be served with the summons, except when service is by publication under Rule 4(e).

(d) Personal Service.

(1) By Whom. Service of all process may be made:
(A) within the state by any person of legal age and not a party to nor interested in the action; and
(B) outside the state by any person who may make service under the law of this state or under the law of the place where service is made, or by a person who is designated by a court of this state.

(2) How Service Made Within the State. Personal service of process within the state must be made as follows:
(A) Serving an Individual Fourteen Years of Age and Older. Service must be made on an individual 14 or more years of age by:
(i) delivering a copy of the summons to the individual personally;
(ii) leaving a copy of the summons at the individual's dwelling or usual place of residence in the presence of a person of suitable age and discretion who resides there;
(iii) delivering, at the office of the process server, a copy of the summons to the individual's spouse if the spouses reside together;
(iv) delivering a copy of the summons to the individual's agent authorized by appointment or by law to receive service of process; or (v) any form of mail or third-party commercial delivery addressed to the individual to be served and requiring a signed receipt and resulting in delivery to that individual.
(B) Serving an Individual Under the Age of Fourteen. Service must be made on an individual under the age of 14 by delivering a copy of the summons to:
(i) the individual's guardian, if the individual has one within the state;
(ii) the individual's parent or any person or agency having the individual's care or control, or with whom the individual resides, if the individual does not have a guardian within the state; or
(iii) the person designated by court order, if service cannot be made under (i) or (ii).
(C) Serving an Incompetent Individual or Appointed Guardian. Service must be made on an individual who has been judicially adjudged incompetent or for whom a guardian of the individual's person or estate has been appointed in this state, by delivering a copy of the summons to the individual's guardian. If a general guardian and a guardian ad litem have been appointed, both must be served.
(D) Serving a Corporation, Partnership, or Association. Service must be made on a domestic or foreign corporation or on a partnership or other unincorporated association, by:
(i) delivering a copy of the summons to an officer, director, superintendent or managing or general agent, or partner, or associate, or to an agent authorized by appointment or by law to receive service of process on its behalf, or to one who acted as an agent for the defendant with respect to the matter on which the plaintiff's claim is based and who was an agent of the defendant at the time of service;
(ii) if the sheriff's return indicates no person upon whom service may be made can be found in the county, then service may be made by leaving a copy of the summons at any office of the domestic or foreign corporation, partnership, or unincorporated association within this state with the person in charge of the office; or
(iii) any form of mail or third-party commercial delivery addressed to any of the foregoing persons and requiring a signed receipt and resulting in delivery to that person.
(E) Serving a Municipal or Public Corporation. Service must be made on a city, township, school district, park district, county, or any other municipal or public corporation, by delivering a copy of the summons to any member of its governing board.
(F) Serving the State and Its Agencies.
(i) State. Service must be made on the state by delivering a copy of the summons to the governor or attorney general or an assistant attorney general.

(ii) State Agency. Service must be made on an agency of the state, such as the Bank of North Dakota or the North Dakota Mill and Elevator Association, by delivering a copy of the summons to the managing head of the agency or to the attorney general or an assistant attorney general.
(G) Serving an Agent Not Authorized to Receive Process. If service is made on an agent who is not expressly authorized by appointment or by law to receive service of process on behalf of the defendant, a copy of the summons and complaint must be mailed or delivered via a third-party commercial carrier to the defendant with return receipt requested not later than ten days after service by depositing a copy of the summons and complaint, with postage or shipping prepaid, in a post office or with a commercial carrier in this state and directed to the defendant to be served at the defendant's last reasonably ascertainable address.
(3) How Service of Process is Made Outside the State. Service on any person subject to the personal jurisdiction of the courts of this state may be made outside the state:
(A) in the same manner as service within this state, with the force and effect as though service had been made within this state;
(B) under the law of the place where service is made for service in that place in an action in any of its courts of general jurisdiction; or
(C) as directed by court order.

(e) Service by Publication.

(1) When Service by Publication Permitted. A defendant, whether known or unknown, who has not been served personally under subdivision (d) of this rule may be served by publication in one or more of the following situations only if:
(A) the claim for relief is based on one or more grounds for the exercise of personal jurisdiction under paragraph (2) of subdivision (b) of this rule;
(B) the subject of the action is real or personal property in this state, and:
(i) the defendant has or claims a lien or other interest in the property, whether vested or contingent,
(ii) the relief demanded against the defendant consists wholly or partly in excluding the defendant from that lien or interest or in defining, regulating, or limiting that lien or interest, or
(iii) the action otherwise affects the title to the property;
(C) the action is to foreclose a mortgage, cancel a contract for sale, or to enforce a lien on or a security interest in real or personal property in this state;
(D) the plaintiff has acquired a lien on the defendant's property or credits within this state by attachment, garnishment, or other judicial processes and the property or credit is the subject matter of the litigation or the underlying claim for relief relates to the property or credits;
(E) the action is for divorce, separation, or annulment of a marriage of a state resident;
(F) the action is to determine parenting rights and responsibilities of an individual subject to the court's jurisdiction; or
(G) the action is to award, partition, condemn, or escheat real or personal property in this state.

(2) Filing of Complaint and Affidavit for Service by Publication. Before service of the summons by publication is authorized, a complaint and affidavit must be filed with the clerk of court where the action is venued. The complaint must set forth a claim in favor of the plaintiff and against the defendant and be based on one or more of the situations specified in paragraph (e)(1). The affidavit must be executed by the plaintiff or the plaintiff's attorney and must state one or more of the following:
(A) that after diligent inquiry personal service of the summons cannot be made on the defendant in this state to the best knowledge, information, and belief of the affiant;
(B) that the defendant is a domestic corporation that has forfeited its charter or right to do business in this state or has failed to file its annual report as required by law;
(C) that the defendant is a domestic or foreign corporation and has no officer, director, superintendent, managing agent, business agent, or other agent authorized by appointment or by law on whom service of process can be made on its behalf in this state; or
(D) that all persons having or claiming an estate or interest in, or lien or encumbrance on, the real property described in the complaint, whether as heirs, devisees, legatees, or personal representative of a deceased person, or under any other title or interest, and not in possession, nor appearing of record in the office of the register of deeds, the clerk of the district court, or the county auditor of the county in which the real property is situated, to have such claim, title or interest in the property, are proceeded against as unknown persons defendant under N.D.C.C. Chs. 32-17 or 32-19, and stating facts necessary to satisfy the requirements of those chapters.
(3) Number of Publications. Service of the summons by publication may be made by publishing the summons three times, once each week for three successive weeks, in a newspaper published in the county where the action is pending. If no newspaper is published in that county, publication may be made in a newspaper having a general circulation in the county.
(4) Mailing or Delivering Summons and Complaint. A copy of the summons and complaint, at any time after the filing of the affidavit for publication and no later than 14 days after the first publication of the summons, must be deposited in a post office or with a third-party commercial carrier in this state, postage or shipping prepaid, and directed to the defendant to be served at the defendant's last reasonably ascertainable address.
(5) Personal Service Outside State is Equivalent to Publication. After the affidavit for publication and the complaint in the action are filed, personal service of the summons and complaint on the defendant out of state is equivalent to and has the same force and effect as the publication and mailing or delivery provided for in paragraphs (e)(3) and (4).
(6) Time When First Publication or Service Outside State Must Be Made. The first publication of the summons, or personal service of the summons and complaint on the defendant outside the state, must be made within 60 days after the filing of the affidavit for publication. If not made, the action is considered discontinued as to any defendant not served within that time.
(7) When Defendant Served by Publication is Permitted to Defend.
(A) The defendant who is served by publication, or the defendant's representative, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action.

(B) Except in an action for divorce, the defendant who is served by publication, or the defendant's representative, on just terms, may be allowed to defend at any time within three years after entry of judgment if the defendant files an affidavit with the court that states:
(i) the defendant has a good and meritorious defense to the action; and
(ii) the defendant had no actual notice or knowledge of the action to enable the defendant to make application to defend before the entry of judgment.
(C) If the defense is successful and the judgment, or any part of the judgment, has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold under the judgment to a purchaser in good faith may not be affected.
(D) A defendant is considered to have had notice of the action and of the judgment if the defendant:
(i) receives a copy of the summons in the action by mail or delivery under paragraph (e)(4); or
(ii) is personally served the summons outside the state under paragraph (e)(5).
(8) Additional Information to be Published for Real Property. In all cases in which publication of summons is made in an action that the title to, or an interest in or lien on, real property is involved, the publication must also contain a description of the real property and a statement of the object of the action.

(f) Serving a Person in a Foreign Country. Unless otherwise provided by law, an individual, other than a minor or an incompetent person, may be served at a place not within any judicial district of the United States:

(1) by any internationally agreed means of service that is reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or
(2) if there is no internationally agreed means, or if an international agreement allows but does not specify other means, by a method that is reasonably calculated to give notice:
(A) as prescribed by the foreign country's law for service in that country in an action in its courts of general jurisdiction;
(B) as the foreign authority directs in response to a letter rogatory or letter of request; or
(C) unless prohibited by the foreign country's law by
(i) delivering a copy of the summons and the complaint to the individual personally; or
(ii) using any form of mail or third-party commercial delivery that the clerk addresses and sends to the individual and that requires a signed receipt; or
(3) by other means not prohibited by international agreement, as the court orders.
(4)Serving a Minor or Incompetent Person. Unless otherwise provided by law, service must be made on a minor or an incompetent person in a place not within any judicial district of the United States in the manner prescribed by paragraphs (2)(A), (2)(B), and (3).
(5) Serving a Foreign Corporation, Partnership, or Association. Unless otherwise provided by law, service must be made on a foreign corporation, partnership or other unincorporated association, that is subject to suit under a common name, in a place not within any judicial district of the United States in the manner prescribed for individuals in this subdivision except personal delivery under paragraph (2)(C)(i).

(g) When Service by Publication or Outside State Complete. Service by publication is complete fifteen days after the first publication of the summons. Personal service of the summons and complaint upon the defendant outside the state is complete fifteen days after the date of service.

(h) Amendment of Process or Proof of Service. The court may allow any process or proof of service to be amended at any time on notice and just terms, unless it clearly appears that the substantial rights of the party against whom the process was issued would be materially prejudiced.

(i) Proof of Service. Proof of service of the summons and of the complaint or notice, if any, accompanying the summons or of other process, must be made as follows:

(1) if served by the sheriff or other officer, by the officer's certificate of service;
(2) if served by any other person, by the server's affidavit of service;
(3) if served by publication, by an affidavit made as provided in N.D.C.C. § 31-04-06 and an affidavit of mailing or an affidavit of delivery via a third-party commercial carrier of a copy of the summons and complaint under paragraph (e)(4) of this rule, if the summons and complaint has been deposited;
(4) in any other case of service by mail or delivery via a third-party commercial carrier resulting in delivery under paragraph (d)(2) or (d)(3), by an affidavit of mailing or an affidavit of delivery of a copy of the summons and complaint or other process, with return receipt attached; or
(5) by the written admission of the defendant.

(j) Contents of Proof of Service.

(1) The certificate, affidavit or admission of service mentioned in subdivision (i) must state the date, time, place, and manner of service.
(2) If the process, pleading, order of court, or other paper is served personally by a person other than the sheriff or person designated by law, the affidavit of service must also state that:
(A) the server is of legal age and not a party to the action nor interested in the action, and
(B) the server knew the person served to be the person named in the papers served and the person intended to be served.

(k) Contents of Affidavit of Mailing or Delivery via a Third-party Commercial Carrier. An affidavit of mailing or delivery required by this rule must:

(1) state a copy of the process, pleading, order of court, or other paper to be served was deposited by the affiant, with postage or shipping prepaid, in the mail or with a third-party commercial carrier and directed to the party shown in the affidavit to be served at the party's last reasonably ascertainable address;
(2) contain the date and place of deposit;
(3) indicate the affiant is of legal age; and
(4) contain the return receipt, if any, attached to the affidavit.

(l) Effect of Mail or Delivery Refusal. If a summons and complaint or other process is mailed or sent with delivery restricted and requiring a receipt signed by the addressee, the addressee's refusal to accept the mail or delivery constitutes delivery. Return of the mail or delivery bearing an official indication on the cover that delivery was refused by the addressee is prima facie evidence of the refusal. Service is complete on the date of refusal.

(m) Service Under Statute. If a statute requires service and does not specify a method of service, service must be made under this rule.

N.D.R.Ev. 602 A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

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 **CERTIFICATE OF SERVICE**

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

I hereby certify that on June 13, 2014, I electronically filed with the Clerk of the North Dakota Supreme Court the following:

1. BRIEF OF DEFENDANT/APPELLEE/CROSS-APPELLANT EOG RESOURCES, INC.; and,

2. SUPPLEMENTAL APPENDIX OF DEFENDANT/APPELLEE/CROSS-APPELLANT EOG RESOURCES, INC.

and served the same electronically as follows:

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and served by U.S. Mail, postage prepaid, addressed to the following:

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