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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/aCathy 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 DEFENDANTS AND APPELLEES
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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and Rules:

Secondary Authorities:

STATEMENT OF THE ISSUES

[¶1] Whether the district court correctly granted summary judgment in favor of Hassan and against Capps?

[¶2] Whether the district court correctly determined that the Weflans failed to satisfy the requirements of N.D.C.C. Chapter 38-18.1 (Termination of Mineral Interest Act)?

STATEMENT OF THE FACTS

[¶3] On March 24, 1975, Ruth A. Nelson conveyed the following real property located in Mountrail County, North Dakota, by warranty deed to Olav and Rose Weflen, reserving 1/2 of the underlying minerals:

Township 153 North, Range 90 West:
Section 4: Lots 3 and 4, S1/2 NW1/4, SW1/4
Section 9: NW1/4

("Subject Property") (Capps Appendix at 123). On June 6, 1979, Ruth A. Nelson executed a mineral deed to Terrel A. Anderson and Patricia Anderson (now Capps). (Anderson and Capps are collectively referred to hereinafter as "Capps"). (Capps App. at 157). This mineral deed purported to convey "an undivided 1/2 mineral interest in and to all of the oil, gas and other minerals in and under and that may be produced" from the Subject Property. (Id.) Directly below the property description in the mineral deed, the following clause was added setting forth the intent of Ruth A. Nelson with regard to the scope of this transfer:

> It is the intent hereof to transfer a 1/2 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.) (emphasis added). The 1979 mineral deed was recorded with the Mountrail County Recorder's Office on March 31, 2009.

[¶4] As the surface owners of the Subject Property in 2005, Colleen Weflen, Marleen Weflen, Sharon Kruse, Catherine Harris, and Norris Weflen ("Weflens") claimed the minerals underlying the Subject Property pursuant to the statutory requirements of N.D.C.C. § 38-18.1. On December 28, 2005, the Weflens published a *Notice of Lapse of Mineral Interest* with additional publications made on January 4, 2006, and January 11, 2006, in accordance with N.D.C.C. § 38-18.1-06(2). (Capps App. at 125). On January 13, 2006, a copy of this notice was sent by certified mail to Ruth A. Nelson at two addresses, one obtained from a 1973 oil and gas lease, and the other from the 1975 warranty deed to Olaf and Rose Weflen. (Capps App. at 134). These mailings included the USPS service option of restricted delivery, ensuring that only the addressee (Ruth A. Nelson) would be entitled to receive this mail. (Capps App. at 135). These mailings were returned undelivered to the Weflens. (Id.)

[¶5] A *Notice of Termination of Mineral Interest* was recorded on March 6, 2006, in the Mountrail County Recorder's Office. In 2008, Capps and Anderson filed statements of claim governing the same minerals and subsequently brought suit to quiet title in the mineral interest in 2009. (Capps App. at 139-40). Defendants and Appellees Gwen Hassan, Penny Brink, Michael Lee, and Melissa Kellor ("Hassan") were joined in this matter, and claim an interest to the minerals of the Subject Property as heirs of the Estate of Ruth A. Nelson.

[¶6] After a number of motions, the district court entered a judgment adjudicating fewer than all of the parties' claims in accordance with N.D.R.Civ.P. 54(b). The Weflans

appealed the district court's judgment. This Court heard oral arguments in December 2012, and ultimately remanded this matter, concluding that the district court abused its discretion in entering a final judgment under N.D.R.Civ.P. 54(b).

[¶7] On June 28, 2013, Capps moved for summary judgment against Hassan based on their interpretation of the 1979 mineral deed. On July 29, 2013, Windsor Bakken, LLC filed a brief joining in Capps's motion for summary judgment. Hassan refuted Capps's interpretation of the 1979 mineral deed and filed a cross-motion for summary judgment on September 3, 2013. On October 29, 2013, the district court granted Hassan's cross-motion for summary judgment and denied Capps's motion for summary judgment. The district court mistakenly granted the remaining one-half mineral interest of the Estate of Ruth Nelson to Hassan. Capps subsequently filed a motion for reconsideration that was unopposed by Hassan. On January 13, 2014, the district court correctly identified the heirs of the Estate of Ruth Nelson, as well as the heirs' respective shares of the remaining one-half mineral interest.

[¶8] Capps filed a notice of appeal on March 27, 2014. Multiple parties followed suit. For the reasons discussed below, the district court correctly granted summary judgment in favor of Hassan and against Capps, and correctly determined that the Weflans failed to satisfy the requirements of N.D.C.C. Chapter 38-18.1 (Termination of Mineral Interest Act).

LAW AND ARGUMENT

I. THE DISTRICT COURT CORRECTLY GRANTED SUMMARY JUDGMENT IN FAVOR OF HASSAN AND AGAINST CAPPS.

A. Standard of Review.

[¶9] Whether the district court properly granted summary judgment is a question of law which is reviewed de novo on the entire record. ***See*** Haugland v. City of Bismarck, 2014 ND 51, ¶ 4, 843 N.W.2d 840. Summary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. ***See*** Erickson v. Brown, 2008 ND 57, ¶ 22, 747 N.W.2d 34. To successfully defend against a summary judgment motion, the non-moving party must present "competent, admissible evidence on an essential element of the claim" sufficient to raise a genuine issue of material fact, otherwise, it is presumed such evidence does not exist. ***See*** Halvorson v. Sentry Ins., 2008 ND 205, ¶ 5, 757 N.W.2d 398.

> The party resisting the motion may not simply rely upon the pleadings or upon unsupported, conclusory allegations, but must present competent admissible evidence by affidavit or other comparable means which raises an issue of material fact, and must, if appropriate, draw the court's attention to relevant evidence in the record raising an issue of material fact.

See Grandbois and Grandbois, Inc., 2004 ND 162, ¶ 17, 685 N.W.2d 129. "Mere speculation is not enough to defeat a motion for summary judgment, and a scintilla of evidence is not sufficient to support a claim." ***See*** Zuger v. State, 2004 ND 16, ¶ 8, 673 N.W.2d 615.

[¶10] For the reasons explained below, there are no issues of material fact regarding the summary judgment motions at issue in this appeal. As identified by the district court, "[t]he issue in these motions for summary judgment is the legal effect of the language included in the 1979 Mineral Deed from Ruth Nelson to Capps and Anderson" and "whether the words 'remaining minerals' create an ambiguity in the Mineral Deed." (Capps Appendix at 153). As correctly determined by the district court, "rational arguments cannot be made for different interpretations of the words 'remaining minerals' and that the words can have but one meaning: that Ruth intended to transfer 1/2 of whatever mineral interest Ruth still owned at the time she executed the Mineral Deed." (Id.) "In light of the [district court's] conclusion that the words 'remaining minerals' in the Mineral Deed do not create an ambiguity and are intended to transfer 1/2 of whatever mineral interest Ruth still owned at the time the Mineral Deed was executed, there is no overconveyance, and *Duhig* would not apply." (Id. at 154).

B. Pursuant to the express language as contained within the four corners of the 1979 mineral deed, it was the intent of Ruth A. Nelson to convey a 1/2 mineral interest to the "*remaining minerals*" owned by her in the Subject Property at the time of the conveyance.

[¶11] "The primary purpose in construing a deed is to ascertain and effectuate the grantor's intent." ***See*** Nichols v. Goughnour, 2012 ND 178, ¶ 12, 820 N.W.2d 740. Deeds that convey mineral interests are subject to general rules governing contract interpretation, and courts will construe contracts to give effect to the parties' mutual intent. Id. (internal citations omitted). N.D.C.C. Chapter 9-07 provides a number of principles governing the interpretation of contracts also applicable to deeds: (1) deeds are to interpreted as a whole to give effect to every part if reasonably practicable; each clause is to help interpret the others (§ 9-07-06); (2) the language of a deed governs its

interpretation if the language is clear and explicit and does not involve an absurdity (§ 9-07-02); (3) deeds must be interpreted so as to give effect to the mutual intention of the parties as it existed at the time of contracting so far as this intent is ascertainable (§ 9-07-03); (4) repugnancy in a deed 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 deed as a whole (§ 9-07-17); and (5) words in a deed that are inconsistent with the intent of the parties are to be rejected (§ 9-07-18).

[¶12] Capps asserts that the intent of the parties in the 1979 mineral deed should be construed solely from the initial granting clause, thus ignoring the limiting language setting forth the intent of the grantor with regard to the scope of the transfer. (Capps Appellants' Brief at 7-11). Capps also assert that title passes as to the greater interest where a subsequent clause purports to transfer a lesser interest. (Id. at 11-12). However, under N.D.C.C. Chapter 9-07, the limiting language of the 1979 mineral deed cannot be ignored and must be interpreted in conjunction with the granting clause in order to ascertain the scope of the conveyance; the granting clause alone is not determinative of the interest conveyed. The Capps interpretation of the 1979 mineral deed wholly fails to effectuate the grantor's intent as explicitly stated in the deed and is inconsistent with the principles of contract interpretation applicable to mineral deeds as delineated above. ***See*** N.D.C.C. §§ 9-07-02; 9-07-03; 9-07-06; 9-07-17; 9-07-18.

[¶13] To ascertain and effectuate the intent of Ruth A. Nelson, the 1979 mineral deed must be interpreted as a whole to give effect to every part thereof. Accordingly, the granting language must be read in conjunction with the limiting language in order to ascertain the intent of Ruth A. Nelson with regard to the scope of the conveyance (i.e. to

convey a 1/2 mineral interest to the *remaining minerals* owned by her at the time of the conveyance). The language of the 1979 mineral deed does not involve an absurdity and must be interpreted so as to give effect to the mutual intent of the parties as it existed at the time of the conveyance in 1979. Any repugnancy between the grant and the subsequent limiting language must be reconciled by giving effect to the intent and purpose of the deed as expressly stated by the limiting language contained therein. Any language inconsistent with this stated intent is to be rejected.

[¶14] In accordance with these principles of deed interpretation, it is clear that Ruth A. Nelson intended to convey a 1/2 mineral interest to the remaining minerals owned by her at the time of the conveyance in 1979. As described above, the limiting language located directly below the property description sets forth Ruth A. Nelson's intent as the grantor with regard to the scope of the conveyance and provides:

> It is the intent hereof to transfer a 1/2 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.

(Capps Appendix at 157) (emphasis added). This limiting language helps to interpret the proper scope of the granting clause and provides the context in which to interpret the granting language of the deed. Capps recognizes that the grantor utilized a form deed in this transaction. The inclusion of the limiting language permitted the grantor to memorialize her true intent. Capps would prefer the Court give this statement no attention, thereby ignoring an obvious attempt to adapt a form deed to the grantor's specific wishes.

[¶15] Additionally, interpretation of the 1979 mineral deed in this manner is consistent with Ruth A. Nelson's prior 1975 conveyance and reservation of a 1/2 mineral interest in the Subject Property. Of the 1/2 mineral interest held by Ruth A. Nelson after the 1975 conveyance and reservation (i.e. the remaining minerals), the conveyance of a 1/2 interest of these minerals results in the net transfer of a 1/4 mineral interest. One-quarter of the minerals underlying the Subject Property were never transferred by Ruth A. Nelson and remained titled in her name until her death in 1983. Furthermore, if Ruth A. Nelson had intended to grant a 1/2 mineral interest to all of the minerals underlying the Subject Property (as Capps claim), the limiting language of the 1979 mineral deed would not have been necessary to explain the proper scope of the grant. However, because it was expressly included in the mineral deed, this limiting language must be given effect in order to ascertain and effectuate Nelson's intent with regard to the scope of the grant in the 1979 deed.

[¶16] Furthermore, as acknowledged by Capps, the intent of the parties is to be determined from the "four corners of the deed, if possible." (Capps Appellants' Brief at 7-8). The limiting language of the 1979 mineral deed at issue in this case is clearly within the four corners of the deed and sets forth the intent of Ruth A. Nelson with regard to the scope of the conveyance and must be considered when determining the intent of the parties. Accordingly, the limiting language of the 1979 mineral deed cannot be ignored and must be interpreted in conjunction with the granting clause in order to ascertain the scope of the conveyance; the granting clause alone is not determinative of the interest conveyed.

C. The limiting language of the 1979 mineral deed constitutes an express exception to the granting language and operates as a limiting description of the interest which did not pass to the grantees.

[¶17] This Court has previously delineated the differences between "reservations" and "exceptions" in the context of mineral conveyances. ***See*** Mueller v. Strangeland, 340 N.W.2d 450 (N.D. 1983); ***see also*** Christman v. Emineth, 212 N.W.2d 543 (N.D. 1973). A reservation is a new interest created from what is granted; "it creates a new right in the grantor from the subject of the conveyance something which did not exist as an independent right before the grant and which is originated by it." ***See*** Christman, 212 N.W.2d at 552 (internal citation omitted). As distinguished from a reservation, "an exception operates to take something out of the [interest] granted which would otherwise pass." Id. Stated another way, a reservation creates a new interest in the property, passing back from the grantee to the grantor as an incident of the grant, whereas an exception is regarded as merely a part of the limiting description of the interest granted which never passes to the grantee. ***See*** W.E. Shipley, Grant, Reservation, or Exception as Creating Separate and Independent Legal Estate in Solid Minerals or as Passing Only Incorporeal Privilege or License, 66 A.L.R.2d 978 (1959).

[¶18] "While it is often difficult to distinguish between exceptions and reservations, both cause something to be deducted from the thing granted, narrowing and limiting what would otherwise pass by the general words of the grant and the technical meaning will give way to the obvious intent, even though the technical term to the contrary was used." ***See*** Mueller, 340 N.W.2d at 452. Thus, an obvious intent to deduct something from the thing granted will be given effect, whether the term "exception" or "reservation" is used. Id. An exception may appear in any part of the deed, but it must be an exception to the

granting language, not some other provision in the deed. Id. at 453 (citing Royse v. Easter Seal Soc. for Crippled Children & Adults, Inc. of North Dakota, 256 N.W.2d 542, 545 (N.D. 1977) ("In addition to the certainty requirement, an exception, although it may appear in any part of the deed, must be an exception to the grant, not to some other provision in the deed.").

[¶19] In this case, the limiting language of the 1979 mineral deed operates as part of the limiting description of the interest granted which does not pass to the grantee; the language does not create a new right in the grantor from the subject of the conveyance which did not exist as an independent right before the grant. Although the exception is not set forth in the initial granting clause (due to the standard-form mineral deed used), it is conspicuously stated after the real property description and operates as a limitation to the grant, not some other provision of the deed. Accordingly, the limiting language of the 1979 mineral deed is properly categorized as an "exception" to the grant and not as a "reservation" of a mineral interest.

[¶20] Capps asserts that the 1979 mineral deed lacks express reservation or exception language, thus resulting in the granting clause prevailing. (Capps Appellants' Brief at 12-14). However, given the circumstances of this case, it is evident that the limiting language of the 1979 mineral deed constitutes an express exception to the grant. As described above, prior to the execution of the 1979 mineral deed, Ruth A. Nelson had conveyed the Subject Property to Olaf and Rose Weflan in 1975, reserving 1/2 of the underlying minerals. It is therefore apparent that Ruth A. Nelson's reference to the "*remaining minerals*" in the 1979 mineral deed, was a reference to the 1/2 mineral interest she retained in the Subject Property. Accordingly, the limiting language of the

1979 mineral deed constitutes an express exception to the granting language and operates as a limiting description of the interest which did not pass to the grantees. Again, if Ruth A. Nelson had intended to grant a full 1/2 mineral interest, there would have been no need to include any clarifying language such as that contained in the 1979 mineral deed.

D. The *Duhig* Rule does not apply to the 1979 mineral deed at issue.

[¶21] In cases involving a grantor's overconveyance of minerals to a third-party grantee, North Dakota courts have applied the *Duhig* Rule in construing the deed. ***See*** Nichols v. Goughnour, 2012 ND 178, ¶ 15, 820 N.W.2d 740. The effect of the *Duhig* Rule is that "a grantor cannot grant and reserve the same mineral interest, and if a grantor does not own a large enough mineral interest to satisfy both the grant and the reservation, the grant must be satisfied first because the obligation incurred by the grant is superior to the reservation." Id. As discussed above, a reservation is effectively a "re-grant" from the grantee back to the grantor, thus creating a new interest in the grantor. ***See*** Christman, 212 N.W.2d 543 (N.D. 1973).

[¶22] Capps asserts that as a result of the *Duhig* Rule, Ruth A. Nelson transferred her entire mineral interest in the Subject Property pursuant to the 1979 mineral deed. (Capps Appellants' Brief at 14-15). However, for multiple reasons, the *Duhig* Rule does not apply as to the 1979 mineral deed. First, given the proper interpretation of the mineral deed as discussed above, the 1979 mineral deed does not result in an overconveyance of minerals. Second, the 1979 mineral deed contains and exception to the granting language, not an attempted reservation of minerals. As previously discussed, the limiting language of the 1979 mineral deed operates as part of the limiting description of the interest granted (i.e. an exception) and does not create a new right in the grantor as an incident of

the conveyance (i.e. a reservation). Rather, the limiting language provides the context in which to interpret the proper scope of the granting language of the deed. Because the 1979 mineral deed did not result in an overconveyance of minerals or contain a subsequent mineral reservation, the *Duhig* Rule is not applicable in this matter and does not operate to transfer Ruth A. Nelson's entire mineral interest in the Subject Property.

II. THE DISTRICT COURT CORRECTLY DETERMINED THAT THE WEFLANS FAILED TO SATISFY THE REQUIREMENTS OF N.D.C.C. CHAPTER 38-18.1 (TERMINATION OF MINERAL INTEREST ACT).

A. Standard of Review.

[¶23] "Interpretation of statutes is a question of law." ***See*** Meier v. N. Dakota Dept. of Human Services, 2012 ND 134, ¶ 6, 818 N.W.2d 774, 776. Questions of law are reviewed by this Court de novo on the entire record. ***See*** Haugland v. City of Bismarck, 2014 ND 51, ¶ 4, 843 N.W.2d 840. Accordingly, this matter involves an interpretation of whether the Weflans failed to satisfy the notice requirements of N.D.C.C. § 38-18.1-06(2). For the reasons discussed below, the district court correctly determined that the Weflens failed to comply with the statutory requirements of N.D.C.C. § 38-18.1-06(2) and therefore, the minerals at issue did not vest in the Weflans as surface owners.

B. The district court correctly determined that mailing a notice of lapse to a deceased person at their address of record is absurd and violates N.D.C.C. Chapter 38-18.1 (Termination of Mineral Interest Act).

[¶24] The particular provision of the Termination of Mineral Interest Act at issue in this matter is N.D.C.C. § 38-18.1-06(2), which details the method and requirements of the surface owner to provide a notice of lapse of the mineral interest. This Court briefly summarized the legislative history of the Termination of Mineral Interest Act in Sorenson v. Felton, 2011 ND 33, ¶ 9, 793 N.W.2d 799, which includes amendments to N.D.C.C. §

38-18.1-06 in both 2007 and 2009. Neither the 2007 nor the 2009 amendments were made retroactive. Id. The Weflens commenced publication under N.D.C.C. § 38-18.1-06 in December 2005 and mailed notices to Ruth A. Nelson in 2006, before those amendments were made effective. Accordingly, neither the 2007, nor the 2009 amendment are applicable to this case. In December 2005, N.D.C.C. § 38-18.1-06(2) read as follows:

> 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***.

(Emphasis added).

[¶25] In its February 2, 2012 *Order Denying Weflens' Motion for Summary Judgment; Granting Capps' Motion for Reconsideration and Rule 54(b) Certification*, the district court recognized this Court's interpretation of N.D.C.C. § 38-18.1-06(2) in Felton and in Sorenson v. Alinder, 2001 ND 36, 793 N.W.2d 797. Specifically, the district court cited this Court's holding that N.D.C.C. § 38-18.1-06(2) requires a "reasonable inquiry" only when the mineral owner's address does not appear of record. (Capps App. at 112). The possibility that the Court's interpretation of N.D.C.C. § 38-18.1-06(2) leads to an absurd result was made by Felton, who argued that "a surface owner with knowledge of a mineral owner's correct mailing address could send notice to an incorrect mailing address." ***See*** Felton, 2011 ND 33 at ¶ 14. However, the Court indicated it would not issue an advisory opinion on a set of facts that was not actually before the Court on

appeal. Id. Hassan asserts that the application of the facts of this particular case does in fact result in an absurdity.

[¶26] This Court has long held that "[s]tatutes must be construed to avoid absurd results." ***See*** Felton, 2011 ND 33, ¶ 14, 793 N.W.2d 799; ***see also*** Toso v. Workforce Safety & Ins., 2006 ND 70, ¶ 25, 712 N.W.2d 312. "Statutes are not to be read in isolation or applied in a vacuum," and the Court "must consider the practical effects of a particular construction and avoid absurd or ludicrous results." ***See*** In re D & P Terminal, Inc., 2012 ND 149, ¶ 17, 819 N.W.2d 491. While the Court has previously parsed this same version of N.D.C.C. § 38-18.1-06(2) in Felton, that review was limited to the specific facts of Felton and did not foreclose the possibility that a separate, distinguishable set of facts could produce an absurdity under the Court's construction in Felton. ***See*** Felton at ¶ 14.

[¶27] Here, the district court relied on evidence that the Weflens had knowledge, at the time they published and mailed their *Notice of Lapse*, that Ruth A. Nelson was deceased. (Capps App. at 115). Norris Weflen testified at his deposition that he knew Herman and Ruth Nelson were deceased at the time the lawsuit was filed and assumed they were dead in November 2005. (Capps Appendix at 143-144). At the time the district court issued its February 2, 2012 *Order*, no party had presented evidence to rebut this evidence.

[¶28] Accordingly, the evidence before the district court was that the Weflens mailed the *Notice of Lapse* to an individual whom they knew or assumed or thought to be dead. By taking this action, it allowed them to gain title to valuable mineral interests and potentially exploit an unintended loophole in the Termination of Mineral Interest Act. If this behavior is to be permitted, the mailing of a notice of lapse would serve no legitimate

or rational purpose. The district court was absolutely correct in determining that this set of facts results in an absurdity, especially when a reasonable inquiry would have undoubtedly resulted in finding the correct owner of the minerals.

[¶29] "When adherence to the letter of the law would cause an absurd result, we give effect to the legislative intent even though contrary to the letter of the law." ***See*** Samdahl v. N. Dakota Dept. of Transp. Dir., 518 N.W.2d 714, 717 (N.D. 1994). When examining the factual situation present in this case, permitting surface owners to mail a notice of lapse to a mineral owner of record, whom they knew or believed to be dead, is absurd; surely it was not the intent of the legislature to characterize this as sufficient notice under N.D.C.C. Chapter 38-18.1.

[¶30] Hassan asserts that the obvious intent of the legislature in crafting N.D.C.C. § 38-18.1-06(2) was to provide notice under due process of law for the forfeiture of mineral interests. The remedy is to give effect to legislative intent, the letter of the law notwithstanding. ***See*** Samdahl, 518 N.W.2d at 717. Permitting the Weflens to mail notice of lapse to an individual whom they knew or believed to be dead is absurd; however, this Court can give effect to the notice provision of N.D.C.C. § 38-18.1-06(2) simply by requiring compliance with the second step: conducting a reasonable inquiry.

C. The district court correctly determined the method utilized by the Weflens to mail the *Notice of Lapse* was improper and prevented its delivery.

[¶31] In 2005, N.D.C.C. § 38-18.1-06(2) established a two-step process to provide notice to a mineral owner of the surface owner's notice of lapse: (1) publication of the notice in the official county newspaper where the mineral interest is located; and (2) "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***." ***See*** N.D.C.C. § 38-18.1-06(2) (emphasis added). The Weflens' actions related to publication are not at issue here. However, in its February 2, 2012 order, the district court correctly identifies that the controlling statute does not require certified mail, return receipt, or restricted delivery. (Capps App. at 115-116).

[¶32] "Interpretation of statutes is a question of law." ***See*** Meier v. N. Dakota Dept. of Human Services, 2012 ND 134, ¶ 6, 818 N.W.2d 774, 776. "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, but any words explained in this code are to be understood as thus explained." ***See*** N.D.C.C. § 1-02-02. "If statutory language is ambiguous or doubtful in meaning, courts may consider extrinsic aids, such as legislative history, to determine legislative intent." ***See*** Kaspari v. Olson, 2011 ND 124, ¶ 13, 799 N.W.2d 348.

[¶33] This Court has already indicated in Felton that the purpose and meaning of N.D.C.C. § 38-18.1-06 "can be understood when looking at the whole provision," and that N.D.C.C. § 38-18.1-06(2) requires notice by mail "if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry." ***See*** Felton, 2011 ND 33 at ¶ 11. It is undisputed that "[t]he surface owner must comply with the notice provisions in section 38–18.1–06, N.D.C.C., to claim the abandoned minerals." Id. However, the Weflens did not simply mail a copy of the *Notice of Lapse* to the owner within 10 days of publication as required. The mailing was done in a manner significantly more restrictive, and blatantly to the advantage of the surface owner.

[¶34] According to the United States Postal Service ("USPS"), "Certified Mail Service" permits a sender to track the delivery (or attempted delivery) of their item; "Return Receipt" provides proof that an item was delivered in the form of a postcard or e-mail bearing the signature of the recipient; and "Restricted Delivery" permits the sender to specify who can sign and receive the item. ***See*** https://www.usps.com/send/insurance-and-extra-services.htm (last visited June 14, 2014). We assume these services were employed to provide documentation of the mailing, similar to utilizing these services under Rule 4, N.D.R.Civ.P. However, by adding these extra mail services, the Weflens made it more difficult to accomplish notice to the mineral owner of record. If there was a forwarding address, the notice may not have reached the owner. If the owner of record was incapacitated or, as in this case, deceased, no other individual could receive the *Notice of Lapse* and forward it onto heirs of the mineral owner of record, such as Hassan. In fact, the act of mailing the *Notice of Lapse* with these extra services attached would be an exercise in futility and would all but assure that the notice would never reach its recipient and the surface owner could succeed on their claim for minerals that were never truly abandoned. The Weflens altered the method by which notice was provided failed to comply with N.D.C.C. § 38-18.1-06(2) and therefore, the minerals at issue did not vest in the Weflans as surface owners.

D. The district court correctly determined that the mineral owner's address did not appear of record.

[¶35] In finding that the "owner" of the mineral interest's address did not appear of record, and that the record owner (Ruth A. Nelson) was no longer the actual owner under North Dakota law, the district court cited N.D.C.C. § 30.1-12-01, which states:

> Upon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will or to those indicated as substitutes for them in cases involving lapse, renunciation, or other circumstances affecting the devolution of testate estate, or in the absence of testamentary disposition, to the decedent's heirs….

(Capps App. at 116). The importance of this analysis is due to the mailing requirement of N.D.C.C. § 38-18.1-06(2), which again states in pertinent part:

> 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***.

See N.D.C.C. § 38-18.1-06(2) (emphasis added). Under N.D.C.C. § 30.1-12-01, Ruth A. Nelson is no longer the owner of the mineral interest. Ownership devolved to Ruth A. Nelson's heirs at law. The notice requirement in effect in 2005 did not simply require the surface owner to provide notice to the owner of record. "Property passes upon death, not distribution." ***See*** Feickert v. Frounfelter, 486 N.W.2d 131, 132 (N.D. 1991).

[¶36] The strict interpretation of N.D.C.C. § 38-18.1-06(2) requires mailing of notice to the "owner of the mineral interest." If the actual owner's address was not of record, then the second prong (i.e. a reasonable inquiry) should have been conducted. The district court logically continues this argument with the analysis that the critical question is not whether the Weflens knew Ruth A. Nelson was deceased, but rather whether Ruth A. Nelson actually was deceased. (Capps App. at 119). Upon her death, Ruth A. Nelson's ownership of the minerals underlying the Subject Property ceased and therefore, she cannot subsequently abandon this mineral interest. In this case, the Weflens mailed the

Notice of Lapse to Ruth A. Nelson at a time when she was in fact deceased. Under North Dakota law, she was not the owner of any mineral interest underlying the Subject Property. Accordingly, Hassan contends that the Weflens failed to comply with the requirements of N.D.C.C. § 38-18.1-06(2) and therefore, the minerals at issue did not vest in the Weflans as surface owners.

CONCLUSION

[¶37] For the reasons discussed above, the district court correctly granted summary judgment in favor of Hassan and against Capps, and correctly determined that the Weflans failed to satisfy the requirements of N.D.C.C. Chapter 38-18.1 (Termination of Mineral Interest Act). Accordingly, Hassan respectfully requests that the Court affirm the district court's *Judgment*, dated March 21, 2014.

Dated this 16th day of June, 2014.

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CERTIFICATE OF SERVICE

[¶38] I hereby certify that a true and correct copy of the foregoing brief was on the 16th day of June, 2014, electronically filed with the Clerk of the North Dakota Supreme Court and e-mailed to the following:

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