20140110

FILED
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July 16, 2014
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
FOR THE 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,

vs.

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 f/k/a Sharon Weflen, a married woman dealing in her sole and separate property, Catherine Harris f/k/a Catherine 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

Mountrail County
District Court
No. 31-10-C-00009

REPLY BRIEF
OF APPELLEES AND
CROSS-APPELLANTS
WEFLEN

APPEAL FROM THE JUDGMENT DATED AND ENTERED MARCH 21, 2014, PURSUANT TO THE ORDER FOR JUDGMENT DATED AND FILED MARCH 16, 2014

MOUNTRAIL COUNTY DISTRICT COURT,
NORTH CENTRAL JUDICIAL DISTRICT
THE HONORABLE DAVID W. NELSON, PRESIDING

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[¶2] **I. LAW AND ARGUMENT**

[¶3] **A. The Weflens Strictly Complied with N.D.C.C. § 38-18.1-06(2).**

[¶4] The Capps argue that mailing the notice was invalid because Ruth Nelson was dead and so "she was not the mineral interest owner." (Brief, p. 2) The Weflens dispute Capps's statement that the discussion of "record owner" and "legal owner" in Estate of Christeson v. Gilstad, 2013 ND 50, 829 N.W.2d 453 has "no place here." (Brief, p. 2) The record shows that the *last use* of the mineral interests was Ruth Nelson's warranty deed to Olav and Rose Weflen, dated March 24, 1975. (Capps Appx. p. 123) The address of the *last user* of the minerals was the address of record; the Weflens properly sent notice to that address.

[¶5] Further, their theory on the notice requirement places a burden upon landowners *not* intended by the Legislature:

> It cannot be disputed that Nelson was not the mineral interest owner when notice was sent certified, restricted delivery, mail. *This is true regardless of belief or knowledge*. Because Nelson was not the mineral interest owner, a reasonably inquiry was required.

(Brief, p. 4 (*emphasis added*)). Taking that position to its logical conclusion, a reasonable inquiry is *always* required whether there is an address of record or not, because one never knows whether the record owner is deceased. According to the Capps, even if a landowner sends notice by the allegedly superior method of "regular" mail to the last address of record, that notice is deficient if the record owner is dead. This position disregards Sorenson v. Felton, 2011 ND 33, 793 N.W. 2d 799, Sorenson v. Alinder, 2011 ND 36, 793 N.W.2d 797, and Johnson v. Taliaferro, 2011 ND 34, 793 N.W.2d 804, all which clearly stated that where a mineral owner's address is of record, no further inquiry is required - even if the record owner is thought to be or known to be deceased.

[¶6] B. The Question Is Not Whether a Deceased Person Can Be a Mineral Interest Owner.

[¶7] The Capps claim this case raises the question "can a deceased person be a mineral interest owner?" and that the Weflens answer "yes." (Brief, p. 7) However, that question is irrelevant to Ch. 38-18.1. Ruth Nelson was the last user of record, and was the "record owner" under Estate of Christeson v. Gilstad, 2013 ND 50, 829 N.W.2d 453. Though neither the Capps nor the Hassans were mineral owners of record, they claim to be "owners" for purposes of Ch. 38-18.1. Not surprisingly, they never acknowledge that the *purpose* of Ch. 38-18.1 is to solve the problems of non-use of minerals and failure to keep record title current.

[¶8] While devolution upon death is correct in determining ownership in some circumstances, it is not under N.D.C.C. Ch. 38-18.1. The record owner had not used the minerals since March 24, 1975. (Capps Appx. p. 123) No one in Ruth Nelson's family recorded any document indicative of ownership. The Capps's grievance is that the Weflens "should have" mailed the notice in some way that it would have found strangers to the title who failed to avail themselves of the protections of the recording statutes. They argue that the Weflens should have just put a stamped envelope in a mailbox. (Brief, p. 5) However, the Legislature didn't require "actual notice" nor did it specify *how* the notice of lapse was to be mailed. *See, e.g.* Sorenson v. Felton, 2011 ND 33, 793 N.W.2d 799. The mailing complied with the statutory requirements; the argument that one method of mailing is superior to another is the functional equivalent to requiring "actual notice", which the Legislature did not do.

[¶9] **C. Finding That the Weflens Properly Complied with the Notice Requirements Does Not Render N.D.C.C. § 38-18.1-06 (2005) Unconstitutional.**

[¶10] The Capps claim that "Alternatively, the 2005 Version of N.D.C.C. §38-18.1-06 Violates Due Process and is Unconstitutional as Applied." (Brief, p. 8) They are wrong.

[¶11] **1. North Dakota's statute is constitutional under Texaco, Inc. v. Short, 454 U.S. 516, 523 (1982).**

[¶12] North Dakota's abandoned minerals chapter was modeled after abandoned mineral rights statutes in Indiana and Michigan. *See Hearing on H.B. 1084 Before the Senate Finance & Taxation Comm.*, 48th N.D. Legis. Sess. (March 8, 1983). The Capps claim that North Dakota's statute is materially different from the Indiana statute, making Short distinguishable, and that the Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) due process standard is applicable. (Brief, p. 9) This is incorrect.

[¶13] **a. North Dakota's statute is equivalent to a statute of limitations.**

[¶14] At the time the Weflens terminated the mineral interest, the statute provided that the mineral interest reverts to the surface owner on the date of abandonment, which is the date of the first publication of the notice. N.D.C.C. § 38-18.1-02 (2006). The event of lapse requires 20 years of non-use and the first publication. Estate of Christeson v. Gilstad, 2013 ND 50, ¶ 8, 829 N.W.2d 453. The Capps state that "In North Dakota, the severed mineral interest never lapses without publication and notice to the surface owner [sic] and filing with the County Recorder." (Brief, p. 10) This is incorrect. North Dakota does *not* require specific notice to the address of record *prior* to lapse. Section 38-18.1-06(1) requires giving notice *of* the lapse - meaning that the lapse has already occurred so notice is subsequent to lapse. This is just as was explained by the Short court, "[t]he statute does not require that

any specific notice be given to a mineral owner *prior* to a statutory lapse of a mineral estate. The Act does set forth a procedure, however, by which a surface owner who has succeeded to the ownership of a mineral estate pursuant to the statute may give notice that the mineral interest has lapsed." Texaco, Inc. v. Short, 454 U.S. 516, 523 (1982). North Dakota's statute, like Indiana's, is equivalent to a statute of limitations; the reverting or vesting procedure in North Dakota is the same mechanism that was upheld as constitutional in Short. That North Dakota added a mandatory notice by publication requirement and a requirement to mail notice of the lapse *after* lapse has occurred does not alter the applicability of the Short ruling. When Short interpreted the constitutionality of Indiana's abandoned minerals statute, it agreed with the Indiana court that it was appropriate to place the burden on the owner of a mineral interest to preserve his interest in furtherance of the abandoned minerals statute:

> The Act reflects the legislative belief that the existence of a mineral interest about which there has been no display of activity or interest by the owners thereof for a period of twenty years or more is mischievous and contrary to the economic interests and welfare of the public. The existence of such stale and abandoned interests creates uncertainties in titles and constitutes an impediment to the development of the mineral interests that may be present and to the development of the surface rights as well. The Act removes this impediment by returning the severed mineral estate to the surface rights owner. There is a decided public interest to be served when this occurs.

Texaco, Inc. v. Short, 454 U.S. at 523. This precisely reflects the intent of the North Dakota Legislature in modeling our statute after the Indiana statute, though Rep. Murphy's "use it or lose" summation is more succinct. *See Hearing on H.B. 1084 before the Senate Finance & Taxation Committee*, 48th Legislative Assembly (March 8, 1983) (Rep. Jack Murphy, testifying that the law "Would get the royalty back into hands who will make better use of it. If don't use for 20 years - lose it.").

[¶15] **2. The statute is self-executing.**

[¶16] Capps also assert that the statute is not self-executing because "a judicial determination is always going to be necessary to determine whether proper notice was given." (Brief, p. 11) This is contrary to this Court's recent statement in Peterson v. Jasmanka:

> The statutory procedure is wholly self-executing, and once the notice procedure under the statute is completed, title to the mineral interest vests in the surface owner as of the date of abandonment, without the necessity of a subsequent quiet title action. (Citations omitted)

Peterson v. Jasmanka, 2014 ND 40, ¶ 12, 842 N.W.2d 920. The reason for the notice after lapse is to allow the legal owner the opportunity to challenge the fact of the lapse itself - whether 20 years of non-use had occurred - but it does not allow the lapsed mineral interest owner to otherwise contest the self-executing extinguishment of the mineral interest. This distinction was explained by Short:

> [I]t is essential to recognize the difference between the self-executing feature of the statute and a subsequent judicial determination that a particular lapse did in fact occur. As noted by appellants, no specific notice need be given of an impending lapse. *If there has been a statutory use of the interest during the preceding 20-year period, however, by definition there is no lapse-whether or not the surface owner, or any other party, is aware of that use.* Thus, no mineral estate that has been protected by any of the means set forth in the statute may be lost through lack of notice.

Texaco, Inc., v. Short, 454 U.S. at 533-34 (*emphasis added*). The Capps ignore the distinction between the self-executing feature of the statute and a *subsequent* judicial determination.

[¶17] Capps also erroneously relies upon Tulsa Professional Collection Servs., Inc. v. Pope, 485 U.S. 478 (1988) as support for their due process/actual notice argument. Pope is inapposite and unhelpful in that its due process determination turned on the fact that the

court found state action in the involvement of the probate court in, among other things, appointing the executrix and in directing her to publish notice of the opening of the estate. Pope, 485 U.S. at 487-88. Here, there is no state action triggering a Mullane-type of due process. In Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306 (1950) at 307-320, a private person sought to employ court procedures to determine the property rights of others, specifically, the trustee sought *judicial approval* of its accounting so that the trust beneficiaries would be bound. *Id.* at 309-311. The Capps claim that filing the notice and publication papers with the County Recorder after the lapse is "state action" so that Mullane due process applies. (Brief, p. 12) However, simply recording documents with the Recorder cannot be called a "determination" of property rights so as to rise to the level of "state action". Rather, as this Court has noted,

> The fundamental purpose of the recording statutes is to protect potential purchasers of real property against the risk that they may be paying out good money to someone who does not actually own the property that he is purporting to sell. The recording acts operate by making the history of the title involved in a real estate transaction readily available to a prospective purchaser, and by providing that the history so disclosed by the record is binding upon a prospective purchaser whether he consults the record or not. (*Citations omitted*)

[¶18] Swanson v. Swanson, 2011 ND 74, ¶ 15, 796 N.W.2d 614. Recording documents is a ministerial action on the part of the County Recorder. *See, e.g.* Loran v. Iszler, 373 N.W.2d 870 (N.D. 1985). The Mountrail County Recorder had no discretion in recording the notice documents, and so there was no judicial "determination" of anyone's rights such as existed in Mullane or Pope. *See, e.g.* State ex rel. Standard Oil Co. v. Blaisdell, 22 N.D. 86, 132 N.W. 769 (N.D. 1911).

[¶19] **II. CONCLUSION**

[¶20] For all of the above reasons, the Weflens respectfully request that this Court reverse the district court, granting them summary judgment quieting title in them in and to the minerals in and under the subject property as a matter of law.

Dated this 16th day of July, 2014.

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[¶21] **CERTIFICATE OF SERVICE**

I, Richard P. Olson, attorney for Appellees and Cross-Appellants Weflen, do hereby certify that on the 16th day of July, 2014, copies of the REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS WEFLEN were served on the following by electronic mail transmission, per N.D. Sup.Ct. Admin. Order 14(D):

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I further certify that a copy of the REPLY BRIEF OF APPELLEES AND CROSS-APPELLANTS WEFLEN was deposited in the United States mail, postage prepaid, at Minot, North Dakota, and addressed to the following Appellee:

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[¶22] **CERTIFICATE OF COMPLIANCE**

I, Richard P. Olson, attorney for the Appellees and Cross-Appellants Weflen, do hereby certify that the above reply brief complies with all type-volume limitations as set forth in the North Dakota Rules of Appellate Procedure.

I further certify that the attached Reply Brief of Appellees and Cross-Appellants Weflen contains fewer than 2,000 words, and was prepared using WordPerfect 10.0, Times New Roman font, size 12.

Dated this 16th day of July, 2014.

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[¶23] **STATUTORY ADDENDUM**

***Hearing on H.B. 1084 before the Senate Finance & Taxation Committee*,**

48th Legislative Assembly (March 8, 1983)

Rep. Murphy - objection always was "unconstitutional"
This one passed supreme court of Indiana and Michigan and U.S. Very few people who sold mineral rights owned by landowner; others are by railroads, etc. This bill will locate many lost owners. People who do not even know they own these. Would get the royalty back into hands who will make better use of it. If don't use for 20 years-lose it.

Arthur Bauer, attorney, Bismarck. Involve with this type of bill for 10 years. "using" is defined in bill. If don't use (at least file statement of claim) then lose it. Very fair bill. Notice feature in this bill. Has amendment to engrossed bill - in favor even though it will cost him $10,000 for fees. No tax in this bill. Biggest cost will be recording fees - if they are not high enough. Amend to raise them. Could include mandatory title quiet. Sec.1 - very important definition of mineral interest - typographical error. Follow some type notice procedure and 12 in the House. He mentioned big loophole. Reviewed some states because don't like to take property from someone.

Jim Marsden, Farm Bureau. Answers concern many of our landowners have. Supports this bill.

Florence Holmes, Burleigh County Registrar of Deeds. Not in favor or opposed. Just need to use "recorded" instead of probably end up getting attorney opinions. Object only to research work not paid for. This bill does not do this. Same letters opposed but that was regarding Sec. 7 which has been deleted. That referred to "search".

Ron Soderberg, County Assn., No problem as amended.

Bernice Asbridge, Burleigh County. She raised question "What assurance is there you have aimed all interest back in surface owners name. Didn't understand reply.

Murphy: Reason for getting mineral interest back into surface owner, to get some use out of it.

COMMITTEE DISCUSSION: March 15, 1983

Arthur Bauer attended the meeting to anser question ant etc. He states the law fundamentally " the down of the state is still mineral, but face it - in ND the down of the state is still the surface. By law it isn't but in reality it is - emotionally. They discussed the expense of getting this 20 year activity. (4 tracts at 5$ each = $20 plus another $5 for labor) Not always would you need an attorney to prepare - just depends. All this discussion is on tape. He explained in anser to Sen. Adams question: If one party owns surface an others own mineral rights - the mineral rights owner would have to record them. They will be sent notice - if mineral rights owner does not receive it, or be notified or find out in some way - (he didn't finish sentence but Sen. Lee mentioned two year cushion). First part of his amendments is to clarify. People used to be opposed philosophical because giving from one to another. Action can't be by predecessor, has to be by present owner. (There is a lot of discussion on tape, which was not clear to me). He referred to 1st page, line 12, make sure this bill is re: severed owner - not taking away from surface owner - re: ambiguity makes it in conformity to preamble (line 1-5) This is to clarify. (this was a little unclear to me). Sen. Adams moved the amendment as was penned in on engrossed bill. A lot of the amendment was changing "file" to "record". Sen. Lee seconded the motion, Ken Jakes: question sec. 8 - will have to take a look at what happens in the 20 years. Re: retrospective statement. VOTE: All in favor. Reference was made to sending notice to paper and last shown address. Reference was made to "surface owner could take away mineral rights from mineral owner because of retro before 20 year are up. This was also not real clear to me. Would have to listen to tape to get it clear. Reference was made to the retrospective part of the act. VOTE: all in favor, except Sen. Wright. Sen. Adams assigned to the bill on the floor. (it was discussed earlier about getting it into a conference committee and Art Bauer coming and explaining it some more)

Proposed Amendments to H.B. 1084, submitted by Arthur C. Bauer

On page 1 in Section 1 after word "otherwise" insert the words "owned by a person other than the owner of the surface"

Reason: Although the preamble to the bill provides for the termination of mineral interests in land owned by persons other than the owners of the surface, the definition of mineral interest in Section 1 describes any interest in the minerals and a legal question of ambiguity could arise.

On page 2 in Section 3, Sub-Section 5 following the words "subject to an order or an agreement to", delete the words "an order or an agreement to"

Reason: The deleted words are repeated and are an obvious typographical error.

On page 3 in Section 5 delete lines 8 through 12 which is following: "Preserved or diligently tried to preserve, all of the mineral interests which were not being used, and within ten years prior to the end of the period provided in section 4, preserved other mineral interests in that county by filing a statement of claim"

Reason: In the Indiana statute, from which this bill is modeled, the notice provisions were applicable to only owners of one or more mineral interests. This bill provides for notice to owners of one or more mineral interests within a county. Should the above paragraph remain in the bill it would be impossible for a person owning only one mineral interest within a county to preserve other mineral interests in the county by filing a statement of claim.

On page 3 in Section 5, Sub-Section 4 following the numeral "6" delete the words "or within sixty days after receiving actual knowledge that the mineral interest has lapsed"

Reason: To allow the filing of a statement of claim within sixty days after receiving actual knowledge that the mineral interest had lapsed would provide a legal loophole in the bill large enough to hold a Greyhound bus.