

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. Weflan, 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

District Court No. 31-10-C-00009

**APPELLEES AND CROSS-
APPELLANTS, WINDSOR
BAKKEN, LLC AND GULFPORT
ENERGY CORPORATION'S
REPLY BRIEF**

ON APPEAL FROM THE DISTRICT COURT
NORTH CENTRAL JUDICIAL DISTRICT
MOUNTRAIL COUNTY, NORTH DAKOTA
THE HONORABLE DAVID W. NELSON

**APPELLEES AND CROSS-APPELLANTS, WINDSOR BAKKEN, LLC
AND GULFPORT ENERGY CORPORATION'S REPLY BRIEF**

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TABLE OF CONTENTS

	<u>Paragraph</u>
TABLE OF AUTHORITIES	ii-iii
STATEMENT OF THE CASE.....	1
LAW AND ARGUMENT	5
I. THE DISTRICT COURT ERRED WHEN IT INTERPRETED THE ACT TO REQUIRE NOTICE TO NELSON’S HEIRS	5
CONCLUSION.....	17

TABLE OF AUTHORITIES

Paragraph

North Dakota Cases

Estate of Christeson v. Gilstad,
2013 ND 50, ¶9, 829 N.W. 2d 303 5, 6, 8, 9

Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co.,
2011 ND 154, ¶ 15, 801 N.W.2d 677 8

North Dakota Statutes

N.D.C.C. § 1-05-05..... 12

N.D.C.C. § 11-18-01..... 7

N.D.C.C. § 11-28.2-02..... 12

N.D.C.C. § 20.1-03-01.3..... 12

N.D.C.C. § 24-06-29..... 12

N.D.C.C. § 30.1-12-01..... 8

N.D.C.C. § 30.1-20-01..... 8

N.D.C.C. § 32-19-20..... 12

N.D.C.C. § 32-19-25..... 11

N.D.C.C. § 35-22-03..... 12

N.D.C.C. § 35-27-24..... 12

N.D.C.C. § 38-11.1-03..... 12

N.D.C.C. § 38-11.1-04.1..... 13

N.D.C.C. Ch. 38-13.1-02 10

N.D.C.C. § 38-14.1-14(d)..... 12

N.D.C.C. Ch. 38-18.1 (2005)..... 1

N.D.C.C. § 38-18.1-06(2) (2005) 2

TABLE OF AUTHORITIES

	<u>Paragraph</u>
N.D.C.C. § 38-22-06.....	13
N.D.C.C. § 47-30.1-01(2).....	10
N.D.C.C. § 47-30.1-01(12).....	10
N.D.C.C. § 47-30.1-16.1.....	10

STATEMENT OF THE CASE

[¶1] The parties to this action disagree as to the proper interpretation of the 2006 version of the Termination of Mineral Interest Act (“Act”). N.D.C.C. Ch. 38-18.1 (2005).

[¶2] The surface owners, the Weflens, and those who claim an interest in the disputed minerals through the Weflens, urge this Court to interpret N.D.C.C. § 38-18.1-06(2)(2005) as requiring the surface owner to mail notice of termination to the address of the “record” owner of the effected minerals, if an address is shown. If that is done, as it was in this case, no other acts are required to fulfill the mailing requirement of the Act.

[¶3] The Hassans and the Capps, parties who claim an interest in the disputed minerals through the record owner, Ruth Nelson, urge this Court to hold that the Act’s use of the word “owner” cannot, as a matter of law, include any non-living person; and, as such, if the “record” owner of the minerals is not alive the surface owner must make reasonable inquiry as to deceased “record” owner’s heirs and their addresses for purposes of mailing the notice of termination.

[¶4] As is set out more fully below, the Capps’ and the Hassans’ interpretation of the Act is contrary to the Act’s clear language and is contrary to the North Dakota Legislative Assembly’s statutory framework for property ownership. The Legislative Assembly has determined that unless stated differently notice to the owner of record is the intended manner of providing notice. The interpretation urged by the Capps and the Hassans, which deviates from the statutory framework intended by the Legislature, if adopted by this Court, will lead to harmful, unintended consequences under the Act and in other areas of law, and as such, it should be rejected.

LAW AND ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT INTERPRETED THE ACT TO REQUIRE NOTICE TO NELSON'S HEIRS.

[¶5] The Reply Brief of Appellees and Cross-Appellants Weflen sets forth arguments in response to the Capps' claims that mailing notice to Nelson was invalid because she was deceased. Windsor joins in the Weflens' arguments. Windsor, however, wishes to highlight unintended consequences of this Court adopting the Capps' broad legal proposition that the North Dakota Century Code's use of the word "owner", as it relates to interests in real property, means only the "legal" owner and not the "record" owner, because, according to the Capps, dead people cannot own real property. (See Reply Brief of Appellants and Cross Appellees Patricia R. Capps and Terrel A. Anderson at p. 2.) The Capps contend the term "record owner" has "no support in statute and has come into existence only through specific circumstances stated in Estate of Christeson v. Gilstad. . ." (Id.) Based on this unsupportable position, the Capps contend that the use of the word "owner" in the Act cannot, as a matter of law, mean a deceased "record" owner because "[s]uch a person is neither an owner nor a "record owner." (Id.)

[¶6] The Capps' contention is not support by this Court's holding in Estate of Christeson v. Gilstad, 2013 ND 50, ¶9, 829 N.W. 2d 303, and it is not supported by the North Dakota Century Code's multiple references to record owners of real property. This Court should hold that unless the Legislative Assembly has stated differently, its use of the term "owner" means "owner of record."

[¶7] The Recorder in every county maintains a record "of each patent, deed, mortgage, bill of sale, security agreement, judgment, decree, lien, certificate of sale, and other instrument required to be filed or admitted to record..." N.D.C.C. § 11-18-01. The

records maintained by the Recorder include the identity of the owner of record of all real property located in the State of North Dakota.

[¶8] This Court has recognized ownership of real property passes upon death to a decedent's heirs. See N.D.C.C. §§ 30.1-12-01 and 30.1-20-01; Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co., 2011 ND 154, ¶ 15, 801 N.W.2d 677 (“[p]roperty passes upon death, not upon distribution”). Accordingly, this Court has explained that there can exist two “owners” of real property: the “record” owner based on the title records maintained by the County Recorder and the “legal owner” based on the automatic passing of property upon death. Gilstad, 2013 ND at ¶ 9.

[¶9] The Capps urge this Court to expand this holding. This Court should decline the request because the distinction between a “record” owner and a “legal” owner, as defined by the Court in Gilstad, is not well supported in the North Dakota Century Code. This distinction is primarily recognized in the Century Code in relation to abandoned property.

[¶10] N.D.C.C. § 47-30.1-01(2) recognizes in connection with unclaimed property under the Uniform Unclaimed Property Act that an “apparent owner” is the “person whose name appears on the records of the holder as the person entitled to property held, issued, or owing by the holder.” N.D.C.C. § 47-30.1-01(12) recognizes that an “owner” is a “person having a legal or equitable interest in property” In the context of minerals, the Uniform Unclaimed Property Act recognizes that any sum payable as mineral proceeds is properly considered abandoned if the owner has not claimed the proceeds. In determining whether the provisions of the Unclaimed Property Act apply, the holder is to use available information known about the “apparent owner.” N.D.C.C. § 47-30.1-16.1. If the apparent owner is deceased, and the owner cannot be located, the

property can be paid to the unclaimed property fund. Similarly, N.D.C.C. Chapter 38-13.1-02, Trusts for Unlocatable Mineral Owners, recognizes that in some situations the owner of minerals will not be locatable due to the death or other circumstances.

[¶11] The “record” owner and “legal” owner distinction is not otherwise widely recognized in the Code, except the Code does recognize, in the area of foreclosures, that if the record owner is deceased, service can be accomplished upon an estate. See N.D.C.C. § 32-19-25 (notice of foreclosure by action served upon the title owner of record or upon the personal representative of the owner’s estate).

[¶12] Although there is some support for the Court’s definition of “legal” ownership in the Century Code, the vast majority of statutes rely on the concept of the “owner of record” of real property. See N.D.C.C. § 1-05-05 (service on the record owner as part of foreclosure); N.D.C.C. § 11-28.2-02 (notice mailed to property owners of the district as recorded in the county treasurer’s office as part of meetings of recreation service districts); N.D.C.C. § 20.1-03-01.3 (exemptions to hunting statutes for record title owner); N.D.C.C. § 24-06-29 (notice of obstructions to be mailed to record owner of the adjacent property at the owner’s last-known address); N.D.C.C. § 32-19-20 (notice before foreclosure to be served on the title owner of record of the real estate); N.D.C.C. § 35-22-03 (notice of foreclosure by advertisement served on the record title owner); N.D.C.C. § 35-27-24 (notice of action to enforce construction lien to be served upon the record owner of the property by registered mail directed to the owner’s last known address); and N.D.C.C. § 38-11.1-03 (surface owner means person who holds record title to the surface of the land as an owner); and N.D.C.C. § 38-14.1-14(d) (notice of permit application

must list names and addresses of owners of record of all surface and subsurface areas adjacent to any part of the permit area).

[¶13] In situations where the Century Code uses the term “owner” without more as is the case here, the proper interpretation is “record” owner and not “legal” owner as urged by the Capps. This is especially true if the statute in question concerns providing notice. See N.D.C.C. § 38-11.1-04.1 (mineral developer must give notice to surface owner of drilling operations); and N.D.C.C. § 38-22-06 (notice of hearing must be given to each mineral owner).

[¶14] The Capps’ interpretation of the Act, if adopted by the Court, would radically change the meaning of these notice statutes and result in unintended consequences. First, because the records of the Recorder could not automatically be relied upon, the party trying to provide notice would have to determine whether the owner was alive or dead. This, at times, as it relates to minerals, will be a difficult determination. If the party trying to provide notice determines the record owner is deceased, then that party will necessarily need to determine the decedent’s heirs. The heirs may or may not be related to the decedent depending on whether he or she died intestate. Finally, the party trying to provide notice will necessarily have to try to determine how to contact the heirs. It is very possible that one of these steps will result in failure due to the lack of information.

[¶15] The Legislative Assembly did not intend for notice to be this difficult. It created the Recorder system so that notice would be easy to provide. In situations where it is absolutely necessary to determine the “legal” owner of minerals and other property, the Legislative Assembly set up a procedure in the event that owner could not be located. No

such procedure will exist concerning providing notice if the Capps' interpretation is adopted.

[¶16] Because the Capps' interpretation is contrary to the language of the Act and contrary to the statutory plan of the Legislature it should be rejected.

CONCLUSION

[¶17] This Court should reverse the District Court's Summary Judgment and grant Summary Judgment in favor of the Weflens.

Respectfully submitted this 17th day of July 2014.

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Sharon Kruse, a/k/a Sharon O. Kruse, a married
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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
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AFFIDAVIT OF SERVICE

