IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Douglas J. Meyer,	)	
Pamela C. Handley,	)	
Stephen T. Meyer,	)	
Andrea K. Meyer,	)	
Emil J. Meyer, Jr.,	)	
Plaintiffs and Appellants	)	
vs.	)	Supreme Court No. 20150170
	)	
Norman E. Engebretson,	)	
Sonja M. Eckert,	)	
Karen A. Bailey,	)	
Robert C. Engebretson,	)	
Stephanie C. McCall and Robert E.	)	**APPELLANTS' OPENING BRIEF**
McCall Trustees of the Stephanie C. McCall	)	
Living Trust dated December 21, 2010,	)	
Karen E. Smith Personal Representative	)	
of the Estate of Caryl E. Smith,	)	
Henry M. Hanson,	)	Appeal from Summary Judgment.
Dean C. Hanson,	)	"Order for Judgment" dated April 29, 2015
Angela Scott DeGrado,	)	Issued By: Judge David Nelson
Myrna Elletson,	)	Northwest Judicial District
Deanna Faye Asmus,	)	Williams County, North Dakota
Nancy Carlson,	)	Case No. 53-2013-CV-01313
Debra Neff,	)	
Kristen Giuseffi,	)	
Dennis Meyer,	)	
Christie Meyer,	)	
North Dakota Minerals, LLC.,	)	
Wilma Wiengart,	)	
Daniel Meyer,	)	
Sandra Spehar,	)	
Kay Malloy,	)	
Bruce R. Davis,	)	
Claude Dean Davis,	)	
Kelly Marie Fox Sikes,	)	
Michelle Annette Jefferson Oneil	)	
James Ghrames,	)	
John M. Pearsall,	)	
Jeanine Sanders Pearsall,	)	
David O. Pearsall,	)	
Oliver O. Pearsall,	)	
Gary P. Hytrek,	)	

Pamela C. Hytrek,)
Cheryl D. Hytrek,)
Barbara June Nisley,)
Fred Louise Orchard)
Eric J. (and Regina) Kaupanger,)
Elena M. Brady Trustee of the)
Mark A. Kaupanger 2008 Irrevocable)
Special Needs Trust)
Heir of Arthur M. Kaupanger,)
Sonja M. Nelson,)
Kristine Kaupanger,)
f/k/a Chris Ellis,)
Karen L. Kaupanger,)
Karlene R. Dahlmeier,)
Cynthia K. Kaupanger,)
Kurt Kaupanger,)
American Oil and Gas, Inc.)
Evertson Energy Partners Royalty, LLC)
Gary C. Stewart)
Ann Marie Urban)
LPI Holdings, LLC)
Eagle Pass Properties, LLC)
S&E Royalty, LLC)
Rose Exploration, Inc.)
William R. LaCrosse and Tammy LaCrosse)
Sundance Energy, Inc.)
XTO Energy, Inc.)
Whiting Oil and Gas Corporation)
Northern Oil and Gas, Inc.)
Morganthaler Oil and Gas Properties, LLC)
Triangle USA Petroleum Corporation)
Horizon Royalties, LLC)
OGR Bakken Resources, LLC)
Hess Corporation)
WM ND Energy Resources II, LLC)
and any individual or entity known and)
or unknown who may have or claim)
interest in mineral ownership in and to all)
oil gas and other minerals in the subject)
lands.)
Defendants and Appellees)

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] The sole issue for review is whether the District Court erred by failing to apply the rule of *Duhig v. Peavy-Moore Lumber Company*, 135 Tex. 503, 144 S.W.2d 878 (1940) (the "*Duhig* Rule"), to a conveyance of land when the grantor owned only 50% of the mineral rights and purported to reserve 50% of the mineral rights.

STATEMENT OF THE CASE

[¶2] Appellants Douglas Meyer, Pamela Handley, Stephen Meyer, Andrea Meyer and Emil J. Meyer, Jr. ("Emil's Heirs") are the children and heirs of Emil Meyer. They commenced an action in the District Court for the Northwest Judicial District, Williams County (the "District Court") to quiet title to mineral rights that Carl J. Meyer, their grandfather, conveyed to their father, Emil. APP- 317, ¶ 3. Various other individuals and entities with competing interests were named as defendants. A number of defendants filed counterclaims, asserting that their rights were superior to and free of the interests asserted by Emil's Heirs. APP- 317, ¶ 4.

[¶3] Both Emil's Heirs and a number of the defendants/counterclaimants (the "Challengers") filed motions for summary judgment.[1] The parties agreed that no

[1] The summary judgment motions and briefs filed by Emil's Heirs and other parties appear on the Register of Actions (APP-1 through APP-10) as follows: Emil's Heirs (Doc ID#s 120, 121, 153, 165); Defendant Whiting Oil and Gas Corporation (Doc ID#s 132, 136, 156, 167); Defendants/counterclaimants Northern Oil & Gas, Inc., Ann Urban, Rose Exploration, Inc., Triangle USA Petroleum Corporation, LPI Holdings, LLC, Eagle Pass Properties, LLC, John M. Pearsall, Jeanine Sanders, David O. Pearsall, John M. Pearsall as Personal Representative of the Estate of Oliver Pearsall, and William and Tammy LaCrosse (Doc ID#s 101, 102, 148); Defendant Hess Corporation (Doc ID#s

material facts were in dispute, but clashed on application of the *Duhig* Rule to the undisputed facts. APP-316, ¶ 1. The District Court denied the motion of Emil's Heirs and granted the motions filed by the Challengers, in its Order Regarding Motions for Summary Judgment and to Amend, dated April 15, 2015 ("SJ Order"). APP -313, ¶ 5. On April 28, 2015, the District Court issued an Order for Judgment, which expanded its reasoning. APP -314. Judgment entered on April 29, 2015. APP -327. Emil's Heirs filed a Notice of Appeal in this Court on June 9, 2015. APP -330.

STATEMENT OF FACTS

[¶4] Carl J. Meyer obtained the land concerned in this action (the "Subject Lands")[2] from Horace E. Johnson and Ida A. Johnson (the "Johnsons") and Harris W.B. Hanson and Mildred J. Hanson (the "Hansons") by Warranty Deed dated April 30, 1947, recorded May 5, 1947, in Book 92, Page 135, Williams County Register of Deeds. The Warranty Deed reserved 25% of the mineral rights to the Johnsons and 25% to the Hansons. APP-317, ¶ 5. Through this Warranty Deed, Carl J. Meyer thus obtained the Subjects Lands and 50% of the corresponding mineral rights.

(footnote 1, cont.)

110, 142, 161, 163); Defendants/counterclaimants Eric J. (and Regina) Kaupanger, Elena M. Brady Trustee of the Mark A. Kaupanger 2008 Irrevocable Special Needs Trust, Heirs of Arthur M. Kaupanger, Sonja M. Nelson, Kristiane Kaupanger, fka Chris Ellis, Karen L. Kaupanger, Karlene R. Dahlmeier, Cynthia K. Kaupanger, and Kurt Kaupanger (Doc ID#s 130, 144, 150); Defendant/counterclaimant XTO Energy, Inc. (Doc ID# 146).

[2] The legal description of the Subject Lands, located in Williams County, is Township 157 North, Range 96 West, 5th P.M. Section 28: S½SW¼, NE¼SW¼, SW¼SE¼ containing 160.00 acres, more or less.

[¶5] In an Agreement dated October 1, 1949, recorded August 9, 1951, in Book 11m, Page 551, Williams County Register of Deeds (the "Agreement"), Carl J. Meyer and his wife, Christiana, agreed to convey the Subject Lands to Emil and his wife, Helen, by a "deed for said land containing covenants warranting said title against all conveyances, liens and encumbrances, … excepting and reserving unto [the grantors] fifty percent (50%) of the minerals, rocks, ores, coal, oils and gas upon or beneath the surface of said land, or any part thereof, to be delivered to [the grantors] free from cost, and reserving to [the grantors] the right to remove the same and to enter upon this said land for these purposes…." APP- 317, ¶ 6.

[¶6] Carl J. Meyer died before he could honor the Agreement. Accordingly, an Order Directing Conveyance in Fulfillment of Contract Made Prior to Death, dated May 3, 1961, recorded April 2, 1962, in Book 110m, Page 475, Williams County Register of Deeds, ordered Agnes Pearsall, the executrix of his estate, "specifically to perform said agreement" by conveying the Subject Lands to Emil "according to the terms of said agreement." APP-318, ¶ 7. The executrix subsequently delivered to Emil an Executrix' Deed, dated May 5, 1961, recorded April 2, 1962, in Book 145, Page 481, Williams County Register of Deeds (the "Executrix Deed"), granting to Emil "all the right, title, interests and estate of the said Carl J. Meyer, decedent, at the time of his death, … in and to" the Subject Lands, "[e]xcepting and reserving to the Grantor, his heirs and assigns, 50% of all oil, gas and other minerals in and under and that may be produced from said lands, with full right of ingress and egress to search for and to mine and produce the same." APP- 319, ¶ 8.

[¶7] An Order Confirming Conveyance of Real Estate Sold Under Contract, dated February 20, 1968, "confirmed, approved, and declared valid" the conveyance to Emil, further reciting that it "shall pass the title to the estate contracted for as fully as if the contracting party himself still were living and had executed the conveyance."[3]

[¶8] A Final Decree of Distribution dated July 9, 1962 (the "Final Decree"), provided that Carl J. Meyer's estate had been fully administered, and governed distribution of the residue. One of its clauses provided that 25% of the mineral interests in the Subject Lands would pass to the ten siblings of Emil Meyer and his brother, Carl R. Meyer (the "Cousins").[4] The Challengers' claims derive from Carl J. Meyers' purported reservation of 50% of the mineral rights in the Subject Lands and the conveyance of the residue of Carl's estate to the Cousins in the Final Decree. APP-319, ¶ 9.

ARGUMENT

[¶9] "Whether a district court properly granted summary judgment is a question of law, which [this Court reviews] de novo on the record." *Johnson v. Finkle*, 2013 ND 149, ¶11, 836 N.W.2d 444. The District Court misinterpreted governing law when it ruled in favor of the Challengers.

[¶10] The District Court judge ruled that the *Duhig* Rule does not apply to the conveyance from Carl J. Meyer's estate to Emil because he was "convinced that the

[3] A copy of this order, recorded February 26, 1968, in Book 143, Page 385, Williams County Register of Deeds, is attached as Exhibit G to Plaintiffs' Motion for Summary Judgment. (Doc ID# 128).

[4] A copy of the Final Decree is attached as Exhibit A-5 to Defendant Hess Corporation's Memorandum of Law in Support of Its Motion for Summary Judgment. (Doc ID# 116).

Court's reasoning as set out in *Wald[o]ck v. Amber Harvest Corp., et al*., 2012 ND 180, 820 N.W.2d 755 is applicable." APP-313, ¶ 5. In fact, nothing in *Waldock* supports the District Court's grant of summary judgment against Emil's Heirs. *Waldock* reaffirmed the continuing validity of *Duhig* and its North Dakota progeny where, as here, there was an attempted overconveyance of a mineral interest. *Waldock*, ¶ 8.

1. The District Court ignored the crucial difference between this case and *Waldock*.

[¶11] This Court adopted the *Duhig* Rule long ago and has applied it many times, as the cases discussed below demonstrate. In one of these cases, this Court described the underlying facts in *Duhig* as follows:

> In *Duhig*, a third party owned an outstanding ½ mineral interest in certain land and the grantor owned the surface and the remaining ½ mineral interest. The grantor conveyed the surface to the grantee by warranty deed with a reservation of ½ interest in all the minerals under the surface. The grantor and grantee both claimed the ½ mineral interest that was not owned by the third party. The Texas Supreme Court concluded that the grantee owned the surface and a ½ mineral interest, the third party owned the outstanding ½ mineral interest, and the grantor owned nothing.

Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 479 (N.D. 1991). The conveyance from Carl J. Meyer's estate to Emil in the Executrix Deed is exactly the same, as illustrated by substituting the names of the Johnsons and Hansons for the third party, Carl J. Meyer (now, the Challengers) for the grantor and Emil Meyer (now, Emil's Heirs) for the grantee in the same description, as follows:

> In **this case** the **Johnsons and Hansons** owned an outstanding ½ mineral interest in certain land and **Carl J. Meyer** owned the surface and the remaining ½ mineral

> interest. **Carl J. Meyer** conveyed the surface to **Emil Meyer** by warranty deed[5] with a reservation of ½ interest in all the minerals under the surface. **Carl J. Meyer** and **Emil Meyer** both claimed the ½ mineral interest that was not owned by the **Johnsons and Hansons**. The Texas Supreme Court concluded that **Emil Meyer** owned the surface and a ½ mineral interest, the **Johnsons and Hansons** owned the outstanding ½ mineral interest, and **Carl J. Meyer** owned nothing.

[¶12] The principle underlying *Duhig* is that a grantor cannot both convey and reserve all of his mineral interests when he conveys the surface lands. Such an attempt results in an unacceptable overconveyance. Thus, as in *Duhig* and this case, if the grantor owns only 50% of the mineral rights, he cannot both convey and reserve 50% of the mineral rights. Where, as in *Duhig* and this case, there is a "conflict between grant and reservation clauses," the grant "must be satisfied first because the obligation incurred by the grant is superior to the reservation." *Acoma Oil*, 471 N.W.2d at 480. The "key question" in construing the Executrix Deed is "not what the grantor purported to retain for himself, but what he purported to give the grantee." *Miller v. Kloeckner*, 1999 ND 190, ¶ 17, 600 N.W.2d 881, quoting 1 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 311, p. 580.36 (1998) (internal quotation marks omitted).

[¶13] The District Court ignored a crucial difference between *Duhig* and this case, on the one hand, and *Waldock*, on the other, when it found that *Waldock* applied to the transfer from Carl J. Meyer's estate to Emil. There was no attempted overconveyance of mineral rights in *Waldock*, because there was no conflict between the grant and reservation clauses in the deed.

[5]Although the Agreement to transfer the Subject Lands to Email referred to a warranty deed, the Executrix Deed did not warrant title. Application of the *Duhig* Rule is not confined to warranty deeds, as discussed *infra* at ¶ 40.

[¶14] *Waldock*, like this case, involved a deed from a decedent's estate. Mr. Edwardson, like Carl J. Meyer, owned land and 50% of the corresponding mineral interests. When the land was transferred from his estate, however, the estate reserved only a 25% interest. *Waldock*, ¶ 1. The plaintiff in *Waldock* was the grantee's successor, who claimed that he was entitled to the entire 50% mineral interest, despite the estate's reservation of 25%. This Court affirmed the trial court's grant of summary judgment in favor of the estate, finding that plaintiff Waldock did not have any interest in the 25% reserved to the estate in the administrator's deed. *Waldock*, ¶¶ 1, 3.

[¶15] In this case, as in *Waldock*, the grantor estate owned only 50% of the mineral interests in the land conveyed. In this case, unlike in *Waldock*, the estate purported to reserve the entire 50%—just as the grantor had purported to do in *Duhig*. This resulted in an overconveyance which was ineffective under *Duhig*.

[¶16] Consequently, the Final Decree from which the Challengers' claims derive was ineffective to transfer *any* mineral rights to the Cousins. The Final Decree recited that Carl J. Meyer's estate had been fully administered. In administering the estate, the Executrix already had conveyed to Emil *all* of the mineral interests in the Subject Lands that Carl J. Meyer had owned at the time of his death, by operation of the *Duhig* Rule. The Final Decree dealt only with the residue that remained following administration. The residue of Carl J. Meyer's estate did not include *any* mineral interests in the Subject Lands to which the Cousins could succeed.[6]

[6] It is interesting that the Final Decree did not even purport to convey the entire 50% that the estate had owned prior to the transfer to Emil, referring instead to a 25% interest. Apparently, the drafter of the Final Decree believed that the reservation of 50%

[¶17] In summary, the facts in this case are on all fours with *Duhig*. The Executrix Deed purported to convey and reserve all of Carl J. Meyer's mineral interests, resulting in an impermissible overconveyance. The reservation at issue in *Waldock* was of only half of the grantor's mineral interests, and did not result in overconveyance.

2. The location of the reservation clause in the Executrix Deed is immaterial.

[¶18] In ordering the Challengers to submit a proposed order, the District Court gave them the opportunity to expand on its cryptic reference to *Waldock* in the SJ Order and explain precisely why *Waldock's* reasoning should apply to this case, despite its divergent fact pattern. Instead of acknowledging and trying to explain the crucial difference between the percentage interests reserved in the Executrix Deed and the percentage interests reserved in the deed in *Waldock,* the Order for Judgment simply ignored the difference entirely, describing the language of the Executrix Deed as "nearly identical to the language of the deed in *Waldock*." APP- 321, ¶ 12.

[¶19] The District Court focused on a meaningless similarity between the deed in *Waldock* and the Executrix Deed. The order drafted by the Challengers and adopted by the District Court emphasized that, in both deeds, the reservation of mineral rights was contained in the granting clause of the deed. APP-321, ¶ 13 (describing deed in *Waldock*); APP-322 *et seq*., ¶¶ 14, 15 (describing Executrix Deed); APP-324 *et seq*., ¶¶17- 19 (discussing placement of reservation). Although this statement is true, it does not preclude application of *Duhig* Rule. The attempted reservation of mineral rights was

(footnote 6, cont.)

of the mineral rights in the Executrix Deed referred to *half* of the 50% that Carl J. Meyer had owned. Thus, although the Challengers claim 50% of the mineral rights, they could not be entitled to any more than 25% under the Final Decree, even if *Duhig* did not apply here.

contained in the granting clause in several cases in which this Court has applied the *Duhig* Rule.

[¶20] In *Miller v. Kloeckner, supra,* this Court construed a nearly identical deed and reached the result advanced by Emil's Heirs. The deed in *Miller* provided that "[W.V. Hron] does hereby GRANT, BARGAIN, SELL AND CONVEY unto [Benjamin Huether] his heirs and assigns, FOREVER," the described lands, reserving to Mr. Hron, "his heirs, successors and assigns fifty (50) per cent of all the oil, gas, and mineral rights contained in said land." *Miller*, ¶ 2 (brackets in original). The Executrix Deed "granted, bargained, sold and conveyed, and by these presents does grant, bargain, sell and convey" to Emil and "his heirs and assigns, forever, all the right, title, interest and estate of" Carl J. Meyer in the Subject Lands, "[e]xcepting and reserving to the Grantor, his heirs and assigns, 50% of all oil, gas, and other minerals in and under and that may be produced from said lands…." Like Carl J. Meyer, Mr. Hron "owned the entire surface estate and one-half of the mineral estate in the subject tract." *Miller*, ¶ 2.

[¶21] This Court affirmed summary judgment in favor of the grantee— the person in the position of Emil's Heirs—because the deed "purported to convey a one-half interest in the minerals and reserve a one-half interest in the minerals when W.V. Hron owned only a one-half interest in the minerals." *Miller*, ¶ 18. This is precisely the situation in this case.

[¶22] *Miller* relied in part on *Kadrmas v. Sauvageau,* 188 N.W.2d 753 (N.D. 1971). The deed examined in *Kadrmas,* "*immediately following* the description of the land[,] contained the following exception and reservation—'excepting and reserving unto the

grantors one-half (1/2) of all oil, gas, Uranium [capitalized in original] and all other minerals, together with the right of ingress and egress at all times for the purpose of mining, drilling, exploring, developing and marketing the said oil, gas, uranium [lower case in original], and all other minerals on'" the land. The grantors, Mr. and Mrs. Sauvageau, like Carl J. Meyer, "owned only one-half of the minerals, the other one-half belonging to the State of North Dakota." *Id*. at 754 (emphasis added). This Court affirmed judgment in favor of the parties in the position of Emil's Heirs, finding that the language in the deed "is plain and unambiguous," and that the Sauvageaus thereby conveyed, "aside from the surface of the land, a one-half interest in and to the minerals contained therein." *Id*. at 755.

[¶23] In this case, in *Waldock*, in *Miller* and in *Kadrmas*, the reservation was contained in the granting clause of the deed. The *Duhig* Rule was applied in *Miller* and *Kadrmas*, and should have been applied in this case. The distinction between these cases and *Waldock* was not in the *location* of the reservation of mineral rights, but in the *amount* of rights the grantor purported to reserve.

[¶24] Aside from *Waldock*, the only authority the District Court cited to support its reliance on the location of the reservation within the deed was *Royse v. Easter Seal Soc'y*, 256 N.W.2d 542 (N.D. 1977). *Royse* had nothing to do with mineral rights, or the *Duhig* Rule.

[¶25] At issue in *Royse* was the validity of an attempted reservation of an easement. The attempted reservation was contained in the deed's covenant against encumbrances. The *Royse* Court made two related findings. First, it found that the reservation did not

describe the easement "with enough certainty so that it can be identified as to location." The Court continued: "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." Based on these findings, the Court held that "exceptions or exclusions of property should be set forth in the granting clause with the same prominence as the property granted, *or, if placed elsewhere,* should be so explicit as to leave no room for doubt." *Id*. at 545 (emphasis added).

[¶26] The italicized language in *Royse* belies the District Court's description of *Royse* as holding "that for a reservation or exception to be effective against the grant, the reservation or exception *must be contained in the granting clause*." APP- at 322, ¶ 13 n. 1 (emphasis added). *Royse* held that a sufficiently clear reservation could be placed anywhere in the deed.

[¶27] *Waldock* itself does not cite *Royse* for the principle espoused in the Order for Judgment. *Waldock* described *Royse*, accurately, as "stating that to constitute an exception to a grant, [the] exception must be an exception to the grant and not an exception to some other provision of the deed." *Waldock*, ¶ 12. *Waldock* appears to be the only North Dakota case that cites both *Royse* and *Duhig*.

[¶28] Even if *Royse* had held that a reservation must be in the granting clause to be effective against the grantee, it does not follow that each and every reservation contained in a granting clause automatically is effective. For example, as *Royse* illustrates, a reservation is not effective if it does not describe the reserved property in sufficient detail. It stands to reason that, where there is another problem with the reservation—

where, as here, it violates a principle as deeply imbedded in North Dakota law as the *Duhig* Rule—it also cannot be effective against the grant. This is the teaching of *Duhig* and all of the North Dakota cases that follow it.

[¶29] In summary, it is of no legal significance that Carl J. Meyer's attempted reservation of all of the mineral rights he owned was contained in the granting clause of the Executrix Deed. Case law indicates that this is not an uncommon occurrence, and does not preclude application of the *Duhig* Rule to invalidate the attempted reservation.

3. Carl J. Meyer's grant of the Subject Lands included the corresponding mineral interests.

[¶30] *Waldock* acknowledged the continuing validity of the *Duhig* Rule:

> The *Duhig* rule says that where a grantor conveys land in such a manner as to include 100% of the minerals, and then reserves to himself 50% of the minerals, the reservation is not operative where the grantor owns only 50% of the minerals. The deed is construed as undertaking the transfer of 50% of the minerals to the grantee. Both this grant and the reservation cannot be given effect, so the grantor loses because the risk of title loss is on him.

Waldock, ¶ 8 (citations and internal quotation marks omitted).

[¶31] In contravention of this rule, the Order for Judgment focuses on the reservation in the Executrix Deed without first giving effect to the grant. The District Court held that "the Executrix Deed expressly reserved and excepted 50% of the minerals in and under the Subject Lands" and that this 50% interest remained in the estate following the grant of the Subject Lands to Emil in the Executrix Deed. APP- 321 *et seq*., ¶¶ 12, 15. The Order for Judgment incorrectly presumes that a deed conveys only the land it describes, and not the corresponding mineral rights.

[¶32] In *Waldock*, this Court found that the deed from Mr. Edwardson's estate "conveyed Edwardson's interest in the property at the time of his death, *which undisputedly included 50 percent of the mineral interests*, and excepted and reserved to his Estate 25 percent of the mineral interests." *Waldock*, ¶ 12 (emphasis added). The key concept recognized in this statement is that the grant of real estate in a deed includes the grantor's mineral interests. If this were not the case, reservations would not be necessary.

[¶33] In *Waldock*, in *Duhig*, and in this case, the grantor owned a 50% mineral interest, which was conveyed with the land. The reservation of *some* of the grantor's mineral rights could be given effect in *Waldock*, because Edwardson's estate reserved only *some* of the rights it owned. The reservation could not be given effect in *Duhig*, and cannot be given effect in this case, because the grantor attempted to reserve the entire interest he owned. The reservation was inconsistent with the grant.

[¶34] *Sibert v. Kubas*, 357 N.W.2d 495 (N.D. 1984), confirms the principle that mineral rights pass with the land, absent a *valid* reservation. Mary Stuss owned "the entire surface and the remaining one-half interest in the minerals," just as Carl J. Meyer had owned the Subject Lands and the remaining one-half interest in the minerals after the conveyance from the Hansons and the Johnsons. Mary "conveyed the property to David and Patricia by a warranty deed which contained the following reservation: '...excepting and reserving unto the grantor one-half (1/2) of all oil, gas and all other minerals, ...'" Examining this attempted reservation, this Court observed:

> It is well settled that a conveyance of land, without any exception or reservation of the minerals constitutes a conveyance of 100 percent of the minerals as well as the surface. *Consequently, when a grantor conveys, by warranty deed, the entire*

> *surface, excepting and reserving 50 percent of the minerals, he thereby warrants title to and conveys 50 percent of the minerals to the grantee.*

Id. at 496 (emphasis added). The Executrix Deed, also, conveyed the entire surface, "excepting and reserving" 50 percent of the minerals. Like the deed in *Sibert*, it thus conveyed 50 percent of the minerals to Emil.

[¶35] The *Sibert* Court "conclude[d] that the 1970 deed unambiguously warranted title to and conveyed the entire surface and one-half of the minerals in the property to David and Patricia," and disallowed the claim of the party in the Challengers' position, who claimed mineral rights under the reservation clause. *Id*. at 498. The District Court should have reached the same result in this case.

[¶36] The deeds in *Miller* and *Kadrmas*, similarly, were construed as conveying *with the land* the entire 50 percent mineral interest the grantor had held, despite his attempted reservation of a 50 percent interest. The *Kadrmas* Court observed the "well-established rule that a general conveyance of land, without any exception or reservation of the minerals therein, carries with it the minerals as well as the surface." 188 N.W.2d at 755, citing 54 Am.Jur.2d Mines and Minerals, Sec. 108; 58 C.J.S. Mines and Minerals, Sec. 146 b; 3 American Law of Mining, Sec. 15.13. This Court found that the deed "conveyed to the Kadrmases the whole of the lands described, excepting only a one-half mineral interest. In other words, the Sauvageaus conveyed, under warranty of title, *aside from the surface of the land, a one-half interest in and to the minerals contained therein*." Id. (emphasis added). The *Miller* Court observed that "[u]nder *Duhig*, a grantee receives 'that percentage or fractional interest in the land not reserved to the grantor, *since the deed purports to deal with 100% of the minerals*." *Miller*, ¶ 9, quoting 1 Patrick H.

Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law* § 311, p. 580.39 (1998).

[¶37] The Challengers may attempt to distinguish these cases by taking phrases out of context. *Waldock* explained that *Duhig* applies "where a grantor conveys land in such a manner as to include 100% of the minerals," and *Miller* referred to a deed that "purports to deal with 100% of the minerals." *Sibert* and *Kadrmas* referred to a conveyance of land "without any exception or reservation of" minerals. The Challengers may argue that the Executrix Deed did not convey the Subject Lands "in such a manner as to include 100% of the minerals" because it does not specifically grant mineral rights; the only mention of mineral rights is in the reservation. Thus, they may reason, the deed is not subject to the rulings in *Sibert* and *Kadrmas* because it does contain an "exception or reservation of minerals." This appears to be the reasoning adopted by the District Court in its reference to "what the grantor purported to convey to the grantee." APP- 323, ¶ 16.

[¶38] The problem for the Challengers is that *none* of the deeds in these cases specifically included mineral rights in the granting clause. As in the Executrix Deed, the only mention of mineral rights was in the attempted reservation. All of these cases held the reservations to be invalid. There was no valid reservation, not because the grantor did not attempt one, but because the attempted reservation was not *effective* under *Duhig*. These decisions both illustrate and support the proposition that mineral rights accompany a conveyance of the land by operation of law, absent a valid and enforceable reservation.[7]

[7]This result is consistent with North Dakota statutes. "A fee simple title is presumed to be intended to pass by a grant of real property unless it appears from the

[¶39] Nothing in *Waldock* indicates that this Court intended the drastic departure from this proposition that the Order for Judgment effects. Indeed, *Johnson v. Finkle,* decided a year after *Waldock,* cited *Sibert* and *Miller* for the proposition that "[c]onveyance of land without any exceptions or reservations constitutes conveyance of all of the surface and minerals," so that a deed "that describes the land conveyed and reserves 1/4 of the minerals in the grantors, conveys and warrants title *to the entire surface and 3/4 of the minerals*." *Johnson, supra*, ¶13 (emphasis added). *Johnson* applied the *Duhig* Rule to the deed, reiterating the principle that, when a grant and reservation are inconsistent, "the grant must be satisfied first." *Johnson*, ¶ 19. In this case, too, the grant must be satisfied first. The District Court, in adopting the Challengers' reasoning, put the cart before the horse.

[¶40] While reaffirming the continuing validity of the *Duhig* Rule, *Waldock* also clarified that "the label of the deed is not controlling. Rather, the specific language of the granting clause of the deed controls the interests the grantor purported to give the grantee." *Waldock*, ¶ 10. Thus, it does not matter that the Executrix Deed was not a warranty deed, even though some of the cases refer to warranty of title in applying *Duhig*. In *Miller*, this Court noted that, "[a]though *Duhig* involved a general warranty

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(footnote 7, cont.)

grant that a lesser estate was intended." NDCC 47-10-13. "The owner of land in fee has the right to the surface and to everything permanently situated beneath or above it." NDCC 47-01-12. "A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has unless a different intention is expressed or is necessarily implied." NDCC 47-09-16. "Every grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under him." NDCC 47-10-08.

deed, … a *Duhig* result may be reached with a limited warranty or no warranty." *Miller*, ¶¶ 13, 16. *Waldock* cited both *Miller* and *Gawryluk v. Poynter*, 2002 ND 205, ¶ 17, 654 N.W.2d 400, in which this Court quoted with approval a Texas case that applied *Duhig* "to a deed with no warranty." *Gawryluk*, ¶ 17 (citation omitted).

CONCLUSION

[¶41] The District Court misconstrued the *Duhig* Rule in honoring the reservation clause in the Executrix Deed. The deed granted the Subject Lands and all of Carl J. Meyer's mineral interests to Emil. Emil's Heirs respectfully request that this Court reverse the District Court's grant of summary judgment in favor of the Challengers and direct the District Court to enter summary judgment in favor of Emil's Heirs, quieting title to 50 percent of the mineral interests in the Subject Lands in Emil's Heirs.

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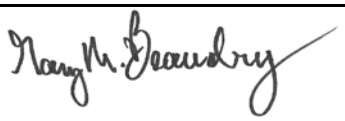

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Douglas J. Meyer,	)	
Pamela C. Handley,	)	
Stephen T. Meyer,	)	
Andrea K. Meyer,	)	
Emil J. Meyer, Jr.,	)	
Plaintiffs and Appellants	)	
vs.	)	Supreme Court No. 20150170
	)	
Norman E. Engebretson,	)	
Sonja M. Eckert,	)	
Karen A. Bailey,	)	
Robert C. Engebretson,	)	
Stephanie C. McCall and Robert E.	)	**CERTIFICATE OF SERVICE**
McCall Trustees of the Stephanie C. McCall	)	
Living Trust dated December 21, 2010,	)	
Karen E. Smith Personal Representative	)	
of the Estate of Caryl E. Smith,	)	
Henry M. Hanson,	)	
Dean C. Hanson,	)	
Angela Scott DeGrado,	)	
Myrna Elletson,	)	
Deanna Faye Asmus,	)	
Nancy Carlson,	)	
Debra Neff,	)	
Kristen Giuseffi,	)	
Dennis Meyer,	)	
Christie Meyer,	)	
North Dakota Minerals, LLC.,	)	
Wilma Wiengart,	)	
Daniel Meyer,	)	
Sandra Spehar,	)	
Kay Malloy,	)	
Bruce R. Davis,	)	
Claude Dean Davis,	)	
Kelly Marie Fox Sikes,	)	
Michelle Annette Jefferson Oneil	)	
James Ghrames,	)	
John M. Pearsall,	)	
Jeanine Sanders Pearsall,	)	
David O. Pearsall,	)	
Oliver O. Pearsall,	)	
Gary P. Hytrek,	)	

Pamela C. Hytrek,)
Cheryl D. Hytrek,)
Barbara June Nisley,)
Fred Louise Orchard)
Eric J. (and Regina) Kaupanger,)
Elena M. Brady Trustee of the)
Mark A. Kaupanger 2008 Irrevocable)
Special Needs Trust)
Heir of Arthur M. Kaupanger,)
Sonja M. Nelson,)
Kristine Kaupanger,)
f/k/a Chris Ellis,)
Karen L. Kaupanger,)
Karlene R. Dahlmeier,)
Cynthia K. Kaupanger,)
Kurt Kaupanger,)
American Oil and Gas, Inc.,)
Evertson Energy Partners Royalty, LLC,)
Gary C. Stewart,)
Ann Marie Urban,)
LPI Holdings, LLC,)
Eagle Pass Properties, LLC,)
S&E Royalty, LLC,)
Rose Exploration, Inc.,)
William R. LaCrosse and Tammy LaCrosse,)
Sundance Energy, Inc.,)
XTO Energy, Inc.,)
Whiting Oil and Gas Corporation,)
Northern Oil and Gas, Inc.,)
Morganthaler Oil and Gas Properties, LLC,)
Triangle USA Petroleum Corporation,)
Horizon Royalties, LLC,)
OGR Bakken Resources, LLC,)
Hess Corporation,)
WM ND Energy Resources II, LLC,)
and any individual or entity known and)
or unknown who may have or claim)
interest in mineral ownership in and to all)
oil gas and other minerals in the subject)
lands.)
Defendants and Appellees)

I, the undersigned, hereby certify that on July 29, 2015, the following:

1. APPELLANTS' OPENING BRIEF
2. APPENDIX TO APPELLANTS' OPENING BRIEF

were served electronically upon the Appellees by email to the following attorneys :

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7. Myrna Elletson,
8. Robert C. Engebretson,
9. Henry M. Hanson,
10. Kay Malloy,
11. Dennis Meyer,
12. Christie Meyer,
13. Debra Neff,
14. Dean C. Hanson,
15. Kristen Giuseffi,

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3. XTO Energy, Inc.,
4. Triangle USA Pet. Corp.,
5. Ann Marie Urban,
6. William R. LaCrosse and Tammy LaCrosse
7. Northern Oil & Gas, Inc.,

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3. Rose Exploration, Inc.,
4. Jeanine Sanders,
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HESS Corporation.

Dated this 29th day of July, 2015.

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