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STATE OF NORTH DAKOTA

Supreme Court No. 20160007
District Court No. 07-08-C-00047

STATE OF NORTH DAKOTA

In the Supreme Court

Ronnie L. Nelson,

Plaintiff/Appellant,

vs.

McAlester Fuel Company, All Unknown Heirs of McAlester Fuel Company and all Other Persons Unknown Claiming and Estate or Interest In or Lien or Encumbrance upon the Property Described in the Complaint,

Defendants/Appellees

On appeal from an Order of Dismissal dated September 9, 2015 of the District Court of Burke County in the North Central Judicial District from the Honorable Gary H. Lee

BRIEF OF APPELLANT.

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II. **Whether the District Court Erred when It Held a Surface Owner Quieting Title had not Strictly Complied with the Notice Requirements of North Dakota's Lapse Mineral Interest Statute**.

STATEMENT OF THE CASE

[¶ 1] On December 4, 2008, Ronnie Nelson (hereinafter "Nelson") by and through his attorney of record, John Steinberger, filed an action for quieting title on 108 mineral acres located in the county of Burke, state of North Dakota. (App. at 5). The action was against the named Defendants, McAlester Fuel Company (hereinafter "McAlester") for 108/479th mineral interest for a net mineral acreage of 108 acres. (App. at 5). Pursuant to chapter 38-18.1 of the North Dakota Century Code, Nelson mailed a notice of the claim to the address of record, published the notice and summons in the legal notices of the county in which land is situated and attempted to locate the previous mineral holder with personal service. (App. at 5).

[¶ 2] Nelson published a notice of lapse of mineral interest against McAlester on three consecutive weeks in the county newspaper of records, the Burke County Tribune. The dates of publication were January 31, February 7 and February 14, 2007. (App. at 5). The notice of the publication was then mailed to McAlester at the address noted of record, which was a post office box numbered 210 in Magnolia, Arkansas. (App. at 5).

[¶ 3] A notice of no personal claim was filed with the district court against McAlester by Nelson on December 4, 2008. (R. at 2). McAlester filed a subsequent notice of claim to the minerals on April 4, 2016, which is not a part of the record of this case. Pursuant to the statute governing the quieting of title on mineral acres, Nelson attempted to have McAlester Fuels personally served by the sheriff's department of Burke County. Service was attempted, but not effectuated due to the inability of the department to located McAlester Fuels. (App. at 5). The returned sheriff's affidavit of service was filed with the district court on December 4, 2008. (R. at 4).

[¶ 4] In response to the inability to locate McAlester Fuels by the sheriff's department, attorney John Steinberger then prepared and signed an affidavit for publication. (R. at 5). Steinberger's affidavit contained the last known address of McAlester which was a post office box in Magnolia, Arkansas. (R. at 5). Steinberger's affidavit for publication was signed on December 5, 2008 and filed on December 9, 2008. (R. at 5).

[¶ 5] Steinberger also mailed via certified mail a copy of the pertinent documents including the summons, complain, affidavit of service, sheriff's return, affidavit for publication and notice of no personal claim to McAlester on December 18, 2008. (R. at 6). The affidavit was filed with the district court on December 24, 2008. (R. at 6).

[¶ 6] Steinberger received a certified mail receipt from the United States postal service indicating the certified mail was not able to be delivered or forwarded. (R. at 7). The receipt was filed with the district court on January 15, 2009. (R. at 7).

[¶ 7] On December 17, 24 and 31, 2008, the Burke County Tribune ran a copy of the Summons and Notice of No Personal Claim for three consecutive weeks as required by the governing statute. A copy of the affidavit of publication and corresponding legal notice were filed with the district court on February 3, 2009. (R. at 8).

[¶ 8] On February 3, 2009, Nelson then filed for default judgment and filed the appropriate documents including the affidavits of mailing, publication, proof, default and lapse. (R. at 8-12). Nelson also simultaneously filed a proposed order and judgment. The district court signed and filed the default documents on the same day. (R. at 13, 14).

[¶ 9] Notice of entry of judgment, along with an affidavit of service, was filed on April 24, 2009. (R. at 15).

[¶ 10] On January 28, 2015, McAlester Fuel Company by and through its attorney, Benjamin Keup, Pearce and Durick, filed and served a notice of appearance accompanied by a motion to vacate the default judgment previously obtained by Nelson. (App. at 17).

[¶ 11] Nelson resisted the motion and filed a response along with accompanying documents on February 6, 2015. (App. at 33). On February 23, 2015, McAlester filed a reply brief. (App. at 33).

[¶ 12] On February 27, 2015, the case was re-assigned to Judge Gary Lee. (App. at 38). The district court entered an order vacating the default judgment on July 1, 2015. (App. at 39). On August 7, 2015, McAlester filed a motion to dismiss the complaint for the quiet title action originally filed on December 4, 2008. (R. at 57-60).

[¶ 13] On August 24, 2015, attorney Erin Conroy entered a Notice of Appearance and filed a brief with accompanying attachments resisting McAlester's motion to dismiss. (App. at 65). McAlester then filed a subsequent reply brief. (R. at 64). No oral argument was heard on the dismissal.

[¶ 14] On September 9, 2015, the district court entered an order for dismissal and on November 9, 2015, notice of entry of judgment was filed and served on opposing counsel by McAlester. (App. at 70-72).

[¶ 15] On January 8, 2016, Nelson filed a notice of appeal with a statement of preliminary issues. (App. at 74).

STATEMENT OF THE FACTS

[¶ 16] Ronnie Nelson is owner of the surface acreage in the county of Burke, state of North Dakota. The legal description of the surface is as follows:

> **Township 163 North, Range 90 West of the 5th P.M.**
> **Section 15: SW1/4**
> **Section 22: W1/2 excepting one acre which begins at the Southwest corner and runs thence East 16 rods, North 10 rods, West 16 rods and South 10 rods to point of beginning.**

[¶ 17] In 2008, by and through his attorney, Nelson brought an action to quiet title against 108 of the 479 mineral acres pursuant to North Dakota's abandoned mineral interest statute N.D.C.C. section 38-18.1-04. No answer to the complaint was received by Nelson within the statutory deadline for answering. No claim for a mineral interest was filed by McAlester within sixty (60) days from the publication of the notice.

[¶ 18] The mineral deed conveying the interest to McAlester from the original mineral interest holder, Wilhite, lists the address for McAlester Fuel Company as "P.O. Box 210, Magnolia, Arkansas." This document was recorded as document number 92551 on March 31, 1958. (App. at 76). The only other document recorded by McAlester on the disputed property is an oil and gas lease recorded as document number 121031 on October 23, 1968.

[¶ 19] Nelson filed for default judgment. Judgment was entered by the district court on February 3, 2009.

[¶ 20] Six (6) years later, on January 2015, McAlester made a motion to vacate the judgment and Nelson responded resisting the motion to vacate. In resisting the motion, Nelson argued McAlester was not able to collaterally attack the judgment because it was not registered as a foreign corporation in North Dakota. The district court granted

McAlester's motion to vacate the default judgment. McAlester then filed its motion to dismiss, which was also resisted by Nelson. The district court subsequently granted McAlester's motion to dismiss Nelson's original complaint. Nelson then filed this appeal. (App. at 74)

[¶ 21] On December 4, 2008, Nelson filed a summons and complaint in the above-captioned quiet title action. Judgment was entered by the district court on February 3, 2009. On January 28, 2015, McAlester filed its motion to vacate along with supporting affidavits and exhibits. Among those exhibits were copies of the original deed dated March 6, 1958, a copy of an oil and gas lease dated February 12, 1968 and other unauthenticated documents purported to evidence McAlester's address around the time of the oil and gas lease was executed. The ancillary documents contained in exhibits 3-9 and exhibit 11 do not contain any evidence the documents were recorded or otherwise available to Nelson at the time of the quiet title action. Therefore, Nelson would not have had access to the inadmissible and extraneous documents at the time he commenced his action for quiet title.

[¶ 22] The only documents available to Nelson at the time of the initial quiet title action were the original 1958 deed and the 1968 oil and gas lease. More interesting than what was submitted as evidence by McAlester is what was <u>not</u> included in the exhibits, which included a Notice of Statement of Claim as required by the abandoned mineral interest statute. McAlester failed to record a statement of claim to the mineral interest in this

case until more than forty-eight (48) years after its last recorded "use" and more than twenty-eight (28) years after it first lapsed.[1] (App. at 5)

[¶ 23] In support of its claim that Nelson failed to perform a diligent inquiry, McAlester included an unauthenticated copy of its most recent Google search results and website contact information. McAlester did not indicate whether the Google search results were from 2008, when Nelson would have conducted his search. Further, McAlester failed to establish the company even had a website in 2008 and whether the search results would have produced the company's current contact information.

[¶ 24] McAlester did not record a Notice of Statement of Claim pursuant to the lapsed mineral statute or other documentation of activity regarding the minerals that would prevent Nelson from quieting title pursuant to the lapsed mineral interest statute. The most recent lease supplied to this Court shows no evidence of having been recorded in Burke county such that Nelson would have been put on notice of McAlester's interest. McAlester sat on its rights to the minerals, failed to file the appropriate documentation pursuant to North Dakota's lapsed mineral statute and now seeks to use that behavior as a sword against Nelson.

[1] Since the commencement of this appeal, McAlester has since recorded a statement of claim on the mineral interest related to this litigation; however, it is not a part of the record of this case for appeal purposes.

LAW AND ARGUMENT

[¶ 25] The district court erred when it found that Nelson failed to comply with the statutory requirements of chapter 38-18.1 of the North Dakota Century Code. The case is appealable from a district court order that substantively affects Nelson's rights.

I. The District Court's Order Dismissing Nelson's Complaint is Appealable.

[¶ 26] Nelson anticipates McAlester may argue on appeal that this Court lacks jurisdiction to hear the appeal because the district court dismissed the action, rather than making the judgment final and appealable as a conversion to summary judgment pursuant to Rule 56 of the North Dakota Rules of Civil Procedure. Before the Supreme Court may consider the merits of an appeal, it must first have jurisdiction. Arrow Midstream Holdings, LLC v. 3 Bears Construction, LLC, 2015 ND 302, ¶ 6, 873 N.W.2d 16 (citing Choice Financial Group v. Schellpfeffer, 2005 ND 90, ¶ 6, 696 N.W.2d 504).

[¶ 27] Ordinarily, an order dismissing a complaint without prejudice is not appealable because either side may commence another action after the dismissal. State v. Gwyther, 1999 ND 15, ¶ 10, 589 N.W.2d 575. A dismissal with prejudice is final and appealable if it has the practical effect of terminating the litigation in the plaintiff's chosen forum. Rodenburg v. Fargo-Moorhead YMCA, 2001 ND 139, ¶ 12, 632 N.W.2d 407; Triple Quest, Inc. v. Cleveland Gear Co., 2001 ND 101, ¶ 8, 627 N.W.2d 379. In this case, the order and judgment effectively foreclosed litigation of Nelson's action in the courts of this state. Consequently, the dismissal with prejudice is appealable as it has the same consequence and effect as one for summary judgment.

[¶ 28] When a motion to dismiss for failure to state a claim upon which relief can be granted is presented before the court and "matters outside the pleadings are presented

to and not excluded by the court, the motion should be treated as one for summary judgment and disposed of as provided in Rule 56." Livingood v. Meece, 477 N.W.2d 183, 187 (N.D. 1991); see also N.D.R.Civ.P. 12(d). Should this occur, each party must be given a reasonable opportunity to present material pertinent to the motion under N.D.R.Civ.P. 56. Livingood, 477 N.W.2d at 187. "When [a] court considers matters outside the pleadings in resolving a motion to dismiss under Rule 12(b), N.D.R.Civ.P., we treat the motion and the court's resolution of it as a summary judgment under Rule 56, N.D.R.Civ.P." Wishnatsky v. Huey, 1997 ND 35, ¶ 12, 560 N.W.2d 878.

[¶ 29] In this case, McAlester's assertion in its brief that the district court only makes its determination on the pleadings alone and nothing outside of the pleadings is disingenuous, as the court must necessarily regard the supporting documentation and indeed even its own findings to grant the motion to dismiss. This procedurally circular argument both punishes Nelson and rewards McAlester by requiring the court to consider substantial information outside of the pleadings and yet also be granted a non-appealable order of dismissal rather than an appealable order of summary judgment. Dismissal on the pleadings alone is both inappropriate and impossible. The district court's order on McAlester's motion should have been properly converted to one for summary judgment as a final and appealable order. In this case, the court vacated a default judgment.

[¶ 30] A default judgment may be set aside for good cause in court, an appellant may appeal directly from the default judgment, and the appellate court may reverse the entry of default judgment if the trial court abused its discretion. See Fingerhut Corp. v. Ackra Direct Marketing Corp., 86 F.3d 852, 856 (8th Cir. 1996); Swaim v. Moltan Co., 73

F.3d 711, 716 (7th Cir. 1996); New York v. Mickalis Pawn Shop, LLC, 645 F.3d 114, 127-28, (2d Cir. 2011) (holding an appellate court reviews whether the trial court abused its discretion in granting a default judgment).

[¶ 31] An appeal in this case may be taken of right pursuant to N.D.C.C. section 28-27-02 on the basis that the plaintiff's substantive rights in the case are disposed of by effect with the trial court's order on the motion to vacate.

[¶ 32] Under North Dakota Rules of Civil Procedure, the exclusive means for opening a default judgment is through a Rule 60(b) motion to vacate the judgment. Rule 55, N.D.R.Civ.P., explanatory note. Overboe v. Odegaard, 496 N.W.2d 574, 577 (N.D. 1993). McAlester's motion to vacate was filed after the default judgment was entered against it under Rule 60(b). Because the district court's decision on the motion to vacate was one that affected a substantive right of Nelson, Nelson should be allowed to appeal the decision, and if he prevails, request a remand from the Supreme Court.

II. Whether the District Court Erred when It Held a Surface Owner Quieting Title had not Strictly Complied with the Notice Requirements of North Dakota's Lapse Mineral Interest Statute.

[¶ 33] The district court erred when it made a de facto finding that Nelson had failed to strictly comply with the statutory requirements of North Dakota's lapsed mineral interest statute without first determining which version of the statute applied to Nelson's case.

[¶ 34] The interpretation and application of a statute is a question of law, which is fully reviewable on appeal. Johnson v. Taliaferro, 2011 ND 34, ¶ 9, 793 N.W.2d 804. In an analogous case, Larson v. Norheim, 2013 ND 60, ¶ 5, 830 N.W.2d 85, this Court explained the standard for interpreting statutes on appeal:

> This Court's primary objective in interpreting a statute is to ascertain legislative intent. Words of a statute are given their plain, ordinary, and commonly understood meaning unless a contrary intention plainly appears. Statutes are construed as a whole and are harmonized to give meaning to related provisions. If the language of a statute is clear and unambiguous, the letter of [the statute] is not to be disregarded under the pretext of pursuing its spirit. If the language of a statute is ambiguous, however, a court may resort to extrinsic aids to interpret the statute. Statutes must be construed to avoid absurd and ludicrous results. We construe statutes in a practical manner, and we consider the context of statutes and the purpose for which they were enacted.

(citing Bragg v. Burlington Res. Oil and Gas Co. LP, 2009 ND 33, ¶ 8, 763 N.W.2d 481 (citations and quotations omitted)).

[¶ 35] North Dakota Century Code chapter 38-18.1 provides the procedure for the termination of abandoned mineral interests. The abandonment proceedings in this case were initiated prior to the 2007 statutory amendments to N.D.C.C. ch. 38-18.1 which became effective on August 1, 2007. See Sorenson v. Felton, 2011 ND 33, ¶ 9, 793 N.W.2d 799. Any mineral interest is, if unused for a period of twenty (20) years immediately preceding the first publication of the notice [of lapse], deemed to be abandoned, unless a statement of claim is recorded in accordance with section 38-18.1-04. N.D.C.C. § 38-18.1-02.

[¶ 36] The North Dakota abandoned mineral interest statute was further modified in 2009. The question of how to interpret and apply chapter 38-18.1, N.D.C.C., is a question of law; therefore, the standard of review is de novo. See Wheeler v. Gardner, 2006 ND 24, ¶ 10, 708 N.W.2d 908 (explaining "interpretation of a statute is a question of law, fully reviewable on appeal.").

[¶ 37] The district court held in its opinion vacating the default judgment section 38-18.1-06, N.D.C.C., requires a surface owner to conduct a reasonable inquiry to find a mineral

owner's current address, even when an address appears of record. N.D.C.C. § 38-18.1-06; however, in this case, Nelson was not required to conduct a reasonable inquiry because McAlester's address appeared of record and the district court applied the incorrect version of the lapsed mineral interest statute. It should have applied the 2007 version, but instead applied the 2009 version, which was not in effect until November 1, 2009.

[¶ 38] In Sorenson v. Felton, 2011 ND 33, this Court explicitly held "that section 38-18.1-06, N.D.C.C., requires reasonable inquiry only when the mineral owner's address does not appear of record." Johnson v. Taliaferro, 2011 ND 34, 793 N.W.2d 804 (citing Sorenson). The Johnson and Sorenson decisions by this Court should control this decision in favor of Nelson because of the incorrect application of the law by the district court.

[¶ 39] McAlester asserts the district court was correct when it required Nelson to comply with section 38-18.1-06.1, N.D.C.C., by proving, in the quiet title action, that he failed to conduct a reasonable inquiry for McAlester's current address before mailing the notice of lapse. N.D.C.C. § 38-18.1-06 (Supp. 2009). Nelson had vested ownership rights to the abandoned minerals before the 2007 and 2009 amendments to chapter 38-18.1, N.D.C.C., were in effect and the Legislature did not impose new notice requirements for Nelson's quiet title action finalized in early 2009 to retroactively deprive him of the ownership rights that vested in 2009 before the new statutory requirements took effect. Taliaferro, at 12.

[¶ 40] The 2009 amendments to chapter 38-18.1 became effective August 1, 2009. N.D.C.C. ch. 38-18.1 (Supp. 2009). Nelson published his notice of claim of lapse on

January 31, February 7 and February 14, 2007. (R. at 3). Nelson mailed notices of lapse to McAlester's address of record on February 15, 2007. McAlester did not file a timely notice of claim, and its mineral interest was abandoned as of the date of first publication. See N.D.C.C. § 38-18.1-02 (2004). As of July 7, 2009, under the law then in effect, "[t]itle to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment." Id.

[¶ 41] The mineral deed conveying the interest to McAlester from the original mineral interest holder, Wilhite, lists the address for McAlester Fuel Company as "P.O. Box 210, Magnolia, Arkansas." This document was recorded as document number 92551 on March 31, 1958. (App. at 76). At that time, if the address was incorrectly listed for McAlester Fuel, then it had an obligation to correct the address. McAlester failed to do so.

[¶ 42] The pre-2009 version of chapter 38-18.1, N.D.C.C., did not articulate a procedure for quieting title in North Dakota. N.D.C.C. ch. 38-18.1 (2004). Nelson filed a complaint to quiet title to the mineral interests on November 4, 2008, before the 2009 amendments went into effect. In 2009, the legislature added amendments to section 38-18.1-06.1, providing procedures for surface owners to quiet title or "perfect" their interests to lapsed minerals. N.D.C.C. § 38-18.1-06.1 (Supp. 2009). This new section imposes the additional burden of showing all the requirements of chapter 38-18.1 were complied with and showing a "reasonable inquiry" was conducted by the surface owner before bringing a quiet title action. N.D.C.C. § 38-18.1-06.1(2) (Supp. 2009). That subsection provides:

> In an action brought under this section, the owner or owners of the surface estate shall submit evidence to the district court establishing that all procedures required by this chapter were properly completed and that a reasonable inquiry as defined by subsection 6 of section 38-18.1-06 was conducted. If the district court finds that the surface owner has complied with all procedures of the chapter and has conducted a reasonable inquiry, the district court shall issue its findings of fact, conclusions of law, and enter judgment perfecting title to the mineral interest in the owner or owners of the surface estate.

Id.

[¶ 43] In North Dakota, no part of the code may be retroactively applied unless specifically permitted by the legislature. N.D.C.C. § 1-02-10 ("No part of this code is retroactive unless it is expressly declared to be so."); see also White v. Altru Health Sys., 2008 ND 48, ¶ 12, 746 N.W.2d 173 ("[T]he legislative direction to make a statute retroactive must be clear."). This Court also held in the Taliaferro case that a lapsed mineral interest that is later reclaimed by the surface owner is a vested right by operation of statute. Taliaferro, at ¶ 16 (citing N.D.C.C. § 1-02-30, "No provision contained in this code may be so construed as to impair any vested right or valid obligation existing when it takes effect.")

[¶ 44] Section 38-18.1-02, N.D.C.C., provided both before and after the 2009 amendments that "[t]itle to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in or under which the mineral interest is located on the date of abandonment." N.D.C.C. § 38-18.1-02 (2004 & Supp. 2009). The quiet title requirements in N.D.C.C. § 38-18.1-06(2) cannot be used to deprive Nelson of an interest in the minerals that has already vested under N.D.C.C. § 38-18.1-02. N.D.C.C. §§ 38-18.1-06(2) (Supp. 2009), 38-18.1-02 (2004). Therefore, the district court erred by holding that Nelson did not strictly comply with the statute requiring that Nelson

prove he made a reasonable inquiry for McAlester's current mailing address before mailing the notice of lapse.

[¶ 45] McAlester based its motion to dismiss on N.D.R.Civ.P. 12(b)(6) and 12(d) for dismissal against Nelson. The district court held that Nelson failed to strictly comply with the statute. (R. at 54). The district court further held that the failure of strict compliance with the statute operated to prohibited title from formally vested in Nelson and title always remained with McAlester. McAlester's linchpin of the argument on dismissal to the district court was that the district court's order on the motion to vacate states that the "mailing was not reasonably certain to reach McAlister [sic]." (R. at 54, ¶ 27).

[¶ 46] Respectfully, Nelson disagrees with the district court's holding in this regarding. The legislature has modified the abandoned mineral interest statute multiple times since its original appearance in the code in 1983 and added the inquiry requirements in 2009 after Nelson's judgment quieting title. Further, there's no evidence in this case that such an inquiry, as conducted in 2008, would have resulted in a "reasonable certainty" the notices would have reached McAlester. Even if Nelson had mailed the notices to the correct post office address of 10, rather than 210, McAlester presented no evidence that any such mailing would have reached it. Further, McAlester has presented no evidence of its own compliance with the statute, which requires that McAlester file its claim within sixty (60) day of the publication. McAlester's failure of compliance necessarily requires that title formally vest with Nelson.

[¶ 47] The abandoned mineral interest statute, as applied to the 2008 judgment in this case, does not require Nelson's mailing be "reasonably certain" to reach the intended

recipient. Rather, the statute, as it was written at the time of Nelson's action required that Nelson only mail the notice to the "address of record." The North Dakota Supreme Court held pursuant to the 2007 abandoned mineral statute and for mineral interests reclaimed prior to 2009, a surface owner is not required to conduct a reasonable inquiry if the mineral owner's address appears of record. (emphasis added.) See Johnson v. Taliaferro, 2011 ND 34, ¶ 17, 793 N.W.2d 804, 807-08; Sorenson v. Felton, 2011 ND 33, ¶ 14, 793 N.W.2d 799, 803. The North Dakota Supreme Court has indicated it is unclear whether the 2009 amendments require a reasonable inquiry, even when the mineral owner's address appears of record. See Taliaferro, ¶ 20, 793 N.W.2d at 808.

[¶ 48] In this case, there is no evidence that a Google search would have uncovered McAlester's website, contact information or any other information regarding the company at that time in 2008. Further, the statute, as it was written at the time, made no such requirement. The statute, as it was drafted at the time of the Quiet Title action, required notice be mailed to the owner's address as it appears of record. The statute, as written when Nelson initiated his case required "if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry." N.D.C.C. § 38-18.1-06(2) (2008).

[¶ 49] In Sorenson v. Felton, 2011 ND 33, ¶¶ 13-1 4, the North Dakota Supreme Court interpreted this sentence of the code and explained that N.D.C.C. section 38-18.1-06(2) requires a "reasonable inquiry" only when the mineral owner's address does not appear of record. In this case, McAlester's address did appear of record and the notice was sent out to that address. Further, the district court's finding in this case that Nelson must have had some reasonable certainty of reaching its recipient is simply not written

in the plain language of the statute as it was written in 2009 when the judgment was entered. Essentially, McAlester is asking this Court to re-write the law as it applied to McAlester and Nelson's claim in 2009.

[¶ 50] Currently, there is no evidence that McAlester is compliant with the statute. The statute requires that within the applicable time period, the former owner of the extinguished minerals must also follow the statute. In this case, there is no evidence McAlester filed a notice of claim within the sixty (60) grace period. This failure resulted in title of mineral vesting in Nelson.

CONCLUSION

[¶ 51] Nelson respectfully requests this Court to reverse and remand for judgment in favor of Nelson as a matter of law.

CERTIFICATION

[¶ 52] The undersigned, as one of the attorneys representing Appellant, and the author of the Brief of Appellant, hereby certifies that said brief complies with Rule 32(a)(7)(A) of the North Dakota Rules of Appellate Procedure, in that the brief was prepared with proportional typeface and that the total number of words does not exceed 8,000 from the portion of the brief entitled "Statement of Issues" through the signature block. The word count was verified with the assistance of the undersigned's word processing software, which also counts abbreviations as words.

Dated this 17th day of June, 2016.

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STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF BURKE | NORTH CENTRAL JUDICIAL DISTRICT

Ronnie L. Nelson Plaintiff, vs. McAlester Fuel Company, All Unknown Heirs of McAlester Fuel Company and all Other Persons Unknown Claiming and Estate or Interest In or Lien or Encumbrance upon the Property Described in the Complaint, Defendant.	Supreme Court No. 20160007 Case No. 07-08-C-00047 **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing:

1. APPENDIX OF APPELLANTS;
2. BRIEF OF APPELLANTS;
3. CERTIFICATE OF SERVICE

was served by electronic communication as required by the North Dakota Rules of Appellate Procedure Rule 3(a) this 17th day of June, 2016 on the Defendant's attorneys of record at the following email addresses:

Zachary Pelham #zepefile@pearce-durick.com
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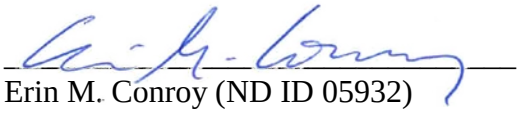
Dated this the 17th day of June, 2016.



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STATE OF NORTH DAKOTA | IN DISTRICT COURT

COUNTY OF BURKE | NORTH CENTRAL JUDICIAL DISTRICT

Ronnie L. Nelson Plaintiff. vs. McAlester Fuel Company, All Unknown Heirs of McAlester Fuel Company and all Other Persons Unknown Claiming and Estate or Interest In or Lien or Encumbrance upon the Property Described in the Complaint, Defendant.	Supreme Court No. 20160007 Case No. 07-08-C-00047 **CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing:

1. Brief of Appellant with corrections,
2. Appendix of Appellant with corrections.

was served by electronic communication as required by the North Dakota Rules of Appellate Procedure Rule 3(a) this 28th day of June, 2016 on the Defendant's attorneys of record at the following email addresses:

Zachary Pelham #zepefile@pearce-durick.com
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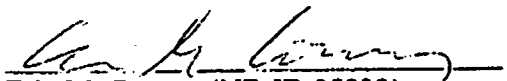
Dated this the 28th day of June, 2016.



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