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DECEMBER 6, 2016
STATE OF NORTH DAKOTA

IN THE SUPREME COURT STATE OF NORTH DAKOTA

Black Stone Minerals Company, L.P. and The Hamill Foundation, Plaintiffs, --------- Missouri River Royalty Corporation and Bauer Family LLP, Appellants, vs. Kate Sarah Brokaw, Gordon Brokaw as Personal Representative of the Estate of Evelyn Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W Of Evelyn G. Brokaw FBO Jacob Gordon Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W Of Evelyn G. Brokaw FBO Emily Sue Brokaw, Kristen Jones, Steven Irgens, James Scott Brokaw, Ryan Kyle Brokaw, Brett Christopher Brokaw, Gordon D. Brokaw, Linda B. Irgens, Martha Brokaw, Lyman G. Brokaw, and all other persons unknown, claiming any estate of interest in or lien or encumbrance upon, the real estate described in the complaint, Appellees.	Case No. 53-2015-CV-01217 Supreme Court Case No. 20160286 **APPELLANT'S REPLY BRIEF**

APPEAL FROM THE JUDGMENT DATED JUNE 16, 2016 OF THE WILLIAMS COUNTY DISTRICT COURT,

THE HONORABLE JOSH B. RUSTAD, PRESIDING.

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ARGUMENT

A. Quieting title to non-parties is clearly erroneous.

¶1. The Plaintiffs agreed that if Lyman G. Brokaw was adjudged to only own one-half of the minerals at the time of the 1958 deed to North American Royalties Inc. then the Hamill Foundation would be the only entity with an interest. In the transcript of hearing, as was a recapitulation of the brief filed with the trial court, the undersigned counsel stated:

> "If we were to take Defendant's [sic] point of view that the chain of title indicates that Lyman only gave North American half interest. [sic] Their interest would have been exhausted with Exhibit K to Hamill for one-half. Then one-fourth would have been an over-conveyance to Hill and then, of course, that other one-fourth that ended up with Black Stone would have been a further over-conveyance." (Tr. Page 14, lines 6-12).

¶2. Any allegation against the savvy Plaintiff mineral owners' abilities or their attorney's ethics is entirely without merit in regards to the ownership between the four plaintiffs. (Appellee's Brief ¶29, 32). Any allegation that the distribution of the Plaintiff's share was never mentioned until this appeal is also clearly not true,

and that no argument was made at summary judgment regarding the ownership if the Brokaws succeeded is patently false as per the transcript.

¶3. The action brought the entire mineral estate before the trial court to adjudge the ownership of all the minerals amongst the parties to the action. N.D.C.C. § 32-17-10. That was simply not done. The Motion to Correct Judgment was denied and is not part of this appeal.

¶4. Below is a capitulation of the deeds after the 1945 judgment as affected minerals, with the ownership amounts bolded where the interest is something other than all of Grantor's interest. (App. 23, 39-58). This chain shows precise descriptions and that the task of determining the exact interest is not arduous:

Deed date:	Grantor:	Grantee:	Conveyancing language:
June 23, 1958	Lyman G. Brokaw	North American Royalties Inc.	"undivided **full** interest"
July 22, 1958	North American Royalties Inc.	Claud B. Hamill	"undivided ½ interest."
August 14, 1959	North American Royalties Inc.	Louis W. Hill, Jr.	"undivided **one-fourth (1/4th)** interest"
May 5, 1977	North American Royalties Inc.	The Wiser Oil Company	"all of its right"
January 15, 1979	Louis W. Hill, Jr.	Arthur C. Bauer	"undivided **10/160ths**…intention of the grantor to convey **10 net mineral acres**"
May 20, 1997	Personal Representative of the Estate of Louis W. Hill, Jr.	Hill Hydrocarbons, Inc. and JMH Oil, Inc.	"all of decedent's"

March 1, 2002	Hill Hydrocarbons, Inc. and JMH Oil, Inc.	Missouri River Royalty Corporation	"all of Grantor's"
January 1, 2001	The Wiser Oil Company	Prince Minerals, Ltd. and Prince Minerals II, Ltd.	"all other right, title and interest of Grantor"
January 1, 2001	Prince Minerals, Ltd. and Prince Minerals II, Ltd.	Black Stone Minerals Company, L.P.	"all mineral interest…owned by Seller…."
March 16, 2005	Arthur Charles Bauer, Jr. and others	Bauer Family L.L.P.	"all of the interests of Bauer and Goetz"

¶5. No argument is clear as to why North American Royalties, Inc., Claud B. Hamill, Louis W. Hill, Jr., The Wiser Oil Company, Arthur C. Bauer, Hill Hydrocarbons, Inc., JMH Oil, Inc., Prince Minerals I, Ltd, and Prince Minerals II, Ltd. now have an interest in one-half of the minerals when none of them were parties to the action. All those entities plus the four original Plaintiffs are "North American Royalties Inc. and Successors in interest (Plaintiffs)." (App. at 76). Just like Martha Brokaw, parties in a quiet title judgment are added on this property who should not be there.

B. The 1945 judgment was not clear.

¶6. The argument that Lyman and Martha Brokaw owned as tenants in common because of N.D.C.C. § 47-02-08 fails to provide a link between the facts and the statute. That Chapter of the Century Code provides for all classifications of

ownership including qualified, limited, future estates and others. N.D.C.C. § 47-02-03, 47-02-13, 47-02-15. The tenants in common statute does not say that without definition otherwise, an interest is held as tenants in common of the entire surface and mineral interest. Missouri River Group does not contend that Lyman and Martha owned as joint tenants. It is irrelevant how they owned their interest between each other in regards to this case, but what the interest each one owned is the issue.

¶7. If the argument that all interest not listed as joint tenants creates ownership equally in all of the surface and minerals, then a life estate in mineral ownership would create a tenants in common ownership in the surface. There are many sticks in the bundle of real property interests. Noss V. Hagen, 274 N.W.2d 228, 235 (N.D. 1979) (Pederson, J., concurring). In fact Martha's ownership could be as vague as the judgement in this matter that quiets title in "North American Royalties, Inc. and successors in interest." (App. At 76). The issue isn't how title was held between the Brokaws but to what type of interest stick each one owned.

¶8. A lack of evidence regarding Martha Brokaw owning a homestead or other interest in the property does not default to presume she owned one-half of the surface and minerals. If the trial court felt that the record was bare, then the matter is more appropriate for a trial on stipulated facts in order to make inferences drawn from the documents of record instead of summary judgment. Desert Partners IV, L.P. v. Benson, 2016 ND 37, ¶10, 875 N.W.2d 510. In this case, the inferences drawn

from the failure to include the minerals in ownership and other documents in title show that no other inference can be drawn from the documents presented to the trial court than whatever interest Martha Brokaw had, it was not minerals.

¶9. Appellees also claim that the present case has nothing in common with caselaw regarding the parol evidence rule. However, while conceding that such an application of the parol evidence rule to a court judgment is novel, the use of it in a circumstances similar to this case is instructive. City of Fargo v. D.T.L. Properties, Inc., 1997 ND 109, 564 N.W.2d 274. In this case, the inclusion of Martha, like the inclusion of extra lots in a deed, to Jordahl was in error when you review the entire chain of title. Id at ¶17.

¶10. Appellees contend that the inclusion in the judgment to Martha Brokaw, who was a stranger to title at that point, is only like one case. In the McKenzie County v. Hodel case, there was a written stipulation outside of title documents. 467 N.W.2d 701 (ND 1991). The certified question in that case involved whether a state court could, in lieu of directing a conveyance, use a judgment to divest a party of title and vest it in others. The reason this case is not instructive is there is no proof of what interest the court intend to divest of Lyman Brokaw and vest into Martha Brokaw. In Hodel there were condemnation documents and stipulations detailing what interest was divested and what was granted. Id. We do not have documents evidencing what was transferred in the case at bar. All we have is a judgment that

says Lyman Brokaw with his wife Martha own the property. The issue is in this case is beyond that step. The question involves what interest, if any, did Martha Brokaw obtain in a court judgment in 1945 when her husband owned title of record and her inclusion in the court judgment was as "Martha Brokaw, his wife." That is why the Malloy case is instructive. Malloy V. Boetcher, 334 N.W.2d 08 (N.D. 1983). The 1945 judgment in this case is not a reservation or exception. In this case, there is no conveyance, no exception, no reservation and absolutely no deed of record transferring an interest from Lyman Brokaw to Martha Brokaw.

¶11. A judgment can transfer an interest, even without compliance with the conveyancing statutes. Just as the judgment on appeal at present vested title back to North American Royalty Corporation and others not in title. When those joining as a stranger in title appear, the legislature has provided title examiners with law to review that effect. N.D.C.C. § 47-19-41. The good faith test is used to determine if an examiner should believe that a stranger joining with the record title holder should require further inquiry. One exception in examination is if the inclusion could be explained by the homestead exemption. N.D.C.C. § 47-18-05. The actions of treating this property solely as a surface interest by the Dale Brokaw 2001 death certificate filed to sever joint tenancy and only claiming surface show the intent of the parties. (App. at 29). Whatever interest Martha had in the 1945 judgment, it did not include minerals.

¶12. The definition of possession has changed so must the caselaw that requires that surface owners must review their title. The only interest the Brokaws claim in title until 2015 is surface related. (App. at 24-30). The surface warranty deeds do not contain exceptions, reservations or grants of minerals until oil started to be developed. The death certificate of Dale Brokaw where only a surface interest is claimed is also evidence of what interest the Brokaws claimed. (App. At 28). The legislature has now made the judiciary job of settling quiet titles of minerals more difficult by amending N.D.C.C. § 47-19.1-07. In this case, record title provided all the evidence and inferences needs that the Brokaw never claimed Martha Brokaw got a one-half interest in the minerals in the 1945 judgment.

¶13. Because the change of the definition of possession occurred recently there is no case law in how we interest what is actual, visible, continuous, notorious, distinct and hostile that conforms to the definition made by the 2013 session. 2013 N.D. Sess. Laws ch. 351, §4. But the facts in this case are unlike most in mineral title in North Dakota. Here parties conveyed specific ownership, instead of a grant of all or one-half of the grantor's interest. The judiciary will need to review title chains much more closely now with the definition. The Plaintiffs don't claim they are showing possession merely by leasing, but that is one of many documents of record that show possession including the deeds which preclude by their face the claim that Martha Brokaw thought she owned one-half of the minerals.

¶14. The claim that the trial court failed to provide findings of fact that any documents proffered by the Plaintiffs were valid is marginally correct. There is an entirely vacant amount of fact finding in the Order Granting Defendants' Motion for Summary Judgment and Denying Plaintiffs' Cross-Motion for Summary Judgment. (App. At 70). In fact, none of the arguments proffered to the lower court by the Plaintiffs are even analyzed, just found to be without merit. As such, this Court can fully review and decide the case substantively.

Dated: December 6, 2016.

/s/ Jannelle Steger Combs

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IN THE SUPREME COURT OF THE STATE OF NORTH DAKOTA

Black Stone Minerals Company, L.P., Missouri River Royalty Corporation, The Hamill Foundation, Bauer Family LLP,

Plaintiffs,

vs.

Kate Sarah Brokaw, Gordon Brokaw as Personal Representative of the Estate of Evelyn Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W Of Evelyn G. Brokaw FBO Jacob Gordon Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W Of Evelyn G. Brokaw FBO Emily Sue Brokaw, Kristen Jones, Steven Irgens, James Scott Brokaw, Ryan Kyle Brokaw, Brett Christopher Brokaw, Gordon D. Brokaw, Linda B. Irgens, Martha Brokaw, Lyman G. Brokaw, and all other persons unknown, claiming any estate of interest in or lien or encumbrance upon, the real estate described in the complaint,

Defendants.

Supreme Court Case No. 20160286
Civil Case No. 53-2015-CV-01217

CERTIFICATE OF SERVICE BY ATTORNEY (N.D.R.App.P.25(d)

1. I, Jannelle Steger Combs, hereby certify that I am an active member of the State Bar of North Dakota, and am not a party to the within action. My business address is 436 Brunswick Drive, Bismarck, North Dakota 58503.
2. That I served a copy of the attached Repy Brief of Appellant to Kate Sarah Brokaw, Gordon Brokaw as Personal Representative of the Estate of Evelyn Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W Of Evelyn G. Brokaw FBO Jacob Gordon Brokaw, Gordon Brokaw as Trustee of the Testamentary Trust U/W Of Evelyn G. Brokaw FBO Emily Sue Brokaw, Kristen Jones, Steven Irgens, James Scott Brokaw, Ryan Kyle Brokaw, Brett Christopher Brokaw, Gordon D. Brokaw, and Linda B. Irgens, at the following e-mail service address on September 30, 2016:

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3. I declare under penalty of perjury under the laws of the State of North Dakota that the foregoing is true and correct and that this document was executed on December 6, 2016 at Bismarck, North Dakota.

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