IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Gilbertson Partnership, Ltd., a North Dakota Limited Partnership,

Plaintiff and Appellee,

vs.

Vernon J. Drabek a/k/a Vernon Drabek, William J. Fizer a/k/a Wm. J. Fizer, Alsie Mae Fizer, Harold R. Bennett, Wyman H. Meigs, Lucile S. Meigs, Lucile S. Colbert, Wyman Orlin Meigs, Theodore F. Loveridge, Faery R. Loveridge, C.H. Kopp, Blanche Kopp, Chester R. Cos, Earl Cox, Virginia Danielson, Royce Cox, Lois Vance, James Cox, Iva Inez Cox, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the Complaint, whether as heirs, devisees, legatees, or personal representatives of any of the above-named persons who may be deceased or under any other title or interest,

Defendants and Appellees,

and

Charyl W. Loveridge and Margaret A. Loveridge,

Defendants, Third-Party Plaintiffs, and Appellants,

vs.

LeRoy Gilbertson, as Trustee of the Gilbertson Partnership Limited Irrevocable Trust,

Third-Party Defendant and Appellee.

Supreme Court No 20160347
Divide Co. Civil No. 12-04-C-00038

APPELLANTS' BRIEF

Appeal from the Summary Judgment Order dated October 7, 2016
Case No. 12-04-C-00038
County of Divide, Northwest Judicial District
The Honorable Joshua B. Rustad

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STATEMENT OF THE ISSUE

[¶1] Charyl and Margaret Loveridge own minerals in Divide County. The surface owner attempted to claim their minerals as abandoned. Though the notice of lapse was deficient, the minerals were quieted in favor of the surface owner. The judgment was vacated, but the surface owner prevailed on summary judgment. Should the Court reverse the district court's decision authorizing surface owners to flout the requirements of the Dormant Mineral Act?

STATEMENT OF THE CASE

[¶2] This action began in September 2004 when the Gilbertson Partnership, Ltd. ("Gilbertson")[1] filed a Complaint seeking to quiet title in certain minerals in Divide County. Appellants' Appendix ("App.") 6-11. In 1986, Gilbertson, as surface owner, attempted to comply with the requirements of N.D.C.C. Ch. 38-18.1, the Dormant Mineral Act ("DMA"). App. 23-29. Gilbertson claimed minerals owned by Theodore Loveridge and Faery Loveridge, among others, had been abandoned. App. 8-11. The 2004 quiet title action was brought related to the 1986 attempt to claim the minerals as abandoned. *Id.*

[¶3] Theodore Loveridge ("Theodore") and Faery Loveridge ("Faery") deeded their minerals to their son Charyl Loveridge ("Charyl") and daughter-in-law Margaret Loveridge ("Margaret") in 1990. App. 21-22. Default judgment was entered against Theodore, Faery, Charyl, and Margaret quieting title against them in February 2005. App. 12-19.

[1] The Gilbertson Partnership, Ltd. later conveyed its interest to the Gilbertson Partnership Limited Irrevocable Trust; references will be collectively referred to "Gilbertson" unless specifically identified otherwise. App. 152-53.

[¶4] Charyl and Margaret filed a Motion to Vacate Default Judgment in 2014. App. 2-3 (Dkt. #28-37). Gilbertson responded and Charyl and Margaret filed a reply brief. App. 3 (Dkt. #39-51). Oral argument on the motion was heard on September 22, 2014. App. 3 (Dkt. #58). The district court vacated default judgment in July 2015. App. 34-57.

[¶5] On August 13, 2015, Charyl and Margaret filed their Answer, Counterclaim, and Third-Party Complaint against Gilbertson, alleging quiet title, waste, and unjust enrichment. App. 58-74. Gilbertson filed its Answer and Third-Party Defendant Counterclaim on September 3, 2015. App. 75-84. Charyl and Margaret then filed their Answer to Gilbertson's Third-Party Defendant Counterclaim. App. 85-88.

[¶6] Competing motions for summary judgment were filed by the parties. App. 4 (Dkt. #84-102). The district court held oral argument on the motions on December 3, 2015. App. 113-151. Each party submitted proposed orders on summary judgment on January 4, 2016. App. 4 (Dkt. #105-08). On October 12, 2016, the district court granted Gilbertson's summary judgment motion and denied Charyl and Margaret's motion. App. 92-105. Judgment was entered on October 14, 2016. App. 106-07. Notice of entry of judgment was filed on October 14, 2016. App. 109-10. Notice of appeal was served on October 14, 2016. App. 111.

STATEMENT OF THE FACTS

[¶7] In 1951 Theodore F. Loveridge and Faery R. Loveridge, both now deceased, were conveyed a 15/240^{ths} undivided interest in certain mineral interests that are subject to this action in Divide County, North Dakota:

Township 161 North, Range 95 West, 5th P.M.
Section 23: NE¼, N½SE¼

("Subject Property"). App. 20. By way of Mineral Deed dated May 24, 1990, and recorded on June 29, 1990, Theodore and Faery conveyed to their son, Charyl, and daughter-in-law Margaret, an undivided one-sixteenth interest in and to all of the oil, gas and other minerals in and under the Subject Property. App. 21, 29-31. The stated intention of the deed was to "transfer fifteen acres undivided in 240 acres." App. 21.

[¶8] Gilbertson, as the surface owner, by "Notice of Lapse of Mineral Interest" ("Notice") dated August 29, 1986, recorded March 2, 1987, gave notice that several mineral interests in the Subject Property had been "deemed abandoned because they have been unused for 20 years and no Statement of Claim has been recorded" and that the surface owner "intends to succeed to ownership" of the described mineral interest "by giving this notice as provided for" in N.D.C.C. § 38-18.1-06. App. 23-27. Included was an "Affidavit of Mailing" that indicated the Notice was mailed to C.H. Kopp on September 30, 1986. App. 28. This Affidavit did not indicate that the Notice was mailed to any of the other defendants. *Id.* An "Affidavit of Publication" dated September 26, 1986, established that the Notice had been published in the Divide County Journal for three consecutive weeks, beginning on September 10, 1986. App. 23-24. The Notice included Theodore as "record title owner" of a 15/240 mineral interest in these lands; the Notice *did not* include Faery, who was a record owner. App. 23, 25-27. The Notice was recorded on March 2, 1987. App. 25-28.

[¶9] Eighteen years after the date of the Notice, Gilbertson commenced the captioned quiet title action. App. 6-11. Theodore and Faery, as well as Charyl and Margaret, were named as defendants. *Id.* The Complaint alleged that each of the mineral interests being claimed were "unused for more than twenty (20) years immediately

preceding the first publication of said 'Notice of Lapse of Mineral Interest'" and that each of those interests were "therefore, abandoned and vested in Plaintiff . . . even though Theodore F. Loveridge and Faery R. Loveridge subsequently conveyed a 1/16th (15 mineral acres) interest to Charyl W. Loveridge and Margaret A. Loveridge." *Id.*

[¶10] The district court issued default judgment on February 23, 2005, quieting title to the Subject Property in Gilbertson and declaring it the fee simple owner of the mineral interests. App. 12-19. Charyl and Margaret entered into a lease, which was notarized, warranted title, and was recorded on October 10, 2005. App. 32-33.

[¶11] The 2005 Judgment was vacated by the district court. App.34-57. This allowed Charyl and Margaret to address the merits of Gilbertson's claims. Oral argument was held on the competing summary judgment motions. App. 113-51. The district court signed the proposed summary judgment order submitted by Gilbertson. *Compare* App. 92-105 *with* App. 4 (Dkt. #107). This appeal followed.

STANDARD OF REVIEW

[¶12] The granting of summary judgment by a district court is reviewed de novo. *Hamilton v. Woll*, 2012 ND 238, ¶ 9, 823 N.W.2d 754.

LAW AND ARGUMENT

[¶13] The district court relied almost entirely on the Marketable Record Title Act ("MRTA") to support its decision. The district court ignored the reality that Gilbertson failed to comply with the DMA. The district court determined the MRTA supplanted the DMA, thereby rewarding a surface owner who failed to comply with the DMA. On appeal, Charyl and Margaret address Gilbertson's failure to comply with the DMA, the district

court's misapplication of the MRTA, and Charyl and Margaret's claims for waste, or, alternatively, unjust enrichment.

I. GILBERTSON'S NOTICE OF LAPSE WAS INVALID

[¶14] Chapter 38-18.1 of the North Dakota Century Code, the DMA, is a statutory procedure that is self-executing if strictly followed. *Spring Creek Ranch, LLC v. Svenberg*, 1999 ND 113, ¶ 10, 595 N.W.2d 323. This Court held "[w]hether the surface owner complied with the requirements under the abandoned minerals procedure, including the notice provisions under N.D.C.C. § 38-18.1-06(2), is a substantive question on the merits in a subsequent quiet title action, not a procedural prerequisite." *Peterson v. Jasmanka ex re. Clark*, 2014 ND 40, ¶ 14, 842 N.W.2d 920, 925. In *Peterson*, the plaintiff mailed a notice of lapse to the last address of record of the record owner. *Id.* at ¶3. Here, the Notice was mailed only to C.H. Kopp. App. 25-28. And the Notice here did not contain Faery, a record owner of the Subject Property. *Id.*

[¶15] The procedure in place at all relevant times in 1986 provided in part:

> 1. Any person intending to succeed to the ownership of a mineral interest upon its lapse, shall give notice of the lapse of the mineral interest by publication.
>
> 2. The publication provided for in subsection 1 must be made once each week for three weeks in the official county newspaper of the county in which the mineral interest is located; *however, if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry, notice must also be made by mailing a copy of the notice to the owner of the mineral interest within ten days after the last publication is made.*

N.D.C.C. § 38-18.1-06 (S.L. 1983, ch. 413, § 5) (emphasis added).

[¶16] Gilbertson was statutorily obligated to mail the Notice to Theodore and Faery. Failure to mail the Notice to a record owner when their address is of record is not

in strict compliance with the statute. It is not disputed that *had* Gilbertson mailed the notice to Theodore and Faery, and also had included Faery on the Notice, the statute would have been self-executing and "once the notice procedure under the statute [was] completed, title to the mineral interest [would have] vest[ed] in the surface owner as of the date of the abandonment, without the necessity of a subsequent quiet title action." *Peterson*, 2014 ND 40, at ¶ 12 (citing *Johnson v. Taliaferro*, 2011 ND 34, ¶¶ 15-17, 793 N.W.2d 804). But, because the Notice was defective, there was no vesting of the mineral interest and Gilbertson did not own the subject minerals. *See, e.g.*, *Halvorson v. Starr*, 2010 ND 133, 785 N.W.2d 248 (mailing notice of lapse after the ten-day mailing requirement defeated the surface owner's claim to the minerals).

[¶17] Gilbertson did not own anything after attempting to comply with the DMA in 1986, except as to C.H. Kopp's interest. Gilbertson did not strictly comply with the statute. All that was recorded in March 1987 was a patently defective Notice. The statement in the Complaint that the Notice was published in accordance with Section 38-18.1-06 was false. Because Notice was defective, and the 2005 Judgment from Gilbertson's quiet title action was vacated, the district court erred in denying Charyl and Margaret's summary judgment motion. This Court should reverse and order title quieted in favor of Charyl and Margaret.

II. THE MRTA IS NOT GILBERTSON'S SAVIOUR

[¶18] The district court's order on summary judgment focuses almost exclusively on the MRTA. The district court, and Gilbertson, ignore the patently deficient Notice and non-compliance with the DMA. The district court misapplied the MRTA as a matter of law and as to the circumstances of this dispute. This section highlights how the district

court incorrectly determined a defective Notice resulted in ownership of the Subject Property in Gilbertson, incorrectly determined that Gilbertson had possession of the Subject Property, incorrectly determined that an unbroken chain of title existed, and failed to address the public policy considerations of non-compliance with the DMA.

A. No Ownership

[¶19] As outlined in Section I, Gilbertson's attempt to comply with the DMA failed as a matter of law. Gilbertson's attempt to utilize the MRTA to supplant the DMA also fails. No deed conveying the subject minerals to Gilbertson exists. The MRTA requires:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by that person and that person's immediate or remote grantors under a *deed of conveyance* which has been recorded for a period of twenty years or longer, and is in possession of such real estate, shall be deemed to have marketable record title to such interest. . ..

N.D.C.C. § 47-19.1-01 (1987 & 2005) (emphasis added). [2] There is no deed for an unbroken period of twenty years here. All Gilbertson has is a patently defective Notice recorded in 1987: 1) it was not mailed within ten days of the last date of publication and 2) it does not include Faery.

[¶20] Gilbertson did not own anything upon which to make a claim that the MRTA applied. If this Court is going to give any credence to the DMA, it must accept the principal that a surface owner who does not comply with the statutory requirements cannot succeed to ownership--period. The recording of a defective notice of lapse does not cause

[2] N.D.C.C. § 47-19.1-01 was amended effective August 1, 2013. Because the issues in this matter did not arise under the current version of the statute, the prior version of the Act is quoted throughout unless otherwise stated.

this document to be a "deed of conveyance" when the notice is patently defective. Here, Gilbertson did not own anything and cannot rely upon the MRTA to succeed to ownership of minerals, which a surface owner can only acquire through strict compliance with the DMA.

[¶21] While Gilbertson, and the district court, put a play on the word "purport" in order to support a fiction that the Notice "claimed[ed] to be or do a particular thing when this claim may not be true," this fails to acknowledge the language that immediately follows in the statute: ". . . which purports *to create the interest* in that person or that person's immediate or remote grantors[.]" N.D.C.C. § 47-19.1-02(1) (emphasis added). First, rather than looking to the Merriam-Webster definition of "purport," as the district court and Gilbertson did, the legal definition should be applied when used as a verb: "[t]o profess or claim, esp. falsely; to seem to be . . . ." BLACK'S LAW DICTIONARY 1356 (9th ed. 2011). Inserted into the language of the statute, it would read: "which [falsely claims or seems to] create the interest . . . ." In this case, the Notice falsely claimed to create the interest because the Notice is patently defective. Second, there was no creation of an interest in Gilbertson by filing the Notice. Rather, the Notice merely stated that "Leroy Gilbertson, the general partner of the Gilbertson Partnership, Ltd., [ ], *intends* to succeed to ownership . . . in these lands . . . ." App. 26 (emphasis added).

[¶22] Gilbertson's position also fails because the DMA is the specific statute on point in this case. The MRTA is the general statute as applied. The specific statute applies where a conflict exists between a general and specific statute. N.D.C.C. § 1-02-07. Title to minerals vest *only* upon compliance with the DMA. Title does *not* vest when a surface owner fails to comply with the statute. The recordation of a patently defective notice of

lapse in 1987 was not a "deed of conveyance" because nothing was recorded exhibiting compliance with the DMA. The district court's conclusion that the MRTA supplants the DMA because the Notice "purported" to be a valid "deed of conveyance" is heretical to the rule of law and must be rejected. The district court's decision should be reversed and title quieted in favor of Charyl and Margaret.

B. No Possession

[¶23] The district court held that Gilbertson possessed the minerals for a period of twenty years. The MRTA provides in part:

> Any person having the legal capacity to own real estate in this state, who has an unbroken chain of title to any interest in real estate by that person and that person's immediate or remote grantors under a deed of conveyance which has been recorded for a period of twenty years or longer, *and is in possession of such real estate*, shall be deemed to have a marketable record title to such interest, subject only to such claims thereto and defects of title as are not extinguished or barred by the application of the provisions of this chapter, instruments which have been recorded less than twenty years, and any encumbrances of record not barred by the statute of limitations.

N.D.C.C. § 47-19.1-01 (emphasis added) (1987 & 2005).

[¶24] The minerals conveyed to Charyl and Margaret were severed from the surface estate. By severance, separate estates are created and each is incapable of possession by the mere occupancy of the other. *Northern Pac. Ry. Co. v. Advance Realty Co.*, 78 N.W.2d 705, 719 (N.D. 1956). Therefore, Gilbertson must prove actual possession of the minerals and not just the surface estate.

[¶25] Gilbertson cannot show that it was in possession of the mineral, as it lacked actual possession. *Sickler v. Pope*, 326 N.W.2d 86, 93-94 (N.D. 1982); *see also* 2012 N.D. Op. Att'y Gen. No. L-11 (2012), (internal citations omitted), available at http://www.ag.nd.gov/Opinions/2012/Letter/2012-L-11.pdf (explaining possession as

applied to severed mineral interests). A lease is not actual possession of the minerals. And neither is a patently defective Notice.

[¶26] Gilbertson takes the position that Charyl and Margaret admitted to "possession" in their pleadings; this was incorporated into the district court's order. App. 100-101. It is clear, however, by the documents cited that this was meant in the generic sense and not to be meant as "possession" as determined in *Sickler*. *See* App 65 (¶50), 71 (¶ 95). These statements in Charyl and Margaret's waste counterclaim cite to docket number 40, which is an affidavit of LeRoy Gilbertson, and Exhibit C (Dkt. #73), which is an oil and gas lease signed by Gilbertson. LeRoy Gilbertson's affidavit states that Gilbertson possessed the property. App. 152-56. Charyl and Margaret simply stated what Gilbertson was claiming—not that it was true in the sense of "possession" as defined in *Sickler*. Further, this statement was made in the claim for waste. As discussed below, Gilbertson did receive royalty payments attributable to Charyl and Margaret's minerals; Charyl and Margaret seek damages for waste. Charyl and Margaret explained this to the district court and objected to this being deemed an admission. Again, it is impossible for Gilbertson to legally possess a mineral interest it never owned.

[¶27] Gilbertson cannot show evidence of any extraction of minerals from the subject property for twenty continuous years. This is fatal to its claim that the MRTA bars Charyl and Margaret's claims to the minerals. "In order to come under the protection of [the MRTA], one who claims an interest in real estate must have two qualifications. He must have an unbroken chain of title of record, and he must be in possession of the interest which he claims." *Sickler*, 326 N.W.2d at 93. *Sickler* determined that oil and gas leases executed by plaintiff and her predecessors did not constitute actual possession of the

severed mineral interest for purposes of adverse possession. *Sickler* held this lack of proof of possession barred the application of the MRTA, because the plaintiff and her predecessors in interest "have not been in possession of the mineral estate" and could therefore not claim the protection of the MRTA. *Id.* at 93-94.

[¶28] Similarly, in this case, Gilbertson cannot establish possession of the minerals. It can point only to the existence of an executed lease, which is insufficient to establish possession of a mineral estate. *Id.* Because Gilbertson cannot establish possession of the mineral estate, the MRTA does not apply.

[¶29] Moreover, Gilbertson recorded a defective Notice: it did not include Faery and was not mailed after publication. These defects preclude possession of the mineral estate by Gilbertson. It is axiomatic that Gilbertson cannot possess an interest that never lapsed.

[¶30] The Legislature added the following language to N.D.C.C. § 47-19.1-07, effective August 1, 2013: "The holder of an interest in severed minerals is deemed in possession of the minerals if that person has used the minerals as defined in section 38-18.1-03 and the use is stated in the affidavit of possession provided for in this section." N.D.C.C. § 47-19.1-07 (2013) (emphasis added). Statutes are not applied retroactively unless specifically stated. *See* N.D.C.C. § 1-02-10 (stating "[n]o part of this code is retroactive unless it is expressly declared to be so); *White v. Altru Health Sys.*, 2008 ND 48, ¶ 17, 746 N.W.2d 173 (noting the Legislature must give explicit notice if a statute is to apply retroactively); *Halvorson v. Starr*, 2010 ND 133, ¶¶ 11-13, 785 N.W.2d 248 (stating that the Legislature must "give explicit notice" if it intends a statute to be retroactive and

determining that the plaintiff's arguments did not conform to the strict construction of the DMA).

[¶31] Although Gilbertson argued, and the district court held, that the legislative history behind the MRTA applies to make this provision retroactive, this fails to offer anything other than speculation as support. App. 95-96; *see* also Dkt. #98 at ¶¶ 4-5. The only support for Gilbertson's argument is that the chair of the Real Property Section of the State Bar Association, requested the amendment because of defects in mineral chains that could be ignored. Dkt. #98 at ¶ 5. But when referring to the proposed (and eventually passed) amended language, the chair states, "[w]hat this bill does you will find on the 3rd page, line 8, 9 and 10 *is now applied* (sic) Marketable Record Title Act to several (sic) mineral interests...." *See* Hearing on S.B. 2169 Before the Senate Judiciary Comm., 63rd N.D. Legis. Sess. (March 26, 2013) (Testimony of Grant Shaft, North Dakota Bar Association) (emphasis added). This is far from the explicit notice that is required in order to apply the statute retroactively—so far departed, in fact, that it actually indicates that the amended Act only applies to severed mineral interests *prospectively*. Gilbertson's argument that the amendment "simply clarified the law" is wrong. Simply stating that an amendment clarified a law does not make it retroactive when it still is without an explicit notice as required by N.D.C.C. § 1-02-10.

[¶32] None of the parties argue N.D.C.C. § 47-19.1-07 is ambiguous. For a statute that is not ambiguous, legislative history is irrelevant. *See Sorenson v. Felton*, 2011 ND 33, ¶ 16, 793 N.W.2d 799 ("We conclude, it is inappropriate to look to the legislative history to interpret the statute because the language in section 38-18.1-06, N.D.C.C., is not ambiguous.").

[¶33] While Gilbertson claims to rely on the 2013 amendment to the MRTA, Gilbertson never recorded an affidavit of possession as provided in the 2013 amended portion. If Gilbertson truly believes in its legal fiction, it ought to at least attempt to comply with the fiction it attempts to create. The MRTA requires the use of the minerals to be included in an affidavit of possession. N.D.C.C. § 47-19.1-07 (2013). Although there is a statement of possession in Leroy Gilbertson's affidavit, which was filed with Gilbertson's brief in response to Loveridges' motion to vacate the default judgment, it was never *recorded* in order to establish a time from which to begin the twenty-year period. App. 152-56.

C. Broken Title

[¶34] Even *if* Gilbertson could prove that there was possession of the subject minerals when it recorded a patently defective Notice in 1987, reversal is appropriate because Charyl and Margaret were deeded the subject property in 1990 and also leased the minerals in 2005. App. 21-22, 32-33. A person is deemed to have an unbroken chain of title:

> when the official public records of the county wherein such land is situated discloses a conveyance or other title transaction dated and recorded twenty years or more prior thereto, which conveyance or other title transaction purports to create such interest in that person or that person's immediate or remote grantors, with nothing appearing of record purporting to divest that person and that person's immediate or remote grantors of such purported interest.

N.D.C.C. § 47-19.1-02(1) (1987 & 2005) (emphasis added). A title transaction is defined as "any transaction affecting title to real estate, including title by will or descent from any person who held title of record at the date of that person's death, title by decree or order of any court, title by tax deed or by trustee's, referee's, guardian's, executor's, master's in

chancery, or sheriff's deed as well as by direct conveyance." N.D.C.C. § 47-19.1-02(2) (1987 & 2005). As cited above, the MRTA only applies if title records show an unbroken chain of title for twenty years "with nothing appearing of record purporting to divest that person and that person's immediate or remote grantors of such purported interest." N.D.C.C. § 47-19.1-02(1) (1987 and 2005). The conveyance in 1990 and lease in 2005, which were recorded before an unbroken period of twenty years had occurred, preclude the MRTA's application. N.D.C.C. 47-19.1-07 (1987 and 2005).

[¶35] Even if the Notice was not defective, the chain of title was broken in 1990 when Theodore and Faery conveyed the mineral interest to Charyl and Margaret. App. 21-22. And the chain of title was again broken when Charyl and Margaret signed a mineral lease that warranted their title, was notarized, and recorded in 2005. App. 32-33. Gilbertson did not have an unbroken chain of title because the deed and lease divested Gilbertson of any portion of Charyl and Margaret's interest it believed it had.

[¶36] There are several defects in the title to the property that prevent it from being marketable. Used interchangeably with marketable title, "[a] 'good and merchantable title' means a title in fee simple, free from litigation, palpable defects, and grave doubts . . . ." *Coverston v. Egeland*, 69 N.W.2d 790, 798 (N.D. 1955) (citing *Kennedy v. Dennstadt*, 154 N.W. 271, 274 (N.D. 1915)). In *Coverston*, much like this case, the question of whether title was marketable was at issue. *Id.* at 793. Here, title to Charyl and Margaret's interest was questioned in a drilling order title opinion ("DOTO"). App. 157-66. Gilbertson cannot argue that the title was free from litigation. The litigation commenced in 2004. Next, Gilbertson cannot argue that the title is free from palpable defects. The Notice is patently defective, otherwise the attorney who authored the DOTO

would not have drafted a comment and requirement cautioning Continental Resources, Inc. ("Continental") of the potential title dispute. App. 161-66. Lastly, the title attorney revealed grave doubts as to the title to Gilbertson's interest as it applies to the portion that was taken from Charyl and Margaret. *Id.* This Court has said that marketable title is "free from litigation, palpable defects *and* grave doubts." *Coverston* at 798 (emphasis added). In this case, not just one, but all three impediments are present and the interest is not marketable as it applies to Gilbertson. The district court's order should be reversed and title quieted in favor of Charyl and Margaret.

D. Public Policy Considerations Bar Gilbertson's Claims

[¶37] Gilbertson's play on the minerals owned by Charyl and Margaret is based on a legal fiction Gilbertson *attempted* to create, which the district court accepted. The legal fiction begins when Gilbertson failed to adhere to the clear requirements set forth in N.D.C.C. ch. 38-18.1 in 1986. Gilbertson's failure to adhere to the DMA should not mean that the MRTA is a work-around for surface owners who *attempt* (yet fail) to take property that does not belong to them by claiming the minerals as abandoned. Time does not confirm a void act–and neither should this Court. N.D.C.C. § 31-11-05(30).

[¶38] To apply the MRTA to this case would violate public policy. Surface owners must strictly comply with the requirements of N.D.C.C. ch. 38-18.1. To apply the MRTA to this situation, where it is clear that Gilbertson failed to comply with the DMA, rewards a party for not complying with a law that, according to this Court, requires strict compliance. Strict compliance should continue to mean strict compliance.

III. GILBERTSON COMMITTED WASTE

[¶39] Waste was committed here by Gilbertson when it leased the mineral interest that was improperly obtained through its defective Notice and subsequent quiet title action. App. 89-91. Leasing the mineral interest was an affirmative act by Gilbertson that granted the lessee the right to produce the minerals. *Id.* "A recovery may be had in the action by any party against a defendant personally served or who has appeared, or against the plaintiff, for the value and the use and occupation of the premises and for the value of the property wasted or removed therefrom . . .." N.D.C.C. § 32-17-02. And,

> [i]f such recovery is desired by plaintiff,[3] the plaintiff shall allege the fact, stating particularly the value of the use and occupation, the value of the property wasted or removed, and the value of the real property aside from the waste or removal, and shall demand appropriate relief in the complaint.

Id. Charyl and Margaret made the proper allegations in their counterclaim and third-party complaint. App. 64-66, 70-72.

[¶40] If title is quieted in favor of Charyl and Margaret, then they are (and were) tenants in common with Gilbertson. Charyl and Margaret alleged that they are joint tenants with each other, but tenants in common with Gilbertson, which is consistent with the statute. App. 65, 71. The waste at issue here would be considered commissive waste, also known as active or affirmative waste, which is defined as "[w]aste caused by the affirmative acts of the tenant." BLACK'S LAW DICTIONARY (10th ed. 2014).

> If a . . . tenant in common, of real property, commits waste thereon, any person aggrieved by the waste may bring an action against the one committing waste therefor, and in such action there may be judgment for treble damages, forfeiture of the estate of the party offending, and eviction from the premises.

[3] In this case, Loveridges would be considered the Plaintiff as they are the Counterclaimant and Third-Party Plaintiff.

N.D.C.C. § 32-17-22 (emphasis added).

[¶41] The party committing the waste, who is also susceptible to the claim of waste by the aggrieved party, can be "a ... tenant in common . . .." *Id.* Williams and Meyers explains the following:

> Since the Statute of Westminster II, c. 22 (1285), a cotenant has been subject to the law of waste. This rule of liability is uniformly found in the several states, either by virtue of the adoption of the rule as part of the common law or by the adoption of a specific statute dealing with the subject. Prima facie, therefore, a cotenant may not remove minerals from the land concurrently owned without the consent of his concurrent owners.

PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS OIL AND GAS LAW, § 502 (Abridged 4th ed. 2010).

[¶42] The district court's denial of summary judgment should be reversed and a monetary award issued for $85,215.27 ($28,405.09 x 3), representing treble damages for the waste caused by Gilbertson's actions. This amount was initially calculated in the counterclaim and third-party complaint, and later revised upon receipt of additional information from Continental, the operator of the Melgaard 1-14H well. App. 65, 70-71; Dkt. #76-79, 96.

IV. ALTERNATIVELY, UNJUST ENRICHMENT APPLIES

[¶43] A claim for unjust enrichment requires meeting five elements: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) an absence of justification for the enrichment and impoverishment; and (5) an absence of remedy provided by law. *Id.* (citing *A & A Metal Bldgs. v. I-S, Inc.*, 274 N.W.2d 183, 189 (N.D. 1974)). Charyl and Margaret have provided evidence of Gilbertson's enrichment. *See* Dkt. #77-79. They have also provided evidence that they were impoverished by never being paid under their lease. *See* Dkt. #96. The enrichment

of Gilbertson was at the expense of Charyl and Margaret—the connection is clear. *Id.* Gilbertson cannot justify its enrichment and the Loveridges' impoverishment; Gilbertson recorded a patently defective Notice without justification. If the legal remedy of waste is rejected, there is no other remedy at law for Charyl and Margaret to pursue in order to realize the monies that have already been paid to Gilbertson from the Subject Property owned by Charyl and Margaret as a result of Gilbertson's failure to comply with the DMA.

[¶44] Charyl and Margaret's counterclaim and third-party complaint alleged that they are owed $32,209.92. App. 66-67, 72-73. This amount was re-calculated when Charyl and Margaret received new information from Continental. Dkt. #96. The amount Charyl and Margaret seek to recover for Gilbertson's unjust enrichment is only from payments made for production from the Melgaard 1-14H well, that total being $28,405.09 (15/70.83 * 134,128.84 = $28,405.09). App. 66-67, 72-73; Dkt. #76-79, 96.

[¶45] Gilbertson argued, and the district court held, that because Charyl and Margaret have entered into a lease with Continental, that this precluded a claim for unjust enrichment. App. 102-03. Charyl and Margaret concede that they have entered into a lease with Continental, but this does not preclude them from bringing a claim against Gilbertson. Gilbertson cited, as did the district court, to *Ritter, Laber and Assoc., Inc. v. Koch Oil, Inc.*, 2004 ND 117, ¶ 26, 680 N.W.2d 634, to support a position that unjust enrichment is only available "as an equitable doctrine based upon a quasi or constructive contract implied by law" and that it "serves as a basis for requiring restitution of benefits conferred 'in the absence of an expressed or implied in fact contract.'" Yet the same opinion stated "it is well-settled that unjust enrichment applies only in the absence of a contract *between the parties*, and there can be no implied-in-law contract when there is an express contract

between the parties relative to the same subject matter." *Id.* at ¶ 28 (emphasis added). There is not a contract between the parties here. A claim may be had for unjust enrichment. *Id.*

[¶46] Gilbertson argues, and the district court held, that *Ritter* rejected the argument made by Charyl and Margaret. App. 102-03. However, that case and the case it cites to, *Apache Corp. v. MDU Resources Group, Inc.*, 1999 ND 247, 603 N.W.2d 634, are distinguishable. In *Ritter*, Koch was a party to two different types of division orders (contracts): "basic" and "100%" division orders. The basic division orders were with those who had an interest in the oil (plaintiffs) and the 100% division orders were with well operators. *Ritter*, 2004 ND 117, ¶ 3. Thus, Koch was a party to both contracts. In *Apache Corp.*, Apache's theory was that it was a third-party beneficiary to a contract between MDU Resources and Koch. *Apache Corp.*, 1999 ND 247, ¶7. The Court rejected the argument, saying the evidence did not show "MDU and Koch contracted 'expressly for the benefit of' Apache." *Id.* at ¶ 11. Both of these cases are clearly distinguishable here because the parties contracted with separate companies. App. 32-33, 89-91, 155-56.

[¶47] "Even when a person has received a benefit from another, that person is liable only if the circumstances of the receipt or retention are such that, as between the two persons, it is unjust to retain the benefit." *Ritter*, 2004 ND 117, ¶ 26 (citing *Apache Corp.*, 1999 ND 247, ¶ 14) (quoting Restatement of Restitutions § 1 cmt. c. (1937)). In *Ritter*, this Court stated that their decision in *Apache Corp.* was that "the money MDU saved by breaching its contract with Koch was not a 'benefit at the direct expense of' Apache." *Id.* at ¶ 27. The difference in the current case is that Gilbertson did benefit at the direct expense of Charyl and Margaret. How could it possibly be just that Gilbertson has collected money

rightfully owed to Charyl and Margaret when its receipt by Gilbertson was based upon patent noncompliance with the DMA? There was no contract between the parties to this action. Justice and equity require that money paid to Gilbertson for the 15/240ths interest that was improperly taken from Charyl and Margaret be paid to them.

V. FAERY LOVERIDGE WAS INEXPLICABLY IGNORED

[¶48] The district court ignored the plain fact Faery Loveridge was not included in the Notice of Lapse document that was recorded in 1987. App. 23-28. Gilbertson apparently relies on the Notice as evidence of a "conveyance" and "possession" against Faery. It is undisputed that Faery was a record owner of the minerals with her husband Theodore until conveying the interests to Charyl and Margaret in 1990. App. 20-22. It is inconceivable how the district court could conclude, or how Gilbertson could argue, that the MRTA would apply to take minerals owned by Faery. As an *alternative argument only*, and without waiving any claims or arguments stated above, if the Court does not reverse the district court as to all of the subject property as should occur, half of the subject minerals belonged to Faery and were never subject to the dormant mineral claim or to Gilbertson's legal fiction brought under the MRTA. In the alternative only, if the Court rejects Appellants arguments in Sections I and II above, the minerals owned by Faery should be quieted in Charyl and Margaret. Further, in the alternative only, Charyl and Margaret's claims for waste or unjust enrichment would apply to Faery's interest.

CONCLUSION

[¶49] For all the reasons set forth above, the district court's decision quieting title in Gilbertson should be reversed. Title to the Subject Property should be quieted in favor of Charyl Loveridge and Margaret Loveridge. An award of $85,215.27, treble damages

for the waste committed by Gilbertson, should be awarded. Alternatively, if the Court rejects the at-law waste claim, $28,405.09 should be awarded to Charyl and Margaret for unjust enrichment.

[¶50] In the alternative only, and only in the event the Court does not quiet all of the title in the Subject Property to Charyl and Margaret as argued in Sections I and II, Faery Loveridge's interest should be quieted in favor of Charyl and Margaret and either $42,607.65, representing half of the waste claim, or $14,202.55, representing half of the unjust enrichment claim, should be awarded to Charyl and Margaret.

Dated this 22nd day of February, 2017.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Gilbertson Partnership, Ltd., a North Dakota Limited Partnership, Plaintiff and Appellee, vs. Vernon J. Drabek a/k/a Vernon Drabek, William J. Fizer a/k/a Wm. J. Fizer, Alsie Mae Fizer, Harold R. Bennett, Wyman H. Meigs, Lucile S. Meigs, Lucile S. Colbert, Wyman Orlin Meigs, Theodore F. Loveridge, Faery R. Loveridge, C.H. Kopp, Blanche Kopp, Chester R. Cos, Earl Cox, Virginia Danielson, Royce Cox, Lois Vance, James Cox, Iva Inez Cox, and all other persons unknown claiming any estate or interest in, or lien or encumbrance upon the property described in the Complaint, whether as heirs, devisees, legatees, or personal representatives of any of the above-named persons who may be deceased or under any other title or interest, Defendants and Appellees, and Charyl W. Loveridge and Margaret A. Loveridge, Defendants, Third-Party Plaintiffs, and Appellants, vs. LeRoy Gilbertson, as Trustee of the Gilbertson Partnership Limited Irrevocable Trust, Third-Party Defendant and Appellee.	Supreme Court No 20160347 Divide Co. Civil No. 12-04-C-00038

AFFIDAVIT OF SERVICE

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

Annette Kirschenheiter, being first duly sworn, deposes and says that on the 22 day of February, 2017, she mailed a copy of the foregoing *Appellants' Brief* and *Appellants' Appendix* by placing a true and correct copy thereof in an envelope, addressed to the following:

Sara K. Sorenson
Ohnstad Twichell, P.C.
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West Fargo, ND 58078-0458

and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Annette Kirschenheiter
Annette Kirschenheiter

Subscribed and sworn to before me this 22 day of February, 2017.

DAYNA BARONE
Notary Public
State of North Dakota
My Commission Expires October 10, 2018

Dayna Barone
Notary Public