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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Supreme Court No. 20180348
Civil No. 31-2013-CV-00070

In the Matter of Edward J. Brown, an Unlocatable Owner of Mineral Interests Underlying Certain Tracts of Land Within Township 154 North, Range 94 West and Township 153 North, Range 94 West, All Located in Mountrail County, North Dakota

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Sundance Oil and Gas, L.L.C., Petitioner and Appellee
v.
Barbara B. Corwin, individually and as Personal Representative of the Estate of Edward J. Brown, Patricia B. Goldberg, individually and as Personal Representative of the Estate of Janet G. Brown, and Mountrail County Treasurer, Trustee, Respondents,
and
Hess Corporation, Respondent and Appellant

BRIEF OF HESS CORPORATION, RESPONDENT and APPELLANT

Appeal from Order Denying Hess's Motion to Set Aside Default Judgment
Dated July 17, 2018,
District Court, North Central Judicial District, Mountrail County, North Dakota
The Honorable Richard L. Hagar

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STATEMENT OF THE ISSUE

[¶1] Hess Corporation leased minerals from two mineral owners, recorded the leases, and began drilling. Over two years after Hess leased the minerals, Sundance Oil and Gas, LLC filed an unlocatable mineral owner action, claiming the mineral owners' father could not be found. Without actual notice to Hess, Sundance obtained a default judgment that authorized a competing lease to Sundance for the same minerals that Hess leased. Hess did not receive actual notice of the default proceeding. Did the default judgment violate Hess's due process rights and thus render the default judgment void?

STATEMENT OF THE CASE

[¶2] This is a dispute about the due process right to notice of an adverse action against one's property. The dispute is between a lessee who received its leases by contracting with the actual mineral owners, and a lessee who received its lease for the same minerals by petitioning a court to authorize a competing lease—without giving actual notice to the initial lessee.

[¶3] More specifically, it is undisputed that Hess obtained valid mineral leases from the heirs of Edward J. Brown, the original mineral owner. (App. 113-16.) Hess recorded those leases and began drilling. (App. 132-37.) Approximately two years after Hess obtained its leases, Sundance filed a lawsuit pursuant to N.D.C.C. § 38-13.1 (the "Unlocatable Mineral Owner Statute") claiming it could not locate Brown. (App. 4-6.) In a motion for default judgment, Sundance requested the district court to create a trust for the benefit of Brown and authorize a lease of Brown's mineral interest to Sundance. (App. 22-34.) The district court granted motion. (App. 35-37.) Hess did not have actual notice of these court proceedings (the "Default Proceeding").

[¶4] Less than a year after obtaining the competing lease, Sundance filed a different lawsuit against Hess and Brown's heirs, seeking to quiet title to the leasehold mineral interests in its favor (the "Quiet Title Action"). (App. 56-85.) The district court granted Sundance's summary judgment. (App. 221-33.) This Court reversed and remanded for further proceedings. *Sundance Oil & Gas, LLC v. Hess Corp.*, 2017 ND 269, 903 N.W.2d 712. The Quiet Title Action remains pending.

[¶5] Then, in the Default Proceeding, Hess filed a motion to set aside the default judgment under N.D.R.Civ.P. 60(b)(4), contending the default judgment is void for lack of due process. (App. 38-55, 565-71.) The district court denied that motion. (App. 572-82.) This appeal followed. (App. 583-84.)

STATEMENT OF THE FACTS

[¶6] The key facts:

Date	Event
Mar. 1952	Edward J. Brown acquires mineral interests in Mountrail County. (App. 112.)
Jul. 1977	Edward J. Brown dies intestate in Florida. (*See* App. 187-88.)
Jan. 2000	Janet Brown, Edward J. Brown's wife, dies intestate in New York. (*See* App. 189-90.)
Mar. & Apr. 2011	Hess leases mineral interests from Edward J. Brown's two living heirs, (Corwin and Goldberg), the mineral owners. (App. 113-16.)
May 2011	Hess files memoranda of its leases with the Mountrail County Recorder, which properly indexes Hess's leases in the tract index. (App. 133.)
Apr. 2013	Hess acquires permits to begin drilling three wells on the tract of land containing its leased minerals. (App. 132-37.)
May 2013	Without notice to Hess, Sundance files a lawsuit to establish a trust for the benefit of Edward J. Brown and obtain a lease for Brown's mineral interests (now owned by Brown's living heirs). (App. 4-6.)
Jun. 2013	Hess begins drilling three wells on the tract. (App. 132-33.)
Jul. 2013	The district court in the Default Proceeding grants default judgment, thereby authorizing a lease to Sundance for Brown's mineral interests. (App. 35-37.) Sundance's lease conflicts, in part, with Hess's leases. (App. 56.)
May 2014	Hess first learns that Sundance was claiming an interest in its leasehold minerals when Sundance sues Hess and Brown's heirs in the Quiet Title Action. (App. 56-85.)
Aug. 2014	Hess counterclaims, alleging that Sundance could not obtain a lease superior to Hess without notifying Hess of the Default Proceeding. (App. 86-105.)
Feb. 2017	The district court in the Quiet Title Action renders judgment in favor of Sundance. (App. 221-33.)
Nov. 2017	This Court reverses and remands the Quiet Title Action, in part advising that the proper place to challenge proper notification is in the Default Proceeding, not the Quiet Title Action. *Sundance Oil & Gas, LLC v. Hess Corp.*, 2017 ND 269, ¶ 21, 903 N.W.2d 712.
Feb. 2018	In the Default Proceeding, Hess files a motion to set aside the default judgment. (App. 38-55.)
Jul. 2018	The district court denies the motion to set aside the default judgment. (App. 572-82.)

A. Brown's Heirs own the minerals.

[¶7] Edward J. Brown ("Brown") once owned minerals in Mountrail County, North Dakota. (App. 112.)[1] In 1977, he died intestate in Florida. (*See* App. 187-88.) In 2000, his wife died intestate in New York. (*See* App. 189-90.) Brown's living heirs were his daughters, Corwin and Goldberg (the "Heirs"). (App. 187-90.) Therefore, the Heirs inherited ownership of Brown's mineral interests.

B. Hess leased minerals from the Heirs, properly recorded the leases, and began drilling.

[¶8] In March 2011, the Heirs leased to Hess. (App. 113-16.) Hess leased a portion of the Heir's interest, not their entire interest.[2]

[¶9] In May 2011, memoranda of Hess's leases were filed with the Mountrail County Recorder. (App. 114, 116, 133.) The memoranda were properly indexed in the Mountrail County Recorder's tract index. (App. 133.)

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[1] Specifically, he owned a 50/2000ths interest in:

<u>Township 153 North, Range 94 West</u>
Section 1: NW1/4, N1/2SW1/4, SW1/4SW1/4
Section 2: E1/2SE1/4, SW1/4SE1/4, SE1/4NE1/4, Lots 1 and 2

<u>Township 154 North, Range 94 West</u>
Section 23: E1/2NW1/4, SW1/4NW1/4, W1/2NE1/4, N1/2SW1/4, SE1/4SW1/4, W1/2SE1/4, SE1/4SE1/4
Section 25: E1/2NW1/4, E1/2SW1/4, SW1/4NW1/4, SW1/4SW1/4, SW1/4SE1/4, and part of the SW1/4 of the SE1/4, 20 acres
Section 26: NE1/4, E1/2NW1/4, N1/2SW1/4
Section 35: SE1/4, S1/2NE1/4, SE1/4NW1/4, NE1/4SW1/4, W1/2NW1/4, SE1/4SW1/4, SW1/4SW1/4, 20 acres

(App. 112.)

[2] Hess leased minerals from the heir's interest in Township 154 North, but not any of their minerals in Township 153 North. (*Compare* App. 112, *with* App. 113-16.)

[¶10] Hess had acquired permits by April 2013 and had begun drilling three wells on the tract of land containing its leased minerals by June 2013. (App. 132-37.) The permits, production, and spacing data were publicly available on the North Dakota Industrial Commission's website. (*See* App. 132-37.)

C. Approximately two years after Hess obtained the leases, Sundance acquired a conflicting lease from the district court.

[¶11] About a month after Hess acquired permits—and approximately two years after Hess obtained the leases—Sundance filed a petition with the district court pursuant to the Unlocatable Mineral Owner Statute, seeking the establishment of a trust for Brown's mineral interests and a lease of Brown's minerals to Sundance. (App. 4-6.) Sundance claimed Brown was an unlocatable mineral owner. (App. 5.) It had searched for Brown and suspected that he was deceased. (*See* App. 25-27, 127.) Nevertheless, Sundance then attempted service on Brown by certified mail and publication. (App. 25.)

[¶12] Sundance did not serve Hess, nor did it attempt to do so. But, as part of its case, Sundance stated that it was "actively engaged in the exploration for and development of oil and gas" in the area and that it (Sundance) had "investigat[ed] and review[ed] [the] title documents recorded in Mountrail County, North Dakota." (App. 16, 24, 26.) Sundance moved forward in district court without notice to Hess, despite Hess's active oil and gas operations on the tract and the properly indexed memoranda of Hess's leases. (*See* App. 132-33.)

[¶13] Obviously, neither Brown nor his Heirs answered or appeared. (App. 35.) By default judgment, the district court established a trust for Brown's mineral interests, naming the Mountrail County Treasurer as trustee. (App. 36-37.) The court also

authorized the trustee to execute and deliver an oil and gas lease dated July 17, 2013 in favor of Sundance, which conflicts, in part, with the previously executed Hess leases. (App. 37, 56-57, 61-64.) Sundance's lease covers the minerals that Hess leased, plus additional acreage not leased by Hess.[3] Hess never received actual notice of the Default Proceeding.

D. Sundance filed a quiet title suit against Hess, which was appealed to this Court.

[¶14] In May 2014, Sundance sued Hess and the Heirs to quiet title to the mineral interests. (App. 56-85.) The Quiet Title Action was the first notice that Hess ever received that Sundance sought to claim an interest in Hess's mineral interests. Sundance claimed a superior lease solely by virtue of the lease it took in the Default Proceeding. (App. 56-60.) Hess counterclaimed, alleging that Sundance could not obtain a lease superior to Hess without notifying Hess of the Default Proceeding. (App. 86-105.) But, the district court granted summary judgment in favor of Sundance. (App. 221-233.)

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[3] The Sundance Lease covers:

> Township 153 North, Range 94 West
> Section 1: Lots 3 (40.10), 4 (40.14), S1/2NW1/4, SW1/4SW1/4, N1/2SW1/4
> Section 2: Lots 1 (40.19), 2 (40.25), SE1/4NE1/4, E1/2SE1/4, SW1/4SE1/4
>
> Township 154 North, Range 94 West
> Section 23: S1/2NE1/4, W1/2E1/2, N1/2SW1/4, SE1/4SE1/4, SE1/4SW1/4, NW1/4NW1/4
> Section 25: E1/2W1/2, SW1/4NW1/4, SW1/4SW1/4, West 20 acres of the SW1/4SE1/4
> Section 26: NE1/4, E1/2NW1/4, N1/2SW1/4
> Section 35: Lot 1 (39.10), NW1/4NW1/4, SE1/4NW1/4, S1/2NE1/4, NE1/4SW1/4, SE1/4, 20 acres located in the SW1/4SW1/4, SE1/4SW1/4

(App. 56-57, 61-64.)

[¶15] Hess appealed to this Court. On November 20, 2017, this Court reversed summary judgment and remanded for further proceedings, holding that a genuine dispute existed about whether Sundance had knowledge of Hess's leasehold interest when Sundance received its lease, and thus whether Sundance was to be considered good faith purchaser. *Sundance Oil & Gas, LLC v. Hess Corp.*, 2017 ND 269, ¶¶ 9-22, 903 N.W.2d 712.

[¶16] This Court advised that "[t]he proper place for Hess to challenge whether it was properly notified is in the [Default Proceeding] itself and not in this current quiet title action." *Id.* at ¶ 21. Hess's motion in the Default Proceeding to set aside the default judgment was denied, and this appeal followed. (App. 572-84.) The Quiet Title Action remains pending in the district court.

ARGUMENT

[¶17] The district court erred in denying Hess's motion to set aside the default judgment because the judgment is void for violation of Hess's due process rights. Hess's due process rights were violated because it did not receive actual notice of the Default Proceeding.

[¶18] Hess was required to receive actual notice for three reasons:

(1) The Default Proceeding adversely affected Hess's leases because it clouded title to the leases and diminished their value by authorizing a competing lease.

(2) Hess, as mineral lessee, was reasonably ascertainable because of Hess's active drilling and Hess's recording of its leases in the tract index.

(3) Although the Unlocatable Mineral Owner Statute does not expressly provide who is to receive notice, the statute requires that "the best interest of all owners of an interest in the mineral, leasehold, or royalty interest" be satisfied, which includes Hess.

[¶19] Accordingly, this Court should reverse the denial of Hess's motion to set aside the default judgment and remand for further proceedings.

A. The standard of review is plenary.

[¶20] The standard of review for the denial of a motion for relief from a default judgment under N.D.R.Civ.P 60(b)(4) is plenary. *Smith v. Hall*, 2005 ND 215, ¶ 7, 707 N.W.2d 247. Likewise, the standard of review for the underlying issues here—constitutional due process and interpretation of a statute—is plenary. *Schwab v. Zajac*, 2012 ND 239, ¶ 22, 823 N.W.2d 737; *Isaacson v. Isaacson*, 2010 ND 18, ¶ 9, 777 N.W.2d 886; *Grinnell Mut. Reinsurance Co. v. Thompson*, 2010 ND 22, ¶ 9, 778 N.W.2d 526.

B. The default judgment is void because it violated Hess's due process rights.

[¶21] The district court erred in denying Hess's motion to set aside the default judgment because the judgment is void. The judgment is void because it violated Hess's due process rights.

[¶22] Under N.D.R.Civ.P. 60(b)(4), the district court must set aside a final judgment as a matter of law if "the judgment is void." N.D.R.Civ.P. 60(b)(4); *Monster Heavy Haulers, LLC v. Goliath Energy Servs., LLC*, 2016 ND 176, ¶ 11, 883 N.W.2d 917. A judgment is void under Rule 60(b)(4) if the court lacked subject-matter or personal jurisdiction, or if the judgment is premised on a due process violation. *Dockter v. Dockter*, 2018 ND 219, ¶ 13, 918 N.W.2d 35.

[¶23] The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits states from depriving any person of property "without due process of law." U.S. Const. amend. XIV, § 1; *Miles Homes Div. of Insilco Corp. v. City of*

Westhope, 458 N.W.2d 321, 324 (N.D. 1990). "An elementary and fundamental requirement of due process in any proceeding . . . is notice . . . ." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950). A purpose of notice is "to minimize substantively unfair or mistaken deprivations of property." *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 53 (1993) (citation omitted).

[¶24] "Actual notice" is required of "a proceeding which will adversely affect" an entity's property interest, so long as that entity is "reasonably ascertainable." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983); *In re Estate of Elken*, 2007 ND 107, ¶¶ 9, 13, 735 N.W.2d 842. In such instance, notice by publication does not suffice. *Mennonite Bd. of Missions*, 462 U.S. at 797-98.

[¶25] Further, when a statute applies but does not expressly provide who is to receive notice, then the court must determine who is required to receive notice to satisfy due process. *Nelson v. Ecklund*, 68 N.D. 724, 283 N.W. 273, 276 (1938). In making this determination, the court is guided by the subject of the statute. *See Mullane*, 339 U.S. at 315; *see also In re Estate of Elken*, 2007 ND 107, ¶¶ 9-10, 735 N.W.2d 842.

[¶26] Here, the district court erred in holding that Hess was not required to receive actual notice of the Default Proceeding. Hess was required to receive actual notice because (1) the Default Proceeding adversely affected Hess's leases, (2) Hess, as mineral lessee, was reasonably ascertainable, and (3) the Unlocatable Mineral Owner Statute requires satisfaction of Hess's best interest. These reasons are discussed in turn.

1. The Default Proceeding adversely affected Hess's leases.

[¶27] The Default Proceeding adversely affected Hess's leases because it clouded title to Hess's leases and diminished their value by authorizing a competing lease.

[¶28] "Oil and gas leases are interests in real property in North Dakota." *Kittleson v. Grynberg Petroleum Co.*, 2016 ND 44, ¶ 34, 876 N.W.2d 443 (citation omitted). For a proceeding to "adversely affect" a property interest, it is not necessary for the proceeding to completely extinguish or deprive the owner of the property interest. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 488 (1988); *see Connecticut v. Doehr*, 501 U.S. 1, 12 (1991). "[E]ven the temporary or partial impairments to property rights . . . are sufficient to merit due process protection." *Doehr*, 501 U.S. at 12. Also, "[i]t is not necessary for a proceeding to directly adjudicate the merits of a [property interest] claim in order to 'adversely affect' that interest." *Pope*, 485 U.S. at 488 (citing *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983)). Accordingly, a proceeding "adversely affect[s]" a property interest if it temporarily clouds title to the property, diminishes the value of the property interest, or impairs the ability to sell the property (among many other things). *E.g.*, *Pope*, 485 U.S. at 488; *Doehr*, 501 U.S. at 11-12; *accord, e.g.*, *Ford Motor Credit Co. v. NYC Police Dep't*, 503 F.3d 186, 192 (2d Cir. 2007); *Reardon v. United States*, 947 F.2d 1509, 1517-19 (1st Cir. 1991).

[¶29] For example, in *Mennonite Board of Missions*, the United States Supreme Court held that a mortgagee possessed a legally protected interest in a tax sale of the mortgaged property because the tax sale diminished the value of its interest by granting the tax-sale purchaser a lien with a superior priority. 462 U.S. at 798. As the Court subsequently explained in another case:

> In *Mennonite* itself, the tax sale proceedings did not address the merits of the mortgagee's [lien] claim. Indeed, the tax sale did not even completely extinguish that claim, it merely "diminishe[d] the value" of the interest. Yet the Court held that due process required that the mortgagee be given actual notice of the tax sale.

Pope, 485 U.S. at 488 (citing *Mennonite Bd. of Missions*, 462 U.S. at 798).

[¶30] Similarly, in *Doehr*, the United States Supreme Court held that not providing a property owner notice before issuing a prejudgment attachment on its property violated due process, because "attachment ordinarily clouds title" and "impairs the ability to sell or otherwise alienate the property," among other reasons. 501 U.S. at 4-5, 11-12, 18. The Court explained:

> [T]hese effects do not amount to a complete, physical, or permanent deprivation of real property . . . . But the Court has never held that only such extreme deprivations trigger due process concern. . . . To the contrary, our cases show that even the temporary or partial impairments to property rights . . . are sufficient to merit due process protection.

Id. at 12.

[¶31] Here, the district court concluded that the Default Proceeding did not "deprive[ ]" Hess of its property interest because the Default Proceeding created a trust and only the quiet title action can extinguish Hess's leases. (App. 577 at ¶ 12, 578 at ¶ 15, 580 at ¶ 18.) This is wrong for several reasons.

[¶32] First, it misconstrues the law. As explained above, the standard is whether a property interest is adversely affected, not completely deprived.

[¶33] Second, it overlooks a significant fact: The court in the Default Proceeding not only created a trust, but also authorized a competing lease to Sundance. (App. 36-37 at ¶ 10.) Specifically, the court ordered that "[t]he trustee is hereby authorized to execute and deliver to Sundance Oil & Gas, LLC an oil and gas lease in the form attached hereto as Exhibit 'A' . . . ." (App. 37 at ¶ 10.4, 56-57, 61-64.) There is no dispute that Sundance's lease is for the same minerals as Hess's leases and thus clouds title to Hess's leases. Indeed, after obtaining a default judgment, Sundance sued to quiet title to the

leases, asserting its lease was superior and Hess's leases should be voided. (App. 56-60.) In the quiet title action, Sundance even admitted that "Hess had an interest in the Trust Action [i.e. the Default Proceeding] in that the creation of the trust and the authorization of the execution of the Sundance Lease created a competing claim by a subsequent purchaser." (App. 156 at ¶ 25.) The cloud in title created by the Default Proceeding has consequently diminished the value of Hess's leases and impaired Hess's ability to sell its leases. (*See* App. 56-60.)

[¶34] Just as in the cited cases, this cloud in title and diminution in value—even if temporary—constitute "adverse effects" that trigger due process protection. It is irrelevant that Hess's leases cannot be completely extinguished in the Default Proceeding.

[¶35] Accordingly, the Default Proceeding adversely affected Hess's property interest in a manner sufficient to trigger due process protection. The district court erred in concluding otherwise.

2. Hess, as mineral lessee, was reasonably ascertainable.

[¶36] Because the Default Proceeding adversely affected Hess's leases, Hess was entitled to actual notice of the Default Proceeding, so long as Hess, as mineral lessee, was reasonably ascertainable. *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 800 (1983); *In re Estate of Elken*, 2007 ND 107, ¶¶ 9, 13, 735 N.W.2d 842. An entity is reasonably ascertainable if it can be "identified through 'reasonably diligent efforts.'" *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 485, 490-91 (1988) (citation omitted); *In re Estate of Elken*, 2007 ND 107, ¶ 9, 735 N.W.2d 842. The United States Supreme Court has "disavowed any intent to require 'impracticable and extended

searches'" or "cumbersome" service. *Pope*, 485 U.S. at 490 (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 317-18 (1950)); *In re Estate of Elken*, 2007 ND 107, ¶ 9, 735 N.W.2d 842.

[¶37] After discussing this line of caselaw and Hess's "reasonably ascertainable" argument, the district court concluded "that actual notice to the potentially hundreds of individuals and/or entities with an interest in the same tract of land under which Edward J. Brown's mineral interest was situated would be cumbersome and impracticable." (App. 576 at ¶ 9, 578-79 at ¶¶ 13-15, 580 at ¶ 18.)[4]

[¶38] Hess as mineral lessee (the only entity or person at issue) was reasonably ascertainable, and actual notice to Hess was not cumbersome or impracticable, for two reasons: (1) Hess was actively drilling, and (2) Hess's leases were in the tract index. Each of these reasons are addressed below.

a. Hess was actively drilling for the Heir's minerals.

[¶39] Hess as mineral lessee was reasonably ascertainable by observing Hess's active drilling.

[4] The district court pointed to language from *Mullane* that stated publication was sufficient as to property owners whose interests were "conjectural or future" and for whom it was "not reasonably possible or practicable" to give actual notice. *Mullane*, 339 U.S. at 317. (*See* App. 578 at ¶¶ 14-15.) However, the district court omitted the other half of the holding from *Mullane*, which is that notice by publication was *insufficient* as to known property owners. *Mullane*, 339 U.S. at 317-18, 320 (holding notice by publication is insufficient as to known property owners but sufficient as to property owners whose "whereabouts could not with due diligence be ascertained"). The district court also did not discuss *Pope* and *Mennonite*, which refined the due process principles first established in *Mullane* by explaining that actual notice is required for owners who are reasonably ascertainable. *Pope*, 485 U.S. at 485, 491; *Mennonite Bd. of Missions v. Adams*, 462 U.S. at 800.

[¶40] When an operator drills for minerals, it must either own or lease an interest in those minerals. 1 Williams & Meyers, Oil and Gas Law § 202 (2017). The operator often tries to obtain leases from all the mineral owners on a tract of land. (*See* App. 264 ("As a developer establishes a field they must account for all mineral acres under that field."), 274 ("Companies would prefer not to have unleased entities in a project . . . ."), 269 (explaining "the difficulty in assembling sufficient mineral ownership to make a project profitable").

[¶41] Here, *before* Sundance obtained its competing lease, Hess had begun actively drilling three wells for minerals on the tract of land that contains the Heir's minerals. (App. 132-37.) Thus, Hess necessarily had to either own or lease minerals on the tract. Sundance claims it, too, was "'actively engaged in the exploration for and development' of the area during the [Default Proceeding]." *Sundance Oil & Gas, LLC v. Hess Corp.*, 2017 ND 269, ¶ 17, 903 N.W.2d 712. (*See also* App. 24.) As a nearby developer, Sundance could have easily observed Hess's drilling and thus easily been aware of Hess's interest in the minerals.

[¶42] Sundance argued that even if it knew Hess had an interest in some of the minerals on the tract, Sundance had no way of knowing that Hess had an interest in Brown's minerals specifically. This is not true—Sundance simply could have asked Hess.

[¶43] One way to ascertain who has a property interest in litigation is to ask those who have relevant knowledge of the property interests. *See In re Estate of Elken*, 2007 ND 107, ¶¶ 12-13, 735 N.W.2d 842. For example, in *In re Estate of Elken*, an estate's personal representative learned that the decedent had a guardian. *Id.* at ¶ 2. In turn, the guardian learned that the estate had a certain creditor. *Id.* The representative then

published a "notice to creditors" to submit their reimbursement claims by a certain date, but the representative did not mail the notice to the creditor because he did not know about him. *Id.* After the deadline expired, the creditor brought a reimbursement claim against the estate, contending his claim was not time barred because he did not receive actual notice in violation of due process. *Id.* at ¶¶ 2-3, 5-6. This Court held that the representative could have reasonably ascertained the creditor's existence through reasonably diligent efforts by contacting the guardian to inquire about the decedent's affairs. *Id.* at ¶¶ 12-13. Because the creditor was reasonably ascertainable, failure to provide him actual notice violated due process and his claims were not time barred. *Id.* at ¶¶ 8-13.

[¶44] Just as the representative in *In re Estate of Elken* could have found out about creditors with an interest in the estate by asking the guardian, Sundance could have found out about lessees with an interest in Brown's (or his Heir's) minerals by asking Hess. As an operator on the tract containing Brown's minerals, Hess likely would have leased from Brown or would have known who did. Asking Hess would have been simple and easy to do.

[¶45] The district court focused on whether notice to "potentially hundreds" of entities with an interest in the tract of land was "cumbersome and impracticable." (App. 280 at ¶ 18.) But there were not hundreds of operators on the tract. Inquiry or notice to a single operator—or, at most, a few operators—is neither cumbersome nor impracticable.

[¶46] Because Hess was actively drilling, reasonably diligent efforts would have resulted in the identification of Hess as a lessee of the Heir's minerals from Brown. Therefore, Hess as mineral lessee was reasonably ascertainable.

b. Hess's leases were recorded in the tract index.

[¶47] In addition, Hess as a mineral lessee was reasonably ascertainable because its leases could be reviewed in the tract index.

[¶48] In North Dakota, there are two types of property record indexes: the older grantor–grantee index (sorted by names) and the newer tract index (sorted by tracts of land, with names being irrelevant). N.D.C.C. §§ 11-18-07, 11-18-08; *Swanson v. Swanson*, 2011 ND 74, ¶ 15, 796 N.W.2d 614; *Hanson v. Zoller*, 187 N.W.2d 47, 55-56 (N.D. 1971). Searching the grantor–grantee index is "cumbersome" and "totally impractical." *Hanson*, 187 N.W.2d at 55-56. But the tract index "makes all instruments *easily* accessible" and "*readily* available" through a "*simple* record search." *Swanson*, 2011 ND 74, ¶ 15, 796 N.W.2d 614 (emphases added). Therefore, the grantor–grantee index's concept of "chain of title" is irrelevant, and the tract index is the only index used to determine constructive notice of a recording. *Hanson*, 187 N.W.2d at 55-56.

[¶49] Hess recorded its leases in the tract index. (App. 133.) There is evidence that "[a] reasonably diligent title opinion covering any of the tracts [applicable] would have necessarily disclosed Hess's leasehold interests." (App. 133 at ¶ 11.) Instead of taking the easy and reasonable approach of searching the tract index, Sundance seems to have only searched the grantor–grantee index.

[¶50] Sundance and the district court relied on a Fifth Circuit Court of Appeals case involving a type of grantor–grantee index used by a Louisiana parish in the 1980s, wherein the Fifth Circuit likened those records to a large tree. *See Davis Oil Co. v. Mills*, 873 F.2d 774, 787, 789 (5th Cir. 1989) (explaining that the search for all persons with interests in the property would involve more than one search, and that each person's conveyances would have to be traced by name). (*See* App. 578 at ¶ 13.) But the Fifth

Circuit recognized that the complexity of land records differs among jurisdictions and that "a particular case may turn on . . . the relative ease or difficulty of identifying such interest holders from the land records." *Davis Oil Co.*, 873 F.2d at 790. Therefore, although the holding in *Davis* might be relevant to North Dakota's grantor–grantee index, it is irrelevant to North Dakota's tract index.

[¶51] In the face of the clear authority that searching the tract index in North Dakota is easy, Sundance also argued that even if it could have easily found Hess's leases in the tract index, it had no way of knowing that the leases were for Brown's minerals specifically. Although the leases named Corwin and Goldberg as the grantors and not Brown, Sundance could have determined that Corwin and Goldberg were the heirs of Brown by simply asking them or Hess. Notably, the leases contained addresses for Hess, Corwin, and Goldberg, so they could have easily been asked by mail. (App. 113-16.)

[¶52] Sundance further argued—and the district court agreed—that because the tract index lists "potentially hundreds" of entities or persons with interests in the tract, actual notice to all of them would be "cumbersome and impracticable." (App. 578 at ¶ 13, 580 at ¶ 18.) This is wrong. First, in determining whether actual notice was required for Hess, this Court does not need to reach whether actual notice was required for anyone else because they are not at issue in this appeal and might not be similarly situated as Hess. In any event, even if other interest holders are considered, identifying them and providing them with actual notice would be neither cumbersome nor impracticable. As explained above, this Court has held that identifying interest holders in the tract index is easy. *Swanson*, 2011 ND 74, ¶ 15, 796 N.W.2d 614. And the United States Supreme Court has consistently found that providing actual notice to many interest holders is

"efficient and inexpensive" by using mail. *See, e.g.*, *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 490 (1988) ("[The United States Supreme Court] ha[s] repeatedly recognized that mail service is an inexpensive and efficient mechanism that is reasonably calculated to provide actual notice."); *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 309, 319-20 (1950) (finding that even when the number of interest owners requiring actual notice was potentially well over 113, notice by mail was an "efficient and inexpensive means of communication" to those owners).

[¶53] In conclusion, reasonably diligent efforts, which were not cumbersome or impracticable, would have located Hess's leases because they were recorded in the tract index. This is an additional reason why Hess as a mineral lessee was reasonably ascertainable.

* * *

[¶54] The bottom-line is that if Sundance had actually wanted to find out about Hess's mineral interests, it easily could have done so. The reasonableness of locating and providing notice to a property owner is viewed from the standpoint of someone who actually desires to do so. *See Jones v. Flowers*, 547 U.S. 220, 238 (2006). As the United States Supreme Court has explained:

> "[W[hen notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." . . . [W]e conclude, at the end of the day, that someone who actually wanted to alert [the property owner] that he was in danger of losing his [property] would do more . . . , and there was more that reasonably could be done.

Id.

[¶55] Sundance could have observed Hess's active drilling and reviewed Hess's leases in the tract index. For these reasons, Hess as mineral lessee was reasonably

ascertainable. Therefore, Hess was entitled to actual notice, and the district court erred in holding otherwise.[5]

3. The applicable statute requires satisfaction of Hess's best interest.

[¶56] Further, Hess was required to receive actual notice of the Default Proceeding because the applicable statute, the Unlocatable Mineral Owner Statute, requires satisfaction of Hess's best interest.

[¶57] When a statute applies but does not expressly provide who is to receive notice, as here, then the court must determine who is required to receive notice to satisfy due process. *Nelson v. Ecklund*, 68 N.D. 724, 283 N.W. 273, 276 (1938). In making this determination, the court is guided by the subject of the statute. *See Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 315 (1950); *see also In re Estate of Elken*, 2007 ND 107, ¶¶ 9-10, 735 N.W.2d 842 (determining who is required to receive notice based on common-law due process principles and statutory interpretation). "[W]herever possible statutes must be interpreted in accordance with constitutional principles of law so as to give to all interested parties reasonable notice . . . ." *First Am. Bank & Tr. Co. v. Ellwein*, 198 N.W.2d 84, 95 (N.D. 1972).

[¶58] Here, the Unlocatable Mineral Owner Statute provides: "A person that owns a mineral, leasehold, or royalty interest underlying a tract of land may petition the district court . . . to declare a trust in favor of other persons also owning or claiming an interest in

[5] In the Quiet Title Action, this Court remanded for a determination of whether Sundance had actual knowledge of Hess's leasehold interest. *Sundance Oil & Gas, LLC v. Hess Corp.*, 2017 ND 269, ¶¶ 17-19, 903 N.W.2d 712. Even if the jury in that case were to decide that Sundance did not have *actual* knowledge, this Court in this appeal can and should determine that Hess as mineral lessee was *reasonably ascertainable*. These two issues are different. In other words, any finding in favor of Sundance in the Quiet Title Action does not affect reversal in this case. Sundance's knowledge (or lack of it) should not impact Hess's constitutional right to due process.

the mineral, leasehold, or royalty interest underlying the tract." N.D.C.C. § 38-13.1-01. The petitioner must prove two things:

(1) that "a diligent but unsuccessful effort to locate the absent owner or claimant has been made" and

(2) "that appointment of a trustee will be in the best interest of *all* owners of an interest in the mineral, leasehold, or royalty interest."

Id. (emphasis added).

[¶59] For the court to evaluate whether these requirements are satisfied, notice must necessarily be given to (1) the unlocatable owner and (2) all other owners. As to the second requirement specifically, the court cannot sufficiently determine whether the trust "will be in the best interest of all owners" if those owners do not have notice of the trust application and an opportunity to explain how the trust affects their interests. Indeed, the requirement is essentially meaningless if the only information about whether the trust is in all the owners' best interests comes from the self-interested petitioner who is trying to obtain a lease for itself.

[¶60] The district court concluded "that actual notice, if required by N.D.C.C. § 38-13.1-01, would be an all or nothing proposition – actual notice to *all* individuals and/or entities with an interest in the tract of land under which Edward J. Brown's mineral interests were located OR actual notice to *none* of them." (App. 579 at ¶ 17.) Then the court choose the latter: notice to none. (App. 579 at ¶ 17.) But notice to "all" is precisely what the statute demands. *See* N.D.C.C. § 38-13.1-01. (*See* App. 264 "[The statute] does not relieve the developer of the responsibility to locate *all* owners." (emphasis added)).

[¶61] In any event, this case only concerns Hess. Again, this Court does not need to reach whether any other type of owner was entitled to actual notice. As an owner of a leasehold interest, Hess clearly falls under the purview of owners whose "best interest"

the statute is trying to protect. Hess should have received actual notice so that it could protect its interest.

[¶62] The district court pointed to legislative history that explains that the purpose of the statute is to establish an efficient mechanism for leasing unlocatable mineral interests to promote oil and gas development. (App. 579 at ¶ 16.) This purpose is not undermined by requiring actual notice to Hess; to the contrary, it is furthered. Hess was already drilling under valid leases obtained from the rightful mineral owners when Sundance petitioned for a competing lease. Allowing Sundance to obtain a competing lease without notifying Hess threatens the vitality of the oil and gas production already in place. Actual notice to a reasonably ascertainable operator and mineral lessee, such as Hess, is an efficient mechanism to avoid mistakenly issuing a competing lease and to protect production already in place under valid leases.

[¶63] Accordingly, these statutory considerations provide a further reason to require actual notice to Hess. The district court erred in holding that the Unlocatable Mineral Owner Statute does not require actual notice to Hess.[6]

CONCLUSION

[¶64] The district court erred in denying Hess's motion to set aside the default judgment because the judgment is void for violation of Hess's due process rights. Hess's due

[6] Additionally, due process principles that apply here do not apply to the abandoned mineral statute. Due process notice requirements differ for self-executing statutes than for statutes that require state or judicial action to take effect. *Capps v. Weflen*, 2014 ND 201, ¶¶ 14-23, 855 N.W.2d 637. This Court held that lack of certain notice under North Dakota's abandoned mineral statute is constitutional because the statute is self-executing, meaning it does "not require any judicial action before a mineral interest is deemed to have lapsed." *Id.* In contrast, the Unlocatable Mineral Owner Statute at issue here requires judicial action to have any effect, including a petition to the court, court appointment of a trustee, and court authorization of execution of a lease. N.D.C.C. § 38-13.1-01.

process rights were violated because it did not receive actual notice of the Default Proceeding. Hess was required to receive actual notice because (1) the Default Proceeding adversely affected Hess's leases, (2) Hess as mineral lessee was reasonably ascertainable, and (3) the Unlocatable Mineral Owner Statute requires satisfaction of Hess's best interest. For these reasons, Hess respectfully requests this Court to reverse the denial of Hess's motion to set aside the default judgment, to render that the default judgment is void, and to remand for further proceedings.

Dated this 2nd day of November, 2018.

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶65] This brief contains 5,749 words, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify this brief complies with the typeface requirements of N.D.R.App. 32 and the type style requirements of that rule because it has been prepared in a proportionally-spaced typeface using Microsoft Word, Times New Roman, 12 point font.

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