

STATE OF NORTH DAKOTA
Supreme Court Case No. 20200133
McKenzie County Case No. 27-2016-CV-00530

Great Plains Royalty Corporation, a North Dakota Corporation,

Plaintiff/Appellee and Cross Appellant

v.

Earl Schwartz Company, a North Dakota Partnership, Basin Minerals,
LLC, a North Dakota Limited Liability Company, and Kay Schwartz York, Kathy
Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal
Representative of the Estate of Earl N. Schwartz, SunBehm Gas Inc., a North Dakota
Corporation

Defendants/Appellants and Cross Appellees

BRIEF OF APPELLANT SUNBEHM GAS, INC.

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR
JUDGMENT ENTERED ON FEBRUARY 18, 2020, AMENDED JUDGMENT ON REMAND
ENTERED ON MARCH 4, 2020, AND NOTICE OF ENTRY OF JUDGMENT ENTERED ON
MARCH 5, 2020, IN DISTRICT COURT OF MCKENZIE COUNTY, CIVIL NO. 27-2016-CV-
00530, BY THE HONORABLE DANIEL S. EL-DWEEK, PRESIDING

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JURISDICTIONAL STATEMENT

[¶ 1] The District Court had jurisdiction to hear and try this case under Article VI, section 8 of the North Dakota Constitution and section 27-05-06 of the North Dakota Century Code. This Court has jurisdiction to hear this appeal under Article VI, section 6, of the North Dakota Constitution and section 28-27-01 of the North Dakota Century Code.

STATEMENT OF THE ISSUES

[¶ 2] Whether or not the District Court erred by quieting title in Properties Nos. 2 and 3 in the Plaintiff/Appellee, Great Plains Royalty Corporation.

[¶ 3] Whether or not the District Court erred in finding "that the evidence presented in his matter, being essentially identical to that presented in the bankruptcy adversary, supports a finding that it was not the intent of Atkinson to sell Great Plains Royalty Corporation assets other than as specially described in the Notice of Sale."

[¶ 4] Whether or not the District Court erred in finding that "Defendants could have offered evidence as to the nature of this specific assets sold by Atkinson within the bounds of the notice of sale, but the Court does not find any such evidence on the record."

STATEMENT OF THE CASE

[¶ 5] This case comes to the North Dakota Supreme Court on appeal from McKenzie County in the Northwest Judicial District. The case before the Court is a quiet title action wherein SunBehm and ESCO seek to quiet title in their favor in lands in McKenzie County, North Dakota. The District Court sitting in McKenzie County originally found that SunBehm and ESCO's claim to title in the subject properties was superior to Great Plains' claim to title and quieted title in favor of SunBehm and ESCO. Great Plains appealed that decision and the Supreme Court reversed the District Court, stating that ESCO and SunBehm did not receive all of Great Plains' property, and remanded the case. SunBehm then appealed the District Court's

new Findings. The quiet title dispute stems from Great Plains' bankruptcy liquidation action in 1969. The dispute arose regarding whether assets were properly identified and sold by the bankruptcy at Great Plains' bankruptcy auction sale. SunBehm and ESCO claim that the bankruptcy trustee sold all of Great Plains' interest in the properties listed in the Notice of Sale to Earl Schwartz who subsequently passed title to a SunBehm and ESCO.

[¶ 6] In this Court's review of the District Courts' present Findings and Judgment on Remand, this Court must consider whether the District Court properly ruled on the quiet title claims. SunBehm maintains that Great Plains has no interest remaining in the properties listed in the Notice of Sale and that the District Court erred in ruling otherwise. This Court should reverse the District Courts' ruling.

STATEMENT OF THE FACTS

[¶ 7] Plaintiff, Great Plains Royalty Corporation, (hereinafter, "Great Plains") is a North Dakota Corporation whose principal office is located at 1212 Pin Oak Loop, PO Box 7201, Bismarck, ND 58507-7201. Great Plains was originally formed on August 6, 1958.

[¶ 8] Defendants, Earl Schwartz Company, Basin Minerals, LLC ("Basin"), and Kay Schwartz York, Kathy Schwartz Mau, and Kara Schwartz Johnson, as co-personal representatives of the Estate of Earl N. Schwartz (collectively hereinafter, "ESCO"). ESCO claims an interest as to the following property:

Township 152 North, Range 95 West
Section 24: NW1/4

[¶ 9] Defendant, SunBehm Gas, Inc. (hereinafter, "SunBehm"), is a North Dakota Corporation whose principal office is located at 2819 S Broadway STE A, P.O. Box 608, Minot, ND 58702-0608. SunBehm claims an interest as to the following property:

Township 152 North, Range 95 West
Section 16: NW1/4

[¶ 10] On April 12, 1968, Great Plains was the subject of an involuntary bankruptcy petition. On October 11, 1969, Great Plains was switched to a Chapter 7 voluntary liquidation. Great Plains' bankruptcy estate was administered by the bankruptcy trustee, Myron Atkinson (hereinafter, "Bankruptcy Trustee").

[¶ 11] Great Plains failed to properly schedule its property in the bankruptcy proceeding.

[¶ 12] On June 9, 1969, a Report of Sale and Petition for Order Confirming Sale (hereinafter, the "Report and Petition") was filed by the Honorable Gordon Thompson in Great Plains' bankruptcy proceeding. Pursuant to the Report and Petition, after soliciting bids for individual parcels, "the Trustee re-opened bidding for all of the assets of the estate and a bid of Two-Hundred Twenty-Five Thousand and no/100 Dollars (\$225,000.00) was received from Earl Schwartz, of Kenmare, North Dakota, and upon receipt of said bid the Trustee invited other bids but none was forthcoming" except for an unacceptable, conditioned bid from First Mortgage Investors, Inc. As a result, Earl Schwartz of Kenmare, North Dakota was declared to be the high bidder.

[¶ 13] Thereafter, on June 23, 1969, the Bankruptcy Court entered its Order Confirming Sale of Assets (hereinafter, "Order Confirming Sale"), to Earl Schwartz. Specifically, Paragraph 5 of the Order Confirming Sale states, "That, therefore, the Referee confirms the sale of all of the assets of the bankrupt corporation to Earl Schwartz of Kenmare, North Dakota, for the sum of \$225,000.00, . . ."

[¶ 14] Furthermore, Paragraph 7 of the Order Confirming Sale states:

That the purchaser, Earl Schwartz, has entered into an agreement with Cardinal Petroleum Company, Billings, Montana, and SunBehm Gas, Inc., Minot, North Dakota, to purchase certain properties included in the bankrupt estate and an assignment of the interest of the said Earl Schwartz has been made and the Referee

approves the transfer of title on said properties directly from the bankrupt estate to the assignees.

[¶ 15] Among the properties transferred to Earl Schwartz and SunBehm were the following properties which have been referred to as Properties No. 2 and 3 throughout this litigation and are more fully described as follows:

Township 152 North - Range 96 West
Section 24: NW¼

(hereinafter, "Property No. 2").

Township 152 North, Range 95 West
Section 16: NW¼

(hereinafter, "Property No. 3").

[¶ 16] On February 9, 1970, the Order Confirming Sale was partially amended stating, "That Section 5 of the Order of June 19, 1969, is hereby amended to read that the Referee confirms the sale of all of the assets of the bankrupt corporation included in the Notice of Sale to Earl Schwartz of Kenmare, North Dakota."

[¶ 17] Great Plains initiated this litigation by way of a Summons and Complaint dated November 30, 2016, and filed on December 27, 2018. On August 23, 2017, Great Plains submitted an Amended Complaint. Great Plains's Amended Complaint sought to quiet title on three separate pieces of real property in McKenzie County. SunBehm only has an interest in the third property, which has been referred to as Property No. 3.

[¶ 18] On September 20, 2017, SunBehm submitted its Answer and Counterclaim to Great Plains' Amended Complaint. SunBehm maintains that it is a rightful owner of the mineral interest in question within Property No. 3 because Earl Schwartz purchased all of Great Plains's interest in Property No. 3 and subsequently transferred a portion of that interest to SunBehm.

ESCO submitted an Answer and Counterclaim maintaining ownership of Property No. 2 and other properties.

[¶ 19] A two-day bench trial was held on January 9 and 10, 2018. At the bench trial, the Court heard testimony and received exhibits from all parties. The Court was also presented with expert testimony from each side. ESCO submitted an Answer and Counterclaim maintaining ownership of Property No. 2 and other properties.

[¶ 20] The Court issued a letter to all counsel on February 23, 2018, which outlined the Court's decision on the pending matters. The Court then assigned counsel for ESCO and SunBehm to collaborate in drafting and submitting proposed Findings of Fact, Conclusions of Law, and Order for Judgment as well as a proposed Judgment. The Court signed its Findings of Fact, Conclusions of Law, and Order for Judgment on May 30, 2018. The Clerk of Court subsequently signed and filed the corresponding Judgment.

[¶ 21] Great Plains appealed the District Courts' decision and in Supreme Court Case No. 20180285, this Court reversed the District Court decision and remanded the case to the District Court.

[¶ 22] The parties submitted opposing Findings of Fact, Conclusions of Law and Orders for Judgment and on February 18, 2020, the District Court issued its Findings. Amended Judgment on Remand was issued on March 4, 2020. All of the parties have filed Notices of Appeals.

LAW AND ARGUMENT

I. Great Plains should be found to have no standing to pursue its claims as to Properties Nos. 2 and 3 and all other properties listed in the Notice of Sale.

[¶ 23] Great Plains and its representative and obviously biased expert at trial, Gary Preszler's theory in this case is that because Great Plains in the Chapter 7 bankruptcy failed to properly disclose its property to the bankruptcy trustee, the undisclosed property remains the property of

Great Plains. This theory flies in the face of all bankruptcy laws and common sense. Great Plains was required by 11 U.S. Code §521 of the Bankruptcy Code to file "a schedule of assets and liabilities". Further, under 11 U.S. Code §521 (4), if a trustee is serving in the case, the debtor is to "surrender to the trustee all property of the estate and any **recorded** information, including books, **documents**, records and papers relating to the property of the estate." (Emphasis added)

[¶ 24] As was stated in Bankruptcy No. 68-00039, Adversary No. 13-07018, Page 2 (Exhibit P-22, Index No. 129) "The Trustee explained he and Jestrab found Great Plains' records to be a 'mess' and Great Plains did not provide any assistance to the Trustee or attorneys assisting him." Great Plains failed to provide the Trustee with copies of the recorded documents showing the actual ownership of Great Plains in the properties.

[¶ 25] With reference to T152N-R96W, Section 24 NW¹/₄, (Property No. 2) Great Plains had received two (2) Mineral Deeds conveying to it a total of 15/160 mineral interest (Exhibits P-4 and P-5, Index Nos. 111 and 112). Also, with reference to this Property Great Plains received an Assignment of Overriding Royalty Interest of a 1/8 x 7/8 interest (Exhibit P-6, Index No. 113).

[¶ 26] With reference to T152N-R95W, Section 16 NW¹/₄, Great Plains had received a Mineral Deed conveying to it a 4/160 mineral interest (Exhibit P-7. Index No. 114).

[¶ 27] As is also stated in Bankruptcy No. 68-00039, Adversary No. 13-07018, Page 2 (Exhibit P-22, Index No. 129), "Neither the Trustee nor the attorneys assisting him conducted a comprehensive title search to ensure the Inventory included all the assets Great Plains owned because such a search was too costly." This may have been a mistake or a dereliction of duty, but the fact remains that it should not have been necessary to conduct such a search, because it was the duty of Great Plains to have provided a list of its assets and the recorded documents showing its ownership.

[¶ 28] 11 U.S. Code §541 defines what assets become property of the bankruptcy estate. "All legal or equitable interest in property as of the commencement of the case" becomes the property of the bankruptcy estate. The debtor must also list "all contingent and liquidated claims of every nature, ... and counterclaims of debtor." Section 541 is extensive in that the section encompasses "every conceivable interest of the debtor, future, non-possessory, contingent, speculative and derivative." Great Plains is now trying to claim that only partial or term interests in the two (2) properties listed above were sold to ESCO and SunBehm and that based on Great Plains' failure to properly schedule the properties, Great Plains now has complete ownership of the properties.

[¶ 29] Inadvertence or ignorance of the law does not justify a failure to list a known actual or potential claim on the bankruptcy schedules. In re Costal Plains, 179 F 3d 197, (5th Cir. 1999).

[¶ 30] The importance of the disclosure rules is highlighted by the fact that a debtor who knowingly and fraudulently conceals asset information not only faces repercussions in civil litigation, but puts the debtor at risk of being criminally prosecuted under 18 U.S. Code 8152.

[¶ 31] At the close of a bankruptcy case, the trustee normally abandons his interest in the balance of the property of the estate pursuant to 11 U.S. Code 554(c). Under this scenario, the debtor would regain standing to pursue a claim in a subsequent non-bankruptcy proceeding. However, Section 554(c) only applies when a debtor has properly disclosed the claims on its bankruptcy schedules during the bankruptcy proceeding. When a debtor fails to list an asset in the bankruptcy schedules, the trustee is not made aware of the asset and thus, is denied an opportunity to pursue the claim. Moore v. Slonim, 426 F Supp 524, 527 (D. Conn 1977). To allow a debtor to pursue the claim, post-bankruptcy would produce an inequitable result whereby the debtor would be rewarded for its omission, while the bankruptcy creditors would suffer. Moore Id. at 527-528. Accordingly, when a debtor fails to list an asset in the bankruptcy schedules, the claim does not automatically revert back to the debtor at the conclusion of the

bankruptcy case; rather the claim remains property of the estate and is not abandoned by the trustee pursuant to 554(d). Moore Id. at 527. Thus, when the debtor attempts to pursue an unsecured claim in subsequent nonbankruptcy litigation, the court should conclude that the debtor lacks standing to raise the claim. Moore Id. at 528. Great Plains should not now be allowed to benefit due to its failure to cooperate with the Bankruptcy Trustee and its failure to properly list its assets. Rather it should be determined that Great Plains, based on its failure to properly list its assets, should be dismissed from claiming any further interest in the unlisted properties due to a lack of standing.

II. SunBehm should prevail based upon the merits and evidence presented.

[¶ 32] In the event that the Court does not dismiss Great Plains' claims based on a lack of standing, it is SunBehm's position that SunBehm and ESCO should prevail on the merits in this matter. The Supreme Court has determined that based upon Bankruptcy Case No. 68-00039, Adversary No. 13-07018 (Exhibit P-21, Index No. 128) ESCO did not purchase "all" of the assets of Great Plains and found that the lower court's finding that property not described or identified in any way was included in the sale, was clearly erroneous. The Supreme Court also stated that SunBehm was not in privity in the bankruptcy adversary proceedings for purposes of collateral estoppel. SunBehm agrees that property not described or identified in any way was not included in the sale.

[¶ 33] SunBehm's and ESCO's properties, which were in dispute in the Amended Complaint herein, were in fact described in the Notice of Sale. Those properties are as follows:

McKenzie County, North Dakota
Township 152 North - Range 96 West
Section 24: NW¹/₄

(Property No. 2)

Township 152 North - Range 95 West
Section 16: NW¼

(Property No. 3)

[¶ 34] Property No. 2 (ESCO property) was described in the Notice of Sale (Exhibit P-13, Index No. 120) as follows:

Harry M. Dickey, Clear Creek Field W.I.

McKenzie County, (Madison Unit) T152N-R96 Section 24: NW¼ .021973

[¶ 35] Great Plains' actual ownership in T152N-R96W, Section 24: NW¼ was a 15/160 mineral interest subject to a held by production oil and gas lease with a 1/8 royalty, and an additional overriding royalty interest under the lease in the amount of 1/8 x 7/8. Using a 160 spacing unit. these interests would total 0.021973, of which .0117191 is lease royalty and .0102539 is overriding royalty. (15/160 mineral interest x 1/8 royalty = .0117191) (15/160 mineral interest x 1/8 royalty x 87.5% = .0102539). (Exhibits P-4, P-5 and P-6, Index Nos. 111, 112, and 113).

[¶ 36] Property No. 3 (SunBehm property) was described in the Notice of Sale (Exhibit P-13 Index No. 120) as follows:

Clayton Sorenson, Hawkeye Field W.I.

McKenzie County, T152N-R95, Section 16: NW¼ .003125

[¶ 37] Great Plains's actual ownership in T152N-R95W was 4/160 mineral interest subject to a held by production oil and gas lease with a 1/8 royalty. Using a 160 spacing unit. this interest amounts to a .003125 lease royalty interest. (4/160 mineral interest x 1/8 royalty = .003125) (Exhibit P-7, Index No. 114).

[¶ 38] The oil and gas leases covering the properties continue to be held by continuous production to this day. These facts were admitted to at trial by Mr. Preszler. (Transcript, Page

182 Lines 14-24 and Page 200, Lines 4-18). The held by production oil and gas leases appear at Exhibits P8 and P9, Index Nos. 115 and 116.

[¶ 39] W.I. with reference to the above property descriptions stands for "Working Interest" and Great Plains did not own any working interest in reference to either of Properties 2 and 3. This was also admitted to by Mr. Preszler. (Transcript, Page 184, Lines 15-25 and Page 185, Lines 1-5).

[¶ 40] There were no deeds ever issued by the bankruptcy trustee in reference to Properties Nos. 2 and 3. (Mr. Preszler's testimony, Transcript, Page 185, Lines 13-18).

[¶ 41] As shown at Exhibit D-206, Index No. 110, subsequent to the auction sale, a Report of Sale and Petition for Order Confirming Sale was filed by the bankruptcy trustee. This Petition and Report did not describe any of the assets but did state that all sales of the property were "as is" and that "the trustee was selling merely the interest of the bankruptcy estate and no more."

[¶ 42] The subsequent Order Confirming Sale of Assets (Exhibit D-207, Index No. 171) also did not list the assets. Exhibit D-200, Index No. 172 is a Partial Amended Order Confirming Sale of Assets which added the following language to the previous Order "the Referee confirms the sale of all of the assets of the bankruptcy corporation included in the Notice of Sale." This Order also did not specifically list any assets.

[¶ 43] So the issue in this case is what was sold at the bankruptcy auction sale in reference to these Properties. Great Plains argues that because of the unclear and incomplete descriptions contained in the Notice of Sale, ESCO and SunBehm purchased no interest whatsoever in Properties Nos. 2 and 3. In other words, Great Plains, by not doing what it was supposed to do - schedule their assets- outwitted everyone and retained their property.

[¶ 44] Great Plains' theory of what was sold at the auction sale with reference to Properties Nos. 2 and 3 is difficult to ascertain. Gary Preszler, Great Plains' representative at trial, was qualified

as an expert over Defendants' objections and it is his testimony on which Great Plains' claims are based. It appears from his testimony that the basis for Great Plains' claims are either 1) that because there were never any deeds placed of record with reference to Properties Nos. 2 and 3 title to the Properties remains with Great Plains, or 2) that only wellbore interests in the Harry Dickey and Clayton Sorenson wells were sold at the auction sale. Neither of these theories are credible. Properties Nos. 2 and 3 were listed in the Notice of Sale and were purchased by ESCO and SunBehm. There are bankruptcy court orders to that effect. A quiet title judgment in SunBehm's and ESCO's favor would remedy the lack of deeds being issued.

[¶ 45] So what did ESCO and SunBehm purchase? While the description in the Notice of Sale do not correctly describe the 4/160 mineral interests owned by Great Plains in reference to Property No. 3 and the 15/160 mineral interest and 1/8 x 7/8 overriding royalty interest owned in reference to Property No. 2, they do show the correct producing decimal interests that Great Plains owned at the time of the sale. $4/160 \times 1/8 = .003125$ as to Property No. 3 and $15/160 \times 1/8 + 1/8 \times 7/8 = .021973$ as to Property No. 2. The Notice of Sale states that the interests were Working Interests, however everyone agrees that this was a mistake. Everyone also agrees that Properties Nos. 2 and 3 continue to be producing interests and continue to be held by production by the original leases. The words "well bore" do not appear anywhere in the Notice of Sale descriptions of the interests and therefore the interests cannot and should not be limited to the Harry M. Dickey and Clayton Sorenson wells. Martin Acquisition LLC v. Cheetah Gas Co Ltd., 2020 WL 1181981 (W.D.La.) states that:

when parties wish to limit the interests assigned to a certain depth, well bore, or the like, they tend to use very specific language. There was no such specificity in Exhibit A, so a broader assignment was held to have occurred. Estess v. Placid Oil, 2016 WL 403103 (W.D. La.)

[¶ 46] ESCO's and SunBehm's expert witness, Nick Schwartzendruber, testified that a well bore assignment would have to specifically stated as being so and the mentioning of the Harry M. Dickey and Clayton Sorenson wells in the descriptions were identifying features just as were the field names and unit names, and that under no circumstances would this be interpreted as somehow being limited to certain wells. (Transcript, Pages 2-170 & 2-171).

[¶ 47] ESCO's and SunBehm's expert witness further testified:

My belief and opinion is that the trustee intended to sale all of the interests that were reasonably identified by the trustee in pursuing the Great Plains bankruptcy, and so if a property interest held by the debtor a that time was mis-identified or incorrectly identified or incompletely identified due to some sort of mistake, I don't believe that it was the intent of the trustee to carve up these interests and keep some of them in the bankruptcy estate.

There would be -- that would make no sense. The intent would be to sale all right, title and interest of the debtor to purchaser in any lands, wells or personal property reasonably identified in these schedules. (Transcript, Pages 2-146 - 2-147).

[¶ 48] Mr. Preszler at Transcript, Page 52, Lines 11-23 testified that in fact there were no Harry M. Dickey and Clayton Sorenson wells in existence at the time of the bankruptcy sale and that these wells were inside unit areas.

[¶ 49] ESCO's and SunBehm's expert stated the following on this scenario:

Q. Okay. And we just heard testimony yesterday also that at the time this wasn't even the Harry M. Dickey well because the formation in the area of the field had been unitized. Does that affect your opinion in any way of what was being conveyed here?

A. Yes. So once an area has been unitized, the unitized area operates as a -- like a singular entity and production from any well -- you heard Mr. Preszler testify about this yesterday; that some wells are producers, some wells are injectors, some wells cease to be producers and become injectors. Sometimes wells are shut in or plugged because of reservoir characteristics. The whole thing's operated as an entity and all production from that unit is, kind of, put into the pot and allocated to the various owners, usually on a tracts basis, like a surface-acreage basis.

So to say that it's a wellbore conveyance in a unitized area makes absolutely no sense from a practical standpoint.

Q. Because all the wells are treated as an essential singular entity?

A. It's a single entity so that, you know, allocating back to some well and it just makes no sense.

Q. Okay.

THE COURT: And let me just ask -- and if anybody has any objection to this, this is just so that I understand.

So in -- when you have a well in a unitized area, typically, there wouldn't be a wellbore interest in a unitized area.

THE WITNESS: It would be a very strange conveyance because the formula for -- things are allocated -- the production from the unit is allocated back to the tracts. (Transcript Pages 2-149 - 2-150)

III. Addressing and differentiating Adversary No. 13-07018, Exhibit P-22, Index No. 129.

[¶ 50] In Bankruptcy No. 68-00039, Adversary No. 13-07018 (Exhibit P-22, Index No. 129), Bankruptcy Judge Shon Hastings examined five (5) different conveyances from the Great Plains' Bankruptcy Trustee to ESCO. The Judge examined each of the five (5) conveyances (the Disputed Assets) separately and reached an opinion as to what was conveyed in each instance. SunBehm was not in privity in this matter and is not bound by its results. Also, the Judge stated therein that "only the claims relating to the Disputed Assets are addressed in this opinion." (Page 8). Another item that differentiates this case from the present matter is the fact that there were deeds or assignments for the Disputed Assets interests, while in the present matter no deeds were ever completed as to Properties Nos. 2 and 3. Also, no expert testimony supporting ESCO's position was presented in the bankruptcy proceeding. Judge Hastings had only the testimony of Gary Preszler, Great Plains' representative, on which to rely.

[¶ 51] There are some similarities between the first Disputed Asset which is referred to as "7/160 interest" and the descriptions of Properties Nos. 2 and 3 in the Notice of Sale. The 7/160 interest in the bankruptcy proceeding and Properties Nos. 2 and 3 herein were all described as Working Interests in the Notice of Sale. In the subsequent conveyance, the 7/160 interest was described as an overriding royalty interest. Judge Hastings decided that the Working Interest and

overriding royalty descriptions were mistakes and instead, what was meant to be conveyed was a .005469 royalty interest.

[¶ 52] Gary Preszler testified as Great Plains' expert in the bankruptcy proceeding. "He opined that Great Plains had a 'reversionary' interest in the mineral acres that would manifest when the lease to the third party expired." (Page 10) If the testimony is to be given any credence, the royalty interest with reference to Properties Nos. 2 and 3 would never have reverted to Great Plains because as is shown hereinabove, oil and gas leases covering those interests continue to be held by production. Preszler "also opined that Great Plains did not ever own the overriding royalty interest in the Melvin Peterson 1 well and, therefore, suggested ESCO would have acquired no interest in the property through the Trustee's Assignment." (Page 10) This testimony again sums up Great Plains' theory in these cases. That is, thanks to their failure to provide the Bankruptcy Trustee any records they are entitled to reap a windfall. In deciding that the 7/160 interest was a conveyance of a .005469 royalty interest in the Melvin Peterson 1 well, Judge Hastings did not have an opportunity to hear any testimony from an actual expert as to how this interest should have been determined. As shown above in the testimony of ESCO's and SunBehm's expert witness and based upon the case law cited, the only possibility that makes any sense in these matters is that the interests sold and conveyed were not limited to specific wellbores and the interests conveyed were not partial interests, but rather all of Great Plains' rights and interest in the lands described.

[¶ 53] The Bankruptcy Trustee in Adversary No. 13-07018, Exhibit P-22, Index No. 129, "testified that he intended to sell all of Great Plains' interest in the assets identified and included in the Inventory." (Page 3). SunBehm not being in privity had no opportunity to question the trustee, but if he had been asked: Are you conveying partial interests which will revert back to Great Plains at some point?; his answer would surely have been no.

[¶ 54] The Inventory and the Notice of Sale did not say 4/160 mineral interest as to Property No. 3 or 15/160 mineral interest and a 1/8 x 7/8 overriding royalty interest as to Property No. 2, however the Notice of Sale and Inventory did contain the correct decimal interests which are arrived at when an owner of a 4/160 mineral interest is leased at 1/8th royalty in a 160 acre spacing unit and when an owner of a 15/160 mineral interest plus is leased at 1/8th royalty in a 160 acre spacing unit and also owns a 1/8 x 7/8 overriding royalty interest. The decimal interests were derived from the mineral acres which were owned by Great Plains and would not have existed without this ownership. It is uncertain if the Bankruptcy Trustee understood how such interests are created, but because Great Plains intentionally chose not to schedule its properties as it was required to do, and because the trustee chose not to conduct a title search, the descriptions of the properties in the Notice of Sale were incomplete.

[¶ 55] As has been stated throughout herein, whether or not SunBehm and ESCO receive the royalty decimal interests, or the correctly described mineral interests and the accompanying royalty decimal interests will not matter as to Properties Nos. 2 and 3, because those properties continue to be held by production. Great Plains' argument that they continue to own these interests is certainly not an option.

[¶ 56] Judge Hastings found that there was no mutual mistake as to the 7/160 interest because the Judge was not "satisfied that the trustee understood the nature of Great Plains' interest in the described property and intended to convey them, but mistakenly used the wrong words to do so."

[¶ 57] The Bankruptcy Trustee had no chance to understand the nature of Great Plains' interest because Great Plains did not schedule their property as they were required to do, and the Bankruptcy Trustee chose not to do a title search.

[¶ 58] Section NDCC 32-04-17 states as follows:

32-04-17. Revision of contract for fraud or mistake.

When, through fraud or mutual mistake of the parties, or a mistake of one party which the other at the time knew or suspected, a written contract does not truly express the intention of the parties, it may be revised on the application of a party aggrieved so as to express that intention so far as it can be done without prejudice to rights acquired by third persons in good faith and for value.

[¶ 59] I submit that Great Plains intentionally failed to provide the trustees with its actual ownership in the Properties and thereby committed fraud. Further, as a result of the fraud, the property descriptions should be reformed under Section 32-04-17 to reflect Great Plains' actual ownerships in the Properties.

[¶ 60] Section 32-04-17 also states that there can be reformation when one party is mistaken and the other party knew or suspected the mistake. Earl Schwartz, who was the purchaser at the bankruptcy sale, knew that the descriptions in the Notice of Sale were not accurate. Exhibit D105, Index No. 179 is a copy of the Notice of Sale on which Earl Schwartz made notations listing the actual mineral interests that were owned by Great Plains, which shows that while the Bankruptcy Trustee may not have known the actual ownerships in order to properly list them in the Notice of Sale, the buyer, Earl Schwartz, knew of the mistakes. This should also allow reformation of the descriptions.

[¶ 61] In Great Plains' cross examination of ESCO's and SunBehm's expert witness, Nick Schwartzendruber, was asked if he agreed with Judge Hastings' decision in Adversary No. 13-07018, Exhibit P-22, Index No. 129, Mr. Schwartzendruber stated:

I haven't read it. I don't -- no -- I mean, I know that you state that you think this is similar. As I understand, this is a different property with different facts and I can't tell you how it translates into my analysis but to the extent that the Judge, based on the same set of facts, essentially is drawing a different conclusion that what I'm stating today, I would tell you, I think she got it wrong. (Transcript, Page 2-194 - 2-195).

IV. The "as is" argument.

[¶ 62] The "as is" argument previously made by SunBehm should apply to properties that were described in the Notice of Sale. The Bankruptcy Trustee stated in his Report of Sale and Petition for Order Confirming Sale (D-206, Index No. 170) that "all sales of the property were 'as is'; that the Trustee warranted neither title nor condition of the property and that the Trustee was selling merely the interest of the bankruptcy estate and no more." The interest of the bankruptcy estate in Property No. 2 was 15/160 mineral interest and 1/8 x 7/8 overriding royalty. The interest of the bankruptcy estate in Property No. 3 was 4/160 mineral interest.

[¶ 63] ESCO's and SunBehm's expert witness testified:

Yeah. Yeah, I think that, you know, one thing that's kind of, been frustrating is I've heard the testimony is, you know, well, this is an "as is" sale. Well, to me that operates both ways. It doesn't only operate to the benefit of the bankruptcy estate and the re-instituted company.

If a great -- it was -- and, you know, buyer beware. You know, look into the title and if you buy more, if you end up buying -- you know, you bought all right, title and interest is the way I see it -- Earl Schwartz did, and if it ended up being more, then that's to his benefit. IF it ended up being less, that's to his detriment but that cuts both ways. (Transcript, Page 156).

[¶ 64] Bankruptcy courts have concluded that when property is advertised for sale "as is," the property conveyed will be that actually held by the trustee, whether or not such property is accurately described in a notice thereof. Matter of A.H.-R.S. Coal Corp., 8 B.R. 455, 458 (Bankr, W.D. Pa. 1881). Properties Nos. 2 and 3 were advertised for sale and inaccurately and incompletely described in the Notice of Sale. The Bankruptcy Trustee held all of Great Plains' interest in the Properties and all interest in Properties Nos. 2 and 3 should pass to ESCO and SunBehm.

CONCLUSION

[¶ 65] For reasons stated above, this Court should reverse the District Court's decision and quiet title in Property No. 2 in ESCO and Property No. 3 in SunBehm.

Dated this 7th day of October, 2020.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies, in compliance with N.D.R.App.P. 32(a)(8)(A), that the Brief in Appellant SunBehm Gas, Inc. was prepared with Times New Roman proportional typeface, 12 pt. font, and totals 22 pages.

Dated this 7th of October, 2020.

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STATE OF NORTH DAKOTA
Supreme Court Case No. 20200133
McKenzie County Case No. 27-2016-CV-00530

Great Plains Royalty Corporation, a North Dakota Corporation,
Plaintiff/Appellee and Cross Appellant

v.

Earl Schwartz Company, a North Dakota Partnership, Basin Minerals,
LLC, a North Dakota Limited Liability Company, and Kay Schwartz York, Kathy
Schwartz Mau, and Kara Schwartz Johnson as the Co-Personal
Representative of the Estate of Earl N. Schwartz, SunBehm Gas Inc., a North Dakota
Corporation

Defendants/Appellants and Cross Appellees

CERTIFICATE OF SERVICE

APPEAL FROM FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR
JUDGMENT ENTERED ON FEBRUARY 18, 2020, AMENDED JUDGMENT ON REMAND
ENTERED ON MARCH 4, 2020, AND NOTICE OF ENTRY OF JUDGMENT ENTERED ON
MARCH 5, 2020, IN DISTRICT COURT OF MCKENZIE COUNTY, CIVIL NO. 27-2016-CV-
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I, Jon Bogner, certify that I served the following document(s) as indicated below:

- 1. Certificate of Service;**
- 2. Brief of Appellant SunBehm Gas, Inc.; and**
- 3. Appendix of Appellant SunBehm Gas, Inc.**

On October 7, 2020, by sending a true and correct copy thereof by electronic means only to the following email addresses which, to the best of my knowledge, is the actual email address of the person intended to be served, to wit:

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