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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20200133
McKenzie County No. 27-2016-CV-00530

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

vs.

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

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

BRIEF OF GREAT PLAINS ROYALTY CORPORATION, PLAINTIFF, APPELLEE, AND CROSS-APPELLANT

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[1] I. STATEMENT OF ISSUES FOR REVIEW

[2] A. Whether the District Court erred in denying Great Plains' claim for damages for lost royalties and interest based on claims of slander of title and/or conversion.

B. Whether the District Court properly implemented the mandate of the Supreme Court as articulated in *Great Plains Royalty Corporation v Earl Schwartz Co.*, 2019 ND 124, 927 N.W.2d 880 as regards the parties relative claims to "Property 2", "Property 3", and the "Subject Properties".

[3] II. STATEMENT OF THE CASE

[4] A. Course of Proceedings

[5] Great Plains Royalty Corporation, (hereinafter Great Plains) initiated these proceedings on November 20, 2016. (Case Summary, Index nos. 1-2 hereinafter Index nos. 1-2; Plaintiff/Appellee and Cross Appellant's appendix 18-27, hereinafter A: 18-27). The summons and complaint were served upon the Defendants/Appellants and Cross Appellees, Earl Schwartz Company, Basin Minerals, LLC, and Sunbehm Gas, Inc., by admission of service prior to December 22, 2016. (Index nos. 3-5, A: 28-30).

[6] Prior to January 21, 2017, ESCO and Sunbehm served Great Plains with an answer and counterclaim. (Index no. 11, 12 A: 31-56). Great Plains served ESCO and Sunbehm with an answer to counterclaim on January 31, 2017. (Index Nos. 14-15, A: 47-56). In such answer Great Plains denied that ESCO had superior title to the Subject Properties.

[7] Great Plains, ESCO and Sunbehm stipulated to a scheduling order which was

signed by the trial court on May 1, 2017. (Index no. 21, A: 57-59). Great Plains then filed a motion to add party defendants and amend complaint to include Kay Schwartz York, Kathy Schwartz Mau and Kara Schwartz Johnson as the co-personal representatives of the estate of Earl Schwartz. (Hereinafter ESCO [the Schwartz Defendants collectively unless otherwise noted] and Sunbehm), which was granted by the trial court. (Index nos. 22-31, A: 60-83). An amended complaint and summons were served on August 23, 2017. (Index nos. 30-32, A: 84-95).

[8] Great Plains notified ESCO and Sunbehm of Great Plains' designation of an expert witness on September 5, 2017. (Index Nos. 33-34, A: 96-98). On September 9, 2017, Great Plains, ESCO and Sunbehm agreed to modify the scheduling order (Index no. 36) and an order modifying scheduling order was signed by the trial court on September 15, 2017. (Index no. 39, A: 99-100).

[9] Sunbehm filed an amended answer and counterclaim to Great Plains' amended complaint on September 20, 2018. (Index no. 40, A: 101-105). ESCO, Basin, and Schwartz filed an amended answer to Great Plains' amended complaint on September 22, 2018. (Index no. 42, A: 106-111).

[10] On October 23, 2018, Great Plains filed a motion, notice of motion, affidavit, brief, and exhibit for partial summary judgment. (Index nos. 44-48, A: 112-174). On October 26, 2018, Great Plains filed an amended answer to Sunbehm's amended answer and counterclaim. (Index no. 50, A: 175-177). ESCO did not file an amended counterclaim.

[11] ESCO and Sunbehm filed an answer brief in response to Great Plains' motion for partial summary judgment. (Index no. 52, 54, A: 178-195). Great Plains filed reply

briefs and exhibit A in response to ESCO and Sunbehm's answer briefs to Great Plains' motion for partial summary judgment. (Index nos. 65-66, 69-70, A: 195-235).

[12] On December 21, 2017, Great Plains filed a motion in limine to exclude ESCO and Sunbehm's expert for failure to designate said expert. (Index nos. 72-74, A: 236-249). On December 22, 2017 Great Plains filed an exhibit list and trial witness list. (Index nos. 77-78, A: 250-256). On December 27, 2017, Great Plains filed a pre-trial memorandum and amended exhibit list. (Index nos. 80-81, A: 257-275). On December 29, 2017, Sunbehm filed a trial witness list and exhibit list. (Index nos. 83-84, A: 276-280).

[13] On January 5, 2018, Sunbehm filed a motion in limine to exclude certain past title opinions. (Index nos. 87-88, A: 281-288). Sunbehm also filed a response to Great Plains' motion in limine with attached exhibits. (Index nos. 90-93, A: 289-306). Great Plains filed a reply brief and exhibit A in opposition to Sunbehm's motion in limine. (Index nos. 95-96, A: 307-321).

[14] On January 8, 2018, Sunbehm filed a pretrial memorandum. (Index no. 101, A: 322-331). On the same day ESCO filed a witness list and exhibit list. (Index nos. 103-104, A: 332-336).

[15] Trial on this matter was held on January 9-10, 2018. (Index no. 76). Numerous exhibits were entered by Great Plains, ESCO and Sunbehm. (See Index nos. 108-206, A: 341-685). Great Plains included, as a part of its appendix, the following documents: Great Plains' exhibits (Index nos. 108-109, 117-125, 127-131, 133-135, 137-139, 144-146, 148, 150-156, 158, and 160-163); Sunbehm's exhibit (Index no. 209); ESCO, Basin, and Schwartz's exhibits (Index Nos. 179, 181). On January 16, 2018, Great

Plains filed a brief in support of motion to amend prayer for relief. (Index no. 106, A: 337). ESCO, Basin and Schwartz filed a response in opposition to motion to amend, along with an affidavit. (Index nos. 184-185, A: 685-691).

[16] On January 26, 2018, Great Plains filed a post-trial brief. (Index no. 187, A: 692-727). ESCO and Sunbehm did the same, (Index no. 189, 196, A: 728-750). On February 7, 2018, ESCO, Basin, and Schwartz filed or attempted to file updated discovery answers. (Index no. 202, A: 751-758).

[17] On February 23, 2018, the trial court sent an email to the attorneys for Great Plains, ESCO and Sunbehm. In that email, the trial court denied Great Plains' motion to amend the amended complaint and answer to ESCO and Sunbehm's counterclaims. (Index no. 207, A: 759-760). On April 18, 2018, the trial court signed an order, prepared by ESCO and Sunbehm's attorneys, denying Great Plains' motion to amend the amended complaint. (Index no. 213, A: 763-766). On April 19, 2018, the trial court sent another email to the attorneys for Great Plains, ESCO and Sunbehm. In a two-page letter, the trial court denied Great Plains' amended complaint and quieted title in ESCO and Sunbehm. (Index no. 212, A: 761-762). On April 2, 2018, ESCO, Basin, and Schwartz filed proposed findings of fact, conclusions of law, and order for judgment. (Index no. 214, A: 767-781). On May 17, 2018, Great Plains objected to those proposed findings of fact, conclusions of law, and order for judgment. (Index no. 217, A: 791-792). On May 17, 2018, the trial court signed the findings of fact, conclusions of law, and order for judgment. (Index no. 219, A: 793-805). On May 30, 2018, the judgment was signed by the Clerk of Court (Index no. 222, A: 806-810), and notice of entry of judgment was filed on May 31, 2018. (Index no. 224, A: 811).

[18] On July 25, 2018, Great Plains filed a notice of appeal with statement of preliminary issues (Index no. 227, A: 812-815), and order for transcript (Index no. 228, A: 818-819). The clerk of court filed a certificate on appeal on August 15, 2018. (Index no. 231, A: 822).

[19] The appeal was heard and on May 16, 2019 the Supreme Court reversed and remanded with an opinion found at *Great Plains Royalty Corporation v Earl Schwartz Co*., 2019 ND 124, 927 N.W.2d 880 (hereinafter "*Great Plains*"). (Index nos. 232 and 233). On July 16, 2019 notice of a corrected opinion was filed with the District Court. (Index no. 243).

[20] On August 15, 2019, Great Plains filed its proposed Findings of Fact, Conclusions of Law, and Order for Judgment ("Findings"). (Index no. 244). On September 23, 2019, Defendants filed their proposed Findings. (Index no. 257)). The District Court entered Findings on February 18, 2020 (Index no. 278, ESCO A: 325-345) and an Amended Judgment was entered on March 4, 2020. (Index no. 286, ESCO A: 346-351). Notice of Entry of Judgment was served and filed on March 5, 2020. (Index nos. 287 and 288).

[21] Sunbehm filed its Notice of Appeal on May 6, 2020 (Index no. 303, ESCO A: 352-353). Great Plains filed its Notice of Cross-Appeal on May 18, 2020 (Index no. 305, ESCO A: 354-358) and ESCO/Schwartz Defendants filed their Notice of Appeal on May 21, 2020. (Index no. 308, ESCO A: 359-361). On June 17, 2020, the Supreme Court remanded the matter to the District Court to consider and rule upon a pending objection to the costs awarded to Great Plains. (Index no. 312). After consideration, the District Court denied certain of the costs previously awarded Great Plains. (Index no. 313, ESCO A: 362-365). Great Plains has not appealed that order reducing its award of costs.

[22] B. Statement of Facts

[23] Great Plains incorporated on August 6, 1958. (Index no. 48, A: 132). After its formation, Great Plains acquired various mineral, and oil and gas interests in the State of North Dakota and other states, including interests in McKenzie County. (Index no. 48, A: 133-140). In the amended complaint (Index no. 30, A: 84-93), Great Plains describes its McKenzie County minerals as Properties Nos. 2 and 3 (Index no. 30, 44, A: 86-91, 133-140).

[24] On April 12, 1968, Great Plains was subjected to an involuntary bankruptcy petition, that being Bankruptcy No. 68-00039 (hereinafter bankruptcy case). (Index no. 48, A: 141-151).

[25] The bankruptcy case was later changed to a voluntary liquidation on October 11, 1969. The bankruptcy estate was administered by its trustee, Myron Atkinson, who is now deceased. (Index no. 126). Prior to his death, Trustee Atkinson testified at a deposition and at a bankruptcy adversary proceeding involving Great Plains, ESCO and Basin. (Index no. 127-129, A: 384-479). As stated by Trustee Atkinson: he, and estate legal counsel Frank Jestrab, of Williston, identified the assets of the debtor, i.e. Great Plains to the extent possible. The assets so identified were offered for sale and sold. Trustee Atkinson also stated that he suspected that not all of Great Plains' assets had been identified during his term as trustee. (Index no. 127, A: 393-394, 400, 404). A partial listing of Great Plains' identified assets as known to the Trustee were included in a bankruptcy inventory (Index no. 117, A:344-347), report of appraiser (Index no. 118-119, A: 348-359), and order confirming sale of assets (Nunc Pro Tunc) filed on June 19, 1969 (Index no. 121, A: 371-373) and partial amended order confirming sale of assets (Nunc Pro

Tunc) dated February 9, 1970, from the bankruptcy court confirming the sale of Great Plains' identified assets. (Index no. 123, A: 377-378). The partial amended order confirming sale of assets (Nunc Pro Tunc) amended the order confirming sale of assets (Nunc Pro Tunc) provided in part, as follows: "...Upon petition of Myron Atkinson, Trustee of the Estate of Great Plains Royalty Corporation...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, for the sum of $225,000.00..." (Emphasis added), (Index no. 123, A:377). The records of the Bankruptcy Court make it clear that not all assets were sold to Earl Schwartz because other assets were identified and sold at a later date. (A: 1012 at docket entries 18-25).

[26] The bankruptcy case was first closed on or about July 25, 1974, with the approval of Trustee Atkinson's Account, and an order for his discharge. (Index no. 48, A: 143). Since then, there have been other proceedings in the bankruptcy case. (Index no. 48, A: 144-151). In fact, on April 30, 2013, ESCO and Basin filed a motion to reopen the bankruptcy and in 2010 Sunbehm filed a motion to correct a scrivener's error. (A: 1014 at docket entry 34; A: 1012 at entry 4).

[27] In April and May of 1982, after the bankruptcy case had been closed, two mineral deeds for property owned by Great Plains were recorded in Burke County and such deeds dealt with mineral properties which are part of the Subject Properties. (Index nos. 161-162, A: 666-667). The deeds were alleged to contain the signature of the bankruptcy Trustee Atkinson. However, Trustee Atkinson, testified that "he had concerns about the signatures on the deeds, had no recollection of the two deeds, that in 1982 after he had been

discharged as trustee, he had no authority as trustee for Great Plains, that the deeds were not drafted in a form he would have used, and that had he been presented those deeds, he would have sought advice from legal counsel as to whether or not he had the authority to sign those deeds." (Index no. 127, A: 407-410, and Index nos 160-161, A: 666-667). As regards such mineral deeds, the District Court concluded the following:

> For the reasons stated above, the Court specifically concludes that the mineral deeds shown as P-53 and P-54, which relate to a portion of the Subject Properties in Burke County, convey no right, title, or interest in the minerals described to Earl Schwartz out of the GPRC bankruptcy estate. (ESCO A: 343, at ¶38)

[28] Great Plains was involuntarily dissolved for failing to file its annual reports with the North Dakota Secretary of State on November 22, 1983. The corporation was reinstated as allowed by law on September 14, 2011. (Index nos. 108-109, A: 341-343). Both before and after reinstatement, persons affiliated with Great Plains discovered that not all of the assets of Great Plains had been identified during the administration of the bankruptcy case by Trustee Atkinson. (Index no. 46, A: 118). Because there remained unpaid general creditor claims, some of the missed and unsold assets Trustee Atkinson were identified to the new trustee, Gene Doeling, and a price was negotiated. (Index no. 48, A:148).

[29] Great Plains initiated adversary proceedings against ESCO and Basin. (Index nos. 128-129, A: 421-479). As a result of Adversary number 13-07018, the Honorable Shon Hastings issued several memorandum orders. (Index nos. 128-129, A: 421-479). One order determined a motion for summary judgment. (Index no. 128, A: 433). Thereafter, a trial was held in bankruptcy court addressing the remaining issues regarding the dispute of Great Plains' assets and the status of Great Plains being recognized as a corporation in

good standing. The bankruptcy court first determined that Great Plains was reinstated as a corporation in North Dakota. (Index no. 129, A: 437). The bankruptcy court also quieted title to Great Plains in a number of assets that ESCO and Basin were claiming. (Index no. 129, A: 434-479).

[30] Thereafter, the funds paid to Trustee Doeling resulted in full payment of all claims and statutory interest. The surplus remaining after such payments were made were distributed to Great Plains as the debtor. See 11 U.S.C. §726(5) and (6).

[31] On July 20, 2015, and February 4, 2016, Great Plains commenced two additional adversary actions in the bankruptcy case to address issue of title to additional properties in which Great Plains held title. (Index no. 48, A: 150-151). In each case, ESCO and Basin argued that the United States Bankruptcy Court no longer had jurisdiction over Great Plains' assets because all creditors had been paid in full and the title issues were no longer related to any bankruptcy questions. The Honorable Shon Hastings agreed and dismissed the proceedings. (Index no. 48, A: 161-162). On May 24, 2016, the Great Plains' bankruptcy case was re-closed. (Index no. 48, A: 151).

[32] That as a result, in order to clear title to un-administrated assets, Great Plains had to proceed forward in North Dakota state court. (Index nos. 1-2, 11, 12, 14-15, A: 18-27, 31-56).

[33] Trial on this matter was held on January 9 and 10, 2018. On April 19, 2018, the trial court sent an email to the attorneys for Great Plains, ESCO, and Sunbehm. In a two-page letter, the trial court denied Great Plains' amended complaint and quieted title in ESCO and Sunbehm. (Index no. 212, A: 761-762). Not only did the trial court quiet title in the properties that were in dispute before the trial court, the trial court stated: "... The

court is left with two outcomes: 1) that Great Plains managed to somehow retain interests in property over 40 years after it was liquidated in bankruptcy, or 2) that the bankruptcy trustee sold the entire estate to ESCO. The only conclusion that makes sense is that **EVERYTHING** owned by Great Plains Royalty was sold in 1969 by the bankruptcy trustee to ESCO." (Emphasis added). (Index no. 212, A: 761-762).

[34] From the trial court's two page email, on April 2, 2018, ESCO, Basin, and Schwartz filed thirteen pages of proposed findings of fact, conclusions of law, and order for judgment. (Index no. 214, A: 767-781). On May 17, 2018, Great Plains objected to those proposed findings of fact, conclusions of law, and order for judgment. (Index no. 217, A: 791-792). On May 17, 2018, the trial court signed the findings of fact, conclusions of law, and order for judgment. (Index no. 219, A: 793-805). On May 30, 2018, a five-page judgment was signed by the Clerk of Court (Index no. 222, A:806-810).

[35] The findings of fact, conclusions of law and order for judgment contained numerous statements that were not addressed in the trial court's two-page email. The findings of fact also went into detail as to why ESCO and Basin were entitled to those two properties. (Index no. 219, A: 797-800). The conclusions of law cited portions of the trial court's two-page email, but added the following language to the paragraph stating that: "Great Plains managed to somehow retain interests in property over 40 years after it was liquidated in bankruptcy, but adding: "and nearly thirty years after it was involuntarily dissolved by the North Dakota Secretary of State." (Index No. 219, A: 800) The conclusions of law also went beyond the trial court's two page email by stating: "that the bankruptcy trustee sold the entire estate to ESCO," but adding: "Accordingly, as explained below, the court concludes it was the intent of the parties to the bankruptcy proceeding and

sale to sell all of Great Plains' assets to Earl Schwartz at the June 5, 1969 sale. Moreover, even if this was not the case, Great Plains subsequently lost its ability to claim title to property no. 2 and property no. 3 by virtue of its involuntary dissolution by the North Dakota Secretary of State." (Index no. 219, A: 761-762). The conclusions of law also added entire provisions that were not addressed by the trial court in its two-page email. In particular, the conclusions of law state: "...In the present case, as noted above, the report of sale and petition for order confirming sale, filed one day after the actual sale of Great Plains' property, as well as the order confirming sale of assets (Nunc Pro Tunc), filed within a month of the sale of Great Plains' property, both indicate that Earl Schwartz purchased "all of the assets" of Great Plains, and that Atkinson was merely selling the interest of Great Plains "as is." In addressing the status of Great Plains as a corporation, the conclusions of law go on to state: "This fails to acknowledge that as of August 1, 1983, at the latest, Great Plains ceased to exist as a corporation, and thus ceased being a "person" capable of owning or possessing any property... Upon reinstatement, Great Plains Royalty Corporation shall have all of the rights and privileges it would have possessed as a North Dakota corporation had it properly and timely submitted all annual reports and fees to the North Dakota Secretary of State. But this decision by the district court for Burleigh County is not binding on Defendants in the present action, because none of Defendants were parties to the Burleigh County case and because issues of ownership pertaining to property no. 2 and property no. 3 were not raised in that case." (Index no. 219, A; 803).

[36] The judgment also contains numerous provisions that were not included within the trial court's two-page email. Two of those provisions were: "That on June 5, 1969, as part of its involuntary bankruptcy proceeding, Great Plains' assets were liquidated and sold

by the bankruptcy trustee in an auction sale. It was the intent of the parties to the bankruptcy proceeding and sale to sell all of Great Plains' assets to the purchaser therein, Earl Schwartz."

[37] III. LAW AND ARGUMENTS

[38] Because this is an appeal after remand questions arise involving the mandate rule and the law of the case doctrine. This appeal also involves questions of law, an abuse of discretion and questions of fact. For questions of law, a de novo standard is applied, a clearly erroneous standard for questions of fact, and an abuse discretion for discretionary matters.

[39] *Bertsch v. Bertsch*, 2006 ND 31, 710 NW2d 113 (N.D. 2006).

[40] **Great Plains' Cross-Appeal**

[41] Great Plains filed its cross-appeal in this matter believing that the District Court erred in denying Great Plains' claim for damages for lost royalties and interest based on slander of title and/or conversion. The trial record shows by a preponderance of evidence that Great Plains is entitled to an award of damages from the Defendants.

[42] The main focus of this issue is the knowledge and actions of Defendants and their predecessors in interest for ESCO, Basin, and Sunbehm. The trial record contains a letter (A: 627) from Amerada Hess Corporation to Earl Schwartz dated April 28, 1971. The bankruptcy court filing stamp shows it being received by the Bankruptcy Court on May 4, 1971, containing a handwritten note to Bankruptcy Referee Gordon Thompson from Earl Schwartz. Amerada was questioning the nature of the interest Schwartz was claiming by an assignment from the Great Plains' bankruptcy. Schwartz was requesting of Thompson

"some paper they will pay on". Mau testified the handwriting was that of Earl Schwartz and he further acknowledged that the letter indicated that Schwartz had questions about what he had purchased from the bankruptcy trustee. (TT p. 2-38, ll. 10-20) The Court should note that the concerns of Schwartz, whatever they may have been, arose well before Atkinson was discharged 1974. It should also be noted that apparently Atkinson took action because of the Earl Schwartz letter to Referee Thompson according to the bankruptcy court docket. (A: 1012, at entry 20). Evidence of the fact that the bankruptcy court would address issues needing correction was shown at trial. (Plaintiff's Exhibits 12 and 13; Index nos. 119 and 120). No party has presented any evidence that Earl Schwartz took further action to address his concerns in the bankruptcy proceedings.

[43] In considering Schwartz's request to Referee Thompson, the Court finds that Earl Schwartz personally possessed sufficient information on May 4, 1971 that did, or should have, put him on notice that there may be issues with the nature or quantity of the oil and gas assets purchased from Trustee Atkinson. Defendants have admitted the fact of this knowledge on the part of Earl Schwartz, the "discovery" of the claim. (Sunbehm Brief ¶60). *Peterson v. Huso*, 552 N.W.2d 83, 84 (ND 1996) As provided by N.D.C.C. §28-01-05, Schwartz had 20 years to present any such claims and the record reflects no action on his part.

[44] Robert Mau is Earl Schwartz's son-in-law (TT p. 2-26, ll. 16-17) and he became affiliated with ESCO in the mid-1970's (TT p. 2-27, ll. 13-15). In 1987 Mau became the manager of ESCO while Schwartz was still living (TT p. 2-28, ll. 1-9). At trial Mau affirmed his bankruptcy deposition testimony that he became aware of issues with the

Great Plains' assets purchased ten or twenty years ago (TT p. 2-35, ll. 10-25; p. 2-36, ll. 107). Mau's concerns as to title were also expressed in his letter to the United States Bankruptcy Court dated February 8, 2002, wherein he appears to be looking for a particular "document" or "order" (Index no. 156, A: 661.)

[45] In view of these facts it would seem reasonable that Earl Schwartz and later Mau would have brought their concerns to the attention of the bankruptcy court in a formal manner to obtain clarification of exactly what had been purchased at the sale in 1969. Even Defendants' expert Swartzendruber concedes that would have been prudent (TT p. 2-183, ll. 11-24). However, instead of presenting these questions to the bankruptcy court, Mau appears to have elected to use "self-help" remedies to resolve the title issues in the favor of ESCO, Basin, and the Schwartz family which will be discussed below. At this juncture it is important to note that the identification of assets still owned by Great Plains was not just of concern to that company, but also to its unpaid creditors up until 2013 when all creditors were paid in full (A: 500). Until the time of full payment to creditors, the property of Great Plains which had not been administered remained part of its bankruptcy estate subject to the control of the bankruptcy court and any duly appointed trustee. *In re Dunning Bros. Co*., 410 B.R. 877 (Bkrtcy.E.D.Cal. 2009).

[46] The self-help remedies employed by ESCO, Basin, and the Schwartz Estate included the recording of instruments to assets still owned by Great Plains to make it appear that those assets were, in fact, owned by ESCO and Basin. Great Plains offered into evidence the following instruments (i) Assignment, Bill of Sale, and Conveyance (A: 513) from Schwartz Estate to ESCO, (ii) Mineral Deed (A: 515) from ESCO to Basin, and (iii)

Assignment of Overriding Royalty Interest (A: 517) from ESCO to Basin. Great Plains' expert, Gary Preszler, testified that each of these instruments included Property No. 2 and in each case he found no conveyance to the respective grantors from Great Plains or Great Plains' bankruptcy trustee. (TT pp. 89-95). Mau stated that the grantors and grantees in these instruments were essentially comprised of the same people, that is they are members of the Earl Schwartz family, with a change in name only. (TT p. 2-32, ll. 1-6; p. 2-34, ll. 3-25). When asked about these instruments, Mau admitted that the Schwartz Estate had been paid royalties from Property No. 2. (TT p. 2-55, ll. 21-23).

[47] Mau also admitted that the purpose of the instruments was to have the operators pay the Property No. 2 royalties to Basin (TT pp. 2-56-58) and the record reflects that occurred. (A: 823-952). Preszler further testified that Sunbehm received royalty payments for Property No. 3 despite the fact that Sunbehm had no instrument of conveyance from Trustee Atkinson as reflected in later testimony (TT pp. 127-128). As to such royalties and the records thereof received into evidence, Preszler tabulated the amounts paid to the Schwartz Defendants for Property No. 2 and Sunbehm for Property No. 3. That tabulation, exclusive of interest, showed:

Property No. 2	Bakken Wells	January 2010 to March 2017	$360,727.01	A: 628
Property No. 2	Clear Creek/ Madison Tract	July 1974 to March 2017	$ 91,865.18	A: 631
Property No. 3	HA State Wells	July 2010 to March 2017	$ 22,790.17	A: 644
Property No. 3	Hawkeye Madison Tract 23	July 1974 to December 2016	$ 2,954.76	A: 646

Defendants did not present any testimony or other evidence challenging the royalty or late payment penalty tabulations presented.

[48] The foregoing facts must be considered in the light of the applicable law regarding slander of title, conversion, and unjust enrichment. Despite ESCO's claim to the contrary, Great Plains did plead unjust enrichment on the part of Defendants (A: 89 and 91). Great Plains' Amended Complaint states a claim against the defendants for slander of title. By statute, slander of title is defined as follows:

> No person shall use the privilege of filing notices under this chapter or recording any instrument affecting title to real property for the purpose of slandering the title to real estate or to harass the owner of the real estate and in any action brought for the purpose of quieting title to real estate, if the court shall find that any person has filed a claim for the purpose of slandering title to such real estate or to harass the owner of the real estate, the court shall award the plaintiff all the costs of such action, including attorney fees to be fixed and allowed to the plaintiff by the court, and all damages that plaintiff may have sustained as the result of such notice of claim having been filed for record or the instrument having been recorded.
>
> N.D.C.C. § 47-19.1-09 (West)

[49] The North Dakota Supreme Court has described the elements of slander of title and the resulting damages. This Court has defined slander of title as "a false and malicious statement, oral or written, made in disparagement of a person's title to real or personal property, and causing him special damage." *Briggs v. Coykendall,* 57 N.D. 785, 788, 224 N.W. 202, 204 (1929). The plaintiff must demonstrate the defendant acted with malice, intending to injure, vex, or annoy the plaintiff. *Serhienko v. Kiker,* 392 N.W.2d 808, 815 (N.D.1986). It has long been the law of this state that, in order to sustain an action for slander of title, the plaintiff must prove special damages. *Briggs,* 57 N.D. at 792-93, 224

N.W. at 206. *Maragos v. Union Oil Co. of California,* 1998 ND 180, ¶¶ 4-5, 584 N.W.2d 850.

[50] The Supreme Court determined in *Great Plains* that the Defendants have not proven title to mineral interests in excess of the interests as described in the Notice of Sale (i.e. equitable title), accordingly the District Court should have found that Defendants slandered the title of Great Plains as to what has been described as Properties No. 2 and 3. Great Plains proved its record title through testimony and certified real estate records. (A: 953-962). The Defendants presented no instruments of conveyance divesting Great Plains of such mineral interests, or its ORRI interest. Great Plains also offered and the District Court received into evidence instruments of conveyance wherein the Estate and ESCO conveyed or assigned interests to Basin that included the properties in which Great Plains held record title. As a result of these slanderous filings, the Estate, ESCO and Basin induced Petro-Hunt, LLC to pay to them royalties which were the rightful property of Great Plains. The slanderous nature of the filings is proven by the fact that as the instruments were recorded, Petro-Hunt, LLC would respond thereto by changing the named payee of the royalties. (Compare payee/owner change at A: 823, 852, and 858). At trial the District Court received into evidence title opinions showing Great Plains as the record title owner. (Index no. 137)

[51] If slander of title is found, Great Plains is entitled to an award of all of it damages proven at trial, its costs, and reasonable attorney's fees. Great Plains would also be entitled to the statutory rate of interest of 18% in order for it to be made whole. See N.D.C.C. §47-16-39.1

[52] As to Sunbehm and Property No. 3, Sunbehm offered no evidence at trial of any trustee conveyance or court asset approval order, or any document supporting a claim of title from Great Plains, the bankruptcy court, or Earl Schwartz. Therefore, Sunbehm is liable to Great Plains for royalties and interest obtained from that mineral property

[53] Even if slander of title is not found, Great Plains has presented sufficient evidence of the fact that the defendants have wrongfully converted or misappropriated Great Plains' mineral royalties and have been unjustly enriched thereby. The court should award damages and interest for at least the legal rate of 6%. In *Christensen v. Farmers State Bank of Richardton,* 157 N.W.2d 352 (N.D.1968), the North Dakota Supreme Court defined conversion as follows:

> "Conversion consists of a positive tortious act, a tortious detention of personal property from the owner, or its destruction, or a wrongful exercise of dominion over the property inconsistent with, or in defiance of, the rights of the owner. (Citations omitted.) The gist of a conversion is not in acquiring the complainant's property, but in wrongfully depriving him of it, whether temporarily or permanently, and it is of little relevance that the converter received no benefit from such deprivation. (Citations omitted.)" 157 N.W.2d at 357.
>
> Unjust enrichment is a broad, equitable doctrine which rests upon quasi or constructive contracts implied by law to prevent a person from unjustly enriching himself at the expense of another. To recover under a theory of unjust enrichment, the plaintiff must prove: (1) an enrichment, (2) an impoverishment, (3) a connection between the enrichment and the impoverishment, (4) the absence of a justification for the enrichment and impoverishment, and (5) the absence of a remedy provided by law. The theory may be invoked when a person has and retains money or benefits which in justice and equity belong to another.
>
> *KLE Constr., LLC v. Twalker Development, LLC,* 2016 ND 229, ¶6, 887 N.W.2d 536

[54] The Defendants claim that they are not liable for royalties paid to them pursuant to wrongfully recorded instruments for several reasons. First, they argue they have no

obligation because royalties must be sought from a mineral lessee or well operator. The fact that Great Plains may be able to seek compensation from others, should not bar a claim against a wrongful actor who was unjustly enriched at the expense of another. *KLE Constr., LLC v. Twalker Development, LLC,* 2016 ND 229, ¶6, 887 N.W.2d 536.

[55] It is also claimed that conversion can only be proven if it relates to specific identifiable personalty. However, in this case the property converted was money paid to Defendants and money is, by definition, a fungible good.

Lastly, Defendants claim that the claim of Great Plains is barred by the appliable statute of limitation. The statute for conversion is six years and calculating Great Plains losses for the appliable period would simply be a mathematical calculation.

[56] Sunbehm should be liable for the royalties wrongfully taken by it for Properties No. 3 and the Schwartz defendants should be found jointly and severally liable for the royalties wrongfully taken by them. As stated by Robert Mau, the persons interested in the Earl Schwartz Estate are the same persons who were, or are, owners of ESCO and Basin (Answer No. 1, A: 664). Mau admitted at trial that the transfers from the Estate to ESCO to Basin were just names changes with no real change of ownership. In that case, the court can conclude that the Schwartz defendants acted in concert as provided in NDCC 32-03.2-02, or that they are alter egos of each other.

[57[To apply the alter ego doctrine, “there must be such a unity of interest and ownership between the corporation and its equitable owner that the separate personalities of the corporation and the shareholder do not in reality exist,” and “there must be an

inequitable result if the acts in question are treated as those of the corporation alone." *Red River Wings, Inc. v. Hoot, Inc.,* 2008 ND 117, ¶34, 751 N.W.2d 206

[58] **Great Plains Reply Brief to the Appeal Briefs of Sunbehm and the ESCO.**

[59] The issue to be considered as whether the District Court properly implemented the mandate of the Supreme Court as articulated in *Great Plains Royalty Corporation v Earl Schwartz Co*., 2019 ND 124, 927 N.W.2d 880 ("*Great Plains*" herein) as regards the parties relative claims to "Property 2", "Property 3", and the "Subject Properties". This the second appeal of the issues in this case. As requested by the District Court, Great Plains submitted its proposed Findings for consideration. In order to assist the District Court in implementing the mandate of the Supreme Court as articulated in *Great Plains,* the District Court was also provided the proposed Findings in annotated format which contained detailed references to trial testimony, trial exhibits, and the opinion of the Supreme Court. (A: 963-989).

[60] Aside the issue of damages claimed by Great Plains, the arguments presented by the Defendants appear to be the same as they presented in *Great Plains.* The briefs read more like expanded petitions for rehearing than new arguments on undecided issues. It is worthy of note that the Sunbehm brief makes no reference to the decision in *Great Plains* and the ESCO brief makes only one reference. The arguments of Defendants must be examined in light of the doctrine of law of the case and the mandate rule.

[61] Law of the Case and the Mandate Rule

[62] Defendants' Briefs are, for the most part, a re-hash of the same arguments presented on appeal and rejected by the North Dakota Supreme Court in *Great Plains.* Accordingly, the fact of the appeal and the remand now implicate the doctrine of law of

case and the mandate rule. These have been described by the North Dakota Supreme Court as follows:

> " Generally, the law of the case is defined as ‘ the principle that if an appellate court has passed on a legal question and remanded the cause to the court below for further proceedings, the legal question thus determined by the appellate court will not be differently determined on a subsequent appeal in the same case where the facts remain the same.’ " *Robertson v. North Dakota Workers Comp. Bureau,* 2000 ND 167, ¶ 18, 616 N.W.2d 844 (quotation omitted). In other words, " [t]he law of the case doctrine applies when an appellate court has decided a legal question and remanded to the district court for further proceedings," and " [a] party cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal *or which would have been resolved had they been properly presented in the first appeal.* " *Kortum v. Johnson,* 2010 ND 153, ¶ 9, 786 N.W.2d 702 (quotations omitted) (emphasis added); *see also State ex rel. Dep't of Labor v. Riemers,* 2010 ND 43, ¶ 11, 779 N.W.2d 649; *Frisk v. Frisk,* 2006 ND 165, ¶ 14, 719 N.W.2d 332; *Jundt v. Jurassic Res. Dev.,* 2004 ND 65, ¶ 7, 677 N.W.2d 209; *State v. Burckhard,* 1999 ND 64, ¶ 7, 592 N.W.2d 523; *Tom Beuchler Constr., Inc. v. City of Williston,* 413 N.W.2d 336, 339 (N.D.1987). " The mandate rule, a more specific application of law of the case, requires the trial court to follow pronouncements of an appellate court on legal issues in subsequent proceedings of the case and to carry the [appellate court's] mandate into effect according to its terms...(emphasis added). and we retain the authority to decide whether the district court scrupulously and fully carried out our mandate's terms." *Burckhard,* at ¶ 7 (quotations and citations omitted).

- *Carlson v. Workforce Safety and Ins.*, 2012 ND 203, at ¶16, 821 N.W.2d 760; See also *Montana-Dakota Utilities Co. v. Behm*, 2020 ND 234, ¶8, 20200122

[63] Sunbehm’s Brief

[64] Sunbehm first argues that Great Plains lacks standing to pursue claims as to Properties Nos. 2 and 3, and the “Subject Properties” because it did not cooperate with the Trustee Atkinson by properly scheduling its assets. Sunbehm cites 11 U.S.C. § 521 of the Bankruptcy Code as to this requirement. It needs to be noted that when the Great Plains filed its case the Bankruptcy Code was not the law. At that time the applicable law was the Bankruptcy of Act of 1898. This codification of law was repealed and replaced by the

Bankruptcy Code on November 6, 1978.

[65] This argument lacks merit for several reasons. First, Sunbehm's Answer and Counterclaim do not allege such a claim and it was not argued at trial (ESCO A: 23-25). More importantly, Sunbehm did not present this argument to support its claims in *Great Plains*. A reading of Sunbehm's Brief in *Great Plains* (A: 990-1009) shows no claim of this nature while, of course, it could have been presented. Therefore, it is deemed waived under the law of the case doctrine.

[66] However, even if open to consideration the argument is not supported by any statute, rule, or case. The Bankruptcy Code provides more than enough sanctions for debtors that do not comply with statutory obligations. In *Doeling v Marman*, U.S. Bankruptcy Court, District of North Dakota, Adversary Proceeding No. 14-07017, the debtors were denied a discharge for failing to maintain sufficient records from which the debtors' transactions could be ascertained. See 11 U.S.C. §727(a)(3). On the other hand there is simply no provision of law that awards a windfall to the purchaser of a debtor's property. In fact, after all creditors are paid the Bankruptcy Code specifically states that any surplus belongs to the debtor. See 11 U.S.C. §726(a)(6).

[67] Sunbehm next argues that it should have prevailed upon the merits in the District Court. The argument presented is only a slight variation of the argument presented in *Great Plains.* If the argument was previously presented it lacks merit was being contrary to the law of the case as stated by the Supreme Court. If found to be a slightly different argument, it was waived by Sunbehm's failure to present it in *Great Plains*. It must be remembered that none of the Defendants in this case have any recorded documents of conveyance from Trustee Atkinson, or any successor trustee. The only document they have upon which to

claim title is the Notice of Sale, the significance of which was fully litigated in *Great Plains*. This argument is essentially a restatement of what Great Plains calls the "footprint" theory which was presented at trial through Defendants' expert, Nick Swartzendruber. According to Swartzendruber, it had to be presumed that Trustee Atkinson intended to sell any and all interests of Great Plains set forth in the Notice of Sale by reference to only the surface legal descriptions, or partial legal descriptions, i.e. the "footprint", without regarding to the balance of language describing the particular interest offered for sale. (TT p. 2-146, ll. 17-25; p. 2-147, ll. 1-4). This position is contrary to Atkinson's testimony and was rejected by the Supreme Court in *Great Plains* ¶34.

[68] A related persistent claim of all Defendants is that Earl Schwartz "paid" for the mineral assets under this all-inclusive theory of title. He did not. The interests as described in the Notice of Sale were appraised before sale and determined to have a value of $209,278.37 (A: 348). Earl Schwartz paid $225,000.00 (A: 374) which comes out to only about 7.5% more than appraised value.

[69] Sunbehm's third argument, although not described as such, is a request for reformation of contract (Sunbehm Brief ¶58-61). Relief in the form of reformation was not requested in Sunbehm's Answer and Counterclaim, but it was argued by Sunbehm in *Great Plains.* (A: 1004), and no relief was granted by the Supreme Court. Therefore, under the law of the case doctrine, the argument is considered and conclusively rejected.

[70] Sunbehm's fourth and final argument is Great Plains' mineral assets not described in the Notice of Sale should be included because Atkinson sold the assets "as-is" resulting in the all-inclusive transfer of assets without regard to detailed descriptions in the Notice of Sale. (Sunbehm Brief ¶¶62-64). This argument was specifically considered and rejected by

the Supreme Court in *Great Plains* at ¶37. This argument it is also not supported by the trial record. When Trustee Atkinson and legal counsel Jestrab applied for corrective instruments, the Petition in bankruptcy court (A: 1016-1017) recites the following at paragraph 5 to clarify working interest drilling units instead of the full Great Plains' leasehold:

> That it appears that it was the intention of the Trustee to sell the drilling units and the correct royalty percentages and that the failure to advertise was an oversight and upon information and belief the bid prices reflect that this was likewise the intention of the bidder [Earl Schwartz].

[71] Schwartz Defendants' [ESCO] Brief

[72[Subsequent to the filing of the Notices of Appeal by Sunbehm and Great Plains, ESCO also gave Notice of Appeal. Sunbehm is primarily interested in Property No. 3 and ESCO is interested in Property No. 2 and the "Subject Properties". Another difference is that in *Great Plains* the Supreme Court found that ESCO and Basin were collaterally estopped from re-litigating the issue of Atkinson's intent because they were parties to Bankruptcy Adversary No. 13-07018 wherein the issue was addressed and ruled upon by the Honorable Shon Hasting, Judge of the United States Bankruptcy Court. (*Great Plains* ¶21)

[73] ESCO's first argument starts ¶¶20-21 of their brief. ESCO claims, without evidence, that Earl Schwartz would have identified the interests of Great Plains by comparing the Notice of Sale with available county records. Because of this Earl Schwartz acquired title to the properties despite the lack of instruments of conveyance and despite different descriptions in the Notice of Sale.

[74] It is unclear to Great Plains whether (i) this is a claim for all interests of Great

Plains under the described lands, the "footprint" theory, or (ii) if it refers to title claimed as specifically stated in the Notice of Sale. The first claim would be barred by collateral estoppel which was confirmed by the Supreme Court. The second claim was never presented to the District Court at trial, no factual evidence was offered as to those interests, and the claim was never argued in *Great Plains*. This is a new argument which cannot now be raised on a second appeal when it logically could have been raised at trial and in the first appeal. Up until now ESCO has always relied on the "all assets" argument or the related "footprint" argument, before the bankruptcy court, the District Court, and the Supreme Court.

[75] ESCO returns to the "footprint" theory of title in its second argument starting at ¶22 by making reference to ownership of all interests on or under "the lands referenced in the Notice of Sale". According to ESCO, a bankruptcy notice to sell estate property is only a general description and a diligent buyer will search available records to ascertain the true nature of the assets offered by the trustee. Presumably, Earl Schwartz was that "diligent buyer" despite the total absence of evidence to that end. The evidence we do have is the clear and unambiguous testimony of Trustee Atkinson that no representations were made other than a sale of assets as advertised (*Great Plains* ¶32). Because these claims all revolve around Atkinson's intent and the result of the sale he conducted, Great Plains believes these arguments are merely a variation of the arguments litigated in the U.S. Bankruptcy Court and/or those presented in *Great Plains*.

[76] ESCO next argues that the District Court misapplied the collateral estoppel doctrine to the facts of this case. The Findings submitted by Great Plains on that issue are almost entirely directly based on the Supreme Court opinion in *Great Plains*. (*Great Plains*

¶¶13-21). Great Plains believes a fair reading of that opinion conclusively determines that as to ESCO and Basin, Trustee Atkinson only offered for sale and only sold those specific oil and gas interests stated in the Notice of Sale. ESCO's argument is a difference without a distinction by stating that they are now focused not on "all assets owned" by Great Plains, but what interests were "included" in the Notice of Sale. ESCO Brief ¶30. However, this argument is not new, but is simply a restatement of their "footprint" theory presented at trial by Nick Swartzendruber. Therefore, it was either omitted from the first appeal and waived, or included and determined in that appeal.

[77] ESCO next argues that Great Plains is judicially estopped from claiming an interest in the Subject Properties. This argument is essentially the same as the "lack of standing" argument made by Sunbehm which is addressed above in ¶¶60-62. Those arguments will not be restated here other than to note that this claim was not raised in ESCO's first appeal and its does not appear as an argument presented to the District Court after remand. (ESCO Brief [after remand] at Index no. 256).

[78] ESCO raises a claim of judicial estoppel which would bar Great Plains from maintaining a claim of ownership in the assets not sold to Earl Schwartz. The cases cited by ESCO deal with cases in which the debtor obtained a discharge of debt. The reasoning is that it is not equitable to allow a debtor to maintain a claim of ownership in undisclosed assets to the detriment of the debtor's creditors who could have benefitted from disclosure. That is not the situation for Great Plains. Great Plains is not an "individual" and therefore it did not receive a discharge of debt and it never could (11 U.S.C. §727(a)(1). In this case, any assets found, at any time, were first liable for the debts of Great Plains until all debts were paid in full, along with all statutory interest. That did not occur until 2013.

[79] Judicial estoppel is an equitable principal which must be applied in an equitable manner. The North Dakota Supreme Court has said "……. proceeding is grounded in equity and is, therefore, governed by the equitable concept that one who seeks equity must do equity," *Schulte v. Kramer*, 2012 ND 163 ¶42, 820 N.W.2d 318 (2012). As applied in North Dakota judicial estoppel has been narrowly construed:

> The doctrine applies only where a party's subsequent position is totally inconsistent with its original position, and does not apply where distinct or different issues or facts are involved. In *Dunn v. North Dakota Dep't of Transp.*, 2010 ND 41, ¶ 10, 779 N.W.2d 628, we recognized we had " consistently assumed, without deciding, the doctrine of judicial estoppel applies in North Dakota." In *Dunn*, at ¶ 10, we said that in several cases, we had declined to apply judicial estoppel because a party's subsequent position was not entirely inconsistent with that party's original position.

Peterson v. Sando, 2011 ND 206, ¶¶10-11, 806 N.W.2d 172 (2011)

[80] In order to satisfy this standard ESCO would have needed to offer into evidence the bankruptcy schedules of Great Plains so they could be compared to other evidence as to the actual ownership interests of Great Plains. This was never done. Equally important is that the evidence at trial showed that ESCO had possession of detailed records of Great Plains' mineral properties that apparently only came to light during the bankruptcy litigation. (TT p. 1-134, l. 2-25; A: 586-587).The evidence is undisputed that Robert Mau, ESCO's manager, knew that there were issues with title to the Great Plains' property purchased by Earl Schwartz no later than February 8, 2002. (A: 661). Instead of seeking clarification of the title claimed with a duly appointed bankruptcy trustee, he arranged for the wrongful recording of instruments that caused royalties to be paid to ESCO and Basin. It is equally undisputed that at the time he took these steps, there remained unpaid creditors in the Great Plains bankruptcy. Mau's actions resulted in a misappropriation of bankruptcy estate

property that should have been applied to the still outstanding debt and accrued interest. The unclean hands of ESCO (Schwartz Defendants) make it clear they are not entitled to any equitable remedy.

[81] ESCO's last argument is that remand is needed so that the District Court may clarify the meaning and scope of its order. (ESCO Brief ¶34). ESCO says clarification is needed because Sunbehm and ESCO must have acquired at least some interest in the properties described in the Notice of Sale. As far as known to Great Plains this is the first instance wherein Defendants have claimed anything less than "all assets" of Great Plains, or "All Great Plains' Interests in the Lands Referenced on the Notice of Sale ….", the "footprint" theory. (ESCO Brief heading at ¶22). The remedy now sought on this second appeal is not one presented at trial and does not appear to be included in the ESCO Brief supporting its Findings on remand. (Index no. 256).

[82] As to whether Great Plains claims oil and gas interests in the Subject Properties, the record is clear. Defendants' expert witness, Nick Swartzendruber, essentially conceded that Great Plains held record title to the properties in question (TT pp. 2-163 to 2-164) and Great Plains' expert, Gary Preszler testified as to each property. (TT pp. 2-203 to 2-231). In the absence of recorded instruments, Sunbehm and ESCO had, at most, 20 years within which to request documents of conveyance from the bankruptcy trustee or petition for confirmation of its interests resulting from the bankruptcy sale. (N.D.C.C. §28-01-05).

[83] Arguably, ESCO only had 10 years to take such action as provided at N.D.C.C. §28-01-15(2). Great Plains believes that this Court's holding in *Western Energy Corporation v. Stauffer,* 2019 ND 26, 921 N.W.2d 431, is particularly on point with the facts in this matter. In that case Westerns' predecessor in title sold land under a contract for

deed which contained a mineral reservation. A short time later, in June of 1959, the contract was satisfied by a warranty deed that contained no mineral reservation. *Western Energy* ¶2. Both vendor and purchaser, and their successors, entered into various mineral conveyances and reservations. In 2016 Western sought to quiet title to the allegedly vendor reserved minerals. *Western Energy* ¶3. The district court correctly determined that the action was actually one for reformation of the warranty deed delivered to the purchaser. *Western Energy* ¶4. The district court determined that reformation was barred by the 10-year statute found at N.D.C.C. §28-01-15(2) and the Supreme Court affirmed.

[84] The claims of ESCO and Sunbehm are strikingly similar in this case. They ask that the Notice of Sale be somehow completely reformed into an instrument of conveyance that conveys something more than is stated on the face of the Notice. As provided in *Western Energy*, those claims are barred by the passage of time. The record is clear that Earl Schwartz had concerns as to possible title issues by May 4, 1971 based on the concerns expressed to Referee Thompson in his handwritten note. (A: 627). Therefore, this new claim is untimely both in these proceedings and is barred by the applicable statute of limitations.

[85] CONCLUSION

[86] WHEREFORE, Great Plains respectfully request that this Court dismiss the appeals of ESCO and Sunbehm and confirm the Findings of Fact, Conclusions of Law, and Order for Judgment as they relate to Property Nos. 2 and 3, and the Subject Properties.

[87] Great Plains further requests that this Court determine that ESCO and Sunbehm slandered the title to Great Plains' properties, award damages, costs, and attorney fees according to statute or adjudge that ESCO and Sunbehm are liable for damages for

royalties misappropriated by them along with interest, grant costs and disbursements, reasonable attorney's fees, and such other relief as the court deems fair and equitable.

[88] Dated this 16th day of December, 2020.

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CERTIFICATE OF COMPLIANCE

[89] The undersigned, as attorney for Great Plains Royalty Corporation, a North Dakota Corporation, Plaintiff, Appellee, and Cross-Appellant, in the above matter, and as the author of the Plaintiff, Appellee, and Cross-Appellant's brief, hereby certifies, in compliance with Rules 28 and 32 of the North Dakota Rules of Appellate Procedure, that the Plaintiff, Appellee, and Cross-Appellant's brief, excluding this certificate of compliance and the certificate of service comprises 38 pages, or less.

[90] Dated this 16th day of December, 2020.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20200133
McKenzie County No. 27-2016-CV-00530

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

vs.

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

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

CERTIFCATE OF ELECTRONIC SERVICE

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

[91] James J. Coles does hereby certify and affirm: That he is of legal age and not a party to this action.

[92] That on the 16th day of December, 2020, he electronically served a true and correct copy of the following documents(s): **PLAINTIFF, APPELLEE AND CROSS-APPELLANT'S BRIEF** (Supreme Court E-filing Portal) **AND PLAINTIFF,**

APPELLEE AND CROSS-APPELLANT'S APPENDIX (email as Parts 1 and 2) as follows:

[93] Penny Miller, Clerk
North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

[94] and were emailed upon the following:

[95] Lawrence Bender
lbender@fredlaw.com
Attorney for Appellants and Cross-Appellees

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[96] To undersigned's knowledge, information and belief, such address was the last known email address of the party intended to be so served.

/s/ James J. Coles
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GreatPlainsBrief_SupCtNo_20200133

20200133
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
DECEMBER 21, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

SUPREME COURT NO. 20200133
McKenzie County No. 27-2016-CV-00530

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

vs.

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

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CERTIFCATE OF ELECTRONIC SERVICE

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

[1] James J. Coles does hereby certify and affirm: That he is of legal age and not a party to this action.

[2] That on the 21st th day of December, 2020, he electronically served a true and correct copy of the following documents(s):

APPENDIX OF GREAT PLAINS ROYALTY CORPORATION, PLAINTIFF, APPELLEE, AND CROSS-APPELLANT [Corrected as to missing page and text searchable feature], (Filing via the Supreme Court E-filing Portal) as follows:

[3] Petra Mandigo Huom, Clerk
North Dakota Supreme Court
supclerkofcourt@ndcourts.gov

[4] and service by email upon the following:

[5] Lawrence Bender
lbender@fredlaw.com
Attorney for Appellants and Cross-Appellees

Jon Bogner
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Attorney for Appellant and Cross-Appellee

Daniel Oster
Co-Counsel for Plaintiff/Appellee/Cross-Appellant
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[6] To undersigned's knowledge, information and belief, such address was the last known email address of the party intended to be so served.

/s/ James J. Coles
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CertificateSerAppendixCorrected