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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

VIC CHRISTENSEN MINERAL TRUST, *Plaintiff*, v. ENERPLUS RESOURCES CORPORATION, *Defendant, Cross-Claim Defendant, and Appellant,* and MEYER FAMILY MINERAL TRUST, JOANN DERYCE STRUTHERS TRUST, and STEVEN J. REED LIVING TRUST, *Defendants, Cross-Claim Plaintiffs, and Appellees.*	)	Supreme Court No. 20210050 Dunn Co. Civil No. 13-2019-CV-00012

APPELLANT ENERPLUS RESOURCES (USA) CORP.'S REPLY BRIEF

Appeal from Orders of the District Court, dated July 27, 2020 and August 10, 2020, and Judgments dated August 10, 2020, November 23, 2020, and March 17, 2021, Granting Summary Judgment against Appellant

Appeal From
Southwest Judicial District, Dunn County, North Dakota
The Honorable William Herauf

ORAL ARGUMENT REQUESTED

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INTRODUCTION

[1] Enerplus's Opening Brief[1] ("Br.") demonstrated conclusively that from 2017 to 2019, a dispute of title existed that affected royalty payments to the Trust Defendants. The responsive Brief filed by the Trust Defendants ("Opp.") fails to defeat this showing. Enerplus is not liable simply because its interpretation of a deed is not the one ultimately accepted by a court, nor is Enerplus's interpretation foreclosed by prior decisions of this Court. The Trust Defendants also offer no substantive rebuttal to the fact that there was an obvious title dispute between the parties that lasted for eighteen months.

[2] Because there was a title dispute, Enerplus was entitled to safe harbor from liability for suspending payments pursuant to N.D.C.C. § 47-16-39.1. Enerplus respectfully requests the District Court's orders and judgments granting summary judgment to the Trust Defendants be reversed and summary judgment be granted to Enerplus instead.

ARGUMENT

I. The Trust Defendants Fail to Show Any Basis for Liability Against Enerplus

A. The Trust Defendants' Framing Creates a False Dichotomy

[3] The Introduction to the Trust Defendants' Brief argues that there is only one issue in this appeal: "whether Enerplus rightfully suspended royalty payments that were due to the Trust Defendants, or in other words, did a title dispute exist, or did Enerplus simply wrongly identify that a title dispute existed." Opp. ¶ 17. The Trust Defendants then assert that "the title dispute was mistakenly and wrongly manufactured by Enerplus, and . . . no suspension of royalties should have ever occurred," and as a result, "Enerplus is not entitled to any protection under N.D.C.C. § 47-16-39.1." *Id.*

[1] Defined terms used herein have the same meaning as in Enerplus's Opening Brief.

[4] The Trust Defendants frame the issue as a simple binary choice: either (1) the Trust Defendants' interpretation of the Reeds Deed is correct, and Enerplus is liable, or (2) Enerplus's interpretation of the Reeds Deed is correct, and Enerplus is not liable. In reality, however, there is a third possibility: (3) The Trust Defendants' interpretation of the Reeds Deed is correct, but Enerplus is not liable.

[5] This possibility is grounded in the fact that Enerplus' role as an oil and gas operator is to identify title disputes, not resolve them. It gains nothing by withholding payments; rather, like a bank in an interpleader action, its only interest is in making sure that payments are made to the correct parties. The Trust Defendants' framing distorts Enerplus's role and the statutory criteria by focusing only on the outcome of the dispute, then working backwards to liability if any other interpretation was endorsed.

[6] A dispute of title is just that: a disagreement between parties about title to property. Resolving a title dispute nearly always entails approving one party's interpretation of the chain of title. The fact that another interpretation is not ultimately accepted, however, does not mean it lacked merit. It is often possible to make "[r]ational arguments" in support of more than one view. *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 490 (N.D. 1980). Indeed, it is only under exceptional circumstances that an argument is deemed frivolous in the legal sense. *See, e.g.*, *CHS Inc. v. Riemers*, 2018 ND 101, ¶ 10, 910 N.W.2d 189, 192 ("A claim for relief is frivolous . . . only if there is such a complete absence of actual facts or law a reasonable person could not have expected a court would render a judgment in that person's favor.") (quotation omitted).

[7] The Trust Defendants thus set up a false dichotomy by asserting that Enerplus must be liable if this Court rules against the existence of the NPRI. The third,

correct possibility recognizes that good faith, nonfrivolous arguments exist for and against the existence of the NPRI, and consequently, Enerplus is not liable for suspending payments regardless of the final outcome to the case.

[8] This is the only reasonable approach. An operator may identify a title dispute for any number of reasons, including ambiguities in the chain of title, ambiguities in the law, or the actions of the parties themselves. Shackling liability to the ultimate resolution of the dispute turns the identification process into little more than a judicial guessing game, and it effectively erases everything that supported the existence of the dispute in the first place. Such a rule would defeat the purpose of the statute and fail to comport with the plain text of N.D.C.C. § 47-16-39.1, which carves out a safe harbor if there is *any* "dispute of title," without reference to the relative merits of the various competing claims. The only requirement is that a dispute "exist[]." N.D.C.C. § 47-16-39.1.

[9] As discussed in the following sections, Enerplus still believes that its interpretation of the Reeds Deed is the correct one. Nonetheless, even if this Court rules that Enerplus's interpretation was not correct, it should still hold that Enerplus is not liable for statutory interest. The Trust Defendants' false dichotomy must be rejected.

B. The Language in the Reeds Deed Permits Multiple Interpretations

[10] Turning now to the specific language in dispute, the Trust Defendants argue that Enerplus interpreted three deeds incorrectly: the Roquette Deed, the Reeds Deed, and the 1968 quitclaim deed conveying the NPRI back to Mrs. Christensen. Opp. ¶ 18. The Trust Defendants assert that the conveyance to Mr. Roquette is controlled by the *Duhig* rule, as set forth in *Acoma Oil Corp. v. Wilson,* 471 N.W.2d 476 (N.D. 1991) and *Wenco v. EOG Resources Inc.*, 2012 ND 219, 822 N.W.2d 701. *Id.* ¶¶ 19–20.

[11] The first issue with the Trust Defendants' argument is that, as Enerplus

explained, the *Duhig* rule does not apply if the Reeds Deed "conveyed mineral acres *with* a reference to the outstanding royalty interest," as Mr. Schill believed. *See* Br. ¶¶ 59–60. For this reason, the *Acoma* and *Wenco* cases are not dispositive of this case.

[12] The Trust Defendants primarily address the language in the Reeds Deed by block-quoting a large section of *Miller v. Kloeckner,* 1999 ND 190, 600 N.W.2d 881. *See* Opp. ¶¶ 28–29. The Trust Defendants assert that *Miller* shows that "[t]he 'subject to' language did not reserve the outstanding royalty interest to the Grantor," but "[r]ather, this wording was only 'intended to protect the grantor on the warranty and are not intended as a limitation on the nature of the interest conveyed by the granting clause.'" *Id.* ¶ 28.

[13] The Trust Defendants' quotations conflate two separate issues. The "subject to" language that appeared in *Miller* was ineffective because the grantor did not have the necessary interests to satisfy both the reservation and the grant. *Miller*, 1999 ND 190, ¶ 18 ("[Grantor] purported to convey a one-half interest in the minerals and reserve a one-half interest in the minerals when [Grantor] owned only a one-half interest in the minerals.") The only question was whether the *Duhig* rule was applicable given the limited warranty. *Id.* ¶¶ 14–16. That the reservation was ineffective under the fact pattern in *Miller*, however, does not mean that the "subject to" language is meaningless in all situations.

[14] The second quotation provided by the Trust Defendants does not show otherwise. Opp. ¶ 28. In that section of *Miller*, the Court quoted a Colorado Supreme Court decision which distinguishes between the granting clause and the warranty clause. *Miller*, 1999 ND 190, ¶ 15 (*quoting O'Brien v. Village Land Co.*, 794 P.2d 246, 251 (Colo. 1990)). This quotation states that it is the granting clause that defines and designates the estate conveyed, not the warranty clause. *Id.*

[15] Here, the "subject to" language that the Trust Defendants reference *is* part of the granting clause.[2] *See* App. 69 ("the above grant and conveyance, however, being subject to all mineral reservations and conveyances . . . and other reservations of record, as of the date of this instrument"). The warranty clause comes later in the deed. *See* App. 70 (representing that the Grantor "does covenant with the [Grantees] that (subject to the exceptions and reservations above stated) she is well seized in fee of the land and premises aforesaid . . ."). Thus, the Trust Defendants' quotation from *Miller* is simply not germane.

[16] The only other conveyance language cited by the Trust Defendants appears in *Wenco*. Opp. ¶¶ 30–32. *Wenco* analyzed whether a burden persisted through two subsequent conveyances. 2012 ND 219, ¶¶ 2–3. Notably, the first conveyance "did not reference the earlier royalty conveyance," and stated only that it was "made subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed." *Id.* ¶ 2.

[17] The "subject to any rights" language in *Wenco* is much less specific than the Reeds Deed, which stated that it was "*subject to all mineral reservations and conveyances . . . and other reservations of record*, as of the date of this instrument." App. 69 (emphasis added). There is also no indication that this deed contained similar language in the warranty clause, unlike the Reeds Deed. The second conveyance then stated only that it was made "subject to 'prior mineral reservations . . . now of record,'" again without any additional language added to the warranty clause. *Wenco*, 2012 ND 219, ¶ 3.

[2] The phrase "subject to" appears twice in the deed, but it appears from the first sentence of Paragraph 28 that the Trust Defendants are referring to the language in the granting clause. Opp. ¶ 28 (referencing the deed's language of "the above grant and conveyance, however being subject to all mineral reservations and conveyances").

[18] Thus, while there are some facial similarities, the language in the operative deeds in *Wenco* were substantively different from the language in the Reeds Deed. At a minimum, the difference is enough that there is a colorable argument to be made that *Wenco* does not control.[3] Again, this Court does not need to find that Enerplus's interpretation was correct, just that a good-faith argument could be made in favor of that position. The language in the deeds, the lack of direct authority on point, and the cautions raised in the Mineral Title Standards are all sufficient grounds to support such an argument.

C. The Other Issues Raised by the Trust Defendants Are Not Relevant

[19] In addition to the above claims, the Trust Defendants make several arguments that are not relevant to the issue here. For example, they argue that even without the rulings from *Duhig*, *Acoma*, and *Wenco*, Enerplus "could still have applied after acquired title principles . . . thereby not burdening the Trust Defendants' 1/5 mineral interest." Opp. ¶ 22. However, the Trust Defendants do not cite a single case or authority on behalf of this argument, so the Court need not consider it. *See, e.g.*, *Somerset Court, LLC v. Burgum*, 2021 ND 58, ¶ 13, 956 N.W.2d 392. Even if considered, after-acquired title is not applicable here because Enerplus's position is that the Reeds Deed intended to—and did—convey an interest expressly burdened by its share of the outstanding NPRI. The grantor had sufficient interests to satisfy that conveyance at the time of recordation, so

[3] The Trust Defendants also reference Mineral Title Standard 7-05.1 and its commentary on the *Wenco* case. Opp. ¶ 32. As Enerplus explained, however, this Standard was revised in 2018, *after* Enerplus made the decision to suspend payments. *See* Br. ¶ 44, n.6. The Mineral Title Standards in effect at the time discussed only *Acoma*, which is not applicable for the reasons previously stated. Br. ¶ 59. The Trust Defendants also misstate the Standard when they state that the caution within only applies in certain circumstances not applicable here. Opp. ¶ 33. In reality, the Standards state that in "***all circumstances***, the title examiner should exercise extreme caution in determining the ownership of all royalty within the lands . . . ." App. 118–19 (emphasis added).

after-acquired title does not come into play. *See* Br. ¶ 59.

[20] With respect to merger, the Trust Defendants appear to argue that Mr. Schill was wrong to merge the NPRI royalty interest into Mrs. Christensen's estate but not their own, contrasting it with the "Kellogg" interest that was merged as to the entire W/2. Opp. ¶¶ 23–24. However, there is a simple explanation for the difference in treatment. The conveyance returning the Kellogg interest to the Christensens was recorded in March 1958, *prior* to the Reeds Deed, which was not recorded until March 1962. App. 70, 72–73. As a result, it merged with the Christensens' estate prior to the conveyance to the Reeds. The NPRI, by contrast, was not conveyed back to Mrs. Christensen until 1968, well *after* the conveyance to the Reeds, so it never merged with the 1/5 interest conveyed to them.

[21] Regardless, whether other interests should or should not have been merged has nothing to do with this appeal. These irrelevant issues fail to provide any basis for liability against Enerplus pursuant to N.D.C.C. § 47-16-39.1.

II. The Trust Defendants Do Not Rebut the Factual Evidence of a Dispute

[22] The final matter to address is the factual evidence of a dispute between the parties. In its Opening Brief, Enerplus presented evidence of the lengthy dispute of title between the parties following the suspension of payments in late October 2017. Br. ¶¶ 65–70. The existence of such a dispute is not seriously controverted; indeed, the Trust Defendants, underlying plaintiff VCMT, and even the District Court all referred to the dispute as a "dispute of title" at various times. *Id.* ¶ 68. On its face, this factual evidence of a dispute of title is sufficient to trigger the safe harbor in N.D.C.C. § 47-16-39.1.

[23] In response, the Trust Defendants assert without evidence that VCMT was only "under the impression" they had a royalty interest "because of the misinterpretation

contained in the title opinion."[4] Opp. ¶ 25. This argument misses the mark. VCMT was represented by experienced counsel throughout the entirety of these proceedings; they are responsible for their own actions, including the decisions to push for a maximal NPRI, reject the Trust Defendants' stipulation, and file a lawsuit to quiet title. Br. ¶¶ 24–31. This is little more than a bare attempt to apply a double standard to the parties, under which VCMT's 18-month misunderstanding of the law is forgivable, but Enerplus's is not.

[24] The Trust Defendants also argue that "the Stipulation was a needless requirement" and that VCMT "might have never commenced a lawsuit" without the suspension of payment. Br. ¶ 35. These assertions are pure speculation. Once it identified the title dispute, Enerplus was bound to obtain a stipulation to resolve it. If this case were really as simple to resolve as the Trust Defendants claim—if the stipulation was actually "needless"[5]—then it should have been resolved by the parties promptly.

[25] The fact that it instead took eighteen months to reach agreement is strong evidence that Enerplus was right to identify a dispute of title here. Moreover, the dispute was only resolved because VCMT agreed to forego its claim to the NPRI; absent that stipulation, the parties might still be in litigation.

[26] It is telling that these brief statements are the only arguments offered by the Trust Defendants in response to the compelling factual record of a title dispute. It is equally

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[4] The Trust Defendants also assert that "a[s] soon as the attorneys for VCMT were made aware of the *Acoma* case in Trust Defendants' Answer," they signed the stipulation. Opp. ¶ 25. This assertion belies the record. In reality, VCMT specifically denied the allegations in their answer to the Trust Defendants' counter-claim that invoked *Acoma*. *See* Index # 18 (Answer to Counterclaim) ¶¶ 4–7.

[5] The stipulation was not "needless" for the Trust Defendants since it resulted in VCMT disclaiming the entire NPRI—and the Trust Defendants earning an "extra" $158,570 as of May 2019 above their original NRI. App. 107 ¶ 11. By comparison, the interest owed by Enerplus on the suspended funds totaled $72,688 for the entire 18 months. App. 60 ¶ 5.

telling that the Trust Defendants do not cite a single case that supports liability in the face of a similarly obvious title dispute between interest holders, nor do they attempt to distinguish the authority that Enerplus cited. Br. ¶¶ 85–86.

[27] The reason is simple: N.D.C.C. § 47-16-39.1 plainly exempts operators from liability under the exact circumstances here. The statute requires only that a dispute of title "exist[]", and the undisputed facts show that a dispute of title existed here. N.D.C.C. § 47-16-39.1. The District Court failed to provide Enerplus with the safe harbor it was entitled to in those circumstances, and as a result, it erroneously granted summary judgment to the Trust Defendants. Enerplus respectfully requests that decision be reversed, and summary judgment be awarded to Enerplus instead.

CONCLUSION

[28] For the foregoing reasons, Enerplus respectfully requests orders and judgments against it as to liability be vacated, and summary judgment be awarded in favor of Enerplus as to the Trust Defendants' cross-claim.

CERTIFICATE OF COMPLIANCE

This brief complies with the page limitations of N.D. R. App. P. 32(a)(8)(A) because it contains 12 pages.

Dated: July 2, 2021

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DECLARATION OF SERVICE

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

Annette Kirschenheiter declares under penalty of perjury that on the 2nd day of July, 2021, she served a true and correct copy of the following:

1. Appellant Enerplus Resources (USA) Corp.'s Reply Brief

along with this service document, via electronic mail submission through the Supreme Court filing portal to the following:

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/s/ Annette Kirschenheiter
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