OIL AND GAS LITIGATION UPDATE FOR THE NORTH DAKOTA STATE COURTS

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ABSTRACT

In 2014, North Dakota encountered a wide variety of oil and gas industry legal issues involving dealings between landowners and oil and gas lessees and operators, the interpretation of oil and gas leases, surface use rights, North Dakota's abandoned mineral statutes, the status of claims for unpaid royalties in bankruptcy, and alleged frivolous lawsuits. In many instances, the facts of the particular case drove the outcome and rulings of the court. However, these recent court decisions have further developed the status of oil and gas law in the state.

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INTRODUCTION

The following decisions of the North Dakota Supreme Court, as well as one example of the rulings issued by the federal district courts of North Dakota, are indicative of the continuing growth of oil and gas litigation in this state.

I. NORTH DAKOTA SUPREME COURT REVERSES SUMMARY JUDGMENT RULING IN FAVOR OF OIL AND GAS LESSEE IN SUIT BY MINERAL OWNERS FOR FRAUD IN THE INDUCEMENT IN THE EXECUTION OF OIL AND GAS LEASES

In *Golden Eye Resources, LLC v. Ganske*,[1] the mineral owners had engaged in extensive negotiations with Golden Eye, which led to their execution of oil and gas leases in favor of Golden Eye in December 2009. On May 28, 2010, the mineral owners sent Golden Eye a notice of rescission seeking to rescind the leases for fraud in the inducement on the grounds that a series of representations Golden Eye allegedly made to the mineral owners prior to their granting of the leases were false.[2] The mineral owners offered to return all payments to Golden Eye as part of the proposed rescission.[3]

"Golden Eye sued [the mineral owners] to quiet title to the lease interests and sought damages for breach of contract and intentional interference with contract."[4] The mineral owners answered and counterclaimed, seeking rescission or cancellation of the leases.[5] On multiple motions and cross-motions for summary judgment, the district court rejected and dismissed all claims, except the court quieted title to the leases in Golden Eye.[6] The court found that certain representations contradicted the terms of the leases and were therefore barred by the parole evidence rule.[7] It further found that "the remaining misrepresentations constituted mere 'sales talk,' 'puffery,' or 'opinion' and were not material

1. 2014 ND 179, 853 N.W.2d 544.
2. *Id.* ¶ 4, 853 N.W.2d at 548.
3. *Id.*
4. *Id.* ¶ 6.
5. *Id.*
6. *Id.*
7. *Id.* ¶ 15, 853 N.W.2d at 550.

to the [mineral owners'] fraudulent inducement claims."[8] Both the mineral owners and Golden Eye appealed.[9]

The North Dakota Supreme Court found that the dispositive issue in the appeal was "whether the district court erred in granting summary judgment dismissing the [mineral owners'] claims they were fraudulently induced into signing the leases by Golden Eye's alleged misrepresentations."[10] The court found that actual fraud is always a question of fact, and that "because 'intent to defraud and deceive is ordinarily not susceptible of direct proof, fraud . . . may be inferred from the circumstances at the time of the transaction.'"[11]

The mineral owners alleged that Golden Eye made a series of factual misrepresentations to induce the mineral owners into leasing to Golden Eye instead of another company. The district court's order listed many of the alleged representations, including the following:

> 1. That Golden Eye itself would drill the wells and develop the [mineral owners'] minerals. . . .
> 4. That Golden Eye would drill the [mineral owners'] minerals as soon as they obtained a drilling rig and would drill the [mineral owners'] minerals first. . . .
> 6. That Golden Eye had acquired 7,000 net mineral acres in the Tyrone Township, where the Defendants' property is located, and was developing that township. . . .
> 10. That Golden Eye had operating/drilling control over the sections where the Defendants' minerals were located. . . .[12]

The North Dakota Supreme Court began its analysis by recognizing that, while the parol evidence rule "generally cannot be used to vary or contradict the terms of a complete, written contract adopted as a definite expression of the parties' agreement,"[13] parol evidence may be used by the parties and considered by the court "when the written agreement does not reflect the parties' intent because of fraud, mistake, or accident."[14] The court noted that this exception to the rule "applies even if the evidence contradicts or conflicts with the terms of the written agreement."[15] The

8. *Id*.
9. *Id*. ¶ 1, 853 N.W.2d at 547.
10. *Id*. ¶ 9, 853 N.W.2d at 549.
11. *Id*. ¶ 11 (quoting Am. Bank. Ctr. v. Weist, 2010 ND 251, ¶ 12, 793 N.W.2d 172, 178).
12. *Id*. ¶ 13, 853 N.W.2d at 550.
13. *Id*. ¶ 17, 853 N.W.2d at 551.
14. *Id.*
15. *Id*. ¶ 18.

court found that the mineral owners were not seeking to enforce the alleged misrepresentations and oral promises, but were instead asking the court "to entirely rescind the leases because of the fraudulent inducement."[16] Consequently, the parol evidence rule simply had no application to bar the presentation of parol evidence in support of the mineral owners' claims.[17]

With regard to the trial court's finding that the remaining statements relied upon by the mineral owners were mere sales talk, puffery or opinion, the appellate court found "[t]he alleged misrepresentations in this case go well beyond mere puffery, sales talk, or opinion, and specifically averred past or present facts which Golden Eye allegedly knew to be untrue."[18] The court distinguished predictions of future events that generally do not constitute fraud.[19] The court found that the trial court erred in disregarding the alleged misrepresentations as being either impermissible parol evidence or as being puffery or the like that was immaterial to the mineral owners' claims for fraudulent inducement.[20] It reversed the summary judgment rulings of the trial court and remanded the case for further proceedings consistent with the opinion.[21]

II. NORTH DAKOTA SUPREME COURT INTERPRETS THE INTERPLAY BETWEEN THE DRILLING OPERATIONS CLAUSE AND THE PUGH CLAUSE OF AN OIL AND GAS LEASE

In *Tank v. Citation Oil & Gas Corp.,*[22] the court was presented with Citation's appeal of a district court summary judgment ruling in favor of Tank quieting title to an oil and gas lease that described the leased premises as being the northwest quarter and south half of section 10, township 151 north, range 96 west, McKenzie County, North Dakota.[23] The oil and gas lease at issue in the case was signed in 1982, and the history of oil and gas activity described by the court commenced in May 1983.[24] The court found that two specific clauses contained in the oil and gas lease had the greatest relevance to the issues in dispute between Citation and Tank. The "drilling operations clause" provided:

16. *Id.* ¶ 21, 823 N.W.2d at 552.
17. *Id.*
18. *Id.* ¶ 24, 853 N.W.2d at 553.
19. *Id.* ¶ 25.
20. *Id.* ¶ 26.
21. *Id.*
22. 2014 ND 123, 848 N.W.2d 691.
23. *Id.* ¶ 2, 848 N.W.2d at 694.
24. *Id.*

> Notwithstanding anything in this lease contained to the contrary, it is expressly agreed that if Lessee shall commence operations for drilling at any time while this lease is in force, this lease shall remain in force and its terms shall continue so long as operations are continuously prosecuted and, if production results therefrom, then as long as production continues. As used in this lease continuously prosecuted shall mean that not more than thirty days shall elapse without operations on any well or that not more than ninety days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of a subsequent well.[25]

The court found this clause provided that the lease would remain in force and effect as long as drilling operations were continuously prosecuted and, if production resulted therefrom, then as long as production continued.[26]

However, the oil and gas lease also contained a "Pugh clause," which the district court found "severed the lease allowing it to become divisible and allowing the lease on the southwest quarter to expire."[27] The Pugh clause provided as follows:

> Nothwithstanding any provision in this lease to the contrary, if, at the end of the one year period from the end of the primary term hereof, this lease is maintained in full force and effect by virtue of production of oil and/or gas, this lease shall nevertheless expire as to all that part of said lands not included in a producing unit unless operations for the drilling of a well have been conducted during such one-year period. Lessee may continue to hold this lease in full force and effect as to all of said lands for subsequent and successive periods of one year by conducing [sic] additional drilling operations on undeveloped portions of said lands during each preceding one-year period. Should Lessee fail to conduct drilling operations during any such one-year period, then this lease shall expire as to said lands not included in producing units at the end of the one-year period during which no drilling operations were conducted. The term "producing unit" as used herein shall mean the following number of acres:

25. *Id.* ¶ 12, 848 N.W.2d at 696.
26. *Id.*
27. *Id.* ¶ 14, 848 N.W.2d at 697.

> A. The number of acres in the drilling and spacing unit allocated to each producing well as determined by the appropriate governing body of the State of North Dakota.
> B. In the absence of rules and regulations promulgated by the appropriate state governing body, the number of acres in a producing unit for each producing well shall be approximately one hundred and sixty as to oil or six hundred forty as to gas.[28]

The district court ruled that the lease terminated as to the southwest quarter by operation of the Pugh clause of the lease. Specifically, it found (a) that the Pugh clause applied each successive one-year period after the expiration of the primary terms of the lease, (b) that the only well in the southwest quarter ceased producing on October 1, 2008, (c) that the drilling of the new well in a new spacing unit that included the southwest quarter commenced no earlier than October 30, 2009, and (d) none of the savings clauses of the oil and gas lease extended the lease through October 30, 2009, and none of those clauses prevented the expiration of the lease as to the southwest quarter.[29]

Citation contended that the court misinterpreted the terms of the lease, that the Pugh clause did not apply, and that the lease was held in force as to all of the lands described in the lease by operation of the drilling operations clause.[30] Specifically, Citation argued (a) that the above-quoted Pugh clause expressly provides that it is only operative at the end of the one-year period following the end of the primary term of the lease, (b) that the conditions required in order for the Pugh clause to effect the expiration of the lease as to the southwest quarter were not met because, at the end of that one-year period after the primary term, the southwest quarter was included in a producing unit, and (c) that the first sentence of the Pugh clause makes that clause operative only one time—i.e., on July 15, 1990, one year after the end of the primary term, when the southwest quarter was held by production.[31]

On appeal, the North Dakota Supreme Court agreed that the *first sentence* of the Pugh clause focuses on the first year after the expiration of the primary term. However, it found that Citation "fail[ed] to consider the rest of the paragraph."[32] The court concluded that when the Pugh clause is

28. *Id.* ¶ 15.
29. *Id.* ¶ 7, 848 N.W.2d at 695.
30. *Id.* ¶ 11, 848 N.W.2d at 696.
31. *Id.* ¶ 16, 848 N.W.2d at 697-98.
32. *Id.* ¶ 17, 848 N.W.2d at 698.

read as a whole,[33] it provides that the lease would expire at the end of each successive one-year period after the primary term as to lands not included in a producing unit, unless additional drilling operations attributable to the non-producing lands were conducted during that one-year period.[34] As a result, the lease expired as to the southwest quarter by operation of the Pugh clause.

The court addressed one particularly interesting contract interpretation issue while reaching its opinion. Both the Pugh clause and the drilling operations clause stated that they applied *notwithstanding any contrary provision in the lease.* However, the court found the two provisions to be in conflict.[35] This presented the dilemma of how a court should give effect to language in a contract that states that each of two clauses that conflict with each other are to be given superseding and controlling effect over all other provisions of the contract. Which provision truly controls over the other?

The North Dakota Supreme Court cited the contract and oil and gas lease interpretation principles that generally provide that (a) contracts are, to the extent possible, interpreted in a way that gives effect to every provision of the contract if reasonably practicable, and (b) oil and gas leases are "often construed most favorably to the lessor because the lessee usually drafts the lease and has more experience drafting the lease to give himself an advantage."[36] Finding that Pugh clauses are generally included to protect the lessor, the court observed that if it interpreted the two provisions the way Citation advocated, "the drilling operations clause would supersede the Pugh clause and the Pugh clause would become meaningless."[37] Because of those considerations, and in order to give effect to both provisions of the lease, the court concluded that the Pugh clause modified the drilling operations clause.[38]

Finally, the court distinguished its prior ruling in *Egeland v. Continental Resources, Inc.*[39] in which the court ruled in favor of the lessee in a similar dispute over the interplay between the Pugh clause and the drilling operations clause of a lease. The court in *Tank* observed that "[b]ecause Pugh clauses vary widely in form, the interpretation of how a

33. *Id.*
34. *Id.* ¶ 18.
35. *Id.* ¶ 27, 848 N.W.2d at 700.
36. *Id.* ¶ 28 (citing West v. Alpar Res., Inc., 298 N.W.2d 484, 490-91 (N.D. 1980)).
37. *Id.*
38. *Id.*
39. 2000 ND 169, ¶ 31, 616 N.W.2d 861, 870-71.

Pugh clause may affect other provisions in a lease may also vary."[40] Because the language of the lease provisions in *Egeland* varied from the provisions at issue in *Tank*, the court found the analysis in *Egeland* inapplicable.[41] Accordingly, the court affirmed the ruling of the district court granting summary judgment in favor of the mineral owner.

III. NORTH DAKOTA SUPREME COURT DETERMINES WHETHER OTHER OWNERS AND SUCCESSOR OPERATOR ARE LIABLE TO THE ROYALTY OWNERS IN A UNIT FOR ROYALTIES OWED PRIOR TO THE BANKRUPTCY OF THE FORMER OPERATOR

In *Van Sickle v. Hallmark Associates, Inc.*,[42] the plaintiffs (the "Van Sickles") owned royalty interests in the Missouri Breaks Unit No. 1 well.[43] Comanche Oil was the original lessee and operator of the four underlying oil and gas leases.[44] However, it later assigned the leases to Alpha Gas Corp., who became the successor operator.[45] Alpha later conveyed an approximate fifty percent of the working interest rights in the leases to other parties (the "Interest Holders").[46]

In 2002, Alpha filed for reorganization under Chapter 11 of the United States Bankruptcy Code.[47] In 2005, the Bankruptcy Court confirmed and approved a plan of reorganization, which provided for the formation of an entity named Missouri Breaks, LLC and the transfer of Alpha's approximate fifty percent working interest in the subject well to that entity.[48] The plan required that Missouri Breaks pay Alpha's creditors in accordance with the terms of the plan using the revenue from its working interest rights.[49] The plan required that, in order to receive payment, the creditors had to file a claim in the bankruptcy proceedings.[50]

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40. *Tank*, ¶ 32, 848 N.W.2d at 701.
41. *Id.*
42. 2013 ND 218, 840 N.W.2d 92. It should be noted that the opinion in this case was issued on November 25, 2013. However, proceedings on a request for rehearing continued into 2014, so that this case is considered appropriate for inclusion in this paper that focuses on 2014 litigation.
43. *Id.* ¶ 3, 840 N.W.2d at 96.
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* (citing 11 U.S.C. §§ 1101-74 (2012)).
48. *Id.* ¶ 4.
49. *Id.*
50. *Id.*

The Van Sickles "did not file a claim with the bankruptcy court, and neither the plan nor the bankruptcy court's final order included their claim."[51] However, it was also undisputed that the Van Sickles "were not listed as creditors in Alpha's bankruptcy case . . . [and] had no notice of Alpha's bankruptcy proceedings . . . ."[52] The evidence in the case showed that Missouri Breaks had made certain royalty payments to the Van Sickles after confirmation of the plan of reorganization.

In 2006, the Van Sickles sued the Interest Holders and Missouri Breaks—who collectively owned the full working interest in the oil and gas leases—for unpaid royalties. The Van Sickles asserted claims of conversion, intentional tortious interference, and breach of contract.[53] They also sued for royalties on oil and gas produced prior to the confirmation of the plan of reorganization.[54] Extensive district court and appellate proceedings followed, as detailed in the opinion of the court. Those proceedings ultimately led to the appeal in which the North Dakota Supreme Court addressed a series of issues.

First, on the issue of whether Missouri Breaks was liable for Alpha's debts under the state-law doctrine of successor liability, the court noted that "[t]he long-established general rule is that a corporation which purchases the assets of another corporation does not succeed to the liabilities of the selling corporation."[55] However, the court noted several exceptions to this general rule, including situations in which "there is an express or an implied agreement to assume the transferor's liability."[56] In the present case, the court found that, under section 5.2 of the plan of reorganization, "Missouri Breaks 'expressly assumed' the four leases under which the well operates."[57] Under 11 United States Code section 365(b), Missouri Breaks' assumption of the leases carried with it "the requirement to cure any defaults in the unexpired leases."[58] The court concluded that Alpha's prior failure to pay royalties was a default under the oil and gas leases that

51. *Id.* (citing Van Sickle v. Hallmark & Assocs., Inc., 2008 ND 12, ¶ 14, 744 N.W.2d 532, 537).

52. *Id.*

53. *Id.* ¶ 5.

54. *Id.*

55. *Id.* ¶ 20, 840 N.W.2d at 99 (quoting Benson v. SRT Commc'ns, Inc., 2012 ND 58, ¶ 20, 813 N.W.2d 552, 559).

56. *Id.* at 100 (quoting Downtowner, Inc. v. Acrometal Products, Inc., 347 N.W.2d 118, 121 (N.D. 1984)).

57. *Id.* ¶ 23, 840 N.W.2d at 100-01.

58. *Id.* ¶ 24, 840 N.W.2d at 101.

needed to be cured upon Missouri Breaks' assumption of the leases and succession to Alpha's ownership.[59]

Second, the court rejected the defendants' assertion that Missouri Breaks received Alpha's oil and gas leases "free and clear" from Alpha's debts prior to the confirmation of the plan of reorganization "because the Van Sickles did not receive notice of the bankruptcy proceedings and the confirmation order and reorganization plan are simply not binding on the Van Sickles."[60]

Third, the court found that under the Bankruptcy Code, a debtor cannot simply retain the favorable aspects of a contract and avoid the burdensome provisions of the contract.[61] Rather, the debtor must either assume or reject the entire contract, both benefits and burdens.[62] The court observed that "[t]his is consistent with our state law regarding implied contracts and assignments."[63] The court concluded that, under the facts presented, Missouri Breaks "implicitly agreed to assume its statutory liability to the Van Sickles for the unpaid pre-confirmation royalties, which were not discharged in the bankruptcy proceedings."[64]

IV. CLAIMANTS TO UNRECORDED SEVERED MINERAL INTEREST CHALLENGE THE VALIDITY OF, AND THE SURFACE OWNERS' COMPLIANCE WITH, NORTH DAKOTA'S ABANDONED MINERAL STATUTES

In *Capps v. Weflen,*[65] the North Dakota Supreme Court addressed an appeal of a proceeding involving the application of the state's abandoned mineral statutes[66] to a mineral interest conveyed by a 1979 mineral deed that was not recorded until 2009. The defendants (the Weflens), owners of property in which the plaintiffs continued to claim ownership of the long-unrecorded mineral interest, followed through with the various steps and procedures required by the abandoned mineral statutes in order to acquire ownership of the alleged abandoned mineral interest.[67] The attempt to claim ownership began with the publication, on December 28, 2005, of

59. *Id.* ¶ 29, 840 N.W.2d at 102.
60. *Id.* ¶ 31, 840 N.W.2d at 103.
61. *Id.* ¶ 32.
62. *Id.*
63. *Id.*
64. *Id.* ¶ 37, 840 N.W.2d at 105.
65. 2014 ND 201, 855 N.W.2d 637.
66. *See* N.D. CENT. CODE § 38-18.1-06 (2013).
67. *Capps*, ¶ 3, 855 N.W.2d at 640.

the first in a series of notices of the lapse of the mineral interest and culminated in the recordation of a termination of mineral interest, affidavit of publication, affidavit of mailing, and notice of lapse of mineral interest in the real estate records on March 6, 2006.[68]

While on a trip to the area in 2008, the spouse of one of the plaintiffs (the Capps) "noticed oil wells in the area of the Weflens' property."[69] Concerned with that oil and gas development, the Capps filed a statement of claim in 2008.[70] In 2009, the Capps recorded the 1979 mineral deed and sued the Weflens to quiet title to the mineral interest.[71] The district court found that the Weflens had no claim to the mineral interest of the Capps because the Weflens had failed to comply with the notice requirements specified in the abandoned mineral statutes.[72] The Weflens appealed that ruling.

The North Dakota Supreme Court, beginning its review of the district court's order granting summary judgment against the Weflens on the ground that they failed to comply with the notice provisions of the abandoned mineral statutes, noted that "[t]here is no dispute that the subject mineral interests were unused for more than 20 years within the meaning of [North Dakota Century Code section] 38-18.1-03, and that no statement of claim was filed within 60 days after first publication of the notice of lapse."[73] However, the lower court found that the Weflens failed to comply with the statutes:

> The district court listed three reasons why the Weflens failed to comply with the statutory provisions: 1) the Weflens "had knowledge that Ruth Nelson was dead at the time they mailed" the notice of lapse to her addresses of record, and "[m]ailing notice to a dead person at their address of record is absurd;" 2) "[m]ailing notice certified, restricted delivery is not required and mailing notice to a dead person by certified, restrictive delivery guarantees notice will not be received by the mineral owner;" and 3) because "property devolves to the deceased's heirs upon death" under the provisions of the North Dakota Uniform Probate Code, [North Dakota Century Code title 30.1], the record owner was no longer the actual owner, and therefore the actual owner's address "did not

68. *Id.*
69. *Id.* ¶ 4.
70. *Id.*
71. *Id.* at 640-41.
72. *Id.* at 641.
73. *Id.* ¶ 8, 855 N.W.2d at 642.

appear of record" which necessitated a "reasonable inquiry" for the address of the actual mineral interest owner.[74]

The court reviewed each of the reasons described above and concluded that the district court's rationale conflicted with North Dakota Century Code chapter 38-18.1 and the North Dakota Supreme Court's interpretations of those statutes.

First, the court found that it was immaterial whether the Weflens had actual knowledge of the death of the predecessor in interest to Capps, who was still the record owner of the mineral interest and the person to whom the statutory notices had been mailed by the Weflens. The court cited prior precedent[75] rejecting the reasoning behind this first basis for the decision below, and the court noted that the plaintiff successors to the mineral interest would have received notice if they had recorded notice of their current addresses and succession in the real estate records.[76] Second, with respect to the Capps' contention that Weflens' use of certified mail with restricted delivery violated the procedures required under North Dakota Century Code section 38-18.1-06(2), the court found that the abandoned mineral statutes do not specify the *type of mailing* required and do not forbid the use of any particular type of mailing.[77] The Weflens were free to use certified mail in sending the notice of lapse.[78]

Third, the court concluded that the district court erred in finding that the Weflens were obligated to search for heirs of a deceased mineral interest owner whose address appeared of record in order to fulfill the requirements of North Dakota Century Code section 38-18.1-06(2).[79] Rather, a surface owner invoking the abandoned mineral statutes is only required to conduct a reasonable inquiry if the mineral owner's address does not appear in the real estate records.[80] This is true even where the surface owner has actual knowledge that the mineral owner whose address appears of record is deceased.[81]

The Capps argued, in the alternative, that even if the Weflens were determined to have complied with the statutory provisions, the notice provisions of the abandoned minerals statutes violate due process and are

74. *Id.* ¶ 9, 855 N.W.2d at 642 (brackets appearing in original text).
75. *Id.* ¶ 10.
76. *Id.* at 643.
77. *Id.* ¶ 11, 855 N.W.2d at 643.
78. *Id.*
79. *Id.* ¶ 12.
80. *Id.* ¶ 13, 855 N.W.2d at 644.
81. *Id.*

unconstitutional as applied in this case.[82] In support of this contention, the Capps cited the landmark decision in *Mullane v. Central Hanover Bank & Trust Co.,*[83] in which the United States Supreme Court held:

> An elementary and fundamental requirement of due process in any proceeding which is to be according finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.[84]

The district court rejected this contention. While agreeing with the district court in this respect, the North Dakota Supreme Court, among other comments, noted the following findings of the United States Supreme Court in a decision upholding the constitutionality of Indiana's Mineral Lapse Act, which is similar to the North Dakota statutes:

> The reasoning in *Mullane* is applicable to a judicial proceeding brought to determine whether a lapse of a mineral estate did or did not occur, but not to the self-executing feature of the Mineral Lapse Act. The due process standards of *Mullane* apply to an "adjudication" that is "to be accorded finality."[85]

The court reversed the district court's judgment and remanded the case for entry of judgment quieting title to the mineral interest in favor of the Weflens.[86]

V. NORTH DAKOTA SUPREME COURT FINDS THAT ANY DEFECT IN MAILING OF REQUIRED NOTICE OF LAPSE OF MINERAL INTEREST UNDER NORTH DAKOTA'S ABANDONED MINERALS PROCEDURE WILL NOT DEPRIVE THE COURT OF PERSONAL JURISDICTION OVER DEFENDANT IN A SUBSEQUENT QUIET TITLE ACTION

In *Peterson v. Estate of Jasmanka,*[87] the personal representative of the Estate of Lester Jasmanka, deceased (the "defendant"), appealed the trial court's order denying her motion to vacate a 1990 default judgment

82. *Id.* ¶ 14.
83. 339 U.S. 306 (1950).
84. *Capps,* ¶ 16, 855 N.W.2d at 644-45 (quoting *Mullane*, 339 U.S. at 314).
85. *Id*. ¶ 19, 855 N.W.2d at 646 (quoting Texaco, Inc. v. Short, 454 U.S. 516, 535-36 (1982)).
86. *Id*. ¶ 24, 855 N.W.2d at 647.
87. 2014 ND 40, 842 N.W.2d 920.

quieting title to certain mineral interests in the Petersons.[88] The underlying factual background included a 1952 deed under which Jasmanka conveyed certain property but reserved a fifty-percent mineral interest.[89] This deed listed Jasmanka's address as "5506 Modoc Avenue in Richmond, California."[90] In 1959, Jasmanka executed two oil and gas leases that each listed his address as being "5505 Modoc Avenue"[91] in Richmond, California.[92] Both the deed and the leases were recorded.[93] The Petersons owned the surface of the lands underlain by the defendant's reserved mineral interest.[94] Jasmanka died in California in 1963.[95]

Thereafter, in 1990, when there had been no use of the minerals for more than thirty years, the Petersons "published a notice of lapse of mineral interest in the official county newspaper. The Petersons also mailed a notice of lapse of mineral interest to [the defendant] at 5505 Modoc Avenue."[96] The present quiet title suit followed, and the Petersons continued to use the 5505 Modoc Avenue address for further service on, and notice to, the defendant. When the defendant filed no response or appearance in the quiet title suit, the district court entered a default judgment quieting title in the mineral rights in the Petersons.[97]

"In 2012, 49 years after Jasmanka's death and 22 years after entry of the default judgment quieting title to the minerals in the Petersons,"[98] the defendant moved to vacate the 1990 default judgment quieting title in the Petersons. The defendant asserted that the 1990 judgment was void because the Petersons mailed notice of the lapse of the mineral interest to the wrong address and thus failed the requirements of North Dakota's abandoned minerals statute, codified at North Dakota Century Code chapter 38-18.1.[99] The defendant further argued that "the Petersons had fraudulently misrepresented to the court that the 5505 Modoc Avenue address was the only address of record for Jasmanka,"[100] thereby providing grounds for vacating the default judgment under North Dakota Rule of Civil

88. *Id.* ¶ 1, 842 N.W.2d at 922.
89. *Id.* ¶ 2.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* ¶ 3.
95. *Id.* ¶ 4, 842 N.W.2d at 923.
96. *Id.* ¶ 3, 842 N.W.2d at 922-23.
97. *Id.* at 923.
98. *Id.* ¶ 5, 842 N.W.2d at 923.
99. *Id.*
100. *Id.*

Procedure 60(b)(3). The district court rejected these arguments and denied the motion to vacate the default judgment.[101] The defendant appealed.

After reviewing the detailed procedural statutes relied upon by the defendant in her appeal, the North Dakota Supreme Court described the defendant's argument:

> [Defendant's] primary contention on appeal is that the district court lacked personal jurisdiction to enter the 1990 quiet title judgment because the Petersons failed to properly serve the notice of lapse of mineral interest upon Jasmanka, the record owner of the mineral interest. [The defendant] in effect contends strict compliance with the notice requirements of the statutory abandoned minerals procedure under [North Dakota Century Code section] 38-18.1-06(2) was a jurisdictional prerequisite to a subsequent quiet title action in district court regarding the disputed minerals.[102]

However, the court noted that its prior decisions have recognized "a clear distinction between the statutory abandoned minerals procedure under [North Dakota Century Code chapter] 38-18.1 and a subsequent quiet title action, and have emphasized they are entirely separate, distinct procedures."[103] The issue of "[p]ersonal jurisdiction in a quiet title action is determined solely by compliance with the service of process procedures under [North Dakota Rule of Civil Procedure 4]."[104] Thus, the court rejected the defendant's attempt to impose the notice requirements under the abandoned minerals procedure as a jurisdictional prerequisite in a subsequent quiet title lawsuit.[105]

The court concluded that any defect that might have occurred "in the mailing of the notice of lapse of mineral interest did not deprive the district court of personal jurisdiction" in the quiet title lawsuit.[106] Consequently, because the judgment was not void, the defendant was not entitled to relief under North Dakota Rule of Civil Procedure 60(b)(4).[107]

VI. NORTH DAKOTA SUPREME COURT AFFIRMS DECISION BY THE DISTRICT COURT FINDING THAT WELL OPERATOR'S

101. *Id.*
102. *Id.* ¶ 11, 842 N.W.2d at 924.
103. *Id.* ¶ 13, 842 N.W.2d at 925.
104. *Id.* ¶ 14, 842 N.W.2d at 925.
105. *Id.*
106. *Id.* ¶ 18, 842 N.W.2d at 926.
107. *Id.*

LAWSUIT AND CLAIMS AGAINST LANDOWNERS WERE WITHOUT REASONABLE CAUSE AND NOT IN GOOD FAITH

The case of *Sagebrush Resources, LLC v. Peterson*[108] involved the appeal of a summary judgment ruling dismissing with prejudice the lawsuit Sagebrush Resources filed against the defendant landowners and further determining that the action was frivolous and not made in good faith and awarding the landowners attorney fees.[109] Sagebrush's lawsuit against the landowners asserted, in part, that Sagebrush was the operator of several wells and related equipment, the landowners wrongfully entered Sagebrush's property without permission, and the landowners wrongfully interfered with Sagebrush's oil and gas exploration and production activities.[110] Sagebrush stated that its awareness of the alleged trespass was based upon certain encounters with one or more of the landowners, as well as its review of complaints and supporting materials the landowners had submitted to the North Dakota Industrial Commission, which included photos of the various well sites.[111]

Sagebrush alleged that it was damaged by the landowners' actions because the landowners filed a series of complaints against Sagebrush with the Industrial Commission alleging violations of the statutes and regulations that govern oil and gas operations.[112] The landowners' complaints resulted in investigations by the Commission that required expenditures by Sagebrush and caused the Commission to "withhold its approval of a planned sale of Sagebrush's interests in the affected units, thereby delaying said sale."[113] The landowners made various assertions in response to Sagebrush's claims and further alleged that Sagebrush's lawsuit was "frivolous and brought in bad faith for purposes of harassment and intimidation."[114] The landowners sought attorney fees and costs under North Dakota Century Code sections 28-26-01 and 28-26-31.[115]

The district court entered summary judgment in favor of the landowners on the claims of Sagebrush and additionally found that "Sagebrush's lawsuit was frivolous and was not brought in good faith."[116]

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108. 2014 ND 3, 841 N.W.2d 705.
109. *Id.* ¶ 1, 841 N.W.2d at 707.
110. *Id.* ¶ 2.
111. *Id.*
112. *Id.* ¶ 4, 841 N.W.2d at 708.
113. *Id.*
114. *Id.* ¶ 3.
115. *Id.*
116. *Id.* ¶ 10, 841 N.W.2d at 710.

The court awarded the landowners $23,729 in attorney fees.[117] Sagebrush did not appeal the summary judgment ruling dismissing its claims against the landowners. However, Sagebrush appealed the district court's award of attorney fees and the finding that its claims were frivolous and not made in good faith.[118]

The North Dakota Supreme Court affirmed the district court's decision and made the following rulings: Sagebrush did not establish a valid trespass claim. Under North Dakota law, an oil and gas lessee holds an *easement* in the surface estate for purposes of developing the minerals.[119] An easement is a *non-possessory* interest in land.[120] The essence of a trespass to real property is interference with possession of land.[121] With regard to a possible claim for trespass to chattels, the court found that the landowners' alleged complaints to the Industrial Commission did not constitute harm sufficient to support such a claim.[122] Second, with regard to Sagebrush's claim for injunctive relief enjoining the landowners from interfering with its operation of the lease, the evidence showed that Sagebrush had already sold and assigned its interest in the subject lease to another company as of the time it filed the present lawsuit.[123]

Last, under the deferential standard of review that applied in this appeal, the North Dakota Supreme Court concluded that the "district court did not misapply the law or act arbitrarily, unreasonably, or unconscionably in deciding that"[124] Sagebrush had asserted claims "without reasonable cause, not in good faith, and found to be untrue."[125] Chief Justice VandeWalle, specially concurring in the affirmance of the district court, stated his belief that "the oil and gas lessee does have the right and perhaps the responsibility to keep people, including the surface owner, off of dangerous property the lessee is using to product the oil and gas . . . ."[126] However, Chief Justice VandeWalle found the evidence supported the conclusion that, "for retaliatory reasons, Sagebrush attempted to restrict the defendants beyond what was necessary to accomplish safety purposes."[127]

117. *Id.* ¶ 12, 841 N.W.2d at 711.
118. *Id.* ¶ 13.
119. *Id.* ¶ 20, 841 N.W.2d at 713 (emphasis added).
120. *Id.*
121. *Id.*
122. *Id.* ¶ 19.
123. *Id.* ¶ 25, 841 N.W.2d at 714.
124. *Id.* ¶ 26, 841 N.W.2d at 715.
125. *Id.*
126. *Id.* ¶ 34, 841 N.W.2d at 715-16 (VandeWalle, C.J., specially concurring).
127. *Id.* at 716.

VII. FEDERAL DISTRICT COURT PRESENTED WITH DISPUTE BETWEEN SURFACE OWNERS AND OPERATOR OVER THE OPERATOR'S ASSERTED RIGHT TO DRILL A SALT WATER DISPOSAL WELL ON LANDS WITHIN A PRODUCTION UNIT

Finally, this discussion of state court decisions will conclude with one federal court opinion that dealt with a series of principles of North Dakota oil and gas laws. The case of *Fisher v. Continental Resources, Inc.*[128] involved a tract of land in which the surface rights were owned by the Fishers and on which Continental proposed to construct and operate a salt water disposal well (the "SWD well"). Beginning on October 26, 2011 and continuing through October 1, 2012, Continental personnel and contract landmen sent the Fishers a series of five letters advising of Continental's plans to drill on the Fishers' property; some of the letters referenced a proposed SWD well, while others referenced the drilling of an oil and gas well.[129] On May 20, 2013, Continental received a permit from the North Dakota Industrial Commission authorizing it to operate the SWD well for salt water disposal purposes.[130] Continental thereafter drilled the SWD well and laid a pipeline across the subject lands to transport saltwater from the well.[131]

In July of 2013, the Fishers sued Continental and asserted that Continental had no legal right to construct and operate a salt water disposal well and pipeline on their property and no right to dispose of salt water in the pore space beneath the surface of the subject tract.[132] The Fishers alleged claims of nuisance, trespass, fraudulent representation, and deceit. Continental contended that both North Dakota law and the applicable unit agreement for the Cedar Hills North Red River "B" Unit, which included the Fisher's property, authorized its activities even though it did not have a salt water disposal agreement in place with the Fishers.[133] Continental filed a counterclaim seeking a judicial declaration that its disputed activities were authorized.[134] Before the district court was Continental's motion for summary judgment.[135]

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128. No.1:13-cv-097, 2014 WL 4410206, at *1 (D.N.D. Sept. 8, 2014).
129. *Id.* at *2.
130. *Id.*
131. *Id*.
132. *Id*.
133. *Id*.
134. *Id*. at *3.
135. *Id*.

The court began its discussion of applicable law with the recognition that the mineral estate in North Dakota is dominant in relation to a severed surface estate because the mineral owner has an implied right to use so much of the surface estate as is reasonably necessary to explore, develop, and transport the minerals.[136] The court went on to observe that the North Dakota Supreme Court has adopted the "accommodation doctrine" to determine issues of reasonable use:

> The test for reasonableness under the "accommodation doctrine" requires a consideration of all the pertinent circumstances including what are the usual, customary, and reasonable practices in the industry, and the nature, condition, location, and current use of the servient estate . . . [W]hether the use of the surface estate by the mineral estate is reasonable is a question of fact.[137]

The court recognized that under the North Dakota statutes[138] the surface owners must be compensated for damages to the surface estate made in conjunction with oil and gas drilling operations.[139]

Seeking summary judgment in its favor, Continental asserted that the SWD well and related pipeline were reasonably necessary, and indeed required, for the development of the mineral estate within the unit, including the minerals underlying the Fisher property.[140] The company also contended that the language in the unit agreement establishing the rights and obligations of the unit operator contemplated salt water disposal operations.[141] However, the Fishers argued that salt water disposal activities were separate and distinct from oil and gas exploration and production and could not constitute a reasonable use of the surface.[142] The court noted that no prior North Dakota court decisions directly addressed the issue of whether a unit operator has the general and implied right to construct and operate a salt water disposal well as part of unit operations.[143]

The court observed that it was not clear from the record whether the minerals underlying this tract of land had been leased, although it recognized that the owner of the mineral rights in that tract would clearly be entitled to a share of unit production by virtue of the applicable unit

136. *Id.*
137. *Id.* at *4 (citing Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 136-37 (N.D. 1979)).
138. *Id.* at *11 (citing N.D. CENT. CODE § 38-11.1-04 (2013)).
139. *Id.* at *3.
140. *Id.* at *5.
141. *Id.*
142. *Id.*
143. *Id.* at *6.

agreement.[144] Without an oil and gas lease, the court noted that it would look to the North Dakota statutes authorizing unitization, the unit agreement, and the unit operating agreement.[145] After reviewing those sources of the operator's rights in conducting unit operations, the court held:

> Section 38-08-09.8 of the North Dakota Century Code, the unitization order, the Unit Agreement, and the Unit Operating Agreement are broad enough to be read as including an implied covenant to drill a salt water disposal well within the Unit in order to dispose of salt water produced by Unit operations. Thus, as long as Continental Resources acts in a reasonable manner and does not use the [SWD] well to dispose of salt water produced outside of the Unit, its actions are not considered unlawful.[146]

However, the court further explained that, under North Dakota law, the question of whether a particular activity and use of the land is reasonable depends upon the facts and circumstances of each case (e.g., whether reasonable alternatives are available).[147] The court concluded that genuine issues of material fact remained in dispute or were unknown and that Fisher's trespass and nuisance claims could not be decided at this stage of the proceedings through summary judgment procedure.[148]

With respect to their additional claims for fraudulent misrepresentation and deceit, the Fishers asserted that Continental's notice letters were unclear as to whether Continental intended to drill a new oil and gas well or, instead, a salt water disposal well.[149] Continental responded that the letters were not misleading and, even if the letters were misleading, the Fishers could not demonstrate the required element of *reliance* on the letters.[150] The court found that, by statute,[151] the Fishers were "entitled to 'sufficient disclosure of the plan of work and operations to enable the surface owner to evaluate the effect of drilling operations on the surface owner's use of the property.'"[152] The court also found that while the Fishers "may have a number of difficult hurdles at trial to demonstrate that

144. *Id*. at *7.
145. *Id.*
146. *Id.* at *9.
147. *Id.* at *9-10.
148. *Id*. at *10.
149. *Id*.
150. *Id*.
151. *Id.* (citing N.D. CENT. CODE § 38-11.1-04.1(2)(a) (2013)).
152. *Id.* (quoting N.D. CENT. CODE § 38-11.1-04.1(2)(a) (2013)).

Continental intended to deceive them,"[153] it could not dispose of the fraudulent misrepresentation and deceit claims and could not find that reliance could not be shown through a summary judgment ruling.[154]

Finally, Continental alleged the Fishers had not properly pled a claim for surface damages under North Dakota Century Code section 38.11.1-04; the Fishers responded that the request for monetary damages in their complaint encompassed a claim for statutory damages.[155] The court first found that the Fisher's complaint was sufficient to include the claim and that Continental would not be prejudiced by the complaint being so construed.[156] The court additionally observed that whether North Dakota Century Code section 38-11.1-04 encompasses the determination of damages for use of the pore space underlying the surface of the affected tract remains an undecided issue under North Dakota law.[157] The court declined to resolve that unsettled question at this point in the proceedings, and it denied Continental's motion for summary judgment.[158]

153. *Id.*
154. *Id*.
155. *Id*. at *11.
156. *Id.*
157. *Id*.
158. *Id.*