NORTH DAKOTA ENERGY LAW LITIGATION UPDATE

The North Dakota Litigation Update summarizes important decisions impacting the practice of energy law in North Dakota. The purpose of the Update is to indicate cases of first impression, cases of significantly altered earlier interpretations of North Dakota law, and other cases of interest. As a special project, Associate Editors assist in researching and writing the Update.[*] The following topics are included in the Update:

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MINERAL RIGHTS – TAX LIENS, ROYALTY INTERESTS AND APPLICABLE DEFENSES

Siana Oil & Gas Co., L.L.C. v. Dublin Co.

In *Siana Oil & Gas Co., L.L.C. v. Dublin Co.*,[1] Greggory Tank appealed from an amended judgment that quieted title to royalty interests in favor of several of the defendants ("the defendants") to property located in McKenzie County.[2] The North Dakota Supreme Court reversed the district court's amended judgment and directed the entry of judgment quieting title in favor of Tank.[3] On remand to the district court, the district court had to determine if Tank could recover royalty payments previously made to the defendants.[4]

In June 2014, Tank sued numerous defendants in an attempt to quiet title to royalty interests in proceeds from an oil and gas well.[5] Most of the defendants did not appear, some settled with Tank, and the remaining defendants (the appellees) contested the quiet title action initiated by Tank.[6] The royalty interests that Tank attempted to quiet title to were subject to several past conveyances.[7] However, based upon an unbroken chain of title, Tank claimed 16 percent ownership of royalty interests based on county records dating back to the federal fee patent, and a 1931 purchase of the property by McKenzie County when the land was subject to a tax foreclosure sale.[8] Not long after that initial purchase, the County subsequently sold and transferred the property in 1945.[9]

The defendants claimed 11 percent ownership to royalty interests from a recorded 1938 assignment to oil and gas produced on the property.[10] In their response, the defendants asserted that "Tank's claim was barred by the Marketable Record Title Act ("MRTA") under N.D.C.C. ch. 47-19.1, the statute of limitations provided in N.D.C.C. § 28-01-05, adverse possession and laches."[11] The defendants requested a judgment in their favor quieting title to their 11 percent interest.[12]

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1. 2018 ND 164, 915 N.W.2d 134.
2. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 1, 915 N.W.2d 134.
3. *Id.*
4. *Id.*
5. *Id.* at ¶ 2.
6. *Id.*
7. *Id.* at ¶ 3.
8. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 3, 915 N.W.2d 134.
9. *Id.*
10. *Id.* at ¶ 4.
11. *Id.*
12. *Id.*

Tank and the defendants both cross-motioned for summary judgment.[13] In response to Tank, the defendants did not produce anything that established their mineral interests before McKenzie County acquired the land in 1931 after the tax lien foreclosure.[14] Further, the defendants did not produce any proof of a transfer from McKenzie County to any individual after the 1931 tax lien foreclosure, or before McKenzie County's 1945 sale and transfer of the property to Tank's predecessors in interest.[15] Defendants contended that:

> Tank's claim to the royalty interest failed as a matter of law, and in the alternative, there are material questions of fact regarding the validity of McKenzie County's acquisition of the property through the tax lien foreclosure proceedings, asserting that Tank failed to prove that McKenzie County had properly served the owner of the property as required in the tax lien foreclosure proceedings.[16]

The district court granted summary judgment quieting title in favor of the defendants and also concluded that "all of the defenses [asserted by the defendants] are well-founded and apply."[17] Lastly, the order stated the defendants had proven their chain of title and that Tank failed to establish the defendants' title was void.[18]

The North Dakota Supreme Court explained the procedure of summary judgment. The court cited the standard in *Riedlinger v. Steam Bros., Inc.*,[19] quoting "Summary judgment is a procedural device used to promptly resolve a controversy on the merits without a trial if either party is entitled to judgment as a matter of law and the material facts are undisputed or if resolving the disputed facts would not alter the result."[20] When a lower court is deciding whether to award summary judgment they may look to the pleadings, depositions, admissions, affidavits, interrogatories, and inferences to be drawn from the evidence.[21]

Tank argued in favor of summary judgment as a matter of law because he could trace the chain of title from the federal fee patent to his acquisition of the property.[22] Defendants argued that their 11 percent royalty interest was

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13. *Id.* at ¶ 5.
14. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 5, 915 N.W.2d 134.
15. *Id.*
16. *Id.*
17. *Id.* at ¶ 6.
18. *Id.*
19. 2013 ND 14, 826 N.W.2d 340.
20. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 7, 915 N.W.2d 134 (citing *Riedlinger*, 2013 ND 14, ¶ 10, 826 N.W.2d 340 (quoting Burris Carpet Plus, Inc. v. Burris, 2010 ND 118, ¶ 10, 785 N.W.2d 164)).
21. *Id.* at ¶ 8 (citing *Riedlinger*, 2013 ND 14, ¶ 10, 826 N.W.2d 340).
22. *Id.* at ¶ 9.

severed from the property through the 1938 conveyance and that their interests could also be traced through the chain of title back to the 1938 conveyance, starting their interest seven years before Tank's interest.[23] Tank argued the defendant's interest could not be severed from the property through the 1938 conveyance because the tax lien foreclosure in 1931 terminated all interest other than McKenzie County's interest in the property.[24]

The North Dakota Supreme Court reasoned that the defendants' interest in the property failed for two reasons.[25] First, the defendants did not produce any records establishing that the grantors of the 1938 conveyance ever had an interest in the property at issue.[26] Second, the court used *Payne v. A.M. Fruh Co.*,[27] to illustrate that Tank's interest was superior to the defendants' interest.[28] Essentially, all prior interests were lost when the county received the property for unpaid taxes, and the county received the deed in 1941.[29] Thus, when Tank's predecessor received the title in 1945, there were no other interests attached to the land making the district court's decision about the defendants chain of title erroneous as a matter of law.[30] The tax deed granted title to property and royalties at issue in favor of Tank's predecessor.[31] Other than the claim that McKenzie County never confirmed proper service of the tax lien foreclosure, the defendants never overcame Tank's predecessor's title.[32] The defendants failed to establish that their grantors ever had an interest in the property to challenge the title.[33] After that was established, Tank did not have the burden to invalidate the defendants' title and the North Dakota Supreme Court concluded that Tank had title as a matter of law.[34]

After the court concluded that Tank had title to the property, the opinion discussed all applicable defenses claimed by the defendants. The defenses brought forward were, "that Tank's claim was barred by the MRTA under N.D.C.C. ch. 47-19.1, the statute of limitations provided in N.D.C.C. § 28-01-05, adverse possession and laches."[35] However, because the MRTA was deemed inapplicable, it will not be discussed.[36]

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23. *Id.*
24. *Id.*
25. *Id.* at ¶ 10.
26. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 10, 915 N.W.2d 134.
27. 98 N.W.2d 27 (N.D. 1959).
28. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 12, 915 N.W.2d 134.
29. *Id.*
30. *Id.*
31. *Id.* at ¶ 14.
32. *Id.*
33. *Id.*
34. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 14, 915 N.W.2d 134.
35. *Id.* at ¶ 15.
36. *Id.* at ¶ 16.

Defendants' adverse possession and statute of limitations claims to bar Tank's quiet title action both required that the defendants had possession of the royalties.[37] Pursuant to North Dakota Century Code § 47-06-03, an adverse possession claim requires "actual open adverse and undisputed possession" by the defendants for ten years.[38] Next, pursuant to North Dakota Century Code § 28-01-05, the statute of limitations claim required Tank to have initiated the action within twenty years after the defendants "seized or possessed" the property.[39] However, both claims failed as a matter of law because the defendants never possessed the property.[40]

Lastly, the court analyzed the defense of laches. Laches is an equitable defense that can be raised when a delay in enforcing a party's rights which works a disadvantage on the other party.[41] The party seeking laches must have some knowledge of his or her rights and must fail to assert them against a party whose, in good faith, position would be changed and unable to be restored.[42] In *Grandin v. Gardiner*,[43] the North Dakota Supreme Court established that an individual holding legal title to a property is not required to take action against an adverse claim that has no chance of succeeding.[44] Tank possessed valid title to the real property, so he was not required to take action against the defendants because their royalty interests never existed.[45] Thus, the doctrine of laches was inapplicable.[46]

Additionally, the defense of laches was raised in relation to the royalty payments that had been made by Tank to the defendants, but this is discussed differently than the quiet title action.[47] Royalty payments were made to the defendants from 1982-1983 and again from 1998-present, but Tank never

37. *Id.* at ¶ 17.

38. *Id.*

39. *Id.*

40. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 17, 915 N.W.2d 134; *see also* Finstrom v. First State Bank of Buxton, 525 N.W.2d 675, 677 (N.D. 1994). "[R]oyalty interests cannot be 'possessed' until the minerals have been extracted from the ground, at which point they become personal property. Therefore, royalty interests cannot be 'possessed' for purposes of the statute of limitations in N.D.C.C. § 28-01-05 or for purposes of adverse possession under N.D.C.C. § 47-06-03. Having concluded that possession could not be achieved prior to the extraction of the minerals, the defendants' claim of adverse possession and affirmative defense based on the statute of limitations were barred as a matter of law." *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 21, 915 N.W.2d 134.

41. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 27, 915 N.W.2d 134; *see also* Sall v. Sall, 2011 ND 202, ¶ 14, 804 N.W.2d 378.

42. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 23, 915 N.W.2d 134; *see also* Loberg v. Alford, 372 N.W.2d 912, 919 (N.D. 1985).

43. 63 N.W.2d 128 (N.D. 1954).

44. *Siana Oil & Gas Co.*, 2018 ND 164, ¶ 21, 915 N.W.2d 134.

45. *Id.* at ¶ 22.

46. *Id.*

47. *Id.* at ¶ 23.

tried to recover those payments until this quiet title action.[48] In asserting this defense, the defendants relied on a 1957 lawsuit filed by Tank's grandparents against the defendants' predecessors over title to the royalty interest to establish that Tank knew about the dispute.[49] Further, the defendants relied on division orders signed by Tank in 2008 and by his father in 1983 which indicated royalty interests less than what Tank claimed.[50] The defendants asserted they acted in good faith because a 2002 title opinion confirmed their title.[51] The North Dakota Supreme Court did adjudicate the good faith question.[52] Whether the defense of laches applied in regard to royalty payments was remanded to the district court for determination of what recovery Tank is potentially entitled to.[53]

48. *Id*.
49. *Id*. at ¶ 25.
50. *Siana Oil & Gas Co*., 2018 ND 164, ¶ 25, 915 N.W.2d 134.
51. *Id*.
52. *Id*.
53. *Id*. at ¶ 26.

REAL PROPERTY LAW-OIL AND GAS LEASE INTERPRETATION AND THE INTERJECTION OF EXTRINSIC EVIDENCE INTO AN UNAMBIGUOUS LEASE.

Hallin v. Inland Oil & Gas Corp.

In *Hallin v. Inland Oil & Gas Corp.*,[54] the Supreme Court of North Dakota affirmed the district court's decision to grant summary judgment to an oil and gas company.[55] The lessors claimed the lease did not cover the entirety of a certain parcel of land.[56] The Supreme Court of North Dakota determined that oil and gas leases encompassed the entire parcel of the land in dispute and that extrinsic evidence was inadmissible to determine whether oil and gas leases covered the entire parcel of land.[57]

Lessors, John Hallin and Susan Bradford, both leased mineral interests they owned in 2007 located in Mountrail County to Inland.[58] The leases stated that Hallin and Bradford leased to Inland "all that certain tract of land situated in Mountrail County."[59] Later, in *Hallin v. Lyngstad*, the Supreme Court of North Dakota determined that Hallin and Bradford collectively owned eighty net mineral acres, whereas their relatives owned forty.[60]

A lawsuit commenced when Inland and Hallin and Bradford disputed whether the leases covered all of Hallin and Bradford's mineral interests.[61] Hallin and Bradford initially sued Inland because they believed they leased sixty out of their eighty acres to Inland.[62] Inland believed they were leased all eighty acres because the lease covered all of their mineral interests.[63] Both sides set forth their arguments before the Supreme Court of North Dakota after the district court found that the leases were unambiguous and granted summary judgment in favor of Inland.[64] Hallin and Bradford, believing another North Dakota case was factually similar relied on it for their argument.[65] They proposed that the court read the leases and payment drafts

54. 2017 ND 254, 903 N.W.2d 61.
55. *Id.* at ¶ 12.
56. *Id.* at ¶ 5.
57. *See id.* at ¶¶ 13, 15.
58. *Id.* at ¶ 2.
59. *Id.*
60. *Hallin*, 2017 ND 254, ¶ 4, 903 N.W.2d 61 (citing Hallin v. Lyngstad, 2013 ND 168, ¶ 19, 837 N.W.2d 888).
61. *Id.* at ¶ 5.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* (citing Borth v. Gulf Oil Exploration and Prof. Co., 313 N.W.2d 706 (N.D. 1981)).

together to show they are each leased thirty net mineral acres.[66] On the other hand, Inland insisted that the leases were unambiguous and covered all of Hallin and Bradford's mineral interests.[67] The district court agreed with Inland's arguments and concluded that the leases were unambiguous and that "as a matter of law, the Hallins and Bradford leased to Inland whatever interest they had in the subject property at the time the leases were executed."[68] Hallins and Bradford appealed the decision of the district court and asserted that the district court erred in granting summary judgment to Inland because they misapplied precedent from *Nichols v. Goughnour*.[69]

The Supreme Court of North Dakota noted that the guiding principle in interpreting leases is to "ascertain and effectuate the parties' or grantor's intent."[70] The rules of contract interpretation are governed by North Dakota Century Code ch. 9-07, which applies to leases.[71] The court also noted that contracts may be read and construed together.[72] The court identified the operative language of Hallin and Bradford's leases was identical to the number of acres included.[73] The lease provided that it included "all that certain tract of land" within the entire 160-acre parcel.[74] The court found that within the four corners of the lease, Hallin and Bradford were clear about what they were leasing which was all of the net mineral acres they owned.[75] Specifically, the court noted that the word "all" is not ambiguous whatsoever.[76] Thus, the court determined that it would be unnecessary to look beyond the leases to figure out the parties' intent.[77] Hallin and Bradford presented extrinsic evidence when they provided the court with payment drafts to show the parties' intent relating to the number of acres leased, but because the leases were clear and unambiguous, the extrinsic evidence was deemed inadmissible to explain the leases.[78] The court concluded that the district court did not incorrectly apply the rules of contract interpretation.[79]

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66. *Hallin*, 2017 ND 254, ¶ 5, 903 N.W.2d 61.

67. *Id.*

68. *Id.*

69. *Id.* at ¶ 7 (citing Nichols v. Goughnour, 2012 ND 178, 820 N.W.2d 740).

70. *Id.* (citing THR Minerals, LLC v. Ronbinson, 2017 ND 78, ¶ 8, 892 N.W.2d 193; Sargent City Water Res. Dist. v. Mathews, 2015 ND 277, ¶ 6, 871 N.W.2d 608; Golden v. SM Energy Co., 2013 ND 17, ¶ 11, 826 N.W.2d 610; N.D. CENT. CODE § 9-07-03 (2019)).

71. *Id.* at ¶¶ 8-9 (citing Irish Oil and Gas, Inc. v. Riemer, 2011 ND 22, ¶ 11, 794 N.W.2d 715).

72. *Hallin*, 2017 ND 254, ¶ 12, 903 N.W.2d 61 (citing *Nichols*, 2012 ND 178, ¶ 13, 820 N.W.2d 740).

73. *Id.* at ¶ 15.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Hallin*, 2017 ND 254, ¶ 15, 903 N.W.2d 61.

79. *Id.*

Next, Hallin and Bradford argued that "the phrase "160.00 acres, more or less" used in the leases is ambiguous as to the number of acres mutually intended to be leased."[80] The court analyzed this argument even though it was an issue that was not raised in district court.[81] The court used precedent set in *Lario Oil & Gas Co. v. EOG Res., Inc.*,[82] and *Hild v. Johnson*,[83] to address the issue of ambiguity of the phrase "more or less."[84] It was determined that "[w]hen a deed purports to convey a specific tract of land with a designation that it contains a given number of acres 'more or less,' the deed will be construed to convey the entire tract."[85] Therefore, the court concluded the leases with Inland contained similar language as the leases in *Lario* and likewise unambiguously included all of the mineral rights.[86]

Finally, Hallin and Bradford relied on *Borth v. Gulf Oil Expl. & Prod. Co.*,[87] to argue for a reversal and decision in their favor.[88] In *Borth*, there was an "unless" clause which provided for the termination of the lease unless the lessee paid a delayed rental.[89] The lease specified that if delayed rental payments were deficient in either time or amount, the lease would automatically be terminated.[90] The lessees believed the lessors only owed sixty mineral acres and the lessors had doubts as to whether they owned sixty or eighty mineral acres.[91] Once the lessors determined they owned eighty acres, they sued to cancel the entire lease under the "unless" clause.[92] Although the district court did not cancel the contract or award the full eighty acres, it did determine that the lease was still valid for the sixty mineral acres and the Supreme Court of North Dakota affirmed its decision.[93]

The court compared what happened in *Borth* to what happened in the instant case and determined that they were distinguishable.[94] The court pointed out that unlike in *Borth*, where there were no title inconsistencies when the lease was executed, here there were title inconsistencies present

80. *Id.* at ¶ 16.
81. *Id.*
82. 2013 ND 98, 832 N.W.2d 49.
83. 2006 ND 217, 723 N.W.2d 389.
84. *Hallin*, 2017 ND 254, ¶ 16, 903 N.W.2d 61.
85. *Id.* (citing *Hild*, 2006 ND 217, ¶ 14, 723 N.W.2d 389).
86. *Id.* at ¶ 17.
87. 313 N.W.2d 706 (N.D. 1981).
88. *Hallin*, 2017 ND 254, ¶ 18, 903 N.W.2d 61.
89. *Id.* (citing *Borth*, 313 N.W.2d at 708-09).
90. *Id.* at ¶ 19.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Hallin*, 2017 ND 254, ¶ 21, 903 N.W.2d 61.

when the leases were executed.[95] These inconsistencies led to a quiet title action where Hallin and Bradford were declared the owners of eighty net mineral acres after executing the leases.[96] Additionally, in *Borth*, the lessors' exact mineral acreage could be determined from reviewing the record title or abstract, but here, that was not possible.[97] Finally, in *Borth*, because the parties did not correctly ascertain the acreage in a lease containing an "unless" clause and the lessor accepted partial delayed rental payments, there was reason to award equitable relief.[98] Because there were inconsistencies in the title, and Hallin and Bradford executed leases that unambiguously conveyed all of their mineral interests to Inland, *Borth* did not apply and therefore, the original judgment stood.[99]

95. *Id*.
96. *Id*.
97. *Id*.
98. *Id*.
99. *Id*. at ¶¶ 21-22.

MINING PRODUCTION – COMPENSATION FOR DAMAGES CAUSED TO WATER WELLS

Agri Industries, Inc. v. Franson

In *Agri Industries, Inc. v. Franson*,[100] Francis Franson appealed from a district court judgment that granted Hess Corporation's ("Hess") motion for summary judgment and Agri Industries, Inc.'s ("Agri") motion for prejudgment interest.[101] Further, Hess cross-appealed the district court's judgment rejecting their alternative arguments for dismissal.[102] The North Dakota Supreme Court affirmed the district court's judgment granting summary judgment to Hess, but reversed the portion of the district court's judgment that granted Agri's motion for prejudgment interest.[103]

In December 2008, Hess hired a company to complete seismographic testing on Franson's property.[104] Shortly after the testing was completed, Franson noticed a loss of pressure from his water well between December 2008 and January 2009.[105] In response to the loss of water pressure, Franson hired Agri to drill a new well in January 2009.[106] Four years after the new well was installed, Agri sued Franson for not paying for its well-drilling services.[107]

In May 2014, Franson began his effort to pay the debt owed to Agri by starting a third-party action against Hess.[108] Franson served the third-party complaint against Hess in December 2014 and he alleged that the damage to his well was a direct result of Hess' seismographic work on his property from the December 2008 test.[109] Hess moved for dismissal or summary judgment by arguing "Franson's claim expired under the six-year statute of limitations, Franson's third-party complaint against Hess failed to state a claim upon which relief could be granted, and Hess could not be liable for torts of its independent contractor."[110] The district court determined that Hess was not entitled to dismissal under the statute of limitations and that the third-party complaint was adequate under North Dakota Rules of Civil Procedure 8 and

100. 2018 ND 156, 915 N.W.2d 146.
101. *Agri Industries, Inc*, 2018 ND 156, ¶ 1, 915 N.W.2d 146.
102. *Id*.
103. *Id*.
104. *Id*. at ¶ 2.
105. *Id*.
106. *Id*.
107. *Agri Industries, Inc*, 2018 ND 156, ¶ 2, 915 N.W.2d 146.
108. *Id*. at ¶ 3.
109. *Id*.
110. *Id*.

14.[111] The district court concluded that Hess was not liable for the negligence of its independent contractor, and that Franson had not complied with North Dakota Century Code § 38-11.1-06, which requires a certified water test to recover against a mineral developer for damage to a water supply.[112]

A jury trial was held to adjudicate the remaining issues between Agri and Franson.[113] The jury returned a verdict in favor of Agri in the exact amount invoiced to Franson for the services, $77,924.85.[114] Further, the jury verdict did not mention interest, so Agri moved for an award of prejudgment interest.[115] It was determined that Agri was entitled to prejudgment interest because the damages were certain or capable of being made certain by calculation.[116]

This was not the end of the case between Franson and Hess because Franson appealed. The first issue raised to the North Dakota Supreme Court was that the district court erred in granting Hess' summary judgment motion because North Dakota Century Code § 38-11.1-06 does not require a certified water test to recover from Hess.[117] The standard of review for summary judgment is derived from *Hallin v. Inland Oil & Gas Corp*.[118] Further, Franson argued the district court misinterpreted North Dakota Century Code § 38-11.1-06.[119] The standard is articulated in *Baukol Builders, Inc. v. Cty. of Grand Forks*[120], where the North Dakota Supreme Court explains, in relevant part, "The primary purpose of statutory interpretation is to determine legislative intent. Words in a statute are given their plain, ordinary, and commonly

111. *Id*.
112. *Id*.
113. *Agri Industries, Inc*, 2018 ND 156, ¶ 4, 915 N.W.2d 146.
114. *Id*.
115. *Id*.
116. *Id*.
117. *Id*. at ¶ 5.
118. 2017 ND 254, 903 N.W.2d 61. "Summary judgment is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record." *Agri Industries, Inc*, 2018 ND 156, ¶ 5, 915 N.W.2d 146 (citing *Hallin*, 2017 ND 254, ¶ 6, 903 N.W.2d 61 (quoting THR Minerals, LLC v. Robinson, 2017 ND 78, ¶ 6, 892 N.W.2d 193)).
119. *Agri Industries, Inc*, 2018 ND 156, ¶ 6, 915 N.W.2d 146.
120. 2008 ND 116, 751 N.W.2d 191.

understood meaning, unless defined by statute or a contrary intention plainly appears."[121] Section 38-11.1-06 of the North Dakota Century Code states:

> If the domestic, livestock, or irrigation water supply of any person who owns an interest in real property within one-half mile [804.67 meters] of where geophysical or seismograph activities are or have been conducted or within one mile [1.61 kilometers] of an oil or gas well site has been disrupted, or diminished in quality or quantity by the drilling operations and a certified water quality and quantity test has been performed by the person who owns an interest in real property within one year preceding the commencement of drilling operations, the person who owns an interest in real property is entitled to recover the cost of making such repairs, alterations, or construction that will ensure the delivery to the surface owner of that quality and quantity of water available to the surface owner prior to the commencement of drilling operations. Any person who owns an interest in real property who obtains all or a part of that person's water supply for domestic, agricultural, industrial, or other beneficial use from an underground source has a claim for relief against a mineral developer to recover damages for disruption or diminution in quality or quantity of that person's water supply proximately caused from drilling operations conducted by the mineral developer.[122]

Utilizing the Plain Language Test, the North Dakota Supreme Court concluded that the statute requires a certified water quality or quantity test be completed within one year of drilling operations in order to recover under the statute.[123] Therefore, because Franson did not have a certified water test done within one year, the district court did not err in granting Hess' motion for summary judgment.[124] Because the North Dakota Supreme Court affirmed the district court's order granting summary judgment to Hess, the court did not address the other issues raised by Hess.[125]

The second argument on appeal was that under North Dakota Century Code § 32-03-04 the district court erred by granting Agri's post-trial motion for prejudgment interest because the jury instruction on interest became the law of the case.[126] The jury instruction provided, "If you return a verdict

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121. *Agri Industries, Inc*, 2018 ND 156, ¶ 6, 915 N.W.2d 146 (citation omitted); N.D. CENT. CODE § 1-02-02 (2019).

122. *Agri Industries, Inc*, 2018 ND 156, ¶ 7, 915 N.W.2d 146 (emphasis in original); N.D. CENT. CODE § 38-11.1-06 (2019).

123. *Agri Industries, Inc*, 2018 ND 156, ¶ 7, 915 N.W.2d 146.

124. *Id*.

125. *Id*. at ¶ 8.

126. *Id*. at ¶ 9.

awarding damages to the Plaintiff, you may award interest at a rate no greater than six and one-half percent (6.50%) per annum from the date of the wrongful act."[127] Because neither of the two parties objected, this instruction became the law for the case.[128] The interest instruction placed the decision on interest in the jury's hands, which did not specifically exclude interest in the award.[129] However, the jury provided its damage award on the verdict form after it was given the instruction on awarding interest so the North Dakota Supreme Court upheld the jury's decision that Franson owed Agri $77,924.85.[130] In light of the instruction on interest, the North Dakota Supreme Court reversed the district court's order granting Agri's motion for prejudgment interest.[131]

127. *Id*. at ¶ 10.
128. *Id*.
129. *Agri Industries, Inc*, 2018 ND 156, ¶ 13, 915 N.W.2d 146.
130. *Id*.
131. *Id*.

ENERGY LAW-SUBSURFACE PORE SPACE IN COMMERCIAL SALTWATER DISPOSAL OPERATIONS.

Raaum Estates v. Murex Petroleum Corp.

In *Raaum Estates v. Murex Petroleum Corp.*,[132] Raaum Estates ("Raaum") brought suit against Murex Petroleum Corporation ("Murex"). Murex is an oil and gas exploration and production company headquartered in Houston, Texas which operates in several states and has over two hundred wells.[133] Murex is the successor-in-interest to an oil and gas lease called the Gulf Lease, which was granted and ratified by Raaum to the Gulf Oil Corporation.[134] The Gulf Lease covered tracts in eight different sections of land located in two different townships and Raaum owned the surface to a number of the tracts subject to the Gulf Lease.[135] The State Raaum ("State Raaum") is an "on-lease" producing oil well, which was operated by Murex after it acquired the interest from the Gulf Lease.[136] Raaum is the fee surface owner of State Raaum.[137]

This legal action started because of a dispute between Murex's use of land within or adjacent to the State Raaum wellsite in the middle of 2009 for the offloading, storage, and pumping of saltwater over to the nearby Fortuna State for underground disposal.[138] Murex converted State Raaum into a saltwater disposal well to provide an outlet for the saltwater being generated by State Raaum.[139] Murex avoided costs of trucking the saltwater to a disposal well operated by a third-party and a third-party disposal fee when they piped the saltwater generated from the State Raaum a short distance over to the Fortuna State.[140] Murex conducted the saltwater handling and pumping equipment at or adjacent to the State Raaum wellsite to get the State Raaum-Fortuna State saltwater disposal up and running and later increased its capacity for saltwater disposal.[141] On average, between 2009 and 2012, Murex disposed between 1,500 and 5,500 barrels of saltwater per month generated by production from the State Raaum through the State Raaum-Fortuna State disposal system.[142]

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132. No. 4:14-cv-024, 2017 WL 2870070 (D.N.D. July 5, 2017).
133. *Id.* at *1.
134. *Id.* at *1-2.
135. *Id.* at *2.
136. *Id.*
137. *Id.*
138. *Raaum*, 2017 WL 2870070, at *2 (D.N.D. July 5, 2017).
139. *Id.* at *3.
140. *Id.*
141. *Id.*
142. *Id.* at *4.

Murex noticed a substantial rise in the amount of saltwater disposed of through the State Raaum-Fortuna State systems beginning in 2012, which hit an all-time high of 113,390 barrels in October 2013.[143] This increase was partly because of three new Murex "on-lease" wells completed in 2013 and from third-party and Murex "off-lease" wells.[144] Although under the Gulf Lease Murex could not engage in "off-lease" disposal of saltwater, it asserted that it had the right to do so under multiple other agreements.[145] Raaum asserted claims for trespass, private nuisance, intentional fraud, negligent misrepresentation, fraud, conversion, and unjust enrichment.[146] Through testimony and other evidence, the court determined that Murex did not act with oppression, fraud, or actual malice and therefore Raaum was not entitled to punitive damages.[147]

Raaum argued that the court should award it an amount in restitution that deprives Murex of what it obtained wrongfully by using its property for disposal of "off-lease" saltwater.[148] Magistrate Judge Miller issued the findings of fact, conclusions of law, and an order for judgment in this case.[149] The court noted that under the Third Restatement of Restitution §40, there is a distinction between conscious trespassers and those who are less culpable.[150] According to Comment b to § 40 the Third Restatement of Restitution, the rental value of the property or cost to obtain a license are recoverable from "innocent" trespassers and converters.[151] The court discussed how Murex agreed to pay the surface owner $.065 per barrel for the Legaard saltwater disposal well, located several miles from the State Raaum.[152] Murex asserted that they are primarily paying for the use of the underground pore space as a disposal site for saltwater and here it was really taking place on the State's land underlying the Fortuna State rather than the Raaum's.[153] Accordingly, Murex urged the court, if it found a trespass occurred and restitution was appropriate, to award an amount that was significantly less than what it or other operators of saltwater disposals were paying surface owners.[154] Further,

143. *Id*.
144. *Raaum*, 2017 WL 2870070, at *4 (D.N.D. July 5, 2017).
145. *Id*.
146. *Id*. at *12.
147. *Id*.
148. *Id*.
149. *Id*. at *1.
150. *Raaum*, 2017 WL 2870070, at *21 (D.N.D. July 5, 2017).
151. *Id*. at *23.
152. *Id*.
153. *Id*.
154. *Id*.

Murex argued it should pay no more than $.035 per barrel to Raaum Estates.[155]

The court dismissed Murex's argument that because no saltwater was being disposed of below the Raaum property only a significantly smaller per-barrel amount was justified in comparison to what it and others were paying surface owner.[156] The court gave three primary reasons why it rejected Murex's position.

First, the court noted it was not convinced that what is being paid for in all cases is the right to use the subsurface pore space.[157] The use of the surface estate for a commercial saltwater disposal operation presents impacts on both the surface and subsurface.[158] In North Dakota, absent a breakdown of the equipment, the existence of saltwater from the interstitial pore space of a formation deep below the surface of the earth likely does not cause any noticeable impact.[159] However, surface owners lose their ability to use the pore space for themselves or sell its storage capacity to others.[160] Generally, surface owners sparingly use the pore space for themselves or sell the storage capacity to others because there is barely a market for it.[161] On the other hand, there are plenty of direct impacts from the surface activity and structures required to inject the saltwater which include; pumphouses, pumps, unloading facilities, storage tanks, and truck activity, unless brought in by pipeline.[162] Therefore, every situation is different and what might be important and of value for one surface owner may not be for another.[163] While the surface impacts may be most important and for others, the loss of use of the pore space could be most important to others.[164]

Second, the court was unpersuaded by the argument that having two separate areas paid at a market rate one for unloading, storage, and pumping facilities, and one for the well where disposal takes place added up to what it would cost for all of those operations occurring at one location.[165] The court predicted that a premium would have likely been paid to do what Murex did.[166] Finally, the court recognized that Murex provided evidence that

155. *Id*.
156. *Raaum*, 2017 WL 2870070, at *23 (D.N.D. July 5, 2017).
157. *Id*.
158. *Id*.
159. *Id*.
160. *Id*.
161. *Id*.
162. *Raaum*, 2017 WL 2870070, at *23 (D.N.D. July 5, 2017).
163. *Id*.
164. *Id*.
165. *Id*. at *24.
166. *Id*.

showed what it and other operators paid to other surface owners for all disposing of barrels of saltwater.[167] The court noted that if a surface owner will only be compensated for some of the saltwater, it is likely that the surface owner would demand a higher per-barrel amount.[168]

The court determined that $.07 per barrel would be an appropriate estimate of what it would have costed Murex to get a license to use the area of land where Raaum disposed "off-lease" saltwater.[169] The court used this number to calculate the appropriate restitution due to Raaum for Murex's past trespasses and awarded damages of $40,906.[170] The court reasoned that since Murex would be paying only for the "off-lease" saltwater in this situation, the per-barrel amount was appropriate because it is within the range of what Murex paid other facilities for the disposal of all saltwater.[171] Despite the fact that this rate does not perfectly match the market rate, the court noted Murex bore the responsibility due to their own course of dealing.[172]

The court issued an order that banned Murex from using saltwater unloading equipment, storage tanks, the truck unloading area, and the injection pump and pumphouse on the land owned by Raaum for the disposal of "off-lease" saltwater unless it obtained an agreement from Raaum allowing it to.[173] Additionally, the court ordered $40,906 in damages be paid to Raaum, with an interest rate of 6% per annum from 2014, bringing the total amount of damages to $49,311.[174]

167. *Id*.
168. *Raaum*, 2017 WL 2870070, at *23 (D.N.D. July 5, 2017).
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*.
173. *Id*. at *27.
174. *Raaum*, 2017 WL 2870070, at *27 (D.N.D. July 5, 2017).

ENVIRONMENTAL LAW- OPERATING OPEN STORAGE COAL PILE IN ACCORDANCE WITH THE CLEAN AIR ACT NEW SOURCE PERFORMANCE STANDARDS.

Voigt v. Coyote Creek Mining Co., LLC

In *Voigt v. Coyote Creek Mining Co., LLC*,[175] ranchers who had property close to Coyote Creek Mining Company's ("Coyote") surface lignite coal mine started a legal action against Coyote. Plaintiff ranchers claimed Coyote was required under the Clean Air Act (CAA) to obtain a "major source" construction permit, and that Coyote had violated the CAA new source performance standards (NSPS) when it operated open storage coal pile without a fugitive dust control plan.[176]

Coyote moved for summary judgment, which was granted by the district court for two reasons.[177] United States Magistrate Judge Miller held first that the mine haul road, which was used to transport lignite coal from an active mining area to open storage pile that sat adjacent to where coal was crushed, did not constitute part of mine's coal processing facility where the CAA's NSPS applied, and thus was excused from the requirement that it had to obtain a major source construction permit.[178] Second, the court determined the North Dakota Department of Health (NDDOH) position that the open storage coal pile was not part of mine's coal processing facilities where CAA's NSPS applied was entitled to deference.[179] After a decision was made by the district court, Casey and Julie Voigt sought an appeal and brought two issues.[180] First, they contested "[w]hether the district court erred by concluding that the applicability of 40 C.F.R. 60.250 *et seq*. to defendant's open coal storage pile and activities upon the coal pile is ambiguous."[181] Second, they contested "[w]hether the district court erred by concluding through summary judgment that defendant's open coal storage pile and activities upon the pile are not part of a coal preparation and processing plant and thus not subject to the provisions of 40 C.F.R. 60.250 *et seq*."[182]

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175. 329 F. Supp. 3d 735 (D.N.D. 2018), *appeal filed*, No. 18-2705 (8th Cir. Aug. 9, 2018).

176. *Id*. at 739-40.

177. *Id*. at 794.

178. *See id*. at 767-68.

179. *Id*. at 781.

180. Statement of Issues and Certification of No Transcript Requested at 1, Casey Voigt v. Coyote Creek Mining Co., LLC, No. 18-2705 (8th Cir. Aug. 23, 2018) [hereinafter Statement of Issues].

181. Statement of Issues, *supra* note 180, at 1.

182. Statement of Issues, *supra* note 180, at 1.

Plaintiffs own or lease some 5,637 acres in Mercer County, close to Coyote Creek Mine.[183] Plaintiffs argued that Coyote did not obtain the proper permit under the Clean Air Act for the construction of its mine.[184] Specifically, Plaintiffs argued that Defendants should have obtained a "major source" construction permit instead of the "minor source" one it obtained.[185] The Coyote Creek Mine mines lignite which is typically consumed near the mine. Other coals and fuels are more economical if they have to be transported any significant distance.[186] A mine mouth plant called Coyote Station is close to the Coyote Creek Mine and is its only customer.[187] The Coyote Creek Mine crushes the mine-run coal down to a smaller size before transporting to the Coyote Station.[188] Because the coal is processed in this fashion, it is subject to additional regulatory requirements by the CAA.[189] Particulate matter, sulfur dioxide, nitrogen oxides (with sulfur dioxide as the indicator), carbon monoxide, lead, and ozone are the six pollutants which fall under the CAA wherein there are national ambient air quality standards.[190] Areas of the country that meet the standards are called "attainment" areas, and those that do not meet standards are called "nonattainment" areas.[191] North Dakota is an attainment area for all six pollutants.[192]

The New Source Performance Standards (NSPS) program is important to achieve and maintain the national ambient air quality standards in accordance with the CAA.[193] Implementing technology-based performance standards to limit emissions from new major sources of pollutions are required by the NSPS provisions.[194] Congress later decided to amend the CAA to include provisions for the prevention of significant deterioration of air quality which are codified under 42 U.S.C. §§ 7470-7492.[195] Under these provisions, a major emitting facility may not be constructed unless it obtains the appropriate permit.[196]

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183. *Voigt*, 329 F. Supp. 3d at 737.
184. *Id*.
185. *Id*.
186. *Id*.
187. *Id*. at 738.
188. *Id*.
189. *Voigt*, 329 F. Supp. at 738.
190. *Id*.
191. *Id*.
192. *Id*.
193. *Id*.
194. *Id*. at 738-39; *see also* Sierra Club v. Otter Tail Power Co., 615 F.3d 1008, 1011 (8th Cir. 2010).
195. *Voigt*, 329 F. Supp. 3d at 739.
196. *Id*.; *see also* 42 U.S.C. §§ 7475(a), 7479(1)-(3) (2018).

In North Dakota, the State is the permitting authority for new facilities that require a major source construction permit and has adopted regulations that impose its own requirements for new facilities if they do not need a major source construction permit.[197] The state agency that is charged with administration and enforcement of the CAA and air quality laws, which includes the responsibility for reviewing construction permit applications and determining the appropriate permit that is required, is the North Dakota Department of Health ("NDDOH").[198]

Defendants applied for and were granted a minor construction permit by the NDDOH for the Coyote Creek Mine.[199] Under 42 U.S.C. § 7604(a)(3) and 28 U.S.C. § 1331, Plaintiffs sought the following relief: (1) that the Coyote Creek Mine should be determined a major source and so violated the CAA by constructing the mine without a major source construction permit; (2) the defendant violated the CAA by operating a new source in violation of a NSPS performance standard; (3) an injunction that prohibits further operation or construction of the Coyote Creek Mine while it is violating the CAA; (4) an assessment of civil monetary penalties; (5) an award of attorney's fees and costs; and (6) any other relief as the court deems proper.[200]

In *Sisseton–Wahpeton Oyate of the Lake Traverse Reservation v. United States Corps of Engineers*,[201] the Eighth Circuit defined the *Auer* (also known as the *Seminole Rock*) doctrine which is the standard in cases that involve an agency's interpretation of its own regulations.[202] The court stated:

> We apply the *Auer* (also known as *Seminole Rock*) standard in cases involving an agency's interpretation of its own regulations. An agency's interpretation of its own regulations is controlling unless "plainly erroneous or inconsistent with the regulation." We must defer to a permissible interpretation even if it is not the "best" interpretation.[203]

The transportation of the coal by truck over the mine haul road and away from the "mine face" is part of the process of "conveying" of the coal to the

197. *Voigt*, 329 F. Supp. 3d at 739; *see also* N.D. ADMIN. CODE art. 33-15 (2019) (North Dakota's air pollution control regulations).

198. *Voigt*, 329 F. Supp. 3d at 739; *see also* N.D. CENT. CODE §§ 23-25-02, 23-12-03 (2019).

199. *Voigt*, 329 F. Supp. 3d at 739.

200. *Id*. at 740.

201. 888 F.3d 906 (8th Cir. 2018).

202. *Voigt*, 329 F. Supp. 3d at 767.

203. *Sisseton-Wahpeton Oyate of the Lake Traverse Reservation*, 888 F.3d 906, 920 (8th Cir. 2018) (citations omitted).

equipment that does the processing within the meaning of 40 C.F.R. § 60.251(f).[204] The court concluded that the haul road is not included.[205]

A major point of contention in this case was what deference might be owed to administrative decisions under the CAA and its cooperative federalism. The State argued in its amicus brief that the court was to give "considerable deference" to the NDDOH's permitting decision and the defendants agreed.[206] The court did not agree with this and noted that the precedent that was cited was not on point.[207] Under the law, there are limited cases that discuss what deference should be attributed to decisions made by a state permitting agency.[208] The court noted that one case addressing the issue was *Northwest Environmental Defense Center v. Cascade Kelly Holdings*,[209] where the court concluded:

> Giving DEQ the deference due a state agency charged with implementing a federal statute that has made technical determinations within its area of expertise, the Court finds that DEQ reasonably approved the use of 98.7 percent capture efficiency.[210]

Recently, in *Grand Canyon Trust v. Energy Fuels Resources (U.S.A.) Inc.*,[211] the court determined that a state is entitled to some deference because it applies deferral regulations pursuant to Congress's express authorization in a manner that is reasonable and in accordance with federal law.[212] Further, in *Red River Coal Company v. Sierra Club*,[213] environmental groups pointed to a letter the EPA had sent to the enforcement agency in another state which stated the issue was an open one, along with a letter to show cause from the EPA alleging CWA violations due to a lack of a permit for the drainage from the reclaimed fills.[214] The mining company looked to the EPA's website for guidance, which stated that abandoned mine drainage is not a point source.[215] The court decided that deference might be appropriate provided that the determination by the state agency was not inconsistent with EPA's

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204. *Voigt*, 329 F. Supp. 3d at 767-68.
205. *Id.* at 768.
206. *Id.* at 769.
207. *Id.*
208. *Id.*
209. 155 F.Supp.3d 1100 (D. Or. 2015).
210. *Id.* at 1126.
211. 269 F.Supp.3d 1173 (D. Utah 2017).
212. *Id.* at 1196.
213. No. 2:17-cv-00021, 2018 WL 491668 (W.D. Va. Jan. 19, 2018).
214. Voigt v. Coyote Creek Mining Co., LLC, 329 F. Supp. 3d 735, 770 (D.N.D. 2018), *appeal filed*, No. 18-2705 (8th Cir. Aug. 9, 2018).
215. *Id.* at 771.

requirements and there was a rational basis for it.[216] However, as in *Grand Canyon Trust* and *Cascade Kelly Holdings*, the court in *Red River Coal Company* would not afford deference simply because the state agency is authorized permitting authority.[217]

The plaintiff made several arguments for why the court should not give deference to the NDDOH's determination that the coal pile was not part of the coal processing plant.[218] The court agreed that NDDOH likely did not consider EPA guidance on coal unloading and defined what facilities are subject to regulation too narrowly.[219] Still, the court decided to give deference to the NDDOH's determination, but noted it was doing so primarily because the record was incomplete with respect to the EPA's stance on the matter.[220] The court concluded its opinion by musing that the bigger picture may have been lost in this case given that the EPA has acknowledged that few, if any, surface coal mines would be major sources of dust emissions and the fact that the EPA does not regulate larger fugitive dust emitters.[221]

216. *Id*.
217. *Id*.
218. *Id*. at 780.
219. *Id*.
220. *Voigt*, 329 F. Supp. 3d at 783.
221. *Id*. at 794.