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North Dakota

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NORTH DAKOTA

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I. INTRODUCTION

Activity in North Dakota's oil and gas industry has increased significantly in the last several years. The increased oil and gas activity has created an increase in North Dakota case law regarding oil and gas related issues. The following is an update on North Dakota case law related to the oil and gas industry from September 1, 2010, through August 31, 2011. The cases address a variety of oil and gas law related issues.

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II. JUDICIAL DEVELOPMENTS

A. *Dormant Mineral Act*

Several recent North Dakota Supreme Court cases address North Dakota's abandoned mineral statutes, otherwise known as North Dakota's Dormant Mineral Act ("The Act"). The Act, located in North Dakota Century Code ("N.D.C.C.") Chapter 38-18.1, allows a surface owner to acquire an abandoned mineral interest where the interest has not been used, as defined by the code, for a period of twenty years. The Act is the subject of the first three cases of this North Dakota update.

1. *Sorenson v. Felton*[2]

Michael Sorenson owned the surface of a tract of land.[3] Barbara Felton acquired an interest in the minerals pursuant to a personal representative's deed recorded in the county records in 1984.[4] After 1984 and prior to January 2008, Felton did not lease the minerals, file a statement of claim, or use the minerals in any other way under the definition of The Act.[5] In January 2007, in accordance with The Act, Sorenson published a notice of lapse of mineral interest in the appropriate newspaper.[6] In addition, Sorenson mailed notice to Felton using the Florida address that appeared on the 1984 personal representative's deed.[7] Sorenson also conducted a Yahoo! People search but found no address for Barbara Felton in Florida.[8] On January 9, 2008, Felton leased her mineral interest to Schmitz Oil Properties.[9] Sorenson filed a complaint to quiet title to the mineral interest in question.[10]

Section 38-18.1-06(2) requires a notice of lapse to be sent by mail "if the address of the mineral interest owner is shown of record or can be determined upon reasonable inquiry."[11] The North Dakota Supreme Court held that because the phrases "shown of record" and "determined upon reasonable inquiry" are separated by the word "or," they are separate and alternative considerations for how a surface owner is to obtain the mineral owner's address for mailing the notice.[12] Therefore, Sorenson was only required to conduct a reasonable inquiry if Felton's address was not shown of record.[13] Since her address was

2. Sorenson v. Felton, 793 N.W.2d 799 (N.D. 2011).
3. *Id.* at 801.
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 802; *see also* N.D. CENT. CODE § 38-18.1-06(2) (2004).
12. *Felton*, 793 N.W.2d at 802–03.
13. *Id.* at 803.

shown of record on the 1984 personal representative's deed, he was not required to conduct any further inquiry.[14] Because an address appears of record and because the notice was sent to the address of record, Sorenson satisfied the requirements of the statute and successfully succeeded to the ownership of Felton's minerals.[15]

2. *Sorenson v. Alinder*[16]

Michael Sorenson owned the surface of a tract of land.[17] Russell Alinder and Edna Alinder acquired an interest in the minerals pursuant to a mineral deed recorded in the county records in 1953.[18] Russell Alinder died in 1980 and Edna Alinder died in 1999.[19] After 1953, Russell Alinder and Edna Alinder did not lease the minerals, file a statement of claim, or use the minerals in any other way under the definition of The Act.[20] In January 2007, in accordance with the requirements of The Act, Sorenson published a notice of lapse of mineral interest in the appropriate newspaper.[21] In addition, Sorenson mailed notice to Russell Alinder and Edna Alinder at the Buffalo, ND address that appeared on the 1953 mineral deed.[22] Sorenson filed a complaint to quiet title to the mineral interest in question.[23]

The district court held that because Sorenson did not conduct a reasonable inquiry to determine a more current address for Russell Alinder and Edna Alinder, Sorenson did not comply with the requirements of The Act.[24] Sorenson appealed, arguing that a reasonable inquiry was not required because there was an address of record.[25] The North Dakota Supreme Court cited their decision in *Sorenson v. Felton* and held section 38-18.1-06(2) only requires a reasonable inquiry when the mineral owner's address is not shown of record.[26] The Court held that Sorenson complied with the requirements of the statute by mailing the notice to Russell and Edna Alinder at their address shown of record, and he was not required to conduct any further inquiry.[27] Sorenson satisfied the requirements of the statute and successfully succeeded to the ownership of the Alinders' mineral interest.[28]

14. *Id.*
15. *Id.*
16. Sorenson v. Alinder, 793 N.W.2d 797 (N.D. 2011).
17. *Id.* at 798.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 798–99.
26. *Id.* at 799.
27. *Id.*
28. *Id.*

3. *Johnson v. Taliaferro*[29]

Taliaferro has been the record owner of a mineral interest under the disputed tract of land since June 26, 1950.[30] An oil and gas lease—dated July 5, 1960, and for a primary term of five years—was Taliaferro's last use of the mineral interest.[31] The lease identified Taliaferro's address as 510 Petroleum Building, Abilene, TX.[32] On June 25, 2009, the Johnsons executed a notice of lapse of mineral interest for the disputed tract of land.[33] On July 30, 2009, the Johnsons mailed a copy of the notice of lapse to Taliaferro at 510 Petroleum Building, 451 Pine St., Abilene, TX 79601-5150.[34] The Johnsons identified the street address for the Petroleum Building through an Internet search and identified the zip code using the United States Postal Service's Internet website. Taliaferro did not receive the notice.[35]

The Johnsons filed an action seeking to quiet title to the mineral interest in the Johnsons.[36] The district court quieted title to the mineral interest in the Johnsons, finding the Johnsons did not need to conduct a reasonable inquiry under section 38-18.1-06 to find Taliaferro's current address, stating that "[W]hen an address appears of record there is no requirement for reasonable inquiry when giving Notice of Lapse of Mineral Interest."[37] Taliaferro appealed the district court's decision, arguing that an amendment to The Act, codified in section 38-18.1-06.1, requires the surface owner to show the court that all the requirements of The Act were complied with, including showing the court "that a reasonable inquiry as defined by subsection 6 of section 38-18.1-06 was conducted."[38]

The North Dakota Supreme Court addressed the unique situation where a notice of lapse was executed and sent prior to the 2009 amendments to The Act taking effect, but a quiet title action was filed after the 2009 amendments took effect.[39] The Court stated the N.D.C.C. cannot be retroactively applied unless specifically permitted by the legislature and that subsequent legislation cannot be used to deprive a person of a vested right.[40] Because the notice of lapse in this case was executed prior to the 2009 amendments to The Act and because The Act provides that "'[t]itle to the abandoned mineral interest vests in the owner or owners of the surface estate in the land in

29. Johnson v. Taliaferro, 793 N.W.2d 804 (N.D. 2011).
30. *Id.* at 805.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*
37. *Id.* at 806.
38. *Id.*
39. *Id.* at 807.
40. *Id.*

or under which the mineral interest is located on the date of abandonment,'" title to this mineral interest vested in the Johnsons prior to the 2009 amendments taking effect.[41] Thus, the Court held that its decision in *Sorenson v. Felton* is controlling and that the Johnsons were not required to conduct a reasonable inquiry in this case.[42]

Because it was not necessary for the outcome of the case, the Supreme Court did not address whether the 2009 addition of section 38-18.1-06.1 requires the surface owner to conduct a reasonable inquiry under a notice of lapse and subsequent quiet title action taking place after August 1, 2009, the effective date of the 2009 amendment.[43]

In 2009, the North Dakota legislature amended The Act. The three dormant mineral cases discussed above were decided under the pre-2009 act. Among other changes, the 2009 amendments to The Act added section 38-18.1-06.1, which provides:

38-18.1-06.1. Perfecting title in surface owner.

1. Upon completion of the procedure provided in section 38-18.1-06, the owner or owners of the surface estate may maintain an action in district court in the county in which the minerals are located and obtain a judgment in quiet title in the owner or owners of the surface estate. This action must be brought in the same manner and is subject to the same procedure as an action to quiet title pursuant to chapter 32-17.
2. In an action brought under this section, the owner or owners of the surface estate shall submit evidence to the district court establishing that all procedures required by this chapter were properly completed and that a reasonable inquiry as defined by subsection 6 of section 38-18.1-06 was conducted. If the district court finds that the surface owner has complied with all procedures of the chapter and has conducted a reasonably inquiry, the district court shall issue its findings of fact, conclusions of law, and enter judgment perfecting title to the mineral interest in the owner or owners of the surface estate.
3. A judgment obtained by the owner or owners of the surface estate in compliance with this section is deemed conclusive except for fraud, misrepresentation, or other misconduct.
4. A mineral lessee that obtains a lease from the owner of the surface estate, which owner has obtained a judgment to minerals pursuant to this section, is deemed a bona fide purchaser and its lease remains effective in the event the judgment is subsequently vacated for any reason. Further, the lessee is not liable to any third party for lease bonus, royalties, or any other proceeds paid to the surface owner under the lease before the judgment being vacated.
5. Absent fraud or misrepresentation, the owner or owners of the surface estate which obtain a judgment under this section and

41. *Id.* (quoting N.D. CENT. CODE § 38-18.1-02 (2004)).
42. *Id.* at 806, 808.
43. *Id.* at 808 (VandeWalle, C.J., concurring).

> lease minerals to a lessee are entitled to retain all lease bonus, royalties, or any other proceeds paid to the surface owner under the lease before the judgment being vacated.[44]

As shown above, the North Dakota Supreme Court has held that section 38-18.1-06 requires a reasonable inquiry only when there is no address of record.[45] However, section 38-18.1-06.1, enacted July 1, 2009, expressly allows the surface owner to maintain an action to quiet title.[46] Section 38-18.1-06.1(2) requires the surface owner to "submit evidence to the district court establishing that all procedures required by this chapter were properly completed and that a reasonable inquiry as defined by subsection 6 of section 38-18.1-06 was conducted."[47] "If the district court finds that the surface owner has complied with all procedures of the chapter and has conducted a reasonable inquiry, the district court shall issue its findings of fact, conclusions of law, and enter judgment perfecting title to the mineral interest in the owner or owners of the surface estate."[48] Because section 38-18.1-06.1(2) requires the surface owner to submit evidence that a reasonable inquiry was conducted and uses the word "and" and not "or," it is an open question whether a surface owner, who attempts to succeed to dormant minerals under the post-2009 act must still conduct a reasonable inquiry despite the Supreme Court's holdings under the pre-2009 act.[49] The Chief Justice of the North Dakota Supreme Court discussed this open question in his concurrence to *Johnson v. Taliaferro*, stating:

> I write separately to highlight the issue outlined in ¶ 15 of the majority opinion, i.e., whether or not title to a severed mineral interest abandoned under N.D.C.C. § 38-18.1-06 and vested in the surface owner prior to 2009 can be quieted in an action brought by the surface owner after the effective date of the 2009 amendments to N.D.C.C. § 38-18.1-06(2) without conducting a reasonable inquiry as to the owner of the mineral interest. Our answer is that title can be quieted without conducting a reasonable search. But, I note our decision does not resolve the issue of whether or not, in light of the 2009 amendments to N.D.C.C. § 38-18.1-06.l(2), a quiet title action would lie or whether or not a severed mineral interest would even be considered abandoned under the provisions of N.D.C.C. § 38-18.1-06 if the procedures under § 38-18.1-06 were begun after the 2009 amendments to § 38.18.1-06.l(2) became effective and no reasonable inquiry was conducted. I believe this is an open question

44. *See* N.D. CENT. CODE § 38-18.1-06.1 (Supp. 2011).

45. *See* Sorenson v. Felton, 793 N.W.2d 799 (N.D. 2011); Sorenson v. Alinder, 793 N.W.2d 797 (N.D. 2011); *Taliaferro*, 793 N.W.2d at 804.

46. N.D. CENT. CODE § 38-18.1-06.1(1).

47. *Id.* § 38-18.1-06.1(2) (Supp. 2011).

48. *Id.*

49. *Id.* § 38.18.1-06.1; *see also Taliaferro*, 793 N.W.2d at 808 (VandeWalle, C.J., concurring).

that invites further legislative clarification or awaits a judicial determination.[50]

B. *Other Case Law*

1. *Irish Oil & Gas, Inc. v. Riemer*[51]

Irish Oil and Gas Inc. ("Irish") entered into oil and gas leases with Gerald C. Riemer, Doris E. Riemer, Lillie J. Riemer, and Joanne Johnson (the "Riemers") in January and February 2008.[52] A Letter Agreement accompanied each lease and provided an offer of bonus consideration of $160 per net mineral acre and a 1/6 royalty in the event of production.[53] The Letter Agreement also provided that within 60 days of receipt of the signed lease, "subject to approval of title, with right of payment extension of 30 additional days, in the event of title curative issues, from expiration of original 60 days" the Riemers would receive a check for $10,640.[54]

Because he had not yet received a check for the bonus consideration, Gerald C. Riemer called Irish and spoke with Tim Furlong, vice president of Irish, regarding the bonus consideration.[55] Following the conversation, Irish sent a letter to Riemer purporting that Riemer agreed to extend the payment deadline to June 15.[56] Irish explained it needed more time because it had encountered title issues.[57] Irish ensured it would communicate with Riemer if the payment was to be delayed past June 15.[58] Gerald C. Riemer claimed he did not agree to extend the deadline for payment by Irish, while Irish claimed Gerald Riemer agreed to an extension.[59]

On April 30, 2008 Gerald C. Riemer leased the same mineral interest to Continental Oil Company.[60] Subsequently, Irish mailed the Riemers a check for the bonus consideration owed.[61] The Riemers returned the check along with a letter indicating the minerals had been leased to another company.[62] Irish sued the Riemers alleging breach of contract.[63]

Paragraph 16 of the oil and gas leases provided:

50. *Taliaferro*, 793 N.W.2d at 808 (VandeWalle, C.J., concurring).
51. Irish Oil & Gas, Inc. v. Riemer, 794 N.W.2d 715 (N.D. 2011).
52. *Id.* at 716.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 716–17.
57. *Id.* at 717.
58. *Id.*
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*

> This lease shall not be terminated, forfeited, or canceled for failure by Lessee to perform in whole or in part any of its implied covenants, conditions, or stipulations until it shall have been first finally and judicially determined that the failure or default exists, and then Lessee shall be given a reasonable time to correct any default so determined, or at Lessee's election it may surrender the Lease with the option of reserving under the terms of this Lease each producing well and forty (40) acres surrounding it as selected by Lessee, together with the right of ingress and egress. Lessee shall not be liable in damages for breach of any implied covenant or obligation.[64]

Irish argued this paragraph requires Riemer to obtain a judicial determination of a breach and allows the lessee a reasonable time to cure the breach.[65] The Supreme Court affirmed the district court's decision that the phrase "implied covenants, conditions or stipulations" does not apply to express provisions of the lease.[66] Thus, this provision applies to the implied covenants found in the oil and gas lease and not to the obligation to pay the lease bonus.[67]

The district court held there was a total failure of consideration because Irish failed to timely pay the bonus.[68] The Supreme Court reversed and remanded for a factual determination.[69] The Supreme Court held that it could not say, as a matter of law, that the potential for royalty from production is not sufficient consideration to support the lease.[70] The Court also could not say that failure to timely pay the bonus leaves the leases with a total failure of consideration that excused Riemers' performance.[71] Rather, the Court stated a fact issue exists as to whether the anticipated royalty payments provided for in the royalty clauses of the leases provide adequate consideration to uphold the contract even where the bonus consideration fails.[72]

2. *Anderson v. Hess Corp.*[73]

The Andersons owned mineral interests and leased those interests to Diamond Resources, Inc. through oil and gas leases dated May 3, 2004, and May 10, 2004.[74] Diamond assigned the leases to Duncan, who assigned them to Hess.[75]

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64. *Id.* at 718.
65. *Id.*
66. *Id.* at 719.
67. *Id.*
68. *Id.* at 718.
69. *Id.* at 722.
70. *Id.* at 721.
71. *Id.* at 722.
72. *Id.* at 721–22.
73. Anderson v. Hess Corp., 733 F. Supp. 2d 1100 (D.N.D. 2010), *aff'd*, 649 F.3d 891 (8th Cir. 2011).
74. *Id.* at 1101.
75. *Id.* at 1101–02.

The leases contained the following habendum clause:

> It is agreed that this lease shall remain in force for a term of five (5) years from this date and as long thereafter as oil or gas of whatsoever nature or kind is produced from said leased premises or on acreage pooled therewith, or drilling operations are continued as hereinafter provided. If, at the expiration of the primary term of this lease, oil or gas is not being produced on the leased premises or on acreage pooled therewith but Lessee is then engaged in *drilling or re-working operations* thereon, then this lease shall continue in force so long as operations are being continuously prosecuted on the leased premises or on acreage pooled therewith; and operations shall be considered to be continuously prosecuted if not more than ninety (90) days shall elapse between the completion or abandonment of one well and the beginning of operations for the drilling of another well. If after discovery of oil or gas on said land or on acreage pooled therewith, the production thereof shall cease from any cause after the primary term, this lease shall not terminate if Lessee commences additional drilling or reworking operations within ninety (90) days from date of cessation of production or from date of completion of dry hole. If oil or gas shall be discovered and produced as a result of such operations at or after the expiration of the primary term of this lease, this lease shall continue in force so long as oil or gas is produced from the leased premises or on acreage pooled therewith.[76]

In October 2008, Hess began preparations for a well on the leased land.[77] From January to May 2009, Hess moved equipment to the well, began to prepare the surface, leveled and lazered the pad, dug the drilling pit, widened the access road to the well, drilled the rat hole, and made other preparations for drilling.[78] Problems at another well prevented Hess from completing its plans to move a rig to the well prior to May 3, 2009.[79] Hess spud the well on May 11, 2009, after which it was continuously drilled until total depth was reached on June 26, 2009.[80] The well produced continuously since June 30, 2009.[81]

On May 7, 2009, Hess attempted to extend the lease term by offering to increase the royalty.[82] The Andersons rejected the offer on May 8, 2009.[83] The Andersons subsequently filed a complaint alleging the leases expired because no wells were drilled prior to the lease expiration dates.[84] Hess argued the leases did not expire because it was

76. *Id.* at 1102 (emphasis added).
77. *Id.*
78. *Id.* at 1102–03.
79. *Id.* at 1103.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*

engaged in drilling operations prior to expiration of the primary terms of the leases.[85]

The court reaffirmed its prior holding from *Murphy v. Amoco Prod. Co.*, that "drilling operations commence when (1) work is done preparatory to drilling, (2) the driller has the capability to do the actual drilling, and (3) there is a good faith intent to complete the well. It is not necessary that the drill bit actually penetrate the ground."[86] Additionally, the court found that "operations" modified both "drilling" and "reworking" and that the phrase "drilling or reworking operations" included both "drilling operations" and "reworking operations."[87]

The court also stated that actual drilling is unnecessary to extend the lease term but that "the location of wells, hauling lumber on the premises, erection of derricks, providing a water supply, moving machinery on the premises," and similar acts preceding the actual drilling, when paired with an actual intent to drill and subsequent drilling of a well, constitute drilling operations.[88] The court found that Hess was engaged in drilling operations prior to the expiration of the primary terms of the leases.[89] Thus, the leases were effectively extended beyond their primary terms by the completion of the well.[90]

3. *Carkuff v. Balmer*[91]

Alice Carkuff had one son, James Carkuff, and four daughters.[92] The plaintiffs, Carkuffs, were the successors to James Carkuff, and the defendants were the successors to the daughters.[93] On June 11, 1953, Alice conveyed all of her interest in the oil and gas in a tract of land to her daughters.[94] On the same day, she quit claimed the surface rights in the tract to James Carkuff.[95] Subsequently, on October 20, 1953, Alice executed a quit claim deed to James for the tract whereby Alice "does by these presents GRANT, BARGAIN, SELL, REMISE, RELEASE and QUIT-CLAIM . . . unto [James] all the right, title and interest in and to" the subject property.[96]

Later, on June 13, 1958, James executed a deed conveying the "surface rights only" back to his mother, Alice.[97] On that same date, Al-

85. *Id.*
86. *Id.* at 1106.
87. *Id.* at 1106–07.
88. *Id.* at 1108 (quoting W.L. SUMMERS, THE LAW OF OIL & GAS § 349 (1959)).
89. *Id.*
90. *Id.*
91. Carkuff v. Balmer, 795 N.W.2d 303 (N.D. 2011).
92. *Id.* at 304.
93. *Id.*
94. *Id.*
95. *Id.*
96. *Id.* at 305, 307–08.
97. *Id.* at 305.

ice executed a deed to James re-conveying the "surface rights only."[98] On May 4, 1959, by four separate quit claim deeds, Alice's four daughters conveyed the mineral interests back to Alice, and later, on April 18, 1963, Alice again re-conveyed the mineral interests back to the four daughters.[99] The question before the Court was whether the October 20, 1953 quit claim deed, which did not contain a mineral reservation and was not limited to surface rights, and which expressly included the term "grant," had the effect of transferring to James all of Alice's subsequently-acquired mineral rights under the May 4, 1959 deeds.[100]

The North Dakota Supreme Court noted that the after-acquired title doctrine "'is one under which title to land acquired by a grantor who previously attempted to convey title to the same land which he did not then own inures automatically to the benefit of his prior grantee.'"[101] That doctrine is codified at N.D.C.C. section 47-10-15, which provides that "[w]hen a person purports by proper instrument to grant real property in fee simple and subsequently acquires any title or claim of title thereto, the same passes by operation of law to the grantee or the grantee's successors."[102] Generally, a quit claim deed conveys only the grantor's interest or title, if any, in property, rather than the property itself.[103] The Court found that after-acquired title by the grantor will not, as a general rule, inure to the benefit of the grantee under a quit claim deed.[104] Moreover, in determining whether a quit claim has been created, "*operative words of grant or release are subordinated to words defining or restricting the interest granted.*"[105]

The Court rejected the Carkuffs' argument that the use of the word "grant" somehow "transformed" Alice's quit claim deed of all her right, title, and interest into one which passes after-acquired interests.[106] The Court found that, although the instrument uses the term "grant," "it does so in reference to Alice Carkuff's 'right, title and interest' in the property, rather than specifically 'grant[ing] the entire fee, i.e. the property itself, to James Carkuff.'"[107] Thus, "subordinating operative words of grant or release to words defining or restricting the interest granted," the Court construed the deed as a quit claim deed, which did not convey after-acquired title.[108]

98. *Id.*
99. *Id.*
100. *Id.* at 305–06.
101. *Id.* at 306 (quoting Torgerson v. Rose, 339 N.W.2d 79, 82 (N.D. 1983)).
102. *Id.*
103. *Id.*
104. *Id.* at 307.
105. *Id.*
106. *Id.* at 308.
107. *Id.*
108. *Id.*

In so holding, the focus of the Court's attention was on the interest purportedly conveyed, rather than the operative language used to make the conveyance.[109] Had Alice executed a quit claim deed of the land itself (using the term "grant"), rather than all of her interest in the land, the Court may have reached a different conclusion.

4. *Johnson v. Hovland*[110]

In 1976, Mathilda Olson conveyed a 50% mineral interest in certain land to her daughter, Bertha Hovland, who, at the time, was married to Lambert Hovland.[111] The deed was executed on March 22, 1976, and recorded on March 23, 1976.[112] Two days later, the deed was re-recorded, this time containing additional language stating an intention to grant Bertha a life estate interest in the 50% mineral interest (rather than fee simple title as originally granted) with the remainder to Robert Liebl and others (the "Liebls"), who were Bertha's children and grandchildren from a prior marriage.[113] The re-recorded deed was not re-executed or re-acknowledged before a notary public.[114]

Bertha died in 1978, and Lambert died in 1983.[115] Probate proceedings for both estates did not include the mineral interest at issue.[116] Under the intestacy laws in effect at the time, Lambert Hovland's estate was entitled to one-half of Bertha Hovland's estate, while the Liebls were collectively entitled to the other one-half.[117] The Hovlands claimed their fee interest under the originally recorded deed, while the Liebls claimed that they were entitled to the entire remainder interest in the minerals upon Bertha's death under the re-recorded deed.[118]

The North Dakota Supreme Court held that the re-recorded mineral deed was invalid on its face and was not a valid corrective deed.[119] The Court found that, for a corrective deed to be effective, the same grantor that executed the original deed must execute the corrective deed.[120] In addition, "'[w]here the grantor has divested himself or herself of title, although by mistake he or she has not conveyed the title in the way in which he or she intended, he or she may not by a subsequent conveyance correct the mistake, there being no title re-

109. *Id.*
110. Johnson v. Hovland, 795 N.W.2d 294 (N.D. 2011).
111. *Id.* at 296.
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 296–97.
117. *Id.* at 297.
118. *Id.*
119. *Id.* at 301.
120. *Id.*

maining to convey.'"[121] As title had already been conveyed as a result of the originally recorded mineral deed, to be entitled to judgment, the Liebls could only pursue a reformation of that originally recorded deed.[122]

In that regard, the Court held that the Liebls did not present sufficient evidence to support a reformation claim.[123] The Court found insufficient an affidavit of the attorney who prepared the deed, both as originally recorded and as re-recorded.[124] The affidavit stated that the attorney represented Mathilda and that the intent of both Mathilda and Bertha was for Bertha to receive a life estate interest, with the remainder interest to the Liebls.[125] The Court noted that, while the affidavit purports to set forth the intent of both parties, the affidavit indicates that the attorney only represented Mathilda, not Bertha.[126] The Court noted that "[t]his is particularly relevant since the alleged 'mutual intention' ultimately reduces or limits Bertha Hovland's estate in the mineral interests to a life estate."[127] In addition, although the Liebls executed various instruments throughout the years purporting to claim an interest in the minerals, including oil and gas leases and stipulations as to how the remainder interests were to be owned, the Court found that this was not evidence of Bertha's intent.[128] In short, there was "no documentary evidence expressing Bertha Hovland's intent and no other testimonial evidence in the record."[129]

5. *Motschman v Bridgepoint Mineral Acquisition Fund*[130]

Motschman owned a mineral interest in a tract of land.[131] Bridgepoint sent a letter to Motschman, offering to purchase his mineral interest for $600 per acre.[132] Motschman sent a return letter indicating his interest in selling his mineral interest.[133] Bridgepoint then sent a letter, along with a mineral deed, to Motschman and included a sight draft for $63,996.00.[134] The letter instructed Motschman to sign and notarize the deed and then deposit the draft.[135] Due to an error

121. *Id.* (quoting 26 C.J.S. *Deeds* § 43 (2001)).
122. *Id.*
123. *Id.* at 302.
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. Motschman v. Bridgepoint Mineral Acquisition Fund, L.L.C., 795 N.W.2d 327 (N.D. 2011).
131. *Id.* at 329.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

with Motschman's name, Bridgepoint sent a corrective mineral deed, which Motschman signed in the presence of a notary.[136] Bridgepoint then sent Motschman a check for $63,996.00.[137] Subsequently, Motschman sent a letter to Bridgepoint claiming he did not intend to sell his minerals; rather, he only intended to lease them.[138] Bridgepoint informed Motschman that the sale was final because the contract was completed and the deed was recorded.[139]

Motschman sued Bridgepoint arguing that consideration for the contract failed because he never cashed the $63,996.00 check.[140] The North Dakota Supreme Court held that consideration does not fail simply because a party refuses to cash a check.[141] If Motschman objected to the form of payment, then he was obligated to voice his objection to the form of payment at the time it was tendered.[142] Because Motschman did not object to the form of payment, the tender of a cashier's check instead of cash did not invalidate the contract.[143]

6. *Jensen v. Rudman Partnership & Hess Corp.*[144]

The Rudman Partnership ("Rudman") and Hess Corporation ("Hess") each owned part of an oil and gas lease covering approximately 880 acres in Mountrail County, North Dakota.[145] The lease was executed August 5, 1949, and had been held by continuous production of oil and gas from part of the leased premises, while other lands covered by the lease never had production.[146] The plaintiffs, as successors-in-interest to the original lessors, served a Notice of Demand for Further Development of the non-producing tracts upon both Rudman and Hess on November 24, 2009.[147] The plaintiffs subsequently brought an action claiming that Rudman and Hess breached the implied covenant to further develop, the implied covenant of reasonable exploration, and the implied covenant not to hold leases for speculative purposes by failing to develop the non-producing tracts for over sixty-one years.[148]

The court confirmed that development is not limited only to drilling operations.[149] Rudman and Hess presented evidence of development

136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.* at 331.
142. *Id.*
143. *Id.*
144. Jensen v. Rudman P'ship & Hess Corp., No. 4:10–cv–00027, 2011 WL 1791102 (D.N.D. May 10, 2011).
145. *Id.* at *1.
146. *Id.* at *1–2.
147. *Id.* at *1.
148. *Id.* at *2.
149. *Id.* at *3.

upon the non-producing tracts including the completion and evaluation of a seismic shoot, the drilling of a well, review of drilling reports from nearby wells, and the evaluation of surrounding lands and producing wells in the area.[150] The Plaintiffs acknowledged that these were development activities but alleged that because they did not occur until nearly sixty years after execution of the lease, the lease should be forfeited for breach of the implied covenants.[151] The court explained that a lessor alleging a breach of an implied covenant is not entitled to forfeiture until the lessee has been given notice of the breach, a demand for compliance with the covenant has been made, and a reasonable time for compliance has been given.[152] Because Rudman and Hess had conducted development activities upon the non-producing premises immediately prior to and after the demand for development, the fact that there had previously been nearly sixty years of non-development was not sufficient to create a fact issue, and the court granted summary judgment in favor of Rudman and Hess, dismissing the lessor's claims.[153]

7. *Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co.*[154]

Helen Testerman owned a mineral interest in a tract of land in North Dakota.[155] In 1989, Testerman, a California resident, executed a will devising her "'share of the Mineral Rights in North Dakota to my nephew, John H. Avery.'"[156] In her will, Testerman also devised other property to her children, Monte C. Testerman and Colleen D. Pando, and to her niece, Georgette O. Navarro.[157] Following the execution of her will, Testerman acquired additional mineral interests in North Dakota from her brother when he died in 1996 ("additional mineral interest").[158]

Helen Testerman died on January 28, 2004 and probate proceedings for her estate were conducted in California.[159] The California probate court issued an order closing her estate and distributed the North Dakota mineral interests to Avery, a sum of cash to Navarro, and the residue of the estate to Pando and Monte Testerman.[160]

150. *Id.* at *5–6
151. *Id.* at *6.
152. *Id.* (citing Johnson v. Hamill, 392 N.W.2d 55, 58–59 (N.D. 1986)).
153. *Id.* at *7.
154. Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co., 801 N.W.2d 677 (N.D. 2011).
155. *Id.* at 680.
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.*
160. *Id.*

On August 25, 2007, Avery entered into an oil and gas lease with the Dublin Company.[161] The lease was recorded September 5, 2007, and later assigned to Lario Oil & Gas Company ("Lario").[162]

In July 2008, Pando filed probate proceedings in North Dakota for the estate of Helen Testerman.[163] Avery filed a petition with the North Dakota probate court seeking an order to distribute the North Dakota mineral interests to Avery in accordance with the California probate court order.[164] Meanwhile, Navarro filed a motion with the California probate court seeking to set aside the order contending that the deed by which Testerman acquired the additional mineral interest from her brother's estate contained handwritten language, written by Testerman, stating "these mineral rights go to Georgette Navarro by Helen Testerman."[165] Navarro asked the California probate court to issue a revised order distributing the additional mineral interest to Navarro in accordance with the handwritten directive.[166]

On October 21, 2008, Navarro entered into an oil and gas lease with The Triple T, Inc. ("Triple T"), covering the subject tract.[167] The lease was recorded on October 31, 2008, and Triple T subsequently assigned an 80% net revenue interest in the lease to Brigham Oil and Gas, L.P. ("Brigham").[168]

Subsequently, through the North Dakota probate proceedings, Avery and Navarro executed an agreement wherein they stipulated and agreed that Avery would receive 100% of the mineral interest Testerman owned of record when her will was executed and that Avery would receive 25% of the additional mineral interest Testerman acquired from her brother's estate, with the remaining 75% of the additional mineral interest to be owned by Navarro.[169] Avery and Navarro did not provide notice of the agreement to Dublin, Triple T, Brigham, or Lario, and those companies were not parties to the agreement.[170] On November 4, 2008, the personal representative of Testerman's estate executed deeds distributing the mineral interests in accordance with the agreement between Testerman and Navarro.[171] The deeds were recorded on December 12, 2008.[172]

Thereafter, Brigham commenced this action alleging it was entitled to its appropriate percentage of production from the oil and gas lease

161. *Id.*
162. *Id.* at 680–81.
163. *Id.* at 681.
164. *Id.*
165. *Id.* at 680–81.
166. *Id.* at 681.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.*

executed by Navarro and that Lario was wrongfully claiming 100% of the production from the mineral interests through its lease with Avery.[173] Brigham argued that Navarro's lease covered the interest she acquired through the agreement and subsequent personal representative's deed.[174]

The North Dakota Supreme Court held that under section 30.1-12-01, "[u]pon the death of a person, the decedent's real and personal property devolves to the persons to whom it is devised by the decedent's last will . . . , subject to administration."[175] The Supreme Court held that because Testerman's will devised her North Dakota mineral interests to Avery, Avery had an ownership interest in the mineral interests upon Testerman's death, subject to administration.[176] Because the California probate court order provided that Testerman's mineral interests passed to Avery, Avery acquired all of Testerman's North Dakota mineral interests at the time of her death subject to administration of the estate in North Dakota.[177] In addition, the Court held that, as a matter of law, under sections 30.1-20-12 and 30.1-22-01, although the agreement is binding upon Avery and Navarro, it is not binding upon Brigham or Lario.[178] Thus, the deeds of distribution issued by the personal representative of the estate were ineffective to alter the interests of anyone not a party to the agreement.[179] Accordingly, because Avery owned the entire interest when he executed the lease to Dublin, subject to administration of the estate, Dublin acquired the lease from the party who owned the entire mineral interest.[180] When Triple T acquired its lease from Navarro, prior to the agreement, Navarro did not have equitable, record, or legal title to the mineral interest.[181] Therefore, the Court held the Dublin lease covers the entire mineral interest at issue.[182]

173. *Id.* at 681–82.
174. *Id.* at 682.
175. *Id.* at 683 (quoting N.D. CENT. CODE § 30.1-12-01 (2004)).
176. *Id.*
177. *Id.*
178. *Id.* at 685.
179. *Id.*
180. *Id.* at 686.
181. *Id.*
182. *Id.*