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I. Introduction

Multiple oil and gas related issues have been addressed over the past year. This article will summarize and discuss various case law, legislative, and regulatory developments related to the oil and gas industry in North Dakota from August 1, 2015 to July 1, 2016.

II. Legislative and Regulatory Developments

The North Dakota Legislature did not have a regular session in 2016. Therefore, it did not enact any new oil and gas legislation.

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A. November Ballot

The North Dakota electorate will decide on a proposed constitutional amendment in the November election. The proposed amendment changes how a certain percentage of the revenue from oil extraction taxes from taxable oil produced in North Dakota will be allocated and distributed. The measure is intended to expand the educational purpose for which the foundation aid stabilization fund may be used.

B. North Dakota Industrial Commission, Department of Mineral Resources, Oil and Gas Division

On June 29, 2016, the North Dakota Industrial Commission, Department of Mineral Resources, Oil and Gas Division ("Commission") approved additions and amendments to the North Dakota Administrative Code Chapters 43-02-03, 43-02-05, and 43-02-08, which address new requirements for the oil and gas industry in areas such as saltwater handling facilities, underground gathering pipelines, and spill containment.[1] Outlined below are some of amendments instituted by the Commission.

The Commission instituted new regulations concerning underground gathering pipelines.[2] These regulations included new notice and inspection requirements for underground gathering pipelines, as well as new bonding requirements for crude oil and produced water underground gathering pipelines.[3] The Commission also amended and expanded regulations concerning the design, construction, operation, maintenance and abandonment of underground gathering pipelines.[4]

The Commission also included new permitting and bonding requirements for new and existing saltwater handling facilities.[5] Additionally, the Commission promulgated a variety of new regulations and requirements regarding the construction, operation, abandonment and reclamation of such facilities.[6] The Commission further established new requirements for construction of perimeter berms to provide emergency containment around saltwater handling facilities, storage facilities and production sites, and treatment plants.[7]

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1. NORTH DAKOTA INDUSTRIAL COMMISSION, https://www.dmr.nd.gov/oilgas/ (last visited September 23, 2016).
2. *Id*.
3. *Id*.
4. *Id*.
5. *Id*.
6. *Id*.
7. *Id*.

The Commission's website contains a complete description of these new policies.[8] The tentative effective date for these rules is October 1, 2016.[9]

III. Judicial Developments

A. The Supreme Court of North Dakota

1. No Private Right of Action for Damages Under N.D.C.C. § 38-08-06.4: Vogel v. Marathon Oil Co.

N.D.C.C. § 38-08-06.4 restricts the flaring of gas produced with crude oil from an oil well and provides that a "producer shall pay royalties to royalty owners upon the value of the gas flared" for wells operated in violation of the statute.[10] In *Vogel v. Marathon Oil Co.*, the Supreme Court of North Dakota addressed whether there is an implied right of action for damages under the statute.[11] Sarah Vogel, a royalty owner, sued Marathon Oil Company alleging that Marathon flared gas in violation of the statute and failed to pay royalties on the value of the flared gas.[12] Vogel sought declaratory relief and money damages under N.D.C.C. § 38-08-06.4 and the Environmental Law Enforcement Act ("ELEA").[13] She also sought damages under common law for conversion and waste.[14] The district court dismissed the complaint without prejudice finding that N.D.C.C. § 38-08-06.4 does not provide an expressed or implied private right of action and further concluded that it did not have subject matter jurisdiction because Vogel did not exhaust her administrative remedies.[15] Vogel appealed the district court judgment.[16]

Upon review, the Court noted that N.D.C.C. § 38-08-06.4 does not expressly provide for a private right of action.[17] Vogel argued, however, that a private right of action was implied in the statute.[18] After a review of statutory language and legislative intent, the Court found there is not an

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8. *Id*.
9. *Id*.
10. 879 N.W.2d 471, 476 (N.D. 2016) (quoting N.D. CENT. CODE ANN. § 38-08-06.4(4) (West 2016)).
11. *Id.* at 474.
12. *Id.* at 474-75.
13. *Id*.
14. *Id.* at 475.
15. *Id.*
16. *Id*.
17. *Id.* at 476.
18. *Id.*

implied private right of action for violation of the statute.[19] Instead, the statute contains a comprehensive regulatory scheme that provides an administrative remedy to royalty owners for a violation of N.D.C.C. § 38-08-06.4.[20]

The Court then addressed Vogel's claim that the ELEA provided a private right of action to enforce N.D.C.C. § 38-08-06.4.[21] The ELEA authorizes a private right of action for any person aggrieved by the violation of any environmental statute.[22] While the Court agreed that the N.D.C.C. § 38-08-06.4 is an environmental statute as defined by the ELEA, it noted that any remedies provided by the ELEA "are cumulative and do not replace statutory or common law."[23] The Court held that the administrative remedies available under N.D.C.C. ch. 38-08 must be pursued "before an 'aggrieved person' may bring a private action under the ELEA," which provides a cumulative remedy that may be pursued if the Commission fails or refuses to act.[24] Therefore, "Vogel [was] required to exhaust her administrative remedies prior to pursuing any claims she may have in court."[25]

The Court further addressed Vogel's common law claims of conversion and waste for damages for unpaid royalties on the flared gas.[26] The Court discussed that N.D.C.C. § 38-08-06.4 regulates the flaring of gas from oil wells, gives royalty owners the right to receive royalties on gas flared in violation of the statute, and provides a remedy for the royalty owner when the statute is violated, "replacing common law claims for royalties on flared gas."[27] The Court then found that the statute is designed to cover the entire field relating to royalties for flared gas and as a result N.D.C.C. § 38-08-06.4 governs any claim for royalties for flared gas.[28] Therefore, the district court did not err in dismissing Vogel's common law claims.[29]

CONCURRING OPINION: Chief Justice VandeWalle wrote a separate opinion concurring in result but outlining concerns with the precedent that

19. *Id.* at 477.
20. *Id.* at 477-78.
21. *Id.* at 480.
22. *Id.*
23. *Id.* at 480-81.
24. *Id.* at 481.
25. *Id.* at 485.
26. *Id.* at 482-83.
27. *Id.* at 482.
28. *Id.*
29. *Id.* at 483.

may be established if the majority's opinion is read too broadly.[30] The concurring opinion discussed concerns regarding potential interference with the contractual relationship between the lessor and the lessee and the rights of the lessor under the lease.[31] Further the concurring opinion expressed concern the decision "will be cited as the basis for the position that N.D.C.C. § 38-08-06.4(5) is the exclusive remedy for lessors or, at the very least, the portal through which all lessors must pass before being allowed to bring a private cause of action against the lessee for royalties for flared gas under their leases," and indicated the opinion should not be cited as such.[32]

DISSENTING OPINION: Justice Kapsner wrote a detailed dissenting opinion regarding the majority's finding that the royalty owner was required to exhaust her administrative remedies before she could bring a private action under the ELEA.[33] The dissenting opinion argued that the "majority ignored the straightforward legal concept" of a "cumulative remedy" and confused the nature of such remedies.[34] The dissent further asserted that, by requiring an aggrieved person to first exhaust administrative remedies before bringing an action under the ELEA, the majority's holding "eviscerates the ELEA" and effectively removed the private enforcement power it was meant to provide.[35] In doing so, the majority disregarded the plain language of the ELEA and frustrated its purpose.[36] The dissent also argued that the majority's holding was inconsistent with other jurisdictions' treatment of similar legislation.[37] Noting that prior to the majority's opinion, the Court had not yet interpreted North Dakota's ELEA.[38] The dissenting opinion maintained that "[t]he majority's inaugural interpretation here strips the statute of the very purpose the legislature expressed for its enactment" and disregards the very reason it was adopted.[39]

30. *Id.* at 485-86.
31. *Id.* at 485.
32. *Id.* at 486.
33. *Id.* at 486-91.
34. *Id.* at 489-90.
35. *Id.* at 486.
36. *Id.*
37. *Id.* at 486-89.
38. *Id*.
39. *Id.* at 489-90.

2. Royalty Interests Cannot Not Be Considered Abandoned if Related Mineral Interests are In Use: Yesel v. Brandon.

In *Yesel v. Brandon*,[40] surface owners, Phyllis Yesel and Gloria Van Dyke, brought an action to quiet title against nonparticipating royalty interest owners alleging the abandoned mineral statutes found in N.D.C.C. ch. 38-18.1 applied to the royalty interests and that the minerals in fact had been abandoned.[41] Under N.D.C.C. § 38-18.1-02, any mineral interest unused for a period of twenty years immediately preceding the first publication of the notice is deemed to be abandoned.[42] Title to the abandoned mineral interest then vests in the owners of the surface estate.[43] The district court granted summary judgment for the royalty owners holding that the abandoned mineral statutes did not apply to royalty interests and even if they did, the royalty interest was used in the previous twenty years.[44] The surface owners then appealed.[45] Christian Teigen, an heir to the named royalty owners, cross appealed from a judgment denying his motion to file a counterclaim and his motion for attorneys' fees.[46]

On appeal, the Supreme Court concluded that the royalty interests were used during the previous twenty years and thus found it unnecessary to address the issue of whether the abandoned mineral statutes apply to royalty interests.[47] Since the mineral interests related to the defendants' royalty interests were covered by numerous leases, were subject to a pooling order, and were producing oil from at least two wells, it was undisputed that the mineral interests were used within the twenty-year period prior to the notice of lapse.[48] Given that a royalty interest owner cannot develop or produce the related mineral interest but can only receive a share of the proceeds of production mineral, the Court held that "a royalty interest cannot be considered abandoned if the related mineral interest is being used under N.D.C.C. § 38-18.1-03(1)"[49] and affirmed summary judgment in favor the royalty owners.[50]

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40. 867 N.W.2d 677 (N.D. 2015).
41. *Id*. at 679.
42. *Id*. at 681.
43. *Id*.
44. *Id.* at 680.
45. *Id*. at 679.
46. *Id*.
47. *Id.* at 680–81.
48. *Id.* at 682.
49. *Id*.
50. *Id*. at 685.

Regarding the issues raised on cross appeal, the Court found that the district court abused its discretion and misapplied the law regarding compulsory counterclaims when it denied the motion to file the counterclaim and remanded for reconsideration of that motion.[51] As to the motion for attorneys' fees, however, the Court concluded the district court did not abuse its discretion in denying that motion.[52]

3. Meaning of "Production" and an Approach for Determining "Production in Paying Quantities" Addressed: Fleck v. Missouri River Royalty Corp.

In *Fleck v. Missouri River Royalty Corp.*,[53] the Supreme Court of North Dakota concluded that the district court, in finding that production in paying quantities was not required to extend a lease, misapplied the law in its interpretation of the lease.[54] The lease at issue was executed in 1972.[55] The term of the lease was for ten years and "as long thereafter as oil or gas, or either of them, is produced from said land by the lessee, its successors and assigns."[56] The lease also contained a savings clause which provided that if production ceased after the expiration of the primary term, the lease would not expire if, within ninety days of cessation, the lessee resumed operations to drill a well or to restore production.[57] In 1982, a well was completed on the property thereby extending the lease.[58] In 2012, Nathaniel Fleck and Alma Bergmann, as trustees of the George J. Fleck Trust (collectively "Fleck"), owner of the mineral interest covered by the lease, brought an action to quiet title, alleging that the well stopped producing in paying quantities in 2010, and the lease had therefore expired.[59]

The district court declared that the lease was valid and granted summary judgment in favor of the lessees.[60] The district court, in concluding that the lease remained in full force and effect at all times, found that the well produced a few barrels per day on average, any temporary cessation of production was timely restored, and production in paying quantities was not

51. *Id*.
52. *Id*.
53. 872 N.W.2d 329 (N.D. 2015).
54. *Id*. at 331.
55. *Id*.
56. *Id.* at 332.
57. *Id.* at 335.
58. *Id.* at 331.
59. *Id.*
60. *Id.*

necessary to extend the lease.[61] Fleck appealed the district court's findings.[62]

On appeal, the Court examined the definition of the term "production," as it was not specifically defined in the lease.[63] Noting that technical words are to be interpreted as they would be by persons working in the related profession, the Court found that, in absence of a definition, the term "production" is "generally interpreted to mean 'production in paying quantities'" when the term is used in a "so long thereafter" clause in an oil and gas lease. [64] The Court further noted that this interpretation has generally been adopted because the objective of a lease is to obtain production of oil or gas in quantities that are commercially profitable to both parties, and parties generally do not intend for the lease to be held for speculative purposes only. [65] Therefore, the Court held that in this case, the term "production" as used in the habendum clause meant "production in paying quantities." [66] In addition, the Court looked at the savings clause of the lease and held that "production" as used in the savings clause must also be interpreted as "production in paying quantities" for the same reasons.[67]

After reviewing past decisions and approaches used in other jurisdictions, the court agreed with the rationale used by Texas and other courts, holding that "[a] court must consider whether the well yielded a profit over operating costs over a reasonable period of time and whether a reasonable and prudent operator would continue to operate a well in the manner in which the well was operated under the relevant facts and circumstances."[68] Finding that a genuine issue of material fact existed regarding whether the well was producing in paying quantities, the Court reversed and remanded the case.[69]

4. Specific "No Deductions" Language Prevails Over General "Market Value at the Well" Provision: Kittleson v. Grynberg Petroleum Co.

In *Kittleson v. Grynberg Petroleum Co.*,[70] the Supreme Court of North Dakota affirmed that the meaning of "market value at the well" can be

61. *Id.*
62. *Id.*
63. *Id*. at 333.
64. *Id.* (quoting Tank v. Citation Oil & Gas Corp., 848 N.W.2d 691 (N.D. 2014)).
65. *Id.*
66. *Id.*
67. *Id.*
68. *Id.* at 335.
69. *Id*. at 336.
70. 876 N.W.2d 443 (N.D. 2016).

contractually modified.[71] In 1991, Grynberg Petroleum Company (collectively with its successors in interest "Grynberg" or "Lessee") and Tyronne and Marilyn Kittleson ("Lessor") entered into an oil and gas lease and executed a separate rider that modified and amended the lease.[72] The royalty clause in the lease specified that the Lessor was be to paid the market value at the well for all gas produced and sold by the Lessee from the leased premise, "provided however, that there shall be no deductions from the value of Lessor's royalty of any required processing, cost of dehydration, compression, transportation, or other matter to market such gas."[73] The gas produced was a sour gas and had to be processed to be made marketable.[74] After the sale of the gas and liquids, Grynberg calculated the Lessor's royalty payment by deducting post-production costs using "the work-back method."[75] A suit was filed claiming that post-production costs were wrongfully deducted because the language contained in the royalty clause prohibited such deductions.[76] After a bench trial, the district court determined that, based on terms in the royalty clause, Grynberg was not allowed to deduct processing costs from the royalties paid to the Lessor.[77] Applying the ten-year statute of limitations, the district court entered a judgment awarding underpaid royalties, interest on the underpaid royalties, and attorney's fees.[78]

On appeal, Grynberg argued that the Court's holding in *Bice v. Petro-Hunt, LLC*[79] controlled and allowed it to deduct post-production costs from the royalty payments.[80] In its interpretation of the "market value at well," the Court in *Bice* adopted the "at the well rule," which allows a lessee to use the work-back method to calculate the gas or oil market value at the well and to deduct post-production costs from its proceeds before calculating royalty.[81] The Court rejected Grynberg's argument, noting that facts in the present case were distinguishable from *Bice*.[82] While the royalty clauses in both cases required the Lessor to be paid the market value at the

71. *Id*. at 450.
72. *Id.* at 445.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 446.
77. *Id.*
78. *Id.*
79. *Id.* (citing Bice v. Petro-Hunt, L.L.C., 768 N.W.2d 496 (N.D. 2015)).
80. *Kittleson*, 876 N.W.2d at 447.
81. *Id.* at 446-47.
82. *Id.* at 447.

well for all gas produced from the leased premise, here the lease contained additional "no deduction" language that was not included in the lease in *Bice*.[83] Noting that the "market value at the well" and the "no deductions" terms in present lease conflict, the Court held that the more specific "no deduction" language controlled.[84] Therefore, the Court concluded that under the "no deductions" language of the royalty clause, Grynberg could not deduct post-production costs.[85]

5. Court Interprets the Interests Conveyed in Multiple Deeds to Railroad: EOG Resources Inc. v. Soo Line Railroad Co.

In *EOG Resources Inc. v. Soo Line Railroad Co.*,[86] the Supreme Court of North Dakota interpreted whether deeds granting interests to a railroad company conveyed a fee simple interest or an easement.[87] EOG Resources, Inc. ("EOG") brought an action to quiet title claiming that Soo Line Railroad had no interest in the minerals in and under the disputed property.[88] In dispute were sixteen parcels of land acquired by Soo Line through seven deeds, a condemnation order, and an Act of Congress.[89] The parties stipulated that the Act of Congress only granted an easement.[90] The district court granted EOG's motion for summary judgment finding that Soo Line only had an easement across the disputed properties.[91] Soo Line Railroad appealed, arguing that the district court erred in concluding that the seven deeds conveyed only an easement.[92] Soo Line Railroad did not appeal the district court's finding regarding the condemnation order. [93]

On appeal, in support of the finding for summary judgment, EOG relied on *Lalim v. Williams County*,[94] where the Court had previously determined that a deed to the county road system only conveyed an easement.[95] However, in its review, the Court distinguished *Lalim* by finding that the deed in *Lalim* was from a private party to the government, whereas in the

83. *Id*.
84. *Id.*
85. *Id.*
86. 867 N.W.2d 308 (N.D. 2015).
87. *Id*. at 310.
88. *Id.* at 311.
89. *Id.* at 312.
90. *Id.*
91. *Id.* at 313.
92. *Id.*
93. *Id.*
94. *Id*. at 314 (citing Lalim v. Williams Cnty., 105 N.W.2d 339 (N.D. 1960)).
95. *Id*. at 314–15.

present case, the deeds are from private parties to a private party.[96] Additionally, it found that the deeds in the present case contain different granting language from the deed in *Lalim.*[97]

The Court instead relied on the specific granting language of the deeds to determine the grantors' intent.[98] The language of six of the seven deeds stated that the grantors "do hereby GRANT, BARGAIN, SELL and CONVEY unto the said party of the second part, its successors and assigns, a piece, parcel or tract of land."[99] Specifically noting that "conveyances to railroads that purport to grant and convey a strip, piece, parcel, or tract of land, and do not contain additional language relating to the use or purpose to which the land is to be put . . . are usually construed as passing an estate in fee."[100] The Court concluded these six deeds were unambiguous and granted a fee simple estate.[101]

The Court then found the language of the seventh deed ambiguous, stating, "Although the deed on its face conveys the property in fee simple, the property description creates ambiguity about whether the parties intended to convey a lesser estate."[102] Since there could be reasonable differences of opinion regarding the inferences to be drawn from such language, summary judgment was inappropriate.[103]

Accordingly, the Court reversed the district court and determined that six deeds were unambiguous and conveyed a fee simple estate and judgment should be entered in favor of Soo Line. [104] The Court further remanded the case for trial on the seventh deed only, as it was ambiguous, and stated that on remand the district court may consider extrinsic evidence to clarify the parties' intentions. [105]

Chief Justice VandeWalle wrote a concurring and dissenting opinion and Justice Sandstrom wrote a separate dissenting opinion.[106] Both opinions argue that all of the deeds were ambiguous and that the entire case should be remanded for trial.[107]

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96. *Id*. at 315.
97. *Id*.
98. *Id.* at 317.
99. *Id.* at 316.
100. *Id.* at 317 (quoting 65 Am. Jur. 2d *Railroads* § 45 (2015)).
101. *Id.* at 321–22.
102. *Id.* at 322.
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id*. at 323-24.
107. *Id.*

6. Court Interprets Language Contained in Warranty Clause as a Reservation of Mineral Interests in the Grantors: Johnson v. Shield.

In *Johnson v. Shield*,[108] the Supreme Court of North Dakota was asked to interpret the language of deed.[109] At issue was whether specific language contained in the warranty clause of a deed constituted a reservation of mineral interest in the grantors.[110] On December 8, 1942, Eugenie and Roy Goldenberg executed a warranty deed for a certain tract of land unto Julian and Arthur Johnson.[111] At the time of the conveyance, the Goldenbergs owned all of the minerals associated with the conveyed tract.[112] While the granting clause of the warranty deed did not address mineral interests, the warranty clause provided that the Goldenbergs

> covenant . . . that they are well seized in fee of land, real estate and premises aforesaid, and have good right to sell and convey the same in manner and form aforesaid; that the same are free from all encumbrances, but reserving, however, to the grantor fifty per cent (50%) of all of the oil, gas, hydro-carbons and minerals in or with respect to said real property.[113]

Eric A. Johnson and others (collectively "Johnson"), successors in interest to Julian and Arthur Johnson, brought an action to quiet title seeking a determination that the deed conveyed all of the minerals located under the property conveyed.[114] On cross-motions for summary judgment, however, the district court found that the deed unambiguously reserved unto the Goldenbergs fifty percent of the minerals from their conveyance and granted summary judgment in favor of Suzanne M. Shield and others (collectively "Shield"), successors in interest to Eugenie and Roy Goldenberg.[115]

On appeal, Johnson, relying on the Court's decision in *Muller v. Strangeland*,[116] argued that the reservation language in the warranty clause only constituted a limitation on the warranty, not a reservation of the

108. 868 N.W.2d 368 (N.D. 2015).
109. *Id*.
110. *Id.* at 369.
111. *Id*.
112. *Id.*
113. *Id.* at 370.
114. *Id.*
115. *Id.*
116. *Id*. at 371 (citing Mueller v. Stangeland, 340 N.W.2d 450 (N.D. 1983)).

minerals.[117] In response, the Court acknowledged that exceptions inserted in the warranty clauses are usually only intended to protect the grantor on the warranty and not meant to be a limitation on the interest conveyed in the granting clause.[118] The Court noted, however, that "reservations or exceptions of property interest may appear in any part of a deed, including the warranty clause." [119] Focusing on the phrase, "reserving . . . *to the grantor*," the Court reasoned the phrase made no sense in the context of a limitation on the warranty.[120] Therefore, the Court concluded that "the disputed language here is so explicit as to leave no room for doubt that it was intended to be a reservation of mineral interests in the Goldenbergs rather than a limitation on the warranty."[121]

7. Disputed Issues of Material Fact Regarding Whether the Plaintiffs Were Good Faith Purchasers for Value, Precluded Summary Judgment: Desert Partners IV, L.P. v. Benson

In *Desert Partners IV, L.P. v. Benson*,[122] the Supreme Court of North Dakota faced an issue revolving around an unrecorded deed. Sometime before 1990, Elmer Benson conveyed a one-fifth share of mineral interests in 160 acres to each of his named grandchildren, Edward Benson, John Benson, Louise Benson, Geri Benson, and Ann Kemske.[123] In 1990, Ann Kemske and her husband conveyed and quitclaimed, by deed, all right, title, and interest in the 160 acres to Thomas Benson.[124] This deed was not recorded until April 9, 2012.[125] On April 15, 2010, Ann Kemske conveyed, by mineral deed, all right, title, and interest in minerals to 1,720 acres, including the 160 acres in dispute, to Family Tree.[126] This deed was recorded May 12, 2010.[127] Family Tree then conveyed twenty acres of the 160 acres to Desert Partners by deed dated May 12, 2010, and recorded June 2, 2010.[128] Desert Partners and Family Tree brought an action to quiet

117. *Id.* at 372.
118. *Id*.
119. *Id*. at 371.
120. *Id.* at 372 (emphasis in the original).
121. *Id.* at 372–73.
122. 875 N.W.2d 510 (N.D. 2016).
123. *Id.* at 511-12.
124. *Id.* at 512.
125. *Id.*
126. *Id.*
127. *Id*.
128. *Id.*

title.[129] John Benson filed an answer, claiming, in part, that the disputed interest had been conveyed unto him and his son, Ben Benson, by Thomas Benson, and arguing that the Plaintiffs failed to make a reasonable and diligent inquiry regarding the ownership of the disputed mineral interests. [130] After its initial ruling of summary judgment was reversed and remanded due to improper notice of the hearing, the district court again granted summary judgment in favor of Desert Partners and Family Tree.[131]

On appeal, John Benson claimed that a statement of claim of mineral interests was recorded in November 2005 stating Thomas Benson, Leatrice Benson, Edward Benson, Louise Benson Kack, Geri Benson, and Ann Kemske were the record owners of the disputed minerals.[132] Accordingly, he argued, that Plaintiffs were not good faith purchasers for value because they should have inquired into the ownership of the minerals.[133] The Court found that "[t]he statement of claim provides constructive notice on the record about Ann Kemske's ownership and authority to convey the disputed mineral interests in 2010, when she executed the mineral deed to Family Tree."[134] The Court further concluded that the statement of claim imposed a duty on Family Tree to make further inquiries regarding the ownership of the disputed mineral interests, and therefore Family Tree was deemed to have constructive notice of the facts that an inquiry would have revealed.[135] Therefore, the Court, finding that genuine issues of material fact existed as to whether the Plaintiffs were good-faith purchasers for value, reversed the motion for summary judgment and remanded for further proceedings.[136]

8. Court Holds that Language Contained in Land Manager's Letter Did Not Modify Lease: Valentina Williston, LLC v. Gadeco, LLC.

In *Valentina Williston, LLC v. Gadeco, LLC,*[137] the Supreme Court of North Dakota affirmed a ruling against a top lessee, finding that the primary lease had not expired and promissory estoppel was not applicable.[138] On May 4, 2007, Leroy and Norma Seaton executed an oil and gas lease unto

129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.* at 515.
133. *Id.* at 512.
134. *Id.* at 515.
135. *Id.*
136. *Id.*
137. 878 N.W.2d 397 (N.D. 2016).
138. *Id*.

Gadeco, LLC ("Gadeco") covering various sections of land.[139] The lease had a primary term of five years and contained a "continuing operations clause" that allowed the primary term to be extended if no more than ninety days elapsed between the completion or abandonment of one well and the beginning of drilling operations of the subsequent well. [140] A well was spud on the property on August 31, 2011. [141] On February 9, 2012, the Seatons entered into a top lease with Valentina Exploration, LLC covering the same section of land already under lease with Gadeco.[142] On March 5, 2012, a land manager for Gadeco sent a letter to lessors stating that

> [p]ursuant to the terms of your Oil and Gas lease with us, dated May 4, 2007 . . . this fulfills our obligation to drill a well and hold your lease acreage in Sections 5, 8, and 18 beyond its primary term. As indicated by the lease, we are tendering a payment of $230.02 which constitutes a shut-in royalty equal to $1.00 per net acre. In addition, per the terms of your lease with us, if no wells are spud prior to the lease expiration of May 4[,] 2012, then the acreage in Sections 6 and 7 will terminate.[143]

Subsequently, within fifty-five days after the primary term, Gadeco completed wells on Sections 6 and 7.[144] Valentina Williston sued for declaratory judgment and quiet title arguing, in part, that the due to the effect of the land manager's letter, the lease was terminated as a matter of law and also that the letter invoked "the doctrine of estoppel."[145] The district court granted summary judgment in favor of Gadeco.[146]

On appeal, the Court noted that the lease outlined specific duties if the lessee were to surrender the lease but did not contain provisions on how the parties could modify it.[147] The Court found that the letter did not meet the requirement for surrender.[148] Then, relying on contract theories, the Court stated that in order for Valentina Williston to succeed, it must show that the letter was a written contract that modified the lease.[149] Upon review, the

139. *Id*.
140. *Id.* at 399.
141. *Id*.
142. *Id.*
143. *Id*.
144. *Id.* at 400.
145. *Id.*
146. *Id.* at 401.
147. *Id.*
148. *Id*.
149. *Id.* at 402.

Court concluded that the letter did not modify the lease because there was no offer or consideration.[150] Additionally, even if the letter contained an offer, there was no acceptance.[151]

The Court also addressed Valentina Williston's argument regarding promissory estoppel, finding that the letter did not contain "a clear, definite, and unambiguous promise."[152] Thus, the promissory estoppel was inapplicable.[153] The ruling of the district court was affirmed.[154]

B. United States Court of Appeals for the Eighth Circuit

1. Pugh Clause Interpreted to Divide Lease at Section Boundary: Northern Oil and Gas, Inc. v. Moen.

In *Northern Oil and Gas, Inc. v. Moen*,[155] the Circuit Court of Appeals for the Eighth Circuit, applying North Dakota law, interpreted a Pugh clause in favor of the lessee.[156] The lease in question, executed in 1984, leased five sections of land (using the Public Land Survey System), for a term of five years and "thereafter as long as oil and gas is [sic] produced from said land or Lessee is engaged in drilling or reworking operations, thereon."[157] The lease also contained a Pugh clause which stated,

> This lease shall terminate at the end of the primary term as to all of the leased lands except those lands located within the same section of a production unit[] or spacing unit prescribed by law or administrative authority on which is located a well producing or capable of [] producing oil or gas in commercial quantities.[158]

At the end of the primary term of the lease, Section 3 contained two active wells and each was assigned a spacing unit.[159] A spacing unit is an administrative created boundary assigned by North Dakota Commission "for drilling, producing and proration purposes," which is used to prevent waste, avoid unnecessary drilling, and protect correlative rights.[160] The first

150. *Id.* at 403.
151. *Id.*
152. *Id.* at 404.
153. *Id.*
154. *Id.* at 405.
155. 808 F.3d 373 (8th Cir. 2015).
156. *Id.*
157. *Id.* at 375 (internal quotation marks omitted).
158. *Id.* at 375-76.
159. *Id.* at 376.
160. *Id.* at 375 (quoting N.D.C.C. § 38-08-07(1)).

well was assigned a 160 acre spacing unit comprised of the northwest quarter of Section 3 and the second well was assigned a 160 acre spacing unit comprised of the northeast quarter of Section 3. [161] The southwest quarter, however, was not included within any spacing unit with an active well. [162] The primary dispute was whether the Pugh clause divided the lease at the spacing unit boundaries or the section boundaries.[163] Essentially, the issue was whether the entire section was held by production anywhere on that section or, in the alternative, did the Pugh clause divide the lease such that the lease expired at the end of the primary term as to all land not contained in a spacing unit with an active well.[164] The district court agreed with the Northern Oil and Limsco that the division line is the section boundary, not the spacing boundary, and entered summary judgment in their favor.[165]

On appeal, the Court considered the specific language of the Pugh clause, as well as the parties' interpretations regarding the meaning of the phrase "the same section of."[166] Noting that neither side proposed an interpretation that gave meaning to both of the disputed terms "section" and "of," the Court found Northern Oil and Limsco's interpretation to be more persuasive and less damaging to the plain language of the Pugh clause.[167] Therefore, the Court adopted the interpretation of Northern Oil and Limsco such that the Pugh clause divided the lease at the section boundaries and affirmed the summary judgment granted by the district court.[168]

161. *Id.* at 376.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 377.
167. *Id.* at 377–78.
168. *Id.* at 380.