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# NOTES AND COMMENTS

## CONVEYANCES OF FRACTIONAL MINERAL INTERESTS: NORTH DAKOTA SUPREME COURT REPUDIATES THE *DUHIG* RULE, *GILBERTSON v. CHARLSON*

### I. INTRODUCTION

Among the many pitfalls in the field of mineral interest conveyances are those controversies involving the construction given reservations or exceptions<sup>1</sup> of fractional mineral interests. One such controversy surrounds the construction given to a warranty deed in which an owner of a fractional mineral interest purports to convey a larger estate than can be granted because of other outstanding mineral interests in the estate.<sup>2</sup> Over the last forty years, the rule developed by the Texas Supreme Court in *Duhig v. Peavy-Moore Lumber Co.*,<sup>3</sup> has been applied by some state courts<sup>4</sup> to resolve this controversy.

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1. [A] "reservation" is a clause in a deed or other instrument of conveyance by which the grantor creates, and reserves unto himself, some right, interest, or profit in the estate granted, which had no previous existence as such, but is first called into being by the instrument reserving it. An "exception", on the other hand, is a clause in a deed or other conveyance by which the grantor excepts something out of that which he granted by deed.

Marberry, *The Construction of Mineral Exceptions and Reservations*, 14 OKLA. L. REV. 457, 459 (1961).

Another authority notes that while the distinction between a reservation and exception was previously significant, today the distinction has a limited importance. 1 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 14.2 (1962). See also 1 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 310 (1980); 2 R. PATTON, PATTON ON LAND TITLES § 344 (2d ed. 1957).

2. "A fecund source of confusion and litigation is found in mineral conveyances made by owners of less than 100% of the minerals in a tract of land." Meyers and Williams, *Oil and Conveyancing: Grants and Reservation by Owners of Fractional Mineral Interests*, 43 VA. L. REV. 639, 639 (1957).

3. 135 Tex. 503, 144 S.W.2d 878 (1940).

4. Besides Texas, six other state courts continue to give judicial approval to either the *Duhig* rule or its rationale. Though not expressly citing the rule, Alabama has approved the *Duhig* rationale in *Martin v. Knight*, 275 So. 2d 117 (Ala. 1973). In Colorado, *Brown v. Kirk*, 127 Colo. 453, 257 P.2d 1045 (1953), remains as precedent for following the *Duhig* reasoning. Louisiana has not expressly adopted the *Duhig* rule, though its acceptance of the rationale is evident in *Continental Oil Co. v. Tate*, 211 La. 852, 30 So. 2d 858 (1947) (dictum) and *Dillon v. Morgan*, 362 So.

Generally, the *Duhig* rule has been used to deny the grantor the title to the fractional mineral interest reserved or excepted in his deed to the grantee by finding that the warranty in the deed estops him from asserting title to the fractional interest at the expense of the purported conveyance to the grantee.<sup>5</sup> The rule continues to be applied, despite some limitation in its application to certain situations<sup>6</sup> and some criticism.<sup>7</sup> The endurance and acceptance of the *Duhig* rule has caused one commentator to note that, "[a]s applied to deed transactions, the rule in the *Duhig* case, whether sound or not, is beyond the judicial point of no return."<sup>8</sup> However, both that statement and the *Duhig* rule were repudiated by the North Dakota Supreme Court, a former adherent of the rule,<sup>9</sup> in its recent decision, *Gilbertson v. Charlson*.<sup>10</sup>

This note will briefly examine the background of the *Duhig* case and the application of the rule. After an analysis of North Dakota's decision in *Gilbertson*, the implications and effect of its repudiation of the *Duhig* rule upon both North Dakota and other *Duhig* adherents, including Oklahoma, will be assessed.

## II. THE *DUHIG* RULE

### A. *The Case*

An understanding of the nature of the controversy governed by the *Duhig* rule may be gained by looking at the facts and reasoning of the

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2d 1130 (La. App. 1978). Mississippi has approved the rule in a series of decisions beginning with *Salmen Brick & Lumber Co. v. Williams*, 210 Miss. 560, 50 So. 2d 130 (1951). In *Salmen*, the court declined to apply *Duhig's* theory of estoppel. Subsequent Mississippi decisions did not expressly apply *Duhig's* estoppel rationale until *Rosenbaum v. McCaskey*, 386 So. 2d 387 (Miss. 1980), which, in contrast, states both rationales of the rule used in *Duhig*. Oklahoma expressly approved the *Duhig* rule in *Birmingham v. McCoy*, 358 P.2d 824 (Okla. 1960), and later applied it in *Bryan v. Everett*, 365 P.2d 146 (Okla. 1961). Finally, the Wyoming Supreme Court adopted the rule in *Body v. McDonald*, 70 Wyo. 37, 334 P.2d 513 (1959).

5. Opinions differ on whether the *Duhig* rule applies only to warranty deeds. See notes 30-31 *infra* and accompanying text.

6. Texas has limited the application of the *Duhig* rule in two areas. In *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 431 (1957), the court refused to extend the rule to the construction of oil, gas, and mineral leases. *Accord*, *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781 (1956). The court in *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953), applied the *Duhig* rule to give the grantee the purported fractional interest conveyed, but refused to allow the rule to change an express agreement stipulating the interests the grantor was to receive in bonuses, rentals, and royalties under leases executed by the grantee.

7. See notes 40-55 *infra* and accompanying text.

8. Barber, *Duhig to Date: Problems in the Conveyancing of Fractional Mineral Interests*, 13 Sw. L.J. 320, 331 (1959).

9. North Dakota judicially approved *Duhig* in *Kadrmas v. Sauvageau*, 188 N.W.2d 753 (N.D. 1971).

10. 310 N.W.2d 144 (N.D. 1981).

*Duhig* case itself. The defendant, Duhig, owned a tract of land under a deed in which his grantor had reserved an undivided one-half interest in the land's minerals. Duhig later conveyed that same tract of land by a general warranty deed to the Miller-Link Lumber Company. In his deed, Duhig also retained an undivided one-half interest in the mineral estate without disclosing the previous grantor's one-half mineral interest reservation.<sup>11</sup> The plaintiff, Peavy-Moore Lumber Company, succeeded the Miller-Link Lumber Company as owner of any title and estate in the tract of land acquired from Duhig's deed. Peavy-Moore brought a suit against Duhig's widow and heir to recover title and possession of the tract.<sup>12</sup> The trial court held that the plaintiff was entitled to recover the title and possession of the land, but could not recover any right to the land's minerals.<sup>13</sup> On the plaintiff's appeal, the Texas Court of Civil Appeals reversed this decision, holding that the plaintiff should recover the one-half mineral interest that Duhig's deed had purportedly conveyed.<sup>14</sup> The Texas Supreme Court affirmed the court of civil appeals' decision.<sup>15</sup> However, it was the reasoning used by the Texas Supreme Court in its affirmation of the award to the plaintiff that was significant in producing the *Duhig* rule.

Two approaches to the construction of the *Duhig* deed and the grantor's reservation within it are apparent in the Texas Supreme Court's opinion. The opinion's author, Commissioner Smedley, construed the description in the granting clause to indicate that the deed was intended to invest the grantee with title to the surface and a one-

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11. The court noted that the description of the land in the granting clause of Duhig's deed was that of the same tract conveyed to Duhig and "was not intended to define or qualify the estate or interest conveyed but . . . [was] inserted to further identify the tract or area described by metes and bounds." 135 Tex. at —, 144 S.W.2d at 879. *But see* Harris v. Windsor, 294 S.W.2d 798 (Tex. 1956) (reservation of fractional mineral interests in description of tract in deed's warranty indicated what interest grantee was to take under the deed). *See also* Masterson, *Double Fraction Problems in Instruments Involving Mineral Interests*, 11 Sw. L.J. 281, 287 (1957).

12. Peavy-Moore Lumber Co. v. Duhig, 119 S.W.2d 688 (Tex. Civ. App. 1938). Through receivership proceedings, Peavy-Moore acquired the Miller-Link Lumber Co.'s title to the land conveyed by Duhig. Meanwhile, in satisfaction of a personal judgment recovered against Duhig by a third party, Duhig's reserved one-half interest was transferred by a sheriff's deed to that third party. Duhig's widow and heir later brought suit to recover Duhig's title to the mineral estate. The Peavy-Moore Lumber Co. then sued Duhig's widow and heir, as well as the third party who claimed Duhig's reserved mineral interest, to recover the title and possession of the tract.

13. *Id.* at 689.

14. The court of civil appeals found the earlier case of Klein v. Humble Oil & Refining Co., 126 Tex. 450, 86 S.W.2d 1077 (1935), to be controlling and rationalized that Duhig's reservation of the one-half interest in the minerals was meant to be the same one-half interest previously reserved by Duhig's grantor. Duhig, in effect, had reserved no interest to himself. 119 S.W.2d at 690.

15. 135 Tex. 503, 144 S.W.2d 878 (1940).

half mineral interest. Smedley interpreted Duhig's reservation as grantor of one-half the land's mineral interests as subtracting the prior outstanding one-half interest reservation from the operation of Duhig's conveyance.<sup>16</sup>

Commissioner Smedley noted, however, that the majority of the court favored a second approach. While basically concurring that the proper construction of Duhig's deed revealed an intent to convey a warranted title to the surface and one-half of the tract's minerals, the majority viewed Duhig's reservation of the one-half interest as intending to reserve the mineral interest for himself rather than subtracting the prior outstanding one-half interest.<sup>17</sup> Without a reference to the outstanding one-half interest, Duhig's deed warranted and purportedly conveyed title to the surface and the remaining one-half mineral interest. The supreme court found that Duhig's reservation of that same one-half interest was a breach of the deed's warranty because the remaining one-half interest could not be simultaneously warranted, conveyed, and reserved by the grantor.<sup>18</sup> The court then formulated a unique remedy for the breach applying what has been called an "analogy to the doctrine of estoppel by deed against assertion of an after-acquired title."<sup>19</sup> The court held that the grantor, Duhig, was estopped by his deed's warranty from claiming title to the one-half mineral interest reserved in his deed.<sup>20</sup> Instead, the one-half mineral interest purportedly conveyed in Duhig's deed passed to the plaintiff and grantee, Peavy-Moore Lumber Co., without the plaintiff having to seek a remedy in a suit for breach of warranty.<sup>21</sup> The final result on the status of title in the tract and mineral rights was the same under either approach taken by the *Duhig* court: Duhig, the grantor, owned no interest; Peavy-Moore Lumber Co., the plaintiff and grantee, held title to the surface and one-half of the mineral interests; and a third party, a prior owner of the tract, held title to the other one-half of the minerals.

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16. Commissioner Smedley's approach is basically the same rationale used by the Texas Court of Civil Appeals in *Peavy-Moore Lumber Co. v. Duhig*, as discussed in note 14 *supra*.

17. 135 Tex. at —, 144 S.W.2d at 880.

18. *Id.*

19. 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 311.

20. "It [the covenant of general warranty] operates as an estoppel denying to the grantor and those claiming under him the right to set up such title against the grantee and those who claim under it." 135 Tex. at —, 144 S.W.2d at 880-81.

21. The court quoted from a Michigan case, *Smith v. Williams*, 44 Mich. 240, 6 N.W. 662 (1880): "The short and effectual method of redress is to deny him the liberty of setting up his after-acquired title as against his previous conveyance." The court rationalized that "[i]f such enforcement of the warranty is a fair and effectual remedy in case of after-acquired title, it is, we believe equally fair and effectual and also appropriate here." 135 Tex. at —, 144 S.W.2d at 880.

## B. *The Rule and Its Application*

The rule from the *Duhig* case has been expressed in various ways.<sup>22</sup> A typical statement of the rule is that a grantor who gives a warranty deed purporting to convey a fractional mineral interest will be estopped from asserting title in a reserved fractional mineral interest if the grantor's asserted title would derogate from the grantee's title to that fractional interest purportedly conveyed.<sup>23</sup>

It has been observed that the *Duhig* rule furnishes a more equitable remedy to a grantee for a grantor's breach of warranty than a suit for damages.<sup>24</sup> Using reasoning similar to the equitable doctrine of after-acquired title,<sup>25</sup> the rule places the loss of title on the grantor who has warranted his title to the mineral estate when in fact he owns only a portion of it.<sup>26</sup>

Through judicial interpretation, the *Duhig* rule has been both extended and narrowed. Several decisions have indicated that the rule applies not just to fractional halves of mineral estates, but to any fractional amount<sup>27</sup> of a mineral interest or its elements<sup>28</sup> conveyed and

22. See, e.g., 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 311; Barber, *supra* note 8, at 330; Marberry, *supra* note 1, at 467.

23. See Barber, *supra* note 8, at 330.

24. *Id.*

25. [A] deed made when the grantor has no title, or has title to a lesser estate than he purports to convey, may operate as an agreement to convey which may be enforced in equity in case of a subsequent acquisition of title by the grantor. However, in most states there is no necessity for action by the grantee, in that the courts hold that an after-acquired or perfected title inures to the grantee, his heirs or assigns, by way of estoppel of the grantor to assert any claim in opposition to his own conveyance, and that such a title vests in the grantee by operation of law as soon as it is acquired by the grantor. The doctrine applies, irrespective of how the subsequent title is acquired, and regardless of whether the grantor, who assumed to convey what he did not have, acted under an honest mistake or committed a fraud.

1 R. PATTON, PATTON ON LAND TITLES § 215 (2d ed. 1957).

26. 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 311.

27. See, e.g., *Brown v. Kirk*, 127 Colo. 453, 257 P.2d 1045 (1953) (grantor attempted to reserve one-half interest with a one-fourth interest outstanding); *Brannon v. Varnado*, 234 Miss. 466, 106 So. 2d 386 (1958) (grantor attempted to reserve a one-fourth interest with a one-half interest outstanding); *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953) (grantor attempted to reserve a three-eighths interest with a one-fourth interest outstanding).

28. A grantor may convey or reserve less than a full mineral interest. The grantor could, for example, convey all of the land's minerals to the grantee, but reserve the right to execute oil and gas leases on that same land. See Masterson, *A Survey of Basic Oil and Gas Law*, 4 ANNUAL INSTITUTE ON OIL AND GAS LAW PROCEEDINGS 219, 237-38 (1953).

The *Duhig* rule has been held applicable in several cases to reservations of mineral interest elements. See, e.g., *McClung v. Lawrence*, 430 S.W.2d 179 (Tex. 1968) (royalty interest); *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62 (1959) (interest in royalties, bonuses, and delay rentals); *Haddad v. Boon*, 609 S.W.2d 609 (Tex. Civ. App. 1980) (application for writ of error granted) (non-participating royalty interests); *Jackson v. McKenney*, 602 S.W.2d 124 (Tex. Civ. App. 1980) (non-participating royalty interests).

reserved. The rule thus operates to secure, first, to the grantee, the fractional interest purportedly conveyed, and then to allocate any excess fractional interest to the grantor's reservation. The *Duhig* rule has also been applied to invest a grantee with title to a fractional interest subsequently acquired by the grantor, which was outstanding at the time of the grantor's purported conveyance.<sup>29</sup>

In *Duhig*, the deed contained a general warranty, but it is unclear whether the *Duhig* rule can be limited to general warranty deeds. Two decisions have applied the rule to deeds with special warranties.<sup>30</sup> The inapplicability of the *Duhig* rule to quitclaim deeds, however, is supported by several authorities.<sup>31</sup>

The remedy provided by the *Duhig* rule affects only those lands covered by the grantor's deed. The rule may not be used to satisfy a failure of title in the grantor by substituting mineral interests from the grantor's other tracts of land not conveyed to the grantee.<sup>32</sup>

The *Duhig* rule serves to prevent title loss in the grantee from a purported conveyance of interest that failed to disclose outstanding ownership of part of the mineral estate. When the deed particularizes the outstanding ownership and explicitly states that the conveyances and grantor's reservation are subject to that outstanding ownership, the *Duhig* rule cannot be applied.<sup>33</sup> Similarly, the *Duhig* rule cannot be applied if its effect is to frustrate the intentions of the parties to the

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29. See *Howell v. Liles*, 246 S.W.2d 260 (Tex. Civ. App. 1951) (grantee's receipt of the additional interest acquired by the grantors subsequent to the warranty deed estopped the grantors from claiming more than the fractional amount reserved); *Frels v. Schuette*, 222 S.W.2d 1006 (Tex. Civ. App. 1949) (grantor was estopped from claiming title to an outstanding one-half mineral interest that had reverted to the grantor subsequent to his warranty deed to the grantee that failed to disclose that same outstanding interest).

30. *American Republics Corp. v. Houston Oil Co.*, 173 F.2d 728 (5th Cir. 1949), *cert. denied*, 338 U.S. 858 (1949); *Merchants & Mfrs. Bank v. Dennis*, 229 Miss. 447, 91 So. 2d 254 (1956). Dictum from both decisions stated that the *Duhig* rule could possibly be applied to quitclaim deeds.

31. See, e.g., 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 311; Barber, *supra* note 8, at 332; Discussion Notes, 2 OIL & GAS REP. 1359 (1953). A recent Mississippi decision, *Rosenbaum v. McCaskey*, 386 So. 2d 387 (Miss. 1980), involved a quitclaim deed and distinguished *Duhig* on that basis.

32. *Hanson v. Pelham*, 413 S.W.2d 394 (Tex. Civ. App. 1967), *rev'd sub nom. Forrest v. Hanson*, 424 S.W.2d 899 (Tex. 1968). In *Forrest*, the court indicated that the grantors would be liable for money damages for the breach of their warranty upon the failure of title to the land conveyed. *Id.* at 905.

33. See *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798 (1956); Discussion Notes, 6 OIL & GAS REP. 1237 (1956). Another decision, *Pich v. Lankford*, 295 S.W.2d 749 (Tex. Civ. App. 1956), *rev'd on other grounds*, 157 Tex. 335, 302 S.W.2d 645 (1957), suggests that *Duhig* may be inapplicable when outstanding reservations are excepted in subsequent deeds of record.

deed.<sup>34</sup> Thus, if the parties expressly agree in their deed that any risk of title loss is to be borne by the grantee, that party may not use the *Duhig* rule when the grantor's mineral interest ownership subsequently proves insufficient to fulfill the purportedly conveyed interest.<sup>35</sup> The *Duhig* rule has also been held inapplicable to those contractual provisions in the deed affecting mineral rights separate from the conveyance of the fractional mineral interest ownership.<sup>36</sup>

Reformation of the deed may be an alternative remedy to the application of the *Duhig* rule.<sup>37</sup> In several decisions, mutual mistake of the parties' understanding of the deed's provisions has prevented the application of the rule.<sup>38</sup> However, the attempt to reform the deed may itself be prevented by statutes of limitation or the defense of laches.<sup>39</sup>

### C. *Objections to the Duhig Rule*

Despite the acceptance and application of the *Duhig* rule, it has not been without its critics. The court in *McMahon v. Christmann*<sup>40</sup> noted that the *Duhig* rule was "novel", and without substantial, directly-related precedent.<sup>41</sup> The dissent in the same case suggested the *Duhig* rule may have been "bad law."<sup>42</sup> However, the majority in *McMahon* also remarked that, "[t]he rule having become an established one in the construction of deeds we have no occasion, in this case or at this late hour, to question its validity when it is so used."<sup>43</sup>

Perhaps the major objection to the *Duhig* rule has been that the rule has, at times, been applied to contradict the parties' expressed or

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34. Barber, *supra* note 8, at 334.

35. *Id.*

36. *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953). However, *Benge* may have been limited by the later decision of *McClung v. Lawrence*, 430 S.W.2d 179 (Tex. 1968), in which the Texas Supreme Court, while reversing on other grounds, affirmed the lower court's application of the *Duhig* rule to provisions in the deed relating to royalty interests. The *McClung* court distinguished, though not clearly, the contractual provisions in the *Benge* deed from those in *McClung*, which the court found to have been written in terms of a reservation. *Id.* at 180.

37. Barber, *supra* note 8, at 337.

38. See *Searcy v. Tomlinson Interests, Inc.*, 358 So. 2d 373 (Miss. 1978); *McClung v. Lawrence*, 430 S.W.2d 179 (Tex. 1968); *Miles v. Martin*, 159 Tex. 336, 321 S.W.2d 62 (1959).

39. *Haddad v. Boon*, 609 S.W.2d 609 (Tex. Civ. App. 1980) (application for writ of error granted). See also Barber, *supra* note 8, at 337.

40. 157 Tex. 403, 303 S.W.2d 341 (1957).

41. The *McMahon* court noted that the cases cited by the *Duhig* court involved after-acquired title. *Id.* at —, 303 S.W.2d at 345.

42. 304 S.W.2d 267 (Tex. 1957) (Garwood, J.) (separately published dissenting opinion).

43. 157 Tex. at —, 303 S.W.2d at 346. The *McMahon* court also claimed their discussion of *Duhig*'s "novelty" was not said in "disparagement" of the rule, but only to support the *McMahon* court's refusal to extend the rule to oil, gas, and mineral leases. *Id.* at —, 303 S.W.2d at 345.



implied intent as manifested in the deed. In *Salmen Brick & Lumber Co. v. Williams*,<sup>44</sup> the dissent criticized the *Duhig* rule for permitting the implications of a warranty to override the grantor's clear intent to make a reservation.<sup>45</sup> The same author questioned the wisdom of a rule that allowed a court "gratuitously to save a grantor against an anticipated suit for breach of warranty."<sup>46</sup> A similar, cautionary note was sounded in *McMahon v. Christmann*<sup>47</sup> when the court stated that the *Duhig* rule "should not be applied to work an automatic transfer of rights and interests . . . a transfer which would all too often frustrate rather than effectuate the intentions of the parties."<sup>48</sup> Other authorities warn of dogmatic application of the *Duhig* rule with results contrary to those intended in the deed's formation.<sup>49</sup> Using the *Duhig* rule, a grantee could acquire a larger fraction of the mineral interest than was bargained for in the deed by placing the title loss upon the grantor.<sup>50</sup>

Over the *Duhig* rule's forty-year span, some discomfort has been expressed as to whether the rule, as an equitable principle, should be applied to benefit a grantee who accepts the deed with constructive or actual knowledge of the true state of title of outstanding ownerships.<sup>51</sup> The *Duhig* rule has not been applied in some situations where the grantee had actual knowledge of outstanding ownerships.<sup>52</sup> However, the greater number of decisions<sup>53</sup> and authorities<sup>54</sup> evidently prefer to ignore the presence of actual or constructive notice to the grantee as to

44. 210 Miss. 560, 50 So. 2d 130 (1951).

45. *Id.* at —, 50 So. 2d at 136 (Alexander, J., dissenting).

46. *Id.* Addressing the *Salmen* defendant who claimed under the grantor, Justice Alexander explained the majority's application of the *Duhig* rule: "[w]e think it best to take your reserved half mineral interest and give it to appellees because it is better for you to surrender this interest than that you be exposed to embarrassment or litigation." *Id.* at —, 50 So. 2d at 137.

47. 157 Tex. at —, 303 S.W.2d at 346.

48. *Id.*

49. *See, e.g.*, Discussion Notes, 10 OIL & GAS REP. 591 (1959); Discussion Notes, 6 OIL & GAS REP. 1237 (1956).

50. 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 311.

51. *Id.* *See also* Barber, *supra* note 8, at 337.

52. *See, e.g.*, Dixon v. Abrams, 145 Colo. 86, 357 P.2d 917 (1960); Harris v. Windsor, 156 Tex. 324, 294 S.W.2d 798 (1956).

53. In *Duhig*, the plaintiff had record notice of the state of the title. In other decisions, the grantee's record notice was disregarded by the court in applying the *Duhig* rule. *See* Lucas v. Thompson, 240 Miss. 767, 128 So. 2d 874 (1961); Bryan v. Everett, 365 P.2d 146 (Okla. 1961); Birmingham v. McCoy, 358 P.2d 824 (Okla. 1960); McClung v. Lawrence, 430 S.W.2d 179 (Tex. 1968); Frels v. Schuette, 222 S.W.2d 1006 (Tex. Civ. App. 1949).

Some courts have applied *Duhig* without comment as to the actual knowledge of outstanding ownership held by the grantee. *See* Brannon v. Varnado, 234 Miss. 466, 106 So. 2d 386 (1958); Miles v. Martin, 159 Tex. 336, 321 S.W.2d 62 (1959); Benge v. Scharbauer, 152 Tex. 447, 259 S.W.2d 166 (1953); Coyne v. Butler, 396 S.W.2d 474 (Tex. Civ. App. 1965).

54. *See* 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 311; Barber, *supra* note 8, at 337.

any outstanding mineral interest, and rely instead on the deed's language to resolve the dispute.<sup>55</sup>

### III. GILBERTSON v. CHARLSON

#### A. Statement of the Case

In *Gilbertson v. Charlson*,<sup>56</sup> the plaintiffs and defendants were heirs, respectively, of the grantee and grantors of the disputed deed.<sup>57</sup> The tract of land involved in the litigation was conveyed in 1943 to the predecessor of the grantors and grantee by a warranty deed from the State of North Dakota with a reservation by the state of five percent of the tract's minerals.<sup>58</sup> Through intestate succession, the grantors and grantee inherited equal portions of the tract and thus owned as tenants in common an undivided one-third interest in the whole surface and in ninety-five percent of the minerals in the tract.<sup>59</sup>

In 1947, the grantors conveyed their interest in the property in one warranty deed to the grantee with a reservation to the grantors of fifty percent of "all oil, natural gas, and minerals" on the tract.<sup>60</sup> Thereafter, the parties to the deed, later, the plaintiffs and defendants, executed various oil and gas leases to the property.<sup>61</sup> The plaintiffs brought an action to quiet title to a certain percentage of the mineral rights after a failure by some interest owners to reconcile their net revenue interests upon the completion of a well drilled on the tract.<sup>62</sup>

On appeal,<sup>63</sup> the plaintiffs maintained that the grantors, from their reservation of fifty percent of the section's minerals, had purportedly conveyed the remaining fifty percent mineral interest to the grantee.

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55. In most states, the guide now is the expressed intention of the parties, so far as it can be ascertained from the entire deed . . . the words employed will be given either a technical or a common meaning, depending upon the sense in which they appear to have been used by the parties, and, where possible, neither as to words nor parts should a technical construction be made which will defeat the evident intention.

1 R. PATTON, PATTON ON LAND TITLES § 214 (2d ed. 1957).

56. 301 N.W.2d 144 (N.D. 1981).

57. The court noted that the grantors and grantee were related, the grantee being the sister of the grantors. *Id.* at 145.

58. In 1943, pursuant to the provisions of ch. 149 of the 1939 Session Laws of North Dakota, all deeds from the state contained a five percent reservation of all oil, natural gas, and minerals in the land conveyed. Brief for Appellants at 3, *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981).

59. 301 N.W.2d at 145.

60. *Id.*

61. Brief for Appellants at 4-5, *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981).

62. *Id.*

63. The district court had granted the defendants a summary judgment. 301 N.W.2d at 145.

Since mineral interest ownerships were outstanding in both the State of North Dakota and the grantee, the grantors had breached their warranty to the purported conveyance. Under the *Duhig* rule, the grantors were estopped by their warranty from asserting title to their reservation of fifty percent of the minerals. The plaintiffs, however, construed *Duhig* to give the grantee the purportedly-conveyed fifty percent interest in addition to her existing ownership of 31 $\frac{2}{3}$ % interest. The plaintiffs thus claimed title to 81 $\frac{2}{3}$ % of the mineral interest.<sup>64</sup>

The defendants contended that *Duhig* was inapplicable when title to the outstanding mineral interest was held by a grantee rather than a prior grantor or a third party.<sup>65</sup> Because the grantee in *Gilbertson* held title to the outstanding mineral interests, the defendants asserted that there could be no failure of the grantee's title because there would be no eviction by one holding a paramount title.<sup>66</sup> The defendants concluded that, absent the failure of the grantee's title, the grantors had not breached their warranty by reserving fifty percent of the section's mineral interests.<sup>67</sup>

#### B. *The Decision*

The *Gilbertson* court's affirmation of summary judgment for the defendants was based primarily on the actual or constructive knowledge held by the grantee at the time of the conveyance.<sup>68</sup> As a co-owner with the grantors of ninety-five percent of the section's mineral interests, the court reasoned that the grantee thus had actual knowledge of the outstanding 31 $\frac{2}{3}$ % of the mineral interests. The court also held that the grantee had constructive knowledge of the state's five percent reservation that was of record.<sup>69</sup>

Based on the grantee's actual and constructive knowledge, the North Dakota Supreme Court distinguished *Gilbertson* from its earlier

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64. Brief for Appellants, *supra* note 61, at 46. As interpreted by the counsel for the appellants (plaintiffs below), *Duhig* protects a grantee in the conveyance of interest purportedly made to him, and does not merely prevent a failure in the grantor's title. Appellant's counsel thus rejected the proposition that the appellants, through the grantee, should take a fifty percent interest that was partly comprised of the 31 $\frac{2}{3}$ % interest already owned by the grantee.

65. Brief for Appellees at 18, *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981).

66. In their brief, the counsel for the appellees (defendants below) quoted from 6A POWELL ON REAL PROPERTY ¶ 908 at 268.24 (1979) (in R. POWELL & P. ROHAN, 1980 edition, quote is found in ¶ 899 at 81-133), which states that the warranty is breached when the grantee suffers an eviction under a paramount title existing at the time of the conveyance. Brief for Appellees at 17, *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981).

67. *Id.* at 18.

68. 301 N.W.2d at 148.

69. *Id.*

approval of the *Duhig* rule in *Kadrmās v. Sauvageau*.<sup>70</sup> The court there noted that the grantees had neither actual nor constructive knowledge of outstanding titles to fractional mineral interests.<sup>71</sup> According to the *Gilbertson* court, the *Kadrmās* grantees' lack of such knowledge justified their claim of a purported conveyance of the mineral estate not reserved by the *Kadrmās* grantors.<sup>72</sup> In contrast, the court determined that the grantee in *Gilbertson* could not similarly claim a purported conveyance of the remaining mineral estate knowing that her grantors possessed only a fraction of the mineral estate.<sup>73</sup> Finding the purported conveyance concept of the *Duhig* rule to be inconsistent with a possession of actual or constructive knowledge of the true state of title, the North Dakota Supreme Court rejected the *Duhig* rule.<sup>74</sup>

Another significant factor in the *Gilbertson* decision is the theory of estoppel used by the court. Rather than applying the estoppel by deed rationale characteristic of the *Duhig* rule, the court utilized a four element test of estoppel in pais that a series of North Dakota decisions have applied in certain real estate controversies.<sup>75</sup> The third element of that test required that the grantee be "destitute of all knowledge" of the

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70. 188 N.W.2d 753 (N.D. 1971).

71. *Id.* at 755. At the time of the conveyance, the grantors had not yet received title to the land which they had purchased earlier from the State of North Dakota. In its quitclaim deed to the grantors, the state had reserved fifty percent mineral interest as was then required by the North Dakota Century Code § 39-09-01. The grantors had reserved the remaining fifty percent mineral interest in their deed to the grantee, but did not disclose the state's reservation. As the state's deed to the grantors was not of record at the time of the conveyance to the grantee, the *Kadrmās* court held that no actual or constructive knowledge of the status of title could be imputed to the grantee. *Id.*

However, in one of their briefs, counsel for the *Gilbertson* appellants (plaintiffs below) suggested that the grantee in *Kadrmās* could be said to have had constructive notice of the state's reservation by virtue of the statute, North Dakota Century Code § 38-09-01, that requires a fifty percent reservation of all minerals to the state. Appellant's Petition for Rehearing at 3, *Gilbertson v. Charlson*, 301 N.W.2d 144 (N.D. 1981).

72. 301 N.W.2d at 147.

73. *Id.* at 148.

74. *Id.*

75. *Cranston v. Winters*, 238 N.W.2d 647 (N.D. 1976) (widow acting as co-executrix of husband's will was not estopped from claiming fee title to property despite will's provision giving her only a life estate in the property); *Hutton v. Korynta*, 218 N.W.2d 177 (N.D. 1974) (lessee's silence at sale of leased property estopped him from asserting his leasehold interest); *Sittner v. Mistelski*, 140 N.W.2d 360 (N.D. 1966) (widow with limited education was not estopped by her action from asserting her title to property when, at the time of those actions, she had no knowledge of her ownership); *Tostenson v. Ihland*, 147 N.W.2d 104 (N.D. 1966) (plaintiff with limited education was not estopped by his failure to object to defendant's possession of property when he was not aware of his ownership of the property); *Gjerstadengen v. Hartzell*, 83 N.W. 230 (N.D. 1900) (administrator who sold land, believing it to be part of the estate, was not estopped by his administrator's deed from asserting title to the land, upon subsequently learning of his ownership).

status of title before the conveyance.<sup>76</sup> Focusing upon that single element, the court found that the remedy of estoppel was not available to the grantee in *Gilbertson* who had actual and constructive knowledge of the outstanding mineral estate ownership.<sup>77</sup>

The court found further justification for a judgment for the grantors in a North Dakota statute<sup>78</sup> that the court read as requiring reservations in a deed be interpreted in favor of the grantor.<sup>79</sup> Finding the interest retained by the grantors in *Gilbertson* to be a reservation, the court recognized the reservation's validity under the authority of the statute.<sup>80</sup>

#### IV. ANALYSIS OF *GILBERTSON V. CHARLSON*

##### A. *Significance of the Gilbertson Decision*

The duration of the *Duhig* rule makes any challenge to it noteworthy in itself, and *Gilbertson* marks the first such substantial challenge to the rule in a number of years.<sup>81</sup> *Gilbertson* is also noteworthy because it raised two important considerations concerning the operation of the *Duhig* rule.

First, *Gilbertson* addressed the issue of whether the rule is applicable when the grantee holds title to all or a portion of the outstanding mineral interest. If *Duhig* was applicable, the court then had to determine whether the purported conveyance was in addition to, or included, the interest already owned by the grantee. These points are significant because they question whether the *Duhig* rule merely serves to prevent a title loss in the grantee, or whether it operates further to secure the actual purported conveyance to the grantee. Because no

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76. The four element test of estoppel in pais used by the North Dakota Supreme Court was set out in *Gjerstadengen v. Hartzell*, 83 N.W. 230 (N.D. 1900):

[T]o the application of this principle with respect to the title of property it must appear: First, that the party making the admission by his declaration or conduct was apprised of the true state of his own title; second, that he made the admission with the express intention to deceive, or with such careless and culpable negligence as to amount to constructive fraud; third, that the other party was not only destitute of all knowledge of the true state of the title, but of the means of acquiring such knowledge; and, fourth, that he relied directly upon such admission and will be injured by allowing the truth to be disproved.

*Id.* at 232 (emphasis added).

77. 301 N.W.2d at 148.

78. N.D. CENT. CODE § 47-09-13 (1978), which states, in part, that "[a] grant shall be interpreted in favor of the grantee, except that a reservation in any grant . . . is to be interpreted in favor of the grantor."

79. 301 N.W.2d at 148.

80. *Id.*

81. See notes 40-55 *supra* and accompanying text.

other decision interpreting *Duhig* had yet questioned the purpose of the *Duhig* rule,<sup>82</sup> the *Gilbertson* court was addressing an issue with the potential to set an influential precedent with regard to future interpretation of *Duhig*.

Only limited and somewhat inconsistent precedent<sup>83</sup> was available to guide the court in determining *Duhig*'s applicability to the grantee with an outstanding mineral interest and the additional interest, if any, he took from the purported conveyance. By summarily rejecting the *Duhig* rule, the *Gilbertson* court short-circuited any rational analysis it may have given to the issue of a grantee with an outstanding interest and forfeited making the definitive statement on the scope of the *Duhig* rule.

The second consideration raised by *Gilbertson* was its confrontation with the question of the grantee's knowledge of outstanding title. As noted previously, the majority of decisions and authorities disregard or hold as immaterial to the application of the *Duhig* rule the grantee's knowledge of the status of title.<sup>84</sup> However, with the grantee having actual knowledge by her ownership of an outstanding interest in the section, the *Gilbertson* court could have made a persuasive argument to

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82. The decisions discussed in note 83 *infra* as precedent on the issue of a grantee holding an outstanding interest do not involve the considerations concerning the *Duhig* rule's purpose inherent in *Gilbertson*.

83. In *Coyne v. Butler*, 396 S.W.2d 474 (Tex. Civ. App. 1965), the plaintiff conveyed a tract of land to the defendant, reserving one-half of the minerals. The defendant subsequently reconveyed the same tract to the plaintiff, reserving one-half of the minerals to himself. Applying the *Duhig* rule, the court determined that the defendant was estopped from claiming the one-half mineral interest by his warranty deed that reconveyed the land to the plaintiff. The court added the purported conveyance of fifty percent mineral interest to the plaintiff's previously-reserved fifty percent interest to give the plaintiff one-hundred percent ownership of the tract's mineral interest. The *Gilbertson* court distinguished *Coyne* on the basis that the language used by the defendant in reconveying the tract was an exception, rather than a reservation, as in *Gilbertson*. 301 N.W.2d at 147 n.2.

In the same footnote, the *Gilbertson* court cited approvingly another Texas case, *McElmurray v. McElmurray*, 270 S.W.2d 880 (Tex. Civ. App. 1954). The grantor and grantee were related, and each owned an undivided one-half interest in both the surface and mineral estate. The grantor conveyed the one-half ownership of the surface to the grantee, but reserved his one-half interest in the mineral estate. The *Gilbertson* opinion does not indicate that, in fact, the grantee did not argue for an application of the *Duhig* rule. 301 N.W.2d at 147 n.2. The *McElmurray* grantee instead sought to have the grantor's reservation interpreted as being only one-half of the grantor's one-half interest, or a fourth of the total mineral estate. The *McElmurray* court rejected the grantee's argument, finding the deed's language to clearly indicate a reservation of one-half of the land's total mineral estate. 270 S.W.2d at 882.

The *Gilbertson* court in the same footnote also referred to *Gibson v. Turner*, 156 Tex. 289, 294 S.W.2d 781 (1956). Since *Gibson* involved oil and gas leases, its precedential value is questionable because the *Duhig* rule was later held inapplicable to oil and gas leases in *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 341 (1957).

84. See notes 51-55 *supra* and accompanying text.

bar the application of *Duhig* against any grantee with knowledge of the outstanding mineral interest. Alternatively, the court could have made a convincing argument for a limitation on *Duhig*'s application when the grantee has actual knowledge of title through his ownership of the outstanding interest.

While the *Gilbertson* decision unequivocally made the grantee's knowledge of title at the time of the conveyance a bar to the application of *Duhig*, the persuasiveness of its approach remains to be seen. The decision is likely to lack credibility not only for its total rejection of the *Duhig* rule, but also for the court's confusion and misapplication of two different theories of estoppel. The *Duhig* rule was based on an estoppel by deed theory by which the estoppel is raised from elements appearing on the "face of the deed."<sup>85</sup> The *Gilbertson* court used an estoppel in pais theory which can be applied to real estate but is based on the actions of the parties rather than the language of the deed.<sup>86</sup> In at least one decision applying the *Duhig* rule, the court warned of the fallacy of confusing the two estoppel theories.<sup>87</sup>

In relation to real estate, a theory of estoppel in pais has been characterized by one authority as being "based on a representation that one has not title to land and not that he has title" to land.<sup>88</sup> The court's use of an estoppel theory based on an assertion of not having title indicates its confusion over the appropriate estoppel theory. Rather than asserting a lack of title, both the plaintiffs and defendants in *Gilbertson* claimed title to the fractional mineral interest through the reservation of the grantors and the purported conveyance to the grantee, respectively. The *Gilbertson* court was familiar with the estoppel by deed theory since it applied the theory in *Kadrmars* when it approved the *Duhig* rule. Nevertheless, the court's use of the improper theory of estoppel will inevitably diminish *Gilbertson*'s acceptance as precedent on the issue of knowledge of outstanding mineral interest in relation to *Duhig*.

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85. *Equitable Royalty Corp. v. Hullet*, 206 Okla. 233, 237, 243 P.2d 986, 991 (1952) (citing 31 C.J.S. *Estoppel* § 10). See also 1 E. KUNTZ, *supra* note 1, § 14.3.

86. See *Cranston v. Winters*, 238 N.W.2d 647 (N.D. 1976); 4 H. TIFFANY, *LAW OF REAL PROPERTY* § 1235 (3d ed. 1975). See also note 75 *supra* and accompanying text.

87. *Body v. McDonald*, 70 Wyo. 37, 334 P.2d 513 (1959). Admonishing the counsel for the grantors, the court noted that the "[c]ounsel cite us to numerous authorities involving an estoppel in pais or equitable estoppel. These authorities are not in point. Learned counsel have failed to distinguish between an estoppel in pais and an estoppel by deed." *Id.* at —, 334 P.2d at 517. The *Body* court then quoted from the decision in *McAdams v. Bailey*, 169 Ind. 518, —, 82 N.E. 1057, 1059 (1907), in which the court stated that "[i]t is a mistake to liken an estoppel by deed to an estoppel in pais." 70 Wyo. at —, 334 P.2d at 517.

88. 4 H. TIFFANY, *supra* note 86.

The significance of the *Gilbertson* decision may well lie in the solutions that the court could have reached. Instead of rejecting *Duhig* and transforming the grantee's knowledge of outstanding titles into a critical element, the North Dakota Supreme Court should have distinguished *Gilbertson* from other decisions applying the *Duhig* rule on the basis of the grantee's ownership of an outstanding mineral interest. The court could have thus created an exception to the *Duhig* rule based, not on the knowledge of the grantee, but on his status as owner of the outstanding interest purportedly conveyed to him by the grantor's deed. The exception would limit the amount of interest taken by the grantee to that purportedly conveyed, including within that amount the interest already owned by the grantee.

While developing this exception, the *Gilbertson* court could have still applied the *Duhig* rule to the five percent mineral interest reserved by the State of North Dakota.<sup>89</sup> By totally rejecting the *Duhig* rule, the court required that the grantee absorb the loss of the five percent mineral interest. With the use of the exception, the *Gilbertson* court could have applied the *Duhig* rule in order to give the complete fifty percent interest purportedly conveyed to her by the grantor's deed. The exception would then limit the grantee's interest to that fifty percent without adding her outstanding interest to it.

This solution would likely have raised several objections. First, the limitation on the grantee's interest taken against the purported conveyance imposed by the exception would be questioned. It may be argued that the exception circumvents the *Duhig* rule by making the amount of interest conveyed contingent upon the grantee's ownership of a fractional mineral interest rather than being subject to the language of the parties' deed. However, as indicated in the criticism of the *Duhig* rule,<sup>90</sup> the rule can sometimes be applied mechanically to transfer fractional interests without giving consideration to the intentions of the parties. While the proposed exception would require the court's examination of factors other than the deed's language, it may also result in a division of the mineral estate more closely resembling the division intended by the parties.

Under the proposed exception, it is presumed that the grantor and grantee, through their mutual ownership of the mineral estate, knew of the interest held by the other. With this first-hand knowledge of the

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89. See note 58 *supra* and accompanying text.

90. See notes 40-50 *supra* and accompanying text.



status of title, it would be more likely than not that the parties would indicate in their deed the exact interests reserved and conveyed. If, however, the deed is written so that the outstanding interests are not clearly specified, the grantee will be limited to taking only the amount of interest purportedly conveyed. Consequently, the grantee holding title to an outstanding interest may be deemed to be less in need of the *Duhig* rule's equitable protection than the grantee with no prior connection to the land. The proposed exception ensures, at least, that the grantee with an outstanding interest would not be unjustly enriched by the application of the *Duhig* rule.

The proposed exception would also be subject to criticism for increasing litigation in a field already over-burdened with lawsuits. Admittedly, any exception to a rule of law makes its interpretation more complicated, requiring further judicial interpretation.<sup>91</sup> The prospects for increased litigation, however, would be limited. First, the circumstance of mutual ownership between the grantor and the grantee giving rise to the exception would probably occur infrequently and generally involve conveyances among family members. Second, the proposed exception is based on the determination of an objective, verifiable fact of the grantee's ownership of an outstanding fractional mineral interest in the property being conveyed. The objective nature of the determination diminishes the potential of endless variations to be settled on a case-by-case basis.

#### B. *The Effect of Gilbertson in North Dakota*

Confusion, complications, and unanswered questions are the immediate effect the *Gilbertson* decision will have on North Dakota law. Most of the problems introduced by *Gilbertson* will be connected with the issue of knowledge held by the grantee of outstanding title. As a matter of procedure, in any action now brought that involves the interpretation of fractional mineral reservations within a deed, the possession of actual or constructive knowledge by the grantee of outstanding mineral interests becomes a critical element to be proved or disproved. The *Gilbertson* court did not go so far, however, as to indicate which party must show the presence or absence of that knowledge.<sup>92</sup> Because

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91. See, e.g., 1 H. WILLIAMS & C. MEYERS, *supra* note 1, § 311.2. The authors note that "perhaps what is lost by adding complexity to the doctrine of *Duhig v. Peavy-Moore* is offset by the gain in effectuating the parties' intention. As it is now, the *Duhig* rule is in such a state that another complexity will hardly be noticed." *Id.*

92. While the *Gilbertson* court made no definite assignment to either party of a showing of

the *Gilbertson* court found the grantee to have constructive knowledge of a recorded reservation,<sup>93</sup> the customary title examination process, if deemed to provide constructive knowledge of title status, may all but eliminate a grantee's argument of absence of knowledge.<sup>94</sup>

Title examiners, as well as attorneys, will be among those to feel the adverse effects of the *Gilbertson* decision. The complicated nature of mineral interest conveyances in which various elements of the mineral interest ownership may be separated and conveyed independently already sufficiently impedes the rendering of a quick, comprehensive title analysis.<sup>95</sup> Under *Gilbertson*, the title examination process becomes more slow, involved, and subject to error as the examiner must account for all fractional interest reservations and conveyances in each deed. In a chain of title that contains a number of deeds with reservations of fractional interests, the title examiner could probably not provide a concise ownership schedule.

Having repudiated the *Duhig* rule, the *Gilbertson* decision leaves North Dakota attorneys facing some legal gaps with respect to real estate transactions. For example, the *Duhig* rule places the risk of loss upon the grantor if his ownership of the fractional interest proves insufficient to fulfill both his reservation and the purported conveyance to the grantee. After *Gilbertson*, the grantor's assumption of the risk of loss is no longer axiomatic. Unless the attorneys have advised the parties to allocate the risk to one or both parties in their deed, the question of who bears the risk of title loss now becomes contingent upon a determination of the grantee's knowledge of title status.

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knowledge, at least two possible inferences may be made from statements in the court's opinion. In its discussion of the *Kadmas* decision, the *Gilbertson* court notes that no claim or assertion of knowledge was imputed to the *Kadmas* grantees. 301 N.W.2d at 147. A possible interpretation of that statement may be that in *Kadmas*, *Gilbertson*, and future cases, the grantors have the responsibility for raising and proving the grantee's knowledge of outstanding title.

On the other hand, the *Gilbertson* court's use of the four part test for equitable estoppel may be construed to put the burden of proof of lack of knowledge upon the grantee. The grantee would be seeking to estop the grantor from claiming title to the reserved interest. As the party seeking estoppel under that test, the grantee would likely be required to show he was "destitute" of knowledge of the outstanding title.

93. 301 N.W.2d at 147.

94. In *Body v. McDonald*, 70 Wyo. 37, 334 P.2d 513 (1959), the court rejected the grantor's claim that the grantee's constructive knowledge should bar the application of the *Duhig* rule. "[I]nasmuch as purchasers of real property usually examine the title thereto, it is highly probable that the purchasers in those cases had knowledge of an outstanding mineral interest . . ." *Id.* at —, 334 P.2d at 517.

95. "Conveyancing in the oil and gas business appears to be growing more complicated in the sense that the elements making up full ownership rights in oil and gas are more frequently separated from one another in a variety of combinations . . ." Maxwell, *The Mineral Royalty Distinction and the Expense of Production*, 33 TEX. L. REV. 463, 463 (1955).

The *Gilbertson* decision also calls into question the validity of protection furnished by a warranty deed. The *Gilbertson* court did not specifically overrule the earlier statement made in *Kadrmas* that a grantor's warranty obligations are superior to his reservation rights.<sup>96</sup> Yet, it seems certain from *Gilbertson* that the enforcement of that warranty obligation may now be predicated only upon a confirmation of the grantee's lack of knowledge of title status. The amount of litigation will increase as quiet title actions and other suits to determine the fractional interest ownership replace the assurance of ownership formerly furnished by the warranty deed.

The financial impact of the *Gilbertson* decision will not be limited to the expenses incurred by the greater number of lawsuits. The western portion of North Dakota comprises part of the Williston Basin which has recently been the site of increased energy and mineral exploration and development.<sup>97</sup> This activity will not only increase the value of the land and the interests held in it, but will likely encourage those owning some interest in the estate to exercise their rights to develop, or have others develop, that interest.<sup>98</sup> Whether the owner, or another party such as an oil or mineral company, develops the interest held in the estate, the costs involved in a mineral development project can be exorbitant.<sup>99</sup> Among the expenses adding to the cost of a development project are those incurred in the process of ascertaining the true owner-

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96. 188 N.W.2d at 756.

97. See generally Hoffman, *Williston—Reviving of a Great Oil Province*, 79 OIL & GAS J., Feb. 2, 1981, at 136; McCaslin, *East Williston Draws High Exploratory Interest*, 78 OIL & GAS J., May 12, 1980, at 175; Tippee, *High Success Rates Spur Drilling in Williston Basin*, 78 OIL & GAS J., Dec. 22, 1980, at 27.

98. See I H. WILLIAMS & C. MEYERS, *supra* note 1, § 301. The authors list a number of rights possessed by the owner of a mineral estate. Among them is the right to explore for and develop the minerals for himself. The authors note that because of the expense and risk involved, owners of mineral estates often allow others, specifically oil and mineral companies, to develop and extract the minerals. *Id.*

99. See generally COMPTROLLER GENERAL OF THE UNITED STATES, *THE U.S. MINING AND MINERAL PROCESSING INDUSTRY: AN ANALYSIS OF TRENDS AND IMPLICATIONS* (1979). While this report primarily focuses upon actions by the federal government that hinder mineral development projects, it also indicates the costs and financial decisions behind a development project. The report notes that it is not uncommon for mineral development projects to cost at least \$100 million, while some projects may cost more than \$1 billion. Since few companies can afford the high costs of a development project, outside investors are usually sought. Among the factors assessed by these investors in deciding to fund a project are the expected development costs. *Id.* at 16-17.

The costs in ascertaining the true ownership of the mineral rights are part of the development costs of the project. It would then follow that any increase in costs from settling the ownership of the mineral rights would thereby increase the overall development costs, making the project less attractive to the prospective outside investor. See Meyers and Williams, *supra* note 2, at 674 n.83.

ship of the mineral estate.<sup>100</sup> Therefore, an exact determination of the fractional mineral interests held by each owner becomes essential to ensure the proper exercise of development rights and distribution of the project's costs and profits.

Unfortunately, the costs of a development project are likely to escalate in the wake of *Gilbertson*. The increased complexity of title examinations will create costly delays in ascertaining title before the project can be commenced. For titles which cannot be perfected, additional costs may arise from settlements and quiet title actions.

At a time when the intensified development of North Dakota's energy and mineral resources demands a faster and more efficient system of title examination, the *Gilbertson* decision's effect instead is to retard and complicate the title search process. By leaving open a number of factors to be decided upon the element of a grantee's knowledge of title, *Gilbertson* will reduce the number of land and mineral titles considered as "good" in North Dakota.

### C. *Implications of Gilbertson for Other Jurisdictions Following Duhig*

Any ability of the *Gilbertson* decision to influence the other jurisdictions following *Duhig* to similarly repudiate the rule may be a consequence of North Dakota's boom in energy and mineral exploration activities. North Dakota's newly accelerated growth in energy development is in contrast to a decline in energy production experienced by Texas, Oklahoma, and Louisiana<sup>101</sup> which follow *Duhig*.<sup>102</sup> It is possible that these three states, along with other *Duhig* adherents, may recognize North Dakota's growing importance among the energy-producing states and thus give its decisions more precedential value. Furthermore, many of the *Duhig* adherents, including Oklahoma, have not had a recent opportunity to reconsider the rule. If another controversy involving the *Duhig* rule were to arise in Oklahoma or another *Duhig* state, the *Gilbertson* decision would at least give those jurisdictions reason to re-assess the rule's applicability.

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100. Meyers and Williams, *supra* note 2, at 674 n.83.

101. See generally COMPTROLLER GENERAL OF THE UNITED STATES, LONG-TERM PLANNING NEEDED IN OIL- AND GAS-PRODUCING STATES (1980); OFFICE OF RESEARCH AND DEVELOPMENT, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ENERGY FROM THE WEST, A PROGRESS REPORT OF A TECHNOLOGY ASSESSMENT OF WESTERN ENERGY RESOURCE DEVELOPMENT (Science and Public Policy Program, Univ. of Okla. and Radian Corp. 1977); OKLAHOMA ENERGY ADVISORY COUNCIL, ENERGY IN OKLAHOMA (1974).

102. See note 4 *supra*.

As has been indicated, though, it is more probable that Oklahoma and the other states following *Duhig* will not join North Dakota in its repudiation of the rule. First, there is considerable precedent in support of *Duhig*. The long list of Texas case precedent approving the rule would make it difficult to overturn there.<sup>103</sup> Oklahoma had precedent reaching a similar result to *Duhig* even before it expressly approved *Duhig*.<sup>104</sup> Second, a theory of equitable estoppel has not been applied by the other *Duhig* adherents to a controversy similar in nature to that in *Duhig*.<sup>105</sup> Finally, no other jurisdiction following *Duhig* makes the statutory requirement that reservations be interpreted in favor of the grantor, as does North Dakota. Given the absence of these factors, it seems unlikely that the other *Duhig* adherents will find *Gilbertson* a persuasive authority for repudiating the *Duhig* rule.

## V. CONCLUSION

Despite criticism and some limitation, the *Duhig* rule has been recognized for the past forty years to provide certainty and guidance in resolving disputed ownerships of fractional mineral interests. The recent rejection of the long-standing *Duhig* rule by the North Dakota Supreme Court in *Gilbertson v. Charlson* may have both positive and negative consequences.

On the positive side, *Gilbertson* represents the principal challenge to the *Duhig* rule in a number of years. It thus provides the most recent opportunity for a re-assessment of the rule. In *Gilbertson*, the North Dakota Supreme Court also confronted the issues of a grantee's knowledge of title status and a grantee's ownership of the outstanding fractional interest—issues that other courts previously sidestepped in applying the *Duhig* rule.

The negative implications from the *Gilbertson* decision, however, will likely outweigh its possible benefits. *Gilbertson's* rejection of the

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103. *Forrest v. Hanson*, 324 S.W.2d 899 (Tex. 1968); *McClung v. Lawrence*, 430 S.W.2d 179 (Tex. 1968); *McMahon v. Christmann*, 157 Tex. 403, 303 S.W.2d 431 (1957); *Harris v. Windsor*, 156 Tex. 324, 294 S.W.2d 798 (1956); *Benge v. Scharbauer*, 152 Tex. 447, 259 S.W.2d 166 (1953); *Haddad v. Boon*, 609 S.W.2d 609 (Tex. Civ. App. 1980); *Jackson v. McKenney*, 602 S.W.2d 124 (Tex. Civ. App. 1980); *Coyne v. Butler*, 396 S.W.2d 474 (Tex. Civ. App. 1965); *Howell v. Liles*, 246 S.W.2d 260 (Tex. Civ. App. 1951); *Flemming v. Miller*, 228 S.W.2d 335 (Tex. Civ. App. 1950); *Frels v. Schuette*, 222 S.W.2d 1006 (Tex. Civ. App. 1949).

104. See *Murphy v. Athans*, 265 P.2d 461 (Okla. 1953).

105. Oklahoma, for example, has used a four element test for equitable estoppel similar to that applied by the North Dakota Supreme Court in *Gilbertson*. The test, as set out in *Rosser v. Texas Co.*, 173 Okla. 309, 48 P.2d 327 (1935), has not been applied by an Oklahoma court to a *Duhig*-like controversy.

*Duhig* rule means a sacrifice of the certainty and guidance provided by the rule. Litigation appears to be the only certain means to determine the many questions now contingent upon a grantee's knowledge of title status. The deleterious effects of this slow, litigious process of title determination will soon be experienced in those North Dakota real estate transactions involving fractional mineral interests. In particular, those interests tied to lands involved in the recent energy and mineral development boom in North Dakota will be burdened.

North Dakota appears committed in its rejection of the *Duhig* rule.<sup>106</sup> The faulty reasoning of the *Gilbertson* decision and its complication of the title search process make it unlikely that the other *Duhig*-adhering jurisdictions will join North Dakota in its repudiation of the rule. Instead, the problems brought on by *Gilbertson* may, in time, cause the North Dakota Supreme Court to find grounds on which to distinguish *Gilbertson*, and, perhaps, to reaffirm its acceptance of the *Duhig* rule.

*Lisa B. Plumly*

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106. The North Dakota Supreme Court denied a motion for rehearing on January 23, 1981.