No. _____

In The Supreme Court of the United States

T.H. MCELVAIN OIL & GAS LTD. PARTNERSHIP, et al.,

Petitioners,

v.

GROUP I: BENSON-MONTIN-GREER DRILLING CORP. INC., et al.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of New Mexico

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Due Process Clause requires evidence of due diligence in efforts to locate an individual before notice by publication can be used to deprive that person of his or her property. *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Jones v. Flowers*, 547 U.S. 220 (2006). The questions presented are:

I. Were non-resident property owners deprived of their constitutionally mandated right to adequate notice when the New Mexico Supreme Court sanctioned service by publication based solely upon a conclusory affidavit alleging "due diligence" when the real property records provided evidence as to their actual place of residence?

II. Did the New Mexico Supreme Court err in holding, contrary to the decisions of this Court, Circuit Courts of Appeals, and other State Supreme Courts, that notice by publication is sufficient to deprive an owner of property when evidence in the record shows where the out-of-state property owners resided and there were numerous other steps that could have been taken to locate them before their property was taken?

PARTIES TO THE PROCEEDING

Petitioners (Plaintiffs-Appellants below) are Karen Ann Handley Anderson; Susan R. Handley McGrew; Billie L. Phillips; Billie L. Phillips Recoverable Trust Dated April 23, 1996, Billie L. Phillips Trustee; Judy Lynn Quint; Ronald Charles Weeber; Lucile Alice Northcote Trust Dated May 29, 1996, Billie L. Phillips, Successor Trustee; and T.H. McElvain Oil & Gas Limited Partnership, a New Mexico Limited Partnership.

Respondents (Defendants-Appellees below) are Group I: Benson-Montin-Greer Drilling Corp., Inc., a Delaware corporation; Elizabeth Jeanne Turner Calloway; Kelly R. Kinney; Katherine P. Miller; Ronald Michael Miller; Vickie Roann Miller; Thomas R. Miller; Fred E. Turner, LLC, a Delaware Limited Liability Company; John Lee Turner; Linda Voitl a/k/a Linda Davis; Estate of William G. Webb, John G. Taylor, Independent Executor; and Group II: Cheryl U. Adams; E'Twila J. Axtell; BP America Production Company; Coastal Waters Petroleum Company, Inc., a Louisiana Corporation; Energen Resources Corporation, an Alabama Corporation; The Estate of Anne B. Little; First Security Bank of New Mexico, as Personal Representative; Lana Gay Phillips; Henrietta Schultz; The Frank and Henrietta Schultz Revocable Trust Dated January 2, 1990, Henrietta Schultz, Trustee; Schultz Management, Ltd., a Texas Limited Partnership; J. Glenn Turner, Jr., LLC, a Delaware Limited Liability Company; Mary Frances Turner, Jr. Trust, JPMorgan Chase Bank, N.A., Trustee; and Group III: all unknown claimants of interest in the premises adverse to the Petitioners.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, Petitioner T.H. McElvain Oil & Gas Limited Partnership states that McElvain Energy, Inc. is the corporate general partner. McElvain Energy, Inc. has no parent corporation and no publicly held company which owns 10% or more of its stock.

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OPINIONS AND ORDERS BELOW

The Decision of the Supreme Court of New Mexico, *T.H. McElvain Oil & Gas Limited Partnership, et al. v. Group I: Benson-Montin-Greer Drilling Corp., Inc., et al. and Group II: Cheryl U. Adams, et al.*, Nos. S-1-SC-34993 and S-1-SC-34997, *entered* October 20, 2016, is reprinted in the Appendix at App. A.

The corrected Opinion of the New Mexico Court of Appeals, *T.H. McElvain Oil & Gas Limited Partnership, et al. v. Group I: Benson-Montin-Greer Drilling Corp., Inc., et al. and Group II: Cheryl U. Adams, et al.*, No. 2015-NMCA-004, 340 P.3d 1277, *entered* October 24, 2014, is reprinted in the Appendix at App. B.

The Order of the Supreme Court of New Mexico Denying Motion for Rehearing, *T.H. McElvain Oil & Gas*

Limited Partnership, et al. v. Group I: Benson-Montin-Greer Drilling Corp., Inc., et al. and Group II: Cheryl U. Adams, et al., Nos. S-1-SC-34993 and S-1-SC-34997, *entered* November 9, 2016, is reprinted in the Appendix at App. E.

The unpublished Order of the San Juan County District Court confirming and adopting the Special Master Report Directing Judgment in Favor of Defendants, Case No. D-1116-CV-2010-1557-6, *entered* on January 8, 2013, is reprinted in the Appendix at App. C.

The Special Master Report, *T.H. McElvain Oil & Gas Limited Partnership, et al. v. Group I: Benson-Montin-Greer Drilling Corp., Inc., et al. and Group II: Cheryl U. Adams, et al.*, Case No. D-1116-CV-2010-1557-6, *entered* on September 21, 2012, is reprinted in the Appendix at App. D.

JURISDICTION

This Court has jurisdiction to review the Opinion of the New Mexico Supreme Court in a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(a). The New Mexico Supreme Court rendered its decision in this case on October 20, 2016. The New Mexico Supreme Court denied Petitioner's Motion for Rehearing on November 9, 2016. The Petition for Writ of

Certiorari is timely filed within 90 days from that date. Sup. Ct. R. 13.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against themselves; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment of the United States Constitution provides:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny

to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Relevant portions of New Mexico's "Process Statute," N.M. STAT. ANN. § 1.004 (1941) are reprinted in Appendix F.

STATEMENT OF THE CASE

The New Mexico Supreme Court approves the use of conclusory affidavits alleging "due diligence" to support service of process on individuals in, among other actions, Quiet Title actions such as the Complaint in this case. Such affidavits do not include any evidence of the due diligence undertaken, for example, the actual physical activities, if any, the sheriff or other person took to allegedly locate and personally serve property owners. New Mexico courts then rely on these conclusory affidavits to allow for notice by inferior means, such as notice by publication.

The acceptance of such conclusory affidavits alone, without judicial hearing or review to ascertain the sufficiency or validity of attempts to locate individuals, is a recipe for abuse. Under this scheme, a party can simply file an affidavit from a process server alleging "due diligence," state that the putative property owner could not be located in the county, and then ask the

court to order service or notice by another means, usually by publication in that same county.

The absurdity of this procedure is clear. If the process server could not locate the individuals in the county, publication in the same county is a futile gesture. Under such a scheme, the risk of erroneous deprivation of property is heightened by the potential for self-interested and even dishonest parties who, without any judicial scrutiny, are allowed to obtain service by publication, a method which is often meaningless and has been described as "poor and sometimes hopeless substitute for actual service." *New York v. New York N.H. & H.R. Co*., 344 U.S. 293, 296 (1953).

As this Court observed in *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306 (1950), the "elementary and fundamental requirement of due process . . . is a notice reasonably calculated under all the circumstances to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. at 314. "[P]rocess which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." *Id.* at 315.

Because conclusory affidavits are devoid of any detail as to what steps, if any, a person employed to locate an absentee, such affidavits are "mere gestures" which fall well below the standards of *Mullane*. Further, as this Court observed more recently in *Jones v. Flowers*, 547 U.S. 220 (2006), based upon the circumstances of

the case and information available, due process demands that the serving party take additional steps to locate a property owner. *See id*. at 234-35. A further discussion of *Jones v. Flowers* is found at p. 30, *infra*.

Relying on *Mullane*, this Court in *Schroeder v. New York City*, 371 U.S. 208, 212-13 (1962) recognized:

> The general rule that emerges from the *Mullane* case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable and whose legally protected interest are directly affected by the proceedings in question.

Thus, where the names and addresses of an absentee owner are readily ascertainable from both deed records and tax rolls, constructive notice by publication is constitutionally defective. *Id*.

Here, a conclusory affidavit was the sole support for service by publication – publication in the very same county where the conclusory affidavit claimed the property owners could not be located. Yet, there was evidence that the real property records clearly showed that the owners resided in San Diego, California, and that ordinary diligence would have revealed the whereabouts of these owners, who continued to reside in San Diego, California. However, because the Court merely took the Undersheriff's affidavit at face value, the surviving property owners – Petitioners' predecessors – never received notice of the Quiet Title

Complaint, and were deprived of valuable property rights.

In upholding the District Court's action, the New Mexico Supreme Court has not only condoned judicial reliance on conclusory affidavits as the sole foundation for service by publication, resulting in a denial of due process for non-resident property owners in New Mexico, but has also ignored the mandates of this Court and other State Supreme Courts. As such, the New Mexico Supreme Court's Opinion and Judgment should be reversed.

A. Factual History

In 1927, Judson and Eva Wilson and their daughter, Mabel Wilson ("the Wilsons"), lived at 3767 Pershing Ave., San Diego, California. In that year, the Wilsons purchased fee title for a 160-acre tract in San Juan County, New Mexico from W.W. McEwan. Mr. McEwan, also from San Diego, California, had acquired the property, on August 7, 1926, by warranty deed from Ramon N. and Emella Lucero.

The 1927 warranty deed from McEwan to the Wilsons, as joint tenants with right of survivorship, identified the Wilsons as " . . . of San Diego, California." That deed was acknowledged before a notary in San Diego. The following year, August 16, 1928, the Wilsons executed a warranty deed, again before a notary in San Diego, California, to a David Miller, subject to the following reservation:

> [E]xcepting and reserving to the grantors herein the oil and gas existing or found therein, with the right to enter on for prospecting or developing same, provided they must pay all damages to land or crops in prospecting or development.

The severed mineral interest retained by the Wilsons and subsequently the Wilson heirs, who are the Petitioners (Plaintiffs) herein, is the real property interest at issue in this matter.

Three years later, on March 14, 1931, David Miller transferred by quitclaim deed one-half of his interest in the 160 acres to his brother, Thomas Miller. This quitclaim deed is silent as to the Wilsons' oil and gas reservation.

David Miller died on April 25, 1937. Four days later, on April 29, 1937, Thomas Miller recorded the 1931 quitclaim deed for his one-half interest in the 160 acres. The David Miller Probate Estate was also opened on April 29, 1937, with Thomas Miller as Executor. Per the David Miller Will, all of David Miller's property passed to Thomas Miller, including the one-half interest in the 160 acres that Thomas Miller did not already own by virtue of the 1931 quitclaim deed. The final decree in David Miller's Probate Estate was not entered until August 5, 1946.[1]

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[1] On October 13, 1949, three years after the final David Miller Probate decree, to apparently address a New Mexico "tax issue," Thomas Miller's lawyers, under oath, filed a supplemental

Judson Wilson died on May 16, 1929. Eva Wilson died on December 17, 1944. Mabel Wilson married Charles Weeber but continued to live at 3767 Pershing Ave., San Diego, California, until her death in 1970. Charles Weeber continued to live at 3767 Pershing Ave. until his death in 1978. The 1948 San Diego City Directory contains a listing for "Weeber Chas. E. (Mabel W.)" at 3767 Pershing Ave. Historical versions of the City Directory, from 1926 and 1930, listed the 3767 Pershing Ave. address for then-living Judson and Eva Wilson.

On October 21, 1948, Thomas Miller filed a Quiet Title Complaint for 931 acres in San Juan County, New Mexico, which included the subject 160 acres located in the geographic center of the larger tract. The caption to the Quiet Title Complaint identified over fifty (50) individual Defendants including W.W. McEwan, Judson Wilson, Eva Wilson, and Mabel Wilson.

In order to obtain an Order of Court authorizing substitute service by publication, Rule 4(g) of the then-applicable Rules of New Mexico Civil Procedures required that "a due inquiry and search has been made" by the plaintiff. And, the plaintiff was required to file a sworn affidavit stating those facts. Rule 4(g) of the New Mexico Rules of Civil Procedure, *NMSA 1941*, § 19-101(4)(g).

The Verified Complaint, signed by Thomas Miller's lawyers, contains no such statement as to "due inquiry

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accounting report, which identified the brothers' joint purchase of the 160 acre tract from the Wilsons in 1928.

and search" for McEwan or the Wilsons. Instead, the Complaint stated:

> If any [d]efendants herein . . . still are living, and reside in or have their places of residence in the State of New Mexico, the said [d]efendants have secreted themselves so that service of process cannot be had upon them in this cause, and that the only way in which said [d]efendants can be served herein is by publication.

The Complaint further stated as to unknown heirs of deceased Defendants:

> [P]laintiff has been unable to learn or determine the names, places of residence, Post Office addresses and whereabouts of said unknown heirs, after diligent search and inquiry.

The Verified Complaint contained no description of what activities, if any, were actually conducted by Thomas Miller, his lawyer, or anyone else as to "due inquiry and search" to locate the Wilsons.

Similarly, Undersheriff William Jones filed an affidavit regarding attempted personal service on the more than 50 named Defendants, stating only that he

> diligently search[ed] and inquired for the [d]efendants, and each of them, in the above-entitled cause; that after such search and inquiry, I have been unable to find any of the [d]efendants in San Juan County, New Mexico, and I have been unable to find the Post Office addressees [sic], places of residence, or

> whereabouts of the [d]efendants, or either of them.

The only other affidavit filed was by Thomas Miller's counsel, J.J. DeWeerd, stating that none of the Defendants were in the military service.

A Notice of Action Pending, as to the Verified Complaint in Quiet Title, was published for four (4) weeks in the Farmington, New Mexico "Times Hustler," a weekly San Juan County newspaper.

No Defendants filed a responsive pleading. Disclaimers were filed by individuals who were all blood relatives of David and Thomas Miller: Mary Hare, a sister, and Boone and Alex Vaugh, nephews.

Based exclusively upon the Undersheriff's affidavit, on December 20, 1948, the District Court for San Juan County entered an Order and Decree quieting title to the entire 931-acre tract in Thomas Miller's name, holding that

> . . . none of the defendants in this case can be served in San Juan County, New Mexico and that after diligent search and inquiry of the Post Offices addresses, places of residence, and whereabouts of all [d]efendants herein [excepting those that filed a Disclaimer of Interest], all are unknown and ascertained; and that none of said [d]efendants, other than those set out above, can be personally served with process in this cause.

Two years later, on January 15, 1950, Thomas Miller, as purported fee-simple owner, conveyed the entire

931 acres to V.H. McRee while reserving to himself three quarters of the minerals under the property. Subsequently, in 1952, the property was committed to a federal exploratory unit, San Juan 32-5, operated by Stanolind Oil & Gas Co. In later years, through the Thomas Miller chain of title, the property changed hands several times with various persons and entities retaining mineral interests, such as overriding royalties. These transactions involved the various groups of Defendants in this case.

In the late 1950s and early 1960s, pursuant to the actions of the United States Army Corps of Engineers, the subject property was flooded by what is now known as the "Navajo Lake."

In 2002, a petroleum landman located the Wilson heirs, who comprise the Plaintiffs' Group and Petitioners herein. The Wilson heirs entered into an oil and gas lease with Plaintiff, T.H. McElvain Oil & Gas Limited Partnership.

In 2006, in anticipation of an onshore drilling operation, Group II Defendant Energen retained a title attorney to perform a drilling title opinion. The examining attorney reviewed the trial court record for the 1948 Thomas Miller Quiet Title case. In his written title opinion, the examining attorney stated that the 1948 Order and Decree were void based upon the failure of Thomas Miller or his lawyers to personally serve the Wilsons or, if nothing else, at least attempt personal service on the Wilsons.

In 2007, Defendant Energen directionally drilled two onshore coalbed methane gas wells, which bottom holed, under the Navajo Lake, in the drilling and spacing unit which includes the 160-acre tract with the Wilson oil and gas reservation.

At present, over one million dollars in production revenue from the coalbed methane gas wells is being held in suspension by the current operator of those properties, pending a final determination confirming or denying the validity of the Wilsons' 1928 reservation of the oil and gas under the 160-acre tract.

B. Procedural History

On September 3, 2010, the Petitioners, as the heirs and successors to the interests of Judson Wilson, Eva Wilson and Mabel Wilson, and their oil and gas lessee, T.H. McElvain Oil & Gas Limited Partnership, filed a Complaint in the Eleventh Judicial District Court, County of San Juan, State of New Mexico, for Declaratory Judgment and to Quiet Title to the mineral interest under or otherwise associated with a 160-acre tract of real property located in Sections 14 and 15, Township 32N, Range 6W, San Juan County, New Mexico, pursuant to a reservation in the warranty deed dated August 16, 1928, between the Wilsons and David Miller.

The Defendants named in the Complaint were various individuals, corporations, trusts or other entities who claimed an interest in the subject property through various recorded documents describing the

subject real property through a chain of title beginning with the 1948 Quiet Title Order and Decree in favor of Thomas Miller.

Several of the Defendants answered the Complaint and asserted counterclaims and cross claims arguing that their title to the "mineral interests" in question was superior to the Plaintiffs and praying for declaratory relief and a decree of quiet title confirming such superior rights.

On June 24, 2011, various Defendants (identified in the context of this case as the Schultz/Turner Defendants) filed two Motions for Summary Judgment asserting that the Petitioners herein were barred in equity (laches, estoppel and waiver) from making claims to the subject mineral interests and that the 1948 Quiet Title Decree granting fee-simple title to Thomas Miller, as the Schultz/Turner Defendants' predecessor in interest, was free from collateral attack given the passage of time. The Motions further asserted that the Schultz/Turner Defendants held the subject mineral interests by adverse possession under the applicable New Mexico statutes or by virtue of the doctrine of "presumed grant." These Motions were joined by other Defendants.

On April 2, 2011, the Petitioners responded to the Schultz/Turner Motions for Summary Judgment and asserted a Cross Motion for Summary Judgment. The Response and Cross Motion maintained that the 1948 Quiet Title Order and Decree was void for lack of personal service on the Wilsons or the failure of the 1948

Quiet Title court record to include evidence of a good faith attempt to locate the Wilsons in San Diego, California. Petitioners also argued that any equitable defense to the claims of the Wilson heirs was defective for lack of notice.

On July 20, 2012, the San Juan County District Court appointed a Special Master to determine the "ownership of the mineral rights at issue in this litigation and adjudicat[e] the pending Motion for Summary Judgment. . . ." The Special Master filed his "Special Master Report" on September 21, 2012. (App. D, p. 80).

The Special Master determined that the Schultz/Turner Defendants and the other Defendants who joined in their Motions should be the correct parties in interest with superior title to the mineral interest at issue. This recommendation was based upon the Special Master's findings that the 1948 Quiet Title service by publication did not violate the Wilson heirs' constitutional rights to due process, as there was " . . . no indication that Thomas Miller had information regarding Mabel Weeber's whereabouts or that her whereabouts would be identified through reasonable diligence. . . ." Thus, the Special Master concluded that there was nothing in the 1948 judgment indicating a lack of jurisdiction. And, Petitioners' collateral attack on the 1948 judgment failed as a matter of law. The Special Master also accepted the Schultz/Turner equitable argument of laches, waiver and estoppel based upon the Petitioners' failure to assert any interest in

the ownership of the mineral interests after the 1928 deed to David Miller.

The District Court entered an Order confirming and adopting the Special Master Report. A Decree of Quiet Title and Judgment in favor of the Defendants was entered on January 8, 2013. (App. D, p. 77).

Petitioners filed a timely Notice of Appeal to the New Mexico Court of Appeals on February 1, 2013.

On October 24, 2014, the New Mexico Court of Appeals, based upon a *de novo* review of the trial court record and the 1948 Quiet Title case, entered its corrected Opinion reversing the District Court's entry of judgment and decree based upon the Special Master Report. The Court of Appeals found that:

> Evidence in the record reflects that every transaction involving the Wilsons and the property showed that the Wilsons resided in San Diego during 1926-28, and no evidence showed that the Wilsons had resided any place except San Diego. Thus, as noted earlier, it is reasonable to infer that Miller was aware of the Wilsons' San Diego residence in 1927 and 1928 and likely could have ascertained their San Diego residence in 1948. Further, with nothing to suggest otherwise, it would be reasonable for Miller to have, in good faith, assumed that the Wilsons were still in San Diego.

(App. B, p. 59).

The Court of Appeals went on to hold:

> [R]easonable inferences drawn from the evidence in favor of Plaintiffs require the conclusion that had Miller been interested in serving the Wilsons in 1948 with notice of the quiet title action, his search would and should have included San Diego and would have likely led to the possibility of learning Mabel Weeber's identity and address. Thus, the attempted constructive service in this case did not pass constitutional due process muster. . . .

(App. B, p. 60).

The Court further observed that:

> It would run contrary to due process to interpret the then-applicable service of process rule to allow a plaintiff to avoid making any effort beyond only publishing in a local newspaper where the property was located to pursue service on a quiet title defendant, who was known to reside in a foreign jurisdiction at the time that the parties conducted their business related to the property, and who was never known to have resided in New Mexico, merely by stating that the defendant may have secreted himself in New Mexico.

(App. B, p. 65).

The New Mexico Court of Appeals concluded that the 1948 Quiet Title Court lacked personal jurisdiction and the entry of the Order and Decree was void. Further, the Opinion held that there was nothing in the

trial court record to support a finding of waiver, laches or estoppel. (App. B, p. 66).

The Schultz/Turner Defendants and other Defendants filed a timely Petition for Certiorari with the Supreme Court of the State of New Mexico. The Petition was granted. The New Mexico Supreme Court filed its Opinion on October 20, 2016.

The Opinion of the New Mexico Supreme Court reversed the Court of Appeals and re-instated the District Court's entry of judgment and Order and Decree based upon the Special Master Report.

C. The Decision Below

The New Mexico Supreme Court reversed the New Mexico Court of Appeals. In an effort to keep the 1948 Order and Decree in place, the New Mexico Supreme Court, while conceding there was information available to Thomas Miller and his lawyers showing the Wilsons' residence in San Diego, concluded that it was speculative as to whether any further "due diligence" on the part of Thomas Miller or his lawyers would have revealed any of the Wilsons' whereabouts. (App. A, p. 29). Attempting to distinguish *Mullane*, the Court stated there was nothing to indicate that Thomas Miller had information regarding Mabel Weeber's whereabouts or that her whereabouts could be identified through reasonable diligence. (App. A, p. 33). The Court posited that Thomas Miller would have needed to acquire and search through the San Diego City Directory to find the Wilsons' San Diego address. Describing such

actions as a "labyrinth," the New Mexico Supreme Court concluded that due diligence in 1948 "did not require this level of effort or investigation," in light of the facts, circumstances and resources available in 1948. (*Id*. at pp. 25-26). Thus, the Court agreed that notice by publication was sufficient and that such notice was consistent with the requirements of *Mullane.* (App. A, p. 29).[2]

Justice Petra Jimenez Maes filed a dissenting Opinion, based upon her conclusion from the record that "there was ample evidence and no need to speculate that the 1948 judgment was void due to the failure of Thomas Miller to undertake a good faith effort to provide the Wilson heirs with sufficient notice of suit." According to Justice Maes, "minimal diligence" on the part of Thomas Miller would have located Mabel Weeber (née Wilson). The dissent also pointed out that there was no need to rely upon *Mullane*, since Rule 4(g) of the 1948 Rules of Civil Procedure required a good faith effort to locate the parties before service by publication was authorized. *Campbell v. Doherty*, 1949-NMSC-030, ¶¶ 30-31, 53 N.M. 280, 206 P.3d 1145. (App. A, pp. 36-39, citations in original).

On November 2, 2016, Petitioners filed a timely Motion to Reconsider the Opinion of October 20, 2015.

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[2] On December 2, 2016, Petitioners filed a Motion and Amended Motion to Stay or Recall the Mandate. These Motions were denied by the New Mexico Supreme Court on December 16, 2016, but are still pending in the New Mexico Court of Appeals and the District Court.

That Motion was denied on November 9, 2016. (App. C, p. 95).

REASONS FOR GRANTING THE WRIT

This case involves an important issue of Due Process law involving the property rights of people (who may reside in other states or countries) and their right to receive adequate notice of legal actions involving their property. While this Court has set forth the requirements that must be met in order for notice to pass constitutional muster, currently there is no mechanism in place to ensure that such requirements have been met before a person is deprived of their property. As a result, the degree of "due process" protection afforded to property owners varies, depending on the jurisdiction in which the legal action is pending. At minimum, this Court should mandate that some type of judicial review or scrutiny be applied not only to conclusory affidavits such as that at issue here, but to any proceeding where due diligence has been averred, by affidavit or otherwise. Without such judicial review, individuals will continue to lose their property without notice and without any ability to challenge a record purportedly supporting such notice. This Court should provide guidance on the constitutional standards such schemes must satisfy. Without a mechanism for enforcement or oversight, conclusory affidavits are the "mere gestures" that this Court rejected in *Mullane* as passing constitutional muster. In the end, the use of such conclusory affidavits often results in notice by publication, which

is, "in too many instances, no notice at all." *Walker v. City of Hutchinson*, 352 U.S. 112, 116-17 (1956).

This Court's plenary review is also warranted because the New Mexico Supreme Court's Opinion cannot be squared with precedent of this Court regarding the pre-deprivation notice required by the due process clause, including *Mullane v. Cent. Hanover Bank & Trust Co*., 339 U.S. 306 (1950); *Schroeder v. New York City*, 371 U.S. 208 (1962); and more recently, *Jones v. Flowers*, 547 U.S. 220 (2006). The New Mexico Supreme Court's Opinion also conflicts squarely with numerous decisions by Federal Courts of Appeals and other State Supreme Courts as well as its own prior opinions.[3]

I. The Acceptance of Conclusory Affidavits Alleging Due Diligence, With Nothing More, Represents a Continuing Divide as to What is Required Under the Due Process Clause

New Mexico's acceptance of conclusory affidavits alleging due diligence, with nothing more to support them, represents continuing action on the part of States which either misunderstands or ignores this Court's pronouncements on pre-deprivation notice requirements. New Mexico is not the only State that accepts such conclusory affidavits; the Supreme Court of

[3] *Owens v. Owens*, 259 P. 822 (N.M. 1927); *Campbell v. Doherty*, 206 P.2d 1145 (N.M. 1949); and *Matter of Baca's Estate*, 621 P.2d 511 (N.M. 1980).

South Carolina has also held that nothing more is required. *See Yarborough v. Collins*, 360 S.E.2d 300, 301 (S.C. 1987) (holding the Court of Appeals erroneously added the requirement that an affidavit for publication must set forth facts showing due diligence had been exercised and the court *should not* consider the sufficiency of the affidavit when there is no allegation the affidavit was obtained by fraud or collusion).

However, as this Court found over 100 years ago in *Romig v. Gillett*, 187 U.S. 111 (1902), a sheriff's affidavit attesting only to the inability to personally serve the defendant with due diligence merely stated a "conclusion of law." The omission of "facts tending to show such diligence" rendered the affidavits insufficient. *Id.* at 115-16, *citing*, *inter alia*, *Kahn v. Matthai*, 47 P. 698, 699-700 (Cal. 1897); *Alderson v. Marshall*, 16 P. 576, 578 (Mont. 1888); *Thompson v. Shiawassee Circuit Judge*, 19 N.W. 967 (Mich. 1884); *Carleton v. Carleton*, 85 N.Y. 313, 315 (1881); *Ricketson v. Richardson*, 26 Cal. 149, 154 (1864); and *McDonald v. Cooper*, 32 F. 745, 748 (D.Or. 1887).

As such, *Romig* established the rule that evidentiary facts must be alleged in an affidavit as a predicate to the conclusion that the plaintiff has satisfied the "due diligence" prerequisite for service by publication. Further, the state and federal court decisions cited by this Court in *Romig* still stand on the issue.

The rule was perhaps best stated by the Supreme Court of California 145 years ago:

> An affidavit which merely repeats the language or substance of the statute is not sufficient. Unavoidably the statute cannot go into details, but is compelled to content itself with a statement of the ultimate facts which must be made to appear, leaving the detail to be supplied by the affidavit from the facts and circumstances of the particular case. . . . To illustrate: It is not sufficient to state generally, that after due diligence the defendant cannot be found within the State, or that the plaintiff has a good cause of action against him, or that he is a necessary party; but the acts constituting due diligence, or the facts showing that he is a necessary party, should be stated. To hold that a bald repetition of the statute is sufficient, is to strip the Court or Judge to whom the application is made of all judicial functions and allow the party himself to determine in his own way the existence of jurisdictional facts – a practice too dangerous to the rights of defendants to admit of judicial toleration. The ultimate facts stated in the statute are to be found, so to speak, by the Court or Judge from the probatory facts, stated in the affidavit, before the order for publication can be legally entered.

Ricketson v. Richardson, 26 Cal. 149, 153 (1864).

By its decision below, the New Mexico Supreme Court has resisted not only this Court's guidance with respect to the due process deficiencies of conclusory affidavits and resulting notice by publication, but also the rulings of the vast majority of courts which have

rejected New Mexico's interpretation of these important due process requirements. Yet, the divide continues, not only between the Supreme Courts of New Mexico and South Carolina and the State and Federal courts which have ruled otherwise, but also between state appellate courts in New Mexico itself.

The Court's intervention is required to resolve this dispute. It should grant the writ and clarify what specific requirements affidavits, alleging due diligence, must contain and what judicial scrutiny should be applied to determine the sufficiency of those affidavits. On that basis, the decision below should be reversed.

II. The Decision Below Conflicts With Decisions of this Court, Circuit Courts of Appeals, and Other State Supreme Courts With Respect to What Constitutes the "Reasonable Efforts" Required to Support Service by Publication

This Court's plenary review is also warranted because the New Mexico Supreme Court's decision conflicts with decisions by several Circuit Courts of Appeals and other State Supreme Courts which have correctly applied this Court's precedent requiring reasonable diligence in providing adequate notice to parties who face potential deprivation of personal or property rights:

- **Second Circuit.** In *Luessenhop v. Clinton Cnty., New York*, 466 F.3d 259 (2d Cir. 2006), the Second

Circuit remanded three foreclosure cases for a redetermination of whether notice was sufficient in light of this Court's decision in *Jones v. Flowers*. In one case (*Tupazes*), the initial letter informing the homeowner of a delinquency was sent via first-class mail and not returned as undeliverable; the second letter was sent via certified mail but no signature confirmation (although print-out tracking statement showed letter was delivered). *Id*. at 272. In another case (*Bouchard*), the letter was sent via certified mail but returned as unclaimed. *Id*. at 272.

- **Third Circuit.** In *Perez-Alevante v. Gonzales*, 197 F.App'x 191 (3d Cir. 2006) (unpublished), the Third Circuit held that notice was insufficient under *Jones v. Flowers* in connection with the affirmance by the Board of Immigration Appeals of the denial of a motion to reopen *in absentia* removal proceedings for a lawful permanent U.S. resident. The relevant statute required notice for removal *in absentia* "if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable. The written notice by the Attorney General shall be considered sufficient for purposes of this paragraph if provided at the most recent address provided under section 1229(a)(1)(F) of this title." *Id*. at 194 (quoting 8 U.S.C. § 1229a(B)(5)(A)). The criminal alien in *Perez-Alevante* was represented by counsel who never received any notices that were mailed to the alien's purported address: "Considering that 'the constitutionality of a particular procedure for notice is assessed *ex ante*' [citing *Jones v. Flowers*], we have no difficulty in finding that the additional step of providing notice

to Perez-Alevante's counsel, where the immigration court knew he was represented by counsel and was in possession of that counsel's contact information, was required by the Due Process Clause." *Id*. at 196.

- **Fourth Circuit.** In *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005), the Fourth Circuit held that a purchaser in a state tax sale was required to search all publicly available county records to determine the correct address for a property owner. The court observed that, "as most cases addressing this situation recognize, it is, at the very least, reasonable to require examination (or reexamination) of *all available public records* when initial mailings have been promptly returned as undeliverable." *Id*. at 577 (emphasis added). The Fourth Circuit cited other cases recognizing that "[g]enerally, when the notice is returned as undeliverable, the tax district should conduct a reasonable search of the public record." *Id.* at 575 (internal quotation marks and citation omitted).

- **Fifth Circuit.** In *Echavarria v. Pitts*, 641 F.3d 92 (5th Cir. 2011) (as revised June 21, 2011), the Fifth Circuit held, applying *Jones v. Flowers*, that the government must "take additional reasonable steps to notify a bond obligor" that the bond has been breached, when the government has knowledge that the initial attempt at notice failed. *Id*. at 93, 95.

- **Seventh Circuit.** In *Peralta-Cabrera v. Gonzales*, 501 F.3d 837 (7th Cir. 2007), the Seventh Circuit held that notice in a deportation proceeding was inadequate, even though the government alleged

that the defendant had "thwarted delivery" of notice of deportation hearing where he gave the full, correct address where he would be staying but failed to instruct authorities to address mail to him "in care of [another person]." *Id*. at 844. The Seventh Circuit reasoned that "the government, not the alien, is in the best position to know how to properly address a hearing notice." *Id*. at 845 (internal quotation omitted).

- **Eighth Circuit.** In *Linn Farms & Timber Ltd. P'ship v. Union Pac. R. Co*., 661 F.3d 354 (8th Cir. 2011), the Eighth Circuit held that notice in connection with the forfeiture of mineral rights due to tax delinquencies was insufficient under *Jones v. Flowers*, where notices of delinquency were sent to a former corporate office and both were returned as undeliverable and unable to be forwarded. *Id*. at 356-58, 362. The Eighth Circuit suggested that the Commissioner could have performed a search of electronic records or an internet search for the owner's address. *Id*. at 360-61.

In *Bowen v. Olsen*, 246 P.2d 602 (Utah 1952), the court held that service by publication in a 1946 Quiet Title Action against a California defendant was insufficient, where plaintiff alleged he made a diligent search of Utah records and defendant's address was unknown. The court held the defendant's address "could with very little diligence have been easily ascertained by a search of the assessment rolls of the county assessor and county treasurer" – which listed defendant's street address – "but such a search was very evidently carefully avoided." *Id*. at 603, 606.

In *Blackgold Exploration Co. Ltd. v. First Federal Savings & Loan Assoc*., 803 P.2d 1138 (Okla. 1990), First Federal attempted to serve notice of a foreclosure action on the president of Blackgold, who was known to reside outside Oklahoma. After two failed attempts to personally serve the president at an address in Arizona, notice was allowed by publication in an Oklahoma newspaper. The Supreme Court of Oklahoma held that notice by publication was insufficient when it is known that the defendant resides outside the circulation area of the newspaper and further held that such notice was insufficient if the address of the interested party is known or "readily ascertainable from sources at hand." *Id*. at 1141, *citing Bomford v. Socony Mobil Oil Co*., 440 P.2d 713, 718 (Okla. 1968). Importantly, the court indicated that "a mere statement that due diligence was made is not sufficient to support notice by publication and a diligent search for the whereabouts of the defendant" may be shown by "exhausting sources such as official records and local directories." 803 P.2d at 1142.

In *Kott v. Superior Court*, 45 Cal. App. 4th 1126, 1137, 53 Cal. Rptr. 2d 215 (1996), the court held that service of a 1995 suit by publication on a Canadian citizen was invalid, because the plaintiff failed to use due diligence to determine the defendant's address in Canada:

> The term "reasonable diligence" . . . denotes a thorough, systematic investigation and inquiry conducted in good faith by the party or his agent or attorney. A number of honest

> attempts to learn defendant's whereabouts or his address by inquiry of relatives, friends and acquaintances or his employer, and by investigation of appropriate city and telephone directories, the voter's register, and the real and personal property index in the assessor's office, near the defendant's last known location, are generally sufficient. These are likely sources of information, and consequently must be searched before resorting to service by publication (internal citations omitted).

Finally, in *Klinger v. Milton Holding Co*., 186 So. 526 (Fla. 1938), the court held that the plaintiff in a 1931 partition action failed to exercise due diligence in locating an out of state defendant where the plaintiff claimed to have reviewed abstracts and various deeds for the properties as well as the Miami city and telephone directories. Yet, a recorded deed for defendant's parcel listed the defendant's address as "Dayton, Ohio" and a record in the tax collector's office showed defendant's street address in Dayton, Ohio. The court held that failure to inspect the deed was by itself sufficient to establish a lack of due diligence, as the deed information ("Dayton, Ohio") was readily sufficient, if properly followed up by inspection of the record of the deed, to acquaint the plaintiff with defendant's residence. *Id*. at 533-34.

III. This Court Should Grant, Vacate, and Remand the New Mexico Supreme Court's Judgment in Light of *Jones v. Flowers*

At minimum, the New Mexico Supreme Court's Opinion in this case should be reversed in light of *Jones v. Flowers*, 547 U.S. 220 (2006).

Jones involved a tax lien sale where the Arkansas Commissioner of State Lands attempted to notify the property owner of its tax delinquency by mailing a certified letter to him at his last known address. The Post Office returned the unopened packet to the commissioner marked "Unclaimed." This Court granted certiorari to resolve a conflict among the Circuits and State Supreme Courts concerning whether the Due Process Clause requires the Government to take additional reasonable steps to notify a property owner when notice of a tax sale is returned undelivered. There, this Court held that "[b]efore a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owners 'notice and opportunity for hearing appropriate to the nature of the case.'" *Jones*, 547 U.S. at 223 (quoting *Mullane*, 339 U.S. at 313). This Court further held that "when mailed notice of a tax sale is returned unclaimed, the State must take *additional reasonable steps* to attempt to provide notice to the property owner before selling his property, if it is practicable to do so." *Id*. at 225 (emphasis added). The Court found there were "several reasonable steps the State could have taken." *Id*. at 231.

Jones makes clear that due process entails further responsibility – additional reasonable steps – when one becomes aware, prior to the taking of property, that the attempts at notice have failed or are ineffective. *Id*. at 229. The New Mexico Supreme Court failed to follow this Court's pronouncements regarding pre-deprivation notice and failed to apply the correct legal standard in light of the fact that Thomas Miller and his lawyers had information, on the face of the 1927 and 1928 deeds, that the Wilsons resided in San Diego, yet they took absolutely no steps to ascertain the whereabouts of any of the Wilsons in San Diego, including a simple search of the City Directory.

Prior to the *Jones* decision, this Court has also required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. In *Robinson v. Hanrahan*, 409 U.S. 38 (1922) (*per curiam*) this Court held that notice of forfeiture proceedings sent to a property owner's home address was inadequate when the State knew that the property owner was in prison. In *Covey v. Town of Somers*, 351 U.S. 141 (1956), the Court held that notice of foreclosure by mailing, posting and publication was inadequate when town officials knew that the property owner was incompetent without a guardian's protection. *Id*. at 146-47.

In *Jones*, this Court concluded that under *Robinson* and *Covey*, the government's knowledge that notice pursuant to the normal procedure was ineffective triggered an obligation on the government's part to take

additional steps to effect notice. That knowledge was one of the "practicalities and peculiarities of the case." 547 U.S. at 230, *citing Mullane*, 339 U.S. at 314-15. Finding that there were several reasonable steps that the State could have taken in an attempt to notify Jones, this Court held that notice by publication was not constitutionally adequate under the circumstances presented because it was possible and practicable to give Jones more adequate warning of the impending tax sale. 547 U.S. at 237.

Here, the same rationale of *Jones*, *Robinson* and *Covey* applies. It is undisputed that there was evidence in the record showing that the Wilsons resided in San Diego, California, at the time of the entry of the 1948 Quiet Title action. This information was contained within the very deeds between the parties which ultimately led to the Quiet Title action. Yet, instead of analyzing what other steps Miller might have taken in 1948 to locate the Wilsons' address in San Diego, California, the New Mexico Supreme Court perfunctorily dismissed those steps as "labyrinth[ine]" and "onerous," and ruled that looking for the Wilsons in San Juan County, New Mexico, was sufficient.

As Petitioners pointed out in their Motion for Rehearing before the New Mexico Supreme Court, there were numerous other steps Thomas Miller and his attorneys could have taken to locate the Wilsons, which were available and routinely used to locate individuals for service, even in the pre-Internet 1940s. As recognized by many courts, these reasonable steps include: (1) retaining a private investigator; (2) background

checks; (3) skip traces; (4) reviewing criminal history; (5) conferring with the defendant's current or former legal counsel; (6) contacting co-defendants; (7) consulting the defendant's relatives, friends and neighbors; (8) talking to tenants or parties in possession of the property at the defendant's putative address(es); (9) reviewing and searching utility company records; (10) searching telephone directories; (11) contacting Directory Assistance; (12) reviewing City Directories; (13) contacting the U.S. Postal Service; (14) inquiring about a "forwarding address"; (15) searching Department of Motor Vehicle records including vehicle title registrations as well as driver's license and driving records; (16) reviewing voter registrator rolls; (17) searching Vital Statistic records including records of births, deaths, marriages and divorce; (18) reviewing local court records (including judgment and bankruptcy records); (19) searching probate records; (20) reviewing the records of business licensing or professional licensing agencies; (21) searching corporate registrations; (22) contacting churches; (23) searching property records; (24) contacting the county recorder's office; (25) reviewing the records of the county assessor; (26) searching real property tax records; (27) reviewing tax lien records; (28) contacting the county tax collector research department; or (29) inspecting of other available public records. *See United States v. Rodrigue*, 645 F. Supp. 2d 1310, 1343-46 (U.S. Ct. Intl. Trade 2009) (collecting cases).

The New Mexico Supreme Court failed to address any of the foregoing steps, which entail nothing more

than a review of public records and which could have been taken by Thomas Miller or his lawyers to locate the Wilsons in 1948. As stated in *Plemons v. Gale*, 396 F.3d 569 (4th Cir. 2005) (*citing Jones*, 547 U.S. at 227), "most cases addressing this situation recognize, it is, at the very least, reasonable to require examination (or reexamination) of *all available public records* when initial mailings have been promptly returned as undeliverable." 396 F.3d at 577 (emphasis added). "Extraordinary efforts typically describe searches *beyond* the public record, not searches *of* the public record." *Id*. (internal quotation marks and citation omitted and emphasis in original).

Similarly, in *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791 (1983), the Court held that when the identity and location of a mortgagee can be obtained through examination of public records, "constructive notice alone does not satisfy the mandate of *Mullane*." *Id*. at 798. Although a party required to provide notice need not "undertake extraordinary efforts to discover . . . whereabouts . . . not in the public record," it must use "reasonably diligent efforts to discover addresses that are reasonably ascertainable." *Id*. at 798 n. 4, 800.

The New Mexico Supreme Court merely accepted and adopted the conclusory affidavit filed by the Undersheriff in the 1948 Quiet Title case without any evidence that Thomas Miller, his lawyers, or the Undersheriff undertook any efforts whatsoever to locate the Wilsons outside of San Juan County, New Mexico, beyond merely "shrugg[ing their] shoulders and say[ing] 'I tried.'" *Jones*, 547 U.S. at 229. The Court ignored the

fact that the Wilsons' address in San Diego, which remained unchanged, was reasonably ascertainable by a routine investigation of public records. A requirement that the court look beyond the mere face of a conclusory affidavit to determine what due diligence, if any, was actually conducted would have easily exposed this failure. This minimum level of judicial review is needed not only to prospectively prevent property owners from being deprived of their property rights based on the largely fictitious "notice" afforded by the inferior method of service by publication, but is needed to allow courts, in post-deprivation proceedings, to review the evidence and adjudicate due process challenges by property owners who, like Petitioners here, learn only years later that their property rights were taken without notice.

———♦———

CONCLUSION

The Petition for Writ of Certiorari should be granted. At the very least, this Court should grant this Petition, Vacate the New Mexico Supreme Court's judgment, and remand the case for further proceedings.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT
OF THE STATE OF NEW MEXICO

Opinion Number: 32666

Filing Date: OCT 20 2016

NO. S-1-SC-34993

T.H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, a New Mexico limited partnership; KAREN ANN HANDLEY ANDERSON, an individual; SUSAN R. HANDLEY MCGREW, an individual; BILLIE L. PHILLIPS, an individual; BILLIE L. PHILLIPS RECOVERABLE TRUST DATED APRIL 23, 1996, BILLIE L. PHILLIPS Trustee; JUDY LYNN QUINT, an individual; RONALD CHARLES WEEBER, an individual; LUCILE ALICE NORTHCOTE TRUST DATED MAY 29, 1996, BILLIE L. PHILLIPS, Successor Trustee,

Plaintiffs-Respondents,

v.

GROUP I: BENSON-MONTIN-GREER DRILLING CORP., INC., a Delaware corporation; ELIZABETH JEANNE TURNER CALLOWAY, an individual; KELLY R. KINNEY, an individual; KATHERINE P. MILLER, an individual; RONALD MICHAEL MILLER, an individual; VICKIE ROANN MILLER, an individual; THOMAS R. MILLER, an individual; FRED E. TURNER, LLC, a Delaware limited liability company; JOHN LEE TURNER, an individual; LINDA VOITL a/k/a LINDA DAVIS, an individual; ESTATE OF WILLIAM G. WEBB, deceased, JOHN G. TAYLOR, independent executor,

Defendants-Petitioners,

GROUP II: CHERYL U. ADAMS, an individual; E'TWILA J. AXTELL, an individual; BP AMERICA PRODUCTION COMPANY, a Delaware corporation; COASTAL WATERS PETROLEUM COMPANY, INC., a Louisiana corporation; ENERGEN RESOURCES CORPORATION, an Alabama corporation; THE ESTATE OF ANNE B. LITTLE, FIRST SECURITY BANK OF NEW MEXICO, as personal representative; LANA GAY PHILLIPS, an individual; HENRIETTA SCHULTZ, an individual; THE FRANK AND HENRIETTA SCHULTZ REVOCABLE TRUST DATED JANUARY 2, 1990, HENRIETTA SCHULTZ, Trustee; SCHULTZ MANAGEMENT, LTD., a Texas limited partnership; J. GLENN TURNER, JR., LLC, a Delaware limited liability company; MARY FRANCES TURNER, JR. TRUST, JP MORGAN CHASE BANK, NA, Trustee,

Defendants,

GROUP III: ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO THE PLAINTIFFS,

Defendants.

and

NO. S-1-SC-34997

T.H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, a New Mexico limited partnership; KAREN ANN HANDLEY ANDERSON, an individual; SUSAN R. HANDLEY MCGREW, an individual; BILLIE L. PHILLIPS, an individual; BILLIE L. PHILLIPS RECOVERABLE TRUST DATED

APRIL 23, 1996, BILLIE L. PHILLIPS, Trustee; JUDY LYNN QUINT, an individual; RONALD CHARLES WEEBER, an individual; LUCILE ALICE NORTHCOTE TRUST DATED MAY 29, 1996, BILLIE L. PHILLIPS, Successor Trustee,

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Defendants,

GROUP II: CHERYL U. ADAMS, an individual; E'TWILA J. AXTELL, an individual; LANA GAY PHILLIPS, an individual;

Defendants-Petitioners,

and

BP AMERICA PRODUCTION COMPANY, a Delaware corporation; COASTAL WATERS PETROLEUM COMPANY, INC., a Louisiana corporation;

ENERGEN RESOURCES CORPORATION, an Alabama corporation; THE ESTATE OF ANNE B. LITTLE, FIRST SECURITY BANK OF NEW MEXICO, as personal representative; HENRIETTA SCHULTZ, an individual; THE FRANK AND HENRIETTA SCHULTZ REVOCABLE TRUST DATED JANUARY 2, 1990, HENRIETTA SCHULTZ, Trustee; SCHULTZ MANAGEMENT, LTD., a Texas limited partnership; J. GLENN TURNER, JR., LLC, a Delaware limited liability company; MARY FRANCES TURNER, JR. TRUST, JP MORGAN CHASE BANK, NA, Trustee,

Defendants,

GROUP III: ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO THE PLAINTIFFS,

Defendants.

ORIGINAL PROCEEDING ON CERTIORARI
John A. Dean, Jr., District Judge

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OPINION

VIGIL, Justice.

I. INTRODUCTION

{1} The underlying claim giving rise to this controversy constitutes a collateral attack, requiring us to determine whether it is apparent on the face of a 1948 quiet title judgment that the district court, which entered said judgment, affirmatively lacked jurisdiction over certain parties because they were notified by publication. It is alleged that in the 1948 lawsuit such notice violated the Due Process Clause, depriving the district court of jurisdiction. Only when a party's whereabouts are not reasonably ascertainable following diligent search and inquiry can constructive notice

substitute for personal notice of suit. Here, constructive service of process by publication satisfied due process and established the 1948 district court's personal jurisdiction. Therefore, the district court's 1948 quiet title judgment was not void, and, accordingly, we reverse the judgment of the Court of Appeals.

II. BACKGROUND

{2} This opinion addresses the consolidated appeals of two groups of Defendants from a Court of Appeals ruling favorable to T.H. McElvain Oil & Gas Limited Partnership, et al., (Plaintiffs). *See T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 2015-NMCA-004, ¶ 55, 340 P.3d 1277. The identities of the numerous parties and undisputed facts underlying the case are as follows.

{3} In 1927 W.W. McEwan conveyed by general warranty deed fee-simple title in 160 acres of land in San Juan County, New Mexico (the Property) to Judson Wilson, Eva Wilson, and Mabel Wilson, as joint tenants with the right of survivorship. The Wilsons, according to that deed, were "of San Diego, California." The following year, on August 16, 1928, the Wilsons executed a general warranty deed in San Diego, conveying the Property to David Miller, subject to the following reservation:

> [E]xcepting and reserving to the grantors herein the oil and gas existing or found therein, with the right to enter on for prospecting or developing same, provided they

> must pay all damage to land or crops in prospecting or development.

{4} On March 14, 1931, David Miller conveyed by quitclaim deed his interest in the Property to his brother, Thomas Miller.[1] The quitclaim deed to Thomas Miller was silent as to any reservation clouding fee-simple title. Thomas Miller did not record the deed until April 29, 1937, after David Miller's death. David Miller had also bequeathed his property in full to Thomas Miller.

{5} Judson Wilson died on May 16, 1929, and Eva Wilson died on December 17, 1944, leaving Mabel Wilson as the only surviving joint tenant from the original W.W. McEwan deed. Nothing in the record indicates that after 1928 Judson and Eva Wilson took any action regarding the Property.

{6} Mabel Wilson, the remaining joint tenant, lived in San Diego until her death in 1970. Mabel had married Charles Weeber prior to 1944, and thereafter went by her married name of Mabel W. Weeber. Following her death, Mabel's estate was probated in the Superior Court for San Diego County. Her estate identified an interest in residential property in San Diego, but made no claim to real property in New Mexico. Charles Weeber's estate similarly made no claim to real property in New Mexico upon his death in 1978.

---

[1] The record indicates that while David Miller had purchased the Property from the Wilsons, Thomas Miller may have contributed one-half of the purchase price to possess an undivided one-half interest in the Property.

{7} On October 21, 1948, Thomas Miller filed a quiet title action in the District Court for San Juan County. In his complaint, Thomas Miller alleged that he was the owner in fee simple of a total of 931 acres in San Juan County (the Subject Acreage), with that acreage encompassing the 160-acre Property presently in dispute. Over fifty individuals were named as defendants – all of whom were named as defendants if living, or if deceased, by their unknown heirs – with Judson Wilson, Eva Wilson, and Mabel Wilson each making the list. Thomas Miller's attorney verified under oath the allegations of the complaint, which in part stated that

> if any [d]efendants herein . . . still are living, and reside in or have their places of residence in the State of New Mexico, the said [d]efendants have secreted themselves so that service of process cannot be had upon them in this cause, and that the only way in which said [d]efendants can be served herein is by publication.

The complaint also alleged that any unknown heirs of deceased were "unknown to the [p]laintiff, and [p]laintiff has been unable to learn or determine the names, places of residence, Post Office addresses and whereabouts of the said unknown heirs, after diligent search and inquiry for the same." Based on the allegations in the verified complaint, service of process was accomplished by publication of a Notice of Action Pending in the *Times Hustler*, a weekly newspaper published in San Juan County – specifically Farmington, New Mexico.

Notice of the action ran in the paper for four successive weeks.

{8} On November 19, 1948, the Sheriff of San Juan County attempted to serve notice on all parties and submitted a sheriff's return stating that he

> diligently searched and inquired for the [d]efendants, and each of them, in the above-entitled cause; that after such search and inquiry, I have been unable to find any of the [d]efendants in San Juan County, New Mexico, and I have been unable to find the Post Office addressees, places of residence, or whereabouts of the [d]efendants, or either of them.

No named defendant entered an appearance in the quiet title action, but some filed a disclaimer of interest in the Subject Acreage. As such, a quiet title judgment (the 1948 judgment) was entered on December 20, 1948, quieting title to the Subject Acreage – which, again, included the Property – in favor of Thomas Miller. The 1948 judgment provided that Thomas Miller was the owner of the Subject Acreage in "Fee Simple Title," and

> that after diligent search and inquiry the post office addresses, places of residence, and whereabouts of all the [d]efendants' herein [excepting those that filed a Disclaimer of Interest], all are unknown and ascertained; and that none of the said [d]efendants, other than those set out above, can be personally served with process in this cause.

{9} Thomas Miller thereafter exercised fee-simple ownership over the Property. On January 15, 1950, Thomas Miller conveyed the Subject Acreage to V.H. McRee while reserving three-quarters of the mineral rights. Then, in 1952, the Property was committed to the San Juan 32-5 federal unit area, of which Stanolind Oil and Gas Company was the operator. In 1953, Miller and McRee executed an oil, gas, and mineral lease with Stanolind Oil and Gas Company – and McRee reserved a one-eighth royalty interest in the minerals produced from the lease. Stanolind Oil Company became Pan American Petroleum Corporation in 1957 and made three assignments of its leasehold interest to J. Glenn Turner, ultimately conveying to him all of its interest appurtenant to the Property. J. Glenn Turner subsequently, in 1959, 1960, and 1961, made various other assignments of his mineral interests appurtenant to the Property before dying in 1975 and leaving his property in trust for his son, J. Glenn Turner, Jr., and a Dallas bank.

{10} In 1956 V.H. McRee conveyed his interest in the Property, by warranty deed, to H.F. and Freda Axtell. The Axtells thereafter executed separate trust agreements, naming E'Twila Axtell, Cheryl Adams, and Lana Phillips as beneficiaries. As of May 2008 the beneficiaries had become successor co-trustees of the trusts through a series of quitclaim transactions, thus entitling them to the one-eighth royalty interest stemming from McRee's one-quarter interest in the mineral rights, as conveyed by Miller in 1950.

{11} As noted, Mabel Weeber – the surviving joint tenant from the McEwan deed – and her husband, Charles Weeber, died in the 1970s without claiming any property in New Mexico. The 1948 San Diego City Directory contains a listing for "Weeber Chas E (Mabel W)." The directory indicated that Charles and Mabel Weeber lived at 3767 Pershing Avenue. Historical versions of the directory, from 1926 and 1930, listed that same Pershing address for then-living Judson and Eva Wilson.

{12} Again, there is nothing in the record indicating that Judson, Eva, or Mabel Wilson took any action regarding the Property after granting the 1928 deed to David Miller. Indeed, it was not until 2002 when a landman representing a Plaintiff in this case, T.H. McElvain Oil & Gas Limited Partnership (T.H. McElvain Oil & Gas), informed Judy Lynn Quint and Ronald Charles Weeber – Mabel Wilson's successors-in-interest – that they were "the current owners of the oil and gas" interests appurtenant to the Property. Subsequently, Judy Lynn Quint and Ronald Charles Weeber entered into a five-year lease with T.H. McElvain Oil & Gas for $ 2,320.00 each.

{13} The Property presently lies beneath Navajo Lake. In 2007 the appurtenant mineral interests greatly increased in value after Energen Resources successfully drilled coal seam gas wells in the underlying bedrock, and the Property was then-after incorporated into two Fruitland coalbed well-spacing units. Energen Resources holds hundreds of thousands of dollars in escrow pending resolution of this litigation –

the primary dispute in this case, then, concerns ownership of those mineral rights.

{14} The procedural posture of this case is as follows. In 2010 Plaintiffs – T.H. McElvain Oil & Gas, and other successors-in-interest to the 1927 joint tenancy granted to Judson Wilson, Eva Wilson, and Mabel Wilson by W.W. McEwan – filed suit to quiet title in the mineral interests appurtenant to the Property, initially making no mention of the 1948 quiet title judgment. After becoming aware of the 1948 judgment in the course of the pleadings, Plaintiffs were forced to change course and, hence, challenged the constitutional effectiveness of the service of process made by publication on their predecessors-in-interest. In essence, Plaintiffs trace their claim to title back to the reservation of mineral interests in the 1928 deed from the Wilsons to David Miller, alleging that reservation is still effective because the allegedly insufficient service of process on the Wilsons voided the 1948 judgment as it applied to them.

{15} The named Defendants in the instant suit fall into two groups: Group 1 (the Benson group) and Group 2 (the Axtell Group). The parties[2] in Group 1

[2] The alignment of the parties and briefing in this case do not match the case caption. In its order the district court quieted the right, title, and ownership of the oil and gas leasehold estate appurtenant to the Property in Benson-Montin-Greer Drilling Corp., Inc.; Henrietta Schultz Trustee, Shultz Management Ltd.; Elizabeth Jeanne Turner Calloway; J. Glenn Turner, Jr., LLC; John Lee Turner; Fred E. Turner LLC; and Mary Francis Turner, Jr. Trust, J.P. Morgan Chase Bank N.A. Trustee. Those interests herein represent Group 1. The district court also quieted right,

counterclaimed to quiet title in the Property's oil and gas leasehold interests, while some parties in Group 2 counterclaimed to quiet title in a percentage of royalty interests flowing from the Property's mineral production. Group 1 Defendants derive their claim to title in the Property's oil and gas leasehold interests from the 1948 judgment in favor of Thomas Miller, and subsequent assignments made by Miller, Pan American Petroleum Corporation, and J. Glenn Turner. This Court has previously quieted title in the Property in favor of some of the Group 1 Defendants, following an ancillary probate of J. Glenn Turner's estate. *See M.H. Clark v. Benson-Montin-Greer Drilling Corp.*, No. 78-1260 (N.M. Sup. Ct. Jul. 12, 1982) (mandate). Group 2 Defendants derive their claim to title in royalty interests in the Property from V.H. McRee's reservation of a one-eighth royalty interest in the minerals produced by his lease to Stanolind Oil and Gas Company, and the subsequent transaction between V.H. McRee and Harrison and Freda Axtell that resulted in various trust agreements benefitted by the royalties.

{16} The parties filed cross-motions for summary judgment claiming title to the relevant mineral interests. To assist the district court in determining the ownership of the mineral rights at issue, the district court appointed a special master pursuant to Rule 1-053 NMRA. The special master determined that the Group 1 and Group 2 Defendants were entitled to

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title, and ownership of a 3.125% mineral interest royalty in the Property in Cheryl U. Adams, E'Twila J. Axtell, and Lana Gay Phillips. Those interests herein represent Group 2.

summary judgment. The special master rejected the Plaintiffs' collateral attack on the 1948 quiet title judgment stating, "there is nothing to indicate that Thomas Miller had information regarding Mabel Weeber's whereabouts or that her whereabouts could be identified through reasonable diligence; therefore, the [c]ourt's conclusion in 1948 that she could not be located for personal service appears appropriate." The special master determined that any investigation by Thomas Miller in 1948 would not have been likely to locate Mabel Weeber for service of process because she did not appear in the 1948 San Diego telephone directory as Mabel Wilson, and also because, by 1948, both Judson and Eva Wilson had died.

{17} The special master further concluded that the Plaintiffs' claim to title was barred by laches, waiver, and estoppel because "[t]he Wilsons and their successors did nothing to claim any ownership interest in the oil and gas connected to the property from the date of the deed to David [Miller] in 1928 until 2002 when McElvain Oil & Gas sought to enter into a lease." The special master also recognized that there was not an ancillary probate proceeding for either of the estates of Mabel or Charles Weeber that listed ownership interest in the Property as being part of their estates. The district court entered an order adopting the special master's report and recommendations, and ruled in favor of Defendants by granting their motion for summary judgment. Title was thus quieted in favor of the Group 1 and Group 2 Defendants.

{18} Plaintiffs then appealed the district court's order, and the Court of Appeals reversed the district court's grant of summary judgment in favor of Defendants. *T.H. McElvain Oil & Gas*, 2015-NMCA-004, ¶ 4. The Court of Appeals concluded that Thomas Miller had failed to exercise diligence and good faith in notifying the Wilsons of the 1948 quiet title action, enabling Plaintiffs' collateral attack on the 1948 judgment for lack of personal jurisdiction. *Id*. ¶ 55. The Court of Appeals further concluded that the record did not support a finding of waiver, laches, and estoppel on the part of Plaintiffs. *Id*. ¶ 55. Group 1 and Group 2 Defendants then appealed the Court of Appeals opinion to this Court, and we granted certiorari. *See T.H. McElvain Oil &Gas Ltd. P'ship v. Benson-Montin-Greer, Drilling Corp.*, 2014-NMCERT-012.

{19} This appeal rests upon the validity of the 1948 judgment quieting title to the Property in favor of Thomas Miller. Our determination of this ultimate issue rests upon whether the constructive service-of-process made by publication upon the Wilsons back in 1948 met constitutional standards of due process and was in accordance with the Rules of Civil Procedure then in effect. If the 1948 judgment is valid, Plaintiffs' right to the mineral interests is foreclosed and Defendants would be entitled to judgment as a matter of law. On the other hand, if the 1948 judgment is void, Plaintiffs may continue to adjudicate the merits of their claim in accordance with this opinion. To support their claim Plaintiffs make a collateral attack on the 1948

judgment, which can only succeed if "lack of jurisdiction appears affirmatively on the face of the judgment or in the judgment roll or record, or is made to appear in some other permissible manner." *See In re Estate of Baca*, 1980-NMSC-135, ¶ 11, 95 N.M. 294, 621 P.2d 511. In deciding the validity of the 1948 judgment we are called upon to consider not only the inherent complexities of a successful collateral attack on a longstanding judgment, but also the competing principles of finality in court judgments and the right to due process before the deprivation of one's property by another. Before we address these important legal principles in the context of the positions taken by the parties, we pause to articulate the legal standards of review for summary judgment in New Mexico with respect to the specific legal issues presented by this appeal.

III. STANDARD OF REVIEW

{20} The district court, upon cross motions for summary judgment, granted Defendants' motion. We review that grant of summary judgment de novo. *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 14, 143 N.M. 142, 173 P.3d 749. Summary judgment is appropriate where the facts are undisputed and the movant is entitled to judgment as a matter of law. *Id.* We view the facts in the light most favorable to the party opposing the motion and indulge all reasonable inferences in their favor. *Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943. New Mexico Courts generally view summary judgment with disfavor. *Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280.

Because the district court granted summary judgment in favor of Defendants, we must review the facts in the light most favorable to Plaintiffs.

{21} A party moving for summary judgment must meet its initial burden of establishing a prima facie case for summary judgment. *See Roth v. Thompson*, 1992-NMSC-011, ¶ 17, 113 N.M. 331, 825 P.2d 1241. Once a moving party meets that initial burden of establishing evidence that there are no issues of material fact, and that judgment as a matter of law may be appropriate, the burden shifts to the nonmoving party to alternatively establish evidence that issues of material fact remain requiring a trial on the merits. *See Romero*, 2010-NMSC-035, ¶ 10 (citations omitted). The "evidence adduced must result in reasonable inferences." *Id.* (citations omitted). "An inference is not a supposition or a conjecture, but is a logical deduction from facts proved and guess work is not a substitute therefor." *Id.* (internal quotation marks and citation omitted).

{22} Defendants offer as evidence in support of their motion for summary judgment the 1948 quiet title judgment granting their predecessors-in-interest title to the mineral interests in the Property, which they thereby assert entitles them to judgment as a matter of law. To successfully rebut Defendants' motion for summary judgment, Plaintiffs needed to adduce evidence establishing the existence of material issues of fact justifying a trial on the merits as to whether that 1948 judgment was void and did not bind Plaintiffs' predecessors-in-interest. *See Romero*, 2010-NMSC-035,

¶ 10. Void judgments can be subject to a collateral attack. *Nesbit v. City of Albuquerque*, 1977-NMSC-107, ¶ 12, 91 N.M. 455, 575 P.2d 1340. A litigant may collaterally attack a judgment by impeaching that judgment with matters outside of its record. *See Arthur v. Garcia*, 1967-NMSC-205, ¶ 6, 78 N.M. 381, 431 P.2d 759 (referring to *Lucus v. Ruckman*, 1955-NMSC-014, ¶ 12, 59 N.M. 504, 287 P.2d 68, *overruled on other grounds by Kalosha v. Novick*, 1973-NMSC-010, ¶ 12, 84 N.M. 502, 505 P.2d 845). Plaintiffs' rebut of Defendants' motion for summary judgment thus needed to advert to evidence demonstrating that the 1948 judgment should be set aside, and "one who challenges an unreversed judgment regularly entered has a very difficult task." *City of Albuquerque v. Huddleston*, 1951-NMSC-032, ¶ 12, 55 N.M. 240, 230 P.2d 972 (citations omitted).

{23} We begin our examination of the merits of Plaintiffs' claim by acknowledging the high standard that

> in New Mexico that every presumption consistent with the record is indulged in favor of the jurisdiction of courts of general jurisdiction whose judgments cannot be questioned when attacked collaterally, unless lack of jurisdiction appears affirmatively on the face of the judgment or in the judgment roll or record, or is made to appear in some other permissible manner."

In re Estate of Baca, 1980-NMSC-135, ¶ 11. Here, Plaintiffs allege it is facially apparent that the district court entering the 1948 judgment affirmatively lacked

personal jurisdiction over Plaintiffs' predecessors-in-interest due to insufficient service of process under the Due Process Clause, U.S. Const. amend. XIV, § 1, rendering the judgment void. Defendants, by contrast, assert that the service of process by publication in the 1948 district court proceedings met constitutional standards and was therefore effective for the district court to acquire personal jurisdiction over all of the defendants, including Plaintiffs' predecessor-in-interest, Mabel Weeber.

{24} By our de novo review of Defendants' motion for summary judgment, we must also consider what is necessary to lodge a meritorious collateral attack on a longstanding judgment, where the collateral attack alleges voidness for the lack of personal jurisdiction because the method of personal service did not satisfy the requirements of due process. We review those interrelated issues of law de novo. *City of Aztec v. Gurule*, 2010-NMSC-006, ¶ 5, 147 N.M. 693, 228 P.3d 477 (citations omitted).

IV. DISCUSSION

A. Due Process Requires Adequate Notice

{25} The Due Process Clause of the Fourteenth Amendment to the United States Constitution prohibits its deprivation of property absent adequate procedural safeguards. U.S. Const. amend. XIV, § 1. The right to be heard in a court of law in response to proceedings seeking to deprive one of one's own property is a

fundamental requirement of due process. "The fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950) (internal quotation marks and citation omitted). "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* (citations omitted). A judgment entered absent sufficient service of process upon a defendant violates due process and is void as to the defendant for want of personal jurisdiction. *See id*. at 313 (noting "the right of [a state's] courts to determine the interest of all claimants, resident or nonresident, provided its procedure accords full opportunity to be heard"); *see also Johnson v. Shuler*, 2001-NMSC-009, ¶ 11, 130 N.M. 144, 20 P.3d 126 (Jurisdiction over the person embraces notions of contacts with the State and sufficiency of notice of the action." (internal quotation marks and citation omitted)); *In re Estate of Baca*, 1980-NMSC-135, ¶ 10, ([W]hen attacked for failure of service of process, [a judgment] is void as to those persons not served and their successors." (citations omitted)); Restatement (Second) on Judgments § 65 (Am. Law Inst. 1982) ("A court has authority to render judgment in an action when the court has jurisdiction of the subject matter of the action . . . and . . . [a]dequate notice has been afforded the party.")

{26} To meet the fundamental requirements of due process, a plaintiff must undertake a diligent and good faith effort to locate defendants and serve them personally with notice. *Campbell v. Doherty*, 1949-NMSC-030, ¶¶ 30-31, 53 N.M. 280, 206 P.2d 1145. But personal service is not always feasible, and in such cases constructive notice may satisfy due process. *Mullane*, 339 U.S. at 317. To meet constitutional standards,

> [t]he notice must be of such nature as reasonably to convey the required information and it must afford a reasonable time for those interested to make their appearance, [b]ut if with due regard for the practicalities and peculiarities of the case these conditions are reasonably met the constitutional requirements are satisfied.

Id. at 314-15 (citations omitted).

{27} Notice of court proceedings cannot just be a mere gesture, else it will not pass constitutional muster – "[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it. The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected." *Mullane*, 339 U.S. at 315 (citations omitted).

{28} Notice by publication, then, is proper in some circumstances as a last resort. *See Campbell*, 1949-NMSC-030, ¶ 31 ("Constructive service . . . is only resorted to from necessity." (internal quotation marks

and citation omitted)). It was not always so. Surveying the history of constructive service, the United States Supreme Court explained that "in *in rem* or *quasi in rem* proceedings in which jurisdiction was based on the court's power over property within its territory, constructive notice to nonresidents was traditionally understood to satisfy the requirements of due process." *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 796 n.3 (1983) (citing *Shaffer v. Heitner*, 433 U.S. 186, 196-205 (1977)). In *in personam* proceedings, by contrast, due process traditionally required personal service to establish a state court's personal jurisdiction over an individual who did not submit to jurisdiction. *Id.* (citations omitted). This distinction is no longer relevant. In *Mullane*, the Supreme Court rejected the idea that the requirements of due process as they apply to constructive service vary depending on whether actions are *in rem* or *in personam*. 339 U.S. at 312; *see also Mennonite*, 462 U.S. at 796 n.3.

{29} *Mullane* clarified, in all cases, the circumstances in which constructive notice by publication comports with due process. *Mullane* concerned the constitutional sufficiency of notice of a judicial settlement of a common trust fund account that was provided by the trustee to beneficiaries of the fund. 339 U.S. at 307. While beneficiaries previously had been notified about trust investments by mail – as all the names and addresses of beneficiaries from participating estates were contained in the bank's records – notice to beneficiaries about the judicial settlement of the common trust fund account was effected solely through

publication. *Id.* at 309-10, 318. Further, the publication failed to identify each individual beneficiary or each participating estate or trust. *Id.* at 310. This, the Supreme Court held, violated the Due Process Clause and, therefore, constituted ineffective service of process. *Id.* at 319 ("The statutory notice to known beneficiaries is inadequate, not because in fact it fails to reach everyone, but because under the circumstances it is not reasonably calculated to reach those who could easily be informed by other means at hand.").

{30} Following *Mullane*, in *Mennonite Board of Missions v. Adams*, the Supreme Court held that an Indiana tax sale statute, which required notice to a mortgagee by publication only, violated due process. 462 U.S. at 798. The Supreme Court held that "unless the mortgagee is not reasonably identifiable, constructive notice alone does not satisfy the mandate of *Mullane*." *Id.* The Court explained that "[n]otice by mail or other means as certain to ensure actual notice is a minimum constitutional precondition to a proceeding which will adversely affect the liberty or property interests of *any* party, whether unlettered or well versed in commercial practice, if its name and address are reasonably ascertainable." *Id.* at 800.

{31} In light of *Mullane* and *Mennonite*, we make clear that constructive service of process by publication satisfies due process if and only if the names and addresses of the defendants to be served are not "reasonably ascertainable." *Mennonite*, 462 U.S. at 800; *see also Schroeder v. City of N.Y.*, 371 U.S. 208, 212-13 (1962) ("The general rule that emerges from the

Mullane case is that notice by publication is not enough with respect to a person whose name and address are known or very easily ascertainable. . . ."); *Mullane*, 339 U.S. at 317 ("This Court has not hesitated to approve of resort to publication as a customary substitute . . . where it is not reasonably possible or practicable to give more adequate warning . . . and [this means of notification] creates no constitutional bar to a final decree foreclosing their rights."); *Clark v. LeBlanc*, 1979-NMSC-034, ¶ 6, 92 N.M. 672, 593 P.2d 1075 ("It is clear that due process prohibits the use of constructive service where it is feasible to give notice to the defendant in some manner more likely to bring the action to his attention." (citing *Mullane*, 339 U.S. 306)). In this case, we apply the principle articulated in both *Mennonite* and *Mullane* to determine if constructive service by publication satisfied due process and thereby established the personal jurisdiction of the 1948 district court over Plaintiffs' predecessors in interest. *See Harper v. Va. Dep't. of Tax'n*, 509 U.S. 86, 97-98 (1993) (holding that unless the Court "'reserve[s] the question whether its holding should be applied to the parties before it,'" a new rule articulated by the Court will "apply retroactively") (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 539 (1991) (opinion of Souter, J.)).

{32} Furthermore, we note that the New Mexico Rules of Civil Procedure, both as they exist today and as they existed in 1948, effectuate the requirements of due process set forth in *Mullane* and its progeny. *See*, *e.g.*, Rule 1-004(E) NMRA, comm. cmt. ("Rule

1-004(E)(1) makes explicit in the rule the general test for constitutionally-adequate service of process established in *Mullane*. . . .”). For example, in 1948, the New Mexico Rule of Civil Procedure 4(g) required a party seeking to serve notice by publication to “‘file a sworn pleading or affidavit, stating that any defendant’” had either gone out of state, concealed himself or herself within the state, otherwise avoided service, or that his or her name or place of residence are unknown. *Campbell*, 1949-NMSC-030, ¶ 24 (quoting Rule 4(g) of the Rules of Civil Procedure. *See* NMSA 1941, § 19-101(4)(g) (Vol. 2)). Such a showing required the clerk of the court to issue notice of the action in a publication in the county in which the action was pending. *See id.* Compliance with this rule was “‘considered as sufficient notice of summons and valid in law,’” giving a district court personal jurisdiction over relevant defendants. *Id.* (quoting NMSA 1941, § 19-101(4)(g) (Vol. 2)). We also acknowledge that in light of *Mullane*, and recognized by this Court even before *Mullane*, the exercise of diligence and good faith to locate a defendant are implicit prerequisites to effective service of process by publication. *Campbell*, 1949-NMSC-030, ¶ 31 (citing NMSA 1941, § 19-101(4)(g) (Vol. 2)); *see also Mullane*, 339 U.S. at 315 (holding, with respect to known defendants, that “[t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it”).

B. Defendants' Predecessors-in-Interest Effected Service Upon Plaintiffs' Predecessors-in-Interest in Compliance With the Due Process Clause and the New Mexico Rules of Civil Procedure

{33} We consider whether the notice preceding the 1948 judgment satisfied the aforementioned standards of due process. Plaintiffs allege that Mabel Weeber, their predecessor-in-interest, did not receive adequate notice of the 1948 quiet title lawsuit filed by Thomas Miller. Therefore, they argue, the judgment granting Thomas Miller title and negating the Wilsons' 1928 reservation of mineral interests in the Property was void as to Mabel Weeber. Defendants argue that Plaintiffs' predecessors-in-interest were either unknown or missing in 1948, and that the district court thus acted in conformance with due process by authorizing constructive service of process on Mabel Weeber. Defendants point out that both Thomas Miller and the Sheriff of San Juan County affirmatively stated in 1948 that they could not ascertain through diligent effort the addresses or places of residence for certain defendants named in the complaint, including Mabel Weeber. Accordingly, Defendants assert that constructive service by publication in the *Times Hustler*, a local Farmington newspaper, satisfied due process.

{34} The summary judgment granted to Defendants by the district court was based upon the recommendations of the special master, who in reaching his decision below distinguished the instant case from *Mullane*. In *Mullane*, the trustee had the names and addresses of

the beneficiaries on its books, and it had used mail to communicate with the beneficiaries in the past. In contrast to *Mullane*, the district court determined that "there is nothing to indicate that Thomas Muller had information regarding Mabel Weeber's whereabouts or that her whereabouts could be identified through reasonable diligence." We agree.

{35} We begin by examining the record of the 1948 district court proceedings. It reveals that the district court had before it a verified complaint and sheriff's return specifically indicating that, after diligent search and inquiry, Plaintiffs' predecessors-in-interest could not be located and personally served with process. The complaint contains two specific allegations necessary to authorize notice by publication under Rule 4(g). First, the complaint alleges that defendants living, or if deceased, their unknown heirs, at some time made a claim of interest in the Property, and "that after diligent search and inquiry" "the Plaintiff has been unable to learn or determine the names, places of residence, Post office addresses and whereabouts [of the unknown heirs of any deceased defendants]." Second, the complaint contains the allegation that if any defendants were still living and residing in New Mexico they could not be located because they had secreted themselves so that personal service of process could not be effected. *See* NMSA 1941, § 19-101(4)(g) (Vol. 2).

{36} Thus, in 1948, Judson and Eva Wilson were deceased, Mabel Wilson had married and went by the name of Weeber, and that married name – and in conjunction, her address under that name – was unknown.

In order to personally serve Mabel Wilson with process, Thomas Miller would have been required to ascertain her new name and current address by first assuming that Mabel still lived in San Diego, based on the sale of the Property twenty years earlier to his brother, David Miller. Next, Thomas Miller would also have needed to acquire and search through the San Diego City Directory from either 1926 or 1930 to find Judson and Eva Wilson's San Diego address. Then, in order to identify Mabel Wilson as Mabel Weeber, he would have been required to search through San Diego's public records for Eva Wilson's death certificate which named her daughter Mabel Weeber as her informant, or alternatively, he would have been required to sift through twenty years of San Diego Union newspaper obituary notices in order to find Eva Wilson's obituary which named Mabel Weeber as the daughter she left behind. To get that far along in the search for Mabel Weeber, Thomas Miller would have been required to infer from the 1928 deed the exact familial relationship between Judson, Eva, and Mabel Wilson (father, mother, and daughter). Plaintiffs rely upon this labyrinth to lead to the discovery of Mabel Wilson, and they ask us to conclude today that because this path was ostensibly available and since Mabel Wilson was not located back then that Miller failed to make a diligent inquiry into her whereabouts.

{37} We indulge all reasonable inferences in Plaintiffs' favor and conclude that the diligence that was necessary to locate Mabel Wilson back in 1948 did not require this level of effort or investigation, particularly

in light of the facts, circumstances and resources available in 1948. Today, with relatively easy access to the internet, social media, and numerous global search engines, it is often not difficult to find persons whose identity and whereabouts are necessary to effectuate personal service of process. The world was quite different in 1948 in this regard. At the time, the task would have undoubtedly been significantly more onerous and time consuming. Further, the failure to find Mabel Weeber was not ipso facto evidence of a lack of diligence under Rule 4(g) in 1948. We conclude that the facts premised on Miller's verified complaint and the sheriff's return of service support the district court's conclusion "that after diligent search and inquiry the post office addresses, places of residence, and whereabouts of all of the Defendants herein . . . all are unknown," and, thus, Mabel Wilson's whereabouts were not readily ascertainable.

{38} Under the federal precedent interpreting due process requirements in the context of constructive service of process, we conclude that the constructive notice given in the underlying case was sufficiently "reasonably calculated" under the circumstances as they existed in 1948. *Mullane*, 339 U.S. at 314; *see also Mennonite*, 462 U.S. at 799-800. Without additional evidence in the record that reveals a more direct path toward Mabel's identity and whereabouts in 1948, we reject Plaintiffs theory that, on its face, the 1948 quiet title judgment was premised upon an obvious lack of diligence on the part of Miller.

C. Plaintiffs Fail to Mount a Successful Collateral Attack on the 1948 Judgment

{39} Our conclusion that the record before the 1948 district court did not reveal an obvious lack of diligence to support a collateral attack finds support in other courts that also have been called upon to consider the reasonableness of the search efforts made in a prior, underlying case. In addition to the allegations in the record, we must consider the reasonableness of the efforts made by Thomas Miller in the search for Mabel Weeber. In determining the validity of the collateral attack on the 1948 judgment in this regard, we refrain from relying on speculation. Furthermore, regarding the reasonableness of the search Miller would have needed to make to ascertain Mabel Wilson's whereabouts, we note that other courts have held that even "a search of the conveyance records to identify parties with mineral interests would be unduly burdensome" and, in such cases, constructive notice may be "sufficient to satisfy the requirements of due process." *Davis Oil Co. v. Mills*, 873 F.2d 774, 791 (5th Cir. 1989); *see also Aarco Oil & Gas Co. v. EOG Res. Inc.*, 20 So.3d 662, 669-670 (Miss. 2009).

{40} For example, in *Davis Oil*, the holder of a mineral lease sought to invalidate a judicial sale of land on due process grounds because he was never given actual notice of the sale. 873 F.2d at 775. Still, the Fifth Circuit determined that constructive notice satisfied the requirements of due process because a search of the conveyance records would be unduly cumbersome. *Id.* at 789. The federal court of appeals explained:

> [W]e do not construe *Mennonite* as requiring actual notice to every party who has a publicly recorded interest in the subject property. . . . Accordingly, the reasonableness of constructive notice in a particular case may turn on the nature of the property interest at stake and the relative ease or difficulty of identifying such interest holders from the land records and also the existence of alternative means of insuring the receipt of notice.

Id. at 790 (citations omitted). The *Davis Oil* court noted, moreover, that the lessee there easily could have assured actual notice of the sale by paying a nominal fee to place his name and address on file in the mortgage records. *Id.* at 790-91. While the lessee did not waive his due process rights by failing to place his name and address on file, the availability of a means to protect his property interest informed whether his identity was reasonably ascertainable and, hence, whether due process required actual notice. *Id.* at 789-90.

{41} More recently, in *Aarco Oil*, the Mississippi Supreme Court held that constructive notice by publication as to owners of mineral interests regarding a 1942 tax sale did not violate their due process rights. 20 So.3d at 670. In that case, the plaintiffs attacked the validity of the 1942 tax sale because the county conducting the tax sale did not provide notice to the then-mineral owners, "either by mail or personal service, in violation of federal and state due process requirements." *Id.* at 667. The plaintiffs contended that the statutorily-required newspaper notices of the sale and

"notice to the surface owners [only] was insufficient to satisfy the due process rights of the mineral owners." *Id.* at 668. The Mississippi Supreme Court disagreed, explaining that under *Mennonite* and *Mullane*, a governmental body is not obligated to undertake extraordinary efforts to discover the identity and whereabouts of all interested parties to the sale. *Id.* (citing *Mennonite*, 462 U.S. at 795; *Mullane*, 339 U.S. at 314). The Court additionally noted that the plaintiffs' predecessors could have protected their interests by ensuring their severed mineral interest was separately assessed for taxes. *Id.* at 670. The Court concluded that "because the identity and whereabouts of the owners of the severed mineral interests were not readily ascertainable, publication and notice to the surface owners [only] were sufficient to satisfy due process." *Id.* at 670.

{42} The conclusions reached in *Aarco Oil*, and *Davis Oil* – that publication notice afforded adequate due process on those facts – are equally applicable to the 1948 judgment in this case. Here, although not dispositive in our analysis, the owners of the mineral estate at the time of the 1948 judgment easily could have assured actual notice of the sale by taking some care to protect their investment. Neither Judson nor Eva Wilson had made a record of their ownership interests in probate following their deaths, and Mabel Wilson took no action during her lifetime to ensure an address was on record in the county where the Property was located. While not necessary to protect one's interest, we consider those facts persuasive to our instant analysis of whether Miller could have discovered the Wilsons'

whereabouts with reasonable diligence. Miller, moreover, was under no obligation to comb San Diego records to identify individuals who might appear to have an interest in the Property and who were not reasonable ascertainable.

{43} As has been the case in other jurisdictions, and in line with the relevant federal precedent in *Mennonite* and *Mullane*, we again conclude that there was not a readily apparent lack of diligence by Miller in searching for Mabel Wilson's whereabouts. Mabel Wilson's address was not in any of the original deeds, and she had changed her name by the time of the 1948 action. Plus, she did not exercise ownership in the Property between 1928 and 1948, and was only one of many potential interest holders named as defendants in Miller's complaint. In light of those facts, it is apparent from the record in the 1948 judgment that Mabel Wilson was not ascertainable. Nor can we conclude from the record facts before us that Miller was not diligent in searching for her whereabouts. As such, under guiding precedent, we cannot conclude that there was a violation of Mabel Wilson's due process. An absence of jurisdiction is thus not apparent from the face of the 1948 judgment, so the judgment was valid with respect to Plaintiffs' predecessors-in-interest. Plaintiffs thus fail to carry their burden in response to Defendant's motion for summary judgment, eliminating their claim to title in the mineral interests presently at issue.

{44} Further underlying that conclusion is the importance we must accord to finality in the context of court judgments. The disposition of a controversy

before a court has far reaching consequences beyond the parties instantly affected. Quiet title judgments, in particular, contribute to the efficient keeping of land ownership records, and as the Landmen's Association amicus brief stated, are "the bedrock of the thousands of land and mineral transactions which take place each year and which involve every type of land transaction from a couple buying their first home to an oil and gas company spending millions of dollars to acquire leasehold acreage." In fact, it is common practice for landmen and title examiners to rely upon county records and regularly entered judgments where a quiet title decree establishes the chain of title. Such quiet title judgments provide the certainty needed to ensure that one is the record owner of property in New Mexico to the exclusion of others.

{45} This Court has said that "[j]udicial decisions, affecting title to real estate presumptively acquired in reliance upon such decisions, should not be disturbed or departed from except for the most cogent reasons, certainly not because of doubts as to their soundness." *Duncan v. Brown*, 1914-NMSC-013, ¶ 9, 18 N.M. 579, 139 P. 140; *see also Bogle Farms v. Baca*, 1996-NMSC-051, ¶ 26, 122 N.M. 422, 925 P.2d 1184. That reasoning still rings true in present times, and is in part protected by the showing of proof needed in order to establish a valid collateral attack upon a quiet title judgment. Without evidence on the face of a quiet title judgment that the district court lacked jurisdiction, that judgment must be accorded finality in accordance

with the reliance interests created as a consequence of the quieting of the title in its owner.

{46} We thus conclude that the high standard for successfully mounting a collateral attack on this record is insurmountable in the instant case. Because we hold that Plaintiffs' suit constitutes an improper collateral attack on the validity of the 1948 judgment, we need not address whether the record also supports a finding of laches, waiver, or estoppel.

V. CONCLUSION

{47} The district court correctly found that the suit brought by T.H. McElvain, et al., constituted an improper collateral attack on the 1948 judgment quieting title in Defendants' predecessors-in-interest. Constructive service by publication of the 1948 proceedings satisfied the due process of Plaintiffs' predecessors-in-interest; accordingly, the 1948 quiet title judgment is not void. The judgment of the Court of Appeals is reversed, and the district court's orders quieting title to the Property in Group 1 and Group 2 Defendants, and granting summary judgment in favor of said Defendants, affirmed.

{48} **IT IS SO ORDERED.**

/s/ Barbara J. Vigil
BARBARA J. VIGIL, Justice

WE CONCUR:

/s/ Charles W. Daniels
CHARLES W. DANIELS, Chief Justice

/s/ Edward L. Chávez
EDWARD L. CHÁVEZ, Justice

/s/ Judith K. Nakamura
JUDITH K. NAKAMURA, Justice

PETRA JIMENEZ MAES, Justice, dissenting.

MAES, Senior Justice (dissenting)

{49} I respectfully dissent from the majority's opinion and adopt in full the opinion of the Court of Appeals, *T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 2015-NMCA-004, 340 P.3d 1277, as my dissent. I find there was ample evidence and no need to speculate that the 1948 judgment was void because the Millers failed to undertake a good faith effort to provide the Wilson heirs sufficient notice of suit. The evidence presented shows that with minimal diligence on the part of Thomas Miller, the location of Mabel Weeber (née Wilson) would have been discovered. In fact, Ms. Weeber's location may have already been known by Mr. Miller. The warranty deed conveying the property to David Miller, and the warranty deed granting Judson, Eva, and Mabel Wilson joint tenancy with right of survivorship both indicated the parties were from San Diego, California. Even with this information, Mr. Miller only posted notice of suit in a New

Mexico newspaper and the sheriff only searched San Juan County, New Mexico for the Wilsons. It is not a stretch of logic to assume a diligent plaintiff would take the extra step to post notice of suit in a San Diego newspaper or at least look to a resident listing in southern California with the information provided on the deeds. In sum, I believe the record shows the notice provided to Mabel Weeber was not constitutionally adequate, thus making the quiet title action subject to collateral attack. The notice and the quiet title action should be void as to her descendants.

{50} Furthermore, I must note I do not believe *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) presents an issue related to this case. Though *Mullane* established a heightened standard for service by publication, the New Mexico notice statute from 1948 comported with *Mullane* and therefore we require no analysis as to the retroactive effect of the case.

{51} As the majority states and I agree, "a plaintiff must undertake a diligent and good faith effort to locate defendants and serve them personally with notice." *T. H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 2016-NMSC-___, ¶ 26, ___ P.3d ___, citing *Campbell v. Doherty*, 1949-NMSC-030, ¶¶ 27, 30-31, 53 N.M. 280, 206 P.2d 1145. If personal service is not possible, plaintiffs have the option of alternative service, in this case service by publication. Notice by publication is not available though if a plaintiff has not first made a good faith effort to find

the respondents in the plaintiff's case. The requirement for good faith effort can be found in the service by publication rule in effect in 1948, which stated notice by publication, effectuated by the court clerk, could be made when a "due inquiry and search has been made" by the plaintiff, and plaintiff has filed a sworn affidavit stating as much. Rule 4(g) of the Rules of Civil Procedure. *See* NMSA 1941, § 19-101(4)(g) (Vol. 2). In *Mullane* the U.S. Supreme Court took issue with the New York notice by publication statute, which did not require naming of each defendant in the pending case, "[t]hus the only notice required, and the only one given, was by newspaper publication setting forth merely the name and address of the trust company, the name and the date of establishment of the common trust fund, and a list of all participating estates, trusts or funds." *Mullane*, 339 U.S. at 310. The company made notice this way despite having knowledge of the names and addresses of every person "who would be entitled to share in the principal" of the trust if it were to become distributable. *Id*. The Court found the trust company should have served all parties by mail. "Where the names and post office addresses of those affected by a proceeding are at hand, the reasons disappear for resort to means less likely than the mails to apprise them of its pendency." *Id.* at 318. In addition, the Court also found the New York statute violated the due process clause of the Fourteenth Amendment because the notice rule was not "reasonably calculated to reach those who could easily be informed by other means at hand." *Id*. at 319.

{52} In contrast, the New Mexico 1948 rule required notice by publication to include "the names of the plaintiff and defendant to the cause, or if there is more than one defendant to the cause the notice shall contain the name of said plaintiff and the name of the first of said defendants," which on its face appears to comport with the *Mullane* ruling. NMSA 1941, § 19-101(4)(g) (Vol. 2). Furthermore, as stated earlier, this type of notice is only available after the plaintiff has sworn in a statement the plaintiff was unable to find the respondent by other means. Presently, there is no conflict between the New Mexico statute and the findings in *Mullane*, as it appears New Mexico was ahead of the curve in preserving due process rights through their notice statute.

/s/ Petra Jimenez Maes
PETRA JIMENEZ MAES, Justice

APPENDIX B

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

Opinion Number: _____

Filing Date: October 24, 2014

NO. 32,666

T.H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, a New Mexico limited partnership; KAREN ANN HANDLEY ANDERSON, an individual; SUSAN R. HANDLEY MCGREW, an individual; BILLIE L. PHILLIPS, an individual; BILLIE L. PHILLIPS RECOVERABLE TRUST DATED APRIL 23, 1996, BILLIE L. PHILLIPS Trustee; JUDY LYNN QUINT, an individual; RONALD CHARLES WEEBER, an individual; LUCILE ALICE NORTHCOTE TRUST DATED MAY 29, 1996, BILLIE L. PHILLIPS, SUCCESSOR TRUSTEE,

Plaintiffs-Appellants,

v.

GROUP I: BENSON-MONTIN-GREER DRILLING CORP., INC., a Delaware corporation; ELIZABETH JEANNE TURNER CALLOWAY, an individual; KELLY R. KINNEY, an individual; KATHERINE P. MILLER, an individual; RONALD MICHAEL MILLER, an individual; VICKIE ROANN MILLER, an individual; THOMAS R. MILLER, an individual; FRED E. TURNER, LLC, a Delaware limited liability company; JOHN LEE TURNER, an individual;

LINDA VOITL a/k/a LINDA DAVIS, an individual; ESTATE OF WILLIAME G. WEBB, deceased, JOHN G. TAYLOR, independent executor,

GROUP II: CHERYL U. ADAMS, an individual; E'TWILA J. AXTELL, an individual; BP AMERICA PRODUCTION COMPANY, a Delaware corporation; COASTAL WATERS PETROLEUM COMPANY, INC., a Louisiana corporation; ENERGEN RESOURCES CORPORATION, an Alabama corporation; THE ESTATE OF ANNE B. LITTLE, FIRST SECURITY BANK OF NEW MEXICO, as personal representative; LANA GAY PHILLIPS, an individual; HENRIETTA SCHULTZ, an individual; THE FRANK AND HENRIETTA SCHULTZ REVOCABLE TRUST DATED JANUARY 2, 1990, HENRIETTA SCHULTZ TRUSTEE; SCHULTZ MANAGEMENT LTD., a Texas limited partnership; J. GLENN TURNER, JR. LLC, a Delaware limited liability company; MARY FRANCES TURNER JR. TRUST, JP MORGAN CHASE BANK, NA TRUSTEE,

GROUP III: ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO THE PLAINTIFFS,

Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT OF SAN JUAN COUNTY
John A. Dean Jr., District Judge

Dufford & Brown, P.C.
Herbert A. Delap
Denver, CO

Cuddy & McCarthy, LLP
John F. McCarthy Jr.
Arturo L. Jaramillo
Santa Fe, NM

for Appellants

Gallegos Law Firm, P.C.
J.E. Gallegos
Michael J. Condon
Santa Fe, NM
Briones Law Firm, P.A.
Felix Briones Jr.
Farmington, NM

for Appellees Henrietta Schultz, The Frank and Henrietta Schultz Revocable Trust, Henrietta Schultz Trustee, Schultz Management Ltd., Elizabeth Jeanne Turner Calloway, Fred E. Turner, LLC, John Lee Turner, J. Glenn Turner, Jr. LLC, Mary Frances Turner Jr. Trust, JP Morgan Chase Bank, N.A. Trustee, and Benson-Montin-Greer Drilling Corp., Inc.

Miller Stratvert P.A.
Dylan O'Reilly
William T. Denning
Farmington, NM

for Appellees E'Twila J. Axtell, Lana Gay Phillips, and Cheryl U. Adams

OPINION

SUTIN, Judge.

{1} The Opinion filed in this case on October 16, 2014, is withdrawn and the following Opinion is substituted in its place.

{2} This case presents a difficult issue of whether constructive notice of an action to quiet title to property, including underlying oil and gas interests located in San Juan County, New Mexico, was effective. Title was quieted in 1948 to property in which the oil and gas interests had been reserved by the grantors of the property in a 1928 warranty deed. Presumably unbeknownst to the grantors who had reserved their oil and gas interests, the decree quieted title to those oil and gas interests in favor of the quiet title plaintiff whose title clearly stemmed from a warranty deed that contained the reservation.

{3} Evidence indicated that the quiet title plaintiff knew or should have known in 1948 that the grantors who reserved the oil and gas interests resided in San Diego, California at the time of the 1928 deed. Evidence also indicated that upon inquiry in San Diego, the quiet title plaintiff may have been able to locate the grantors. Yet, service of process was obtained solely through constructive notice published in a local San Juan County newspaper with no attempt shown in the record to discover the location of those grantors for personal service or to otherwise give notice of the action to those grantors.

{4} In 2002 a group searching for locations to pursue oil and gas exploration discovered, by examining the chain of title to the property, that the oil and gas interests had been reserved by the 1928 warranty deed before the 1948 quiet title action. Based on that discovery, the group was able to locate heirs (the Wilson heirs) to the reserved interests with the result that

Plaintiffs sued the heirs of the quiet title plaintiff's purchasers to establish the Wilson heirs' ownership rights in the reserved oil and gas interests. From an unfavorable district court summary judgment, Plaintiffs appeal, contending that the constructive notice was not effective to permit adjudication of their reserved interests and thus violated due process. We conclude that the Millers failed to undertake a good faith effort to provide the Wilson heirs adequate notice of their 1948 quiet title suit. We, therefore, reverse the district court's grant of summary judgment to Defendants and remand for further proceedings.

BACKGROUND

{5} Plaintiff T.H. McElvain Oil & Gas Limited Partnership (McElvain) entered into a mineral lease agreement in 2002 with the Wilson heirs, specifically, Judy Lynn Quint and Ronald Charles Weeber, pertaining to the mineral interests associated with 160 acres of property in San Juan County (the property). Ms. Quint, Mr. Weeber, and a number of other individuals, are heirs of one of the original grantors, Mabel G. Wilson (later known by her married name, Weeber). Mabel Weeber, who, along with her mother and father, Eva C. Wilson and Judson Wilson (the Wilsons), sold the property to David Miller in 1928, reserving in their warranty deed to David Miller the "oil and gas existing or found" on the property. McElvain and the Wilson heirs are Plaintiffs in the present case.

{6} The property consists of 160 acres lying beneath the surface of Navajo Lake in San Juan County. In 1927 the Wilsons, as joint tenants, acquired a general warranty deed to the property from W.W. McEwen. The 1927 deed from McEwen to the Wilsons listed "Judson Wilson and Eva C. Wilson and Mabel G. Wilson of San Diego, California" as purchasers of the property. When the Wilsons conveyed the property to David Miller in 1928, the warranty deed contained the following express exception and reservation:

> excepting and reserving to the grantors herein the oil and gas existing or found therein, with the right to enter on for prospecting or developing same, provided they must pay all damage to land or crops in prospecting or development.

The deed from the Wilsons to David Miller was recorded in San Juan County in 1928.

{7} By a 1931 quitclaim deed, David Miller conveyed his interest in the property to his brother, Thomas Miller, who had paid one-half of the purchase price for the property at the time that David Miller purchased it from the Wilsons. The quit claim deed executed by David Miller, in which he conveyed his interest in the property to Thomas Miller was recorded in 1937, four days after David Miller's death. By a 1948 quiet title action in the San Juan County district court, Thomas Miller was adjudged to be the fee simple owner of the property.

{8} The numerous named Defendants in the present case were the various lessees and lessors of the mineral interests in the property whose interests stemmed from Thomas Miller's fee simple ownership in the property. The district court appointed a special master "to assist . . . in determining the ownership of the mineral rights[.]" The following background is based on the special master's statement of undisputed facts.

{9} Judson Wilson died in 1929, and Eva Wilson died in 1944. By the time that Eva Wilson died, Mabel Wilson had married and changed her name to Mabel Weeber. Mabel Weeber, the remaining joint tenant in the 1927 warranty deed to the property, died in 1970.

{10} In October 1948, Miller filed a quiet title action in the district court for San Juan County alleging, in relevant part, that he was the fee simple owner of the property. In his complaint to quiet title in the property, Miller named Judson Wilson, Eva Wilson, and Mabel Wilson, along with other individuals who are not relevant to this appeal, as defendants "if living, or if deceased, by their unknown heirs." Miller's complaint included a sworn statement by Miller's attorney that, in relevant part, the Wilsons' heirs were "unknown to . . . Plaintiff, and Plaintiff [had] been unable to learn or determine the names, places of residence, [p]ost [o]ffice addresses[,] and whereabouts of the . . . unknown heirs[ ] after diligent search and inquiry[.]" Additionally, the San Juan County Sheriff submitted a sheriff's return stating that he had "diligently searched and inquired for the [Wilsons]," but "after such search and inquiry, [was] unable to find [them] in

San Juan County . . . and [was] unable to find [their p]ost [o]ffice addresses, places of residence, or whereabouts[.]"

{11} Miller served the Wilsons and their heirs (hereinafter, the Wilsons) with notice of his quiet title action by publication in a Farmington, New Mexico newspaper for four successive weeks. The Wilsons did not respond to the notice. On December 20, 1948, the district court entered judgment quieting title to the property in favor of Miller. In its judgment, the court determined "that after [a] diligent search and inquiry[,] the post office addresses, places of residences, and whereabouts of . . . the [d]efendants" were "unknown"; and, therefore, the defendants could not "be personally served with process in this cause." The judgment concluded that Miller was the owner of the property in fee simple title.

{12} In 1950 Miller conveyed the property to V.H. McRee, but reserved three-fourths of the mineral rights therein. In 1953 Miller and McRee entered into oil, gas, and mineral leases; as of September 24, 2012, those leases remained in effect. The heirs of McRee's purchasers, who are Defendants in this case, claim royalty interests from those leases.

{13} After Mabel Weeber's death in 1970, her estate, which was probated in San Diego, did not identify or include any interest in any New Mexico property. Mabel Weeber's husband, Charles Weeber, died in 1978; his estate also did not mention any interest in any New Mexico property.

{14} Between 1928, when they deeded the property to David Miller, and 2002, when a landman representing McElvain wrote a letter to Judy Lynn Quint and Ronald Charles Weeber informing them that they were the "current owners of the oil and gas" under the property, neither the Wilsons nor their heirs took any action in regard to the property. By September 2012, the mineral interests in the property were valuable because in 2007 Energen Resources, a named Defendant in this case, successfully drilled under Navajo Lake, thus including the property in two Fruitland coalbed well spacing units.

{15} In September 2010, Plaintiffs (the Wilson heirs and McElvain) filed a lawsuit against Defendants (McRee's purchasers' heirs and their mineral lessors) seeking a declaration that, owing to the Wilsons' 1928 oil and gas reservation, Defendants were barred and enjoined from asserting any claim to the mineral interests in the property, and seeking a decree quieting title in Plaintiffs' favor to all of the mineral interests in the property. Defendants answered and also filed counterclaims seeking a declaration of certain Defendants' ownership of the mineral interests in the property. All of the parties moved for summary judgment.

{16} Owing to "the highly complex issues contained" in the case, the district court determined that it was necessary to appoint a special master "who has an expertise in dealing with the specific issues of determining the ownership of mineral rights." Ultimately, the parties chose a retired New Mexico District Court judge to serve as special master in this case. We are not

made aware of whether the special master held any evidentiary or other hearing. The special master filed a report on September 24, 2012.

{17} In his report, the special master identified the central issue in the case as "the validity of the [j]udgment in the 1948 quiet title action which purports to grant fee simple title in [the property to] . . . Miller." In the proceedings before the special master, Defendants' position was that the judgment was valid, therefore, their interests that flowed from Miller's title were also valid while Plaintiffs posited that the judgment was void because the 1948 service by publication failed to satisfy the Wilsons' right to due process. Having reviewed the parties' evidence that was attached to their motions for summary judgment, the special master recommended that the district court grant summary judgment in favor of Defendants because (1) the undisputed material facts supported the legal conclusion that there was no violation of due process in connection with the 1948 quiet title proceeding; (2) Plaintiffs' effort to challenge the validity of the 1948 judgment constituted a collateral attack on the judgment that would only succeed if the judgment reflected an absence of jurisdiction, and an absence of jurisdiction was not reflected in the 1948 judgment; and (3) the undisputed facts established that Plaintiffs' claims of ownership were barred by laches, waiver, and judicial estoppel. Plaintiffs objected to the special master's report by submitting to the special master a motion to reconsider the report and moving the district court to reconsider the special master's findings before entering judgment.

The district court's judgment adopted the special master's report in its entirety. In its summary judgment order, the district court quieted title to the property in favor of Defendants. Plaintiffs appeal from the court's judgment.

{18} On appeal, Plaintiffs argue that the district court erred in each of the foregoing legal determinations. We conclude that Plaintiffs' evidence established that, as a matter of law, Miller failed to exercise diligence and good faith to notify the Wilsons of his quiet title action against them. We also conclude that Plaintiffs' action is not an improper collateral attack, and we further conclude that the evidence in this record does not support the court's conclusion that equitable principles barred Plaintiffs' lawsuit. We therefore hold that the district court erred in granting summary judgment in favor of Defendants.

DISCUSSION

Summary Judgment Standard of Review

{19} "We review the district court's decision to grant summary judgment de novo." *Hydro Res. Corp. v. Gray*, 2007-NMSC-061, ¶ 14, 143 N.M. 142, 173 P.3d 749. Summary judgment is appropriate where the facts are undisputed, and the movant is entitled to judgment as a matter of law. *Id.* We review the facts in a light most favorable to the non-moving party. *Wilde v. Westland Dev. Co.*, 2010-NMCA-085, ¶ 12, 148 N.M. 627, 241 P.3d 628. Further, "[a]ll reasonable inferences from the record should be made in favor of the non[-]moving

party[.]" *J.R. Hale Contracting Co. v. Union Pac. R.R.*, 2008-NMCA-037, ¶27, 143 N.M. 574, 179 P.3d 579 (internal quotation marks and citation omitted). New Mexico courts view summary judgment with disfavor. *Romero v. Philip Morris Inc.*, 2010-NMSC-035, ¶ 8, 148 N.M. 713, 242 P.3d 280.

I. The Due Process Issue

{20} Plaintiffs argue that because the Wilsons were not personally served with notice of the 1948 quiet title action, or, at a minimum, notified of the lawsuit by publication in a San Diego newspaper or by mail at the Pershing Avenue address, the 1948 judgment that effectively deprived the Wilsons of their oil and gas interests in the property violated their right to due process and was, therefore, void. Plaintiffs argue that the undisputed facts show that Miller knew or with reasonable diligence could have learned of the Wilsons' address of 3767 Pershing Avenue in San Diego (the Pershing Avenue address) at which Mabel Weeber could have been personally served in 1948. They argue further that Miller's 1948 complaint contained a conclusory and self-serving representation that despite a diligent inquiry, he was unable to learn of the Wilsons' whereabouts to effect personal service upon them. Plaintiffs contend that the court in the 1948 action compounded the due process violation by finding, based on the sheriff's return, that the Wilsons could not be personally served with process when, in fact, the return merely stated that they could not be served in San Juan County.

{21} The issue whether the Wilsons were afforded due process is a question of law. *See Burris-Awalt v. Knowles*, 2010-NMCA-083, ¶ 15, 148 N.M. 616, 241 P.3d 617. Because we are reviewing the due process issue in the context of an appeal from a summary judgment, we indulge all reasonable inferences in favor of Plaintiffs who opposed Defendants' summary judgment motion. *See Smith v. Durden*, 2012-NMSC-010, ¶ 5, 276 P.3d 943 (stating that in reviewing an appeal from a summary judgment, we indulge all reasonable inferences and view the facts in the light most favorable to the party opposing the summary judgment); *see also Turner v. Bassett*, 2003-NMCA-136, ¶¶ 9-10, 134 N.M. 621, 81 P.3d 564 (reviewing a quiet title decree entered in the context of summary judgment and viewing the evidence in a light most favorable to the nonmoving party), *rev'd on other grounds by* 2005-NMSC-009, 137 N.M. 381, 111 P.3d 701. Whether the district court had jurisdiction over the Wilsons in the 1948 quiet title action is a question of law that we review de novo. *See Sproul v. Rob & Charlies, Inc.*, 2013-NMCA-072, ¶ 6, 304 P.3d 18 ("The determination whether a district court has personal jurisdiction over a nonresident defendant is a question of law that we review de novo.").

{22} In rejecting Plaintiffs' due process argument, the special master concluded that the undisputed facts did "not support the proposition that the 1948 mailing address for the Wilsons would have been identified through the exercise of reasonable diligence." In support of its conclusion, the special master stated that

the sheriff's return "specifically found that, after [a] diligent search and inquiry, . . . Defendants could not be located and personally served with process." Further, the special master stated, "[b]y 1948, both Judson Wilson and Eva Wilson had died; only Mabel Wilson was alive to potentially receive personal service"; and "[b]y 1948, Mabel Wilson had married and was known as Mabel Weeber." The special master observed that there were no facts in the record indicating that Miller knew of Mabel's married name or the name of her husband. The special master rejected "Plaintiffs[']attempt to raise an issue of fact as to the availability of information regarding the location of Mabel Weeber" by showing that phone listings for Mabel and Charles Weeber included the Pershing Avenue address on the basis that these listings only reflected Mabel's married name.

{23} In order to comport with due process, Miller was required to undertake a diligent and good faith effort to ascertain the location of the Wilsons and to personally serve them with process in the 1948 quiet title action. *See Campbell v. Doherty*, 1949-NMSC-030, ¶¶ 27, 30-31, 53 N.M. 280, 206 P.2d 1145 (examining the record from a 1946 lawsuit and recognizing the requirement of diligence and good faith in attempting to discover the names and places of residence of the defendants and or his or her heirs); *Owens v. Owens*, 1927-NMSC-053, ¶¶ 2, 11, 14, 32 N.M. 445, 259 P. 822 (requiring a diligent and good faith effort to effect personal service of process); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 309, 314-18 (1950)

(considering the adequacy of notice given to necessary parties in a 1947 lawsuit and explaining that within the bounds of reasonableness and practicality, notice of process must be certain to reach the affected party). In 1948 notice by publication would have been permissible only out of necessity. *See Campbell*, 1949-NMSC-030, ¶ 31 ("'Constructive service is in derogation of the common law. It is harsh. It lends itself to abuse. It is only resorted to from necessity.'" (quoting *Owens*, 1927-NMSC-053, ¶ 12)); *see Mullane*, 339 U.S. at 315, 317 (recognizing that notice by publication comports with due process only where the parties are unknown or missing).

{24} To support their argument that Miller knew or with reasonable diligence could have learned of Mabel Weeber's identity and whereabouts, Plaintiffs rely on the following evidence in the record that was before the special master. The 1928 deed from the Wilsons to David Miller was notarized in San Diego. In 1926 and in 1930, the San Diego city directory listed the Wilsons' address at the Pershing Avenue address. In 1928, when David Miller acquired the property from the Wilsons, Thomas Miller paid half the purchase price of the property. Eva Wilson's death certificate, which was issued by the Assessor/Recorder/County Clerk of San Diego County reflected that Eva Wilson lived at the Pershing Avenue address, and it listed Mrs. Weeber, who also lived at the Pershing Avenue address, as the "informant." An obituary for Eva Wilson was printed in "The San Diego Union" newspaper in December 1944 and stated, in relevant part, that Mrs. Wilson was survived

by her daughter, Mrs. Mabel W. Weeber. Evidence presented to the special master showed that Mabel Weeber resided at the Pershing address from 1926 until her death in 1970. No evidence in the record shows that the Wilsons ever resided in San Juan County.

{25} Additionally, Plaintiffs look to Miller's knowingly false allegation in his 1948 quiet title action stating he was "the owner in fee simple" of the property. Plaintiffs argue that this information could only have been gleaned by Miller or his attorneys having conducted a title examination of the property. Miller's 1948 complaint stated that Miller had diligently searched and inquired for the "unknown heirs" of the defendants and for the "unknown persons and parties" who claimed "some right, title, interest, equity, lien, claim[,] or demand in, to, or against" the property, but that he could not determine the identities or whereabouts of the unknown heirs and the unknown claimants. Miller's complaint did not, however, state that he had searched diligently or otherwise for the living defendants who were not residents of New Mexico, that is, for Mabel Wilson who was alive and going by her married name, Mabel Weeber. Further, the 1948 sheriff's return stated, in relevant part, that the "Sheriff of San Juan County, New Mexico" certified that he had "diligently searched and inquired for the [d]efendants . . . ; that after such search and inquiry, I have been unable to find any of the [d]efendants in San Juan County, New Mexico, and I have been unable to find the [p]ost [o]ffice addresses, places of residence, or whereabouts of the [d]efendants[.]" Relying on the

sheriff's return that indicated a search limited to San Juan County, the 1948 court found, in relevant part, that the Wilsons could not be personally served there with process.

{26} Based on the foregoing, Plaintiffs argue that because Miller contributed to his brother's purchase of the property and because the information regarding the Wilsons' residence was in his chain of title, Miller knew or should have known that the Wilsons lived in San Diego and that they had reserved the oil and gas interests in the property. They argue that had Miller wished to fulfill his due process obligations, with reasonable diligence, he could have ascertained Mabel Weeber's identity and address, and have personally sent notice to her of his quiet title action. At the very least, they argue Miller could have effected notice by publication in a San Diego newspaper. Plaintiffs argue further that Mabel Wilson was a named defendant in the quiet title action and, as such, she was neither an unknown heir nor was she an unknown claimant; therefore, Miller's complaint blatantly lacked any attestation as to a diligent search for her whereabouts.

{27} Plaintiffs also argue that the 1948 district court erred in finding, based on the sheriff's return, that the Wilsons could not be personally served. In Plaintiffs' view, the sheriff's return merely confirmed that the sheriff was unable to find any of the defendants in San Juan County, New Mexico; therefore, according to Plaintiffs, the 1948 court's finding went "well beyond" what the sheriff's return stated.

{28} Plaintiffs theorize that Miller's failure in good faith to attempt to personally serve Mabel Weeber with notice of his quiet title action may reasonably be viewed as having been intentional and self-serving, as Miller's aim in seeking to quiet title to the property was to acquire the rights to the Wilsons' oil and gas interests in the property. Plaintiffs support their ascription of Miller's mal-intent by pointing to the fact, also in the record, that "shortly after" the 1948 quiet title action, in 1950, Miller conveyed his interest in the property to McRee, but reserved three-fourths of the mineral interests for himself. Plaintiffs argue that Miller's failure to attempt to personally serve Mabel Weeber with process or at least to publish notice of the action in a San Diego newspaper or to mail notice of the action to the Pershing Avenue address was in derogation of the principle that the notice employed must be more than a mere gesture, it must reflect a desire on behalf of the party effecting service of actually informing the absentee of the lawsuit. *See Mullane*, 339 U.S. at 315 ("[W]hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it."). In sum, according to Plaintiffs, because Miller's obvious goal in quieting title to the property was to gain ownership of the Wilsons' oil and gas interests in the property, his actions were designed to avoid giving the Wilsons notice of his lawsuit.

{29} In response, Defendants argue that summary judgment should be affirmed because Plaintiffs failed

to demonstrate that Mabel Weeber was not on notice of the 1948 quiet title action. Because our standard of review mandates that we view the evidence in the light most favorable to and indulge all reasonable inferences in favor of Plaintiffs in this case, we reject this argument. *See Wilde*, 2010-NMCA-085, ¶ 12 (stating the standard of review applicable to an appeal from summary judgment); *J.R. Hale Contracting*, 2008-NMCA-037, ¶ 27 (same). Although it is true that Plaintiffs have failed to affirmatively demonstrate that Mabel Weeber did not see the notice published in the Farmington paper, it is axiomatically difficult to prove something in the negative, particularly several decades after the death of the knowledgeable party. Based on the fact that Mabel Weeber did not enter an appearance in the 1948 action, and the further facts that while Mabel Weeber only lived in San Diego from 1926 and notice of Miller's lawsuit was published exclusively in a Farmington, New Mexico newspaper, a reasonable inference is that Mabel Weeber was not on notice of Miller's 1948 action.

{30} Alternatively, Defendants argue that the special master correctly concluded that Plaintiffs' evidence failed to raise a question of fact as to the validity of the 1948 court's finding that, notwithstanding a diligent search or inquiry, Miller could not locate the Wilsons. In support of their argument, Defendants point to the special master's conclusions that (1) "there is nothing to indicate that . . . Miller had information regarding Mabel Weeber's whereabouts . . . in 1948"; and (2) "[t]here are no facts in the record which would indicate

that . . . Miller or anyone attempting to achieve service on Mabel knew of Mabel's married name or the name of her husband." Defendants contend that Plaintiffs' evidence does not contradict these conclusions. We disagree.

{31} Evidence in the record reflects that every transaction involving the Wilsons and the property showed that the Wilsons resided in San Diego during 1926-28, and no evidence showed that the Wilsons had resided any place except San Diego. Thus, as noted earlier, it is reasonable to infer that Miller was aware of the Wilsons' San Diego residence in 1927 and 1928 and likely could have ascertained their San Diego residence in 1948. Further, with nothing to suggest otherwise, it would be reasonable for Miller to have, in good faith, assumed that in 1948 the Wilsons were still in San Diego.

{32} The absence of anything in the record to indicate that Miller knew that Mabel Wilson had become Mabel Weeber does not support summary judgment for Defendants. Having apparently made no attempt to locate the Wilsons in San Diego, Miller's inability to learn of Mabel Wilson's married name was not caused by the fact that her name had changed, but by the fact that his efforts to locate her were limited to the State of New Mexico. *See Owens*, 1927-NMSC-053, ¶ 10 (stating that one cannot remain willfully, studiously, or deliberately ignorant of a means of personal service and honestly swear that the adversary's residence is unknown). It is possible that had Miller attempted to locate the Wilsons in San Diego, he would have been

stymied by Mabel Wilson's changed name. It is equally possible that a phone call or letter to the county clerk in San Diego, who had issued Eva Wilson's death certificate, which listed Mrs. Weeber as the informant of Eva Wilson's death, would have led to the Wilsons' address, at which Mabel Weeber continued to reside with her husband as reflected by the 1947-48 San Diego City Directory that listed "Weeber Chas E (Mabel W)" at the Pershing Avenue address.

{33} The special master concluded that Mabel Weeber's due process was not violated in the 1948 case because "there is nothing to indicate that . . . Miller had information regarding Mabel Weeber's whereabouts or that her whereabouts could be identified through reasonable diligence[.]" But reasonable inferences drawn from the evidence in favor of Plaintiffs require the conclusion that had Miller been interested in serving the Wilsons in 1948 with notice of the quiet title action, his search would and should have included San Diego and would have likely led to the possibility of learning Mabel Weeber's identity and address. Thus, the attempted constructive service in this case did not pass constitutional due process muster, and summary judgment in favor of Defendants was not appropriate.

The Collateral Attack Issue

{34} Because Plaintiffs sought, in the present lawsuit, to have the 1948 judgment declared void as to the Wilsons, their lawsuit constituted a collateral attack on the 1948 judgment. *See Hanratty v. Middle Rio*

Grande Conservancy Dist., 1970-NMSC-157, ¶¶ 4-5, 82 N.M. 275, 480 P.2d 165 (defining a "collateral attack" as an attempt in a separate action to impeach "a judgment by matters dehors the record" (internal quotation marks and citation omitted)). A judgment entered against a party who did not receive effective service of process is subject to a collateral attack because a court has no jurisdiction over parties who have not been notified of a lawsuit against them. *See Rodriguez v. La Cueva Ranch Co.*, 1912-NMSC-028, ¶¶ 1, 19, 22, 17 N.M. 246, 134 P. 228 (permitting a collateral attack on a land grant partitioning decree by a party that claimed adverse possession in the at-issue land, but who had not received notice of the partition suit and was, therefore, not subject to the decreeing court's jurisdiction); *see also Harlan v. Sparks*, 125 F.2d 502, 505 (10th Cir. 1942) (applying New Mexico law to hold that a probate court's decree of heirship and apportionment of the decedent's property was open to a collateral attack on the ground that certain interested parties did not receive effective service of process); *Jueng v. N.M. Dep't of Labor*, 1996-NMSC-006, ¶ 8, 121 N.M. 237, 910 P.2d 313 (stating that "failure to serve a party with process in a proper manner generally means only that the court has no power over that party and cannot render a judgment binding that party" (alteration, internal quotation marks, and citation omitted)). In this case, based on his having stated no more than that there was "nothing in the 1948 [j]udgment indicating a lack of jurisdiction[,]" the special master concluded that "Plaintiffs' collateral attack on the judgment fails as a matter of law."

{35} Relying on the principle that a judgment cannot be collaterally attacked unless the judgment or the record affirmatively shows that the court lacked jurisdiction over the party contesting its validity, Defendants argue that the 1948 judgment is not subject to Plaintiffs' collateral attack because, on its face, the judgment does not reflect an absence of jurisdiction. *See In re Estate of Baca*, 1980-NMSC-135, ¶ 11, 95 N.M. 294, 621 P.2d 511 (stating that judgments cannot be collaterally attacked "unless lack of jurisdiction appears affirmatively on the face of the judgment or in the judgment roll or record, or is made to appear in some other permissible manner"); *Swallows v. Sierra*, 1961-NMSC-063, ¶ 4, 68 N.M. 338, 362 P.2d 391 (holding that a former judgment could not be collaterally attacked because the party contesting its validity had not claimed that the judgment failed to affirmatively show a lack of jurisdiction). Because the permissibility of a collateral attack of the 1948 judgment on the basis of lack of personal jurisdiction over the Wilsons was considered in the context of a summary judgment, we view the facts in the light most favorable to Plaintiffs and indulge all reasonable inferences in their favor. *See Smith*, 2012-NMSC-010, ¶ 5 (stating that in reviewing an appeal from a summary judgment, we indulge all reasonable inferences and view the facts in the light most favorable to the party opposing the summary judgment). We review de novo whether the court correctly applied the law to the facts. *Gomez v. Chavarria*, 2009-NMCA-035, ¶ 6, 146 N.M. 46, 206 P.3d 157.

{36} Defendants point to the fact that the 1948 judgment states that the Wilsons could not be located or served in San Juan County, notice of the lawsuit was published, and the Wilsons were named in the publication. The court found that the Wilsons could not be personally served, the Wilsons did not answer the published notice, and the judgment stated that the court had jurisdiction over the Wilsons. Defendants also assert that the sheriff's return supports the 1948 district court's finding that the Wilsons could not be personally served. We are not persuaded.

{37} As discussed earlier in this Opinion, Plaintiffs' evidence supports a reasonable inference that Miller, either by having contributed to the purchase price of the property when his brother purchased it from the Wilsons, or by the title examination that led him to name each of the Wilsons as defendants in his quiet title action, knew or should have known that the Wilsons lived in San Diego at the time of the deed. Nevertheless, neither Miller's complaint nor the sheriff's return show that the search for the Wilsons or their "unknown heirs" exceeded the bounds of San Juan County or New Mexico, nor did the complaint acknowledge the fact or the possibility of the Wilsons' out-of-state residence. By omitting from his 1948 complaint the fact that the Wilsons were non-residents of San Juan County or of New Mexico, Miller avoided having to aver that he had, in good faith, attempted to locate them in their home state. *See Bowers v. Brazell*, 1926-NMSC-003, ¶¶ 4, 11, 31 N.M. 316, 244 P. 893 (stating that where a plaintiff sought to provide service

by publication of a defendant residing in a foreign jurisdiction, the plaintiff was required to state in an affidavit that a defendant who is owed service of process resides out of the state); *see also Campbell*, 1949-NMSC-030, ¶ 30 (recognizing the continuing validity, in 1949, of the *Bowers* decision related to notice and jurisdiction). Further, because Miller did not advise the 1948 court of the Wilsons' non-residence, the court had no basis on which to consider the effectiveness of notice by publication in a Farmington, New Mexico newspaper, nor did it have the opportunity to consider whether, owing to the possibility of ineffective notice, it lacked jurisdiction over the Wilsons.

{38} Additionally, Defendants argue that an averment in Miller's complaint that "if [the Wilsons] . . . are living, and reside in or have their places of residence in the State of New Mexico, [they] have secreted themselves so that service of process cannot be had upon them" was sufficient to comport with the then-applicable Rule of Civil Procedure. Defendants' argument is premised on the notion that the then-applicable rule, stated in *Campbell*, provided that the plaintiff was required to "file a sworn pleading . . . stating that any defendant resides or has gone out of the state, or has concealed himself within the state, . . . so that process cannot be served upon . . . them" and, if this was done, service by publication was permissible. 1949-NMSC-030, ¶ 24 (internal quotation marks and citation omitted). Thus, Defendants argue, under the rule stated in *Campbell*, Miller could, in keeping with due process, either state that the Wilsons resided out of State *or* he could state

that if they lived in New Mexico, they had secreted themselves. We disagree.

{39} It would run contrary to due process to interpret the then-applicable service of process rule to allow a plaintiff to avoid making any effort beyond only publishing in a local newspaper where the property was located to pursue service on a quiet title defendant, who was known to reside in a foreign jurisdiction at the time that the parties conducted their business related to the property, and who was never known to have resided in New Mexico, merely by stating that the defendant may have secreted himself in New Mexico. *See Campbell*, 1949-NMSC-030, ¶ 31 (recognizing that in accord with the "plain purpose" of the then-applicable constructive notice statute, one may not willfully, studiously, and deliberately avoid knowledge of an adversary's residence and yet claim that the adversary's residence is unknown). Under the circumstances of this case, where a reasonable inference is that Miller knew of the Wilsons' residence outside New Mexico at the time that the Wilsons purchased the property from McEwen and at the time that the Wilsons conveyed the property to Thomas Miller, due process required that he so state and that he exert a good faith effort to effect personal service. *See Campbell*, 1949-NMSC-030, ¶ 35 ("Diligence is a relative term and must be determined by the circumstances of each case."); *Owens*, 1927-NMSC-053, ¶ 4 (holding that due process required personal service of a plaintiff whose whereabouts, in another state, could have been ascertained but for the plaintiff having wholly failed to

make an effort to do so); *see also Mullane*, 339 U.S. at 315 ("The means [of notice] employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.").

{40} In sum, the 1948 quiet title record, including the complaint and the judgment, affirmatively shows that Miller failed to either investigate strong indications known to him of the Wilsons' whereabouts as required, or to fully apprise the court of the circumstance of the Wilsons' San Diego residence during their transactions in regard to the property. In turn, he was able to effectively avoid any requirement or potential mandate that he attempt to personally serve the Wilsons in San Diego. *See Owens*, 1927-NMSC-053, ¶¶ 4, 10 (holding that the plaintiff, who avoided a requirement to notify the non-resident defendant of his action by stating that he did not know the defendant's address, acted in bad faith because, had he so desired, he could easily have found the defendant's address). We hold that the district court erroneously determined that Plaintiffs' claim was barred under the collateral attack doctrine.

II. The Equity Issues

{41} The district court concluded that an alternative ground for granting summary judgment in favor of Defendants was that the undisputed facts demonstrated that Plaintiffs' claim was barred by the equitable doctrines of laches, waiver, and judicial estoppel. Defendants argue that the district court's application of

laches, waiver, and judicial estoppel should be reviewed for an abuse of discretion. We disagree. When an equitable determination is made in the context of summary judgment, the appellate court reviews the evidence in the light most favorable to the nonmoving party to determine whether the district court erred as a matter of law in applying the equitable principles. *See Brown v. Trujillo*, 2004-NMCA-040, ¶ 20, 135 N.M. 365, 88 P.3d 881 (recognizing that ordinarily an equitable determination is reviewed for an abuse of discretion, but where the equitable determination was made "in the context of summary judgment, we view the evidence in the light most favorable to the nonmoving party"). We review issues of law de novo. *Helena Chem. Co. v. Uribe*, 2013-NMCA-017, ¶ 28, 293 P.3d 888.

{42} In order to permit a legal conclusion that the doctrine of laches applied, the undisputed facts before the district court had to show that (1) Defendants' conduct gave rise to the situation of which the complaint was made and for which Plaintiffs seek a remedy; (2) Plaintiffs had knowledge or notice of Defendants' conduct and an opportunity to institute a lawsuit, but delayed in asserting their rights; (3) Defendants lacked knowledge or notice that Plaintiffs would assert the right on which they based their lawsuit; and (4) Defendants would suffer injury or prejudice in the event Plaintiffs were to prevail or their lawsuit was allowed to proceed. *See Garcia v. Garcia*, 1991-NMSC-023, ¶ 31, 111 N.M. 581, 808 P.2d 31 (stating the elements of laches).

{43} In order to support the legal conclusion that the doctrine of waiver applied, the undisputed facts had to demonstrate that Plaintiffs knew they were entitled to enforce a right, but neglected to do so for so long that Defendants could fairly infer that Plaintiffs waived or abandoned the right. *See Magnolia Mountain Ltd. P'ship v. Ski Rio Partners, Ltd.*, 2006-NMCA-027, ¶ 29, 139 N.M. 288, 131 P.3d 675 (defining waiver by acquiescence). "[A] trial court should not infer acquiescence from doubtful or ambiguous acts." *Id.* (internal quotation marks and citation omitted).

{44} The court based its laches and waiver conclusions on the facts that (1) neither the Wilsons nor their successors did anything to claim ownership in the oil and gas interests connected to the property from the date of the deed to David Miller in 1928 until 2002 when McElvain sought to enter into a lease with them, and (2) Plaintiffs only "stepped forward to contend they [had] an interest in the property after" a well was successfully completed in 2007. While Defendants maintain that each of the district court's laches and waiver holdings should be affirmed, at oral argument before this Court, Defendants did not discuss waiver and concentrated on and emphasized their view that the doctrine of laches was properly applied in this case. Accordingly, although we hold that neither laches nor waiver were properly applied here, we address Defendants' laches argument in some detail.

{45} In regard to laches, Defendants argue in their answer brief and emphasized at oral argument that

because Miller recorded his quiet title judgment pursuant to NMSA 1978, Section 14-9-1 (1886, amended 1991), and because subsequent conveyances of the property were likewise recorded as required by law, the Wilsons and their heirs were, pursuant to NMSA 1978, Section 14-9-2 (1915), charged with "notice" of Miller's quiet title action and of subsequent transactions involving the property. *See* § 14-9-1 (requiring all writings affecting the title to real estate, including deeds, mortgages, and leases, to be recorded in the office of the county clerk in the county in which the property is located); § 14-9-2 (stating that county clerk records of instruments affecting real estate, as required by Section 14-9-1, "shall be notice to all the world of the existence and contents of the instruments so recorded from the time of recording"). In Defendants' view, this notice was sufficient to meet the laches element of Plaintiffs' notice of Defendants' quiet title decree and later lease transactions and their opportunity to institute a lawsuit but delayed in asserting their rights. *See Garcia*, 1991-NMSC-023, ¶ 31 (stating the elements of laches). Defendants' reliance on Sections 14-9-1 and -2 is misplaced.

{46} The phrase "all the world" as it is used in Section 14-9-2 "has been limited to mean persons who are bound to search the record," such as subsequent purchasers. *Allen v. Timberlake Ranch Landowners Ass'n*, 2005-NMCA-115, ¶ 34, 138 N.M. 318, 119 P.3d 743. Neither Section 14-9-2 nor any authority of which we are aware imposes a duty upon the owner of an interest in real property to constantly peruse the records of

the county clerk to determine whether he or she has been divested of his or her property right in a lawsuit of which he or she was not notified. In this case, we will not interpret Section 14-9-2 to stand for the proposition that the Wilsons were "bound to search the record," *Allen*, 2005-NMCA-115, ¶ 34, after they sold the property subject to an oil and gas reservation, such that they should be held to have had constructive notice of Miller's quiet title action as a result of the recording of a quiet title judgment and later leasehold transactions in the San Juan County records.

{47} Defendants argue further that *Skaggs v. Conoco, Inc.*, 1998-NMCA-061, 125 N.M. 97, 957 P.2d 526, and *Farrar v. Hood*, 1952-NMSC-095, 56 N.M. 724, 249 P.2d 759, support the application of the doctrine of laches to the circumstances here. In *Skaggs*, in 1994 the plaintiffs sought to declare void a 1927 drilling and operating agreement between Mr. Skaggs (the decedent) and the prospecting company, Marland Oil Company of Colorado, permitting Marland to explore, drill, develop, produce, and market any oil and gas on the at-issue property. 1998-NMCA-061, ¶¶ 3-4, 7. The plaintiffs claimed that the 1927 agreement was void because the decedent's wife at the time of the conveyance had not joined in the conveyance, and as a result of the allegedly void conveyance, the plaintiffs, who were the decedent's wife's heirs, sought to quiet title to the property in their favor. *Id.* ¶¶ 2-3, 7-8, 10. The defendants claimed that laches, among other defenses, barred the plaintiffs' lawsuit. *Id.* ¶ 7. The record on appeal before the *Skaggs* Court included undisputed

evidence that as early as 1951, the decedent's wife knew of her husband's allegedly void conveyance to Marland and of his subsequent conveyance to third parties of any royalty interest from Marland's activities. *Id.* ¶ 11. The *Skaggs* Court held that under those circumstances, where it was evident that the decedent's wife was on notice of her husband's conveyances, yet neither she nor the heirs attempted to enforce any rights related to the property until more than forty years later, during which time the defendants had invested "substantial sums in prospecting and developing" the property, the doctrine of laches was properly applied. *Id.* ¶ 13.

{48} *Farrar* involved a transaction in which one party, the conveyor, conveyed mineral interests in exchange for a share of a speculative security sold by another party, the seller. 1952-NMSC-095, ¶ 3. The seller was not authorized to engage in the sale of speculative securities at the time of the transaction. *Id.* ¶¶ 2, 8-11. The seller induced the conveyor into the sale by representing that the speculative security venture would be profitable, however, five years after the transaction, the seller informed the conveyor that the venture was less than half as valuable as the seller had earlier represented. *Id.* ¶¶ 12, 14. Nevertheless, the conveyor did not attempt to escape the effect of his mineral deed transfer to the seller until nineteen years later, when the conveyor sought to void the original transaction based on a prohibition against the unauthorized sale of speculative securities. *Id.* ¶¶ 14, 16, 33. By the time the conveyor sought to void the original transaction,

the mineral interests that the conveyor had conveyed to the seller had become twenty times more valuable than they were at the time of the conveyance. *Id.* ¶ 33. The *Farrar* Court held that laches barred the conveyor's lawsuit because it violated the principle that "[a] person may not withhold his claim, awaiting the outcome of an enterprise, and then, after a decided turn has taken place in his favor, assert his interest, especially where he has thus avoided the risks of the enterprise." *Id.* ¶ 35 (internal quotation marks and citation omitted).

{49} In both *Skaggs* and *Farrar*, the parties that were barred by laches were on notice of the allegedly wrongful transaction underlying their lawsuits years before they sued to vindicate their rights. Notably, in concluding that waiver and laches applied in the case now before this Court, the district court did not find that the undisputed facts of this case demonstrated that the Wilsons knew or had notice of Miller's quiet title action, or of Miller's subsequent actions in regard to the mineral interests in the property. Nor, on this record, with regard to the question whether the Wilsons' due process right to notice was violated, could the district court reasonably have concluded that, as a matter of undisputed fact, the Wilsons were on notice of Miller's quiet title action. Unlike the plaintiffs in *Skaggs* and *Farrar*, Plaintiffs have not been shown to have delayed legal action to vindicate a wrong of which they were indisputably on notice. We conclude, therefore, that the record did not support a legal determination that Plaintiffs' lawsuit was barred by laches, and we further

conclude that *Skaggs* and *Farrar* do not support Defendants' laches argument. *See Garcia*, 1991-NMSC-023, ¶ 31 (stating that a finding of laches requires that the complaining party had notice of the defendant's actions).

{50} There is no evidence to support an inference or a conclusion that the Wilsons or their heirs knew that they were entitled to enforce their right to the oil and gas interest in the property against Miller or his heirs, but neglected to do so. The district court could not properly have determined that waiver applied. *See Magnolia Mountain*, 2006-NMCA-027, ¶ 29 (defining waiver). Having not been notified that their ownership of the oil and gas interests in the property were threatened and later unlawfully terminated by Miller's quiet title action, the Wilsons and their heirs cannot be said to have waived their rights.

{51} Judicial estoppel is applied to prevent a party from maintaining inconsistent positions in judicial proceedings. *Citizens Bank v. C & H Constr. & Paving Co.*, 1976-NMCA-063, ¶ 36, 89 N.M. 360, 552 P.2d 796. "Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, [judicial estoppel precludes him from] thereafter assum[ing] a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *Id.* Here, the special master determined that judicial estoppel barred Plaintiffs' lawsuit because Mabel Weeber and her husband, Charles Weeber, whose estates have gone through probate, did not indicate ownership in the subject

property at the time of their respective deaths. Thus, according to the special master, Plaintiffs' present lawsuit was inconsistent with their actions in the probate proceedings.

{52} In our view, judicial estoppel does not apply under the circumstances of this case. That the inventories in Mabel and Charles Weeber's probate proceedings omitted the oil and gas interests in the property is of little, if any, probative value on the matter of ownership of or right to the oil and gas interests in the property. The wills did not mention any particular properties and the inventories were prepared after the two were deceased. Indeed, it is not unheard of that a will would dispose of some, but not all, of a decedent's property. *See* Cal. Probate Code, § 6400 (West 2014) (stating that "[a]ny part of the estate of a decedent not effectively disposed of by will passes to the decedent's heirs"); *see also* NMSA 1978, § 45-2-101(A) (1993) (stating that "[a]ny part of a decedent's estate not effectively disposed of by will passes by intestate succession to the decedent's heirs"). Moreover, the parties do not point to any evidence in the record that reflects that Mabel Weeber or, later, her husband, affirmatively acknowledged their lack of ownership or right to the oil and gas interests in the property. Thus, what this record shows is an absence of any legal position taken by Mabel or Charles Weeber or their heirs in regard to the oil and gas interests in the property. Under these circumstances, we conclude that judicial estoppel is not supported by the undisputed facts in the record.

{53} In sum, the record demonstrates that the Wilsons, particularly Mabel Weeber, did not receive constitutionally adequate notice of Miller's 1948 quiet title action. Further, nothing in the record reflects that they were placed on notice of the quiet title decree or later oil and gas transactions. Under these circumstances, we cannot uphold the district court's application of the equitable principles as a bar to Plaintiffs' lawsuit.

Defendants' Presumed Grant Argument

{54} Defendants argue that we should affirm the district court's summary judgment on the basis of the doctrine of presumed grant. Neither the special master nor the district court considered or ruled on this issue. It is therefore not properly before this Court, and we decline to consider the issue. *See Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 41, 302 P.3d 751 (stating that, where the district court did not consider or rule on an issue, the issue was not properly before this Court).

CONCLUSION

{55} Having concluded that Miller failed to attempt, in good faith and with reasonable diligence, to serve Mabel Weeber with notice of his 1948 quiet title action, we hold that the quiet title action was subject to a collateral attack and was void as to the Wilsons. We also hold that the facts in this record did not support the district court's application and determinations of laches, waiver, and judicial estoppel. We reverse the

order of the district court granting summary judgment in favor of Defendants. We remand for further proceedings consistent with this Opinion.

{56} IT IS SO ORDERED.

/s/ Jonathan B. Sutin
JONATHAN B. SUTIN, Judge

WE CONCUR:

/s/ Roderick T. Kennedy
RODERICK T. KENNEDY, Chief Judge

/s/ Michael E. Vigil
MICHAEL E. VIGIL, Judge

APPENDIX C

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

NO.: D-1116-CV-2010-1557-6

T. H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP, et al.

Plaintiffs,

v.

GROUP I BENSON-MONTIN-GREER DRILLING CORP, INC., a Delaware Corporation, et al.,

GROUP II: CHERYL U. ADAMS, an Individual, et al.,

Defendants.

ORDER CONFIRMING AND ADOPTING SPECIAL MASTER REPORT AND DIRECTING ENTRY OF JUDGMENT IN FAVOR OF DEFENDANTS

(Filed Jan. 8, 2013)

THIS MATTER came before the Court on December 13, 2012 on the Defendants-Counterclaimants' Motion for Order Confirming the Special Master Report of Special Master James A. Hall, which set forth a decision in the parties' cross motions for summary judgment. Though no Rule 1-053(E)(2) objection to the Report was filed the Court also heard the plaintiffs on their Motion to Reconsider Special Master Report and their Response to the Defendants' Motion. All parties appeared by counsel of record.

The Court has considered the summary judgment motions of the parties on file with the Court, their respective Statements of Undisputed Material Facts, the Special Master Report and the arguments of counsel and otherwise proceeded in accordance with Rule 1-053(E)(2) NMRA and is fully advised.

IT IS THEREFORE CONCLUDED AND ORDERED as follows:

1. The Special Master Report granting the motions for summary judgment pursuant to Rule 1-056 NMRA in favor of the Schultz Defendants-Counterclaimants and the Axtell Defendants should be and is hereby adopted and confirmed.

2. Counsel for the prevailing Defendants-Counterclaimants shall submit to the Court for entry a Judgment quieting title in and to the counterclaimants to the subject leasehold and royalty estates in their respective working interests and royalty interests in the San Juan County, New Mexico lands in question described as follows: Township 32 North, Range 6 West, Section 14: SW 1/4, NW 1/4, Section 15: W 1/2 NE 1/4 and S 1/4 NE 1/4. comprising 160 acres.

DONE, December ____, 2012. John A. Dean, Jr.

Submitted:

/s/ J.E. Gallegos
Attorneys for Schultze et al.
Defendants-Counterclaimants

Emailed Approval 01/03/13
Attorneys for Axtell
Defendants-Counterclaimants

H. A. Delap

/s/ H. A. Delap
Attorneys for Plaintiffs McElvain, et al.

/s/ William E. Zimsky
Attorneys for Defendant Energen Resources

APPENDIX D

ELEVENTH JUDICIAL DISTRICT COURT
COUNTY OF SAN JUAN
STATE OF NEW MEXICO

No. D-1116-CV-2010-1557-6

T. H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, A NEW MEXICO LIMITED PARTNERSHIP, et al.

Plaintiffs,

v.

GROUP I: BENSON-MONTIN-GREER DRILLING CORP, INC., a Delaware Corporation, et al.,

GROUP II: CHERYL U. ADAMS, an Individual, et al.,

Defendants.

SPECIAL MASTER REPORT
(Motions for Summary Judgment)

Pursuant to *Rule 1-053 NMRA*, the Special Master recommends that the Court enter the following decision on the pending motions for summary judgment:

Decision

This matter comes before the Court on cross-motions for summary judgment. Defendants/Counter-claimants Henrietta Schultz, trustee of the Frank and Henrietta Schultz Trust, Schultz Management Ltd., Benson-Montin-Greer Drilling Corp. Elizabeth Jeanne Turner Calloway, Fred E. Turner LLC, John Lee Turner, J. Glenn Turner, Jr., LLC and JP Morgan

Chase Bank, N.A., Trustee of Mary Frances Turner, Jr. Trust (collectively the "Schultz Defendants") have filed two motions for summary judgment: 1) requesting that the Court declare that they are the owners of 97.5% of the leasehold in oil, gas and other minerals in 160 acres in San Juan County and 2) requesting that the Court dismiss the Plaintiffs' claim of ownership. Defendants/Counterclaimants E'Twila J. Axtell, Lana Gay Phillips and Cheryl U. Adams (collectively the "Axtell Defendants") have also filed two motions for summary judgment which adopt and mirror the motions filed by the Schultz Defendants.

Plaintiffs T.H. McElvain Oil & Gas Limited Partnership, Karen Ann Handley Anderson, Susan R. Handley McGrew, Billie Phillips, Billie Phillips Revocable Trust, Judy Lynn Quint, Ronald Charles Weeber and Lucile Alice Northcote Trust ("Plaintiffs") have also filed a motion for summary judgment seeking to establish their ownership interest in the leasehold at issue.

Having considered the pleadings, the Court concludes that the material facts are not in dispute and that the Schultz Defendants and the Axtell Defendants are entitled to summary judgment.

Factual Background

The following undisputed facts are established by the affidavits and documents submitted with the various motions for summary judgment:

The property at issue in this dispute is 160 acres in San Juan County which presently lies under the surface of Navajo Lake and is described as follows:

Township 32 North, Range 6 West
Section 14: SW 1/4 NW 1/4
Section W 1/2 NE 1/4, SE 1/4 NE 1/4
San Juan County

The relevant chain of title to this property begins in 1927 when W.W. McEwen conveyed the property by General Warranty Deed to Judson Wilson, Eva C. Wilson and Mabel G. Wilson of San Diego, California as joint tenants. The Plaintiffs' claim of interest in the property flows from the interest obtained by Judson Wilson, Eva Wilson and Mabel Wilson.

On August 16, 1928, Judson Wilson, Eva Wilson and Mabel Wilson conveyed the property to David Miller. This conveyance was subject to the following reservation:

> excepting and reserving to the grantors herein the oil and gas existing or found therein, with the right to enter on for prospecting or developing same, provided they must pay all damage to land or crops in prospecting or development.

It is this exception and the effect of subsequent events on its validity that is at the center of this dispute.

On March 14, 1931, David Miller executed a Quitclaim Deed conveying his interest in the property to his brother T.B. Miller, who was also known as Thomas

Miller. This Quitclaim Deed was not immediately recorded. David Miller died April 25, 1937, and the Quitclaim Deed was recorded on April 29, 1937, a few days after David Miller's death. In his will, David Miller bequeathed all his property to Thomas Miller.

Judson Wilson died May 16, 1929, and Eva Wilson died on December 17, 1944. Mabel Wilson, the daughter of Judson and Eva Wilson and the remaining joint tenant in the original deed from W.W. McEwen, survived until 1970. By the time Eva Wilson died in 1944, Mabel Wilson had married and went by her married name of Mabel W. Weeber.

On October 21, 1948, Thomas Miller filed a quiet title action in the District Court for San Juan County alleging that he was the owner in fee simple of a total of 931 acres, including the 160 acres which is the subject of this dispute. Thomas Miller named multiple individuals as defendants, including Judson Wilson, Eva C. Wilson and Mabel C. Wilson, all of which were named as defendants if living, or if deceased, by their unknown heirs. The Complaint, verified under oath by the attorney for Thomas Miller, stated that, as to many defendants including the Wilsons, the heirs of the defendants are "all unknown to the Plaintiff, and Plaintiff has been unable to learn or determine the names, places of residence, Post Office addresses and whereabouts of the said unknown heirs, after diligent search and inquiry for the same." On November 19, 1948, the Sheriff of San Juan County submitted a Sheriff's Return stating that he

> diligently searched and inquired for the Defendants, and each of them, in the above-entitled cause; that after such search and inquiry, I have been unable to find any of the Defendants in San Juan County, New Mexico, and I have been unable to find the Post Office addresses, places of residence, or whereabouts of the Defendants, or either of them.

Service of many of the defendants, including the Wilsons, was made by means of a Notice published in a Farmington newspaper for four successive weeks. No responsive pleading was filed by the Wilsons or any of their heirs. Judgment was entered quieting title to the property in favor of Thomas B. Miller on December 20, 1948. The Judgment included the following determination:

> 3. . . . that after diligent search and inquiry the post office addresses, places of residences, and whereabouts of all of the Defendants herein [excepting those that filed a Disclaimer of Interest], all are unknown and ascertained; and that none of the said Defendants, other than those set out above, can be personally served with process in this cause.

The Judgment determined that Plaintiff Thomas Miller was the owner of the property in "Fee Simple Title."

Following the quiet title action, Thomas Miller conveyed the 931 acres to V.H. McRee on January 15, 1950. In that conveyance, Thomas Miller reserved three-fourths of the mineral rights. In 1953, Miller and McRee entered into an Oil, Gas and Mineral Lease

with Stanolind Oil Company. Stanolind Oil Company changed its name to Pan American Petroleum Company in 1957. The leases granted to Stanolind remain in effect today.

As noted above, Mabel Wilson, also known as Mabel Weeber, died in 1970. Her estate was probated in the Superior Court for San Diego County. The estate did not identify any interest in real property other than residential property in San Diego. The estate did not include any interest in any New Mexico property. Mabel Weeber's husband, Charles Weeber, died in 1978. Similarly, his estate did not include any interest in any New Mexico property.

There is nothing in the record before the Court indicating that the Wilsons or any of their descendents [sic] took any action regarding the 160 acres at issue from the granting of the deed to David Miller on August 17, 1928 until 2002. In 2002, a landman representing Plaintiff McElvain Oil & Gas Properties, who had apparently examined the chain of title to the property, wrote a letter to Plaintiffs Judy Lynn Quint and Ronald Charles Weeber informing them that they were the "current owners of the oil and gas" under the 160 acres of land based on the August 16, 1928 deed from the Wilsons to David Miller. Ms. Quint and Mr. Weeber are the grandchildren of Charles Weeber. The letter offered Ms. Quint and Mr. Weeber $2,320.00 each for a five year lease. Ms. Quint and Mr. Weeber agreed to the leases.

The mineral interests in this property are now valuable because coalbed wells were successfully drilled under Navajo Lake by Defendant Energen Resources in 2007 and the 160 acres are now included in two Fruitland coalbed well spacing units.

Legal Analysis

Although the parties raise several legal arguments in support of their motions for summary judgment, the central issue in this case is the validity of the Judgment in the 1948 quiet title action which purports to grant fee simple title in Thomas Miller. The Schultz Defendants and the Axtell Defendants take the position that the Judgment is valid; therefore, their interests, which flow from Miller's title, are also valid.

In response, the Plaintiffs contend that the 1948 Judgment is void because it was based upon improper service by publication. Plaintiffs argue that sufficient information existed in 1948 to locate and personally serve Mabel Weeber; therefore, service by publication fails to satisfy the requirements of due process. In support of this position, Plaintiffs note that the September 1927 deed from W.W. McEwen to the Wilsons states that the Wilsons reside in San Diego and that the 1928 deed from the Wilsons to David Miller was executed in San Diego. Plaintiffs also submit an affidavit from Plaintiff Quint stating that "[l]ocal phone books listed Mabel G. Wilson Weeber and Charles E. Weeber's address at 3767 Pershing Avenue, San Diego, California, with their telephone number through 1970." Plaintiffs

take this information and argue that because the Weebers' mailing address in San Diego was ascertainable through reasonably diligent efforts, notice by publication was constitutionally invalid.

Plaintiffs rely on *Mullane v. Central Hanover Bank & Trust Co, 339 U.S. 306 (1950)*, and its progeny, in support of their argument. In *Mullane*, the bank petitioned the Court for settlement of its account as trustee of a common trust fund. Previously, each investor had been notified of investments in the trust by mail. Despite the fact that the names and addresses of the investors were contained in the bank's records, the notice of the court petition for settlement was published. Moreover, the published notice listed only the name and address of the trust company and identified the participating trusts. The interested beneficiaries were not listed. In these circumstances, the Supreme Court concluded that the published notice failed to satisfy due process requirements. *Id. at 320.*

Plaintiffs' position on this issue is not persuasive for several reasons. The undisputed facts simply do not support the proposition that the 1948 mailing address for the Wilsons would have been identified through the exercise of reasonable diligence. In the 1948 Judgment, the Court had before it the verified Complaint and the Sheriff's Return and specifically found that, after diligent search and inquiry, the Defendants could not be located and personally served with process. By 1948, both Judson Wilson and Eva Wilson had died; only Mabel Wilson was alive to potentially receive personal service. By 1948, Mabel Wilson had married and was

known as Mabel Weeber. There are no facts in the record which would indicate that Thomas Miller or anyone attempting to achieve service on Mabel knew of Mabel's married name or the name of her husband.

Plaintiffs attempt to raise an issue of fact as to the availability of information regarding the location of Mabel Weeber through generalized statements in the affidavit of Plaintiff Judy Lynn Quint. Ms. Quint's affidavit, however, is of limited value to the Court as it only makes a generalized claim that phone listings for Mabel G. Wilson Weeber and Charles Weeber included a specific address "through 1970."[1] In response to this affidavit, the Schultz Defendants submitted evidence indicating that the 1948 telephone directory for San Diego included only a listing for "Weeber, Chas. E. (Mabel W)" and that there was no listing under the name of Mabel Wilson. At best, Plaintiffs have placed before the Court evidence that public information in 1948 included some limited information regarding an address for Mabel Weeber. Given that any information available regarding Mabel Weeber is limited to her married name, this evidence simply does not rise to a level to even raise a question of fact as to the validity of the

[1] The Schultz Defendants have filed a Motion to Strike the Affidavit of Judy Lynn Quint on the grounds that the affidavit fails to meet the requirement that it be based on personal knowledge as would be required to be admissible in evidence. The Schultz Defendants are technically correct in their position and the Motion to Strike will be granted. As noted above, summary judgment on behalf of the Schultz Defendants and the Axtell Defendants would still be appropriate even if Ms. Quint's affidavit were admissible.

1948 Court's finding that the Defendants could not be located after diligent search and inquiry.

The circumstances in this case are not similar to the facts that existed in *Mullane* or any of the other cases cited by Plaintiffs. In all of the cases cited by Plaintiffs, the party defending notice by publication had in its possession clear information regarding the identity and whereabouts of the party to be served. When that information is in the possession [sic] a party, it certainly makes sense that service by publication would be contrary to due process. In this case, however, there is nothing to indicate that Thomas Miller had information regarding Mabel Weeber's whereabouts or that her whereabouts could be identified through reasonable diligence; therefore, the Court's conclusion in 1948 that she could not be located for personal service appears appropriate.

The undisputed material facts support the conclusion that there was no violation of due process in connection with the 1948 quiet title proceedings; however, even if there were some issue as to a violation of due process, there are several alternate grounds under which the Schultz Defendants and the Axtell Defendants are entitled to summary judgment. Plaintiffs' effort to challenge the validity of the 1948 Judgment constitutes a collateral attack which is not permitted unless a lack of jurisdiction appears in the judgment. *See, e.g. Swallow v. Sierra, 68 N.M. 338, 339, 362 P.2d 391 (1961).* There is nothing in the 1948 Judgment indicating a lack of jurisdiction; therefore, Plaintiffs' collateral attack on the judgment fails as a matter of law.

Moreover, the undisputed facts in this case establish that the Plaintiffs' claims of ownership are barred by laches, estoppel and waiver. The Wilsons and their successors did nothing to claim any ownership interest in the oil and gas connected to the property from the date of the deed to David Wilson in 1928 until 2002 when McElvain Oil & Gas sought to enter into a lease. The Plaintiffs only stepped forward to contend they have an interest in the property after Energen successfully completed [sic] well in 2007. New Mexico courts have repeatedly refused to recognize claims when the party making the claim has engaged in unreasonable delay in protecting mineral interests. *See, e.g.*, *Farrar v. Hood, 56, N.M. 724, 249 P.2d 759 (1952)*; *Skaggs v. Conoco, Inc. 125 N.M. 97, 957 P.2d 526 (Ct. App. 1998).* In the probate actions for both Mabel Weeber and Charles Weeber, neither included any indication of an ownership interest in the subject property. Plaintiffs' present claim is inconsistent with their actions in the probate proceedings and is barred by judicial estoppel. *Citizens Bank v. C&H Construction Co., 89 N.M. 360, 552 P.2d 796 (Ct App. 1976).* These equitable defenses also bar Plaintiffs' claims.[2]

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[2] The Schultz and Axtell Defendants present two additional arguments in support of their motions for summary judgment. They contend that the language of the 1928 deed from the Wilsons to David Miller which reserves "oil and gas existing or found therein" would not include coal or coalbed methane gas. They also contend that Thomas Miller obtained ownership of all minerals on the property by adverse possession. The Court need not address these arguments because the Schultz and Axtell

Conclusion

For the reasons set forth above, the motions for summary judgment submitted by the Schultz Defendants and the Axtell Defendants are granted. The Plaintiffs' Motion for Summary Judgment is denied.

Respectfully submitted,

/s/ James A. Hall
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Special Master

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I certify that on the 21st day of September, 2012, I mailed this pleading to the following counsel/parties:

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Defendants are entitled to summary judgment on the grounds set forth in the body of this decision.

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/s/ James A. Hall
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APPENDIX E

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

November 9, 2016

NO. S-1-SC-34993

T.H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, a New Mexico limited partnership; KAREN ANN HANDLEY ANDERSON, an individual; SUSAN R. HANDLEY MCGREW, an individual; BILLIE L. PHILLIPS, an individual; BILLIE L. PHILLIPS RECOVERABLE TRUST DATED APRIL 23, 1996, BILLIE L. PHILLIPS Trustee, JUDY LYNN QUINT, an individual; RONALD CHARLES WEEBER, an individual; LUCILE ALICE NORTHCOTE TRUST DATED MAY 29, 1996, BILLIE L. PHILLIPS, Successor Trustee,

Plaintiffs-Respondents,

v.

GROUP I: BENSON-MONTIN-GREER DRILLING CORP., INC., a Delaware corporation; ELIZABETH JEANNE TURNER CALLOWAY, an individual; KELLY R. KINNEY, an Individual; KATHERINE P. MILLER, an individual, RONALD MICHAEL MILLER, an individual; VICKIE ROANN MILLER, an individual; THOMAS R. MILLER, an individual; FRED E. TURNER, LLC, a Delaware limited liability company; JOHN LEE TURNER, an individual; LINDA VOITL a/k/a LINDA DAVIS, an individual; ESTATE OF WILLIAM G. WEBB, deceased, JOHN G. TAYLOR, independent executor,

Defendants-Petitioners,

GROUP II: CHERYL U. ADAMS, an individual; E'TWILA J. AXTELL, an individual; BP AMERICA PRODUCTION COMPANY, a Delaware corporation; COASTAL WATERS PETROLEUM COMPANY, INC., a Louisiana corporation; ENERGEN RESOURCES CORPORATION, an Alabama corporation; THE ESTATE OF ANNE B. LITTLE, FIRST SECURITY BANK OF NEW MEXICO, as personal representative; LANA GAY PHILLIPS, an individual; HENRIETTA SCHULTZ, an individual; THE FRANK AND HENRIETTA SCHULTZ REVOCABLE TRUST DATED JANUARY 2, 1990, HENRIETTA SCHULTZ, Trustee; SCHULTZ MANAGEMENT, LTD., a Texas limited partnership; J. GLENN TURNER, JR., LLC, a Delaware limited liability company; MARY FRANCES TURNER, JR. TRUST, JP MORGAN CHASE BANK, NA, Trustee,

Defendants,

GROUP III: ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO THE PLAINTIFFS,

Defendants.

and

NO. S-1-SC-34997

T.H. MCELVAIN OIL & GAS LIMITED PARTNERSHIP, a New Mexico limited partnership, KAREN ANN HANDLEY ANDERSON, an individual; SUSAN R. HANDLEY MCGREW, an individual; BILLIE L. PHILLIPS, an individual; BILLIE L. PHILLIPS RECOVERABLE TRUST DATED APRIL 23, 1996, BILLIE L. PHILLIPS Trustee, JUDY LYNN QUINT, an individual; RONALD CHARLES WEEBER,

an individual; LUCILE ALICE NORTHCOTE TRUST DATED MAY 29, 1996, BILLIE L. PHILLIPS, Successor Trustee,

Plaintiffs-Respondents,

v.

GROUP I: BENSON-MONTIN-GREER DRILLING CORP., INC., a Delaware corporation; ELIZABETH JEANNE TURNER CALLOWAY, an individual; KELLY R. KINNEY, an individual; KATHERINE P. MILLER, an individual; RONALD MICHAEL MILLER, an individual; VICKIE ROANN MILLER, an individual; THOMAS R. MILLER, an individual; FRED E. TURNER, LLC, a Delaware limited liability company; JOHN LEE TURNER, an individual; LINDA VOITL a/k/a LINDA DAVIS, an individual; ESTATE OF WILLIAM G. WEBB, deceased, JOHN G. TAYLOR, independent executor,

Defendants,

GROUP II: CHERYL U. ADAMS, an individual; E'TWILA J. AXTELL, an individual; LANA GAY PHILLIPS, an individual;

Defendants-Petitioners,

and

BP AMERICA PRODUCTION COMPANY, a Delaware corporation; COASTAL WATERS PETROLEUM COMPANY, INC., a Louisiana corporation; ENERGEN RESOURCES CORPORATION, an Alabama corporation; THE ESTATE OF ANNE B. LITTLE, FIRST SECURITY BANK OF NEW MEXICO, as personal representative; HENRIETTA SCHULTZ, an individual; THE FRANK AND HENRIETTA SCHULTZ REVOCABLE TRUST

DATED JANUARY 2, 1990, HENRIETTA SCHULTZ TRUSTEE; SCHULTZ MANAGEMENT LTD., a Texas limited partnership; J GLENN TURNER, JR., LLC, a Delaware limited liability company; MARY FRANCES TURNER JR. TRUST, JP MORGAN CHASE BANK, NA, Trustee,

Defendants,

GROUP III: ALL UNKNOWN CLAIMANTS OF INTEREST IN THE PREMISES ADVERSE TO THE PLAINTIFFS,

Defendants.

ORDER

WHEREAS, this matter came on for consideration by the Court upon motion for rehearing and brief in support, and the Court having considered said pleadings and being sufficiently advised, Chief Justice Charles W. Daniels, Justice Petra Jimenez Maes, Justice Edward L. Chávez, Justice Barbara J. Vigil, and Justice Judith K. Nakamura concurring;

NOW, THEREFORE, IT IS ORDERED that the motion for rehearing is DENIED; and

IT IS FURTHER ORDERED that mandate shall issue immediately. IT IS SO ORDERED.

WITNESS, Honorable Charles W. Daniels, Chief Justice of the Supreme Court of the State of New Mexico, and the, seal of said Court this 9th day of November, 2016.

(SEAL) /s/ Joey D. Moya

Joey D. Moya, Chief Clerk
of the Supreme Court of the
State of New Mexico

APPENDIX F

New Mexico Rules of Annotates

1.004. Process.

A. (1) **Scope of rule.** The provisions of this rule govern the issuance and service of process in all civil actions including special statutory proceedings.

C. **Service of process; return.**

(2) Service of process shall be made with reasonable diligence, and the original summons with proof of service shall be filed with the court in accordance with the provisions of Paragraph L of this rule.

J. **Process; service in manner approved by court.** Upon motion, without notice, and showing by affidavit that service cannot reasonably be made as provided by this rule, the court may order service by any method or combination of methods, including publication, that is reasonably calculated under all of the circumstances to apprise the defendant of the existence and pendency of the action and afford a reasonable opportunity to appear and defend.

K. **Process; service by publication.** Service by publication may be made only pursuant to Paragraph J of this rule. A motion for service by publication shall be substantially in the form approved by the Supreme Court. A copy of the proposed notice to be published shall be attached to the motion. Service by publication shall be made once each week for three consecutive weeks unless the court for good cause

shown orders otherwise. Service by publication is complete on the date of the last publication.