NORTH DAKOTA SUPREME COURT REVIEW

The North Dakota Supreme Court Review summarizes important decisions rendered by the North Dakota Supreme Court. In this issue, Federal District and Appellate court decisions are also included. The purpose of the Review is to indicate cases of first impression, cases of significantly altered earlier interpretations of North Dakota law, and other cases of interest. As a special project, Associate Editors assist in researching and writing the Review.* The following topics are included in the Review:

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MINES AND MINERALS – TITLE, CONVEYANCES, AND CONTRACTS – LEASES, LICENSES, AND CONTRACTS – CONSTRUCTION AND OPERATION OF OIL AND GAS LEASES – IN GENERAL, GENERAL RULES OF CONSTRUCTION

Hess Bakken Invs. II v. AgriBank, FCB

Hess Bakken Invs. II v. AgriBank[1] analyzed the interpretation of "actual drilling operations" in the context of continuous drilling clauses in two oil and gas leases.[2] The Mountrail County District Court "interpreted [actual drilling operations] as requiring 'placing the drill bit in the ground and penetrating the soil.'"[3] Appellants Hess Bakken *et al.* ("the Hess Group") successfully argued on appeal that the term was ambiguous as a matter of law.[4]

According to the Hess Group's amended complaint, AgriBank executed two leases conveying mineral acres in Mountrail County to Diamond Resources in 2004.[5] "The Subject Leases were for a primary term of five years, which was extended for three years—to April 2, 2012."[6] AgriBank executed new leases with Intervention Energy over the same acreage nine days following this extension's expiry.[7] Intervention Energy, in turn, assigned the leases to Riverbend Oil & Gas ("Riverbend").[8] In 2018, the Hess Group sued, seeking quiet title to the working interests in the original leases and declaratory relief that they remained in effect.[9] "The Hess Group also brought claims for breach of contract, unjust enrichment, and accounting."[10]

The leases at issue contained a "Continuous Drilling Clause," providing:

> Production in paying quantities on a portion of the leased premises or lands unitized therewith will extend this lease only to such acreage of the leased premises beyond the primary term as may be then included in a producing unit or units, the size and conformity of which have been approved by any duly authorized authority having jurisdiction thereof. However*, this lease shall not terminate*

1. 2020 ND 172, 946 N.W.2d 746.
2. *Id.* ¶ 1.
3. *Id.*
4. *Id.*
5. *Id.* ¶ 2.
6. *Id.* ¶ 3.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.*

> *if actual drilling operations on any portion of the leased premises, or on lands with which a portion of the leased premises may be unitized*, (such unit having been approved on size and conformity with any duly authorized authority having jurisdiction thereof) *are being conducted at the end of the primary term*. Such operations shall continue to maintain this lease in force and effect beyond the primary term for so long as actual drilling operations are being conducted with no cessation of more than one hundred twenty (120) consecutive days from the date of the running of the final induction electrical survey of one well and the actual drilling operations of another well; any well commenced and drilled pursuant hereto after the primary term shall be drilled to a depth sufficient to test the producing horizon in the nearest producing well unless production in paying quantities is encountered at a lesser depth. If operations taking place at or after the expiration of the primary term are discontinued for longer than one hundred twenty (120) consecutive days, then this lease shall remain in force and effect only as to the leased premises then included within production unit or units.[11]

The Hess Group alleged Continental Resources, Inc. ("Continental"), the operator of the wells, conducted preparatory activities in March 2012 in anticipation of drilling.[12] "The Hess Group allege[d] Continental drilled wells in May of 2012 that continue[d] to produce oil and gas in paying quantities."[13]

Intervention Energy and RiverBend moved for dismissal.[14] The district court concluded the leases expired because "placing the drill bit in the ground and penetrating the soil" occurred after the primary term of the lease expired.[15] The district court dismissed Hess Group's claims for quiet title, declaratory relief, and breach of contract outright.[16] The district court partially dismissed the claims for unjust enrichment and accounting.[17] The parties' remaining claims were dismissed upon stipulation.[18]

The Hess Group argued "good-faith, on-site activities conducted in preparation for drilling" sufficed to extend the leases beyond the primary term.[19] The Hess Group argued on appeal dismissal was improper because

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11. *Id.* ¶ 4.
12. *Hess Bakken Invs.*, 2020 ND 172, ¶¶ 2, 4, 946 N.W.2d 746.
13. *Id.*
14. *Id.* ¶ 5.
15. *Id.* ¶ 5 (quoting the Hess Bakken Invs. II, LLC, vs. Agribank, FCB, No. 31-2018-CV-00245 (N.D. Dec. 6, 2018)).
16. *Id.*
17. *Id*.
18. *Id.*
19. *Id.* ¶ 7.

those activities occurred prior to the primary term's expiration.[20] On the other hand, AgriBank argued the continuous drilling clauses required more than mere preparatory work.[21] Agribank asserted "the clauses only extend leases when a rotating drill bit has been placed into the earth."[22]

Applying general contract interpretation rules to oil and gas leases,[23] the North Dakota Supreme Court considered several sources of law to support its ultimate conclusion in favor of the Hess Group.[24] The term "drilling operations" was considered in *Abell v. GADECO, LLC*.[25] "Case law tends to define [drilling operations] to include preparation of the drill site."[26] Critically, the lease term at issue in *Abell* did not include the word "actual," and expressly defined "drilling operations, albeit also not within the context of the adjective 'actual.'"[27]

A federal administrative ruling interpreted "actual drilling operations" to mean "penetration of the ground by a drilling bit" in federal oil and gas leases.[28] The North Dakota Supreme Court found this decision unpersuasive because "that decision was in the context of a federal regulatory provision that defined the term as the physical drilling of a well and activities that take place after drilling."[29] The "peculiar nature of federal oil and gas leases" coupled with the deference afforded to administrative agencies further dissuaded the North Dakota Supreme Court from adopting this interpretation of "actual drilling operations."[30]

The court considered the parties' own interpretations given the lack of clear precedential guidance.[31] "The Hess Group emphasize[d] the word 'operations' asserting it contemplates more than simply placing a rotating drill bit into the earth."[32] From AgriBank's perspective, "its interpretation of the word 'actual' refers to a good-faith intent to complete a well and limits the scope of drilling operations to those that are physically undertaken at the well-site, as opposed to off-site activities like mapping a well pad or

20. *Id.*
21. *Id.*
22. *Hess Bakken Invs.*, 2020 ND 172, ¶ 7, 946 N.W.2d 746.
23. *Id.* ¶ 8.
24. *Id.* ¶ 9.
25. 2017 ND 163, ¶ 10, 897 N.W.2d 914.
26. *Hess Bakken Invs.*, 2020 ND 172, ¶ 9, 946 N.W.2d 746 (citing *Abell*, 2017 ND 163, ¶ 10, 897 N.W.2d 914.).
27. *Id.* ¶ 9.
28. *Id.* ¶ 11.
29. *Id.* (citing *Estelle Wolf*, 37 IBLA 195, 200-01 (Oct. 12, 1978)).
30. *Id.*
31. *Id.* ¶ 12.
32. *Id.*

obtaining a drilling permit."[33] Whereas the Hess Group emphasized the word 'operations,' AgriBank emphasized the word 'actual.'[34]

In sum, the court found both sides advanced a rational interpretation of the ambiguous term at issue.[35] "A contract is ambiguous when rational arguments can be made for different interpretations."[36] The interpretation of ambiguous terms is a question of fact, "requiring a factual finding based on extrinsic evidence."[37] The court reversed the order dismissing the non-stipulated claims and reversed for further proceedings since the issue raised was a matter of fact, not law.[38]

Justice Tufte penned a dissent in favor of affirming the district court decision.[39] The dissent reasoned the term "actual drilling operations as used in the lease" unambiguously contemplated more than mere preparatory work, beginning "only when the drill bit penetrates the ground."[40] Justice Tufte distinguished *Hess Invs. v. AgriBank* from *Abell* because *Abell* "construed a lease defining 'operations' broadly to include 'building of roads, preparation of the drill site, and moving in for drilling."[41] Justice Tufte made particular note of the "district court here [concluding] the term 'actual' adds to 'actual drilling operations': it distinguishes drilling from preparing to drill."[42]

33. *Id.*
34. *Id.*
35. *Id*. at ¶ 13.
36. *Id.* (quoting Nichols v. Goughnour, 2012 ND 178, ¶ 12, 820 N.W.2d 740).
37. *Id*.
38. *Id.* ¶ 14.
39. *Id.* ¶¶ 17, 20 (Tufte, J., dissenting).
40. *Id.* ¶ 18.
41. *Id.* ¶ 19.
42. *Id*.

MINES AND MINERALS–TITLES, CONVEYANCES, AND CONTRACTS–TOP LESSEES AND OVERRIDING ROYALTY INTERESTS

Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC

The decision in *Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC*[43] provides lessors of Top Leases the ability to maintain their property interests in land without subjecting them to financial burdens of royalties.[44] The Eighth Circuit Court of Appeals affirmed the judgment of the United States District Court for the District of North Dakota and held Top Leases created from existing subject leases are not subject to overriding royalty interests since they are not extensions or renewals of the underlying subject lease.[45] Furthermore, the court held North Dakota law does not imply fiduciary duties into contractual agreements and therefore, any duty to extend or renew a subject lease encumbered by overriding royalty interests does not exist.[46]

In the case at hand, Pitchblack Oil, LLC and Whitetail Wave, LLC (collectively "Plaintiff") and Hess Bakken Investments II, LCC ("Defendant") had contracted into several Top Lease agreements arising from a subject lease between Rocky Mountain Exploration, Inc. ("RME") and Defendant.[47] These Top Leases included land which was the subject of the initial subject lease.[48] Included within these agreements was the assignment of an overriding royalty interest from RME to the Stuber Group which "would burden 'any extensions or renewals thereof [i.e. of the Subject Leases] entered into within 180 days of expiration of the applicable Lease.'"[49] Several terms of the Top Leases differed from the subject lease in question, including the amount of royalties, consideration, provisions, and tracts of land.[50] Many of the Top Leases were signed before the expiration of the initial subject leases, although several were agreed upon after the expiration of other leases.[51]

Defendant alleged the overriding royalty interests did not burden the subsequent Top Leases.[52] Plaintiff filed suit against Defendant to declare the

43. 949 F.3d 424 (8th Cir. 2020).
44. *Id.* at 431.
45. *Id.*
46. *Id.* at 428-29.
47. *Id.* at 427.
48. *Id.*
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*

Top Leases were extensions or renewals of the subject lease and therefore, subject to the previously existing overriding royalty interests.[53] Defendant filed a motion for summary judgment, which the district court granted.[54] On appeal, the Eighth Circuit looked at whether a fiduciary duty to extend or renew the subject leases existed between the parties, and whether the Top Lease agreements were extensions or renewals of the Subject Lease.[55]

Upon review, the Eighth Circuit affirmed the judgment of the district court. Chief Judge Smith, writing for a unanimous court, found North Dakota law extinguished the arguments raised by Plaintiff.[56] Concerning the issue of fiduciary duties, Chief Judge Smith found North Dakota does not apply the covenants of good faith and fair dealing or imply fiduciary duties into contracts of the sort in dispute here.[57] This differs from Oklahoma and Kansas, states which have had their supreme courts affirm those covenants into the types of contracts at issue in *Pitchblack*.[58] Not only did North Dakota law reject the obligations of these covenants, the Top Leases themselves failed to expressly state any such duties existed between the parties.[59] The Eighth Circuit also rejected the argument that an implied duty for reasonable development existed due to the language of the contracts which excluded such a duty.[60]

Next, the court had to determine whether the Top Leases were extensions or renewals of the Subject Leases first entered by RME.[61] In an exercise of judicial interpretation, the court found the Top Leases could not be interpreted to be renewals or extensions.[62] Material terms of the Top Leases differed substantially from the terms of the Subject Lease and could not hold the Top Leases as extensions or renewals.[63] Renewals are defined as "[t]he re-creation of a legal relationship or the replacement of an old contract with a new contract, as opposed to the mere extension of a previous relationship or contract."[64] A contract subsequent to a previous contract is an extension if it is "[t]he continuation of the same contract for a specified period."[65] Plaintiff argued Top Leases fell under these definitions and North Dakota

53. *Id.*
54. *Id.*
55. *Id.* at 427-28.
56. *Id.* at 428 (stating courts sitting in diversity apply forum state substantive law).
57. *Id.* (stating North Dakota only applies the implied covenant of good faith and fair dealing into insurance agreements).
58. *Id.*
59. *Id.* at 428-29.
60. *Id.* at 429.
61. *Id.*
62. *Id.* at 430-31.
63. *Id.* at 430.
64. *Id.*
65. *Id.* (quoting *Extension*, BLACK'S LAW DICTIONARY (11th ed. 2019)).

case law had previously confirmed when top leases constituted extensions or renewals.[66] In *Sandvick v. LaCrosse*,[67] the North Dakota Supreme Court found an extension of a subject lease exists when there is "a substantially identical top lease taken while the initial lease was still in effect[.]"[68] Here, Pitchblack and Whitetail argued the material terms of importance for review when determining a renewal or extension of a contract are the "duration, the land, and lessee/lessor names" because these terms were the terms included in the *Sandvick* court's analysis.[69]

These arguments failed to persuade the Eighth Circuit.[70] The court found *Pitchblack* to be distinguishable from *Sandvick* because the holding in *Sandvick* required the terms of the top lease and subject lease to be "substantially identical."[71] In *Pitchblack*, the terms of the Top Leases differed substantially from those of the Subject Lease.[72] Terms of primary importance for the court's decision included the duration, consideration, royalty terms, clauses, and subject land involved in each agreement.[73] Although the terms analyzed in *Sandvick* are of importance when determining extensions or renewals, the Eighth Circuit emphasized the importance of considering other terms of the Top Leases as well.[74]

The court noted the time in which the Top Leases were signed was a factor in favor for Plaintiff since most were signed prior to expiration of the Subject Leases.[75] However, the Eighth Circuit found the material differences between the agreements substantially outweighed the importance of the date the agreements were entered into.[76] Therefore, Defendant's Top Leases were not subject to the overriding royalty interests created by the prior assignment between RME and Stuber Group and the decision of the district court was affirmed.[77]

66. *Id.* (citing Sandvick v. LaCrosse, 2008 ND 77, 747 N.W.2d 519).
67. 2008 ND 77, 747 N.W.2d 519.
68. *Id.* ¶ 18 (citing Reynolds–Rexwinkle Oil, Inc. v. Petex, Inc., 1 P.3d 909, 920–21 (Kan. 2000)).
69. Pitchblack Oil, LLC v. Hess Bakken Investments II, LLC, 949 F.3d 424, 430 (8th Cir. 2020).
70. *Id.*
71. *Id.* (quoting *Sandvick*, 2008 ND 77, 747 N.W.2d 519).
72. *Id.*
73. *Id.* at 430-31.
74. *Id.* at 430.
75. *Id.* at 431.
76. *Id.*
77. *Id.*

PROPERTY LAW–PROPERTY RIGHTS AND INTERESTS–APPLICATION OF THE OPEN MINES DOCTRINE

Reese v. Reese-Young

In *Reese v. Reese-Young*,[78] the North Dakota Supreme Court reversed the decision of the district court which granted summary judgment in favor of Appellee, Tia Reese-Young, and applied the open mines doctrine to the mineral interests and rights of property conveyed by a life estate for the first time.[79] This decision resulted in Appellant, Cheryl Reese, being awarded the rights to proceeds accruing from ongoing oil and gas production on the land in dispute.[80] The Supreme Court found no conflict between the application of the common law doctrine and North Dakota statutory law, and found application of the doctrine was warranted by the State.[81]

Prior to any conveyances by the parties involved, the property in dispute had been the subject of an oil and gas lease agreement.[82] Appellant and Appellee both held legal interest in the property until 2008, when Appellant and other joint tenants conveyed their interests to Appellee while reserving a life estate interest in the minerals within the property.[83] In 2017, Appellant brought a quiet title action against Appellee and sought declaration as "the sole remaining life tenant in the property."[84] If so found, Appellant would have been "entitled to all of the proceeds to be derived from the minerals" within the property for her lifetime.[85] Appellee responded and brought a counterclaim to quiet title in her name and sought to preclude Appellant from any income from the oil and gas production of the property.[86] Subsequently, both parties brought motions for summary judgment.[87] Appellant argued the common law open mines doctrine applied to the property involved and that reserved within Appellant's life estate interest were the rights to royalties derived from the minerals within the property.[88] Appellee argued the language of the deed was unambiguous and did not explicitly reserve within

78. 2020 ND 35, 938 N.W.2d 405.
79. *Id.* ¶ 1.
80. *Id.* ¶ 25.
81. *Id.* ¶ 23.
82. *Id.* ¶ 3.
83. *Id.*
84. *Id.* ¶ 4.
85. *Id.*
86. *Id.*
87. *Id.* ¶ 5.
88. *Id.*

the life estate the rights to royalties derived from the property.[89] Therefore, Appellee was entitled to any income derived from oil and gas production from the land.[90]

The district court found in favor of Appellee, concluding the common law open mines doctrine did not apply to the case at hand because no existing North Dakota case law applied the doctrine and no statutory law existed indicating the North Dakota legislature ever intended for the doctrine to apply.[91] Further, the court found the language of the deed in question was controlling because the language was unambiguous; accordingly, Appellee was entitled to oil and gas royalties as well as other royalties and bonuses derived from oil and gas production.[92]

The open mines doctrine allows a "life tenant . . . to operate mines or wells which were open when the life estate was created and is entitled to all proceeds resulting from the operation, even if the use diminishes the market value of the remainderman's interest."[93] Creators of life estates may also prevent application of the doctrine by explicitly stating within the instrument of conveyance the doctrine is not applicable to the property in question.[94] Section 47-02-33 of the North Dakota Century Code ("N.D.C.C.") allows the holder of a life estate to use property in the same manner as a holder in fee simple except when it comes to the act of waste.[95] Rather, if a life estate tenant uses the land in a way which results in injury or diminishment of the property, including the removal of minerals from the land, section 47-04-22 of the N.D.C.C. provides vested remaindermen a remedy against wasteful tenants.[96]

Here, the Supreme Court found the doctrine to be applicable in North Dakota and the case at hand.[97] Writing for the court, Justice VandeWalle noted the doctrine is a long-standing exception to the legal duties found within life estate interests.[98] The court analyzed whether any existing statutory law governed the matter in North Dakota; if so, the court would be precluded from applying the common law doctrine.[99] If not, the court could incorporate the doctrine as part of North Dakota law, notwithstanding any

89. *Id.*
90. *Id.*
91. *Id.* ¶ 10.
92. *Id.*
93. *Id.* ¶ 11.
94. *Id.* ¶ 18.
95. *Id.* ¶ 12 (citing N.D. CENT. CODE § 47-02-33 (2021)).
96. *Id.* ¶¶ 13-14, 16 (citing Meyer v. Hansen, 373 N.W.2d 392, 395 (N.D. 1985); N.D. CENT. CODE § 47-04-22 (2021)).
97. *Id.* ¶ 25.
98. *Id.* ¶¶ 17-18 (citing RESTATEMENT (FIRST) OF REAL PROPERTY § 144 (1936)).
99. *Id.* ¶ 20 (citing Finstad v. Ransom-Sargent Water Users, Inc., 2014 ND 146, ¶ 12, 849 N.W.2d 165).

conflicts between statutory and common law.[100] In this case, the court did not find any statutory law or North Dakota case law which precluded application of the doctrine.[101] Additionally, the court took notice of several states which had previously applied the doctrine and noted "[j]urisdictions which have adjudicated the issue have uniformly held that a life tenant is entitled to the benefit of an open mine without liability or accountability to the remainderman in fee simple, unless the instrument creating the life estate otherwise specifically limits the life tenant's right in this regard."[102]

Upon review of the record, the court determined the facts involved in the case at hand warranted application of the open mines doctrine.[103] The property in dispute was the subject of an existing oil and gas lease prior to the creation of Appellant's life estate interest and the controlling language of the deed reserved in Appellant a right to the minerals within the property.[104] Justice VandeWalle noted interest in the minerals themselves, and not the income or benefits which derive from those minerals, would essentially warrant mineral life estates worthless.[105] Such an application of the law would require life estate tenants to protect the property interests of remaindermen with little or no benefit to life estate tenants.[106] The court also found the deed failed to exclude application of the open mines doctrine.[107] The North Dakota Supreme Court reversed judgment of the district court and remanded the matter for judgment in favor of Appellant.[108]

In a specially concurring opinion, Justice Crothers limited application of the doctrine to the present facts in this case.[109] In a warning to future litigators, Justice Crothers advised he may not come to the same conclusion as the court did in this case if different material facts existed.[110] Justice Crothers also stated his opinion may differ from the decision here if a deed in question conveyed an interest in surface rights as well as mineral rights.[111] Justice VandeWalle joined Justice Crothers in his special concurrence.[112]

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100. *Id.*
101. *Id.* ¶¶ 22-23.
102. *Id.* ¶ 22 (quoting N.D. MIN. TITLE STANDARDS § 7-.03.1 cmt.).
103. *Id.* ¶ 25.
104. *Id.* ¶ 24.
105. *Id.* ¶ 25.
106. *Id.*
107. *Id.* ¶ 24.
108. *Id.* ¶¶ 25-26.
109. *Id.* ¶ 28 (Crothers, J., concurring).
110. *Id.* ¶ 29.
111. *Id.*
112. *Id.* ¶ 30.

CONTRACTS LAW – OIL AND GAS LEASE – CONTRACT INTERPRETATION

Newfield Expl. Co. v. State ex rel. N.D. Bd. of Univ. & Sch. Lands

In *Newfield Exploration Company v. State ex rel. North Dakota Board of University and School Lands*,[113] appellants, the State of North Dakota, ex rel. the North Dakota Board of University and School Lands and the Office of the Commissioner of University and School Lands ("the State") appealed the decision of the McKenzie County District Court interpreting the royalty provisions of natural gas leases between the State and Newfield Exploration Company, Newfield Production Company, and Newfield RMI LLC ("Newfield") as allowing for the reduction of the royalty payments by the amount of expenses incurred to make the natural gas at issue marketable.[114] In a unanimous decision written by Justice Jensen, the North Dakota Supreme Court reversed the district court's judgment.[115]

Newfield operates numerous gas-producing wells across North Dakota.[116] The State and Newfield entered into leases that require gas royalties to be calculated upon "gross production or the market value thereof, at the option of the lessor, such value to be determined by . . . gross proceeds of sale . . . ."[117] Subsequently, Newfield entered into an agreement with Oneok Rockies Midstream L.L.C. ("Oneok") to sell the gas produced at Newfield's wells.[118]

Oneok receives title to the gas when it receives the gas from Newfield but does not pay Newfield until after it processes the gas into a marketable form and then sells the marketable gas.[119] Once Oneok sells the marketable gas, Oneok pays Newfield 70-80% of the amount it received for the marketable gas from the sale.[120] The other 20-30% of the amount Oneok receives from the sale "accounts for Oneok's cost to process the gas into a marketable form and profit."[121]

In June 2016, the State initiated an audit of Newfield.[122] The State alleged Newfield was underpaying the required gas royalties under the

113. 2019 ND 193, 931 N.W.2d 478.
114. *Id.* ¶ 1.
115. *Id.* ¶¶ 1, 12.
116. *Id.* ¶ 2.
117. *Id.* ¶ 2.
118. *Id.* ¶ 3.
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.* ¶ 2.

leases.[123] Specifically, the State claimed Newfield was "paying royalties based on gross proceeds reduced to account for deductions necessary to make the gas marketable and that reducing the gross payments by those deductions is contrary to the express terms of the lease."[124] Newfield alleged it paid the proper amount required under the leases because it paid royalties based on the gross proceeds it received from Oneok.[125]

As a result of the State and Newfield's differing interpretations of the royalty provisions in the leases, Newfield brought suit requesting a judgment declaring "the royalty payments at issue to have been properly calculated based on the gross amount paid to Newfield by Oneok."[126] Both the State and Newfield moved for summary judgment.[127] The district court held Newfield's interpretation was the correct interpretation, finding Newfield only had to pay royalties based on the gross amount received by Oneok.[128]

The North Dakota Supreme Court began analyzing this issue by looking to *Johnson v. Statoil Oil & Gas LP*[129] for guidance on the general rules which govern contract interpretation of oil and gas leases.[130] "The same general rules that govern interpretation of a contract apply to oil and gas leases."[131] Therefore, "[w]ords in a contract are construed in their ordinary and popular sense, unless used by the parties in a technical sense or given a special meaning."[132] Additionally, contracts are read in their entirety to ascertain the parties true intent.[133] Contract interpretation is a question of law and, on appeal, is examined independently to determine whether the trial court erred in its interpretation.[134]

The court next outlined the rules contained in *West v. Alpar Resources, Inc.*[135] pertaining to default natural gas rules.[136] In order to make natural gas marketable, the hydrogen sulfide contained within it, upon extraction, must be removed.[137] Although the general rule is the lessor and the lessee share the costs associated with making the gas marketable, the court focused on the

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.* ¶ 4.
127. *Id.*
128. *Id.*
129. 2018 ND 227, 918 N.W.2d 58.
130. *Newfield Expl. Co.*, 2019 ND 193, ¶ 5, 931 N.W.2d 478 (citing *Johnson*, 2018 ND 227, ¶¶ 7-8).
131. *Id.* (quoting *Johnson*, 2018 ND 227, ¶¶ 7-8, 918 N.W.2d 58).
132. *Id.*
133. *Id.*
134. *Id.*
135. 298 N.W.2d 484 (N.D. 1980).
136. *Id.* at 487.
137. *Newfield Expl. Co.*, 2019 ND 193, ¶ 6, 931 N.W.2d 478 (citing *West*, 298 N.W.2d at 487).

parties' freedom to contract, stating "the parties may contract around the general rule and allocate the expense of making the gas marketable."[138]

The court went on to consider the differences in the terms "gross proceeds" and "net proceeds."[139] "In an oil and gas contract, the term 'gross proceeds' indicates a lessor's royalty is calculated based on the total amount received for the product without deductions for making the product marketable."[140] However, "net proceeds" means "the lessor will share in the costs of making the product marketable – thus reducing the royalty payment.[141]

In this case, the royalty provision read:

> Lessee agrees to pay lessor the royalty on any gas, produced and marketed, based on gross production or the market value thereof, at the option of the lessor, such value to be based on *gross proceeds* of sale where such sale constitutes an arm's length transaction.…
>
> All royalties on oil, gas, carbon black, sulphur [sic], or any other products shall be payable on an amount equal to the full value of all consideration for such products in whatever form or forms, which directly or indirectly compensates, credits, or benefits lessee.[142]

The court noted that under North Dakota Century Code section 15-05-09, the State is allowed to both "lease land under its control for gas exploration" as well as establish the rules and regulations for doing so.[143] Furthermore, the court considered information contained on the Department of Land Trust's website stating, "gross proceeds of sale means income before deduction of expenses. Basically it means the price you sell the oil for, regardless of what expenses go into arriving at that price."[144] The court noted that this information is consistent with its decision in *West*.[145]

Both parties agreed that if Newfield itself directly paid for the gas to be made marketable, the State would have been compensated based on the sale of the gas without any reduction for making the gas marketable.[146] However, the parties disagreed on whether the State should be paid based on the sale of the gas without any reduction for making the gas marketable because Newfield did not directly pay for the gas to be made marketable but rather

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138. *Id.* (citing *West*, 298 N.W.2d at 487).
139. *Id.* (citing *West*, 298 N.W.2d at 489-91).
140. *Id.* (citing *West*, 298 N.W.2d at 489-90).
141. *Id.* (citing *West*, 298 N.W.2d at 490-91).
142. *Id.* ¶ 7 (emphasis added).
143. *Id.* ¶ 8.
144. *Id.* (quoting *North Dakota Oil and Gas Royalty: Frequently Asked Questions*, (2015) https://www.land nd.gov/sites/www/files/documents/Financial%20Services/FAQ-Royalties.pdf).
145. *Id.*
146. *Id.* ¶ 9.

received a reduced payment from Oneok accounting for the cost of making the gas marketable.[147] The State argued that Newfield indirectly paying for the cost of making the gas marketable is no different than if Newfield had directly paid for the gas to be made marketable and therefore is requiring the State to "share in the post-production costs contrary to the leases."[148] On the other hand, Newfield argued "the plain language of the leases requires the State's royalties to be calculated on the payment Newfield receives for the gas from Oneok, regardless of whether that payment is reduced to account for expenses incurred by Oneok to make the gas marketable."[149] The court summarized Newfield's argument by stating, "[e]ssentially, Newfield argues it can pay a royalty based on a payment that has been reduced to account for the expense of making the gas marketable, as long as the expense is incurred by a third party."[150]

The court disagreed with Newfield's argument, recognizing that Subpart (f) of the leases unambiguously anticipated the very circumstance present in this case by defining royalties as, "All royalties on . . . gas . . . shall be payable on an amount equal to the full value of all consideration for such products in whatever form or forms, which directly or indirectly compensates, credits, or benefits lessee."[151] The court held that clearly Newfield benefits, if not directly, at least indirectly, from the expenses to make the gas marketable incurred by Oneok since Newfield's compensation is calculated based on the amount Oneok receives from the marketable gas.[152] Therefore, the court held "[g]ross proceeds from which the royalty payments under the leases are calculated may not be reduced by an amount that either directly or indirectly accounts for post-production costs incurred to make the gas marketable."[153]

As such, the court reversed the district court's judgment because the calculation of royalties as reduced by the cost to make the gas marketable at the very least indirectly benefits Newfield, such calculation is contrary to the leases.[154] Justices McEvers, Crothers, and Tufte joined the majority. Chief Justice VandeWalle concurred in the result.[155]

147. *Id.* ¶¶ 9-10.
148. *Id.* ¶ 9.
149. *Id.* ¶ 10.
150. *Id.*
151. *Id.* ¶ 11.
152. *Id.*
153. *Id.* ¶ 12.
154. *Id.* ¶ 11.
155. *Id.* ¶ 13.

CONTRACT LAW—CONTRACT INTERPRETATION—FORCE MAJEURE CLAUSES

Pennington v. Cont'l Res., Inc.

In *Pennington v. Cont'l Res., Inc.*[156], Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson ("Appellants"), asserted two arguments on appeal from a McKenzie County District Court order granting summary judgment in favor of Continental Resources ("Continental").[157] Appellants argued several leases executed in 2011 and assigned to Continental in 2014, expired in October 2015 because a "regulation and delay" provision contained within the contract did not apply under the circumstances.[158] Second, Appellants contended Continental failed to act reasonably when it did not obtain a permit for a smaller unit of land that would have allowed for drilling immediately within the primary term of the lease.[159]

The district court held the force majeure provision *did* apply as Continental had taken the necessary steps to obtain federal drilling approval but any delay that had occurred was "beyond its control . . . [and] did not arise as a result of the fault or negligence of Continental."[160] The North Dakota Supreme Court affirmed the force majeure provision applied but remanded for further consideration as to whether Continental acted in good faith in its pursuit of drilling permits.[161]

The oil and gas leases, executed on October 25, 2011, included a term of three years with a lessee option of extension for an additional year, along with a provision prohibiting termination if operations were delayed due to an inability to obtain drilling permits.[162] Continental took over the leases by way of assignment in September 2014 and exercised its extension option.[163] In 2012, it applied for a drilling permit on a 2,560-acre unit "that included land covered in the leases."[164] The permits did not receive federal approval because portions of the land contained the Dakota Skipper butterfly, an endangered species found in North Dakota.[165] The U.S. Fish and Wildlife Service issued an opinion in August of 2015 discussing the impact of

156. 2019 ND 228, 932 N.W.2d 897.
157. *Id.* ¶¶ 8, 17.
158. *Id.* ¶¶ 2, 5.
159. *Id.* ¶ 17.
160. *Id.* ¶ 20 (emphasis added).
161. *Id.* ¶ 21.
162. *Id.* ¶ 2.
163. *Id.*
164. *Id.* ¶ 3.
165. *Id.*

Continental's drilling operations on the species and in October of 2015, the company proposed measures to minimize any adverse impact.[166]

Shortly thereafter, Continental recorded an affidavit of delay explaining its inability to obtain federal drilling approval and exercising an extension of the leases under the "regulation and delay" term contained within them.[167] Continental then carved out any land containing Dakota Skipper habitat, reduced its proposal to a 1,920-acre unit, obtained the necessary federal approval, and began drilling in January 2016.[168]

Appellants sued Continental in 2017 alleging the leases expired in October of 2015 and were not extended by Continental's inability to obtain federal approval.[169] Appellants assert the Term of Lease provision controlled—which held the lease to "be in force for a primary term of three (3) years. . . and for as long thereafter as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises[.]"[170] Appellants argued the force majeure clause, which extended the lease by reason of delay, was inapplicable during the primary term of the lease. The clause read as follows:

> Regulation and Delay. Lessee's obligations under this lease, whether express or implied, shall be subject to all applicable laws, rules, regulations and orders of any governmental authority having jurisdiction, including restrictions on the drilling and production of wells, and regulation of the price or transportation of oil, gas and other substances covered hereby. When drilling, reworking, production or other operations are prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits, . . . or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot, . . . this lease shall not terminate because of such prevention or delay, and, at Lessee's option, the period of such prevention or delay shall be added to the term hereof. Lessee shall not be liable for breach of any provisions or implied covenants of this lease when drilling, production, or other operations are so prevented or delayed.[171]

Appellants' argument was two-fold. First, they argued the force majeure clause did not apply to the primary term of the leases which extended the lease *only* once production had started.[172] Second, Appellants argued the

166. *Id.*
167. *Id.* ¶ 4.
168. *Id.*
169. *Id.* ¶ 5.
170. *Id.* ¶ 10.
171. *Id.* ¶ 11.
172. *Id.* ¶ 13.

clause was overridden by two provisions within the lease that prohibited holding the lease beyond its primary term by reason of delays in obtaining permits.[173] These provisions provided, in part, that "[o]perations sufficient to hold this lease beyond the primary term *shall not* include obtaining permits" and that operations—including acts in preparation of drilling (i.e. obtaining permits) interrupted by more than 180 days—would not extend the lease.[174]

Writing for the court, Justice Daniel Crothers rejected these arguments and began the court's analysis by outlining statutory and case precedent related to contract interpretation.[175] The court emphasized a contract is given its intent at the time it is made,[176] "intent is ascertained from the writing alone if possible,"[177] the clear language of the contract should govern precluding any absurdities,[178] and "a contract is interpreted as a whole" giving effect to "every clause, sentence, and provision" as is possible.[179] Finally, "contract interpretation is a question of law" and therefore, fully reviewable on appeal.[180]

Applying these rules of contract interpretation, the court noted both provisions used by Appellants in an attempt to negate the force majeure clause used the phrase "after the primary term" or "beyond the primary term" and applied clearly to the secondary terms of the lease.[181] The court differentiated these provisions from the "Regulation and Delay" provision, which contained no plain language limiting its application to only a secondary term.[182] It stated under the force majeure clause "the leases will not terminate if a delay occurs due to the circumstances listed, including regulatory delay in obtaining drilling permits during the primary term. In construing the lease as a whole . . . [the provision] applies during the primary and secondary terms."[183] Finally, the court rejected Appellants' recitation of various case law[184] explaining the language in those force majeure clauses differed from the language in the instant lease.[185]

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173. *Id*.
174. *Id*.
175. *Id*. ¶ 9.
176. *Id*. (citing Horob v. Zavanna, LLC, 2016 ND 168, ¶ 10, 883 N.W.2d 855; N.D. CENT. CODE § 9-07-03 (2021)).
177. *Id*. (citing N.D. CENT. CODE § 9-07-04 (2021)).
178. *Id*. (citing N.D. CENT. CODE § 9-07-02 (2021)).
179. *Id*. (citing Fleck v. Missouri River Royalty Corp., 2015 ND 287, ¶ 8, 872 N.W.2d 329).
180. *Id*. (citing *Horob*, 2016 ND 168, ¶ 10, 883 N.W.2d 855).
181. *Id*. ¶ 14.
182. *Id*. ¶ 15.
183. *Id*.
184. *See* Beardslee v. Inflection Energy, LCC, 31 N.E.3d 80 (N.Y. 2015); Aukema v. Chesapeake Appalachia, LCC, 904 F. Supp. 2d 199 (N.D. N.Y. 2012).
185. Pennington v. Cont'l Res., Inc., 2019 ND 228, ¶ 16, 932 N.W.2d 897.

However, the court did agree with Appellants regarding the existence of a genuine issue of material fact as to whether Continental acted diligently and in good faith when it pursued a permit for drilling a 2,560-acre unit for more than three years when a smaller parcel existed that was available to them during the primary term of the lease.[186] It agreed "[a]n express *force majeure* clause in a contract must be accompanied by proof that the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible . . . ."[187]

While the district court found "Continental was prevented from commencing operations within the primary term of the Leases by a contingency beyond its control, namely the decisions of the U.S. Fish and Wildlife Service," and "had no reason to believe it would be unable to commence operations . . . until August 24, 2015, when it received the [opinion] indicating that issues pertaining to protection of the Dakota Skipper and its habitat would delay approval,"[188] the North Dakota Supreme Court pointed out the lower court's failure to address the issue of good faith in its analysis.[189] It remanded the case back to district court for further consideration of that point.[190] Notably, it did not reverse summary judgment in whole for a full reconsideration of Appellants' arguments.[191]

Upon remand, the district court found Continental acted in good faith and the lease remained in effect, crediting the company with delays it had experienced prior to having an interest in the leases and rejecting Appellants' argument that production was required prior to the expiration of the primary term of the lease to continue the leases.[192] Upon appeal again by Appellants, the Supreme Court declined to consider the issues:

> On appeal, we did not fully reverse the judgment and remand for all issues to be tried. We only reversed on one issue and remanded with specific instructions . . . for further proceedings on the issue of "whether Continental acted diligently and in good faith." Because a final judgment was entered and reviewed on appeal, with this Court reversing and remanding on a specific issue, the [Appellants] are precluded from raising new issues on remand.[193]

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186. *Id.* ¶¶ 19, 21.
187. *Id.* ¶ 18 (quoting Entzel v. Moritz Sport and Marine, 2014 ND 12, ¶ 7, 841 N.W.2d).
188. *Id.* ¶ 20.
189. *Id.* ¶ 21.
190. *Id.*
191. *Id.*
192. *Id.* ¶ 7.
193. *Id.* ¶ 17.

Thus, the district court properly followed the mandate rule, and its decision became final on the matter.[194]

194. *Id.* ¶ 20.

CIVIL LAW – OIL & GAS – ROYALTY PROVISION

Blasi v. Bruin E & P Partners, LLC

In *Blasi v. Bruin E & P Partners, LLC*,[195] plaintiffs ("Blasi") brought five separate cases against defendants ("Bruin") in federal district court for allegedly underpaying royalties "due under the terms of various oil and gas leases."[196] The central issue to each of the disputes was the interpretation of the royalty provision within the contract between the parties as to whether the valuation point is at the well or at some other place downstream.[197] Blasi, as the lessor in the dispute, accepted royalties from Bruin, the lessee, in cash rather than in kind.[198] Blasi claimed the royalty was to be paid "free of costs."[199] Further, Blasi contended Bruin improperly deducted various costs from the marketable price of the oil, including the costs of moving or gathering the oil.[200] Bruin filed a motion with the court to dismiss the cases, arguing Blasi's interpretation of the royalty provision, that "royalty oil is to be valued at the well," failed as a matter of law.[201] Bruin further asserted valuing the oil at the well allows for the deduction of post-production costs.[202] The federal district court refused to decide Bruin's motion, and instead issued an order certifying the following question to the North Dakota Supreme Court: "[w]hether the instant oil royalty provision is interpreted to mean the royalty is based on the value of the oil 'at the well.'"[203] The court decided to answer the certified question, and in doing so held the royalty provision at issue establishes a valuation point that is at the well.[204]

First, the court acknowledged the value of oil is not constant from extraction to the pump.[205] Rather, the value of oil increases as costs are incurred along the stream of production.[206] The court cited *Bice v. Petro-Hunt, L.L.C.*,[207] articulating its adoption of the "work-back" method which accounts for these additional production costs in calculating the royalty value

195. 2021 ND 86, 959 N.W.2d 872.
196. *Id.* ¶ 2.
197. *Id.*
198. *Id.* ¶ 3.
199. *Id.*
200. *Id.*
201. *Id.* ¶ 3.
202. *Id.*
203. *Id.* ¶ 4.
204. *Id.* ¶¶ 1, 5.
205. *Id.*
206. *Id.*
207. 2009 ND 124, 768 N.W.2d 496.

of oil or gas at a point in the stream of production.[208] In *Bice*, the context was the royalty valuation was "at the well" but the court noted parties are not prohibited from setting a valuation point somewhere other than "at the well."[209]

Rule 47 of the North Dakota Rules of Appellate Procedure grants the court authorization "to answer questions of law certified by a federal court" but two conditions must be satisfied: "(1) the legal question 'may be determinative of the proceeding,' and (2) 'there is no controlling precedent.'"[210] The court found the first condition was satisfied as the federal district court could dismiss the lawsuits upon the determination that "the valuation point is at the well[.]"[211] Additionally, as the federal district court stated when certifying the question for the court, "there is no controlling precedent in North Dakota"[212] and therefore, the second condition was also satisfied.[213]

Blasi filed a motion requesting the court decline to answer the certified question, arguing discovery is necessary before determining the meaning of the disputed royalty provision.[214] Blasi asserted discovery would enable the parties the opportunity to provide the factual and contextual proof of what they each assert a "pipeline" means, given the definitions they each advance are contradictory.[215] Further, discovery would reveal whether the costs deducted by Bruin, and any other costs, are deductible "pre-pipeline."[216]

The court denied the motion invoking its discretion to answer a certified question.[217] The court did not find the meaning of the word "pipeline" dispositive of the issue and found no matter which costs were deducted, regardless of what they were specifically, the valuation point would remain the same.[218] It noted, "whether the deduction of a certain cost was permissible" will only be determinable once a valuation point is established.[219]

To establish the valuation point and interpret the royalty provision, the court looked to the language of the lease. The court applied the same "general

208. *Blasi*, 2021 ND 86, ¶ 5, 959 N.W.2d 872.
209. *Id*. (citing *Bice*, 2009 ND 124, ¶ 20, 768 N.W.2d 496).
210. *Id*. ¶ 6.
211. *Id*.
212. *Id*. ¶ 4.
213. *Id*. ¶ 6.
214. *Id*. ¶ 8.
215. *Id*.
216. *Id*.
217. *Id.* ¶ 7 (citing Mosser v. Denbury Res., Inc., 2017 ND 169, ¶ 8, 898 N.W.2d 406).
218. *Id.* ¶ 9.
219. *Id*.

rules for interpreting contracts to the interpretation of oil and gas leases."[220] The court stated "[t]he construction of a written contract to determine its legal effect is a question of law[,]" and it "will not consider extrinsic evidence when . . . the parties' intent can be ascertained from the writing alone."[221] Further, the court stated ambiguity exists when reasonable arguments can be made for different positions on the meaning of a provision or term.[222] The court recited the royalty provision at issue as: "Lessee covenants and agrees: To deliver to the credit of the Lessor, free of cost, in the pipeline to which Lessee may connect wells on said land, the equal [fractional] part of all oil produced and saved from the leased premises."[223]

Interpreting the clause, the court found "the provision specifies the location for the delivery–'in the pipeline to which lessee may connect wells on said land,'" and further established the oil must be delivered to said location at no cost.[224]

As to the valuation location, Blasi argued it "is independent of the well's location" and the actual valuation location is "the pipeline."[225] Blasi clarified however, "'the' in the phrase 'the pipeline' . . . means a pipe used to transport oil to a refinery," which is typically "hundreds or thousands of miles, not a pipe between the wellhead and tank battery to move oil a few feet."[226] Considering this argument by Blasi, the court rejected the contention a specific type of pipe is designated through "the pipeline" language.[227] The court found the royalty provision articulated the meaning of "the pipeline" is based upon the pipeline's proximity to the wells rather than its physical characteristics.[228] Blasi's interpretation, the court stated, would require the parties "to examine the physical characteristics of various pipes to determine whether they are 'the pipeline'" leading to a complete lack of predictability given the changes to infrastructure could potentially cause the valuation point to shift over time.[229]

The court found the pipeline in issue "may" connect to the wells by the lessee, but the plain language of the royalty clause did not require the actual existence of a pipeline.[230] The court rejected Blasi's interpretation of the

220. *Id.* ¶ 10 (citing Hess Bakken Invs. II, LLC v. AgriBank, FCB, 2020 ND 172, ¶ 8, 946 N.W.2d 746).
221. *Id.*
222. *Id.* (citing Bakken v. Duchscher, 2013 ND 33, ¶13, 827 N.W.2d 17).
223. *Id.* ¶ 11.
224. *Id.* ¶ 12.
225. *Id.* ¶ 13.
226. *Id.*
227. *Id.* ¶ 14.
228. *Id.*
229. *Id.* ¶ 15.
230. *Id.* ¶ 16.

word "may" as it would create redundancy in the lease as the lease specifically provides for "'rights of way and easements for laying pipe lines'" in a separate provision.[231]

Next, the court addressed Blasi's resistance of the interpretation that the location of valuation is "at the 'wells on said land.'"[232] Blasi's resistance of this interpretation stemmed from a gas royalty provision in the lease that uses the language "'at the mouth of the well.'"[233] Blasi argued where "at the mouth of the well" language was missing, the lease drafter must have meant something different, specifically here in regard to the oil royalty provision where this language is replaced by "wells on said land."[234] Although the court noted Blasi's argument had some merit, the lack of reasoning as to why the parties would have contemplated a fixed and definite location for the valuation of the gas royalty, and a valuation point for the oil royalty that can shift based on the method of transportation, gave the court a basis to find a more realistic reason for the discrepancy in the provisions.[235] The court found the royalty provision of the lease unambiguous: it established a fixed and definite location for the valuation of the gas royalty.[236]

Other jurisdictions have interpreted lease provisions similar to that at issue in this case. In making its judgment, the court looked to some of these jurisdictions, including the Tenth Circuit Court of Appeals, the Kansas Supreme Court, and the Supreme Court of Texas.[237] In *Kretni Dev. Co. v. Consol. Oil Corp.*,[238] a dispute arose surrounding the interpretation of a royalty provision that required the lessee to "'deliver to the credit of the lessors . . . free of cost at the pipe lines, to which he may connect his wells, one-eighth part of the oil or gas produced and saved . . . or the proceeds derived from the sale of said one-eighth . . . .'"[239] The Tenth Circuit Court of Appeals affirmed the trial court's determination "the royalty gas was valued and sold 'at the connection with the pipeline in the field'" and the parties could not have reasonably "contemplated that the lessee . . . would provide [the gas] to a far removed point of consumption" sharing in common ownership of the gas until it reached that destination to be sold there.[240]

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231. *Id.*
232. *Id.* ¶ 17.
233. *Id.*
234. *Id.*
235. *Id.*
236. *Id.* ¶ 18.
237. *See id.* ¶¶ 19-21.
238. 74 F.2d 497 (10th Cir. 1934).
239. *Blasi*, 2021 ND 86, ¶ 19, 959 N.W.2d 872 (quoting *Kretni Dev. Co.*, 74 F.2d 497 (10th Cir. 1934)).
240. *Id.*

Additionally, the court cited *Molter v. Lewis*,[241] where a royalty provision required the lessee deliver "the equal one-eighth part of all oil produced and saved from the leased premises" free of cost to the lessor, in the pipeline which the lessee may connect his wells.[242] The court held transportation fees were deductible under the royalty provision as there was no pipeline connected to the well which resulted in the royalty oil being transported by truck to be sold.[243] The court reasoned the duty of the lessee to see that the oil is marketed does not mean "the lessee must pay the transportation charge of the lessee's share of the oil from the well to a distant place," but rather his contract is to deliver his oil to the lessor at the well.[244]

The court also cited *Burlington Res. Oil & Gas Co. v. Texas Crude Energy, LLC*.[245] In *Burlington*, the royalty provision in issue required delivery into "the pipeline, tank or other receptacle to which any well or wells on such lands may be connected, free and clear of … all costs and expenses."[246] The court on appeal stated the provision contemplates delivery at the well and reversed the lower court which held the provision did not allow for deduction of post-production costs.[247]

The court affirmatively answered the certified question and concluded as a matter of law that the oil royalty provision in question is interpreted to mean the royalty is based on the value of the oil "at the well."[248] Its decision was based on the reasonable interpretation of the royalty provision and support from other jurisdictions that interpreted similar provisions.[249]

Honorable David Nelson, sitting in place of Justice VandeWalle, argued in his dissent the parties should have been allowed to conduct discovery before the court decided to answer the certified question on the disputed oil royalty provision.[250] In his dissent, the sitting justice emphasized under the North Dakota Rules of Appellate Procedure, which grants the court power to answer a certified question of law, Rule 47(c)(2) requires a certification order contain "*a statement of all facts relevant to the question certified, showing fully the nature of the controversy in which the question arose*[.]"[251] In further support, the sitting justice cited Justice Kapsner's dissent in *Bornsen v.*

241. 134 P.2d 404, 404-05 (Kan. 1943).
242. *Blasi*, 2021 ND 86, ¶ 20, 959 N.W.2d 872 (quoting *Molter*, 156 Kan. 544, 134 P.2d 404, 404-05 (1943)).
243. *Id*.
244. *Id*.
245. 573 S.W.3d 198 (Tex. 2019).
246. *Blasi*, 2021 ND 86, ¶ 21, 959 N.W.2d 872 (quoting *Burlington Res. Oil & Gas Co*., 573 S.W.3d at 201).
247. *Id*.
248. *Id*. ¶ 22.
249. *Id*.
250. *Id*. ¶ 25.
251. *Id*. ¶ 26.

Pragotrade, LLC,[252] which warned that deciding a certified question with an undeveloped record and without having all relevant facts creates risks of unintended consequences, and "exposes the judiciary to the danger of improvidently deciding issues and of not sufficiently contemplating ramifications of the opinion."[253]

In determining what constitutes a "pipeline" in Blasi and Bruin's leases, the sitting justice believed discovery was necessary to determine the parties' intentions and understanding of the oil royalty provision at the time the various leases were executed.[254] The lack of a full record arguably precludes the court from identifying any collateral matter potentially related "to the 'pipeline' contemplated by the oil royalty provision."[255] Discovery would allow the representations made by the parties that created the leases to come to light, as well as "what the lessors understood those provisions to mean."[256] Further, the dissent argued discovery would potentially reveal whether Bruin had taken any contrary positions to "their interpretation of the oil royalty provision" offered to the court now.[257] The dissent found such great importance in allowing discovery and creating a factual record that it would have granted Blasi's motion to decline to answer the certified question unless and until discovery was conducted.[258]

252. 2011 ND 183, 804 N.W.2d 55.

253. *Blasi*, 2021 ND 86, ¶ 27, 959 N.W.2d 872 (quoting *Bornsen, LLC*, 2011 ND 183, ¶ 26, 804 N.W.2d 55).

254. *Id.* ¶ 32 (citing West v. Alpar Res., Inc., 298 N.W.2d 484, 490 (N.D. 1980)).

255. *Id.*

256. *Id.* ¶ 33.

257. *Id.*

258. *Id.* ¶ 34.

REAL PROPERTY – JUDGMENT – PRIVITY AND RES JUDICATA IN OIL & GAS LEASES

N. Oil & Gas, Inc. v. EOG Res., Inc.

In *N. Oil & Gas, Inc. v. EOG Res., Inc.*,[259] Northern Oil & Gas ("Northern") filed a quiet-title action against EOG Resources, Inc. ("EOG") regarding the competing mineral interests held by the two corporations.[260] Both companies leased oil and gas rights from different purported owners of the interests and the respective lessors brought similar actions in state court.[261] The district court granted EOG's motion to dismiss, holding privity existed between Northern and its lessor.[262] The Eighth Circuit reversed and remanded the case, holding "[b]ecause Northern acquired its lease before the lessors' case, no privity exist[ed] between Northern and its lessor."[263] The court relied on a previous North Dakota Supreme Court ruling, *Gerrity Bakken, LLC v. Oasis Petroleum N. Am., LLC*,[264] which held in North Dakota, "the privity doctrine cannot be applied if the rights to property were acquired by the person sought to be bound before the adjudication."[265]

Prior to Northern or EOG's involvement, the land and mineral interests at issue were conveyed through a series of transactions. Axel Anderson conveyed mineral interests to Henry Johnson while maintaining a ¼ interest in the mineral rights for himself.[266] "By 2008, Anderson's interest passed to Nancy Finkle and Johnson's interest passed to his descendants ("the Johnsons")."[267] That same year, Finkle entered into an oil and gas lease with Northern's predecessor, which assigned its interest to Northern shortly thereafter, and the Johnsons entered into the same with EOG.[268] "In 2011, the Johnsons filed a quiet title action against Finkle in state court," in which "Northern and EOG were not made parties" or given notice.[269] The state court found for the Johnsons' and terminated Finkle's interest.[270] After this judgment, EOG notified Northern that it would no longer cooperate in the

259. 970 F.3d 889 (8th Cir. 2020).
260. *Id.* at 890.
261. *Id.*
262. *Id.* at 891.
263. *Id.*
264. 2018 ND 180, 915 N.W.2d 677.
265. *Id.* ¶ 17.
266. *N. Oil & Gas*, 970 F.3d at 891.
267. *Id.*
268. *Id.*
269. *Id.*
270. *Id.*

development of oil and gas.[271] Northern responded by filing a quiet-title claim in federal district court.[272] EOG then moved to dismiss, claiming the state court judgment barred the quiet-title claim by res judicata.[273]

Since it was implementing the principles of res judicata, the state court judgment against Finkle could only preclude Northern's claim if there was privity between the two.[274] Northern argued under North Dakota law, privity can only apply where a mineral lease was acquired after the litigation begins.[275] The district court rejected that argument, holding under a two-pronged test, "Northern's interests (1) were aligned with Finkle's and (2) were protected by the state-court proceedings."[276] The court held Northern's interests were adequately represented by Finkle, and granted EOG's motion to dismiss.[277]

A few months after the federal district court's decision, the North Dakota Supreme Court decided a factually similar case. In *Gerrity Bakken,* lessors filed suit against defendants to quiet title regarding the underlying mineral rights.[278] The lessors failed to name Gerrity Bakken (the lessee) in the suit, which resulted in a ruling for the defendants.[279] Shortly after the conclusion of that case, Gerrity Bakken filed a quiet-title action against the defendants.[280] The defendants argued the earlier judgment precluded Gerrity's claim under the privity doctrine.[281] The court rejected the defendant's privity argument, holding "the privity doctrine cannot be applied if the rights to property were acquired by the person sought to be bound before the adjudication."[282]

Based on the *Gerrity Bakken* decision, Northern moved for reconsideration.[283] The district court denied that motion, noting North Dakota's privity standard allows for consideration of fundamental fairness.[284] The court held Northern was bound to the quiet-title judgment as a result of fundamental fairness.[285]

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271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.*
277. *Id.*
278. Gerrity Bakken, LLC v. Oasis Petroleum N. Am., LLC*,* 2018 ND 180, 915 N.W.2d 677.
279. *Id.* ¶ 6.
280. *Id.* ¶ 7.
281. *Id.* ¶ 17.
282. *Id.*
283. N. Oil & Gas, Inc. v. EOG Res., Inc., 970 F.3d 889, 892 (8th Cir. 2020).
284. Id; *see* Kulczyk v. Tioga Ready Mix Co., 2017 ND 218, ¶ 11, 902 N.W.2d 485.
285. *N. Oil & Gas*, 970 F.3d at 892.

Northern appealed to the United States Court of Appeals for the Eighth Circuit, arguing the district court erred by holding Northern was in privity with Finkle and that res judicata barred its quiet-title action.[286] The court laid out its responsibility as follows: (1) the law of the forum where the first judgment was made (North Dakota) governs the res judicata analysis; (2) a district court's interpretation of state law is reviewed de novo and the appeals court is bound by the decisions of the state supreme court; (3) when no state supreme court case is on point, the role of the appeals court is to predict how the supreme court would handle the case.[287]

The Eight Circuit disagreed with the district court, holding privity and res judicata do not apply in this case because Northern obtained its interest three years before the quiet-title action commenced.[288] The court highlighted the similarities between this case and *Gerrity Bakken*, showing in neither case were the lessees named in the initial complaint.[289] Further, the cases were both lost by the lessors before the lessees filed their own quiet-title actions.[290] It applied the facts and holding in *Gerrity Bakken* to this case and found Northern was not in privity with Finkle.[291]

The Eighth Circuit distinguished its opinion from that of the district court, highlighting that although *Gerrity Bakken* did not address fundamental fairness directly, the role of the federal courts in this case was to predict how the state supreme court would have ruled.[292] The court found *Gerrity Bakken* was strikingly similar giving it "a convincing clue for making that prediction."[293]

However, the Eighth Circuit stated there was a reasonable argument to be made for fundamental fairness.[294] It highlighted *Stetson v. Investors Oil, Inc*.[295] as a case that could provide insight into the fundamental fairness argument.[296] In *Stetson*, an individual filed a suit and won a judgment against an oil prospecting company, seeking payment for unpaid services on an oil well.[297] Following the judgment a garnishment action was brought by his trustee against the defendants, who were owners of the company and its

286. *Id.*
287. *Id.*
288. *Id.* at 895.
289. *Id.* at 893.
290. *Id.*
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.*
295. 176 N.W.2d 643 (N.D. 1970).
296. *N. Oil & Gas*, 970 F.3d at 893.
297. *Stetson*, 176 N.W.2d at 644.

financiers.[298] The defendants argued there was no privity because the earlier lawsuit had only included their agent – the company – not them.[299] The North Dakota Supreme Court rejected that argument, applying res judicata and binding them to the earlier judgment.[300] It noted the defendants had participated in and received communications regarding the previous action, in which, equity required an expanded privity rule to bind the owners.[301] The Eighth Circuit distinguished the present case from *Stetson*, arguing Northern did not participate or have communications in the prior action.[302] The circuit court further highlighted North Dakota courts have never found an equitable way to apply res judicata "where the third party (1) acquired its interest prior to the proceeding and (2) was not involved in the proceeding."[303]

The Eighth Circuit further bolstered its reasoning by highlighting a recent decision of the North Dakota Supreme Court which, after noting fundamental fairness, applied the *Gerrity Bakken* rule.[304] The circuit court addressed some of EOG's other arguments, specifically that a party is in privity when it has a subordinate interest to a party involved in an earlier case.[305] The circuit court found no case law supports this argument.[306] EOG further argued privity applies when there is adequate representation of the party's interest.[307] This argument drew from a U.S. Supreme Court case, *Taylor v. Sturgell*,[308] which dealt with the application of federal law.[309] The circuit court found this case did not apply as it addressed an issue of federal, not state law and, even if it would apply, Finkle did not adequately represent Northern's interests.[310] To adequately represent a nonparty's interests under *Taylor,* at a minimum (1) the party must understand they are acting in a representative capacity and (2) the original court took care to protect the interest of the nonparty.[311]

The Eighth Circuit Court concluded the *Gerrity Bakken* rule would apply in this case and therefore, privity and res judicata did not apply as Northern obtained its property interest three years before the previous case

298. *Id.* at 644-45.
299. *Id.* at 647-48.
300. *Id.* at 651.
301. *Id.* at 650-52.
302. N. Oil & Gas, Inc. v. EOG Res., Inc., 970 F.3d 892,894 (8th Cir. 2020).
303. *Id.*
304. *Id*; *see* Great Plains Royalty Corp. v. Earl Schwartz Co., 2019 ND 124, ¶ 24, 927 N.W.2d 880.
305. *N. Oil & Gas*, 970 F.3d at 894.
306. *Id.*
307. *Id.*
308. 553 U.S. 880 (2008).
309. *Id.* at 885.
310. *N. Oil & Gas*, 970 F.3d at 895.
311. *Taylor*, 553 U.S. at 900.

commenced.[312] The circuit court reversed and remanded for further proceedings.[313]

312. *N. Oil & Gas*, 970 F.3d at 895.
313. *Id.*

MINERAL LAW – BREACH OF CONTRACT – PROPERTY LAW

SunBehm Gas, Inc., v. Equinor Energy, LP

In *SunBehm Gas Inc., v. Equinor Energy, LP*,[314] the court addressed the issue of whether statutory interest requirements of North Dakota Century Code section 47-16-39.1 apply to SunBehm Gas Inc.'s ("SunBehm") overriding royalty interests.[315] Plaintiff SunBehm's motion for partial summary judgment is predicated on North Dakota Century Code section 47-16-39.1, which allows a "mineral owner or the mineral owner's assignee" to collect interest on oil and gas royalties that are not paid within one hundred fifty days after oil or gas produced is marketed and cancellation of the lease is not sought.[316] Defendant Equinor Energy, LP ("Equinor") argued the statute did not apply because SunBehm did not actually own the oil and gas rights at issue.[317] In response to Equinor's motion to dismiss, SunBehm filed a motion for partial summary judgment, arguing its overriding royalty interests qualify it for the rights under section 47-16-39.1.[318] The United States District Court of North Dakota found section 47-16-39.1 did not apply in this case and granted Equinor's motion to dismiss for failure to state a claim.[319]

SunBehm is a North Dakota corporation that "owns overriding royalty interests in various oil and gas wells in McKenzie County, North Dakota."[320] Equinor is a Texas-based limited partnership that operates those wells in McKenzie County, and it commenced production on several wells in 2012, 2013 and 2014.[321] However, Equinor did not pay SunBehm for its royalty interests until 2017.[322] This well exceeded the statutory 150 day payment period under section 47-16-39.1, which also allowed SunBehm to receive interest on late payments at a rate of 18% per year.[323] Although Sunbehm acknowledged overriding royalty interests "are carved out of leases and have different characteristics than landowner's royalty interests" it maintained that its overriding royalty interest was merely a "smaller interest in a mineral

314. SunBehm Gas, Inc. v. Equinor Energy, LP, No. 1:19-CV-94, slip op. at 1 (D.N.D. Apr. 27, 2020).
315. *Id.*
316. *Id.*; N.D. CENT. CODE § 47-16-39.1 (2021).
317. *SunBehm*, slip op. at 1-2.
318. *Id.* at 1.
319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. N.D. CENT. CODE § 47-16-39.1 (2021).

estate."[324] These interests are created by the language in the lease and the interest's duration is limited by the lease language.[325] Using this overriding royalty interest, SunBehm "filed a claim for statutory interest, attorney's fees, and costs."[326] On June 3, 2019, Equinor removed the case to federal court based upon diversity jurisdiction.[327] Once the case was accepted, Equinor moved for dismissal.[328]

On June 3, 2019, Equinor removed the case to federal court by invoking the court's diversity jurisdiction.[329] The court found no factual disputes and only addressed the narrow legal question of whether section 47-16-39.1 applied to SunBehm's overriding royalty interests.[330] This was the first case in the district court addressing this specific issue and there was no precedent from North Dakota case law involving overriding royalty interests.[331]

The district court began its analysis by first determining whether an overriding royalty interest was a type of royalty interest, and if so, whether that overriding interest made SunBehm a mineral assignee.[332] Utilizing North Dakota case law, the court identified three royalty interests: landowner's royalty, nonparticipating royalty, and overriding royalty interest.[333] A landowner's royalty interest is the result of a mineral lease and comes from the ownership of the subject minerals.[334] A landowner's royalty "guarantees the mineral owner a share of production from the operator's activity under the lease."[335] A nonparticipating royalty interest is when a "mineral owner conveys his royalty interest to another person" and that person does not retain the rights to "develop the minerals, execute leases, or receive bonus and rentals" but "is simply entitled to receive a share of any production."[336] The landowner may limit the royalty under the specific lease or convey it in perpetuity.[337] An overriding royalty interest is created when an oil and gas lease is executed with an operator, who then obtains a working interest; the overriding royalty is "carved out of the working interest" that gives an operator "the right to develop the mineral in and under the subject land."[338]

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324. *SunBehm*, slip op. at 3.
325. *Id.* at 9.
326. *Id.* at 2.
327. *Id.* at 2.
328. *Id.*
329. *Id.* at 1.
330. *Id.*
331. *Id.*
332. *Id.*
333. *Id.* at 2-3.
334. *Id.* at 2.
335. *Id*. at 3.
336. *Id.*
337. *Id.*
338. *Id.*

The interest is limited to the lease and simply gives the owner of the interest a right to a share of production.[339]

Equinor argued SunBehm's overriding interest did not make it an owner of the oil and gas under the ground.[340] SunBehm responded with a reference to *Acoma Oil Corp v. Wilson*,[341] and quoted "all types of royalty interests are ultimately derived from the mineral estate[.]"[342] The court struck down this argument, because the sentence also says the mineral estate is "a share of the product or proceeds *reserved to the owner for permitting another to develop or use the property.*"[343] The court deduced the *Acoma* court was referring to a royalty interest held by the mineral owner.[344] SunBehm cited another case, *Van Sickle v. Hallmark & Assocs., Inc.*,[345] but the court rejected the comparison because the case did not involve an overriding royalty interest.[346] After finding *Acoma* and *Van Sickle* distinguishable, the court determined section 47-16-39.1 did not apply to SunBehm's overriding royalty interest.[347]

Moving on to the issue of whether an overriding royalty interest made SunBehm an assignee, the court reviewed North Dakota Century Code section 38-18-05(6) on the definition of a mineral owner.[348] According to the statute, a mineral owner is:

> [A]ny person or persons who presently own the mineral estate, their successors, assigns, or predecessors in title, under a specified tract of land by means of a mineral deed, or by an exception or reservation in the deed, grant, or conveyance of the surface, or by any other means whatsoever.[349]

SunBehm again argued it was a mineral owner assignee, because its overriding royalty interests were smaller portions of the mineral estate.[350] Equinor argued SunBehm "was never assigned actual ownership of the mineral estate" and the court agreed because SunBehm's interpretation of section 38-18-05(6) is a "tortured construction" and "is not supported by the plain language of the statute."[351] Utilizing SunBehm's interpretation, the

339. *Id.*
340. *Id.* at 4.
341. Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 481 (N.D. 1991).
342. SunBehm Gas, Inc. v. Equinor Energy, LP, No. 1:19-CV-94, slip op. at 4 (D.N.D. Apr. 27, 2020).
343. *Id.*
344. *Id.*
345. 2013 ND 218, 840 N.W.2d 92.
346. *Sunbehm*, slip op. at 4.
347. *Id.*
348. *Id.* at 5.
349. N.D. CENT. CODE § 38-18-05(6) (2021).
350. *SunBehm*, slip op. at 5.
351. *Id.* at 5.

court stated section 38-18-05(6) would be read as "if the operator fails to pay royalties to the mineral owner, or the mineral owner's assignee, including the operator himself and his assignees."[352] The court determined SunBehm's expansion of the phrase "mineral owner's assignee" would be an interpretation that "goes farther than any North Dakota court has allowed."[353]

The district court found section 47-16-39.1 "does not apply to holders of overriding royalty interests" and denied SunBehm's motion for partial summary judgment.[354] Because SunBehm could not show an entitlement to relief, it failed to state a claim upon which relief can be granted.[355] The court granted Equinor's motion to dismiss and all of SunBehm's claims were dismissed with prejudice.[356]

352. *Id.*
353. *Id.*
354. *Id.*
355. *Id.*
356. *Id.*