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STATE OF NORTH DAKOTA

Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson, Plaintiffs-Appellants, v. Continental Resources, Inc., Defendant-Appellee.	Supreme Court No. 20200318

Appeal from a Judgment, Entered October 15, 2020, and the underlying
Opinion, Dated October 5, 2020,
Case No. 27-2017-CV-00440
County of McKenzie, Northwest Judicial District
The Honorable Daniel El-Dweek, District Judge, Presiding

BRIEF OF APPELLEE

ORAL ARGUMENT REQUESTED

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STATEMENT OF ISSUES

[¶ 1] In addition to the issues stated in the Appellants' Opening Brief, Defendant-Appellee Continental Resources, Inc. ("Continental") states the following issue:

[¶ 2] Whether the District Court carried out this Court's mandate on remand for further proceedings on the issue of whether Continental acted diligently and in good faith.

STATEMENT OF THE CASE

[¶ 3] This case concerns the respective rights of Continental and Plaintiffs-Appellants Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson (collectively, "Nelsons") under four identical oil and gas leases (collectively, "Leases"). The Nelsons seek a declaration that the Leases have expired. Continental argues the District Court correctly determined the Leases remain in effect.

[¶ 4] This is the second time this case has been before the Supreme Court. Following the District Court's grant of summary judgment in favor of Continental in January 2019, the Nelsons appealed. In the first appeal, the Court examined whether Paragraph 12 of the Leases, a force majeure clause, provided for an extension of the term because there was a delay in obtaining the necessary permits. On August 27, 2019, this Court affirmed in part and reversed in part. This Court determined the language of the Leases allowed the primary term of the Leases to be extended if there was an inability to obtain necessary permits and remanded "for further proceedings" concerning "whether Continental acted diligently and in good faith" in pursuing permitting. *Pennington v. Cont'l Res., Inc.*, 2019 ND 228, ¶ 21, 932 N.W.2d 897.

[¶ 5] Following a trial on remand, the District Court found Continental had acted diligently and in good faith and the Leases remained in effect. Appendix to Appellants' Opening Brief ("App.") 103-109, ¶¶ 51-59. The District Court rejected the Nelsons'

attempts to inject new issues into the case beyond the narrow issue for remand identified by this Court in August 27, 2019 opinion both on procedural grounds and on the merits. *Id.* ¶ 59.

[¶ 6] In this appeal, the Nelsons do not challenge the District Court's holding on diligence and good faith. Instead, the Nelsons appeal the District Court's rejection of their new arguments concerning the Leases' language. *See* Appellants' Opening Brief, ¶¶ 1-2. For the reasons below, the District Court's decision should be affirmed in all respects.

STATEMENT OF FACTS

[¶ 7] The Nelsons' second appeal raises two new legal issues for this Court's review: (1) whether Continental's inability to obtain permits prior to September 1, 2014, while Tracker Resources Development III, LLC ("Tracker") was lessee, extends the Leases' term under Paragraph 12 and (2) whether the Leases may be maintained in effect by commencement and continuation of drilling operations. The facts and procedural history relevant to those two newly-raised issues are summarized below.

I. The Leases.

[¶ 8] Although the parties dispute how the Leases should be interpreted, there is no dispute as to the Leases' language.

[¶ 9] In relevant part, Paragraph 3, titled "Term of Lease," provides:

> This lease shall be in force for a primary term of three (3) years from the date hereof, and for as long thereafter as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises or from lands pooled or unitized therewith or *this lease is otherwise maintained in effect pursuant to the provisions hereof.*

App. 16 (emphasis added).

[¶ 10] Paragraph 17 grants the lessee an option to extend the lease term by one year. App. 19.

[¶ 11] Paragraph 12 is a force majeure clause that provides, in pertinent part:

> When drilling, reworking, production or other operations are prevented or delayed . . . by inability to obtain necessary permits . . . this lease shall not terminate because of such prevention or delay, and, at the lessee's option, the period of such prevention or delay shall be added to the term hereof.

App. 18.

[¶ 12] Paragraph 4 is a continuous drilling operations clause that, as relevant to this appeal, provides:

> If after the primary term this lease is not otherwise being maintained in force, but Lessee is then engaged in Operations, as defined below, then this lease shall remain in force so long as any one or more Operations are prosecuted with no interruption of more than 180 consecutive days.
>
> . . . . .
>
> "Operations" shall mean any activity conducted on the leased premises, or lands pooled or unitized therewith, that is reasonably calculated to obtain or restore production, including without limitation, (i) drilling . . . .

App. 16-17.

[¶ 13] The Leases each attach and incorporate an "Exhibit A." App. 20-22. The language of Exhibit A applies "[n]otwithstanding the provisions of the lease to the contrary." App. 20. Paragraph (a) of Exhibit A provides that the Leases will terminate at the end of the primary term unless there is production for which the lessee is receiving royalty payments or "unless Lessee is then engaged in drilling or reworking operations in accordance with the provisions of this lease." *Id.* Paragraph (a) continues:

> In the event that Lessee is engaged in said drilling or reworking operations at the expiration of the primary term, the lease shall remain in full force and effect as to all the leased premises so long as a continuous drilling program is maintained whereby not more than 180 days shall elapse from the completion or abandonment of drilling or completion operations upon the last well to the commencement of another well.

Id.

II. The Parties' Relationship and Conduct under the Leases.

[¶ 14] It is undisputed the Nelsons entered into the Leases with Tracker on October 25, 2011. *See, e.g.*, App. 16. The parties also agree effective September 1, 2014, Tracker assigned the Leases to Continental. *Id.* at 23-30.

[¶ 15] The Nelsons assert there was no "relationship" between Continental and Tracker regarding the Leases prior to September 1, 2014. Continental disputes this. The District Court found Continental began acting on Tracker's behalf no later than February 2013 when the North Dakota Industrial Commission ("Commission") issued a pooling order encompassing the leased property. *See* App. 108–09.

[¶ 16] Although the parties dispute the significance of these facts, it is undisputed on April 11, 2012, the Commission established a standup 2,560-acre spacing unit ("2560 Unit") that included the lands covered by the Leases. Appendix of Appellee ("CRI App.") 42-53. On April 18, 2012, Continental applied to the Commission for an order pooling all interests in the 2560 Unit and for permits to drill the Buelingo 3-17H and Buelingo 2-17H wells in the 2560 Unit. *Id.* at 61-63, 77-78, 81-82. On February 14, 2013, the Commission pooled all interests in the 2560 Unit. *Id.* at 54-56.

[¶ 17] Matt Callaway, formerly a land supervisor for Continental, testified at trial that it would not have made sense for Tracker to develop the Leases prior to its assignment of the Leases because Continental had the majority interest in the area. Transcript of Proceedings ("Trans.") (Trial Day 1) 26. The District Court credited this testimony, although the Nelsons appear to dispute it. *See* App. 109, ¶ 59.

[¶ 18] The parties agree on October 21, 2014, Continental exercised its option to extend the Leases for an additional one-year term, pursuant to Paragraph 17 thereof. *See* Trans. (Trial Day 1) 19, 31.

[¶ 19] Pursuant to the force majeure clause at Paragraph 12 of the Leases, Continental recorded an Affidavit of Regulation and Delay on October 21, 2015, stating its operations on the Leases had been delayed by inability to obtain permits from the Bureau of Land Management ("BLM"). App. 36-37. These facts are not disputed.

[¶ 20] The District Court found Continental's drilling operations were prevented or delayed by its inability to obtain necessary permits from the BLM for a total of 791 days, from June 1, 2013 to August 1, 2015. Appellants' Opening Brief, ¶ 25. The Nelsons do not challenge the District Court's determination that the force majeure period permitting delay ended on August 1, 2015. *Id.* ¶ 28.

[¶ 21] Continental commenced drilling operations on the Leases on January 29, 2016. *See* Trans. (Trial Day 1) 139; Trans. (Trial Day 3) 68; App. 91, ¶ 27. Continental continued its operations thereafter until Continental obtained production in July 2017. *See* Trans. (Trial Day 3) 68; App. 91, ¶ 27; Appellants' Opening Brief, ¶ 23. The Nelsons do not dispute the foregoing facts.

III. Procedural History.

[¶ 22] The Nelsons initiated the present action against Continental on August 22, 2017 seeking a declaration that the Leases had expired. Following cross-motions for summary judgment, on January 4, 2019, the District Court issued an order granting Continental's motion. The District Court held Paragraph 12 operated to extend the term of the Leases until Continental obtained regulatory approval to commence drilling operations, and the Leases remained in effect despite Continental's inability to commence drilling operations prior to October 25, 2015. CRI App. 36-38.

[¶ 23] The Nelsons appealed, raising three arguments. First, the Nelsons argued Paragraph 12 could not extend the Leases' beyond their primary term. Appellants' Opening

Brief at 13-19, *Pennington*, 2019 ND 228, 932 N.W.2d 897, Seq. # 10. Second, the Nelsons argued Continental's inability to obtain permits could not serve as a basis for extending the Leases' term because Paragraph (p) of Exhibit A to the Leases provided, "Operations sufficient to hold this lease beyond the primary term shall not include obtaining permits . . . ." *Id.* at 19-21. And third, the Nelsons argued there was a genuine issue of fact regarding whether Continental's drilling operations had actually been prevented or delayed by Continental's inability to obtain permits. *Id.* at 21-26.

[¶ 24] On August 27, 2019, this Court issued an opinion affirming in part, reversing in part, and remanding the case to the District Court. This Court rejected the Nelsons' first two arguments, but agreed "a genuine issue of material fact exists as to whether Continental acted diligently and in good faith" in pursuing permitting. *Pennington*, 2019 ND 228, ¶ 21, 932 N.W.2d 897. Accordingly, this Court remanded for "further proceedings on this issue." *Id.*

[¶ 25] On remand, the District Court held a trial on July 28-30, 2020. The District Court's October 2, 2020 Findings of Fact, Conclusions of Law, and an Order for Judgment concluded Continental's diligently pursued permits in good faith. App. 103, ¶¶ 51-54. The District Court also found Continental's drilling operations were prevented or delayed from June 1, 2013 to August 1, 2015, or 791 days, extending the Leases' term until December 24, 2017. App. 97, ¶ 41. Because Continental established drilling operations on January 28, 2016, and obtained production on July 30, 2017, each of which was prior to the end of the extended primary term on December 24, 2017, the District Court concluded the Leases remained in effect and rejected the Nelsons' arguments to the contrary. *See id.*

[¶ 26] The Nelsons now appeal for a second time. They do not challenge the District Court's conclusions concerning Continental's good faith and diligence. Instead,

they argue the Leases expired because Paragraph 12 should only allow Continental to extend the Leases for days of delay occurring *after* Continental acquired the Leases. Appellants' Opening Brief, ¶¶ 42-55. Therefore, the Nelsons argue, the primary term should have expired on June 30, 2016, which was after Continental began drilling operations but before it obtained production. *Id.* ¶ 55. The Nelsons further challenge the District Court's conclusion that drilling operations alone are sufficient to maintain the Leases in effect. *Id.* ¶¶ 30-41. The combined effect of these two arguments is that, in the Nelsons' view, the Leases should have expired on June 30, 2016 because although continuous drilling operations had commenced by that point, production had not yet been obtained. *See id.* ¶ 29.

[¶ 27] From the date of filing this lawsuit until the most recent trial, almost a three-year period of ongoing litigation, the Nelsons never meaningfully raised these issues. They did not make these arguments in the first set of summary judgment motions in late 2018. *See generally* CRI App. 3-29. Nor did they raise these issues in the first appeal before this Court in 2019. *See generally* Appellants' Opening Brief, *Pennington*, 2019 ND 228, 932 N.W.2d 897; Appellants' Reply Brief, *Pennington*, 2019 ND 228, 932 N.W.2d 897. Instead, the Nelsons waited until trial to raise these issues to the District Court.

STANDARD OF REVIEW

[¶ 28] The construction of an oil and gas lease is a question of law, and this Court "will independently examine and construe the contract" on appeal. *Egeland v. Continental Resources, Inc.*, 2000 ND 169, ¶ 10, 616 N.W.2d 861. "A trial court's findings of fact will not be reversed on appeal unless they are clearly erroneous." *Moen v. Thomas*, 2001 ND 95, ¶ 19, 627 N.W.2d 146. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if there is no evidence to support it, or if, after reviewing all the

evidence, [this Court is] left with a definite and firm conviction a mistake has been made." *Id.* "On appeal, the trial court's findings of fact are presumed to be correct, and the complaining party bears the burden of demonstrating a finding is clearly erroneous." *Id.*

LAW AND ARGUMENT

[¶ 29] The Nelsons' appeal fails and the District Court's decision must be affirmed for several reasons. First, both of the purported "errors" identified by the Nelsons in their appeal relate to legal issues not properly before the District Court. As explained below, had the District Court admitted these issues and ruled in the Nelsons' favor on remand, it would have committed reversible error by exceeding the scope of the mandate reflected in this Court's August 2019 opinion.

[¶ 30] Even ignoring the scope of this Court's mandate, however, the Nelsons' arguments fail on the merits. The Nelsons' effort to compress the period of excused delay under Paragraph 12's force majeure clause by excluding days prior to Continental's acquisition of the Leases is inconsistent with the plain language of the Leases and unsupported by the District Court's findings of fact (which are not clearly erroneous). Further, assuming *arguendo* the days pre-dating the assignment of the Leases should be excluded and the Leases would have expired on June 30, 2016, the Nelsons' appeal still fails under Paragraph 4 of the Lease and Paragraph (a) of the Exhibit because there is no dispute Continental began continuous drilling operations in January 2016. Realizing this defect in the timeline, the Nelsons urge this Court to hold that drilling operations are not enough to maintain the Leases. Rather, the Nelsons argue production is required and because Continental did not establish production until July 30, 2017, the Leases expired. The plain language of the Leases confirms this interpretation is incorrect.

[¶ 31] For these reasons, Continental respectfully requests this Court affirm the District Court's decision in its entirety.

I. The District Court properly adhered to the law of the case and the Supreme Court's mandate on remand.

[¶ 32] The district court properly limited its review to the scope of this Court's mandate by focusing the remand proceedings on the question of Continental's diligence and good faith.

[¶ 33] Under the principle of law of the case, legal determinations of this Court "'will not be differently determined on a subsequent appeal in the same case where the facts remain the same.'" *Viscito v. Christianson*, 2016 ND 139, ¶ 7, 881 N.W.2d 633 (quoting *Carlson v. Workforce Safety & Ins.*, 2012 ND 203, ¶ 16, 821 N.W.2d 760)). A party "'cannot on a second appeal relitigate issues which were resolved by the Court in the first appeal *or which would have been resolved had they been properly presented in the first appeal*.'" *Id.* (emphasis in original).

[¶ 34] The mandate rule is a more specific application of the law of the case. *Id.* Under the mandate rule, when this Court has passed on a legal question and remanded to the district court for further proceedings, the trial court must "follow [the] pronouncements of [this Court] on legal issues in subsequent proceedings of the case and to carry [this Court's] mandate into effect according to its terms." *Law v. Whittet*, 2015 ND 16, ¶ 5, 858 N.W.2d 636 (internal quotation marks omitted). Where a district court fails to adhere to the scope of the mandate of the appellate court, it commits reversible error. *See id.* at ¶¶ 10-13. Similarly, a district court violates the mandate rule when it entertains new arguments from a party on remand when those arguments "could have been made in conjunction"

with the earlier proceedings. *Johnston Land Co., LLC v. Sorenson*, 2019 ND 165, ¶ 11, 930 N.W.2d 90. Such arguments "c[o]me too late." *Id.*

[¶ 35] The Nelsons' appeal fails under the law of the case and the mandate rule. In its August 2019 opinion, this Court examined the District Court's determination that the force majeure clause of Paragraph 12 "extended the leases until regulatory approval could be obtained to begin drilling operations." *Pennington*, 2019 ND 228, ¶ 5, 932 N.W.2d 897. The Nelsons did not, in their first appeal, challenge the District Court's reading of the Leases which implicitly concluded Continental's efforts to secure permits prior to assignment extended the Leases, and that drilling operations alone were sufficient to maintain the leases at the expiration of or beyond the primary term. CRI App. 36-38.

[¶ 36] The Nelsons waited to raise these issues until trial on remand. There is no reason they could not have done so in the first appeal. The facts regarding the language of the Leases and the dates on which Continental acquired the Leases, began drilling operations and obtained production were developed and undisputed prior to the first summary judgment motion in late 2018 and well before this Court's August 2019 opinion. *See* CRI App. 31-32, 33-34; *see also Pennington*, 2019 ND 228, ¶¶ 2, 4. The Nelsons' first appeal focused on the timeline of operations, emphasizing that Continental was able to begin drilling within 100 days of adjusting its permitting strategy, but the Nelsons made no argument that drilling was not sufficient to maintain the Leases. *See, e.g.*, Appellants' Opening Brief at 6, *Pennington*, 2019 ND 228, 932 N.W.2d 897, Seq. # 10 ("Nelsons contend on appeal that the leases automatically expired at the end of the primary term because it is undisputed that no drilling had commenced . . . ."); *cf. Pennington*, 2019 ND 228, ¶ 4, 932 N.W.2d 897 (setting forth the timeline of relevant events, concluding with

Continental's commencement of drilling operations in January 2016). The Nelsons raised these issues too late.

[¶ 37] This Court issued a specific mandate for the District Court on remand and the District Court correctly limited the scope of the remand to the Court's mandate. Specifically, this Court determined that, although the language of the Leases allowed a delay in obtaining permits to extend the primary term, the grant of summary judgment to Continental was improper because there was "a genuine issue of material fact . . . as to whether Continental acted diligently and in good faith" in pursuing permits. *Id.* at ¶ 21. This Court "remand[ed] for further proceedings *on this issue*." *Id.* (emphasis added). The Nelsons argue, in effect, that the District Court should be reversed *because* it did not violate the mandate rule and consider the Nelsons' too-late arguments. This is completely backwards. To the contrary, it would have been reversible error for the District Court to have entertained the Nelsons' arguments, reaching beyond the scope of the issue this Court directed for further proceedings on remand—whether "Continental acted diligently and in good faith." The Court should therefore affirm the decision of the District Court.

II. The District Court correctly determined that the period of excused delay began on or before June 1, 2013.

[¶ 38] The Nelsons' late-raised arguments do not disturb the District Court's conclusion that the period of excused delay began on or before June 1, 2013. The Nelsons argue only a current lessee's efforts to obtain permits trigger the protection of Paragraph 12's force majeure clause. They argue there was no force majeure event while Tracker held the Leases because Tracker did not seek permits. Importantly, the Nelsons' do not challenge the District Court's factual conclusion that Continental was indeed seeking permits in good faith and diligently prior to its acquisition of the Leases; the

Nelsons simply argue those efforts are of no legal significance. In addition to being improperly raised at this point in the proceedings under the law of the case and the mandate rule, this argument fails for the reasons below.

A. The language of Paragraph 12 applies to *any* inability to obtain permits.

[¶ 39] "'What types of events constitute *force majeure* depend on the specific language included in the clause itself.'" *Entzel v. Mortiz Sport & Marine*, 2014 ND 12, ¶ 7, 841 N.W.2d 774 (quoting 30 *Williston on Contracts* § 77.31, at 364 (4th ed. 2004)). Paragraph 12 does not include any language limiting its force majeure protections to the *lessee's* inability to obtain permits. To the contrary, Paragraph 12 unambiguously provides that "inability to obtain necessary permits" is a force majeure event and "the period of" the prevention or delay caused by that event "shall be added to the term" of the Lease. The parties could have negotiated a narrower force majeure clause triggered only by the "*Lessee's* inability to obtain necessary permits," but they did not. The plain language of Paragraph 12 must rule and the full "period of" the delay must be added to the term of the Leases.

[¶ 40] It makes good sense for this Court to apply the language of Paragraph 12 as it is written and decline the Nelsons' invitation to add language to the Leases. Paragraph 7 of the Leases specifically anticipates both voluntary pooling and pooling upon governmental order "either before or after the commencement of drilling or production." App. 17. Similarly, this Court construes "contracts in light of existing statutes, which become part of and are read into the contract as if those provisions were included in it." *Egeland v. Continental Resources, Inc.*, 200 ND 169, ¶¶ 10, 12 (reading North Dakota's pooling statute into an oil and gas lease). The North Dakota Industrial Commission has statutory authority to order pooling under N.D.C.C. § 38-08-08 upon the application of

"any interested person." Pooling serves an important public policy; it reduces the inefficiency and waste in oil and gas development likely to occur if the law adhered to the traditional "rule of capture" principle. *See Continental Resources, Inc. v. Farrar Oil*, 1997 ND 31, ¶¶ 10-17, 559 N.W.2d 841. The availability of pooling practically means it is not unusual for some third party other than the lessor or lessee to pursue permits; the phrasing of Paragraph 12 anticipates that possibility. *See* N.D.C.C. § 38-08-08 (permitting "any interested party" to seek a pooling order).

[¶ 41] The Nelsons do not challenge the trial evidence demonstrating Continental had pursued a development strategy for the 2560 Unit, including the leased properties, well before it acquired the Leases. To this end, Continental sought a pooling order covering the leased properties, which was granted by the Commission in February 2013. CRI App. 54-56. By statute, Continental's operations on the pooled lands are "deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof." N.D.C.C. § 38-08-08(1). Under this pooling order, owners of an interest in the pooled properties would have had an opportunity to share in the proceeds of oil and gas production. CRI App. 54-56. Thus, had Tracker retained the Leases, it too would have shared in the proceeds. Mr. Callaway testified at trial that Continental was the majority interest owner in the pooled 2560 Unit, and it would have been difficult, if not impossible, for Tracker to conduct its own operations on the Leases. Trans. (Trial Day 1) 26; *see also* N.D.A.C. § 43-02-03-16.2(1)(f) (stating the Commission's general presumption that drilling permits within a given spacing unit should be issued to and held by the majority owner in the unit). The District Court credited this testimony, and the

Nelsons make no argument that the District Court clearly erred in doing so. *See* App. 109, ¶ 59.

[¶ 42] The Nelsons assert, however, that the 2013 pooling order is irrelevant because the particular pooled configuration never culminated in drilling such that the pooling order became "effective." Appellants' Opening Brief, ¶ 52. This argument misses the point. It would be nothing short of absurd to interpret Paragraph 12 to extend the term of the Leases only after drilling began. If drilling operations had commenced, there would have been no need to extend the term of the Leases pursuant to a force majeure clause in the first instance. *See Bice v. Petro-Hunt, LLC*, ¶¶ 25-27, 768 N.W.2d 496 (interpreting an oil and gas lease to avoid an absurd result) (citing N.D.C.C. § 9-07-02).

[¶ 43] This Court should reject the Nelson's invitation to shorten the period of excused delay.

B. The District Court's reading of the Leases is consistent with principles of contract assignment.

[¶ 44] The Nelsons' reliance on the contract law rule that Continental, as assignee, acquires no greater rights than Tracker, as assignor, held under the Leases is misplaced. Continental acknowledges the general principle that the assignee of a contract acquires no more rights than held by the assignor. *See Collection Ctr. v. Bydal*, 2011 ND 63, ¶ 15, 795 N.W.2d 667. However, this rule does not advance the Nelsons' cause because, as the District Court implicitly determined, Continental is not attempting to claim greater rights than those held by Tracker under the Leases.

[¶ 45] In particular, the Nelsons assume, without explanation or analysis, that Tracker would not have been entitled to the protection of Paragraph 12. This assumption is at odds with the language of the Leases which, as noted above, does not limit Paragraph

12's description of triggering events to just the lessee's inability to obtain necessary permits. The Nelsons do not challenge the District Court's determination that there was, in fact, a delay in obtaining permits during the time Tracker held the Leases even though such permits were diligently pursued in good faith. In other words, although the question is not presented on these facts, Tracker would have been entitled to the protections of Paragraph 12 had Tracker retained the Leases.

C. The Leases did not expire because Continental began continuous drilling operations in January 2016.

[¶ 46] Finally, even if the Nelsons were correct that the period of excused delay excludes days prior to September 1, 2014 when Continental took assignment of the Leases from Tracker, the District Court's determination the Leases remain in effect must still be affirmed. If the pre-assignment periods of delay are excluded, the Leases would have expired on June 30, 2016, unless production had been established or Continental was then engaged in drilling operations as anticipated by Paragraph 4 of the Leases and Paragraph (a) of Exhibit A. The Nelsons concede that drilling began in January 2016, well before the Nelsons argue the Leases should have expired, and was maintained continuously until production was established in July 2017. *See* Trans. (Trial Day 3) 68. The Leases remain in force.

III. The District Court correctly determined that Continental's continuous drilling operations maintained the Leases in effect.

[¶ 47] Recognizing their argument to exclude pre-assignment period of delay is insufficient for them to prevail, the Nelsons raise a second new argument—that despite the presence of a continuous drilling operations clause, Continental's drilling activities were insufficient to maintain the Leases. This argument fails on the language of the Leases.

A. The Leases contain a continuous drilling operations clause.

[¶ 48] "A continuous drilling operations clause provides that 'a lease may be kept alive after the expiration of the primary term and without production by drilling operations of the type specified in the clause continuously pursued.'" *Egeland v. Continental Resources, Inc.*, 2000 ND 169, ¶ 3, n.2, 616 N.W.2d 861 (quoting 8 P. Martin & B. Kramer, *Williams & Meyers Oil & Gas Law Manual of Terms*, p. 208 (1999)).

[¶ 49] Paragraph 4 of the Leases is a continuous drilling operations clause which provides that "[i]f after the primary term this lease is not otherwise being maintained in force, but Lessee is then engaged in Operations [including drilling], then this lease shall remain in force so long as any one or more Operations are prosecuted with no interruption of more than 180 consecutive days." App. 16-17. Paragraph (a) of Exhibit A to the Leases, which by its own terms, applies, "[n]otwithstanding the provisions of the lease to the contrary" confirms that these Leases were intended to contain a continuous drilling operations clause. App. 20. As relevant here, Paragraph (a) provides, "In the event that Lessee is engaged in said drilling or reworking operations *at the expiration of the primary term*, the lease shall remain in full force and effect" as long as drilling operations are continuously maintained (emphasis added). *Id.*

B. The Nelsons' arguments do not defeat the continuous drilling operations clause.

[¶ 50] To avoid the effect of the continuous drilling operations clause, the Nelsons argue Paragraph 4 and Paragraph (a) of Exhibit A do not apply for a variety of reasons. None of the Nelsons' arguments in this regard are availing.

1. Paragraph 3 is not the only portion of the Leases that governs their term.

[¶ 51] The Nelsons argue this Court's straight-forward observation in its August 2019 opinion that "the lease term is governed under Paragraph 3," *see Pennington*, 2019

ND 228, ¶ 10, means that *only* Paragraph 3 is relevant to determining when the Lease will expire. This argument does not withstand scrutiny.

[¶ 52] The Nelsons' rigid reading of the August 2019 opinion is implicitly contradicted by that very opinion. First, the Court closely examined Paragraph 12's force majeure clause which allows the lessee to extend the term if there is an inability to obtain necessary permits or another triggering event. App. 44-45, ¶¶ 11-13. Second, the Court acknowledged Continental's exercise of its option under Paragraph 17 to extend the primary term by one year. *See* App. 42, ¶ 2. The District Court's application of the plain language of provisions other than Paragraph 3 to determine the term of the Leases was entirely consistent with this Court's August 2019 opinion.

[¶ 53] Further, the language of Paragraph 3 also anticipates that other provisions in the Lease may affect the term. Paragraph 3 provides that after the primary term, the lease remains in effect if production is obtained "or this lease is otherwise maintained in effect pursuant to the provisions hereof." App. 16. The language of Paragraph 3 does not undercut the continuous drilling operations language in Paragraph 4 or Paragraph (a) of Exhibit A.

2. The Nelsons' reading of Paragraph 4 is not consistent with the plain language of the Leases.

[¶ 54] The Nelsons misinterpret the phrase "after the primary term" in Paragraph 4, arguing drilling operations that take place prior to the expiration of the primary term are not sufficient to maintain the Leases. Appellants' Opening Brief, ¶ 39. The Nelsons presumably acknowledge that continuous drilling operations without production occurring in the secondary term *are* sufficient to maintain the Leases because such operations unequivocally occur "after the primary term." The Nelsons also acknowledge that "[u]nder a paid-up oil and gas lease, 'the lessee has no obligation to commence operations during

the primary term of the lease.'" Appellants' Opening Brief, ¶ 31 (quoting *Irish Oil & Gas, Inc. v. Riemer*, 2011 ND 22, ¶ 22, 794 N.W.2d 715. The import of the Nelsons' treatment of "after the primary term" appears then to be limited to the precise moment the primary term ends. The Nelsons argue, in essence, that although no production or drilling operations are required *during* the primary term and that continuous drilling operations would be sufficient to maintain the leases the moment *after* the primary term ends, the Leases are nevertheless snuffed out at the stroke of midnight in between the primary term and the secondary term. The Court should reject the Nelsons' interpretation of the Leases in this regard as it is contradicted by the plain language of the Leases.

[¶ 55] A careful examination of Paragraph 4 confirms the Nelsons' reading is incorrect. The pertinent language provides "*[i]f* after the primary term *this lease is not otherwise being maintained in force*, but Lessee is *then engaged* in Operations [including drilling]," the lease remains in force. App. 16-17. Put another way, Paragraph 4 provides if, when the primary term ends, the Lease would otherwise terminate (i.e., it "is not otherwise being maintained in force"), it does not expire if the lessee is "then-engaged" in drilling operations.

[¶ 56] To the extent the Nelsons argue this language in Paragraph 4 may only extend the Lease term if there is a *gap* in production after it is initially achieved, the Court should reject the argument because another portion of Paragraph 4 addresses gaps in production. The prior sentence directs that "if all production . . . permanently cases from any cause," the Lease will remain effective if the lessee commences further operations, including "drilling an additional well." App. 16. This Court should interpret the Leases in

a manner that avoids surplusage and in a manner "so as to give effect to every part" of the Leases. *See* N.D.C.C. § 9-07-06.

[¶ 57] Reading Paragraph 4 to allow the primary term to transition into the second term without expiration if drilling has begun by that time is consistent with the plain language of Paragraph (a) of Exhibit A, which more specifically addresses the effect of drilling operations upon the transition between the primary and secondary terms. That paragraph provides the Leases do not terminate "at the end of the primary term" as to portions of the leased premises included within a production or spacing unit if the lessee "is then engaged in drilling or reworking operations . . . ." App. 20. It also specifically states "In the event that Lessee is engaged in said drilling or reworking operations *at the expiration of the primary term*, the lease shall remain in full force and effect as to all the leased premises so long as" continuous drilling operations are maintained. *Id.*

3. The Nelsons may not escape the plain language of Paragraph (a) of Exhibit A by characterizing it as a Pugh clause.

[¶ 58] This Court should reject the Nelsons' efforts to discount Paragraph (a) by characterizing it as a Pugh clause. The Nelsons argue, without reference to the language of Paragraph (a) that, as a Pugh clause, this provision requires actual production to maintain the lease on portions of the property in identified units, and because "there was no unit where oil production existed prior to the expiration of the Leases, the Pugh Clause is irrelevant and cannot be used to extend the Leases beyond the primary term." Appellants' Opening Brief, ¶ 40. The Nelsons' interpretation of Paragraph (a) does not reflect the plain language.

[¶ 59] The second sentence of Paragraph (a), which contains the language relied upon by the District Court, is not properly characterized as a Pugh clause at all. A Pugh

clause "'protect[s] the lessor from the anomaly of having the entire property held under a lease by production from a very small portion.'" *Egeland v. Continental Resources, Inc.*, 2000 ND 169, ¶ 17, 616 N.W.2d 861 (quoting *Sandefer Oil & Gas, Inc. v. Duhon*, 961 F.2d 1207, 1209 (5th Cir. 1992)). "A Pugh clause cannot arise by implication." *Id.* To achieve a Pugh clause's effect of severability, a lease provision "must clearly and explicitly direct a division of the lease into several parts, and direct that production [or continuous drilling operations] on the pooled portion does not constitute production on the part not pooled." *Id.* The second sentence of Paragraph (a) does not make any reference to production or spacing units and it does not direct that any portion of the property be treated differently than any other portion. It is not a Pugh clause.

[¶ 60] Moreover, even if the second sentence of Paragraph (a) was a Pugh clause, the Nelsons' general description of what Pugh clauses typically provide is irrelevant here. "Pugh clauses vary widely in form" and therefore must be analyzed with refence to the actual language used. *See Egeland v. Continental Resources, Inc.*, 2000 ND 169, ¶ 17, 616 N.W.2d 861; *see also Johnson v. Statoil Oil & Gas, LP*, 2018 ND 227, ¶ 12, 918 N.W.2d 58 ("Because Pugh clauses vary widely in form, the interpretation of how a Pugh clause may affect other provisions in a lease may also vary." (internal quotation omitted)). Paragraph (a), whether it is a Pugh clause or not, does not require actual production to maintain the Leases in effect. To the contrary, the clause expressly provides that drilling operations are sufficient to maintain the Lease if such drilling operations are continuously maintained. App. 20.

[¶ 61] Similarly, even if the second sentence of Paragraph (a) is properly read as a Pugh clause, it makes no difference to the outcome because the entire leased property is

within Section 8 and included in the 1920-acre spacing unit on which continuous drilling was commenced in January 2016 and production was established in July 2017. This Court should apply the plain language of Paragraph (a) and hold that Continental's continuous drilling operations maintained the Leases in effect.

C. Even if actual production were required to transition from the primary to the secondary term, Continental timely established production.

[¶ 62] Finally, even if actual production were required (it is not), the District Court's determination that the Leases remain in effect must still be affirmed. The Nelsons do not challenge the District Court's conclusion that production was established in July 2017, prior to the expiration of the primary term, properly calculated to include periods of delay occurring prior to Continental's acquisition of the Leases (as detailed above). The Leases remain in force.

IV. Oral Argument.

[¶ 63] Continental respectfully requests oral argument. Oral argument may assist the Court to better understand the history of this matter, including the scope of the issues in this second appeal and the relationship between the various provisions of the leases. In addition, oral argument will afford the parties an opportunity to respond to any questions this Court may have in light of the arguments herein.

CONCLUSION

[¶ 64] The District Court's decision should be affirmed in all respects. The District Court properly adhered to this Court's mandate for the proceedings on remand and examined the narrow question of Continental's good faith and diligence in pursuing permits. Further, each of the Nelsons' two newly-formulated interpretations of the Leases must be rejected on the merits.

Dated this 22nd day of March, 2021.

By: */s/ Mark Vyvyan*

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee Continental Resources, Inc., hereby certifies the above brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellant Procedure. The total number of pages in the brief, excluding the certificate of service and this compliance totals 27 pages.

Dated this 22nd day of March, 2021.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson, Plaintiffs-Appellants, v. Continental Resources, Inc., Defendant-Appellee.	Supreme Court No. 20200318

Appeal from a Judgment, Entered October 15, 2020, and the underlying
Opinion, Dated October 5, 2020,
Case No. 27-2017-CV-00440
County of McKenzie, Northwest Judicial District
The Honorable Daniel El-Dweek, District Judge, Presiding

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the Brief of Appellee and Appendix of Appellee were, on March 22, 2021, filed electronically with the Clerk of the North Dakota Supreme Court through the E-filing Portal and served by e-mail on the following:

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