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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Tyronne B. Kittleson, Trustee, Tyrone B. Kittleson Real Estate and Oil Trust,	)	
Plaintiff and Appellee	)	
v.	)	
Grynberg Petroleum Company; Celeste C. Grynberg, Trustee of the Rachel Susan Grynberg Trust; Celeste C. Grynberg, Trustee of the Stephen Mark Grynberg Trust; and Celeste C. Grynberg, Trustee of the Miriam Zela Grynberg Trust,	)	**SUPREME COURT NO. 20150075**
	)	Civil No. 27-09-C-00069
Defendants and Appellants	)	
and	)	
Grynberg Petroleum Company; Celeste C. Grynberg, Trustee of the Rachel Susan Grynberg Trust; Celeste C. Grynberg, Trustee of the Stephen Mark Grynberg Trust; and Celeste C. Grynberg, Trustee of the Miriam Zela Grynberg Trust,	)	
Third-Party Plaintiffs	)	
vs.	)	
Missouri River Royalty Corporation,	)	
Third-Party Defendant and Appellee	)	

APPEAL FROM JUDGMENT DATED JANUARY 23, 2015

MCKENZIE COUNTY DISTRICT COURT
NORTHWEST JUDICIAL DISTRICT
THE HONORABLE DAVID NELSON

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[1.] Whether the district court erred as a matter of law in interpreting the lease agreement?

[2.] Whether the district court's findings of fact concerning the value of the gas and the liquids at the well were clearly erroneous?

[3.] Whether the district court erred when it determined the four year statute of limitations governing the sales of goods did not apply?

STATEMENT OF THE CASE

[4.] Tyronne B. Kittleson ("Kittleson"), as Trustee of the Tyronne B. Kittleson Real Estate and Oil Trust, brought this breach of oil and gas lease action against the Grynberg Petroleum Company, Celeste C. Grynberg, Trustee of the Rachel Susan Grynberg Trust; Celeste C. Grynberg, Trustee of the Stephen Mark Grynberg Trust; and Celeste C. Grynberg, Trustee of the Miriam Zela Grynberg Trust (collectively "Grynberg"). The crux of the controversy between the parties concerns a lease provision that contains "market value at the well" language while also expressly providing that "there shall be no deductions from the value of the Lessor's royalty of any required processing, cost of dehydration, compression, transportation, or other matter to market such gas." Appendix at 27.

[5.] Kittleson filed a summons and complaint against the Grynberg Petroleum Company in 2005 seeking to recover certain oil and gas royalties that had been improperly deducted as post-production costs. App. at 8 - 11. Under the lease agreement, deductions from royalties for post-production costs were prohibited. In 2011, the District Court granted Kittleson's request to add the various Grynberg Trusts as defendants. App. at 18. Thereafter, Kittleson filed an amended complaint, adding the Grynberg Trusts as defendants. App. at 21. Grynberg filed a Third-Party Complaint against the Missouri River Royalty Corporation, claiming that the "deductions that [Kittleson] is seeking to recover were and are being made by Missouri River . . . ." App. at 33. Grynberg denied that any improper deductions were made from Kittleson's royalties, but, to the extent improper deductions were made, Missouri River Royalty was responsible because Missouri River Royalty operated the Eide 35-11 well and the

replacement well, the Eide 35-11R. Missouri River Royalty moved for summary judgment. The district court granted Missouri River Royalty's motion for summary judgment, concluding that Missouri River Royalty was not a party to the Kittleson lease, and therefore, Missouri River Royalty could not be held liable to Kittleson for any underpayment of royalties. App. at 46 - 58.

[6.] In 2012, the Grynbergs filed a motion for partial summary judgment against Kittleson, specifically claiming that Kittleson's damages prior to September 5, 2001 were barred by N.D.C.C. § 41-02-104, the four year statute of limitations governing contracts for the sale of goods. Docket ID# 43. The district court denied the motion for summary judgment, concluding that the ten year statute of limitations contained in N.D.C.C. § 28-01-15(2) governed the case. App. at 43. Grynberg never requested the court to consider barring damages from any date later than September 5, 2001.

[7.] A bench trial was held November 3, 2014, before the Honorable David W. Nelson. Before trial, the parties stipulated that Kittleson owns a net revenue interest of .00307617 in the proceeds from the Eide 35-11 and its replacement well, the Eide 35-11R, and that the Grynberg Petroleum Company assigned the lease to the various Grynberg Trusts. At trial, Kittleson presented the deposition testimony of Pam Holm, a representative of Missouri River Royalty and the deposition testimony of Greg Jones, an accountant with Eide Bailly, discussing how damages were calculated. Kittleson did not dispute that the gas produced from the Eide wells is sour gas that requires processing to be made marketable. Following the trial, the parties submitted post-trial briefs.

[8.] The district court entered its Findings of Fact, Conclusions of Law and Order for Judgment and Judgment in favor of Kittleson. App. at 467 - 475. The district court

determined that the Kittleson lease and rider were not ambiguous as a matter of law. App. at 467. The court also determined that the "market value at the well" language did not supersede or take precedence over specific "no deductions" language contained in the rider agreement. Id. The court further determined that the legal effect of the "no deductions" provision in the rider agreement prohibited deductions from the value of Kittleson's royalties for any post-production costs associated with processing, dehydrating, compressing, or storing the gas. Id. The court found that Grynberg breached the oil and gas lease by deducting post-production costs, and that based on the evidence presented at trial, Kittleson's royalty was underpaid in the amount of $17,237.71. Id. Pursuant to the express terms of the lease and the provisions of N.D.C.C. § 47-16-39.1, the court also determined that Kittleson was entitled to interest at a rate of 18%, which was included in the total damages calculations. Id. The court also granted Kittleson's court costs and reasonable attorney's fees as allowed by North Dakota law as well as the Oil and Gas lease. Grynberg appealed from the court's judgment entered January 23, 2015. App. at 483.

STATEMENT OF FACTS

[9.] This case involves a matter of oil and gas lease interpretation. On May 9, 1991, Tyronne Kittleson and Marilyn Kittleson entered into an oil and gas lease with the Grynberg Petroleum Company, the Grynbergs' predecessor in interest. App. at 25. The Kittlesons and the Grynberg Petroleum Company also entered into a rider agreement, which "expressly modified and amended" the oil and gas lease. App. at 27. The rider provided that, "To the extent that the terms of the Lease and this Rider are inconsistent,

this Rider shall be deemed controlling." Id. The rider also contained the following provision, which is at the heart of the dispute between the parties:

> Lessee [Grynberg] shall pay Lessor [Kittleson] the market value at the well for all gas (including all substances contained in such gas) produced from the leased premises and sold by Lessee or used off the leased premises, including sulfur produced in conjunction therewith; provided however, that there shall be no deductions from the value of Lessor's royalty of any required processing, cost of dehydration, compression, transportation, or other matter to market such gas. The current fair market value shall be paid for all gas and related substances produced regardless of whether or not such gas is produced to the credit of Lessee or sold under a contract executed by or binding on Lessee.

Id. (emphasis added).

[10.] Despite the express "no deductions" provision contained in the rider, deductions for post-production costs were taken from Kittleson's royalties beginning no later than June 1997. Although Grynberg did not operate the Eide wells, Grynberg did enter into a joint operating agreement with the operator of the wells, Missouri River Royalty, as to how it would be operated. Docket ID# 98, ¶ 4; App. at 469. It is undisputed that the gas produced from the Eide wells is a sour gas with no discernible market value at the well. To be made marketable, the gas must be processed. App. at 469. Because the gas is sour, the operator of the Eide wells, Missouri River Royalty, entered into contracts with Hess and other third parties to gather and process the gas. App. at 343 - 405. Hess and other third party processors retain a portion of the processed gas, as well as other marketable byproducts, as payment for the processing. App. at 343 – 405. Grynberg incorrectly asserts that Missouri River Royalty retained the stripped liquids when in fact Hess retained the liquid hydrocarbons. See Grynberg Brief at ¶ 23, contra App. 347 – 348 (Gas Purchase Contract between Missouri River Royalty and Hess providing that

Missouri River Royalty received zero percent (0%) share of liquid byproducts). After processing, the sweetened gas is marketed by Missouri River Royalty at the tailgate of the processing plant. Throughout the period of production, Missouri River Royalty sold the processed gas by transactions with third parties. App. at 343 - 405.

[11.] In paying its royalty obligation, Grynberg calculated Kittleson's royalty using the work-back method; Grynberg took the sales price it received for its gas production at a downstream point of sale and then subtracted the post-production costs it incurred in making the gas a marketable product. App. at 470. Kittleson commenced this action in 2005 seeking to recover royalties that had been impermissibly deducted, an accounting, interest on the royalty at 18%, and attorney's fees according to North Dakota law and the terms of the lease.

LAW AND ARGUMENT

A. THE DISTRICT COURT PROPERLY DETERMINED THAT THE LEASE EXCLUDED DEDUCTIONS FROM THE VALUE OF KITTLESON'S ROYALTY FOR PROCESSING, DEHYDRATION, COMPRESSION, AND TRANSPORTATION TO MARKET SUCH GAS.

[12.] This case is fundamentally a case of lease interpretation; specifically, how to interpret a lease that contains "at the well" language while also, in the same exact sentence, including an express provision that "there shall be no deductions from the value of Lessor's royalty of any required processing, cost of dehydration, compression, transportation, or other matter to market such gas." Grynberg argues that the district court erred when it failed to apply the "at the well" rule. This case is not whether North Dakota has adopted the "at the well" rule; this case is about interpreting the lease in its entirety so that all of its provision are taken into consideration and determining the true

intent of the parties. Although North Dakota follows the "at the well" rule, parties to a lease are free to establish their own agreements with respect allocating post-production expenses. That is the case here. This Court does not need to overturn Bice v. Petro-Hunt, L.L.C., 2009 ND 124, 768 N.W.2d 496 or adopt the first marketable product doctrine in affirming the district court, it simply needs to follow the plain language of the addendum to the parties oil and gas lease.

[13.] "Interpretation of a contract is a question of law, and on appeal this Court independently examines and construes the contract to determine if the district court erred in its interpretation." Irish Oil & Gas, Inc. v. Riemer, 2011 ND 22, ¶ 11, 794 N.W.2d 715. "The same general rules that govern interpretation of contractual agreements apply to oil and gas leases." Id. "Words 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 by the parties." Egeland v. Cont'l Res., Inc., 2000 ND 169, ¶ 10, 616 N.W.2d 861. "A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the true intent of the parties." Id. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D.C.C. § 9-07-06.

[14.] It is undisputed that North Dakota has adopted the majority "market value at the well" rule for calculating gas royalties. Bice, 2009 ND 124, ¶ 21, 768 N.W.2d 496. In adopting the "market value at the well" approach, the Court rejected the first marketable product doctrine. Id. Specifically in Bice, the Court held that the term "market value at the well" was not ambiguous and that Petro Hunt could deduct post-production costs from its plant tailgate prior to calculating royalties. Id.

[15.] Applying the "market value at the well" rule, lessees are generally permitted to deduct post-production costs after production has reached the wellhead. Id. at ¶ 13 (stating, "the majority of states interpret the term 'market value at the well' to mean royalty is calculated based on the value of the gas at the wellhead."). Thus, any costs incurred by the lessee after gas has reached the wellhead, whether to improve the quality of gas or to transport it to market where it may be sold may be deducted before the royalty is calculated. Id.; see also, Edward B. Poitevent, II, Post-Production Deductions from Royalty, 44 S. Tex. L. Rev. 709, 714 (2003) ("Generally, costs incurred by a lessee prior to its final sale may be categorized into gathering, compression, treatment, processing, transportation, and dehydration costs.").

[16.] Under the "at the well" rule, royalty calculations may be made by two different methods: the comparable sales method or the workback method. Bice, 2009 ND 124, ¶ 14, 768 N.W.2d 496. The comparable sales method determines the market value of gas at the wellhead "by averaging the prices that the lessee and other producers are receiving, at the same time and in the same field, for oil or gas of comparable quality, quantity, and availability." Id. Under the alternative work-back method, the lessee calculates the market value of the gas at the well "by taking the sales price that it received for its oil or gas production at a downstream point of sale and then subtracting the reasonable post-production costs (including transportation, gathering, compression, processing, treating, and marketing costs) that the lessee incurred after extracting the oil or gas from the ground." Id.

[17.] Although North Dakota adopted the "at the well" rule this Court has never concluded that "at the well" language supersedes an express "no deductions" clause. The

inclusion of the express "no deductions" language clearly modified the "at the well" language. The "no deductions" provision entails a completely different contractual relationship than the interpretation and rule discussed in Bice. Simply because the lease uses the specific phrase "market value at the well" does not render the "no deductions" clause meaningless. The entire lease has meaning. Under North Dakota law, "the terms of the lease, the nature of the claimed deductible items and the type of royalty determine whether post-production costs are deductible prior to calculating the royalty." Bice, 2009 ND 124, ¶ 12, 768 N.W.2d 496 (citing West v. Alpar Res., Inc., 298 N.W.2d 484, 490 (N.D.1980)

[18.] This case can be resolved by applying the general rules that govern contract interpretation. Words in a contract are given their ordinary and popular meaning, unless the parties give the terms technical or special meanings. Egeland, 2000 ND 169, ¶ 10, 616 N.W.2d 861. Courts are to consider a contract in its entirety so that all its terms have meaning. Id. Grynberg also notes that "This Court must give meaning to all the terms of the Lease" while, ironically, neglecting to give any meaning to the specific "no deductions" language.

[19.] In support of its argument, Grynberg relies on Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118 (Tex. 1996). While Heritage is based on lease language that is similar to the language at issue here, Heritage nonetheless stands on a tenuous precedential cliff, and controls only the case it decided. The issue before the Texas Supreme Court in Heritage concerned construction of royalty clauses in several oil and gas leases and whether the lessee could deduct transportation costs from the lessors' royalties. Id. at 120. The leases at issue generally contained the following language:

> In consideration of the premises, Lessee covenants and agrees . . .
>
> (b) To pay the Lessor ¼ of the market value at the well for all gas (including substances contained in such gas) produced from the leased premises; provided, however, that there shall be no deductions from the value of Lessor's royalty by reason of any required processing, cost of dehydration, compression, transportation, or other matter to market such gas.

Id. at 120-21 (emphasis added). The trial court and the court of appeals each concluded that the royalty clauses showed the parties' intent not to deduct post-production costs when determining market value at the well. On appeal, the Texas Supreme Court reversed, concluding that "the commonly accepted meaning of the 'royalty' and 'market value at the well' terms renders the post-production clause in each lease surplusage as a matter of law." Id. at 123. The concurrence reasoned:

> There is little doubt that at least some of the parties to these agreements subjectively intended the phrase at issue to have meaning. However, the use of the words "deductions from the value of Lessor's royalty" is circular in light of this and other courts' interpretation of "market value at the well." The concept of "deductions" of marketing costs from the value of the gas is meaningless when gas is valued at the well. Value at the well is already net of reasonable marketing costs. The value of gas "at the well" represents its value in the marketplace at any given point of sale, less the reasonable cost to get the gas to that point of sale, including compression, transportation, and processing costs.

Id. at 130 (Owen, J., concurring). Essentially, the concurrence concluded that because the term "market value at the well" was interpreted by a majority of jurisdictions to generally permit lessees to deduct post-production expenses after gas reaches the wellhead, then the inclusion of any additional language, even language expressly stating the parties agreed to no such deductions, was immaterial. Both the majority and the concurrence failed to cite any authority for their conclusion that the "at the well" language trumped the express language prohibiting deductions. This interpretation also

cut against general rules of contract interpretation that a lease should be read and considered in its entirety to give effect to the entire agreement.

[20.] The better reasoned view came from the dissent. The dissenting justices noted that the lease agreement, containing explicit language that "[t]here shall be no deductions from the value of the Lessor's royalty by reason of any [post production costs]," entered into by experienced parties, should have been honored and enforced by the Court: "What could be more clear? This provision expresses the parties' intent in plain English, and I am puzzled by the Court's decision to ignore the unequivocal intent of sophisticated parties who negotiated contractual terms at arm's length." Id. at 131 (Gonzalez, J., dissenting). "Neither the majority nor the concurrence give proper legal effect to specific language in these contracts which clearly denotes the parties' intent that 'there shall be no deductions from the value of Lessor's royalty by reason of any ... cost of ... transportation.'" Id. at 131 (Gonzalez, J., dissenting). The dissent further noted, "By supplying a meaning not found in the leases for 'market value at the well,' both the majority and the concurrence create an ambiguity where none exists." Id.

[21.] Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118 (Tex. 1996) has limited precedential value. Following the publication of the original decision and the "Court's unprecedented refusal to enforce the contract as written," there was a wave of backlash by "educational institutions, charitable organizations, independent mineral and royalty owners, and oil and gas practitioners . . . ." Heritage Res., Inc. v. NationsBank, 960 S.W.2d 619 (Tex. 1997). Indeed, on petition for rehearing, several Justices of the Court changed their positions dividing the Court four-to-four:

> Justice Cornyn and Justice Spector have joined Justice Abbott and me [Justice Gonzalez, author of the original dissent] in voting to grant NationsBank's motion for rehearing. Chief Justice Phillips has also switched his position and now agrees with Justice Owen's concurrence, in which Justice Hecht joined. Justice Enoch has recused himself on rehearing, leaving Justice Baker as the lone remaining supporter of his original majority opinion. Thus, the Court is now deadlocked four-to-four on the proper disposition of this case. We cannot call upon the Governor to specially appoint a replacement Justice to break the tie under these circumstances, and NationsBank's motion for rehearing is therefore overruled by operation of law.

Id. at 620 (emphasis added). The Court then stated, "Because we are without majority agreement on the reasons supporting the judgment, however, the judgment itself has very limited precedential value and controls only this case." Id. (emphasis added); see also Richard F. Brown, Oil, Gas and Mineral Law, 51 SMU L. Rev. 1219, 1222 (1998) ("The precedential value of Heritage Resources . . . [is] thus severely limited."); Owen L. Anderson, Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically? Part 2, 37 Nat. Resources J. 611, 693 (1997) (stating the opinion "appears to have little, if any, value as precedent"). Furthermore, on rehearing the Court stated, "Lessors should not lose the benefit of their bargain because the Court now reads language clearly prohibiting deductions from royalty as 'surplusage.' The Court's error in this case will have far-reaching effects on the oil and gas industry in Texas, as millions of dollars will now be placed in dispute." Heritage Res., Inc., 960 S.W.2d at 620.

[22.] Heritage Resources was also addressed in the recent Texas Supreme Court decision Chesapeake Exploration, L.L.C. v. Hyder, No. 14-0302, 2015 WL 3653446, (Tex. June 12, 2015). That case concerned whether a lease agreement between the

Hyders (lessors) and Chesapeake (lessee) required the Hyders to pay a share of postproduction costs on an overriding royalty. Id. at *1.

[23.] Specifically, the lease provision at issue called for "a perpetual, cost-free (except only its portion of production taxes) overriding royalty of five percent (5.0%) of gross production obtained" from directional wells drilled on the lease but bottomed on nearby land. Id. The lease further contained a disclaimer stating, "Lessors and Lessee agree that the holding in the case of Heritage Resources, Inc. v. NationsBank, 939 S.W.2d 118 (Tex.1996) shall have no application to the terms and provisions of this Lease." Id. The dispute at issue was whether the overriding royalty was free of production costs. The Court started from the position that an overriding royalty on oil and gas production is free of production costs but must bear its share of postproduction costs unless the parties agree otherwise. The Court concluded, "The gas royalty does not bear postproduction costs, not because it is based on a volume other than full production, but because the amount is based on the price actually received by the lessee, not the market value at the well." Id. at *4. Thus, while overriding royalty interests are generally subject to post production costs, the language used in the lease shifted the burden of paying these postproduction costs to Chesapeake. With respect to the decision in Heritage Resources, the Court noted:

> Heritage Resources does not suggest, much less hold, that a royalty cannot be made free of postproduction costs. Heritage Resources holds only that **the effect of a lease is governed by a fair reading of its text**. A disclaimer of that holding, like the one in this case, cannot free a royalty of postproduction costs when the text of the lease itself does not do so. Here, the lease text clearly frees the gas royalty of postproduction costs, and reasonably interpreted, we conclude, does the same for the

> overriding royalty. The disclaimer of Heritage Resources' holding does not influence our conclusion.

Id. at *5 (emphasis added).

[24.] Similarly here, the effect of the Kittleson lease should be governed by a fair reading of its text and the dispute at issue can be solved by simply applying general principles of contract interpretation. Grynberg solely focuses on the "market value at the well" language of the lease while completely neglecting the express prohibition against deductions for post-production costs contained in the negotiated Rider to the form Oil and Gas lease. Grynberg, like the Texas Supreme Court in Heritage Resources, does not give the royalty provision its complete meaning. This is in direct contravention to basic contract principles. See id. at 619 (stating, "In the interpretation of contracts the primary concern of courts is . . . to give effect to the intentions of the parties as expressed in the instrument. To achieve this object the [c]ourt will examine and consider the entire instrument so that none of the provisions will be rendered meaningless.") (emphasis added); see also Laura H. Burney, The Royalty Clause, 19 Eastern Mineral Law Foundation § 3.03, 1998 WL 1107911 (stating "Even if one agrees with the [Texas] court's conclusion about the meaning of the phrase 'market value at the well,' its treatment of the 'no deductions' language is novel at best. In interpreting the royalty clause containing this phrase, the court contradicted the very rules of construction it recited."); Owen L. Anderson, Royalty Valuation: Should Royalty Obligations Be Determined Intrinsically, Theoretically, or Realistically? Part 2, 37 Nat. Resources J. 611, 693 (1997) ("the entire royalty clause does not mean what the [Texas] court concludes. Read as a whole . . . the lessee may not take any deductions from the market value of the

gas. The additional 'no-deduction' clause underscores that the lessee must pay royalty on the full market value of production.").

[25.] Section 9-07-16, N.D.C.C., deals with such a situation in addressing additions to form contracts:

> When a contract is partly written and partly printed, or when part of it is written or printed under the special directions of the parties and with a special view to their intention and the remainder is copied from a form originally prepared without special reference to the particular parties and particular contract in question, the written parts control the printed parts and the parts which are purely original control those which are copied from a form and if the two are absolutely repugnant the latter must be disregarded insofar as such repugnancy exists.

[26.] The Kittleson lease does not define "market value at the well." Moreover, at the time of the 1991 lease agreement was entered into, the North Dakota Supreme Court had yet to define the term "market value at the well." See Garman v. Conoco, Inc., 886 P.2d 652 (Colo. 1994) ("[b]efore one can be bound by industry custom he must know of it or it must be so universal and well-established that he is presumed to have knowledge of its existence." (Internal quotation omitted). Even in Bice, this Court noted, "The major treatises on oil and gas law demonstrate the unsettled nature of the law concerning the interpretation of the term 'market value at the well.'" Bice, 2009 ND 124, ¶ 13, 768 N.W.2d 496; see also Edward B. Poitevent, II, Post-Production Deductions from Royalty, 44 S. Tex. L. Rev. 709, 713 (2003) ("The point at which production ends, however, is disputed by the two theories, and the lessee's costs to make production 'marketable' are in some states treated as an element of production that the lessee must shoulder alone."). Whereas the interpretation of "at the well" remains unsettled to this day, there can be no doubt that the phrase, "there shall be no deductions from the value of Lessor's royalty of

any required processing, cost of dehydration, compression, transportation, or other matter to market such gas" means exactly what it says.

[27.] This Court can give meaning to the entire lease without rendering part of it meaningless or "superfluous." The gas produced in this case was sour gas and generally had no market value at the well until it was processed and sold at the plant tailgate. Once the gas is sold, by definition it has a market value. Amerada Hess Corp. v. Conrad, 410 N.W.2d 124, 127 (N.D. 1987) (stating, "the selling price of gas normally fixes its fair market value"). From there, royalty calculations can be made. See West v. Alpar Res., Inc., 298 N.W.2d 484, 489 (N.D. 1980) (quoting 3 Kuntz, Law of Oil and Gas, p. 323 (1967)) ("lessee has a duty to produce a marketable product and to bear all expenses of such production that the lessee has a duty to market . . . but that unless the lease reveals a contrary intention, the expenses incident to marketing the product should be shared by the lessor and lessee.") (emphasis added).

[28.] This Court can give effect to both terms by having the lessee pay royalties on the gas after it has been made marketable; that is simply paying a royalty on the marketable products. Until a marketable product is produced, the lessee bears the costs of capturing and handling the gas. Grynberg is responsible for the costs incurred in turning the raw gas into a marketable product under the express terms of the rider. Once the gas is converted into a marketable product, Kittleson would be entitled to his share of the royalties. Post-production costs incurred by Grynberg in making the gas marketable should not be deducted from Kittleson's royalties. Here, market value would be determined at the plant tailgate.

[29.] Although this interpretation is similar to the "first marketable product" approach, which was rejected in Bice v. Petro-Hunt, L.L.C., 2009 ND 124, 768 N.W.2d 496, the North Dakota Supreme Court has recognized that "[u]ltimately, when parties enter a contract, they make their own law, and the duties between them are established by the contract." Jones v. Pringle & Herigstad, P.C., 546 N.W.2d 837, 842 (N.D. 1996); see also Garman, 886 P.2d 652, 657 (Colo. 1994) ("Naturally, the contracting parties are free to allocate the costs of compression, transportation and processing in their agreements."). Here, the parties entered into an arm's length transaction and agreed to include the "no deductions" clause. This Court should honor that agreement. Moreover, any ambiguity should be construed most strongly against the lessee. See Alpar Res., Inc., 298 N.W.2d 484, 491 (N.D. 1980).

[30.] Ultimately, this case is about lease interpretation. Given the specific language providing that there shall be "no deductions" of common post-production expenses, this Court should determine that the lease requires the lessee to pay royalties on the market value of the gas after it has been made marketable, that is after the lessee has undertaken costs to process, dehydrate, compress, transport, and market the gas. Market value in this case, due to the language and procedure agreed upon by the parties, is measured not at the well, but at the plant tailgate. If the lease simply contained "market value at the well" language without the express "no deductions" clause, then Bice would be applicable and the lessee would be entitled to deduct post-production costs after production reached the wellhead. That is not the case here. Under the terms of this lease, Grynberg may not deduct post-production costs. The district court did not err when it concluded that Grynberg breached the lease for deducting post-production costs.

B. THE DISTRICT COURT'S FINDINGS OF FACT CONCERNING THE VALUE OF THE GAS AND THE LIQUIDS AT THE WELL WERE NOT CLEARLY ERRONEOUS.

[31.] Grynberg argues the district court's findings of fact with respect to the value of the gas and liquids at the well are not supported by evidence in the record. "A district court's findings of fact will not be reversed on appeal unless they are clearly erroneous." Ritter, Laber & Associates, Inc. v. Koch Oil, Inc., 2007 ND 163, ¶ 14, 740 N.W.2d 67. "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, on the entire evidence, we are left with a definite and firm conviction that a mistake has been made." Brigham Oil & Gas, L.P. v. Lario Oil & Gas Co., 2011 ND 154, ¶ 32, 801 N.W.2d 677.

[32.] At trial, Kittleson introduced the deposition testimony of Greg Jones, an accountant, regarding how the damages were calculated. Kittleson also introduced Exhibit 1, Hess accounting statements of the propane, butane, natural gas, drip/condensate and sulfur that was processed from the Eide wells. Kittleson introduced Exhibit 2, a summary of the production payments for Tyronne B. Kittleson from the Eide 35-11R well. Kittleson also introduced Exhibit 5, a summary of the steps performed by the accounting firm Eide Bailly in preparing its work papers for calculating its accounting for Kittleson's royalties. Kittleson also introduced Exhibit 6, a summary of the Kittleson royalties.

[33.] The damages in this case were ultimately based upon the deductions taken as shown in the Exhibit 2 royalty summary, and the value of the gas and the liquid substances contained in the gas which were retained by the processor. Grynberg did not challenge those computations nor present computations of its own regarding the value of

the products. Any uncertainly or difficulty in determining the value was a result of Grynberg's actions in allowing such deductions. Furthermore, this Court has held that "Evidentiary imprecision on the amount of damages does not preclude recovery." Keller v. Bolding, 2004 ND 80, ¶ 21, 678 N.W.2d 578. "Where damages obviously have been suffered and there is no definite evidence available for an exact determination of the amount of damages resulting from a breach of contract, the best evidence which the circumstances will permit is all the law requires." Id.; see also B.W.S. Investments v. Mid–Am Restaurants, Inc., 459 N.W.2d 759, 764 (N.D.1990) (stating "In a case where the amount of damages may be hard to prove, the amount of damages is to be left to the sound discretion of the finder of facts.").

[34.] Upon reviewing the evidence presented at trial, and upon review of the parties' post trial briefs, the district court concluded that "Grynberg breached the lease when it deducted expenses for post-production costs and Kittleson's royalty was underpaid in the sum of $17,237.71 on an ongoing basis as shown on page 1 of Exhibit 6." App. at 473. In the instant case, the district court's finding of fact concerning the value of the gas and liquids at the well was not induced by an erroneous view of the law, and there is evidence to support the court's findings.

C. THE DISTRICT COURT DID NOT ERR WHEN IT DETERMINED THE FOUR YEAR STATUTE OF LIMITATIONS GOVERNING THE SALES OF GOODS DID NOT APPLY.

[35.] Grynberg argues the district court erred when it determined that this dispute is governed by the ten year statute of limitations set forth in N.D.C.C. § 28-01-15(2). Grynberg instead contends that Kittleson's claim for damages is barred by the four year statute of limitations set forth in N.D.C.C. § 41-02-104, the sale of goods. Grynberg

argues that the sale of goods limitations period applies because, pursuant to N.D.C.C. § 41-02-07, "A contract for the sale of minerals or the like (including oil and gas) or a structure or its materials to be removed from realty is a contract for the sale of goods within this chapter if they are to be severed by the seller . . . ." (Emphasis added). Grynberg omits the important qualifying language at the end of the statute stating that the four year statute of limitations only applies if the oil and gas is "severed by the seller."

[36.] The official comments to N.D.C.C. § 41-02-07 further state that, "Notice that this subsection applies only if the minerals or structures 'are to be severed by the seller'. If the buyer is to sever, such transactions are considered contracts affecting land . . . ." The Oil and Gas Lease does not call for Kittleson as "seller" to sever the minerals. Therefore, N.D.C.C. § 41-02-07 does not apply nor does the shorter statute of limitations.

[37.] Section 28-01-15, N.D.C.C., states that the following actions must be commenced within ten years after the claim for relief has accrued: "2. An action upon a contract contained in any conveyance or mortgage of or instrument affecting the title to real property except a covenant of warranty, an action upon which must be commenced within ten years after the final decision against the title of the covenantor . . . ." (Emphasis added). North Dakota case law is clear that "oil, gas and mineral leases are conveyances of interests in real property . . . ." Petroleum Exch. v. Poynter, 64 N.W.2d 718, 722 (N.D. 1954); see also GeoStar Corp. v. Parkway Petroleum, Inc., 495 N.W.2d 61, 67 (N.D. 1993) (stating, "an unaccrued oil and gas royalty is an interest in real property."); GeoStar Corp. v. Parkway Petroleum, Inc., 495 N.W.2d 61 (N.D. 1993); Corbett v. La Bere, 68 N.W.2d 211, 211-12 syllabus 1 (N.D. 1955) ("The interest acquired by the lessee under an ordinary oil and gas lease is known as a working interest

and is an interest in real property. The interest of the lessor under the lease is known as a royalty interest and is also an interest in real property.”).

[38.] Ultimately, because this action involves interpretation of an oil and gas lease, an instrument affecting the title to real property, the district court properly determined that the statute of limitations that governs this action is N.D.C.C. § 28-01-15(2) which provides a ten year statue of limitations. In the alternative, if this Court determines that the ten year statute of limitations in N.D.C.C. § 28-01-15(2), is inapplicable to this action for some reason, Kittleson would then request this Court to apply the six year statute of limitations governing contracts. See N.D.C.C. § 28-01-16(1). However, in no event should the date of any limitation on damages be later than September, 2001 as set out in the following argument.

[39.] Grynberg never presented any argument to the district court for any bar on damages after September 5, 2001. See Grynberg’s Motion for Partial Summary Judgment Docket ID# 43. Specifically, Grynberg only made the following argument with respect to the bar on damages: “More particularly, Grynberg Petroleum seeks summary dismissal of all claims alleged by plaintiff Kittleson which accrued prior to September 5, 2001, a date exactly four (4) years prior to commencement of this action, because all such earlier claims are barred by the statute of limitations provided by Section 41-02-104, N.D.C.C.”.

[40.] Grynberg waived any right to contend for a bar to damages after September 5, 2001, because such argument was never presented to the district court. “An issue that was not raised before the district court cannot be raised for the first time on appeal, and the issue must be raised in the district court so the court can rule on it for an effective

appeal." Ruud v. Frandson, 2005 ND 174, ¶ 10, 704 N.W.2d 852. "This Court has repeatedly and consistently held that issues or contentions not raised or considered in the district court cannot be raised for the first time on appeal from a judgment or order, and this Court will not address issues raised for the first time on appeal." Beeter v. Sawyer Disposal LLC, 2009 ND 153 ¶ 20,771 N.W. 2d 282. Kittleson cannot now argue the statute of limitations bars claims after September 5, 2001.

CONCLUSION

[41.] For the foregoing reasons, Kittleson respectfully requests this Court to affirm the judgment of the district court.

Dated this 2nd day of September, 2015.

/s/ Kent Reierson

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Tyronne B. Kittleson, Trustee, Tyrone B. Kittleson Real Estate and Oil Trust, Plaintiff and Appellee v. Grynberg Petroleum Company; Celeste C. Grynberg, Trustee of the Rachel Susan Grynberg Trust; Celeste C. Grynberg, Trustee of the Stephen Mark Grynberg Trust; and Celeste C. Grynberg, Trustee of the Miriam Zela Grynberg Trust, Defendants and Appellants and Grynberg Petroleum Company; Celeste C. Grynberg, Trustee of the Rachel Susan Grynberg Trust; Celeste C. Grynberg, Trustee of the Stephen Mark Grynberg Trust; and Celeste C. Grynberg, Trustee of the Miriam Zela Grynberg Trust, Third-Party Plaintiffs vs. Missouri River Royalty Corporation, Third-Party Defendant and Appellee	)	**SUPREME COURT NO. 20150075** Civil No. 27-09-C-00069

AFFIDAVIT OF ELECTRONIC SERVICE

Beth Wald, being first duly sworn on oath, deposes and says: That she is a citizen of the United States over the age of eighteen years and not a party to, nor interested in, the above entitled action.

That on the 4th day of September, 2015, a copy of the following document:

Brief of Appellee

was served, via the Odyssey Electronic Service and File System using the email addresses provided on the Odyssey Electronic Service and File System, upon the following:

Monte L. Rogneby
mrogneby@vogellaw.com

Beth Wald

Beth Wald

Subscribed and sworn to before me this 4th day of September, 2015.

Joann Kleinknecht

Joann Kleinknecht, Notary Public
Burleigh County, North Dakota
My Commission Expires:

JOANN KLEINKNECHT
Notary Public
State of North Dakota
My Commission Expires October 02, 2016