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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sandra Horob, Steven Poeckes, Steve Shae, Mike Shae, and Paul Shae, Plaintiffs/Appellants, vs. Zavanna, LLC, et al., Defendants/Appellees.	**SUPREME COURT NO. 20150203** Civil No. 53-2014-cv-00157

ON APPEAL FROM JUDGMENT
STATE OF NORTH DAKOTA
WILLIAMS COUNTY

ON APPEAL FROM JUDGMENT GRANTING DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT MAY 28, 2015 STATE OF NORTH DAKOTA COUNTY OF WILLIAMS

BRIEF OF PLAINTIFFS/APPELLANTS

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[1] Whether the district court erred as a matter of law in holding that several periods of nonproduction of oil or gas, and lack of drilling operations, lasting longer than 60 days did not terminate the Shae Lease under the clear and unambiguous language of the lease that specifically provided that any cessation of production and drilling operations lasting more than 60 days terminated the lease.

[2] Whether the district court erred as a matter of law in holding that, even if the Shae Lease had terminated for the nonproduction of oil or gas and cessation of drilling operations, the lease remained valid under the terms of a Communitization Agreement between Wiser Oil Company and the United States of America to which the Plaintiffs' predecessors were not a party.

[3] Whether the district court erred in holding that, even if the Shae Lease had terminated for the nonproduction of oil or gas and cessation of drilling operations, the lease remained valid because Plaintiffs ratified the lease by accepting intermittent royalty payments, when at the time of such acceptance, Plaintiffs did not know of the several periods of nonproduction of oil or gas that previously held the lease.

[4] Whether the district court erred in adopting, verbatim, the entirety of the Defendants' 21-page proposed order in lieu of conducting its own independent analysis under N.D.R.Civ.P. 52.

STATEMENT OF THE CASE

[5] This is an appeal from the district court's May 28, 2015 Order denying the Plaintiffs' ("Horob") motion for summary judgment and granting the Defendants' motions for summary judgment. The dispute centers on the validity of a 1969 oil and gas lease, the Shae Lease, entered into between the parties' predecessors. Horob owns an

undivided interest in the minerals located under certain Williams County property in Township 155, Range 100, Sections 21, 28, 29, and 32, and Township 154, Range 100, Section 5, that were subject to lease (the "Property").

[6] The Shae Lease remained in force for a 10 year primary term beginning February 1, 1969 and ending February 1, 1979. The Rolfstad #1 well located in Township 155, Range 100, Section 29, began producing oil and gas in January 1979. The clear and unambiguous language of the Shae Lease provided that after the expiration of the lease's primary term, if production of oil or gas ceased from any cause, the lease terminated unless the lessee commenced additional drilling or reworking operations within sixty (60) days from when production stopped.

[7] The Rolfstad well was the only well producing on the Property during the relevant time periods. Through the years, production from the Rolfstad well slowed until April 2004, when no oil or gas was produced. It is undisputed that the Rolfstad well did not produce oil or gas from April to September 2004, November 2006 to January 2007, or December 2010 to February 2011. These time periods of nonproduction all lasted longer than 60 days. It is undisputed that no additional drilling or reworking operations were conducted during any of these cessations in production.

[8] In late 2010, Horob learned of the cessation in production from the Rolfstad well that began in 2010. Horob then began investing whether there were other periods of nonproduction, which revealed two periods of nonproduction that occurred in 2004, and 2006 into 2007, which, along with the nonproduction that occurred in 2010 into 2011, led to this litigation.

[9] During the periods of production, given the low volume of oil and gas produced from the well, the royalty checks sent to Horob were intermittent. There were never regular, monthly royalty checks sent to Horob for the Rolfstad well. Thus, when royalty checks did arrive, Horob had no reason to suspect that the Rolfstad well had stopped producing oil and gas for several periods lasting longer than 60 days in violation of the Shae Lease. In August 2011, then-operator Continental Resources, Inc., sent a letter to the working interest owners of the Rolfstad well, which did not include Horob, stating that "due to a lapse in production, the leases associated with this well have expired under their own terms and are no longer in force and effect."

[10] On January 30, 2014, Horob filed their Summons and Complaint in Williams County District Court (ROA # 1 and 3) seeking a declaration that the Shae Lease terminated because of the several periods of nonproduction lasting longer than 60 days, and the lack of any additional drilling or reworking operations during those time periods, in violation of the lease.

[11] On January 31 and February 5, and March 19, 2014, numerous Defendants filed their Answers and Counterclaims seeking a declaration that the Shae Lease was valid (ROA # 9 – 20, 26 – 39, and 55). Thereafter, Horob learned of additional persons with an interest in the Shae Lease. On May 20, 2014, Horob served the Summons and Complaint on those Defendants. (ROA # 73 and 74). On June 16, 2014, these Defendants served their Answers and Counterclaims. (ROA #80 – 94). The Defendants contend the periods of nonproduction lasting more than 60 days did not terminate the lease because production was eventually restored after the 60 day lapses in production.

[12] On October 2, 2014, Horob filed their motion for summary judgment and supporting brief (ROA # 126 – 128) asking the district court to hold that, as a matter of law, the Shae Lease terminated upon the three periods of nonproduction lasting longer than 60 days. On November 3, Petro-Hunt, LLC et al. filed their cross-motion for summary judgment and supporting brief (ROA #151 and 152) asking the district court to hold that the Shae Lease remained valid. On November 19, Zavanna, LLC et al. filed their cross motion for summary judgment and supporting brief (ROA #163 and 164) taking the same position as Petro-Hunt, LLC. The parties exchanged response briefs (ROA #182, 191, and 196). A hearing on the summary judgment motions was held before the Honorable Paul Jacobson on January 20, 2015. In May 2015, the district court issued an Order and Judgment denying Horob's motion for summary judgment and granting the Defendants' motions for summary judgment (ROA #210 and 213), holding the Shae Lease was valid.

[13] On July 16, 2015, Appellant Horob timely provided notice of appeal from the district court's Judgment (ROA #216), arguing the district court erred in holding that the Shae Lease did not terminate upon the several 60 day periods of nonproduction. Accordingly, Horob respectfully requests that this Court reverse the district court's Order and Judgment denying their motion for summary judgment and granting the Defendants' motions for summary judgment and to further direct the district court to enter an Order and Judgment holding the Shae Lease terminated as a matter of law when the lessee failed to produce oil or gas, or conduct any additional drilling or reworking operations, for those time periods exceeding 60 days in violation of the clear and unambiguous language in the lease.

STATEMENT OF THE FACTS

A. The Shae Lease

[14] The facts in this case are largely undisputed. Horob owns an undivided interest in the oil, gas and other minerals in certain Williams County property, to-wit:

Township 155 North, Range 100 West
Section 21: S/2SW/4
Section 28: W/2
Section 29: S/2SE/4, SE/4SW/4
Section 32: NW/4NE/4, E/2NE/4NW/4

Township 154 North, Range 100 West
Section 5: Lots 1, 2, 3, and 4
Section 5: S/2N/2, N/2SE/4, NE/4SW/4

(the "Property"). The Property was subject to the Shae Lease, entered into by Horob's predecessors, John W. Shae and Bernice Shae, husband and wife, lessor, and the William Herbert Hunt Trust Estate, lessee, filed in Williams County in May 1969 and recorded at document no. 341691. (ROA #225). Sandra Horob and Steve Poeckes are John W. Shae's children. (ROA #155, 20-23:6-14). Steve, Paul, and Mike Shae are the children of John Shae, Jr., deceased, who was John W. Shae's son. (ROA #156, 28-31:3-5).

[15] The Shae Lease remained in force for a term of 10 years starting February 1, 1969, and as long thereafter as oil or gas was produced from the Property. There are two determinative clauses in the Shae Lease, the habendum clause and the continuous drilling operations clause. The habendum clause controlled the duration of the Shae Lease. "A habendum clause sets forth the duration of the grantee's or lessee's interest in the premises." See Egeland v. Continental Resources, Inc., 2000 ND 169, ¶ 3 n. 1, 616 N.W.2d 861. In relevant part, the habendum clause in the Shae Lease stated: "[t]his lease shall remain in force for a term of ten (10) years from this date (called 'primary term'),

and as long thereafter as oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, is produced ... ." (ROA #225).

[16] The other clause at issue, the continuous drilling operations clause, described how the Shae Lease could be extended after the primary term ended. "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.'" See Egeland at ¶ 3 n. 2. The continuous drilling operations clause in the Shae Lease stated that if production of oil or gas ceased after the primary term, *from any cause*, the lease terminated if additional drilling or reworking operations were not commenced within 60 days from when production ceased. In relevant part, the clause stated: "[i]f, after discovery of oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter, ..." (ROA #225).

B. The Rolfstad well did not produce oil or gas, and the operator did not conduct additional drilling or workover operations, for several time periods lasting longer than 60 days as required by the Shae Lease

[17] The primary term of the Shae Lease ended February 1, 1979. The Rolfstad well began producing oil and gas in January 1979. The Industrial Commission ("NDIC") scout ticket data shows the production history for the Rolfstad well. (ROA #131). The Rolfstad well was the only well on the Property holding the Shae Lease during the time periods in question. (ROA # 132; #210 at ¶¶ 6 - 10). Through the years, production from the Rolfstad well slowed until April 2004, when no oil or gas was produced. (ROA #131). It is undisputed that the Rolfstad well did not produce oil or gas

from April to September 2004, November 2006 to January 2007, or December 2010 to February 2011. These periods of nonproduction were greater than the 60 day cessation of production period defined by the clear and unambiguous language in the Shae Lease. In its Order, the district court recognized that the Rolfstad well did not produce oil or gas during these time periods. (ROA # 210 at ¶ 8).

[18] Likewise, additional drilling or reworking operations were not conducted on the Rolfstad well within 60 days from when the production of oil and gas ceased during these time periods. Just like the 60 day cessations in production that occurred, the district court recognized that no drilling or reworking operations were performed in response to the lapses in production from the Rolfstad well. (ROA #210 at ¶¶ 8, 22).

[19] This is supported by the drilling log for the Rolfstad well, which shows no additional drilling or reworking operations were conducted during the relevant time periods. (ROA # 172). The dates listed in the bottom right-hand corner detail the work performed on the well. It shows work done in January 1979, February 1985, April 1987, June 2003, February 2007, August 2007, and March 2011. Absent, as the district court noted, was evidence of additional drilling or workover operations conducted on the Rolfstad well during the relevant time periods. (See ROA #210 at ¶¶ 8, 22).

[20] In August 2011, Continental Resources, Inc. ("Continental"), the operator of the Rolfstad well, sent a letter to the well's working interest owners – which did not include Horob – indicating that all the leases held by the well, including the Shae Lease, expired under their own terms because of the lapse in production from the Rolfstad well. (ROA # 135, 136). In relevant part, the letter stated:

> "In accordance with Article VI.B of that certain Joint Operating Agreement dated March 9th, 1987; Continental Resources, Inc. ("Continental") proposes to plug the

> above captioned well [Rolfstad 1 well]. Due to a lapse in production, the leases associated with this well have expired under their own terms and are no longer in force and effect."

In August 2011, Continental filed a sundry notice with the NDIC indicating they intended to plug and abandon the Rolfstad well. (ROA #138).

[21] Several years before the 2010 – 2011 cessation of production, Continental acknowledged the Shae Lease expired under its own terms because of a lapse in production from the Rolfstad well. According to Continental, the well was shut-in in March 2004 because it was uneconomical to produce oil and gas from the well. (ROA #132). Continental explained, "The leasehold on this well is not HBP'd [held by production] by any other well." (See id.) In August 2004, the Bureau of Land Management sent Continental a letter indicating the Rolfstad well "[h]as not produced economic volumes since March 2004." (ROA #133). A sundry notice indicates the well was not returned to production until September 10, 2004. (ROA # 134).

C. Horob did not learn of the 60 day periods of nonproduction until late 2010, after they had received royalty checks related to the Rolfstad well

[22] Horob did not know of the cessations in production from the Rolfstad well until after they received royalty checks. The NDIC data for production from oil and gas wells is not public information like the information of record at the county recorder's office. It is available on a paid subscription basis only. The NDIC's website states, "Production information for individual wells, fields and units may be obtained through the subscription service on our website, or you may subscribe to the monthly production report and have the reports sent to you each month." See www.dmr.nd.gov/oilgas/webhelpfaq.asp#prod1 (last updated October 26, 2015). It costs $84.00 per year to subscribe to the production reports from the NDIC. See

www.dmr.nd.gov/oilgas/prodorderweb.pdf (last updated October 26, 2015). Horob did not know that when they received royalty checks for the Shae Lease, there had already been periods of nonproduction lasting longer than 60 days in violation of the lease.

[23] When Continental began sending the Shaes royalty checks in 2009, Steve Shae testified he did not know how compensation was calculated for the royalties, and that he was just learning "what that whole compensation was for." (ROA #185, 55:3-18). When Shae and his siblings, Paul and Mike, received their interest in the Property from their father's estate, they were not even sure the extent of the interests they acquired. They hired Precis Databanc, Inc., a Williston-based company, to assist them in, "Defining the scope of the mineral acres we inherited." (Id., 66:23 – 67:20). Similarly, Shae was unaware of the Shae Lease until three to nine months after receiving his interest in the Property through the March 2010 Personal Representative's Mineral Deed of Distribution from his father's estate. (Id., 72:3 – 73:18).

[24] The Plaintiffs first had discussions regarding the cessations in production from the Rolfstad well in late 2010 or 2011, after Continental had sent them royalty checks. (Id., 74:1-17; 75:7 – 76:12).

> Q. Can you tell me generally about the discussions in those emails, other than, you know, break in production and validity of the Shae Lease, can you give me a little bit more detail on that?
>
> A. At that time it was very simple, maybe a group of relatives or mineral rights owners who were learning or seeking advice on how to be fairly compensated.
>
> Q. And a group of relatives, who does that all include?
>
> A. Steve Poeckes, Sandy Horob, Jerry Shae, and then me and my brothers were eventually copied into this.

(Id., 76:21 – 77:8).

[25] Like Shae, Sandra Horob did not know what affect accepting sporadic royalty checks would have on her ability to later challenge the Shae Lease. Horob did not know how the royalty payments arose or how they were calculated. (ROA #187, 45:14 – 46:1). Like Shae, Sandra Horob did not learn of the periods of nonproduction from the Rolfstad well until "around 2010," which was after the periods of nonproduction had occured (Id., 50:22-25). This was also after she had received the intermittent royalty checks for the Shae Lease.

Q. Did you have an understanding – do you have any idea of how frequent you've received royalty checks since 1992?

A. None. I have no idea of the frequency.

Q. Do you know if they were on a regular basis, let's say, like a monthly basis, or were they on occasion?

A. I recall it being not very regularly.

(Id., 44:21 – 45:3). Like Shae, Sandra began discussing with family members what rights they might have with regards to the nonproduction sometime around 2010. (Id., 53:13 – 54:4). When Sandra Horob mentioned this to Steve Poeckes, he suggested the periods of nonproduction were "worth investigating." (Id., 54:21 – 55:21).

[26] Like Shae and Sandra, Poeckes did not know about the cessations in production from the Rolfstad well when he was receiving royalty checks. It wasn't until "approximately 2010 or something like that," that Poeckes began investigating the claims the Plaintiffs might have as to the Shae Lease. (ROA #188, 36:10 – 39:12). Poeckes received an e-mail in 2010 from a relative, Jerry Shae, who indicated he was contacting a lawyer regarding the Shae Lease. (Id., 38:24 – 39:22). When Poeckes received this e-mail, he was not aware of any cessations in production from the Rolfstad well. (Id.)

Shortly thereafter, Poeckes stopped accepting royalty checks for production from the Rolfstad well. (Id. 94:19 – 95:15). In August 2011, Horob contacted an attorney with questions regarding the Property. Among Horob's questions was "what is the exact status of the mineral acres (i.e. who owns them?)." (ROA #189).

LAW AND ARGUMENT

A. The district court erred as a matter of law when it held the "temporary cessation of production doctrine" applied to the Shae Lease, and the several periods of nonproduction lasting longer than 60 days did not terminate the lease under the clear and unambiguous language of the lease

[27] Under N.D.R.Civ.P. 56, summary judgment should be granted when there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. "[S]ummary judgment is a procedural device for promptly resolving a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law." Lario Oil & Gas Co. v. EOG Resources, Inc., 2013 ND 98, ¶ 5, 832 N.W.2d 49; see also Tank v. Citation Oil & Gas Corp., 2014 ND 123, ¶ 8, 848 N.W.2d 691. Here, like Tank, the determinative question involves the interpretation of a contract, the Shae Lease.

[28] The Shae Lease terminated under its own terms as a matter of law because there were several periods of nonproduction lasting longer than 60 days, and no additional drilling or reworking operations occurred during those time periods. The fact there was no production and no additional drilling or reworking operations on the Rolfstad well during those 60 day periods is undisputed. The district court made these findings in its Order. (ROA #210 at ¶ 8).

[29] The Shae Lease is clear and unambiguous. An unambiguous contract is susceptible to summary judgment. "[A]n unambiguous contract is particularly amenable to summary judgment." Rogstad v. Dakota Gasification Co., 2001 ND 54, ¶ 20, 623 N.W.2d 382 (quoting Garofalo v. Saint Joseph's Hosp., 2000 ND 149, ¶ 7, 615 N.W.2d 160). In Garofalo, the Court explained that summary judgment is appropriate in contract disputes when the contract is unambiguous. "The construction of an unambiguous written contract is generally a question of law for the court, making summary judgment particularly appropriate in contract disputes." Garofalo at ¶ 7.

[30] Oil and gas leases are interpreted under the same rules governing contracts. "The same general rules that govern interpretation of contractual agreements apply to oil and gas leases." Egeland at ¶ 10. The interpretation of a lease to determine its legal effect is a question of law. "The construction of a written contract to determine its legal effect is a question of law for the court to decide, ..." Id. Whether a lease is ambiguous is a question of law. "The determination of whether or not a contract is ambiguous is also a question of law for the court to decide." Miller v. Schwartz, 354 N.W.2d 685, 688 (N.D. 1984). Words in a lease are construed in their ordinary and popular sense. Id. When words in a lease are clear and unambiguous, the lease must be enforced according to the plain meaning of its terms. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." Id. (quoting N.D.C.C. § 9-07-02); see also Nichols v. Goughnour, 2012 ND 178, ¶¶ 12 – 14, 820 N.W.2d 740.

[31] The language in the Shae Lease was clear and unambiguous, and controls the interpretation of the lease. The habendum clause controlled the duration of the Shae

Lease. See Egeland at ¶ 3. The primary term of the Shae Lease lapsed on February 1, 1979. The language in the Shae Lease provided that, upon expiration of the primary term, the lease could only be extended beyond February 1, 1979 if one of two events occured: (1) oil or gas was produced; or (2) upon cessation of production, the lessee engaged in additional drilling or reworking operations on the Property within 60 days. (ROA #225). It is undisputed that the Rolfstad well did not produce oil or gas from April to September 2004, November 2006 to January 2007, and December 2010 into February 2011. (ROA #210 at ¶ 8; #131).

[32] The Shae Lease clearly and unambiguously provided that if production of oil and gas ceased from any cause, which it did, the lessee had 60 days to commence additional drilling or reworking operations to save the lease from expiring.

> "[i]f, after discovery of oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, the production thereof should cease from any cause, this lease shall not terminate if lessee commences additional drilling or reworking operations within sixty (60) days thereafter, ..."

(ROA #225). The district court recognized no additional drilling or reworking operations occurred when production ceased during the time periods in question. "In addition, counsel for both Plaintiffs and Defendants agreed at oral argument that it appears Continental did not perform drilling or reworking operations in response to the temporary lapses in production that are issue." (ROA #210 at ¶ 8). Therefore, under the clear and unambiguous language of the Shae Lease, the lease terminated when 60 days lapsed, on three separate occasions, without the production of oil or gas and without any additional drilling or reworking operations.

[33] The district court erred as a matter of law when it ruled that because the operator eventually restored production to the Rolfstad well, the temporary cessation of

production doctrine saved the Shae Lease from expiring. The district court's reliance on Feland v. Placid Oil Co., 171 N.W.2d 829 (N.D. 1969), in holding the temporary cessation doctrine saved the Shae Lease from expiring is misplaced. The district court ignored a critical fact. The clear and unambiguous language in the Shae Lease required the lessee to restore production or conduct additional drilling or reworking operations within 60 days or the lease would expire. The lease in Feland, along with the leases in Sorum v. Schwartz, 344 N.W.2d 73 (N.D. 1984), and Greenfield v. Thill, 521 N.W.2d 87 (N.D. 1984), contain a key difference when compared to the Shae Lease. Those leases did not have a defined time period for when the lessee was required to restore production or conduct additional drilling or reworking operations like the Shae Lease did.

[34] The Shae Lease had a specific time requirement for restoring production or conducting additional drilling or reworking operations, 60 days. The language in the lease controls over the general rule that temporary cessation of production will not, in itself, terminate the lease. "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. 9-07-02. This statute applies to oil and gas leases. "The same general rules that govern interpretation of contractual agreements apply to oil and gas leases." Egeland at ¶ 10.

[35] In Feland, the lease remained in effect "as long thereafter as oil, gas, casinghead gas, casinghead gasoline or any of them is produced from the leased premises." Id. at 831. Unlike the Shae Lease, there was no defined time period for restoring production in the Feland lease, so the Court had to determine whether nine months was a reasonable time to resume production. Id. at 833. The Shae Lease contains a clear and unambiguous definition of "reasonable time" for the lessee to resume

production or conduct additional drilling or reworking operations – 60 days. Even Feland recognized the language in a lease controls. "[I]t is important to note that lessee's rights are primarily governed by the specific grant of such rights in the lease." Id. at 834. It is undisputed that on several occasions, production from the Rolfstad well ceased for longer than 60 days, and during those 60 days, the lessee did not conduct additional drilling or reworking operations to prevent the Shae Lease from terminating.

[36] In Feland and Greenfield, the Court cited with approval to 100 A.L.R.2d 885. "A good summary of cases on the question of stoppage of production is contained in 100 A.L.R.2d 885." Feland at 833; see also Greenfield at 89. This ALR recognizes the critical affect of having a time limit for resuming production defined by the lease.

> Thus in Woodson Oil Co. v Pruett (1955, Tex. Civ. App) 281 SW2d 159, where the lease contained a 60-day "drilling and reworking" clause, and the jury had determined that production had ceased for a period of more than 60 days after the expiration of the primary term, the court rejected the lessees' contention that the cessation of production on the lease was sudden and only temporary, and that they were entitled to a reasonable time in which to remedy the defect and resume production.
>
> The court stated that while this might be true under the terms of some leases, under the lease in question the parties had agreed and stipulated what would constitute temporary cessation, and consequently if the cessation of production was for more than 60 consecutive days it could not be regarded as temporary under the terms of this lease, and if reworking or additional operations were not begun within such period the lease terminated by its own provisions.

100 A.L.R.2d 885 at § 10 ("Effect of drilling and reworking clauses"). The ALR goes on to discuss several cases, including Woodson Oil Co. v. Pruett, 281 S.W.2d 159 (Tex. Civ. App. 1955) and Haby v. Stanolind Oil & Gas Co., 228 F.2d 298 (5th Cir. 1956). These cases stand for the proposition that when the lease defines the time period for resuming production or conducting additional operations, to avoid termination of the lease, production or additional operations must occur within that defined time period.

[37] In these cases, the lessees made the same argument as the Defendants, which was erroneously relied on by the district court. That is, the cessation of production from the Rolfstad well was only temporary and the cessations of production did not terminate the Shae Lease. The courts rejected this because the leases defined the time period for restoring production. "[T]he parties here provided a saving clause in case production ceased 'from any cause.' In such event, to avoid the termination of the lease, the lessee must 'commence additional drilling or re-working operations within 60 days thereafter.' ... The lease fixed precisely enough the conditions upon which its continuance depended, ..." Haby, 228 F.2d at 306. The Fifth Circuit rejected the temporary cessation argument relied on by the district court.

> The lease provides, in effect, that if production should cease the lessee must commence re-working or additional operations within sixty days or the lease would terminate. If the cessation of production is for more than sixty consecutive days it is not to be regarded as temporary under the terms of this lease. If reworking or additional operations are not begun within the sixty-day period the lease terminates by its own provisions.

Id. at 306 (quoting Woodson at 164 – 65). When a lease defines the time for restoring production, the lessee is not entitled to an undefined "reasonable time" after that period lapses to restore production.

[38] Like the leases in Haby and Woodson, the Shae Lease provided that if production ceased for more than 60 days, it was not temporary. The district court found there was no production from the Rolfstad well for more than 60 days during April to September 2004, November 2006 to January 2007, or December 2010 to February 2011. The district court also found no additional drilling or reworking operations occurred during those time periods. Therefore, as a matter of law, the cessation of production from the Rolfstad well was not temporary under the terms of the Shae Lease. The Shae Lease

terminated when 60 days lapsed without production or additional drilling or reworking operations, and the district court erred when it held the Shae Lease remained valid because the cessation of production was only temporary.

B. The district court erred when it held that, even if the Shae Lease had terminated, the lease remained valid under the Communitization Agreement between Wiser Oil Company and the United States of America

[39] The Communitization Agreement between the United States and Wiser Oil Co., (ROA #167), did not save the Shae Lease from terminating when several 60 day periods lapsed without production of oil and gas. A communitization agreement is a drilling agreement that allows operators who cannot independently develop separate tracts due to well-spacing or well development programs to cooperatively develop such tracts. See 43 CFR 3217.11. Here, the Communitization Agreement allowed for the pooling of federal oil and gas leases that could not be independently developed. In North Dakota, there is no case law standing for the proposition that communization agreements between an operator and the United States for federal leases can change material terms of private leases. Horob was not a party to the Communitization Agreement, and whatever Wiser Oil Co. agreed to with the United States does not bind or modify the terms of the Shae Lease.

[40] Even if the Communitization Agreement did apply, it only applies to those limited acres from the Shae Lease specifically committed to the communitized area by the agreement. The scope of the Communitization Agreement is limited by its clear and unambiguous language to the 160-acre spacing unit for the Rolfstad well. Any rights acquired by the United States through the Communitization Agreement, and the affect those rights may have on the Shae Lease, are limited to those acres from the Shae Lease

that are included within the 160-acre spacing unit for the Rolfstad well.

[41] The Rolfstad well is located in a 160-acre spacing unit in the SW/4 of Section 29, Township 155, Range 100. The Communitization Agreement covers only the Springbrook formation in the 160-acre spacing unit for the Rolfstad well. Only a small portion of the Shae Lease, 21.61 net acres in the SE/4SW/4 of Section 29, is covered by the Communitization Agreement. (See ROA #167 at 1, 6, and 11).

[42] The federal statute authorizing the federal government to enter communitization agreements to pool smaller tracts of land explicitly separates those parts of a lease that are included in a communitized federal unit, and those parts of a lease that are not included within the federal unit. The controlling statute provides:

> Any lease heretofore or hereafter committed to any such plan embracing lands that are part within and in part outside of the area covered by any such plan shall be segregated into separate leases as to the lands committed and the lands not committed as of the effective date of the unitization.

30 U.S.C. § 226(m). If the Communitization Agreement applies to the Shae Lease, it only applies to that limited portion of the Property in the lease specifically committed to it. The Communitization Agreement does not apply to the remainder of the Shae Lease, or, paraphrasing 30 U.S.C. § 226(m), to those "lands not committed as of the effective date of the unitization." Therefore, only the 21.61 net acres of Horob's Property in Section 29 would be subject to the Communization Agreement.

[43] While there is no North Dakota case law on the issue, according to West's Federal Administrative Practice, lands outside of a communitization agreement are held only if oil and gas are produced in paying quantities on that portion of the Shae Lease.

> Any lease covering lands that are partly inside and partly outside of the unit area is segregated into separate leases as to the lands committed and the lands not committed. The lease on the nonunitized portion continues in force at least for

> the primary term of the original lease, but not for less than two years from the date of unitization, and then as long as oil and gas is produced in paying quantities on that portion.

5 West's Fed. Admin. Prac. § 5936 (4th ed.) (July 2012). The date of unitization in the Communitization Agreement was August 26, 1987. Accordingly, two years from that date of unitization, or 1989, the nonunitized portion of the Shae Lease continued only for so long as oil and gas were produced in paying quantities.

[44] It is undisputed that oil and gas were not produced during the 60-day periods of nonproduction in 2004, 2006 and 2007, and 2010 into 2011. Thus, even if the Communitization Agreement held the nonunitized portion of the Shae Lease outside of the SE/4SW/4 of Section 29, the Shae Lease still terminated under its own terms as to the remainder of the Property outside of Horob's 21.61 net acres in the SE/4SW/4 of Section 29 when the lessee failed to produce oil or gas during the cessations in production.

C. The district court erred in holding that, even if the Shae Lease had terminated for nonproduction of oil or gas and the lack of additional drilling or reworking operations, the lease remained valid because Horob ratified the lease by accepting intermittent royalty payments

[45] Whether Horob ratified the Shae Lease by accepting intermittent royalty checks without any knowledge of the cessations in production from the Rolfstad well is a question of fact. "Whether or not ratification exists is a question of fact where more than one inference can be drawn from the evidence." Funke v. Aggregate Const., Inc., 2015 ND 123, ¶ 36, 863 N.W.2d 855; see also Opp v. Matzke, 1997 ND 32, ¶ 13, 559 N.W.2d 837 ("The issues of authorization or ratification may ordinarily be questions of fact, preventing summary judgment.") Viewing the facts in the light most favorable to Horob, the district court erred in finding that Horob accepted the benefits of the Shae Lease while having knowledge of the obligations arising from it.

[46] The facts, viewed in the light most favorable to Horob, show that they did not know of the cessations in production until "around 2010." (ROA # 187, at 50:22-25). "Where a party, with knowledge of facts entitled him to rescission of a contract or conveyance, afterward, without fraud or duress, ratified the same, he has no claim to the relief of cancellation." Daniel v. Hamilton, 61 N.W.2d 281, 288 (N.D. 1953). Horob could not have ratified the Shae Lease when they received the royalty checks because they did not have knowledge of the key fact entitling them to challenge the lease, namely, the cessations of production that lasted longer than 60 days in violation of the Shae Lease, when they received the royalty checks.

[47] Horob learned of the cessations in production from the Rolfstad well sometime in late 2010, after Continental had already sent royalty checks. (ROA #185, at 74:1-17; 75:7 – 76:12). In 2010, Steve Shae explained that on learning of the cessations in production from the Rolfstad well, the Plaintiffs began discussing what affect that may have had on the Shae Lease. See supra at ¶ 24 (quoting ROA #185, 76:21 – 77:8). Like Shae, Sandra Horob did not learn of the periods of nonproduction until "around 2010." (ROA #187, at 50:22-25). At that point, the Plaintiffs began discussing what rights they might have with regards to the periods of nonproduction. (Id., 53:13 – 54:4). When Sandra mentioned this to Steve Poeckes, he suggested the periods of nonproduction were "worth investigating." (Id., 54:21 – 55:21).

[48] According to Poeckes, it wasn't until "approximately 2010 or something like that," that the Plaintiffs began looking into what claims they may have as to the Shae Lease. (ROA #188, 36:10 – 39:12). Critically, when Poeckes began looking into what

rights the Plaintiffs may have with regards to the Shae Lease, he was unaware of the cessations in production that had already occurred on the Rolfstad well.

Q. Do you have a copy of the email that you received from Jerry in 2010?

A. No.

...

Q. Were you at that time aware of any lack of production regarding the Rolfstad well?

A. No.

(Id., 38:24 – 39:22). Shortly thereafter, Poeckes stopped accepting royalty checks. (Id. 94:19 – 95:15). Like Sandra and Steve Shae, if Poeckes did not know of the cessations in production from the Rolfstad well until after he received royalty checks, he could not have ratified the Shae Lease based on receiving the checks because he did not know of the key fact entitling him to challenge the lease.

[49] In August 2011, Horob was in the process of gathering information and exploring what rights they had with regards to the Property. In August 2011, Paul Shae e-mailed Steve Shae and Sandra indicating he spoke with a lawyer with questions regarding the Property. (ROA #189). One of the questions Shae asked was "the exact status of the mineral acres (i.e. who owns them?)." This e-mail, along with the fact that Horob did not know of the cessations of production until after they received royalty checks, shows they lacked knowledge of the key fact allowing them to challenge the validity of the Shae Lease when they received the checks – the cessations in production.

[50] The fact Horob did not receive royalty checks during the periods of nonproduction was not unusual, and did not indicate something was amiss with the Rolfstad well. Because of the low production volumes from the Rolfstad well (see ROA #131), the Plaintiffs were not receiving regular, monthly royalty checks. Rather, as

Sandra stated, she received royalty checks sporadically, not a monthly basis. See supra at ¶ 25 (quoting ROA #187, 44:21 – 45:3).

[51] Similarly, the district court erroneously determined Horob could have learned of the nonproduction by checking publically available NDIC records. (See ROA #210 at ¶ 38). The records from the NDIC are not publically available like documents of record with the county recorder's office. Instead, access to NDIC records requires a paid subscription. See supra at ¶ 22. There are no facts indicating Horob had access to the NDIC records at the time the cessations in production occurred. Additionally, unlike the working interest owners in the Rolfstad well, Horob was not sent a copy of the August 2011 letter from Continental (ROA #135, 136) indicating the leases held by the Rolfstad well had expired because of the lapse in production.

[52] Considering the foregoing, genuine issues of material fact exist as to whether Horob ratified the Shae Lease by accepting royalty checks because, viewing the facts in the light most favorable to Horob, Horob did not have knowledge of the key fact entitling them to challenge the validity of the lease – the cessations in production from the Rolfstad well – until after they had received the royalty checks. Upon learning of the cessations in production, Horob began investing what rights they had with regards to the Shae Lease, which culminated with this litigation.

[53] Moreover, even if Horob had knowledge of the cessations in production when they received the royalty checks, which they did not, that did not constitute a ratification of the Shae Lease. Whether Horob prevailed on their claim or not, they would still be entitled to the 12.5 percent royalty payments from the checks they received when the cessations of production occurred. The Shae Lease provided for a 1/8, or 12.5

percent, royalty. When a person accepts benefits they are entitled to, there is no ratification or estoppel because they are entitled to those benefits they received under all circumstances. "An acceptance of a portion of that to which a party is entitled, unless by way of compromise and settlement or accord and satisfaction, is not a bar to the subsequent assertion of a claim for the rest, ..." Bankers Trust Co. v. Pacific Employers Insurance Co., 282 F.2d 106, 112 (9th Cir. 1960); see also Grand Western R. Co. v. H.W. Nelson Co., 116 F.2d 823, 836 (6th Cir. 1941) ("[e]stoppel does not arise where the person accepting the benefits is entitled thereto, regardless of the questioned transaction.")

[54] The royalty checks Horob received are benefits they were entitled to as payment for their mineral interests no matter the outcome of their challenge to the Shae Lease. If the lease is no longer in effect, Horob would be entitled to 100 percent of the value of the resources taken from their Property, and could treat the 12.5 percent royalty owed under the terms of the Shae Lease as a partial payment towards the amounts owed by the Defendants. "By accepting the payment due under the contract for deed, [plaintiff] exercised a right which existed prior to the judgment. No advantage was derived or benefit gained by the judgment which she was not already entitled to under the contract for deed." Sulsky v. Horob, 357 N.W.2d 243, 246 (N.D. 1984).

[55] The guiding principle in Sulsky applies here – there is no ratification when a party receives a benefit they are entitled to under any circumstance. Horob received no benefit or advantage by accepting payments they were entitled to whether the Shae Lease was valid or not. See also Cook v. Ball, 144 F.2d 423, 438 (7th Cir. 1944) ("It is well settled that even by quasi estoppel one cannot be estopped by reason of accepting that

which he is legally entitled to receive in any event.") Horob did no more than accept what they were entitled to regardless of the status of the Lease. As such, the district court erred in holding Horob ratified the Shae Lease by accepting royalty payments.

D. The district court erred in adopting, verbatim, the entirety of the Defendants' 21-page proposed order in lieu of conducting its own independent analysis under N.D.R.Civ.P. 52

[56] The mechanical adoption of a litigant's findings is an abandonment of the duty imposed on the district court to conduct its own independent analysis. In G.M. Leasing Corp. v. United States, the Tenth Circuit held that the "[t]rial court erred because it entered no independent findings of fact or conclusions of law but merely accepted those prepared by the appellee." 514 F.2d 935, 940 (10th Cir.), cert. granted on other grounds, 423 U.S. 1031, 96 S.Ct. 561, 46 L.Ed.2d 404 (1975). The Court explained, "The mechanical adoption of a litigant's findings is an abandonment of the duty imposed on trial judges by Rule 52, F.R.Civ.P., because findings so made fail to 'reveal the discerning line for decision. ... .'" Id. (quoting Kelson v. United States, 503 F.2d 1291, 1294-95 (10th Cir. 1974)).

[57] Appellate review of mechanically adopted findings can be difficult. While the findings are formally those of the district court, the United States Supreme Court has indicated, "Those (findings) drawn with the insight of a disinterested mind are ... more helpful to the appellate court." United States v. El Paso Natural Gas Co., 376 U.S. 651, 656, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964). The trial judge's duty to make formal findings under Rule 52 exists not only to aid appellate review, but also "to evoke care on the part of the trial judge in considering and adjudicating the facts in dispute." Featherstone v. Barash, 345 F.2d 246, 249 (10th Cir. 1965).

[58] A comparison of the Defendant's proposed order (ROA #208) with the Court's Order (ROA #210) shows all 21-pages are exactly the same. The parties submitted 127-pages of briefing to the district court on the issues presented for summary judgment (ROA #128, 152, 164, 182, 191, and 196) and the record on appeal shows that, before the Order was issued, over 200 documents were filed by the parties. This case involves significant and intertwined legal questions related to the rights of mineral owners and developers in North Dakota's oil fields. While it is not unusual for the district court to adopt, word-for-word, smaller proposed orders of the several-page variety, copying all 21 pages of the Defendants' proposed order without any independent review or analysis is the sort of abandonment of duty imposed on the district court to conduct its own independent analysis discussed in G.M. Leasing Corp. v. United States.

[59] After spending considerable time and resources in litigation, Horob has no means of knowing whether the district court performed its own independent analysis of the case. Instead, Horob is left with the knowledge that the district court simply cut and pasted 21 pages of the Defendants' analysis in its proposed order as the Order from the district court. Pursuant to Rule 52, sound judicial policy and the expectations of the litigants to have an engaged, independent district court conducting its own analysis of the facts and law with a critical eye favors remanding the matter to the district court with instructions to conduct its own independent analysis.

CONCLUSION

[60] Appellants respectfully request that this Court reverse the district court's Order and Judgment granting Defendants' motions for summary judgment and denying Plaintiffs' motion for summary judgment, and that this Court remand to the district court with instructions to hold that the Shae Lease terminated, as a matter of law, upon those

time periods from April to September 2004, November 2006 to January 2007, and December 2010 to February 2011 when there was no production of oil or gas from the Property, and no additional drilling or reworking operations were conducted in violation of the clear and unambiguous terms of the lease.

Respectfully submitted this 27th day of October, 2015.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorneys for the Plaintiffs/Appellants in the above matter, and as the author of the above brief, hereby certify, in compliance with Rule 32 of the North Dakota Rules of Appellate Procedure, that the above brief was prepared with proportional typeface and the total number of words in the above brief, excluding words in the table of contents, table of authorities, signature block, certificate of service and this certificate of compliance, totals 7,884.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sandra Horob, Steven Poeckes, Steve Shae, Mike Shae, and Paul Shae, Plaintiffs/Appellants, vs. Zavanna, LLC, et al., Defendants/Appellees.	**SUPREME COURT NO. 20150203** Civil No. 53-2014-cv-00157

I hereby certify that on October 29, 2015, I served the following documents:

1. **Brief of Plaintiffs/Appellants; and**

2. **Appendix of Plaintiffs/Appellants**

on the following by electronic mail transmission, pursuant to N.D. Sup. Ct. Admin. Order 14(D):

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sandra Horob, Steven Poeckes, Steve Shae, Mike Shae, and Paul Shae, Plaintiffs/Appellants, vs. Zavanna, LLC, et al., Defendants/Appellees.	**SUPREME COURT NO. 20150203** Civil No. 53-2014-cv-00157 CERTIFICATE OF SERVICE FILED IN THE OFFICE OF THE CLERK OF SUPREME COURT NOV 12 2015 STATE OF NORTH DAKOTA

I hereby certify that on October 30, 2015, I served the following documents:

1. **Brief of Plaintiffs/Appellants; and**

2. **Appendix of Plaintiffs/Appellants**

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