20160096
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
AUGUST 8, 2016
STATE OF NORTH DAKOTA

In the Supreme Court

State of North Dakota

Darwin and Jean Krenz, Plaintiffs, Appellees, and Cross-Appellants, v. XTO Energy, Inc., Defendant, Appellant, and Cross-Appellee.	))))))))))	Sup. Ct. No. 20160096

Appeal from District Court Judgment issued January 20, 2016
The Honorable David W. Nelson

Reply Brief of Appellees and Cross-Appellants Darwin and Jean Krenz w/addendum

Charles M. Carvell (#03560)
PEARCE DURICK PLLC
314 E. Thayer Avenue
Bismarck, ND 58502
T: 701.223.2890 F: 701.223.7865
www.pearce-durick.com

R. Kirk Mueller, Pro Hac Vice
(#P01489)
DAVIS GRAHAM & STUBBS LLP
1550 Seventeenth St. Suite 500
Denver, CO 80202
T: 303-892-9400 F: 303-893-1379
www.dgslaw.com

Attorneys for Darwin and Jean Krenz

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

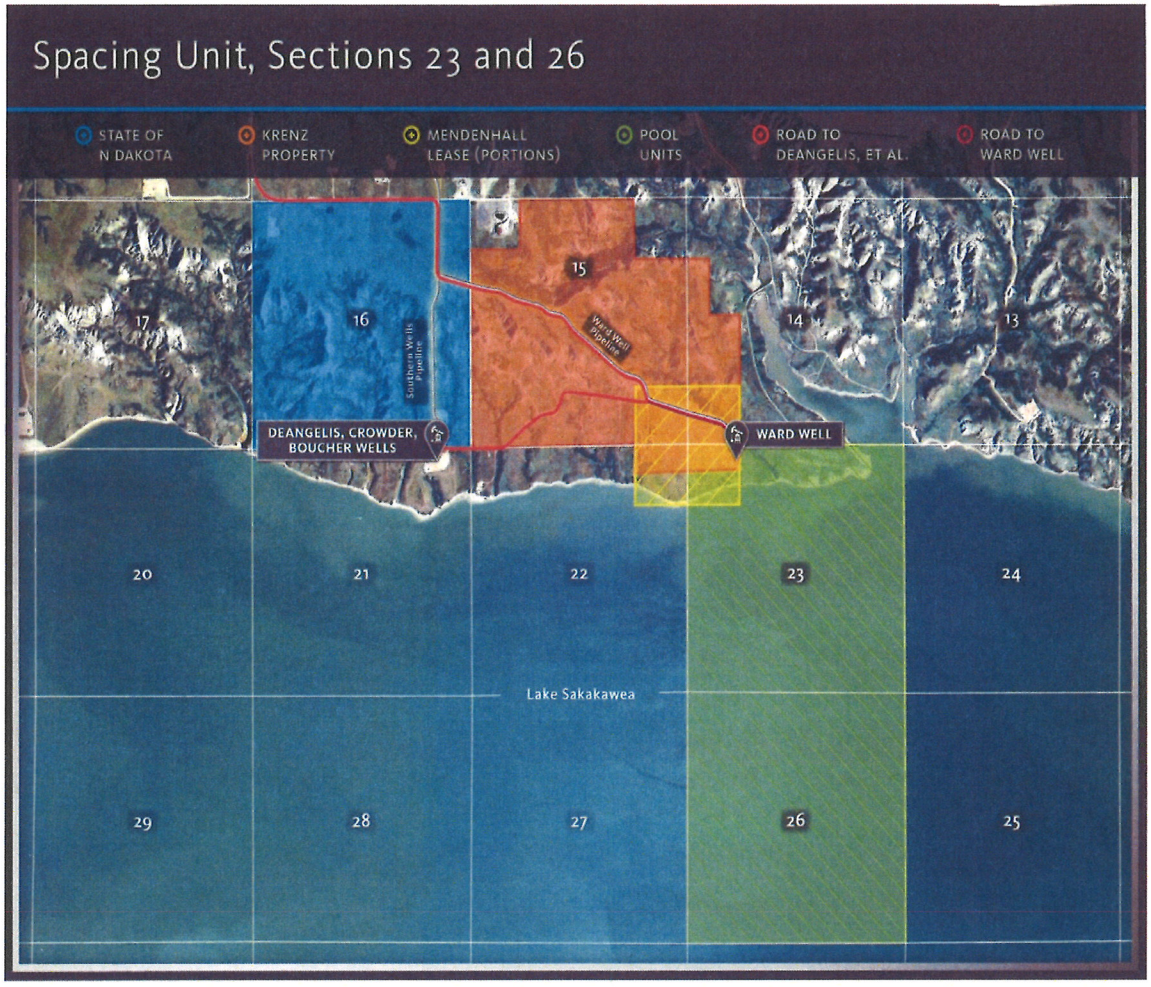
Argument

I. Introduction

¶1 XTO does not dispute the principle that an oil and gas lessee cannot "use the surface of one lease to benefit . . . another lease," 4 *Summers Oil & Gas Law* § 40.4 (3d ed., Supp. Nov. 2015), or what Professor Kramer describes as "an axiomatic rule" that a lessee who uses the surface "'in connection with operations on other premises constitutes an excessive user of his surface easements.'" Bruce Kramer, *Pooling and Horizontal Wells: Can They Teach an old Dog New Tricks*, 55 Rky. Mtn. Min. L. Inst. 8-1, 8-9 (2009) (citation omitted). The surface of leased land can be burdened, but only by activities that benefit the land's underlying minerals—not to benefit adjacent or off-lease minerals.

¶2 XTO asserts a "pooling" exception to the rule. It has a lease on eighty acres of Krenz land in Sections 14 and 15 and asserts the right to burden those eighty acres to benefit the 1,280-acre Ward Well spacing unit in Sections 23 and 26.

¶3 The following map depicts the spacing unit and some Mendenhall Lease acreage. The lease itself is in the Krenzes's Supplemental Appendix.



¶4 XTO's pooling argument has two prongs. It asserts a contractual right under the Mendenhall Lease and a statutory right under the pooling statute.

II. Mendenhall Lease

¶5 When the Mendenhalls issued their lease, they did not own the surface, and as severed mineral owners their ability to authorize surface use was limited. They had the right to issue a lease under which the lessee would have an implied easement to use the surface to produce the Mendenhalls'

underlying minerals, but they could not give their lessee permission to impose additional burdens on the land and require the Krenzes to host oil and gas activities that benefit minerals under other lands. Industry can impose on North Dakota landowners only so much of its well pads, roads, pipelines, flares, disposal wells, water wells, central tank batteries, and processing plants.

¶6 Had the Mendenhalls owned the surface when they issued their lease, they could have allowed expanded surface uses. As severed mineral owners, however, who issued their lease in 2004, thirty-two years after the Krenzes acquired the land, they could not burden land they did not own. Although state policy encourages oil and gas development, there is a constitutional right to exclude, perhaps a landowner's "most fundamental" right. *Wild Rice River Estates, Inc. v. City of Fargo*, 2005 ND 193, ¶13, 705 N.W.2d 850.

¶7 Severed mineral owners "should not be able to" issue leases that subject the surface to operations benefiting other leases. Carroll Martin, *Yours, Mine, and Ours: Conflicts Between Mineral and Surface Estates*, 46 RMMLF-INST 19 § 19.02[2][b] (2000). Indeed, pooling's effect on surface access "may turn on whether the mineral estate was severed from the surface." Rick Davis, Jr., *Private Lands – Surface Access and Use*, 2005 No. 1 RMMLF-INST Paper No. 9A § 4.01[b] (2005).

¶8 In *Robinson v. Robbins Petroleum Corp.* 501 S.W.2d 865, 866-68 (Tex. 1973), the surface owner acquired title after the lease had been issued but before waterflood units were created, and while his land could be used to

benefit the lease, it was not subject to burdens benefitting the later-established, larger unit.

¶9 The case XTO principally relies on, *Key Operating & Equipment, Inc. v Hegar*, 435 S.W.3d 794 (Tex. 2014), recognizes that the chronology of events is relevant. In that case, when the surface owners, the Hegars, cited *Robinson*, the court distinguished *Robinson* by stating: "But the Hegars took their surface title subject to the mineral lease . . . ." *Id.* at 800. *Key Operating* did not disapprove of *Robinson*, but applied it.

¶10 In *Cole v. Anadarko Petroleum Corp.*, 331 S.W.3d 30, 36 (Tex. Ct. App. 2010), the surface owners' complaint about how their land was used to benefit a unit was rejected because their predecessor in title had approved the unit. In *Miller v. Crown Central Petroleum Corp.*, 309 S.W.2d 876, 877 (Tex. Ct. App. 1958), the surface owners' objection to a pipeline was rejected because they acquired title after oil and gas leases were issued. It makes all the difference when "the surface estate severance antedate[s] the creation of the pooled unit . . . ." Bruce Kramer, *Horizontal Drilling and Trespass: A Challenge to the Norms of Property and Tort Law*, 25 Colo. Nat. Res., Energy & Envtl. L. Rev. 291, 337 (2014).

III. Pugh Clause

¶11 The Mendenhall Lease contains a Pugh clause.[1] A Pugh clause "is strong evidence" the parties intend to limit the effects of pooling. Bruce

[1] It states:

Kramer, *The Legal Framework for Analyzing Multiple Surface Use Issues*, 2004 No. 4 RMMLF-INST Paper No. 1, at § VII(A) (2004). The clause here begins: "Notwithstanding the provisions of this lease to the contrary," and thus expressly trumps the pooling clause.

¶12 In general, leases are "indivisible" and operations anywhere on lease acreage are considered operations on all the lease. *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶12, 848 N.W.2d 691. A Pugh clause, however, "severs the lease" and "divides the land," "direct[ing] a division of the lease into several parts." *Id.* at ¶20. Each part is separate and distinct. *Id.* at ¶7. A Pugh clause "'provides for a severance of the lease where less than all of the leasehold is included in a single unit,'" *id.* at ¶14 (citation omitted), which is the case here: a portion of the Mendenhall acreage, the NWNW of Section 23, is in the Ward Well spacing unit, but the remaining Mendenhall acreage is not.

¶13 In *Kysar v. Amoco Production Company*, the court relied on a Pugh clause to stop Amoco from the kind of off-lease, adjacent land access that XTO asserts. It stated that Pugh clauses "divide or segregate the lease into separately maintained parts when a portion of the lease is included in a

---

> Notwithstanding the provisions of this lease to the contrary[,] this lease shall terminate at the end of the primary term as to all of the leased land except those tracts within a production or a spacing unit . . . on which is located a well producing or capable of producing oil and or gas or on which Lessee is engaged in drilling or reworking operations. . . .

unit." 93 P.3d 1272, ¶28 (2004). The clause "limit[s] the power to pool" and is "a clear indication" to reject expansive application of the fiction created by pooling that the lease remains indivisible when all land under lease is not in the same producing unit. *Id.* at ¶46. Amoco's assertion of "expanded" surface access was rejected. *Id.* at ¶51.

¶14 XTO argues *Kysar* is inapplicable because it involves a federal communitization agreement, not pooling. Communitization, however, is the federal equivalent of pooling. *Id.* at ¶22.

IV. Pooling Statute

¶15 The pooling statute, Section 38-08-08(1), states:

> Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof.

This confines pooling to tracts within the unit. It says nothing about lands outside the unit, including whether adjacent lands might be used to further unit interests. XTO also cites N.D.C.C. § 38-08-07(1), which authorizes the Industrial Commission to establish spacing units, but it too says nothing about use of land outside the unit.

¶16 The pertinent provision of the Commission's pooling order states:

> All oil and gas interests in the spacing unit for . . . Sections 23 and 26 . . . are hereby pooled for the development and operation of the spacing unit.

XTO Supp. Appx. at 38 (¶2). This also says nothing about accessing lands adjoining the pooled spacing unit.

¶17 The pooling statute and pooling order address interests within the spacing unit, but do not establish an exception to the general rule that lessees cannot use the surface of one lease to benefit another lease.

V. Case Law

¶18 XTO relies on *Continental Resources Inc. v. Farrar Oil Company*, 1997 ND 31, 559 N.W.2d 841 (N.D. 1997), which involved a dispute over the right of Continental to access land within a 640-acre spacing unit. *Farrar* explains how a pooling order expands an operator's right to access land within a spacing unit. It is not an adjacent lands or off-lease case and does not address access to land outside spacing units.

¶19 Nor does *Key Operating*. It involved a well on a 30-acre tract pooled with a 10-acre tract, with the surface of the latter owned by the Hegars. 435 S.W.3d at 796. Key Operating's access to the well on the 30-acre tract was on a road that crossed Hegar land. *Id.* It asserted the right use the entire pooled area. The court agreed: "Key has the right to use the road across the pooled Hegar tract for production of minerals from all the acreage with which it is pooled." *Id.* at 801. The case did not involve use of land outside the pooled area to benefit land within it, which is the Krenz-XTO dispute. *Key Operating* is also distinguishable because the Hegars acquired title after the lease was issued. *Id.* at 800. Other cases XTO cites also involve

either a surface owner who acquired the land after the lease was issued or concern access only within the pooled area and therefore are not adjacent land, off-lease cases. *Felmont Oil Corp. v. Cavanaugh*, 446 A.2d 1280, 1281-82 (Pa. Super. Ct. 1982) (lease and unit in place when surface owner acquired title); *Acree v. Shell Oil Co.*, 548 F. Supp. 1150, 1152 (M.D. La. 1982) (lease in place when surface owners acquired title); *Holt v. Southwest Antioch Sand Unit*, 292 P.2d 998, 999 (Okla. 1955) (all land at issue within the unit).

¶20 XTO relies on the U.S. District Court's unreported decision in *Continental Resources, Inc., v. Langved*, No. 4:15-cv-00019, Order on Motions (D.C. N.D., Apr. 12, 2016). The case is distinguishable because the lease Continental relied on for access "was executed by Langved himself." Addendum at Add-12. Further, the court rested its decision on the pooling statute and *Farrar Oil*, *id.*, neither of which—as explained above—address access to land outside pooled units. Lastly, Langved's three-page brief in response to Continental's motion did not cite any case law, nor any authority at all. *Id.* at Add-15. In describing that response Continental stated Langved "merely raises peripheral issues not relevant to the only substantive legal issue addressed in the motion"—Continental's access rights. *Id.* at Add-18.

VI. Consequences

¶21 If an oil company's surface access to pooled lands is not confined to state-established spacing units, but extends to all land and leases the company choses to pool with other land and leases, the company will be able

to concentrate, or saturate, individual tracts with industry infrastructure. The Mendenhall Lease covers tracts in nine sections of land in two townships. Another lease in the area covers tracts in sixteen sections in six townships. Dkt. 246; *see also* Krenz Supp. Appx. at 4 (XTO's area leasehold map). If pooling gives companies expanded access rights, they may be able to force a single landowner or a few landowners to bear extraordinary burdens, burdens that should be spread among many landowners. While this case concerns only whether the Krenzes eighty acres in Sections 14 and 15 can be burdened to benefit the 1,280-acre Ward Well spacing unit, XTO's position may have more far-reaching ramifications.

Conclusion

¶22 The District Court's decision giving XTO expanded surface access should be reversed.

Dated: August 8, 2016.

/s/ Charles M. Carvell
Charles M. Carvell (#03560)
PEARCE DURICK PLLC

R. Kirk Mueller,
Pro Hac Vice (#P01489)
DAVIS GRAHAM & STUBBS LLP

Addendum

Table of Contents

§ 38-08-07. Commission shall set spacing units.

The commission shall set spacing units as follows:

1. When necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights, the commission shall establish spacing units for a pool. Spacing units when established must be of uniform size and shape for the entire pool, except that when found to be necessary for any of the purposes above mentioned, the commission is authorized to divide any pool into zones and establish spacing units for each zone, which units may differ in size and shape from those established in any other zone.

. . .

NDCC 38-08-08(1)

§ 38-08-08. Integration of fractional tracts.

1. When two or more separately owned tracts are embraced within a spacing unit, or when there are separately owned interests in all or a part of the spacing unit, then the owners and royalty owners thereof may pool their interests for the development and operation of the spacing unit. In the absence of voluntary pooling, the commission upon the application of any interested person shall enter an order pooling all interests in the spacing unit for the development and operations thereof. Each such pooling order must be made after notice and hearing, and must be upon terms and conditions that are just and reasonable, and that afford to the owner of each tract or interest in the spacing unit the opportunity to recover or receive, without unnecessary expense, that owner's just and equitable share. Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such operations upon each separately owned tract in the drilling unit by the several owners thereof. That portion of the production allocated to each tract included in a spacing unit covered by a pooling order must, when produced, be deemed for all purposes to have been produced from such tract by a well drilled thereon. For the purposes of this section and section 38-08-10, any unleased mineral interest pooled by virtue of this section before August 1, 2009, is entitled to a cost-free royalty interest equal to the acreage weighted average royalty interest of the leased tracts within the spacing unit, but in no event may the royalty interest of an unleased tract be less than a one-eighth interest. An unleased mineral interest pooled after July 31, 2009, is entitled to a cost-free royalty interest equal to the acreage weighted average royalty interest of the leased tracts within the spacing unit or, at the operator's election, a cost-free royalty interest of sixteen percent. The remainder of the unleased interest must be treated as a lessee or cost-bearing interest.

. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA

Continental Resources, Inc.,	)	
	)	
Plaintiff,	)	**ORDER ON MOTIONS**
	)	
vs.	)	
	)	Case No. 4:15-cv-19
Art Langved,	)	
	)	
Defendant.	)	

Before the Court is the Plaintiff's "Motion for Default Judgment or in the Alternative for Summary Judgment" filed on October 27, 2015. See Docket No. 23. The Defendant filed a response in opposition to the motion on December 8, 2015. See Docket No. 36. The Plaintiff filed a reply on December 22, 2015. See Docket No. 37. Also before the Court is the Defendant's Rule 12(b)(1) "Motion to Dismiss for Lack of Subject Matter Jurisdiction" filed on November 5, 2015. See Docket No. 29. The Defendant filed a response in opposition to the motion on November 30, 2015. See Docket No. 34. For the reasons set forth below, the Plaintiff's motion for default judgment is denied and its motion for summary judgment is granted. The Defendant's motion to dismiss is denied.

I. BACKGROUND

The Plaintiff, Continental Resources, Inc., ("Continental"), is an Oklahoma corporation with its principal place of business located in Oklahoma City, Oklahoma. Continental is an oil and gas exploration company with operations in western North Dakota and elsewhere.

The Defendant, Art Langved, lives north of New Town in Mountrail County, North Dakota. He is a North Dakota resident and the surface estate owner of certain real property ("Subject

Property") in Mountrail County, North Dakota, described as follows:

Township 153 North, Range 93 West
Section 15: N/2, N2/S/2, SE/4SW/4, SE/4SE/4
Section 22: N/2NE/4, SE/4NE/4, NE/4SE/4

Langved also owns an interest in the oil and gas underneath the Subject Property.

Langved leased his interest in the oil and gas in and under the Subject Property to Diamond Resources, Inc., in April 2004 ("Langved Lease"). See Docket No. 21. Through a series of assignments, the Langved Lease passed to Hess Bakken Investments II, LLC ("Hess") which assigned the lease to Continental in October 2014, with an effective date of November 1, 2013. See Docket No. 21-1. The Langved Lease grants the lessee the exclusive right to conduct drilling and production operations on the Subject Property and to use as much of the surface estate of the Subject Property as is reasonably necessary to exercise its leasehold rights. Those rights include the exclusive right to use the land for oil and gas exploration and production, along with rights of way and easements for laying pipelines and related infrastructure. See Docket No. 21.

On or about July 17, 2014, Continental applied for and was granted permits from the North Dakota Industrial Commission ("Industrial Commission") to drill three oil and gas wells ("Margaurite Wells") from a surface location in the NE/4 of Section 15. This location was within a 480-acre spacing unit comprised of the E/2W/2E/2 and the E/2E/2 of Sections 15 and 22, Township 153 North, Range 93 West, Mountrail County, North Dakota. The spacing unit for the Margaurite Wells includes part of the Subject Property. Thereafter, Continental drilled the Margaurite 1-ISH, Margaurite 2-15H1, and Margaurite 3-15H wells ("Margaurite Wells") as permitted. Continental has plans to drill twenty-six additional wells on two additional spacing units that include portions of the Subject Property. These twenty-six wells will be drilled from the surface of the Subject Property and are referred to as the Corsican Wells and the Rath Wells.

Notwithstanding the exclusive rights granted pursuant to the Langved Lease, Langved sought to prevent Continental from drilling the Margaurite Wells and later sought to prevent Continental from laying pipelines and developing other infrastructure that is necessary to produce and market oil and gas from the wells.

During the summer of 2014, when Continental was preparing to drill the Margaurite Wells, Langved and/or his agent, Tom Gray ("Gray"), constructed or caused to be constructed a shack within five-hundred feet of the proposed surface location of the Margaurite Wells. Langved then contacted the Industrial Commission on July 21, 2014, the same day Continental planned to begin drilling operations, demanding that Continental's drilling operations be halted based on Continental's allegedly having violated the five hundred-foot setback mandated by state law.

Langved's actions prompted the Industrial Commission to temporarily halt Continental's drilling activities as it evaluated Langved's claim. On July 22, 2014, the Industrial Commission informed Continental it could proceed with drilling its wells, concluding the shack was a mere ploy to delay drilling.

On July 23, 2014, when Continental returned to the Marguarite well site to begin drilling operations, Gray was present and continued to interfere with Continental's activities. Gray's behavior was aggressive and included using strong language in an attempt to stop Continental's drilling operations. In addition, Gray nearly caused an accident involving a Continental pickup truck pulling a forty-foot trailer and Gray's vehicle on a highway near the well site. After the near accident, Gray drove a vehicle onto the section line right-of-way that provides access to the Margaurite Wells, blocking access to the well site. The vehicle remained in place for the remainder of the day on July 23, 2014. Langved and Gray continued to obstruct Continental's activities throughout 2014 and early 2015. Some of the statements Langved made in his attempts to stop

Continental's activities could be interpreted as threats to use violence.

Continental filed a complaint in this Court on February 12, 2015. See Docket No. 1. The jurisdictional basis for the action was diversity of citizenship. See 28 U.S.C. § 1332. Continental filed a motion for a temporary restraining order along with its complaint. See Docket No. 3. The Court granted the motion for a temporary restraining order on February 18, 2015, prohibiting Langved from interfering with Continental's operations. See Docket Nos. 8 and 10. The temporary restraining order was extended by stipulation of the parties until March 25, 2015. See Docket Nos. 13 and 14. Continental was able to complete work on the Margaurite wells after receiving a temporary restraining order from this Court, enjoining Langved from interfering with Continental's work on the Subject Property. In a second stipulation the parties informed the Court that the need for immediate relief had passed and the temporary restraining order could be cancelled. The Court adopted the stipulation and cancelled the temporary restraining order. See Docket No. 17.

An amended complaint was filed on March 31, 2015. See Docket No. 20. In its amended complaint, Continental seeks to permanently restrain and enjoin Langved from interfering with its oil and gas development activities on the Subject Property including its right to install pipelines, electric lines, and other infrastructure that is reasonably necessary to explore for, produce, and market oil and gas produced by those wells. Langved did not file an answer in response to the amended complaint. Instead, on November 5, 2015, nearly seven months after his answer to the amended complaint was due, Langved filed a motion to dismiss, asserting the Court lacks subject matter jurisdiction over Continental's amended complaint. See Docket No. 29. Now before the Court is Continental's motion for default judgment, or in the alternative summary judgment, and Langved's motion to dismiss. See Docket Nos. 23 and 29.

II. LEGAL DISCUSSION

A. DEFENDANT'S MOTION TO DISMISS

Langved contends the Court lacks subject matter jurisdiction because diversity is lacking and the amount in controversy does not exceed $75,000. Continental resists the motion. The Court finds Langved's contentions unpersuasive.

Rule 12(b)(1) of the Federal Rules of Civil Procedure governs motions to dismiss for lack of subject matter jurisdiction. Federal district courts have original jurisdiction over all civil actions where the amount in controversy exceeds $75,000 and the parties are citizens of different states. 28 U.S.C. § 1332. Complete diversity between all parties must exist. Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373 (1978). In order for complete diversity to exist in this case, Continental and Langved must be "citizens of different States." See 28 U.S.C. § 1332(a)(1). The legal standard to determine citizenship is straightforward. Citizenship is determined by a person's physical presence in a state along with his intent to remain there indefinitely. Yeldell v. Tutt, 913 F.2d 533, 537 (8th Cir. 1990). For diversity purposes, a corporation has dual citizenship; it is a citizen of its state of incorporation and of the state where its "principal place of business" is located. 28 U.S.C. § 1332(c)(1).

Challenges to subject matter jurisdiction can be raised at any time prior to final judgment. Grupo Dataflux v. Atlas Global Grp., L.P., 541 U.S. 567, 571 (2004). For purposes of determining the existence of diversity jurisdiction, the citizenship of the parties is to be determined with reference to the facts as they existed at the time the lawsuit was filed. Id. at 569-70. When jurisdictional allegations are challenged, the burden is on the plaintiff to establish complete diversity. Yeldell, 913 F.2d at 537. A determination of citizenship for diversity purposes is a mixed question of law and fact, but mainly fact. Blakemore v. Mo. Pac. R.R. Co., 789 F.2d 616, 618 (8th

Cir. 1986). "Citizenship" and "domicile" are synonymous for purposes of 28 U.S.C. § 1332 analysis. Ellis v. Se. Constr. Co., 260 F.2d 280, 281 (8th Cir. 1958). "[A] person can have only one domicile at a time, and a domicile once obtained persists until a new one is acquired." Id.

In this diversity case, Continental is an Oklahoma corporation with its principal place of business located in Oklahoma City, Oklahoma. Langved is a North Dakota resident and citizen. Since Continental and Langved are citizens of different states, diversity is complete. See One Point Solutions, LLC v. Borchert, 486 F.3d 342, 346 (8th Cir. 2007) (explaining the requirements of complete diversity). Contrary to Langved's arguments, it does not matter that the original lessee, Diamond Resources, was a citizen of North Dakota. The lease at issue was freely assignable. See Docket No. 21, p. 1, ¶ 11. Continental is now the owner of the lease and Diamond Resources is not a party to this action. Contrary to Langved's unsupported assertion, Continental does not stand in the shoes of Diamond Resources for the purposes of diversity analysis. Nor does it matter that the dispute involves property located in North Dakota, and Langved's suggestion otherwise has no merit. What matters is the undisputed fact that Langved is a citizen of North Dakota and Continental is a citizen of Oklahoma. Because the parties are citizens of different states, there is complete diversity under 28 U.S.C. § 1332(a).

Langved's contention that the amount in controversy does not exceed $75,000 is not well-developed. Langved offers little more than a conclusory statement that the $75,000 threshold has not been satisfied. In cases stating claims for declaratory and injunctive relief, the amount in controversy under 28 U.S.C. § 1332 is the value to the plaintiff of the right it seeks to enforce. See Horton v. Liberty Mut. Ins. Co., 367 U.S. 348, 352–53 (1961); Hedberg v. State Farm Mut. Auto. Ins. Co., 350 F.2d 924, 928 (8th Cir. 1965); MCC Mortg. LP v. Office Depot, Inc., 685 F. Supp. 2d 939, 944 (D. Minn. 2010). Continental has alleged in its amended complaint that Langved has

prevented or sought to prevent Continental from exercising its right to develop the oil and gas in and under the Subject Property and other lands pooled with Langved's land. Langved does not dispute that he and his agents have interfered with Continental's activities on his land. Continental has further alleged that the value to Continental of that right substantially exceeds $75,000, exclusive of interest and costs. Continental has pled claims for declaratory and injunctive relief, and the value to Continental of the rights it seeks to enforce greatly exceeds $75,000. See Horton, 367 U.S. at 352–53; Hedberg, 350 F.2d at 928; MCC Mortg. LP, 685 F. Supp. 2d at 944. The surface damage agreement between Continental and Langved alone calls for payments to Langved in excess of $55,000. See Docket No. 29-2. Continental has plans to drill twenty-six additional wells from the Subject Property and lands pooled with the Subject Property. Given the costly nature of oil and gas exploration activities along with the value of the natural resource itself once produced, the Court has no trouble concluding the value of Continental's right to develop the oil and gas underlying the Subject Property far exceeds $75,000.

B. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

As a preliminary matter, Continental's request for default judgment must be denied because filing a motion for the entry of default is a pre-requisite to the entry of a default judgment. See Johnson v. Dayton Elec. Mfg. Co., 140 F.3d 781, 783 (8th Cir. 1998) ("[w]hen a party 'has failed to plead or otherwise defend' against a pleading listed in Rule 7(a), entry of default under Rule 55(a) must precede grant of a default judgment under Rule 55(b)."). As no entry of default has been made in this case, Continental's request for default judgment is premature.

Continental contends that Langved has no legal right to interfere with its oil and gas development operations on the Subject Property and it should be granted summary judgment.

Langved contends the Court lacks jurisdiction, a contention the Court rejected above.

Summary judgment is appropriate when the evidence, viewed in a light most favorable to the non-moving party, indicates that no genuine issues of material fact exist and that the moving party is entitled to judgment as a matter of law. Davison v. City of Minneapolis, Minn., 490 F.3d 648, 654 (8th Cir. 2007); see Fed. R. Civ. P. 56(a). Summary judgment is not appropriate if there are factual disputes that may affect the outcome of the case under the applicable substantive law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue of material fact is genuine if the evidence would allow a reasonable jury to return a verdict for the non-moving party. Id.

The Court must inquire whether the evidence presents a sufficient disagreement to require the submission of the case to a jury or whether the evidence is so one-sided that one party must prevail as a matter of law. Diesel Mach., Inc. v. B.R. Lee Indus., Inc., 418 F.3d 820, 832 (8th Cir. 2005). The moving party bears the responsibility of informing the court of the basis for the motion and identifying the portions of the record which demonstrate the absence of a genuine issue of material fact. Torgerson v. City of Rochester, 643 F.3d 1031, 1042 (8th Cir. 2011). The non-moving party may not rely merely on allegations or denials in its own pleading; rather, its response must set out specific facts showing a genuine issue for trial. Id.; Fed. R. Civ. P. 56(c)(1). The court must consider the substantive standard of proof when ruling on a motion for summary judgment. Anderson, 477 U.S. at 252.

In this case, Continental owns an exclusive leasehold interest in the mineral estate, which is dominant in that the law implies a legitimate area within which mineral ownership of necessity carries with it inherent surface rights to find and develop the minerals, which rights must and do involve the surface estate. Hunt Oil Co. v. Kerbaugh, 283 N.W.2d 131, 135 (N.D. 1979). North Dakota has adopted the general rule that, in the absence of other rights expressly granted or reserved,

the owner of the mineral estate has the right to make use of as much of the surface estate as is reasonably necessary to explore, develop, remove, and transport the minerals. Christman v. Emineth, 212 N.W.2d 543, 550 (N.D. 1973). Thus, even in the absence of a specific agreement with the surface owner, Continental has the implied right to use as much of the surface of the Subject Property as is reasonably necessary to develop the oil and gas that may be found in and under the Subject Property or other lands pooled with the Subject Property. As the surface owner, Langved has the statutory right to be compensated for the damage to his property. See N.D.C.C. § 38-11.1-04.

Continental has been granted the express right under the Langved Lease to use the surface of the Subject Property for the purpose of "operating for and producing therefrom oil and all gas." See Docket No. 21. The Langved lease was executed by Langved himself and has been assigned to Continental. Thus, Langved is interfering with operations he expressly authorized in the lease. See Docket No. 21 (granting lessee the "exclusive right" to explore for and produce oil and gas, including "rights of way and easements for laying pipe lines" and constructing other infrastructure); see also Hunt, 283 N.W.2d at 135 (citing Feland v. Placid Oil Co., 171 N.W.2d 829, 834 (N.D. 1969)) (discussing surface use generally).

The surface rights granted by the Langved Lease and North Dakota law extend not only to the Subject Property, but also to all lands pooled with the Subject Property. See N.D.C.C. § 38-08-08. In cases where an oil and gas lease has been included within a pooled spacing unit, all leases covering lands located within the pooled unit are treated as if they were leases of the entire unit. See Continental Resources, Inc. v. Farrar Oil Co., 559 N.W.2d 841, 845-46 (N.D. 1997); see also N.D.C.C. § 38-08-08(1) ("Operations incident to the drilling of a well upon any portion of a spacing unit covered by a pooling order must be deemed, for all purposes, the conduct of such

operations upon each separately owned tract in the drilling unit by the several owners thereof."). The creation of a spacing unit gives the unit operator the right and obligation to conduct oil and gas development operations throughout the unit. Fisher v. Cont'l Res., Inc., 49 F. Supp. 3d 637, 644 (D.N.D. 2014). In this case, because the drilling units for the Margaurite, Corsican, and Rath wells are pooled, operations within those units are considered operations on the Langved Lease. Thus, the entire surface of the Subject Property may be used as reasonably necessary to explore for and produce oil and gas from the drilling units for the Margaurite, Corsican, and Rath wells.

Under these principles of North Dakota law, Continental has the right to move on and use so much of the surface of the Subject Property as is necessary to drill and operate wells, lay oil, gas, and water pipelines, and to furnish electricity for the drilling units that contain or will contain the Margaurite, Corsican, and Rath wells. Langved, despite owning an interest in the surface of the Subject Property, has no right to prevent or interfere with Continental's use of the surface for the purpose of developing its oil and gas leasehold.

IV. CONCLUSION

The Court has carefully reviewed the entire record, the parties' submissions, and the record as a whole. For the reasons set forth above, Continental's motion for default judgment is **DENIED** and its motion for summary judgment is **GRANTED** (Docket No. 23). Langved's motion to dismiss (Docket No. 29) and motion for hearing (Docket No. 28) are **DENIED**. The Court further **ORDERS and DECLARES** that Continental has the right to develop its leasehold estate in the Subject Property and use as much of the surface of the Subject Property as is reasonably necessary to explore for and produce oil and gas from the Subject Property and lands pooled with the Subject

Property, and Langved is permanently enjoined from interfering with that right. Let judgment be entered accordingly.

IT IS SO ORDERED.

Dated this 12th day of April, 2016.

/s/ Daniel L. Hovland
Daniel L. Hovland, District Judge
United States District Court

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DISTRICT

CONTINENTAL RESOURCES, INC.

Plaintiff,

vs.

Case No. 4:15-cv-019

DEFENDANT'S RESPONSE TO MOTION FOR ENTRY OF JUDGMENT BASED UPON
A. LACK OF SUBJECT MATTER JURISDICTION
B. LACK OF DIVERSITY

ART LANGVED

Defendant

Comes now the Defendant, by his attorney, Fintan L. Dooley,

OVERVIEW

Continental Resources, Inc. [herein, "Continental"] commenced these proceedings seeking a Declaratory Judgment and Injunction against Defendant, Art Langved, a/k/a Arthur V. Langved [herein, "Langved"] on 2/12/15. Langved's new counsel has filed a detailed Rule 12 -B Motion asking for hearing. If a hearing is afforded the 84-year-old, a cancer afflicted gentleman, a rancher living alone, Arthur Langved will explain the facts including details that he had been repeatedly given oral assurances by Continental agents that this federal case would be dismissed upon his acceptance of Continental's provision of a concrete pad for his garage. He did accept the offer of a concrete pad. The case was not dismissed. Langved would like to tell his story.

A more efficient resolution of this proceeding is dismissal, which will recognize that Continental does not have a basis for its diversity assertion because it stands in the shoes of Diamond Resources, a North Dakota Corporation. The latter is the original entity with which Langved signed the 2004 oil and gas lease. Continental, as an assignee of that lease, cannot

assert diversity. These arguments were presented more elaborately in Langved's Rule B-12 Motion.

A second basis supporting dismissal will recognize that no federal statutes or federal questions are involved in the interpretation of the lease. Several novel questions now on review before the Mountrail County District Court are associated with Continental's use of Langved surface estate. One of them is whether the text of the Diamond Resource lease can be construed to entitle Continental to access remote minerals. Related question is whether the limiting language in the Diamond Resource lease can, by decisions of North Dakota Industrial Commission, be avoided and so allow Continental to access remote minerals. Both questions are novel because Langved has asserted such interpretations violate article 1 section 16 of the North Dakota Constitution which protects his vested property rights.

Initially the answers provided by NDIC have favored Continental. The two orders issued by the NDIC are challenged and documents explaining the genesis of those decisions have been sought and will continue to be sought by motions and briefs presented to Mountrail County District Court. As disclosed in Langved's Rule 12- B Motion, he has made elaborate constitutional assertions in his appeal of those NDIC determinations which he believes violated his right to a contract that, by its terms and by the North Dakota Constitution, protects his Freedom of Contract.

By this federal action, Continental has multiplied proceedings against Langved. Continental attempts to obtain by default judgment, a home run. That will shorten the game that was certainly take longer if a thoughtful process were to occur in the Mountrail County District Court. If Langved lives so long, ultimately those questions will be resolved by the North Dakota Supreme Court.

To be clear, one of the key questions before the Mountrail County Court in Langved's appeal is whether by changing unitization of a drilling and spacing unit which has been previously approved and placed in production, whether the NDIC has authority to change that drilling and spacing unit and thereby burden Langved's surface estate to favor the state of North Dakota and Continental and disfavor Langved?

How could this happen? By accessing State of North Dakota minerals submerged under the impounded waters of Lake Sacajawea and utilizing Langved's surface estate to locate the Corsican Wells. The cluster of questions will involve interpretation of paragraph 12 of the Diamond Resource Lease. The lease was particularly addressed in the Langved B-12 Motion. For convenience of the court, a readable version of paragraph 12 is filed in support of this opposition to entry of default judgment.

This court cannot resolve that novel question without the certification of the same question to the North Dakota Supreme Court. In summary, matters at issue in this case are governed by the substantive laws of North Dakota. This case should be dismissed.

WHEREFORE, Langved requests that these proceedings be dismissed for lack of diversity and lack of subject matter jurisdiction. Langved requests he be allowed to tax costs and attorney fees.

Fintan L. Dooley, ND Bar #03270
220 North 4th Street
Bismarck, ND 58501
Office: 701-212-1000
Cell: 414-731-0520
Fax: 701-557-1681
Email: findooley@gmail.com

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
NORTHWESTERN DIVISION

Continental Resources, Inc., Plaintiff. vs. Art Langved, Defendant.	)	Case No. 4:15-cv-019 **PLAINTIFF'S REPLY TO DEFENDANT'S RESPONSE TO MOTION FOR DEFAULT JUDGMENT OR IN THE ALTERNATIVE FOR SUMMARY JUDGMENT**

Plaintiff Continental Resources, Inc. ("Continental") submits this reply to the response brief filed by Defendant Art Langved ("Langved") in opposition to Continental's motion for default judgment or in the alternative for summary judgment. Continental respectfully requests that the Court enter a judgment declaring that it has the right to use as much of the surface of its oil and gas leasehold estate as reasonably necessary to explore for and produce oil and gas from the leased lands and lands pooled with the leased lands and permanently enjoining Langved from interfering with that right.

In his response to Continental's motion for default judgment or summary judgment (Doc. No. 36), Langved reiterates the jurisdictional arguments he made in his motion to dismiss and conflates the issues before this Court with the issues raised in the administrative appeal currently pending in state court, but he offers no substantive reason to deny Continental's motion. Instead, Langved's response, which was filed three weeks late, merely raises peripheral issues not relevant to the only substantive legal issue addressed in the motion: Continental's legal right to make reasonable use of the surface of its leasehold estate to explore for and produce oil and gas from leased lands and lands pooled with the leased lands. Langved's apparent efforts to distract the Court from that issue should be ignored.

The jurisdictional arguments were fully addressed in Continental's response to Langved's motion to dismiss and need not be repeated here. (*See* Doc. No. 33). Likewise, the North Dakota Industrial Commission's orders regarding pooling and spacing are outside of this Court's jurisdiction. Those orders are the subject of a pending administrative appeal, and Langved will have ample opportunity to challenge them before the state district court and the North Dakota Supreme Court.

For the foregoing reasons and the reasons set forth in earlier briefing filed by Continental, the Court should enter a judgment denying Langved's motion to dismiss, granting Continental's motion for default judgment or in the alternative for summary judgment, and declare that Continental has the right to use as much of the surface of its leasehold estate as reasonably necessary to explore for and produce oil and gas from the leased lands and lands pooled with the leased lands.

Dated this 22nd day of December, 2015.

FREDRIKSON & BYRON, P.A.

By /s/ Michael D. Schoepf
LAWRENCE BENDER, ND #03908
MICHAEL D. SCHOEPF, ND #07076
Attorneys for Plaintiff
Continental Resources, Inc.
1133 College Drive, Suite 1000
Bismarck, North Dakota 58501
Telephone: (701) 221-8700
lbender@fredlaw.com
mschoepf@fredlaw.com

In the Supreme Court

State of North Dakota

Darwin and Jean Krenz, Plaintiffs, Appellees, and Cross-Appellants, v. XTO Energy, Inc., Defendant, Appellant, and Cross-Appellee.	)	Supreme Court No. 20160096 **Certificate of Service**

I certify that a true and correct copy of the following:

1. Appellees' Reply Brief with Addendum
2. Appendix

was on the 8th day of August, 2016, filed and served by electronic means, properly addressed to the following:

Lawrence Bender
lbender@fredlaw.com

Leah C. Janus
ljanus@fredlaw.com

/s/ Charles M. Carvell

Charles M. Carvell (#03560)
Pearce & Durick
314 E. Thayer Avenue
Bismarck, ND 58502
T: 701.223.2890 F: 701.223.7865
www.pearce-durick.com