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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Arthur Langved, Appellant and Constitutional Petitioner, vs. Continental Resources, Inc., Appellee, State of North Dakota by and thru the North Dakota Industrial Commission, and Quasi-Judicial Officers, Hon. Wayne Stenehjem, Attorney General and Commissioner, Hon. Jack Dalrymple, Governor and Commissioner, Constitutional Respondents.	Supreme Court No. 20160363

Appeal from Judgment entered on September 1, 2016,
Civil No. 31-2015-CV-0142,
County of Mountrail, North Central Judicial District,
The Honorable Richard L. Hagar, District Judge, Presiding

BRIEF OF APPELLEE CONTINENTAL RESOURCES, INC.

FREDRIKSON & BYRON, P.A.

LAWRENCE BENDER, ND #03908
Attorneys for Appellee
Continental Resources, Inc.
1133 College Drive, Suite 1000
Bismarck, North Dakota 58501
Telephone: (701) 221-8700
lbender@fredlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Paragraph

CASES

STATUTES

TREATISES

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶ 1] Whether the district court erred in affirming Order Nos. 26538 and 26732 of the North Dakota Industrial Commission (the "Commission") by concluding that the Commission properly exercised its authority in modifying its previous orders establishing spacing units and in creating new spacing units.

STATEMENT OF THE CASE

[¶ 2] The present appeal arises from Commission Case No. 23916, which concerned an application by Appellee Continental Resources, Inc. ("Continental") to the Commission for an order terminating existing oil and gas well spacing units, creating new well spacing units, and modifying existing well setback requirements for portions of the Elm Tree-Bakken and Sanish-Bakken Pools, which are located in McKenzie and Mountrail Counties, North Dakota. Appellant Arthur Langved ("Langved") opposed Continental's application at a hearing held by the Commission on April 23, 2015. Post-hearing briefs were filed in which Langved argued that the proposed modification of the then-existing spacing units would result in an unconstitutional diminution of Langved's property rights.

[¶ 3] On June 30, 2015, the Commission issued Order No. 26538 approving Continental's application. On July 14, 2015, Langved filed a Petition for Reconsideration and Modification of Order No. 26538, arguing that certain evidence was not appropriately considered by the Commission, that the Commission was biased because of the State of North Dakota's ownership of minerals within the spacing units, and that the Commission should have accepted Langved's constitutional arguments. On July 28, 2015, the Commission denied Langved's petition by Order No. 26732.

[¶ 4] On August 24, 2015, Langved appealed Commission Order Nos. 26538 and 26732 to the district court. Langved did not seek, nor did the district court order, suspension of the Commission's orders under N.D.C.C. § 38-08-14(2). Oral argument was ultimately heard by the district court on May 18, 2016. On July 27, 2016, the district court issued an Order Affirming Decisions of the Industrial Commission of North Dakota in Commission Case No. 23916. The district court concluded that Langved's constitutional claims were not appropriate for the appeal and that such claims should instead be asserted in an inverse condemnation action. Regarding the substance of the Commission's decision, the district court concluded that the Commission regularly pursued its authority in hearing and deciding Continental's petition and that the Commission's findings and conclusions in Order Nos. 26538 and 26732 are sustained by the law and by substantial and credible evidence.[1] On September 1, 2016, the district court entered a judgment denying Langved's appeal and affirming the Commission's Order Nos. 26538 and 26732.

[¶ 5] On October 31, 2016, Langved appealed the district court's decision to this Court. The issues raised by Langved's appeal generally concern the constitutional and statutory authority of the Commission to terminate and/or modify existing spacing units on which production has occurred or is occurring.

[1] The court also concluded that there had been no procedural violations or conflicts of interest that would require remand of the Commission's decision. This aspect of the district court's decision does not appear to be at issue on appeal.

STATEMENT OF FACTS

[¶ 6] On March 20, 2015, Continental made application to the Commission for an order amending previous orders and establishing new spacing units for Sections 15, 16, 17, 18, 19, 20, 21, and 22, Township 153 North, Range 93 West, McKenzie and Mountrail Counties, North Dakota (the "Subject Lands"). *See* Supplemental Appendix of Appellee Continental Resources, Inc. ("Supp. App."), at pp. 1–4. Specifically, Continental sought an order terminating a 2560-acre spacing unit comprised of Sections 17, 18, 19, and 20 and terminating two "standup" (i.e., north-south) 1280-acre spacing units covering Sections 15 and 22 and Sections 16 and 21, respectively, each of which had previously been established by Commission Order No. 24889. *Id.* at p. 2. In place of the existing spacing units, Continental requested that the Commission establish: (1) one 1280-acre standup spacing unit comprised of Sections 18 and 19; (2) two "laydown" (i.e., east-west) 1680-acre spacing units comprised of all of Sections 16 and 17 and the W½ and W½W½E½ of Section 15 (i.e., the western 5/8ths of Section 15), and all of Sections 20 and 21 and the W½ and W½W½E½ of Section 22 (i.e., the western 5/8ths of Section 22), respectively; and (3) one standup 480-acre spacing unit comprised of the E½W½E½ and E½E½ of Sections 15 and 22 (i.e., the eastern 3/8ths of Sections 15 and 22). *Id.*; *see also id.* at pp. 5–9 (which contains maps of the configuration of spacing units and diagrams of Continental's proposed development plans). Continental based its request on its conclusion that the configuration of the proposed spacing units would permit

Continental to drill in a manner that would increase the ultimate recovery of the underlying reservoir. *Id.* at p. 3.[2]

[¶ 7] Continental had previously proposed to develop the existing 2560-acre spacing unit covering Sections 17, 18, 19, and 20 by drilling twenty-eight horizontal wells in a starburst pattern from a single well pad in the SW¼SW¼ of Section 19. Appellant's Appendix, ("App."), at p. 11. Continental had also previously proposed to develop the two existing 1280-acre standup spacing units covering Sections 15 and 22 and 16 and 21, respectively, by drilling fourteen horizontal wells on each unit, each running parallel to the unit's long axis. *Id.* at pp. 10–11. Three wells had been previously drilled in the 1280-acre spacing unit covering Sections 15 and 22: (1) the Continental #3-15H Margaurite well; (2) the Continental #2-15H1 Margaurite well; and (3) the Continental #1-15H Margaurite well (collectively, the "Margaurite Wells"). *Id.* At the time of Continental's application, Continental had not paid out any proceeds of production from the Margaurite Wells. *See* Supp. App., at pp. 15–17. Continental's witnesses indicated that if Continental's application were granted Continental would provide working interest owners a new opportunity to elect to participate in the Margaurite Wells and would refund any joint interest billings paid by working interest owners as necessary before distributing proceeds of production from the Margaurite Wells. *Id.*

[2] Continental's application also included a request for setback relief which is not at issue on appeal. *Id.* at p. 4.

[¶ 8] Continental proposed to develop the proposed 1280-acre standup spacing unit comprised of Section 18 and 19 by drilling thirteen horizontal wells, with each well running north-south, parallel to the unit's long axis. App., at p. 11. Continental proposed to develop the two proposed 1680-acre laydown spacing units comprised of all of Sections 16 and 17 and the western 5/8ths of Section 15, and all of Sections 20 and 21 and the western 5/8ths of Section 22, respectively, by drilling thirteen horizontal wells in each unit, with each well running east-west, parallel to the unit's long axis. *Id.* These wells were proposed to be drilled from two common well pads located in the NE¼ and the SE¼ of Section 15. *Id.* Continental did not propose any additional wells to be drilled on the proposed 480-acre spacing unit comprised of the eastern 3/8ths of Sections 15 and 22. The Commission's decision to reduce the setback along the western border of the proposed 480-acre spacing unit, however, allowed for Continental to drill a fourth well thereon at some point in the future. *See id.* at p. 40. For a diagram of the 480-acre spacing unit established by the Commission indicating where a fourth well could be drilled, see Supp. App., at pp. 79–80.

[¶ 9] The Commission held a hearing on Continental's application on April 23, 2015. At the hearing Continental offered exhibits and expert testimony setting forth its reasons for requesting the configuration of the proposed spacing units. Continental's witnesses testified that Continental had been unable to develop the two existing 1280-acre spacing units because available surface locations for drilling and development were limited by the lack of suitable terrain, the proximity of Lake Sakakawea, the presence of certain cultural resources, and existing development of the area including pipelines and other infrastructure. *See* App., at p. 12; Supp. App., at pp. 18–33. Though there were

potential surface locations in adjacent sections from which drilling and development of the existing 1280-acre units could occur, Continental had not been successful in obtaining necessary surface use agreements from the owners of these sites, including Langved, despite attempted negotiations over the course of the preceding year. *See* App., at p. 12; Supp. App., at pp. 18–33. Continental's witnesses also testified that Continental's original proposal to develop the existing 2560-acre spacing unit using a starburst pattern would be less efficient, and result in a lesser ultimate recovery, than Continental's proposal to develop the 1680-acre spacing units using an east-west parallel pattern. App., at pp. 11–12; Supp. App., at pp. 34, 43–48; *see also id.* at pp. 13–14 (post-hearing exhibits submitted by Continental regarding the inefficiency of starburst vs. parallel drilling patterns).

[¶ 10] Langved appeared at the hearing and testified that he opposed the proposed spacing unit configuration. Supp. App., at pp. 36–42. Langved did not present any expert testimony at the hearing. *Id.* In post-hearing briefing, Langved asserted that Continental's application should be denied because it would take or damage his property rights with respect to (1) his right to bargain with Continental for the use of his surface estate for a drilling pad location, and (2) his right to a certain amount of "gathering line participation" based on the proposed development of the existing spacing units. *Id.* at pp. 51–52, 64–67.

[¶ 11] The Commission ultimately granted Continental's application. The Commission concluded that Continental's proposed well locations had the advantage of being a greater distance from Lake Sakakawea than the locations previously proposed, and further concluded that Continental's use of common drilling pads

> will reduce surface impact and the expenditure of funds on surface facilities and enhance the economics of production, thereby preventing economic waste and promoting the greatest ultimate recovery of oil and gas from the Elm Tree and Sanish-Bakken Pools; and will improve the timing and economics of connecting wells to gas gathering systems thereby reducing gas flaring and will minimize surface disturbance and enhance the aesthetic values resulting from fewer production facilities.

App., p. 12. The Commission also concluded, based on its review of evidence as to reserve estimates presented in this and previous Commission cases concerning the Subject Lands, that the total estimated ultimate recovery for the Subject Lands would be greater under the proposed spacing unit configuration (37.352 million barrels of oil equivalent ("BOE") rather than 36.2 (later corrected to 36.4) million BOE) and fewer wells would be needed under the spacing unit configuration proposed (42 wells rather than 56 wells). *Id.* at p. 16; *see also id.* at pp. 61–62 (clarifying the Commission's analysis of this issue). The Commission also addressed Langved's arguments by noting that the estimated ultimate recovery from the Subject Lands in which Langved's minerals would participate would be less under the proposed spacing unit configuration (4.125 million BOE rather than 4.852 million BOE). *Id.* at pp. 16–17. The Commission concluded, however, that the proposed spacing unit configuration could allow for the drilling of one more well on the 480-acre spacing unit comprised of the eastern 3/8ths of Sections 15 and 22, *id.* at p. 40, and that the proposed spacing unit configuration would protect correlative rights insofar as producing more oil with fewer wells would ultimately benefit all interest owners affected thereby, *id.* at pp. 16–17. Langved petitioned the Commission for reconsideration of its decision, asserting, among other arguments not raised on appeal, that his property-based constitutional arguments should be reconsidered. Supp. App., at pp. 69–70. The Commission denied Langved's petition.

STANDARD OF REVIEW

[¶ 12] Section 38-08-14 the North Dakota Century Code permits parties adversely affected by an order of the Commission pertaining to the regulation of gas and oil resources to appeal that decision to an appropriate district court. Section 38-08-14(3) provides the standard of review for such appeals as follows: "Orders of the commission must be sustained by the district court if the commission has regularly pursued its authority and its findings and conclusions are sustained by the law and by substantial and credible evidence." The "substantial evidence" rule requires only that there be "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hanson v. Indus. Comm'n*, 466 N.W.2d 587, 590 (N.D. 1991). This standard requires something less than a preponderance of the evidence. *Id.* Furthermore, decisions of an administrative agency are ordinarily presumed to be correct, and courts will give significant deference to the agency in addressing decisions of a highly technical nature, such as the management of gas and oil resources. *See id.* at 590–91. The Commission's resolution of legal questions is fully reviewable on appeal. *Gadeco, LLC v. Indus. Comm'n*, 2012 ND 33, ¶ 15, 812 N.W.2d 405, 411-12.

[¶ 13] "A court reviewing an administrative agency decision generally will review only issues raised in the agency proceeding." *Symington v. N.D. Workers Comp. Bureau*, 545 N.W.2d 806, 810 (N.D. 1996). Thus if a party attempts to raise an issue on appeal that it failed to raise in the agency proceeding, the appellate court will not consider it. *Id.*; *see also Lamb v. Moore*, 539 N.W.2d 862, 864 (N.D. 1995). However, because administrative agencies have no authority to decide constitutional issues, such issues "may be raised for the first time on appeal to the district court, if based solely on the record made in the administrative agency." *Froysland v. N.D. Workers Comp. Bureau*,

432 N.W.2d 883, 892 & n.8 (N.D. 1988) (quoting *Johnson v. Elkin*, 263 N.W.2d 123, 126 (N.D. 1978)). In reviewing appeals from administrative decisions involving constitutional issues, the North Dakota Supreme Court has reiterated that a party "who attacks a statute on constitutional grounds, defended as that statute is by a strong presumption of constitutionality, should bring up his heavy artillery or forego the attack entirely." *Id.* at 892 n.7; *see also Frokjer v. N.D. Bd. of Dental Examiners*, 2009 ND 79, ¶ 12, 764 N.W.2d 657, 661 (citing *Froysland*, among other cases). Though a party may raise issues on appeal concerning the constitutionality of a statute or an agency's actions, a party may not transform an administrative appeal into an inverse condemnation action. *See Gowan v. Ward Cty. Comm'n*, 2009 ND 72, ¶ 11, 764 N.W.2d 425, 430; *see also Irwin v. City of Minot*, 2015 ND 60, ¶ 7, 860 N.W.2d 849, 852 ("Inverse condemnation actions are a property owner's remedy, exercised when a public entity has taken or damaged the owner's property for a public use without the public entity's having brought an eminent domain proceeding." (quoting *Aasmundstad v. State*, 2008 ND 206, ¶ 15, 763 N.W.2d 748)).

LAW AND ARGUMENT

I. Introduction

[¶ 14] As explained below, the Commission regularly pursued its authority in issuing Order Nos. 26538 and 26732, and the Commission's findings and conclusions in support thereof are sustained by the law and by substantial credible evidence. Under N.D.C.C. § 38-08-14, the Commission's orders must therefore be affirmed. As also explained below, Langved's arguments concerning the statutory and constitutional authority of the Commission are without merit, and should therefore be disregarded. As

such, the district court's order affirming Commission Order Nos. 26538 and 26732 should be affirmed.

II. The Commission Regularly Pursued Its Authority in Issuing Order Nos. 26538 and 26732, and the Commission's Findings and Conclusions as Stated Therein Are Sustained by the Law and by Substantial Credible Evidence.

[¶ 15] The district court affirmed the Commission's Order Nos. 26538 and 26732. Appellant's Appendix, at pp. 99, 104–05. This Court is likewise required to affirm the Commission's decision if it determines "(1) the Commission has regularly pursued its authority, and (2) the Commission's findings and conclusions are sustained by the law and by substantial and credible evidence." *Hystad v. Indus. Comm'n*, 389 N.W.2d 590, 592 (N.D. 1986). As explained in the following subsections, because the Commission's Order Nos. 26538 and 26732 meet these requirements, the Commission's decisions must be affirmed.

A. The Commission Regularly Pursued its Authority in Issuing Decisions in Order Nos. 26538 and 26732.

[¶ 16] The district court concluded that by holding a hearing and making a decision on Continental's application the Commission regularly pursued its authority under N.D.C.C. § 38-08-07. The district court considered and rejected Langved's arguments concerning purported procedural irregularities committed by the Commission. *See* App., at pp. 96–99. These issues are not discussed in Langved's appellate brief, and are accordingly deemed abandoned for purposes of this appeal. *See, e.g., Murchison v. State*, 1998 ND 96, ¶ 13 578 N.W.2d 514, 516 ("Issues not briefed by an appellant are deemed abandoned.").

B. The Commission's Findings and Conclusions Are Sustained by the Law and by the Evidence Presented and Considered in this Case.

[¶ 17] When reviewing the factual basis of a Commission decision, this Court proceeds with the following questions: (1) Are the findings of fact supported by substantial evidence? (2) Are the conclusions of law sustained by the findings of fact? (3) Is the [Commission's] decision supported by the conclusions of law?" *Amoco Prod. Co. v. N.D. Indus. Comm'n*, 307 N.W.2d 839, 842 (N.D. 1981). As explained below, the record shows that the Commission's decisions are sustained by the law and by substantial credible evidence.

1. The Commission's findings of fact are supported by substantial evidence.

[¶ 18] The Commission's findings of fact must be supported by substantial evidence. As noted above, the "substantial evidence" required to support a decision of the Commission refers to "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Hanson*, 466 N.W.2d at 590. This is something less than the preponderance of the evidence, and differs from the usual standard of review for other agency decisions. *Id.* This Court will accord "greater deference to Industrial Commission findings of fact than [it] ordinarily accord[s] to other administrative agencies' findings of fact." *Id.*

[¶ 19] Continental submitted evidence at the Commission's hearing (1) that a starburst drilling pattern was inefficient as opposed to a parallel drilling pattern and would result in a lesser ultimate recovery, and (2) that Continental's inability to acquire surface locations for its drilling operations had prevented it from developing the oil and gas resources in and under portions of the Subject Lands. *See supra* Paragraph 9. Continental also submitted estimates of ultimate recovery per well under the proposed spacing unit, which the Commission compared against reserve estimates relied upon in

previous cases concerning the Subject Lands. *See* Supp. App., at pp. 10–11; App., pp. 16–17, 61–62. Based on its comparison of these estimates, the Commission found that the then-existing spacing unit configuration would result in an estimated ultimate recovery of 36.4 million BOE from 56 wells located on the Subject Lands, whereas the proposed spacing unit configuration would result in an estimated ultimate recovery of 37.352 million BOE from 42 wells located on the Subject Lands. *See* App., at pp. 61–62.

[¶ 20] To the extent that Langved sets forth a statement of facts in his principal brief, he describes a series of prior Commission actions with respect to the Subject Lands and makes various calculations of oil proceeds that Langved supposedly would have "participated in" under the previous spacing unit configuration. *See* Brief of Appellant, ¶¶ 5–9, 11–17. Langved has thus failed to offer or indicate the existence of any evidence contrary to the evidence considered and relied upon by the Commission. *See id.* at pp. 15–17. A reasonable mind would therefore find the evidence relied upon by the Commission, described in the preceding paragraph, is adequate to sustain the Commission's findings as to the increased ultimate recovery and reduced well count on the Subject Lands under the proposed spacing unit configuration. *See Hanson*, 466 N.W.2d at 590–91. Moreover, because the particular issue to which Continental's evidence is directed concerns the efficient development of oil and gas pools, the Commission's expertise in such matters should receive "respect and appreciable deference." *Id.* Accordingly, the Commission's findings of fact as set forth in Order Nos. 26538 and 26732 are sustained by substantial and credible evidence.

2. The Commission's conclusions of law are supported by its findings of fact.

[¶ 21] The Commission's findings of fact must be "directed toward the statutory standards" of N.D.C.C. ch. 38-08 in order for these findings to support the Commission's conclusions of law and ultimately its decision. *See Gadeco, LLC*, 2012 ND 33, ¶ 16, 812 N.W.2d at 412. Put another way, the Commission's findings of fact must be "sufficient to enable this Court to understand the basis for [the Commission's] decision." *Id.*

[¶ 22] Under N.D.C.C. § 38-08-04, the Commission has "continuing jurisdiction and authority over all persons and property, public and private, necessary to enforce effectively the provisions of [N.D.C.C. ch. 38-08]." The Commission shall set the size and shape of a spacing unit to encourage "the efficient and economical development of the pool as a whole." *Id.* § 38-08-07(2); *see also Slawson v. N.D. Indus. Comm'n*, 339 N.W.2d 772, 774 (N.D. 1983) ("The purposes of pooling are to prevent the physical and economic waste that accompany the drilling of unnecessary wells and to protect the correlative rights of landowners over a reservoir."). The Commission may modify existing spacing units whenever such modification is "necessary for the prevention of waste, or to avoid the drilling of unnecessary wells, *or* to protect correlative rights." N.D.C.C. § 38-08-07(4) (emphasis added). For purposes of oil and gas development, Chapter 38-08 of the Century Code defines "waste" as, among other things, "[t]he locating, spacing, drilling, equipping, operating, or producing of any oil or gas well or wells in a manner which causes, or tends to cause, reduction in the quantity of oil or gas ultimately recoverable from a pool under prudent and proper operations." N.D.C.C. § 38-08-02(19)(c). Waste is also defined as "physical waste, as the term is generally understood in the oil and gas industry." *Id.* § 38-08-02(19)(a). An accepted industry definition of "physical waste" is as follows:

> Operational losses in the production of oil and gas. There are two main divisions of loss of oil and gas, namely surface loss and underground loss. Surface loss of oil is due principally to evaporation and surface loss of gas is due principally to burning at field flares or blowing into the atmosphere. Underground loss is due to *failure to recover the maximum quantity which theoretically could be produced*, as by dissipation of reservoir pressure.

Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Manual of Oil and Gas Terms,* 774 (16th ed. 2015) (emphasis added). A well is "unnecessary" if it would make the recovery of the oil and gas in place in a given pool less efficient. *Cf. id.* at 315 (defining "economic waste" as, among other things, "[t]he drilling of wells in excess of the number necessary for the efficient recovery of the oil and gas in place").

[¶ 23] In this case, the Commission found that Continental's proposed spacing units would increase the estimated ultimate recovery of oil and gas from the Subject Lands beyond what would have been possible under then-existing spacing units while simultaneously requiring fewer wells. *See* App., pp. 16–17, 61–62. Thus the Commission altered the spacing units on the Subject Lands in order to prevent waste (i.e., to maximize the estimated ultimate recovery of oil and gas) and to avoid the drilling of unnecessary wells (i.e., to maximize the efficiency of recovery operations) which are both expressly recognized bases for modification of spacing units under North Dakota law. *See* N.D.C.C. § 38-08-07(4). The Commission also found that alteration of the then-existing spacing units would be appropriate to address the surface access issues identified by Continental, noting that "[i]t would be impractical to establish spacing units knowing they are technologically impossible to develop or cannot be economically developed due to access issues." *See* App., pp. 12, 15. Thus the Commission's alteration of the spacing units on the Subject Lands was intended to encourage "the efficient and economical development of the pool as a whole." N.D.C.C. § 38-08-07(2); *cf. id.* § 38-08-07(3) ("[I]f

the commission finds that . . . surface conditions would substantially add to the burden or hazard of drilling [a] well . . . the commission is authorized to enter an order permitting the well to be drilled at a location other than that prescribed by such spacing order . . . .”). The Commission’s findings thus specifically addresses themselves to the circumstances identified in N.D.C.C. § 38-08-07 as necessary and sufficient for the creation or modification of a spacing unit. Accordingly, the Commission’s conclusions of law are supported by the Commission’s findings of fact.

3. The Commission’s decision is supported by its conclusions of law.

[¶ 24] The Commission’s ultimate decision must be supported by its conclusions of law. N.D.C.C. § 38-08-07(1) provides that the Commission “shall” establish spacing units, including spacing units of non-uniform size and shape, when necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights. N.D.C.C. § 38-08-07(4) provides that the Commission “may” modify a previous order establishing spacing units when necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights. As explained in the preceding subsection, the Commission concluded that the proposed spacing unit configuration would prevent waste and avoid the drilling of unnecessary wells. Under these circumstances, the Commission is required to establish new spacing units and is permitted to modify existing units. Accordingly, the Commission’s ultimate decision is supported by its conclusions of law.

III. Langved’s Statutory Arguments Regarding Necessity, Waste, and Correlative Rights Are Without Merit.

[¶ 25] Langved appears to argue that the Commission exceeded its authority under N.D.C.C. ch. 38-08 in issuing Order Nos. 26538 and 26732. Continental notes, however, that the organization of Langved’s brief makes it difficult to identify which

arguments are intended to support which specific legal points. *See Holden v. Holden*, 2007 ND 29, ¶ 7, 728 N.W.2d 312, 315 ("We have repeatedly stated we are not ferrets and we 'will not consider an argument that is not adequately articulated, supported, and briefed.'"). Langved argues (1) that the Commission failed to explain why the non-uniform sizing for the new spacing units was "necessary," (2) that the Commission's orders will not prevent waste, and (3) that the Commission failed to protect his correlative rights. Brief of Appellant, ¶¶ 19–40.

[¶ 26] Regarding Langved's necessity argument, the Commission did in fact conclude that the proposed units were necessary to prevent waste and to avoid drilling unnecessary wells, based on its analysis of evidence presented by Continental. *See supra* Part II. Langved appears to suggest specifically that the 480-acre standup unit was unnecessary because the Commission could have included it within 1920-acre laydown units. Langved has never previously made such an argument regarding necessity in this case. *See, e.g.*, *Jury v. Barnes Cnty. Mun. Airport Auth.*, 2016 ND 106, ¶ 21, 881 N.W.2d 10, 16 ("Arguments not previously raised will not be considered for the first time on appeal."). Moreover, Langved's assertion that an alternative development plan would have been possible "in a technological sense," ignores the economic concerns that Continental's witnesses testified to and that the Commission must consider in setting spacing units. *See* N.D.C.C. § 38-08-07(2); Supp. App., at pp. 46–47. Accordingly, Langved's arguments concerning necessity are unavailing.

[¶ 27] Langved also argues that the Commission's orders will not prevent waste because the Commission relied on "speculative" yield information and failed to make certain calculations regarding recovery under the then-existing spacing units. Any

determination as to the ultimate recovery available from the Subject Lands will necessarily be "speculative." *See, e.g.*, Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Manual of Oil and Gas Terms*, 1105 (16th ed. 2015) (defining "ultimate recovery" as the "total *expected* recovery of oil and/or gas from a producing well, leasehold, pool, or field" (emphasis added)). More importantly, however, Langved fails to actually show that waste would occur under the new spacing configurations; Langved argues that additional calculations should have been made, but he does not indicate what these additional calculations would have shown, much less how they would have affected the Commission's decision regarding prevention of waste. *See* Brief of Appellant, ¶¶ 33–40. Without such information, Langved's arguments regarding waste are without merit.

[¶ 28] Finally, Langved makes arguments at various points in his brief regarding the Commission's supposed failure to protect correlative rights. Such arguments are not relevant to the issue of the Commission's statutory authority under N.D.C.C. § 38-08-07 to issue Order Nos. 26538 and 26732, because this was not the Commission's stated basis for establishing the proposed spacing units. *See* Brief of Appellant, ¶ 30; *see also Hystad*, 389 N.W.2d at 591 ("Within the exercise of its administrative judgment, however, the Commission must satisfactorily explain why different size spacing units are necessary to accomplish one or more of [the objectives identified in N.D.C.C. § 38-08-07]."). Accordingly, Langved's arguments concerning correlative rights are unavailing.

IV. Langved's Constitutional Argument Is Without Merit.

[¶ 29] Langved's constitutional argument, in sum, is that the Commission's modification of existing spacing units is unconstitutional in this case because it damaged Langved's "vested" property rights. Langved presents his argument as though he believes a taking has occurred, for which he must be compensated. *See, e.g.*, Brief of Appellant,

¶¶ 41–47. Langved appears to concede that if a taking of his property did occur as a result of the Commission's decision, the taking was for a public purpose. *See id.* ¶¶ 69–71. The North Dakota Constitution does not prohibit such a taking, but instead only requires that the property owner receive "just compensation." *See* N.D. Const. art I, § 16. The proper remedy for such a taking is an inverse condemnation action. *See, e.g.*, *Irwin*, 2015 ND 60, ¶ 7, 860 N.W.2d at 852. As explained by the district court, Langved is not permitted to turn his appeal of the Commission's orders into an inverse condemnation action. *See* Appellant's Appendix, at pp. 95–96. Accordingly, Langved's constitutional argument is unavailing.

[¶ 30] To the extent that Langved is not seeking compensation, but is instead arguing that the Commission is prohibited from modifying spacing units on the Subject Lands by the North Dakota Constitution, Langved's argument also fails. Langved's arguments about his property rights appear to be premised on his assertion that when production occurs from any well within an existing spacing unit, such production "*vests* the *correlative share* as a constitutionally protected property right." Brief of Appellant, ¶ 45. *But see id.* at ¶¶ 63–64 (listing in a conclusory fashion various interests that Langved has purportedly lost, and claiming that the Commission's decision violates Langved's oil and gas lease with Continental, rather than any constitutional provision). There does not appear to be any support for this proposition. Langved cites *In re Farmers Irrigation Dist.*, 194 N.W.2d 788 (Neb. 1972) as recognizing "the concept of vested rights in a well in production." Brief of Appellant, ¶ 48 (emphasis omitted). The decision actually approves an oil and gas agency's decision to make an order allocating production from an already-producing well retroactive to the date of first production, which would seem

contrary to the general point of Langved's argument. *In re Farmers Irrigation Dist.*, 194 N.W.2d at 791–92. The significance of *In re Cont'l Oil Co.*, 178 P.2d 880 (Okla. 1947) to Langved's arguments, also cited in the portion of Langved's brief concerned with vested property interests, is likewise unclear. *See* Brief of Appellant, ¶ 52. But even if Langved did possess property rights that were impaired by the Commission's orders, his arguments would still fail. This Court has previously held that the Commission exercises the police powers of the state when it orders spacing or compels pooling and such police powers supersede the rights of private property owners without violating the North Dakota Constitution. *Cont'l Res., Inc. v. Farrar Oil Co.*, 1997 ND 31, ¶¶ 15–16, 559 N.W.2d 841, 845–46. Accordingly, to the extent that Continental understands Langved's arguments regarding his purported property interests, they are without the support of legal authority or clear reasoning and should therefore be disregarded. *See, e.g.*, *Weeks v. N. Dakota Workforce Safety & Ins. Fund*, 2011 ND 188, ¶ 8, 803 N.W.2d 601, 604 ("[W]ithout supportive reasoning or citations to relevant authorities, an argument is without merit." (quoting *Riemers v. Grand Forks Herald*, 2004 ND 192, ¶ 11, 688 N.W.2d 167)).

[¶ 31] Continental acknowledges that the Commission did determine that Langved's mineral interests could potentially share in approximately 727,000 fewer BOE under the new spacing unit configuration. *See* App., pp. 16–17. This does not mean that Langved has somehow been deprived of his correlative rights, and thus does not affect the validity or propriety of the Commission's decision. *See, e.g.*, *Hanson*, 466 N.W.2d 587, 594 (N.D. 1991) (noting that a property owner's "correlative right is having the *opportunity* to produce, not having a guaranteed share of production") (quoting 1 B.

Kramer & P. Martin, *The Law of Pooling and Unitization* § 5.01[1] (3d ed. 1990))). Continental notes, however, that the Commission's orders authorized setback relief in the 480-acre unit containing a portion of Langved's minerals such that a fourth well could be drilled therein. *See* App., p. 40; *see also* Supp. App., at pp. 79–80. Such a well would, based on Continental's reserve estimates, would be likely to produce approximately 729,000 to 887,000 BOE and would more than make up for the 727,000 BOE that Langved has purportedly "lost." *See* Supp. App., at p. 10.

[¶ 32] Continental also acknowledges that Langved purports to have calculated "income" that he will lose by virtue of the newly established spacing units. *See* Appellant's Brief, ¶¶ 6–9.[3] None of these calculations were presented to the Commission. *See* Supp. App., at pp. 49–78; App., pp. 8–63. Evidence not presented to an agency may not be considered on an appeal of that agency's decision. *See Stenvold v. Workforce Safety & Ins.*, 2006 ND 197, ¶ 14, 722 N.W.2d 365, 368. On review of an agency's decision, this Court "do[es] not make independent findings of fact." *Filkowski v. Dir., N. Dakota Dep't of Transp.*, 2015 ND 104, ¶ 6, 862 N.W.2d 785, 789. Moreover, Langved's suggestion that these calculations somehow show "waste" of Langved's minerals is

[3] Continental notes that, among other problems with the calculations presented in Langved's brief, Langved appears to rely on Continental's Reserve Gains Summary, *see* Supp. App., at p. 12, in order to assert that each foot of wellbore under the Subject Lands is equivalent to 78 barrels of oil equivalent. *See, e.g.*, Brief of Appellant, ¶ 7. As indicated by the title and descriptions of the exhibit, as well as the testimony of Continental's expert, *see* Supp. App., at p. 35, the exhibit that Langved cites to includes only an estimate of the recovery to be gained by setback relief, i.e., the recovery that would be gained by extending a wellbore further toward a spacing unit border than previously allowed. It is incorrect for Langved to contend that this estimate is applicable to every foot of wellbore extending over the entirety of the Subject Lands without any additional evidence in support of this contention.

premised on a fundamental misunderstanding of waste in the context of oil and gas development. *See supra* Part II.B.2 (explaining that waste occurs when there is a reduction in the maximum amount of oil recoverable from a given pool). Accordingly, the Court should disregard the calculations presented in Langved's brief as irrelevant to the present appeal.

CONCLUSION

[¶ 33] Based on the foregoing, Continental requests that this Court affirm the district court's order affirming Commission Order Nos. 26538 and 26732.

Dated this 6th day of March, 2017

FREDRIKSON & BYRON, P.A.

By /s/Lawrence Bender

LAWRENCE BENDER, ND #03908
Attorneys for Appellee
Continental Resources, Inc.
1133 College Drive, Suite 1000
Bismarck, North Dakota 58501
Telephone: (701) 221-8700
lbender@fredlaw.com

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur Langved, Appellant and Constitutional Petitioner, vs. Continental Resources, Inc., Appellee, State of North Dakota by and thru the North Dakota Industrial Commission, and Quasi-Judicial Officers, Hon. Wayne Stenehjem, Attorney General and Commissioner, Hon. Jack Dalrymple, Governor and Commissioner, Constitutional Respondents.	)	Supreme Court No. 20160363

STATE OF NORTH DAKOTA)
) ss.
COUNTY OF BURLEIGH)

CERTIFICATE OF SERVICE

I hereby certify that on March 6th, 2017, I electronically filed the following documents:

Brief of Appellee Continental Resources, Inc.; and

Supplemental Appendix of Appellee Continental Resources, Inc.

with the Clerk of the North Dakota Supreme Court and served by E-mail on the following:

Fintan L. Dooley
findooley@gmail.com

Matthew A. Sagsveen
masagsve@nd.gov

David P. Garner
dpgarner@nd.gov

FREDRIKSON & BYRON, P.A.

By__/s/Lawrence Bender_____
LAWRENCE BENDER, ND #03908
Attorneys for Appellee
Continental Resources, Inc.
1133 College Drive, Suite 1000
Bismarck, North Dakota 58501
Telephone: (701) 221-8700
lbender@fredlaw.com

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COUNTY OF BURLEIGH)

CERTIFICATE OF SERVICE

I hereby certify that on March 8th, 2017, I electronically filed the following documents:

Brief of Appellee Continental Resources, Inc.

with the Clerk of the North Dakota Supreme Court and served by E-mail on the following:

Fintan L. Dooley
findooley@gmail.com

Matthew A. Sagsveen
masagsve@nd.gov

David P. Garner
dpgarner@nd.gov

FREDRIKSON & BYRON, P.A.

By /s/Lawrence Bender .
LAWRENCE BENDER, ND #03908
Attorneys for Appellee
Continental Resources, Inc.
1133 College Drive, Suite 1000
Bismarck, North Dakota 58501
Telephone: (701) 221-8700
lbender@fredlaw.com

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