20160363

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur Langved, Appellant and Constitutional Petitioner, v. Continental Resources, Inc., Appellee, v. State of North Dakota by and thru the North Dakota Industrial Commission, and Quasi-Judicial Officers, Honorable Wayne Stenehjem, Attorney General and Commissioner, Honorable Jack Dalrymple, Governor and Commissioner, Constitutional Respondents and Appellees.	)	**Supreme Court No. 20160363** **District Ct. No. 31-2015-CV-00142**

APPEAL FROM THE DISTRICT COURT
MOUNTRAIL COUNTY, NORTH DAKOTA
NORTH CENTRAL JUDICIAL DISTRICT

HONORABLE RICHARD L. HAGAR

BRIEF OF CONSTITUTIONAL RESPONDENTS AND APPELLEES STATE OF NORTH DAKOTA

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STATEMENT OF ISSUE

[¶1] The North Dakota Industrial Commission ("Commission") modified existing spacing orders pursuant to Commission Order No. 26538 and denied Appellant's motion for reconsideration pursuant to Commission Order No. 26732. In issuing these orders, because the Commission regularly pursued its authority and its findings and conclusions are sustained by the law and substantial and credible evidence, the district court order affirming the Commission orders should be affirmed.

STATEMENT OF CASE

[¶2] This is an appeal by Arthur Langved ("Langved") from an Order dated July 27, 2016 and Judgment dated September 1, 2016 of the District Court, Mountrail County, North Dakota affirming North Dakota Industrial Commission Order Nos. 26538, which granted Continental Resources, Inc.'s ("Continental") application to terminate certain spacing units and create three new spacing units within McKenzie and Mountrail Counties, and 26732, which denied Langved's Petition for Reconsideration. Appellant's Appendix ("Appx") at 93 – 105.

[¶3] On June 30, 2015, the Commission issued Order No. 26538 granting Continental's application to amend spacing units and well configurations in Sections 15, 16, 17, 18, 19, 20 and 21, Township 153 North, Range 93 West. Appx at 8 – 56. Langved subsequently Petitioned for Reconsideration on July 14, 2015, and argued the Commission's action was unconstitutional, flawed, and that the Commission had inadequately documented its analysis of Langved's correlative rights. Docket Entry 9, Doc ID # 14 Electronic Record on Appeal

("ROA") at 191 – 201. The Commission denied all of Langved's arguments and supplemented its correlative rights analysis in Order No. 26538 through the issuance of Order No. 26732 dated July 28, 2015. Appx at 57 – 63. Langved filed a Notice of Appeal on August 24, 2015. Docket Entry 9, ROA at 218 – 287.

[¶4] On appeal, the district court affirmed Commission Order Nos. 26538 and 26731 and specifically stated that "the Court is satisfied that the Commission's findings and conclusions are sustained by the law and by substantial and credible evidence." Appx at 104.

STATEMENT OF FACTS

[¶5] Langved owns undivided surface and mineral interests in Sections 15, 16 and 22, Township 153 North, Range 93 West. Docket Entry 9, ROA at 82. He owns 560 mineral acres in Section 15, 10 mineral acres in Section 16 and 120 mineral acres in Section 22. Appx at 62.

[¶6] On March 20, 2015, Continental filed an application to amend certain commission orders ("Continental Application") with the Commission in Case No. 23916. Appx at 9. Continental sought the termination of existing spacing units and the formation of new spacing units in Sections 15, 16, 17, 18, 19, 20, 21, and 22, Township 153 North, Range 93 West, in McKenzie and Mountrail Counties. Docket Entry 9, ROA at 1 – 6.

[¶7] The first Commission order Continental sought to amend was Order No. 21151, entered in Case No. 18850, and dated January 3, 2013, which established an overlapping 2560-acre spacing unit in the Elm Tree-Bakken Pool in sections 17, 18, 19, and 20. Docket Entry 9, ROA at 2. There were no

horizontal wells permitted or producing in this spacing unit at the time of the Application. Appx at 10. Continental had previously proposed to develop the 2560-acre spacing unit by drilling twenty-eight horizontal wells in a starburst pattern from a common drilling pad in section 19. Appx at 11.

[¶8] The second Commission order Continental sought to amend was Order No. 24889, entered in Case No. 22555, and dated July 3, 2014, which established two standup, or north-south oriented, 1280-acre spacing units in the Sanish-Bakken Pool, in Sections 15 and 22 and 16 and 21. Docket Entry 9, ROA at p. 2. Continental had previously proposed to develop each 1280-acre spacing unit by drilling fourteen horizontal wells approximately 321 feet apart parallel to the long axis of the spacing unit. Appx at 11. At the time the Commission issued Order No. 26538, the spacing unit described as Sections 15 and 22 had three horizontal wells completed within the east half of the unit: the Continental #1-15H Margaurite well; the Continental #2-15H1 Margaurite well; and the Continental #3-15H Marguarite well. Appx at 10.

[¶9] The Continental Application asked the Commission to create four new spacing units out of the pre-existing units. Docket Entry 9, ROA at 1 - 6. The first was a 480-acre spacing unit comprised of the E/2W/2SE/4, E/2W/2NE/4, and the E/2E/2 of Sections 15 and 22, which would include the Margaurite #1-15H, Margaurite #2-15H1, and Margaurite #3-15H wells, effective from the date of first operations. Appx at 11. No additional wells were planned for this unit. Docket Entry 5, Transcript of Hearing dated April 23, 2015 ("TOH 4/23/2015") at 12. The second unit was a stand-up 1280-acre spacing unit comprised of

Sections 18 and 19. Appx at 11. Continental proposed to develop this spacing unit by drilling thirteen horizontal wells, from a common drilling pad in the SW/4SW/4 of Section 19. Appx at 11.

[¶10] The third and fourth spacing units proposed were two lay-down 1680-acre spacing units. Appx at 11. The first unit would be comprised of Sections 16 and 17, and the W/2 and the W/2W/2E/2 of Section 15. Appx at 11. Continental proposed to develop this spacing unit by drilling thirteen horizontal wells, from two common drilling pads in the NE/4 and SE/4 of Section 15. Appx at 11. The second unit would be comprised of Sections 20 and 21 and the W/2 and W/2W/2E/2 of Section 22. Appx at 11. Continental proposed to develop the spacing unit by drilling thirteen horizontal wells from two common drilling pads, one in the SE/4 of Section 15 and one in the SW/4 of Section 23. Appx at 11.

[¶11] On April 23, 2015, the Commission held an evidentiary hearing on the Continental Application. TOH 4/23/2015 at 1 – 83. Continental's witnesses provided evidence that the existing development plan proposed for the spacing units was inefficient and it would cause the drilling of unnecessary wells. TOH 4/23/2015 at 37 – 47, 52 – 63. Continental also submitted evidence that surface access problems also justified its application to modify the spacing units. TOH 4/23/2015 at 18 – 23. Langved testified in opposition to the Continental Application, and Langved's attorney cross-examined Continental's witnesses. TOH 4/23/2015 at 23 – 26, 48 – 52, 65 – 68. Upon request from Langved and Commission staff, the Administrative Hearing Record ("Hearing Record") was left open after the April 23rd hearing to receive supplemental information from

Continental. Continental supplemented its evidence with additional engineering exhibits (Docket Entry 9, ROA at 59 – 63) and the parties thereafter filed post-hearing briefs. Docket Entry 9, ROA at 74 – 94, 125 – 135. The Commission subsequently granted the Continental Application through Order No. 26538 on June 30, 2015, Appx at 8 – 49, and denied Langved's Petition for Reconsideration through Order No. 26732 on July 28, 2015. Appx at 57 – 63.

ARGUMENT

I. The Court should reject Langved's constitutional claims.

[¶12] The District Court held that the appeal of a Commission order pursuant to N.D.C.C. § 38-08-14 is not an inverse condemnation action and, as such, did not address Langved's inverse condemnation claims. Langved argues that the Commission's application of its statutes and rules regarding the establishment of spacing units through the issuance of Order No. 23586 was "as applied unconstitutional." Brief of Appellant, at ¶ 2. Additionally, he argues that "Article I, Section 16 of the North Dakota Constitution affords him substantive due process rights and thereby protects his vested property interests." Brief of Appellant, at ¶ 3. Specifically, Langved contends that that the Commission's modification of existing spacing units constituted an unconstitutional taking of his property because he has a vested and protected interest in a share of production from the 1280-acre spacing unit covering Sections 15 and 22 ("Section 15/22 Spacing Unit"); that he is entitled to compensation because the modifications to the spacing units will reduce his expected mineral royalties; and that his surface estate has been taken without compensation. Brief of Appellant, at ¶¶ 1 – 90.

He also claims that the modification of the spacing units could only have been accomplished through a condemnation action and that the matter should be remanded to the Commission to establish a record so that an inverse condemnation case can be filed. Brief of Appellant, at ¶ 10.

A. The appeal of Commission orders cannot be converted into an inverse condemnation case.

[¶13] "Judicial review of a Commission order is governed by N.D.C.C. §38-08-14(3), providing, '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.'" *Gadeco, LLC v. Indus. Comm'n*, 2013 ND 72, ¶ 7, 830 N.W.2d 535. This Court applies the same standard of review to appeals from district court involving Commission orders. *Id.* As such, this Court must uphold a Commission order modifying spacing units if the Commission regularly pursued its authority and its findings and conclusions are sustained by the law and by substantial and credible evidence. *See* N.D.C.C. § 38-08-14; *Hystad v. Indus. Comm'n*, 389 N.W.2d 590, 592 (N.D. 1986); *Amoco Prod. Co. v. Indus. Comm'n*, 307 N.W.2d 839, 841 (N.D. 1981). More specifically, this Court is required to apply this standard to determine whether the modification of the spacing units was "necessary to prevent waste, to avoid the drilling of unnecessary wells or to protect correlative rights." N.D.C.C. § 38-08-07; *Hystad*, 389 N.W.2d at 593; *Amoco Prod. Co.*, 307 N.W.2d at 841. In fact, applying this standard of review, this Court has confirmed the Commission's statutory authority to modify spacing units even when they contain producing wells as long as its decision is supported

by substantial evidence. *Hystad*, 389 N.W.2d at 591; *Amoco Prod. Co.*, 307 N.W.2d at 841. Moreover, this Court has stated that if a party seeks just compensation for an alleged taking by the state, "the property owner must take the initiative by commencing an action for inverse condemnation." *Eck v. City of Bismarck*, 283 N.W.2d 193, 197 (N.D. 1979). This is not an inverse condemnation action. Thus, because N.D.C.C. § 38-08-14 explicitly sets forth the standard of review of appeals of Commission orders, it cannot be altered by the fact that Langved has raised constitutional issues as part of this appeal.

[¶14] Furthermore, in similar contexts, this Court has explicitly refused to convert an administrative appeal into an inverse condemnation case. In *Gowan v. Ward Cnty. Comm'n*, 2009 ND 72, ¶ 11, 764 N.W.2d 425; and *Hagerott v. Morton Cnty. Bd. Of Comm'rs*, 2010 ND 32, ¶ 24, 778 N.W.2d 813, the North Dakota Supreme Court held that a party could not turn an appeal of a county commission decision under N.D.C.C. § 28-34-01 into an inverse condemnation action, and declined to address the claims. It follows from these decisions that the Court should apply these same principles to this administrative appeal and decline to consider any of Langved's claims that the Commission orders constitute an unconstitutional taking.

B. The Commission's modification of spacing units is a proper exercise of its police power.

[¶15] The Commission's proper exercise of its police power in modifying spacing units cannot give rise to an inverse condemnation claim. *Cont'l Res. Inc. v. Farrar Oil*, 1997 ND 31, ¶ 16, 559 N.W.2d 841. This Court has previously rejected a claim that a properly issued Commission order can constitute a taking

of private property under Article I, Section 16 of the North Dakota Constitution and, thus, has held that the exercise of the Commission's police powers supersedes a property interest owner's right to use his oil and gas properties as he pleases. *Id.*

[¶16] In *Farrar*, the Court rejected a claim that a pooling order issued by the Commission constituted an unlawful taking and, as such, violated, among other laws, Article I, Section 16 of the North Dakota Constitution. *Id* at ¶ 15. The Court held that "the police powers of the state are properly exercised when the Industrial Commission orders spacing or compels pooling." *Id.* at ¶ 16. "Property is subject to the police power of the state 'to impose such restrictions upon private rights as are practically necessary for the general welfare of all.'" Id. at ¶ 15 (citation omitted).

[¶17] Consistent with *Farrar*, the police powers exercised by the Commission in this case effectively superseded Langved's right to use his oil and gas properties as he pleases. Id. at ¶ 16. "To hold otherwise ... would frustrate the purposes of the North Dakota Resources Act and would make an Industrial Commission's spacing order that modifies an existing spacing unit ineffectual." Id. at ¶ 17.

[¶18] Additionally, although Langved contends that the Commission's orders deprived him of his substantive due process rights under Article 1, Section 16 of the North Dakota Constitution, his arguments do not provide legitimate support for such claims. Brief of Appellant, at ¶ 3, 44, 62. First, for all the reasons stated above, just as Langved cannot convert appeals of Commission orders into inverse condemnation claims, he also cannot convert them into constitutional due

process claims. Second, he cites to *Baeth v. Hoisveen*, 157 N.W.2d 730 (N.D. 1968), as supporting his position that once his mineral rights were put into use they became vested and required the Commission to initiate a condemnation action before it could modify the spacing units. Brief of Appellant, at ¶ 62. In *Baeth*, however, the Court addressed the issue of public and private use of underground waters and the constitutionality of N.D.C.C. § 61-01-01 which regulated the use and ownership of underground waters. *Baeth*, 157 N.W.2d at 730 (N.D. 1968). As such, *Baeth* is not applicable to an appeal of Commission orders which are governed by its own, distinct regulatory scheme. Moreover, the Court declared N.D.C.C. § 61-01-01 as a constitutional exercise of the state's police power which, as previously noted, this Court has also done with respect to modification of spacing orders. *Id.* at 733; *see Farrar*, 1997 ND 31 at ¶16. Thus, this appeal should be reviewed in accordance with the statutory standard of review.

II. The standard of review requires deference to the Commission decision.

[¶19] Review of Commission decisions is limited. The Court must begin with the proposition that the Commission's decisions are "presumed. . . correct." *Hanson v. Indus. Comm'n*, 466 N.W.2d 587, 590 (N.D. 1991). As noted above, the Commission findings of fact must be sustained if they are supported by "substantial and credible evidence." N.D.C.C. § 38-08-14(3). This is different than the standard usually applied in administrative review cases, requiring that the agency findings of fact be supported by a preponderance of the evidence. N.D.C.C. § 28-32-46.

[¶20] "Substantial evidence" means merely such evidence that a "'reasonable mind might accept as adequate to support a conclusion.'" *Gadeco, LLC v. Indus. Comm'n*, 2012 ND 33, ¶ 15, 812 N.W.2d 405 (quoting *Hanson*, 466 N.W.2d at 590). By comparison, "preponderance of the evidence" is a "weight of the evidence" test. *Hanson*, 466 N.W.2d at 590 (citing *Power Fuels, Inc. v. Elkin*, 283 N.W.2d 214, 220 (N.D. 1979)).

[¶21] The "substantial evidence" standard is "something less than" the weight of the evidence and less than the preponderance of the evidence. *Id.* The "substantial evidence" test gives more deference to the agency; the expertise of an agency is entitled to respect and appreciable deference when the question before an agency is of a highly technical nature. *Id.* at 590-591; *Grey Bear v. N.D. Dept. of Human Services*, 2002 ND 139, ¶ 7, 651 N.W.2d 611. Even if inconsistent conclusions might be drawn from the evidence, this does not prevent the Commission's decision from being supported by substantial evidence. *Hanson*, 466 N.W.2d at 590.

[¶22] Review of the Commission's decision is further informed by the principle that courts defer to a reasonable interpretation of a statute by the agency responsible for enforcing it. *GEM Razorback, LLC v. Zenergy, Inc.*, 2017 ND 33, ¶12, __ N.W.2d __ ; *Cass County. Elec. Co-op., Inc. v. Northern States Power Co.*, 518 N.W.2d 216, 220 (N.D. 1994) (citing *Turnbow v. Job Service North Dakota*, 479 N.W.2d 827, 830 (N.D. 1992)); *Grey Bear*, 2002 ND 139 at ¶ 7. The North Dakota Supreme Court has stated it is reluctant "'to substitute its own judgment for that of qualified experts in matters entrusted to administrative

agencies.'" *Amoco Prod. Co.*, 307 N.W.2d at 842 (quoting *Bank of Hamilton v. State Banking Bd.*, 236 N.W.2d 921, 925 (N.D. 1975)).

[¶23] The Court's review regarding questions of law is broader, but if such a question involves interpreting a statute that contains some ambiguity, and it is one the agency is charged with administering, then the Court must give some deference to the agency's construction. *Clapp v. Cass County*, 236 N.W.2d 850, 856 (N.D. 1975); *Grey Bear*, 2002 ND 139 at ¶ 7; *Consolidated Telephone Co-op v. Western Wireless Corp.*, 2001 ND 209, ¶ 7, 637 N.W.2d 699.

III. The Commission regularly pursued its authority when it exercised its continuing jurisdiction to amend Commission Order Nos. 18850 and 24889.

[¶24] Langved argues the Commission did not have jurisdiction to amend Commission Order Nos. 18850 and 24889 because once production started from the Section 15/22 Spacing Unit, he obtained a vested property interest in all present and future production from the spacing unit that could only be modified or terminated through a condemnation process. Brief of Appellant, at ¶¶ 5 – 10. Stated differently, Langved argues the Commission was divested of its continuing jurisdiction over the spacing unit as soon as a well in the Section 15/22 Spacing Unit began producing oil. Brief of Appellant, at ¶ 10. Consequently, Langved argues the only legal remedy available to the Commission was a condemnation proceeding. Brief of Appellant, at ¶ 10. The Court should reject Langved's argument because it has no basis in the law and disregards the Commission's broad statutory authority, which it regularly pursued, to manage the state's oil and gas resources.

[¶25] "'Like other states, the North Dakota legislature recognized that traditional property law principles contributed to inefficiency and waste in oil and gas development, and so enacted an Act for the Control of Gas and Oil Resources in 1953.'" *Gadeco, LLC*, 2012 ND 33 at ¶ 4 (citation omitted). The Legislature has delegated the Commission comprehensive powers to regulate oil and gas development. N.D.C.C. § 38-08-01; *Cont'l Res. Inc.*, 1997 ND 31 at ¶ 12. The Commission has continuing jurisdiction over persons and property necessary to enforce its delegated powers, the authority to determine whether natural resources are being or could be wasted, and the authority to fix spacing units for an oil or gas pool to avoid waste or protect correlative rights. N.D.C.C. §§ 38-08-04 and 38-08-07; *Gadeco, LLC*, 2012 ND 33 at ¶ 4; *Hystad*, 489 N.W.2d at 594 – 597; *see also* Appx at 54 (the Commission states in Order No. 26538 that it has continuing jurisdiction in this matter and reserves the authority to amend the Order).

[¶26] The law requires the Commission to set and/or modify spacing units for a pool "[w]hen necessary to prevent waste, to avoid the drilling of unnecessary wells, or to protect correlative rights." N.D.C.C. § 38-08-07. Spacing units are to be of uniform size and shape for a pool, unless any of the purposes for creating a spacing unit dictate otherwise. N.D.C.C. § 38-08-07(1). "The size and the shape of spacing units are to be such as will result in the efficient and economical development of the pool as a whole." N.D.C.C. § 38-08-07(2). Finally, when necessary to further these fundamental objectives:

> an order establishing spacing units in a pool may be modified by the Commission to increase or decrease the size of spacing units in

> the pool or any zone thereof, or to permit the drilling of additional wells on a reasonably uniform plan in the pool, or any zone thereof, or an additional well on any spacing unit thereof.

N.D.C.C. § 38-08-07(4) (emphasis added).

[¶27] The Commission's statutory authority, and the North Dakota Supreme Court's interpretation of that authority, directly contradict Langved's argument that the Commission is divested of its regulatory jurisdiction over the spacing unit or pool when a well within a spacing unit begins production. *See Cont'l Res. Inc.*, 1997 ND 31 at ¶ 16. There is also no support for Langved's claim that the Commission must use condemnation procedures to amend or modify spacing units.

[¶28] Furthermore, Langved provides no material legal authority to substantiate his contention that once production started on the Section 15/22 Spacing Unit, he obtained a vested property interest that altered the Commission's authority to modify spacing units other than to cite to the 1972 Nebraska Supreme Court decision in *Application of Farmers Irrigation District.* Brief of Appellant, at ¶ 48 – 52. His reliance on this case, however, is misplaced as it does not support his position. Relying on the concept of protection of correlative rights, the Court concluded that the appellant's mineral acreage could not be excluded from the share of the production from a well that was producing from an area that covered his mineral interests and that the only way to fully compensate the owner was to make the relevant pooling order entered by the commission retroactive to the date of first production. *Application of Farmers Irr. Dist.*, 194 N.W.2d 788, 791 – 792 (Neb. 1972). This case actually undermines Langved's position that his

interest became vested upon production given that the Commission determined that the spacing units covered by Order Nos. 26538 and 26732 are more protective of correlative rights than the previous units. Thus, the holding of this case supports the Commission's orders stating the modified spacing should be made effective as of the date of first operations. In fact, the North Dakota Supreme Court has adopted this position. *See Texaco, Inc. v Indus. Comm'n of State of North Dakota*, 448 N.W.2d 621, 624 (N.D. 1989). As this Court noted:

> 'To do so in a fair, reasonable, and adequate manner, and to permit an adjoining landowner to obtain, recover, and received his just and equitable share, the pooling order may be made retroactive to the time production started, and insofar as costs are concerned, to the start of drilling operations. Unless the order may be made effective retroactively, it may on occasion verge on the confiscatory.'

Id. at 624 (quoting *Application of Farmers Irr. Dist.*, 194 N.W.2d at 791 – 792 (Neb. 1972).

[¶29] Based upon the foregoing, this Court should determine the Commission regularly pursued its authority when it issued Commission Order Nos. 26538 and 26732.

IV. Commission Order Nos. 26538 and 26732 protect correlative rights and are sustained by the law and by substantial and credible evidence.

[¶30] The Commission concluded the spacing units and new well configurations proposed by Continental will protect correlative rights. Appx at 17. The North Dakota Legislature has not, by statute, expressly defined the phrase "correlative rights." The North Dakota Supreme Court, however, has consistently accepted and relied upon the following definition of "correlative rights":

> The opportunity afforded, so far as it is practicable to do so, to the

> owner of each property in a pool to produce without waste his just and equitable share of the oil or gas, or both, in the pool; being an amount, so far as can be practically determined, and so far as can practicably be obtained without waste, substantially in the proportion that the quantity of recoverable oil or gas, or both, under such property bears to the total recoverable oil or gas, or both, in the pool, and for such purposes to use his just and equitable share of the reservoir energy.' (citation omitted). There appear to be two aspects of the doctrine of correlative rights: (1) as a corollary of the rule of capture, each person has a right to produce oil from his land and capture such oil or gas as may be produced from his well, and (2) a right of the land owner to be protected against damage to a common source of supply and a right to a fair and equitable share of the source of supply.

Amoco Prod. Co., 307 N.W.2d at 842, n.4. The Court relied upon the above definition in *Slawson v. North Dakota Indus. Comm'n*, 339 N.W.2d 772, 774 n.1 (N.D. 1983) and *Hystad*, 389 N.W.2d at 595 – 596. The Commission also relied upon this definition in Order No. 26538. Appx at 16 (citing *Hanson*, 466 N.W.2d at 591).

[¶31] The long-standing definition explains that a mineral owner has the right of producing and capturing such oil and gas as may be produced on that owner's land, the right to be protected against damage to a common source of supply, and the right to a fair and equitable share of the source of supply. The definition, however, does not guarantee a certain share of production. In *Hanson*, the Court explained:

> The correlative right is having the *opportunity* to produce, not having a guaranteed share of production. Once the state has afforded that opportunity, it has protected the correlative rights of a party; it need not ensure a share of production to a party.

Hanson, 466 N.W.2d at 594 (quoting Kramer & P. Martin, *The Law of Pooling and Unitization,* at § 5.01[1]) (3rd ed. 1990) (emphasis added).

[¶32] The North Dakota Supreme Court has recognized that the consideration and analysis of correlative rights requires a certain expertise: "'[t]he physical characteristics and reservoir dynamics of the common source of supply necessitate the use of highly technical geological and economic information to determine the extent of correlative rights.'" *Id.*, at 591 (quoting *Hystad,* 389 N.W.2d at 596 (Justice VandeWalle concurring)). But the "task of protecting correlative rights 'is far from an exact science and the scales may not weigh evenly.'" *Id.* The Court's definition formed the basis of the Commission's analysis that addressed, and rejected, Langved's arguments regarding correlative rights. Appx at 15 – 17.

[¶33] Langved argues the Commission failed to protect his correlative rights because Commission Order No 26538 changes the size of the spacing unit containing his minerals thus reducing his recoverable royalties. Brief of Appellant, at ¶ 5 – 10. A central point in Langved's argument, which is also the apparent basis for his takings argument, is that a "correlative right" in a spacing unit is a vested property interest that entitles an owner of leased and pooled minerals to a share of an oil and gas producer's estimated total recovery, even if the producer later seeks to amend a spacing unit to accommodate a more efficient plan for extracting oil from a pool. Brief of Appellant, at ¶ 13 – 15. Langved agrees that the Commission's definition of correlative rights is consistent with the law of North Dakota (Brief of Appellant, at ¶ 74), but argues that the only way he will be afforded an opportunity to develop his mineral interests will be for the matter to be remanded to the Commission and for the

Commission "to require development of the underpassed minerals in the 480 Unit." Brief of Appellant, at ¶ 75.

[¶34] The Commission has determined, however, that the spacing and well configuration under Order No. 26538 will result in greater production from fewer wells. Specifically, the Commission found that the modified spacing configuration would produce approximately 1 million more barrels of oils from 14 fewer wells. Appx at 16, 62.

[¶35] The Court's definition of correlative rights, which Langved agrees with and the Commission relies upon, does not entitle an owner of leased minerals pooled within a spacing unit to a guaranteed share of estimated production. Nor is the Commission to be held to an exacting standard such that *any* calculated loss of production and royalties, equates to damage and failure to protect correlative rights. Brief of Appellant, at ¶ 5 – 10, 31 – 40 (emphasis added); *see Hanson*, 466 N.W.2d at 591.

[¶36] Correlative rights are protected when the spacing units established for a particular well, or wells, contain the lands for which oil and gas will be drained. N.D.C.C. § 38-08-07; *see Hystad,* 389 N.W.2d at 599 (recognizing drainage issues as they concern spacing and protection of correlative rights). The Margaurite wells are spaced in the east half of sections 15 and 22. The oil and gas underlying the east half is therefore being drained by the Margaurite wells. There is no evidence in the record that the Margaurite wells are producing oil and gas reserves from the west half of sections 15 and 22. Therefore, the down-spacing of the 1280-acre spacing unit for the Margaurite wells does in fact

protect the correlative rights of all owners in sections 15 and 22. Likewise, the evidence presented to the Commission in support of the Continental Application indicated that the laydown units would produce, or drain, oil and gas underlying sections 15, 16 and 17. Docket Entry 9, ROA at 2 – 4. The portions of the wellbore that traverse through the east half of sections 15 and 22 will be cemented off and will not produce minerals from that unit. Docket Entry 9, ROA at 23 – 31.

[¶37] Langved argues the Commission's computations should be disregarded because they are based on speculative yields. He submits an alternate interpretation of the evidence submitted to the Commission. Brief of Appellant, at ¶¶ 6 – 9, 33, 34. The court should reject Langved's offer to disregard the Commission's technical conclusions. "If the subject matter of a question before an administrative agency is of a highly technical nature, the expertise of the agency is entitled to respect and appreciable deference." Hanson, 466 N.W.2d at 591. Additionally, "determinations of administrative bodies [are ordinarily] presumed to be correct." Id. at 590. Langved presented no expert testimony at the hearing to support his alternative analysis of the production data.

[¶38] Finally, due to the Commission's specialization and expertise, the North Dakota Legislature bestowed power to the Commission so that it may issue orders to fairly effectuate oftentimes highly technical and complex oil and gas statutes and administrative rules. Consequently, judicial deference is consistently given to reasonable and informed orders issued by the Commission due to the Commission's subject matter expertise and judgment as well as its

experience. Because substantial and credible evidence supports the Commission's findings and conclusions within its applicable orders, and judicial deference should be appropriately afforded to those reasonable and permissible findings and conclusions, Commission Order Nos. 26538 and 26732 should be upheld.

V. Commission Order Nos. 26538 and 26732 will prevent waste and avoid the drilling of unnecessary wells.

[¶39] The Commission determined the evidence showed the proposed spacing units and well configurations would prevent waste and the drilling of unnecessary wells. Appx at 17. There is substantial evidence in the Hearing Record to support the Commission's conclusions.

[¶40] At the hearing, Continental's witnesses testified that the company could develop the proposed spacing units with a more efficient drilling plan than the planned "starburst" pattern if the current spacing units were terminated or modified by the Commission. Docket Entry 5, TOH 4/23/2015 at 38 – 41, 47 – 48, 77 – 81. Continental testified through its expert that horizontal wells could be drilled in a north-south or east-west orientation, as opposed to a starburst pattern, or diagonal across the unit, which would create fractures that intersect and communicate with the natural fractures, increasing the estimated ultimate recovery. Docket Entry 5, TOH 4/23/2015 at 38 – 45, 47 – 48, 77 – 81.

[¶41] Continental provided further evidence that there were complications associated with wells developed in a starburst pattern such as skipped stimulation stages due to well bore proximity and anti-collision issues. Docket Entry 5, TOH 4/23/2015 at 38 – 45, 77 – 81; Docket Entry 9, ROA at 208 – 209.

Continental witnesses further submitted evidence to the Commission through exhibits E-10 and E-11 that included an economic overview of 1280-acre and 1680-acre spacing units. Docket Entry 5, TOH 4/23/2015 at 40. These exhibits demonstrate that the new development plan will increase the ultimate oil and gas recovery from the lands covered by the Continental Application.

[¶42] Continental also provided expert testimony that Continental has utilized this pattern only where there was absolutely no other viable option to efficiently develop a unit. Docket Entry 5, 4/23/2015 TOH at 77. Continental supplemented the Hearing Record with additional evidence to the Commission that offered both qualitative and quantitative comparisons of the starburst pattern compared to Continental's proposed north-south, east-west pattern. Docket Entry 9, ROA at 76 – 80. Langved failed to contradict Continental's evidence.

[¶43] The Commission accepted the evidence submitted by Continental and relied upon it to support the conclusions in paragraph 38 of Order No. 26538 that the proposed spacing units and well configurations will prevent waste and the drilling of unnecessary wells. Appx at 11 – 17. The Commission added additional quantitative analysis of the proposed spacing units and ultimate recoveries for the proposed wells in Paragraph Nos. 36 – 37, which further supported the Commission's conclusions in paragraph 38. Appx at 16 – 17. In response to Langved's Petition for Reconsideration, the Commission expanded its analysis of the affected lands in Commission Order No. 26732. Appx at 57 – 63. Both orders state the estimated ultimate recovery for the starburst pattern was approximately 36.4 million barrels of oil equivalent produced from 56 wells.

Appx at 16, 61 – 62. The Commission also estimated the proposed spacing unit modifications would result in a total of approximately 37.352 million barrels of oil equivalent produced from only 42 wells. Appx at 9, 61 – 62.

[¶44] Langved argues the evidence supplied by Continental during and after its hearing is insufficient to support the Commission's findings that new spacing units will prevent waste and the drilling of unnecessary wells. Brief of Appellant, at ¶ 31 – 40. Specifically, Langved argues that, in light of the "immense prejudice" to his mineral interest, the Commission was required to calculate the ultimate recovery of Sections 15 and 22 and 16 and 21, independent of Sections 17, 18, 19 and 20, in order to determine whether the modified spacing units prevented waste. Brief of Appellant, at ¶ 26, 32 – 34. He claims the Commission manufactured numbers to support its conclusions by including eight total sections in its analysis rather than just reviewing the four sections included within the spacing units in which he owned mineral interests. Brief of Appellant, at ¶ 20. Furthermore, he contends that no waste existed in the development of Sections 15 and 22 and 16 and 21 as 1280-acre spacing units but that the modified spacing configuration will produce waste. Brief of Appellant, at ¶ 10, 31 – 40. The only evidence Langved offers in support of this contention is a calculation of lost income that is merely an extrapolation from estimates Continental provided regarding production from reduced setbacks. Brief of Appellant, at ¶ 5 – 10.

[¶45] All of Langved's arguments fail for several reasons. First, contrary to Langved's arguments, the Commission made detailed findings as to the ultimate recovery from each of the sections and the total number of wells that would be

drilled under each type of spacing configuration. Appx at 16, 61 – 62. The Commission even provided a separate analysis of Langved's mineral interests to support its conclusions. Appx at 16 – 17, 61 – 62. The Commission noted that the estimated ultimate recovery Langved could have realized under the former spacing configuration could potentially have been greater than what he would realize under the new spacing configuration. Appx at 16 – 17, 62. As previously noted herein, *supra* ¶ *29*, and as recognized by the Commission, however, the duty to protect correlative rights and prevent waste is not isolated to one individual's interests but rather includes all interests within the affected lands. Appx at 61. The Commission demonstrated that the ultimate recovery from the proposed spacing configuration was greater than the existing configuration and would be realized with 14 fewer wells. Appx at 16 – 17, 61 – 62. Second, Continental applied to the Commission to modify the spacing units encompassing sections 15, 16, 17, 18, 19, 20, 21 and 22. Docket Entry 9, ROA at 1 – 6. Thus, the Commission was required to consider the ultimate impact on all eight sections in addressing the issues of correlative rights, waste and the drilling of unnecessary wells as they concern all owners. Despite Langved's arguments, the Commission could not sufficiently determine the ultimate benefit to all owners affected by the proposed spacing configuration by only considering the spacing units covering the sections in which Langved owned mineral interests, i.e., Sections 15, 16, 21 and 22. Finally, it is undisputed that the proposed spacing configuration requires 14 fewer wells to realize a greater ultimate recovery. Continental presented evidence at the hearing demonstrating this fact that was

uncontroverted by Langved. Docket Entry 9, ROA at 23 – 27. Thus, the proposed spacing unit will prevent the drilling of unnecessary wells.

[¶46] The record indicates the Commission regularly pursued its authority when it modified the spacing units and its findings and conclusions that the proposed spacing units will prevent waste and the drilling of unnecessary wells are sustained by the law and by substantial and credible evidence.

VI. The Commission properly considered surface access issues as a basis for altering previously ordered spacing units.

[¶47] Continental provided substantial testimony that numerous surface topography issues[1] contributed to issues with identifying a proper spacing configuration for the relevant sections. TOH 4/23/2015 at 17 – 25, 59 – 62. Continental witnesses testified it had difficulties obtaining surface locations for the well pads. TOH 4/23/2015 at 17 – 25, 59 – 62; Appx at 12. Contributing factors included the fact that approximately two thirds of the spacing units were under the Lake Sakakawea, steep terrain along the shoreline, current well pads built by another operator, cultural resources, and an existing pipeline. Docket Entry 9, ROA at 19 – 21; TOH 4/23/2015 17 – 25, 68 - 69; Appx at 12. Continental acknowledged it could develop the standup 1280-acre spacing units described as Sections 15 and 22 and 16 and 21, from surface locations outside of the spacing unit. Continental presented evidence, however, that it had unsuccessfully spent more than a year trying to negotiate surface use

[1] The maps at Docket Entry 9, ROA at 19 – 21 illustrate the surface access problems associated with the area.

agreements with Langved for pad sites outside the spacing units. TOH 4/23/2015 21 – 23, 68 – 69; Appx at 12.

[¶48] Langved argues that the Commission does not have authority to modify or terminate a spacing unit based upon surface access or the economics of production. Brief of Appellant, at ¶ 20, 51. The Commission's broad authority includes the ability to consider surface access and the Commission expressly stated in its Order No. 26538 that it has historically considered surface access. Appx at 15. Order No. 26538 expressly states the Commission retained continuing jurisdiction over the spacing units. Appx at 15. Order No. 26538 also states the Commission has modified spacing units in the past based upon surface access issues including topographic features or cultural resources. Appx at 15. "It would be impractical to establish spacing units knowing they are technologically impossible to develop or cannot be economically developed due to access issues." Appx at 15. Order No. 26538 further states that the "[c]ommission has previously . . . altered spacing units when new evidence is discovered in order to best protect correlative rights, prevent waste, and prevent the drilling of unnecessary wells." Appx at 15.

[¶49] The Hearing Record indicates the Commission regularly pursued its authority when it considered the economics of oil production and surface access issues and its findings and conclusions are sustained by the law and by substantial and credible evidence.

CONCLUSION

[¶50] The Commission determined that the modification of existing spacing units pursuant to Order Nos. 26538 and 26732 prevented waste, avoided the drilling of unnecessary wells and protected correlative rights. Because the Commission regularly pursued its authority and its findings and conclusions are sustained by the law and by substantial and credible evidence, these orders should be upheld.

Dated this 8th day of March, 2017.

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur Langved, As Appellant and Constitutional Petitioner, v. Continental Resources, Inc., As Appellee, v. 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 and Hon. Doug Goehring, Agriculture Commissioner and Commissioner, As Appellee and Constitutional Respondents.	**AFFIDAVIT OF SERVICE BY US MAIL AND EMAIL** **Supreme Court No. 20160363** **District Ct. No. 31-2015-CV-00142**

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

[¶1] Lisa A. Johnson states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 8th day of March, 2017, I served the attached **BRIEF OF APPELLEE AND CONSTITUTIONAL RESPONDENTS STATE OF NORTH DAKOTA** upon Fintan L. Dooley and Lawrence Bender, by email and by

placing a true and correct copy thereof in an envelope addressed as follows and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

Fintan L. Dooley
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Bismarck, ND 58501
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Dated this 8th day of March, 2017.

Lisa A. Johnson

Subscribed and sworn to before me
this 8th day of March, 2017.

Notary Public

DONNA J CONNOR
Notary Public
State of North Dakota
My Commission Expires Aug. 6, 2021

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Arthur Langved, Appellant and Constitutional Petitioner, v. Continental Resources, Inc., Appellee, v. State of North Dakota by and thru the North Dakota Industrial Commission, and Quasi-Judicial Officers, Honorable Wayne Stenehjem, Attorney General and Commissioner, Honorable Jack Dalrymple, Governor and Commissioner, Constitutional Respondents and Appellees.	)	**AFFIDAVIT OF SERVICE BY US MAIL AND EMAIL** **Supreme Court No. 20160363** **District Ct. No. 31-2015-CV-00142**

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

[¶1] Lisa A. Johnson states under oath as follows:

[¶2] I swear and affirm upon penalty of perjury that the statements made in this affidavit are true and correct.

[¶3] I am of legal age and on the 10th day of March, 2017, I served the attached corrected title page of the **BRIEF OF CONSTITUTIONAL RESPONDENTS AND APPELLEES STATE OF NORTH DAKOTA** upon Fintan L. Dooley and Lawrence Bender, by email and by placing a true and correct copy

thereof in an envelope addressed as follows and depositing the same, with postage prepaid, in the United States mail at Bismarck, North Dakota.

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Dated this 10th day of March, 2017.

Lisa A. Johnson

Subscribed and sworn to before me
this 10th day of March, 2017.

Notary Public

KAREN L ROBERTS
Notary Public
State of North Dakota
My Commission Expires December 20, 2017