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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Sandra Horob, Steven Poeckes, Steve Shae, Mike Shae, and Paul Shae,	)	
Plaintiffs/Appellants,	)	Supreme Court No. 20150203
vs.	)	
Zavanna, LLC, et al.,	)	
Defendants/Appellees.	)	

Appeal from Summary Judgment Dated May 28, 2015
Case No. 53-2014-CV-00157
County of Williams, Northwest Judicial District
The Honorable Paul Jacobson, Presiding

BRIEF OF DEFENDANTS/APPELLEES ZAVANNA, LLC; ATLANTIC RICHFIELD CO.; JOHN N. KLEMER; MARY K. HARRIS; STEVEN H. HARRIS FAMILY LIMITED PARTNERSHIP; SPRING CREEK EXPLORATION AND PRODUCTION, LLC; VINTAGE OIL & GAS, LLC; SIERRA RESOURCES, INC.; INTERNOS, INC.; PRADERA DEL NOTRE, INC.; SPLIT CREEK ENTERPRISES, LLC; WILD BASIN OIL & GAS; ONYX ENERGY, LLC; CODY OIL AND GAS CORPORATION; MOUNTAIN VIEW ENERGY, INC.; CRYSTAL BFG, LP; ANGLIN OIL, LLC; PEARSON OIL & GAS, LLC; SERENITY, LLC; SUNDANCE ENERGY; BAKKEN CABALLEROS; RUTTER ENTERPRISES, LTD; WEISSER OIL; EAGLE RIVER VENTURES; ULMER ENERGY; RIVER BEND OIL AND GAS, LLC; KEYBRIDGE RESOURCES, LLC; BP AMERICA PRODUCTION CO.; AND ENERGEN RESOURCES CORP.

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the district court erred by holding as a matter of law that production of oil or gas from the Rolfstad 1 well never ceased, and therefore the requirement in the cessation of production clause that the lessee resume drilling or reworking operations within sixty days was never triggered.

[¶2] In the alternative, if production from the Rolfstad 1 well did cease, whether the applicable oil and gas lease remains valid for equitable reasons because Plaintiffs signed division orders and accepted royalty payments.

[¶3] In the alternative, if production from the Rolfstad 1 well did cease, whether the lease remains valid under the applicable communitization agreement with the federal government.

STATEMENT OF THE CASE

[¶4] This case requires the Court to determine whether an oil and gas lease executed by John W. Shae and Bernice Shae on February 1, 1969 remains valid and in effect. Plaintiffs and Appellants Sandra Horob, Steven Poeckes, Steve Shae, Mike Shae, and Paul Shae ("the Plaintiffs") are some of the successors in interest to John W. Shae and Bernice Shae. Defendants and Appellees Zavanna, LLC, Atlantic Richfield Co.; John N. Klemer; Mary K. Harris; Steven H. Harris Family Limited Partnership; Spring Creek Exploration and Production, LLC; Vintage Oil & Gas, LLC; Sierra Resources,

Inc.; Internos, Inc.; Pradera Del Notre, Inc.; Split Creek Enterprises, LLC; Wild Basin Oil & Gas; Onyx Energy, LLC; Cody Oil and Gas Corporation; Mountain View Energy, Inc.; Crystal BFG, LP; Anglin Oil, LLC; Pearson Oil & Gas, LLC; Serenity, LLC; Sundance Energy; Bakken Caballeros; Rutter Enterprises, LTD; Weisser Oil; Eagle River Ventures; Ulmer Energy; River Bend Oil and Gas, LLC; Keybridge Resources, LLC; BP America Production Co.; and Energen Resources Corp. ("the Defendants") are some of the successors in interest the William Herbert Hunt Trust Estate, the original lessee.

[¶5] Plaintiffs initiated this case in November 2013, asserting a claim for declaratory relief and seeking to quiet title in the property at issue. See Plaintiffs' Appendix ("App.") at 20. In May 2014, they amended their complaint to name additional parties. See App. at 53. Defendants filed answers and counterclaims, also seeking declaratory relief and an order quieting title in their respective interests in the property. *See, e.g.*, App. at 58.

[¶6] In October and November 2014, the parties filed cross-motions for summary judgment. Plaintiffs asserted that the Shae Lease expired automatically under the cessation of production clause that appears in paragraph 6 of the Lease, App. at 226, because there were three alleged time periods lasting more than sixty days where no production from the Rolfstad 1 well was reported to the State of North Dakota. Defendants disagreed,

asserting that the cessation of production clause's sixty-day time period for the commencement of new drilling or reworking operations does begin to run until the Shae Lease would have otherwise terminated under its habendum clause. App. 226, ¶ 2. Defendants also raised equitable reasons for continuation of the Lease, and asserted it remained valid as amended by a communitization agreement with the federal government.

[¶7] After oral arguments on January 20, 2015, the district court entered an order granting the Defendants' motions for summary judgment and denying the Plaintiffs' motion. The Court held as a matter of law that any periods of non-production were "temporary," and therefore the Shae Lease did not terminate under the habendum clause. Further, because the Lease did not terminate under the habendum clause, the sixty-day time period in the cessation of production clause never began to run. In addition, the Court held that the Shae Lease remained valid and effective based on equitable principles and the communitization agreement executed by the federal government.

[¶8] Plaintiffs now appeal, asserting that the district court misinterpreted the cessation of production clause (which they describe as a "continuous drilling operations clause"). The Plaintiffs contend the district court's judgment should therefore be reversed. The Plaintiffs' argument distorts the plain language of the Shae Lease. The clause at issue does not say the Shae Lease *will* terminate if no oil or gas is produced for sixty

consecutive days. The clause at issue says the Lease *will not* terminate if additional drilling or reworking operations are commenced within sixty days of the date production "cease[s]." App. at 226 ¶ 6. Because production never "cease[d]" under the habendum clause, the sixty-day period never began to run and the Shae Lease remains valid and in effect. Accordingly, the district court correctly granted the Defendants' motions and its judgment should be affirmed.

STATEMENT OF FACTS

I. The Parties and the Shae Lease.

[¶9] Plaintiffs own interests in the oil, gas, and other minerals in and under the following described lands located in Williams County, North Dakota:

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

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

("Subject Lands"). *See* App. at 54.

[¶10] On February 1, 1969, the Plaintiffs' predecessors in interest, John W. Shae and Bernice Shae, leased their interests in the oil and gas in and under the Subject Lands to the William Herbert Hunt Trust Estate (the "Shae Lease"). *See* App. at 225–27. Through various assignments and other

agreements, Defendants acquired interests in the Shae Lease. *See, e.g.*, App. at 65, ¶ 28.

[¶11] The duration of the Shae Lease is set forth in its habendum clause. *See* Patrick H. Martin & Bruce M. Kramer, 8 *Williams & Meyers Oil and Gas Law* 465 (2013) (defining "habendum clause"). In the Shae Lease, the habendum clause provides for a ten-year primary term and as long thereafter as oil or gas is produced from the Subject Lands or lands pooled with the Subject Lands. *See* App. at 226, ¶ 2. The Shae Lease also contains several savings clauses, which are "lease clause[s] designed to enable a lessee to keep a lease alive under certain circumstances without the production otherwise required [by the habendum clause]. Common savings clauses are the continuous drilling operations clause; drilling operations clause; force majeure clause; and shut-in gas well clause." Martin & Kramer, *supra*, at 947.

[¶12] The first sentence of Paragraph 6 of the Shae Lease, App. 226, contains two inter-related savings clauses. One is a dry hole clause, which provides that the lessee can save the Lease after drilling a well that is a dry hole by resuming delay rental payments or commencing drilling or reworking operations within sixty days. *See* Martin & Kramer, *supra*, at 299 (defining "dry hole clause" as a "lease clause specifying the means by which a lessee may keep a lease alive after the drilling of a dry hole"). The second is a cessation of production clause, which permits the lessee to save the Shae

Lease after a permanent cessation of production by beginning new drilling or reworking operations within sixty days of cessation of production under the habendum clause. See Martin & Kramer, *supra*, at 141 (defining "cessation of production clause" as a "lease clause providing that under certain circumstances a lease may be preserved despite cessation of production in the primary or secondary term").

[¶13] The Plaintiffs refer to the cessation of production clause as a "continuous drilling operations clause." Pls.' Br. ¶ 16; *see also* Martin & Kramer, *supra*, at 200.3 (defining "continuous drilling operations clause" as a "lease clause providing that the lease may be kept alive after the expiration of the primary term and without production by drilling operations of the type specified in the clause continuously pursued"). Drilling operations are one way the lessees can save the Shae Lease following the cessation of production under the habendum clause, but the clause at issue differs from typical continuous drilling operations clauses that oftentimes appear in the habendum clause itself or in a Pugh clause. *Cf. Egeland v. Cont'l Res., Inc.*, 2000 ND 169, ¶ 3, 616 N.W.2d 861 (discussing a continuous drilling operations clause that was part of the habendum clause). The dry hole clause and cessation of production clause that appear in the first sentence of Paragraph 6 of the Shae Lease describe ways to save the Lease in the event a specific event occurs—namely, a dry hole is drilled or production from an

existing well ceases. The second sentence of Paragraph 6 of the Shae Lease is a continuous drilling operations clause.

II. The Rolfstad 1 Well.

[¶14] On September 16, 1978, the original lessee under the Shae Lease spudded the Rolfstad 1 well on the Subject Lands. App. at 237. Production from the Rolfstad 1 well began in January, 1979. App. 254. On March 30, 1987, Lamar Hunt transferred its operatorship of the Rolfstad 1 well to the Wiser Oil Company. Supplemental Appendix ("Supp. App.") at 58. On August 26, 1987, but effective April 7, 1987, Wiser Oil Company entered into a communitization agreement with the United States America to pool the mineral interests and leases that cover the southwest corner of Section 29, which included part of the Shae Lease. App. at 291.

[¶15] The communitization agreement remains effective "for so long as communitized substances are, or can be, produced from the communitized area in paying quantities." App. at 293–94, ¶ 10. The communitization agreement also provides "operations or production pursuant to [the communitization agreement] shall be deemed to be operations or production as to each lease committed hereto." App. at 293, ¶ 8.

[¶16] In 1994, the Wiser Oil Company transferred its operatorship of the Rolfstad 1 well to the Farrar Oil Company. Supp. App. at 59. The Farrar Oil Company transferred its operatorship of the Rolfstad 1 well to Continental Resources, Inc. ("Continental") on August 31, 2001. Supp. App.

at 60. Continental is the current operator of the Rolfstad 1 well. Supp. App. at 61.

[¶17] Over the course of Continental's operatorship of the Rolfstad 1 well, there were temporary lapses in production from April 2004 through September 2004, November 2006 through January 2007, and December 2010 through February 2011. App. at 239, 241–42. Although Continental does not know the specific causes of these temporary stoppages, Supp. App. at 5, 17:9–17, Continental incurred certain expenses associated with the repair of mechanical issues related to the Rolfstad 1 well and its associated facilities, Supp. App. at 61 (explaining work Continental performed on the Rolfstad 1 well on or about the times of the purported cessations). The Rolfstad 1 well has a history of mechanical problems caused by the angle of the wellbore resulting in increased friction and wear on the rods. Supp. App. at 6, 18:1-10. In addition, the Rolfstad 1 well produced a higher amount of saltwater than normal, which led to an increased level of salt content within the wellbore that created additional wear beyond that which is commonly expected. Supp. App. at 6, 19:20–20:4.

[¶18] Irrespective of these temporary stoppages in production, it is undisputed that Continental paid the Plaintiffs their proportional share of the production from the Rolfstad 1 well, including payments made after the 2010 period of non-production. Supp. App. at 85–90.

III. Zavanna's Operations on the Subject Lands.

[¶19] On October 11, 2011, Zavanna, LLC ("Zavanna") spudded the Panther 16-21H well ("Panther Well") on a spacing unit that encompasses all of section 21 of the Subject Lands. Supp. App. at 91–82. Zavanna completed the Panther Well on April 16, 2012. *Id*. At the time the Defendants filed their motion for summary judgment in district court, the Panther Well had produced more than 250,000 barrels of oil and over 225,000 Mcf of natural gas. *Id*.

[¶20] On May 27, 2012, Zavanna spudded the Sylvester 1-32H well. Supp. App. at 64. Zavanna later renamed the Sylvester 1-32H the Beagle 1-32H well ("Beagle Well"). *Id*. The Beagle Well was completed in September of 2012 and began producing oil and gas that same month. *Id*. From September of 2012 through the time the Defendants moved for summary judgment, the Beagle Well produced approximately 128,000 barrels of oil and 121,000 MCF of natural gas. Supp. App. at 64–65. Based upon the high production from the Panther and Beagle Wells and the Plaintiffs being paid royalties under the Shae Lease, including royalties on production after periods of temporary non-production, Zavanna spudded fourteen additional wells on the Subject Lands or lands pooled with the Subject Lands between May of 2013 and February of 2014. Supp. App. at 95–96. At the time the summary judgment motions were filed, Zavanna was waiting to complete those wells until infrastructure to gather and sell the natural gas was in place. *Id*.

[¶21] In addition to the new wells operated by Zavanna, Statoil Oil & Gas LP operates the Sjol 5-8 1H well on a spacing unit that includes a portion of the Subject Lands. Supp. App. at 93. The Sjol 5-8 1H well began producing oil and gas in December of 2011. Supp. App. at 94.

ARGUMENT

I. The Standard of Review.

[¶22] "Whether the district court properly granted summary judgment is a question of law which" is reviewed *de novo* by this court. *Tank v. Citation Oil & Gas Corp.*, 2014 ND 123, ¶ 8, 848 N.W.2d 691 (quoting *Estate of Christeson v. Gilstad*, 2013 ND 50, ¶ 6, 829 N.W.2d 453 (quoting *Golden v. SM Energy Co.*, 2013 ND 17, ¶ 7, 826 N.W.2d 610)). In lease forfeiture cases, "the burden of proof is on the party claiming the forfeiture of the lease." *Sorum v. Schwartz (Sorum II)*, 411 N.W.2d 652, 654 (N.D. 1987) (citing *Mich. Wis. Pipeline Co. v. Mich. Nat'l Bank*, 324 N.W.2d 541 (Mich. 1982)). "Forfeitures [of oil and gas leases] are not favored . . . ." *Id.* (citing *Helm Bros., Inc v. Trauger*, 389 N.W.2d 600 (N.D. 1986)).

II. The Shae Lease Remains Valid and in Effect under its Unambiguous Terms.

A. Summary or Argument.

[¶23] Whether an oil and gas lease continues under a particular set of circumstances depends on the language of the lease provisions, including the habendum clause and any savings clauses, read and considered together. *See Tank*, 2014 ND 123, ¶ 10, 848 N.W.2d 691. North Dakota courts apply the

general rules of contract interpretation to interpret oil and gas leases. *Egeland*, 2000 ND 169, ¶ 10, 616 N.W.2d 861, 864. Courts construe words in a contract based on their plain meaning unless the parties give special or technical meanings to those words. *See id.* Contracts must be read and considered as a whole so *all* of their provisions are considered to determine the parties' intent. *See id*. Ultimately, the goal in interpreting an oil and gas lease is to give effect to the parties' mutual intent at the time of contracting, determining the parties' intent from the writing alone if possible. *See id.; see also* N.D.C.C. §§ 9-07-02, 9-07-03, and 9-07-06.

[¶24] As explained in Paragraphs 11 through 13 above, the Shae Lease contains both a habendum clause and several savings clauses, including a cessation of production clause. Those clauses must be read and considered together in order to give effect to all of them. Thus, the first question that must be asked is whether oil or gas is still being "produced" under the habendum clause. *See* App. at 226, ¶ 2. If it is, as the Defendants contend, the Shae Lease remains valid and in effect and there is no need to address the second question—namely, whether drilling or reworking operations were commenced within sixty days of the date production "ceased." *See* App. at 226, ¶ 6.

[¶25] Plaintiffs' flawed argument skips the first and most important step in the analysis, apparently assuming that oil and gas is no longer being "produced" within the meaning of the habendum clause any time there is a

sixty-day gap in production. The Plaintiffs' argument not only ignores the plain meaning of the words in the habendum clause and the practical realities of oil and gas production, but also decades of case law setting forth well-established rules for interpreting oil and gas leases in North Dakota. Oil and gas wells do not, and cannot, produce every second of every day, every day of every month, or even every month of every year, and any temporary failure to do so does not cause leases requiring production to terminate. Temporary stoppages in production—whether because of mechanical problems with the production equipment, marketing issues, adverse weather, pipeline repairs, or other reasons—are necessary and commonplace parts of the oil and gas business that must be tolerated by lessors and lessees. Such temporary stoppages do not terminate leases.

[¶26] This understanding of the habendum clause is furthered by the language of the cessation of production clause. The cessation of production clause does not say that if production ceases, the Shae Lease will terminate if the lessees do not resume producing oil and gas within sixty days. It says that if production ceases, the Shae Lease will *not* terminate if the lessees "*commence[] additional drilling or reworking operations*" within sixty days. App. at 226, ¶ 6. If weather or mechanical problems temporarily interrupt production, it is not necessary to commence additional drilling or reworking operations to restore production. It is only necessary to wait for the weather to pass or fix the mechanical problems that caused production to temporarily

stop. Thus, when the cessation of production clause refers to production "ceas[ing]," it is referring to a permanent cessation of production under the habendum clause that would require *additional* drilling or reworking operations to remedy.

B. The Shae Lease Remains Valid and Effective Because Production Never "Ceased" under the Habendum Clause.

[¶27] The general rule involving cessation of production is that if production should cease temporarily, or if production temporarily ceases to be in paying quantities, such cessation will not result in a termination or forfeiture of the oil and gas lease. *See Sorum v. Schwartz (Sorum I)*, 344 N.W.2d 73, 76 (N.D. 1984); *Feland v. Placid Oil Co.*, 171 N.W.2d 829, 833 (N.D. 1969). The North Dakota Supreme Court has expressly held that temporary cessation of production will not, by itself, "automatically terminate" an oil and gas lease. *See Feland*, 171 N.W.2d at 833. "This is the universally accepted rule for leases." *Id.* (citing Annot., *Rights of Parties to Oil and Gas Lease or Royalty Deed after Expiration of Fixed Term Where Production Temporarily Ceases*, 100 A.L.R.2d 885, 3 (1965), and cases cited therein).

[¶28] In *Sorum I*, for example, the only active wells on the lease had not produced for more than a year when the lessor filed suit to terminate the lease, and they still were not producing by the time of the trial, more than two years later. 344 N.W.2d at 74–75, 77. Despite the long gap in production, the district court held, and this Court affirmed, that the lessee

should have additional time to bring at least one of the wells back into production and save the lease. *See id.* at 75, 77. The Court's decision was reaffirmed in *Sorum II*, which was an appeal from an order canceling the relevant lease after remand. 411 N.W.2d at 653. In *Sorum II*, this Court held the district court's decision to terminate the lease was clearly erroneous even though operations following remand resulted in production of only 112 Mcf of gas and 25 barrels of oil. *See id.* at 653–54. *Sorum II* was decided in August 1987, which means this Court held it was clearly erroneous for the district court to terminate a lease that had produced a total of 112 Mcf of gas and 25 barrels of oil over the course of nearly seven years. *Id.* at 652.

[¶29] Similarly, in *Feland*, the well at issue did not produce any oil and gas for nine months; yet the North Dakota Supreme Court held the temporary cessation was reasonable as a matter of law and the lease at issue remained valid and in effect. 171 N.W.2d at 836–37; *see also Greenfield v. Thill*, 521 N.W.2d 87, 89 (N.D. 1994) (holding a defeasible fee interest did not terminate despite a twenty-month gap in production).

[¶30] In addition, whether the temporary cessation of production was reasonable must be considered in light of the particular circumstances of the case. *Feland*, 171 N.W.2d at 835. In this case, the longest of the alleged stoppages of production occurred ten years ago and only lasted about six months—a shorter time period than in *Sorum, Feland*, or *Greenfield*. Indeed, the longest cessation of production in the present case lasted less than a third

as long as the cessation in *Greenfield*. 521 N.W.2d at 89. Moreover, the Plaintiffs have offered no evidence that those temporary stoppages were unreasonable under the circumstances. Accordingly, under established case law the Shae Lease remains valid and in effect today.

C. The Cessation of Production Clause Does Not Modify the Plain Language of the Habendum Clause.

[¶31] The Plaintiffs, undeterred by the "universally accepted rule" that a temporary cessation of production does not automatically terminate an oil and gas lease, *Feland*, 171 N.W.2d at 133, assert that the particular language of the Shae Lease modifies the habendum clause and causes the Lease to terminate automatically whenever there is a sixty-day gap in production. Contrary to their argument, because a temporary cessation of production will not automatically terminate a lease that is held by production, the sixty-day savings clause Plaintiffs point to was never triggered. *See Greenfield*, 521 N.W.2d at 89 (citing *Sorum I*, 344 N.W.2d at 76; *Feland*, 171 N.W.2d at 833; *Murphy v. Amoco Production Co.*, 590 F. Supp. 455, 459 (D.N.D. 1984)).

[¶32] As noted above, the cessation of production clause provides that if "production shall cease from any cause," the Shae Lease will remain valid if "the lessee commences additional drilling or reworking operations within" sixty days. In this case, because production from the Rolfstad 1 well never "cease[d]," it never became necessary for the Defendants to engage in new operations to hold the lease. *See* 2 Eugene Kuntz, *A Treatise on the law of Oil*

and Gas § 26.13 at 415–18 and Supp. 157 (1989 and Supp. 2014) (discussing the proper interpretation of cessation of production clauses). Any cessation of production was merely temporary, and the provisions of the savings clause were never triggered.

[¶33] The cessation of production clause provides that if production ceases, the lessee can still save the Lease by commencing drilling or reworking operations within sixty days of a cessation. It is irrational to suggest that a clause designed to give the lessee an opportunity to *save* the Lease would somehow cause the Lease to automatically terminate any time there is a sixty-day gap in production, no matter the cause. Instead, the cessation of production clause is only triggered by a permanent cessation of production that requires commencement of additional drilling or reworking operations to remedy. No such cessation occurred here to require drilling or reworking of the well.

[¶34] Eugene Kuntz, a former law professor at the University of Oklahoma and author of the preeminent treatise on oil and gas law, recognized the potential for confusion between the habendum clause and a savings provision in a cessation of production clause. Professor Kuntz urged caution in distinguishing between the two. *See* Kuntz, *supra* at § 216.3, pp. 415–18 and Supp. 157.

> The doctrine of temporary cessation of production is a practical necessity, because oil and gas are never produced and marketed in a continuous, uninterrupted operation that goes on every hour of the day and night. Once it is recognized that any brief

> interruption in the operation must be tolerated as a practical matter, it becomes necessary to adopt a doctrine that permits temporary cessations of production. The [cessation of production][1] clause was never designed to eliminate or avoid the operation of such doctrine or to require that oil or gas be produced and marketed in a continuous, uninterrupted operation. It was intended to preserve a lease in order to permit a lessee to restore production if production should cease under circumstances that require drilling or reworking on his part in order to restore production.

Id. p. 417.

[¶35] Although the issue has never been specifically addressed by a North Dakota court, courts in other states have followed Kuntz's suggestion when reviewing substantively similar provisions. *See Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 556 (Tex. 2002); *Pack v. Santa Fe Minerals*, 869 P.2d 323, 325–29 (Okla. 1994); *Bachler v. Rosenthal*, 798 S.W.2d 646, 649-50 (Tex. App.—Austin 1990, writ denied). In *Anadarko*, the Court read the cessation of production clause as combining "a sixty-day time limit with a resumption of operations provision." *Id*. That court concluded that the sixty-day time limit is triggered only "when the circumstances require the lessee 'to resume operations for drilling [or reworking] a well.'" *Id*.; *see also Pack*, 869 P.2d at 325 (reaching the same conclusion with respect to a gas well shut in for marketing reasons). Likewise, in *Bachler*, the court

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[1] Kuntz refers to cessation of production clauses as "resumption of operations" clauses. As Martin and Kramer explain in *Williams & Meyers Oil and Gas Law*, a "resumption of operations clause" is a "term employed by one writer [Kuntz] to describe the lease provisions which are referred to herein" as cessation of production clauses. Martin and Kramer, *supra* at 902 (citing Kuntz, *supra*).

considered a lease with a sixty-day window for resuming operations, and held that "if production never ceased, as is the case here, the sixty-day clause is not definitive of the period over which the trier of the facts must determine whether a lease is producing in paying quantities." 846 S.W.2d at 649 (citation omitted).

[¶36] Here, the habendum clause and cessation of production clause must be read together to give effect to both. In accordance with Kuntz's reasoning, the cessation of production clause is only triggered when there is a permanent cessation of production such that it is necessary to drill a new well or rework an existing well. Any temporary cessation of production from the Rolfstad 1 well was not of such nature that required drilling or reworking of the well, and at no point was it permanent. With the exception of a few short stoppages, there was continuous production on the Subject Lands, and no drilling or reworking operations of the Rolfstad 1 well were necessary.

D. There Is No Evidence in the Record that Additional Drilling or Reworking Operations Were Required to Restore Production to the Rolfstad 1 Well.

[¶37] The Plaintiffs focus narrowly on the two-word phrase "any cause" to construe the entire savings clause against the lessee. Contrary to their interpretation, there are many "causes" of temporary productions stoppages that do not require "additional drilling or reworking operations" to remedy. When read as a whole, the cessation of production clause's sixty-day time period must be applied only to cessations of production that require

additional drilling or reworking operations to remedy. In this case, there is no evidence in the record that additional drilling or reworking operations were ever conducted or that any such operations were necessary to restore production to the Rolfstad 1 well. Therefore the cessation of production clause does not apply.

[¶38] The North Dakota Supreme Court has construed the term "reworking operations" as something more than "routine maintenance procedures, such as the periodic starting of a pump . . . ." *Serhienko v. Kiker*, 392 N.W.2d 808, 813 (N.D. 1986). In addition, "reworking operations" has also been defined as "[w]ork performed on a well after its completion, in an effort to secure production where there has been none, restore production that has ceased or increase production." Martin & Kramer, *supra*, at 906. The United States District Court for the District of North Dakota, in applying North Dakota law, defined "drilling operations" as work or operations, commenced in good faith, in order to carry out the duties of the lease "followed diligently and in due course by the construction of a derrick and other necessary structures for the drilling of an oil or gas well, and by the actual operation of drilling in the ground." *Anderson v. Hess Corp.*, 733 F.Supp.2d 1100, 1106 (D.N.D. 2010) (internal citations and quotation marks omitted), *aff'd*, 649 F.3d 891 (8th Cir. 2011). Accordingly, reworking operations go beyond routine maintenance and are those which commence,

restore, or increase production, and drilling operations involve the actual drilling of a new well, including preparatory operations at the well site.

[¶39] The Plaintiffs contend that drilling or reworking operations are the types of activities that the lessee is permitted to perform within a sixty-day window of a cessation of production to prevent the Shae Lease from expiring. Accordingly, for this savings clause to trigger, the cessation must be one that can be remedied by conducting additional drilling or reworking operations. Construing this clause as the Plaintiffs do would result in the Shae Lease terminating any time there is a temporary stoppage of production—regardless of the cause and type of operations that could restore production. Under the Plaintiffs' interpretation, for example, if routine mechanical problems (like worn rods) or bad weather forced the operator to shut the Rolfstad 1 well in for more than sixty days, the Shae Lease would terminate even though the well had the ability to produce and the operator was diligently engaged in bringing the well back on line.

[¶40] Contrary to the Plaintiffs' argument, where there is a period of non-production that additional drilling or reworking operations will not remedy, the sixty-day time limit for beginning additional drilling or reworking operations does not begin to run. Here, the summary judgment record shows the temporary stoppages in production would not have been remedied by additional drilling or reworking operations. See Supp. Aff. at 6, 18:1–20:5 and 63. After each period of non-production, Continental brought

the Rolfstad 1 well back into production by performing routine maintenance. *See id.* Accordingly, the cessation of production savings clause was not triggered.

III. Even if Production Did "Cease," the Defendants' Conduct, Particularly Their Continued Acceptance of Royalty Payments after the Lapses in Production Occurred, Constitutes Ratification of the Shae Lease.

A. What Plaintiffs Knew or Should Have Known.

[¶41] Section 9-03-25 of the North Dakota Century Code provides that "voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting." In other words, ratification of a contract that may not otherwise be binding occurs: (1) when a person voluntarily accepts the benefits of a transaction occurring pursuant to such contract, and (2) the person knows the obligations attendant to such contract. *Id.*; *see also Daniel v. Hamilton*, 61 N.W.2d 281, 288 (N.D. 1953) (citing 12 C.J.S. *Cancellation of Instruments* § 38, and discussing the doctrine of ratification). A party to a contract is presumed to know the contents thereof. *Cf., e.g., Diocese of Bismarck Trust v. Ramada, Inc.*, 553 N.W.2d 760, 769 (N.D. 1996) ("Generally, a party has a legal obligation to know the contents of a contract before signing it."). Where a person has actual notice of circumstances that would prompt a prudent person to make an inquiry as to a particular fact, that person is deemed to have constructive notice of

whatever facts would be discovered by reasonably diligent inquiry. *See* N.D.C.C. § 1-01-25.

[¶42] The Plaintiffs in the present case do not deny that they had knowledge of the terms of the Shae Lease, to which they were party, at the time they accepted royalty checks from Continental. Additionally, the Plaintiffs do not deny that they voluntarily accepted the royalty checks for the Rolfstad 1 well's production from Continental. *See* Supp. App. 85–90; 129, 47:6–47:24; 131, 49:23–50:10; 139–40; 146–47; 158, 78:22–79:19. What Plaintiffs do deny is that they had knowledge of lapses in production from the Rolfstad 1 well lasting longer than sixty days when they accepted the royalty checks from Continental. The Plaintiffs contend that accepting royalty checks after the lapses had occurred but before they learned of the lapses could not constitute ratification because the Plaintiffs could not have knowingly accepted the benefits of the Shae Lease. Furthermore, the Plaintiffs contend that they were not on inquiry notice of the lapses in production, because they had always received royalty checks irregularly due to low production. See Supp. App. at 85–90.

[¶43] The Plaintiffs' claim of ignorance is irrelevant to their ratification of the validity of the Shae Lease by actively accepting the financial benefits of continued production. *See Lawrence v. Delkamp*, 2006 ND 257, ¶ 8, 725 N.W.2d 211 ("When parties conduct themselves in a manner which clearly constitutes a waiver, they cannot later claim they did not know

their actions amounted to a voluntary and intentional waiver of their rights, because one who consents to an act is not wronged by it." (quoting *Gale v. N.D. Bd. Of Podiatric Med.*, 2001 ND 141, ¶ 14, 632 N.W.2d 424)). But more importantly, the Plaintiffs fail to address the fact that the statements Continental sent to the Plaintiffs with their royalty checks from the Rolfstad 1 well included information on monthly sales of oil, which would have necessarily indicated gaps in production. *See, e.g.*, Supp. App. at 85–90. Moreover, Continental was required by NDIC regulation to include such monthly sales data with every royalty payment. *See* N.D.A.C. § 43-02-06-01. North Dakota law applies a rebuttable presumption that the law is obeyed, absent evidence to the contrary. *See* N.D.C.C. § 31-11-03; *see also Bjerke v. Heartso*, 183 N.W.2d 496, 502 (N.D. 1971). The Plaintiffs have pointed to no evidence disputing the presumption that monthly sales information was included with every royalty check for production from the Rolfstad 1 well that was sent to the Plaintiffs or their predecessors. Even if this notice of monthly sales data did not constitute actual notice of gaps in monthly production, it should have prompted Plaintiffs or their predecessors to inquire into publicly available monthly production data before accepting royalty payments from the Rolfstad 1 well, which inquiry would have disclosed the temporary lapses in production at issue in this case. *See* App. at 237–54.

[¶44] Regarding the Plaintiffs' access to production records maintained by the NDIC, they claim that such records are not publicly

available because access to such NDIC records requires a paid subscription, and thus (implicitly) that a search of such records is not a required exercise of reasonable diligence. *See* Pls.' Br. ¶ 51. This argument confuses "publicly available" with "available free of cost." Section 44-04-18 of the North Dakota Century Code provides that all records of a public entity, such as the NDIC, are records available to the public, even though it also provides that such public entities may recover the costs necessarily incurred in responding to records requests from the public. *See* N.D.C.C. §§ 44-04-18(2) (entity may charge fees for making copies of records, posting records, locating records, and redacting records), 44-04-18(3) (entity may recover costs for "extensive use of information technology resources" if incurred by the records request), 44-04-18(5) (entity may charge "a reasonable fee" for providing outside access to an electronic information database maintained by the entity). The Plaintiffs have provided no evidence that the $84 annual fee for convenient online access to NDIC records was unreasonable, much less that it prohibited them from consulting the records for the purpose of monitoring their mineral interests.

[¶45] Moreover, the NDIC's subscription service provides access to data about every oil and gas well in North Dakota. The Plaintiffs only needed data about the Rolfstad 1 well. They could have simply called or written to the NDIC, requesting data about the Rolfstad 1 well. The NDIC would then

be required to provide the data for free or for a very modest charge. *See* N.D. Const. art. XI, § 6; N.D.C.C. § 44-04-18.

[¶46] Thus, regardless of whether the Plaintiffs actually knew of the lapses in production, the undisputed facts of this case reflect that they had at least constructive notice of such lapses given the monthly oil and gas sales data provided by Continental with each royalty check and the publicly available records of production from the Rolfstad 1 well maintained by the NDIC. Accordingly, thePlaintiffs ratified the Shae Lease following the temporary lapses in production when they (1) voluntarily accepted the benefits of the Shae Lease (*i.e.* the royalty payments), (2) knew or should have known of the obligations that they were thereby incurring, and (3) knew or should have known that these obligations could have been avoided.

B. Whether Plaintiffs Were Entitled to the Benefits that They Accepted.

[¶47] The Plaintiffs argue, in the alternative, that even if they knew of the lapses in production, they did not ratify the Shae Lease because (1) they were entitled to compensation for the resources taken from their property, and (2) accepting benefits to which one is already entitled does not result in ratification or estoppel. *See* Pls.' Br. ¶¶ 53–55. In support of this argument, the Plaintiffs cite to federal case law from the Ninth and Sixth Circuits stating, more or less, that acceptance of only partial performance under a contract does not preclude one from seeking the remainder of performance due at a later time. *See id.* ¶ 53. This case law is inapposite to the Plaintiffs'

argument, insofar as it recognizes that the underlying instrument is valid in the first instance (acceptance of partial payment under the contract) and in the second instance (pursuit of the remainder payment under the same contract); Plaintiffs, on the other hand, affirmed the validity of the Shae Lease in the first instance (accepted royalty payments after the first lapse in 2004), but seek to disaffirm in the second instance (now claiming that the Shae Lease terminated as early as 2004). Thus, the Plaintiffs' argument is not supported by this federal circuit court case law.

[¶48] The Plaintiffs also argue that a principle stated in *Sulsky v. Horob*, 357 N.W.2d 243 (N.D. 1984), is applicable in this case. The portion of the *Sulsky* opinion to which the Plaintiffs cite, however, was expressly conditioned upon the particular facts of the *Sulsky* case, and did not establish a generally applicable rule of law. *See Sulsky*, 357 N.W.2d at 246 ("Under these circumstances, [plaintiff's conduct] does not clearly reveal an intention to acquiesce in the judgment."). In fact, the special concurrence by then-Justice VandeWalle indicates that the general "principle" applicable in such cases should lead to the opposite conclusion. *Id.* at 249 (VandeWalle, J., concurring) ("Under ordinary circumstances acceptance of payments due under the contract for deed would, at least to me, clearly reveal an intention to acquiesce in the judgment. However, I agree with the majority opinion that under the circumstances of this case, wherein the second payment was

tendered to Sulsky directly without knowledge of her counsel, dismissal of the appeal is not justified.").

[¶49] But even if *Sulsky* were not limited to its own unique facts, the Court should not consider *Sulsky* or thePlaintiffs' federal circuit case law to be applicable in these circumstances because doing so would lead to absurd results. *Cf., e.g., Fossum v. N.D. Dep't of Transp.*, 2014 ND 47, ¶ 33, 843 N.W.2d 282, 290 (noting that statutes are construed to avoid illogical or absurd results). The basis for the Plaintiffs' contention that they have a preexisting entitlement to the royalty payments, if not to all oil and gas revenues attributable to their mineral interests, is the simple fact that they own the mineral interests. *See* Pls.' Br. ¶ 54. The Plaintiffs' reasoning would prevent ratification by conduct for nearly every commercial contract for goods, services, or real property, insofar as any seller (or lessor) could generally claim entitlement in equity to some compensation for performance rendered. *See, e.g.*, *Hayden v. Medcenter One, Inc.*, 2013 ND 46, ¶ 22, 828 N.W.2d 775, 783. A party to a contract could, for example, accept payment for real property on an installment plan for months or years after a known event of alleged default, thereafter seek rescission, and then deny ratification, claiming she was entitled to payment for the real property anyway as a matter of equity or law. To avoid this absurd result, the Court should reject the Plaintiffs' arguments concerning ratification, and affirm the district court's correct conclusion that the Plaintiffs' conduct ratified the Shae Lease.

IV. The Shae Lease Remains Valid and in Effect as Modified by the Communitization Agreement.

[¶50] Even if the cessation of production clause somehow amended the habendum clause so that a sixty-day gap in production was permanent rather than temporary, the communitization agreement superseded and amended the cessation of production clause such that the Shae Lease still remains valid and in effect. Communitization agreements are governed by 30 U.S.C. § 226. Section 226(m) provides that the Bureau of Land Management ("BLM"), through its Secretary, may alter the terms of communitized leases with the consent of the lessees. *See* 30 U.S.C. § 226(m). Thus, "[a] communitization agreement has the effect of changing the terms of [the leases] pooled within the communitization area, so that the [entirety of the lands subject to the communitized leases], not just that portion of the land within the unitization area, is subject to the benefits and burdens of communitization." *Kysar v. Amoco Prod. Co.*, 2004-NMSC-025, ¶ 15, 135 N.M. 767, 93 P.3d 1272 (internal citations and quotations omitted).

[¶51] In *Kysar*, the issue was whether the lessee had surface rights over an area subject to an oil and gas lease. *Id.* ¶ 1. The lessee was utilizing the lessor's private roads to access a well on adjacent BLM land. *Id.* ¶ 8. The lease did not provide the lessee with such a surface right. *Id.* ¶ 9. However, the lease was subject to a communitization agreement that unitized leases covering the adjacent BLM lands. *Id.* ¶ 12. The lessors "did not sign or otherwise consent to the agreement." *Id.* Nevertheless, the court granted the

lessee the surface rights, reasoning that if "operations conducted anywhere within an area subject to a communitization agreement were deemed to occur on each lease within that area . . . the mineral lessee ought to enjoy an implied right of access to the entire surface subject to the agreement . . . ." *Id*. ¶ 14. The court also noted that if the terms of the communitization agreement could not override the individual lease terms, "the whole intent and purpose of the unitization law could be defeated by one or more recalcitrant surface owners within a unit area." *Id*. ¶ 33 (quoting *Nelson v. Texaco, Inc.*, 525 P.2d 1263, 1266 (Okla. Ct. App. 1974)).

[¶52] Here, the communitization agreement likewise operates to modify the terms of the Shae Lease. Section 226(m) grants the BLM discretion to alter the terms of an oil and gas lease with consent of the lessees. Although the lessors are not parties to the communitization agreement, the Shae Lease granted the lessee the right to pool or unitize the leases with any other lands, leases, or mineral interests. Thus, the lessors, by the terms of the Shae Lease, consented to allowing the lessee to pool the minerals under the Shae Lease with other lands. When the minerals subject to the Shae Lease were pooled with those regulated by the federal lease, the communitization agreement was executed and governed operations on the pooled area.

[¶53] The Communitization Agreement further provides that it shall remain in full force and effect "for so long as communitized substances are, or

can be, produced from the communitized area in paying quantities." (emphasis added). Under the "can be" language in the Agreement, whenever a well capable of producing in paying quantities is present on the communitized area, the communitization agreement shall remain in force. This standard term in the communitization agreement is governed by 30 U.S.C. § 226, which provides:

> No lease issued under this section covering lands on which there is a well capable of producing oil or gas in paying quantities shall expire because the lessee fails to produce the same unless the lessee is allowed a reasonable time, which shall be not less than sixty days after notice by registered or certified mail, within which to place such well in producing status or unless, after such status is established, production is discontinued on the leased premises without permission granted by the Secretary under the provisions of this chapter.

[¶54] Likewise, 43 C.F.R. Section 3107.2-2 provides when a communitized lease enters its secondary term, the sixty-day period to commence drilling or reworking operations is not triggered until the lessee receives notice from the BLM to bring the non-producing well into production.

[¶55] There is no evidence in this matter that the Rolfstad 1 well, despite a temporary lapse in production, was ever incapable of producing oil or gas. Thus, as modified by the communitization agreement, the Shae Lease remains valid and in effect.

V. The District Court Did Not Err by Adopting the Proposed Summary Judgment Order Submitted by the Defendants.

[¶56] At the close of oral arguments on the cross-motions for summary judgment, the district court asked the parties to submit proposed orders

setting forth the reasoning they would like the court to adopt. The Plaintiffs made no objection to this request. Instead, they submitted an eight-page proposed order to the court. Counsel for separately represented defendants, working together, submitted a twenty-one page proposed order. The court signed the Defendants proposed order.

[¶57] The Plaintiffs now claim the court's adoption of the Defendants proposed order was an improper abdication of the court's duty to make findings of fact. First, the district court made no findings of fact, and cannot make findings of fact in response to a summary judgment motion. *Red River Human Servs. Found. v. ND Dep't of Human Servs.*, 477 N.W.2d 225, 229 (N.D. 1991). Accordingly, "mechanical adoption" of the Defendants' proposed findings could not have taken place. Second, even if the court had simply adopted proposed findings submitted by the Defendants, this Court has repeatedly held such a practice, standing alone, is not reversible error. *See Gonzalez v. Gonzalez*, 2005 ND 131, ¶¶ 4–5, 700 N.W.2d 711.

VI. The Defendants Adopt the Arguments of the Other Appellees.

[¶58] In addition to the arguments set forth above, the Defendants hereby adopt the additional arguments set forth in the brief filed by Defendants and Appellees Petro-Hunt, L.L.C. and the William Herbert Hunt Trust Estate.

CONCLUSION

[¶59] For the reasons set forth above, the Defendants respectfully request that the Court enter an order affirming the judgment of the district court.

DATED this 1st day of December, 2015.

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