20190063
FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT
MAY 17, 2019
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson, Plaintiffs-Appellants, v. Continental Resources, Inc., Defendant-Appellee.	Supreme Court No. 20190063

Appeal from a Judgment, Entered January 10, 2019, and the underlying Opinion, Dated January 4, 2019,
Case No. 27-2017-CV-00440
County of McKenzie, Northwest Judicial District
The Honorable Daniel El-Dweek, District Judge, Presiding

BRIEF OF APPELLEE

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STATEMENT OF ISSUES

[¶ 1] Whether the district court erred in concluding that the Regulation and Delay provision contained in Paragraph 12 of the Leases[1] extended the effective terms of the Leases based on the undisputed facts presented by the parties in this case.

STATEMENT OF THE CASE

[¶ 2] The present action was initiated by Plaintiffs-Appellants Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson (the "Nelsons") on August 22, 2017, against Defendant-Appellee Continental Resources, Inc. ("Continental"). On September 7, 2018, the parties made cross motions for summary judgment seeking a declaration from the district court as to whether the Leases remained in effect. A hearing on both motions for summary judgment was held on October 26, 2018. Thereafter, on December 3, 2018, the district court notified the parties by letter that it would be granting Continental's motion for summary judgment and denying the Nelson's motion for summary judgment. The district court issued an order to this effect on January 4, 2019. The district court concluded that judgment in favor of Continental is proper because the Regulation and Delay provision of the Leases operated to extend the term of the Leases until Continental obtained regulatory approval to commence drilling operations, and that the Leases remained in effect despite Continental's inability to commence drilling operations prior to October 25, 2015.

[1] For a more detailed description of the oil and gas leases at issue in this case, see Appellants' Opening Brief, ¶ 8. The lands covered by the Leases shall hereinafter be referred to as the "Subject Lands".

[¶ 3] The Nelsons now appeal the district court's decision, claiming that the district court erred in granting Continental's motion for summary judgment and in denying their motion for summary judgment.

STATEMENT OF FACTS

[¶ 4] The statement of facts set forth in the Order (Doc. ID# 91) issued by the district court granting Continental's motion for summary judgment adequately sets forth the undisputed facts relevant to this case, and Continental hereby incorporates that statement of facts by reference as though fully set forth herein. *See* Appendix to Appellants' Opening Brief ("App.") 27–30 (¶¶ 4–10).

[¶ 5] Continental also desires to correct an assertion made by the Nelsons that "Continental's permitting issue concerned property three sections away from the leased property." Appellants' Opening Brief, ¶ 50. The APD submitted to the BLM on May 15, 2012, sought to drill wells in Section 8, Township 153 North, Range 94 West, McKenzie County, North Dakota, the same section in which the Leases are located, and it is this section that contains the Dakota skipper habitat that gave rise to Continental's permitting issues. *See* Appendix of Appellee ("CRI App.") 46.

STANDARD OF REVIEW

[¶ 6] This Court's standard of review for a district court's grant of summary judgment is well-established:

> [Summary judgment] is a procedural device for the prompt resolution of a controversy on the merits without a trial if there are no genuine issues of material fact or inferences that can reasonably be drawn from undisputed facts, or if the only issues to be resolved are questions of law. A party moving for summary judgment has the burden of showing there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. In determining whether summary judgment was appropriately granted, we must view the evidence in the light most

> favorable to the party opposing the motion, and that party will be given the benefit of all favorable inferences which can reasonably be drawn from the record. On appeal, this Court decides whether the information available to the district court precluded the existence of a genuine issue of material fact and entitled the moving party to judgment as a matter of law. Whether the district court properly granted summary judgment is a question of law which we review de novo on the entire record.

Maragos v. Newfield Prod. Co., 2017 ND 191, ¶ 7, 900 N.W.2d 44 (quoting *Krenz v. XTO Energy, Inc.*, 2017 ND 19, ¶ 17, 890 N.W.2d 222). "Summary judgment is appropriate against a party who fails to establish the existence of a genuine issue of material fact on an essential element of a claim on which she will bear the burden of proof at trial." *Heng v. Rotech Med. Corp.*, 2004 ND 204, ¶ 10, 688 N.W.2d 389.

[¶ 7] Whether a district court has properly applied state case law is a question of law. *O'Hara v. Schneider*, 2017 ND 53, ¶ 13, 890 N.W.2d 831. Whether a district court has properly applied state statutory law is a question of law. *Id.* ¶ 20. A district court's conclusions of law are fully reviewable on appeal. *See, e.g.*, *Larson v. Midland Hosp. Supply, Inc.*, 2016 ND 214, ¶ 9, 891 N.W.2d 364.

LAW AND ARGUMENT

I. Introduction

[¶ 8] The Court should affirm the district court's decision to grant Continental's motion for summary judgment and deny the Nelsons' motion for summary judgment. As explained in greater detail below, the district court correctly concluded that the Leases remain in effect. The parties do not dispute that the Leases have an initial or primary term of three years, beginning on October 25, 2011 and ending on October 25, 2014, as provided for in Paragraph 3 of the Leases. *See* App. 10, 27; Appellants' Opening Brief, ¶ 8. The parties also do not dispute that Continental exercised its option to extend the term of the Leases for an additional year to October 25, 2015, as provided for in

Paragraph 17 of the Leases. *See* App. 27; Appellants' Opening Brief, ¶ 11. The parties also do not dispute that Continental had not commenced drilling operations on the Subject Lands as of October 25, 2015. *See* Appellants' Opening Brief, ¶ 13. The parties also do not dispute that Continental did not obtain the permits necessary to drill on the Subject Lands until January 28, 2016, and that Continental commenced drilling of the Hereford Federal 2-20H1 well immediately thereafter. *See* App. 29 (¶¶ 9–10).

[¶ 9] The parties dispute whether the Leases remained in effect between October 25, 2015, and the commencement of drilling on January 29, 2016, by virtue of the Regulation and Delay provisions set forth in Paragraph 12 of the Leases. The Nelsons contend that the Leases expired after October 25, 2015, for one of several reasons: (1) Paragraph 12 did not extend the Leases beyond their primary term because its only effect is to excuse the performance of Continental's obligations during the Leases' primary term and Continental had no obligations during the Leases' primary term; (2) Paragraph 12 did not extend the Leases beyond their primary term because Paragraph (p) of Exhibit A to the Leases provides that operations sufficient to hold the Leases beyond their primary term "shall not include obtaining permits"; and (3) Paragraph 12 did not extend the Leases' term because Continental's inability to obtain approval of its APD from the BLM was caused by events within its control and thus could have been avoided.

[¶ 10] Then Nelsons' arguments fail because they incorrectly analyze the legal issues presented by this case. Specifically, the Nelsons rely throughout their brief on case law applying the doctrine of *force majeure* or on case law applying contractual *force majeure* clauses that are materially different from Paragraph 12's Regulation and Delay

provisions. Rather than relying on such case law, this Court must look to the language of Paragraph 12 as fixed and agreed upon by the parties, and it is the express terms of Paragraph 12, not general principles of *force majeure*, that will govern the Court's decision in this case.

[¶ 11] As explained in greater detail below, each of the Nelsons' arguments in support of reversal suffers from the foregoing flaw. First, the Nelsons' argument that Paragraph 12 only excuses Continental from performing obligations under the Leases misreads Paragraph 12 in an attempt to marshal favorable, but inapplicable, case law from other jurisdictions. Second, the Nelsons' argument that Paragraph (p) of Exhibit A precludes extension of the Leases' term when a lessee is unable to obtain permits misreads Paragraph (p) in an effort to create a contradiction between it and Paragraph 12 that does not exist. Finally, the Nelsons' argument that Continental cannot rely on Paragraph 12 to extend the Leases' term because its inability to obtain approval of an APD from the BLM could have been avoided is unavailing because it relies almost exclusively on principles borrowed from the general doctrine of *force majeure*, rather than the provisions of Paragraph 12 in which, as the district court noted, "[n]othing . . . requires that Continental abandon its planned drilling operations where those operations have been delayed by an inability to obtain permits necessary to those operations." App. 33. Accordingly, for the reasons set forth above and as further explained herein the district court correctly concluded that the Leases remain in effect, and its decision should be affirmed.

II. Based on Undisputed Facts and the Express Provisions of Paragraph 12 the Leases Remain in Effect.

[¶ 12] The district court correctly construed Paragraph 12's Regulation and Delay provisions and correctly concluded that the Leases remained in effect after October 25, 2015. In North Dakota, the construction of a written contract to determine its legal effect is a question of law for the Court to decide. *E.g.*, *Stetson v. Blue Cross of North Dakota*, 261 N.W.2d 894, 896 (N.D. 1978). "The same general rules that govern the interpretation of a contractual agreement apply to oil and gas leases." *Egeland v. Continental Resources, Inc.*, 2000 ND 169, ¶ 10, 616 N.W.2d 861 (N.D. 2000). "The language of a contract is to govern its interpretation if the language is clear and explicit and does not involve an absurdity." N.D.C.C. § 9-07-02. "The whole of a contract is to be taken together so as to give effect to every part if reasonably practicable. Each clause is to help interpret the others." N.D.C.C. § 9-07-06. Words in a contract should be "understood in their ordinary and popular sense rather than according to their strict legal meaning, unless used by the parties in a technical sense, or unless a special meaning is given to them by usage, in which case the latter must be followed." N.D.C.C. § 9-07-09; *Egeland*, 2000 ND 169, ¶ 10.

[¶ 13] As noted above the parties only dispute on appeal is whether the Leases remained in effect between the expiration of the extended term of the Leases on October 25, 2015 and the commencement of drilling of the Hereford Federal 2-20H1 well on January 29, 2016. To resolve this dispute, the Court must interpret and apply Paragraph 12 of the Leases, entitled Regulation and Delay, to determine whether Continental's inability to obtain approval of an APD for the Subject Lands and

commence drilling operations prior to October 25, 2015, resulted in an extension of the Leases' term.

[¶ 14] The duration of the Leases is set forth in Paragraph 3, captioned "Term of Lease," thereof, which states in relevant part:

> This lease shall be in force for a primary term of three (3) years from the date hereof, and for as long thereafter as oil or gas or other substances covered hereby are produced in paying quantities from the leased premises or from lands pooled or unitized therewith or this lease is otherwise maintained in effect pursuant to the provisions hereof.

See App. 10. The plain language of Paragraph 3 indicates that in this case (1) the Leases are in effect for a minimum of three years, i.e. until October 25, 2014 (the "primary term"), (2) the effective term of the Leases may be extended by production of oil and gas from the Subject Lands or from the 2560 Spacing Unit or the 1920 Spacing Unit, and (3) the effective term of the Leases may also be extended pursuant to any other applicable provision of the Leases. There are two provisions of the Leases pursuant to which the Leases were "maintained in effect" prior to the commencement of drilling operations. First, Paragraph 17 of the Leases, captioned "Renewal Lease," gives Continental, as the lessee, the option to extend the Leases for an additional year. *See* App. 13. As noted above, there is no dispute that Continental exercised its option to extend under Paragraph 17 of the Leases, thus extending the effective term of the Leases until at least October 25, 2015.

[¶ 15] Paragraph 12 of the Leases, captioned "Regulation and Delay," provides that "[w]hen drilling, reworking, production, or other operations are prevented or delayed by . . . inability to obtain necessary permits . . . [the Leases] shall not terminate because of such prevention or delay, and, at [Continental's] option, the period of such prevention

or delay shall be added to the term [of the Leases]." App. 12 (emphasis added). The following facts are undisputed:

- Continental filed an APD with the BLM on May 15, 2012, seeking permission to commence drilling on the Subject Lands, as pooled within the 2560 Spacing Unit.[2] App. 28; CRI App. 2.

- The BLM had not approved the May 15, 2012 APD as of October 25, 2015, and Continental was not able to commence drilling operations on the 2560 Spacing Unit. App. 29; CRI App. 2–3.

- Continental was not notified that the issues concerning the Dakota skipper would cause the BLM to withhold approval of Continental's May 15, 2012 APD until these issues were identified in the U.S. Fish and Wildlife Service's August 24, 2015 Biological Opinion. App. 34; CRI App. 10–34, 41–136.

- Continental thereafter abandoned its initial plan for development of the 2560 Spacing Unit and had to request amendment of the 2560 Spacing Unit to create the 1920 Spacing Unit.[3] App. 29; CRI App. 3.

- Contintental notified Plaintiffs that the effective term of the Leases had been extended as a result of the above-described circumstances. CRI App. 35–38.

- The BLM did not approve Continental's operations in the 1920 Spacing Unit until December 22, 2015, and Continental did not receive all necessary permits from the North Dakota Industrial Commission until January 28, 2016. App. 29; CRI App. 3–4.

- Continental commenced drilling on the Subject Lands on January 29, 2016. App. 29; CRI App. 3.

In other words, Continental's operations were delayed for a minimum period of 1,196 days, or three years, three months, and nine days (the period between Continental's submission of an APD for the 2560 Spacing Unit and the issuance of the Fish & Wildlife Service's Biological Opinion), and Continental commenced drilling on the Subject Lands

[2] The "2560 Spacing Unit" refers to the 2560-acre spacing unit comprised of all of Sections 5, 8, 17, and 20, Township 153 North, Range 94 West, McKenzie County, North Dakota.

[3] The "1920 Spacing Unit" refers to the 1920-acre spacing unit comprised of all of Sections 5, 8, and 17, Township 153 North, Range 94 West, McKenzie County, North Dakota.

within 96 days of the expiration of the Leases' extended term on October 25, 2015. Based on these undisputed facts, the Court should conclude that the Leases did not terminate during the delay in operations described above but rather that the effective term of the Leases was extended for a period of 1,196 days, to February 2, 2019. At the least, the delay caused by the BLM's failure to approve the May 15, 2012 APD caused a delay of drilling operations in excess of 96 days, and thus Continental commenced drilling operations prior to the expiration of the primary term as extended by Paragraph 12. Accordingly, the Leases have not terminated, and the district court's decision to this effect should be affirmed.

III. Paragraph 12 Applies Whenever Operations Are Prevented or Delayed, Regardless of Whether this Occurs During or After the Primary Term.

[¶ 16] The Nelsons' argue that the Leases terminated because Paragraph 12 does not allow for extension of the Leases beyond their primary term. They first assert the Leases are paid up oil and gas leases under which Continental had no obligations to commence drilling or produce oil and gas during the primary term. They then argue that the only effect of Paragraph 12 is to excuse Continental from its obligations in certain circumstances. They discuss several non-North Dakota cases in support of this proposition. They then conclude that, because Continental was not obligated to drill or produce from the Subject Lands during the primary term of the Leases, Continental's failure to do so is not excused by Paragraph 12 and the Leases terminated as a result. The Nelsons' argument is wrong for several reasons, as explained in greater detail below. First, the Nelsons' strained, narrow reading of Paragraph 12 ignores the plain meaning of Paragraph 12's second sentence, which authorizes extension of the Leases' term when a lessee's operations are delayed independent of any "obligation" to conduct such

operations. Second, the Nelsons rely on case law that is inapposite because it analyzes oil and gas leases with provisions materially different from the Leases. And third, if the Court accepts the Nelsons' reading of Paragraph 12, the Nelsons' argument still fails because Continental did have obligations during the primary term of the Leases. Accordingly, the Nelsons' argument on this point is unavailing and does not warrant reversal of the district court's decision.

A. The Nelsons Misread Paragraph 12.

[¶ 17] The Nelsons argue that Paragraph 12 only operates to excuse Continental from its obligations. Appellants' Opening Brief, ¶¶ 38–39. Paragraph 12 contains the following three sentences:

- Lessee's obligations under this lease, whether express or implied, shall be subject to all applicable laws, rules, regulations and orders of any governmental authority having jurisdiction, including restrictions on the drilling and production of wells, and regulation of the price or transportation of oil, gas and other substances covered hereby.

- When drilling, reworking, production or other operations are prevented or delayed by such laws, rules, regulations or orders, or by inability to obtain necessary permits, or by fire, flood, adverse weather conditions, war, sabotage, rebellion, insurrection, riot, this lease shall not terminate because of such prevention or delay, and, at Lessee's option, the period of such prevention or delay shall be added to the term hereof.

- Lessee shall not be liable for breach of any provisions or implied covenants of this lease when drilling, production, or other operations are so prevented or delayed.

App. 12. The first sentence provides that Continental's obligations under the Leases are subject to applicable laws, rules, regulations, and orders. The second sentence provides that the Leases' term may be extended if Continental's operations are prevented or delayed by one or more specified events or circumstances. And the third sentence saves Continental from liability for breach of the Leases' covenants if Continental's operations

have been prevented or delayed by one or more of the events or circumstances specified in the second sentence. The second sentence refers to the first sentence in order to clarify that the "laws, rules, regulations or orders" described therein are the same as those described in the first sentence. The third sentence refers to the second sentence to clarify that Continental may avoid liability for the breach of a lease covenant only if it occurs while Continental's operations are prevented or delayed by the types of events and circumstances listed in the second sentence.

[¶ 18] Continental relies entirely upon the second sentence for its argument that the Leases were extended when the BLM failed to approve Continental's May 15, 2012 APD. By eliminating alternative words and phrases that would not apply under the circumstances of this case, this sentence may be read as follows: "When drilling . . . operations are . . . delayed . . . by inability to obtain necessary permits . . . this lease shall not terminate because of such . . . delay, and, at Lessee's option, the period of such . . . delay shall be added to the term hereof." App. 12. The effect of this sentence is to give Continental the right to extend the term of the Leases when its operations are delayed by an inability to obtain permits for those operations; Continental's inability to make effective use of its lease rights for a period of time is thus accounted for by adding that same period of time back on to the end of the Leases' term. Nothing in the relevant parts of this sentence makes reference to "obligations" or the excusal thereof. The Nelsons nonetheless appear to argue that this sentence only extends the Leases' term when an obligation has been breached. As illustrated by the foregoing, this argument has no basis in the language of Paragraph 12 or any logical reading thereof. Accordingly, because the

Nelsons have read Paragraph 12 incorrectly, their arguments based on this reading are unavailing and should be disregarded by the Court.

B. The Case Law Relied Upon by the Nelsons Is Inapposite.

[¶ 19] The Nelsons brief includes an extended discussion of cases they relied on before the lower court, namely *Aukema v. Chesapeake Appalachia, LLC*, 904 F. Supp. 2d 199 (N.D.N.Y. 2012), *Beardslee v. Inflection Energy, LLC*, 31 N.E.3d 80 (N.Y. 2015), and *San Mateo Cmty Coll. Dist. v. Half Moon Bay Ltd. P'ship*, 76 Cal. Rptr. 2d 287 (Cal. Ct. App. 1998). The Nelsons do not make any significant attempt to address the district court's reasoning in distinguishing these cases from the present case. *See* App. 9–12. As explained by the district court, the leases addressed in *Aukema*, *Beardslee*, and *San Mateo* do not contain provisions analogous to the language analyzed in the foregoing paragraph. *See id.* In *Aukema*, the force majeure clauses considered all contemplate excusing the lessee from its "obligations" under the lease when an event constituting force majeure occurs. *See Aukema*, 904 F. Supp. 2d at 204, 206. Hence the *Aukema* court's conclusion that "[a]s defendants did not have an obligation to drill, the invocation of force majeure to relieve them from their contractual duties is unnecessary." *Id.* at 210. As shown in Part III.A., *supra*, Paragraph 12 of the Leases does not only purport to relieve Continental from its obligations; rather, Paragraph 12 also saves the Leases from termination by adding any period of delay to the term of the Leases, thus maintaining them in effect and extending their term under Paragraph 3. Accordingly, because the leases analyzed in *Aukema* are materially different from the Leases, the *Aukema* decision is not persuasive authority for the facts of this case and should thus be disregarded by this Court.

[¶ 20] In *Beardslee*, the court first concluded that the habendum clause in the lease at issue was not modified by the lease's force majeure clause because it did not

contain language subjecting it to other lease terms. *Beardslee*, 31 N.E.3d at 157–58. This is distinguishable from the present case in which Paragraph 3 of the Leases, which defines the Leases' term, provides that Leases may be "otherwise maintained in effect pursuant to the provisions [t]hereof" beyond the Leases' three-year primary terms. App. 10. The *Beardslee* court also concludes that the force majeure clause at issue in that case only allows extension of the lease's "secondary term," because the clause "expressly refers to a delay or interruption in drilling or production for any enumerated reason." *Id.* at 158. Unlike the *Beardlsee* lease, Paragraph 12 of the Leases provides for an extension of the Leases' terms when drilling, production, or other operations are "prevented or delayed" by any of the enumerated reasons. App. 12. A lessee's concern that drilling and production operations might be "prevented" applies equally to the primary and secondary terms of an oil and gas lease where a lessee must engaged in such drilling and production operations to extend a lease beyond its primary term into its secondary term. *See, e.g.*, 4 Patrick H. Martin & Bruce M. Kramer, *Williams & Meyers Oil and Gas Law*, § 683 (Oct. 2017 update) (noting that lessees may utilize force majeure clauses to protect themselves from automatic termination of a lease where drilling operations cannot be commenced). Accordingly, because the lease at issue in *Beardslee* is distinct from the Leases, the *Beardslee* decision is not persuasive authority for the facts of this case and should thus be disregarded by this Court.

[¶ 21] Because the reasoning of the *Aukema* and *Beardslee* Courts was premised on lease terms materially different from those contained in the Leases, the reasoning set forth in these opinions is of no use to the Court in deciding this case. Accordingly, to the

extent the Nelsons arguments are based on this case law such arguments are unavailing and should be disregarded by the Court.

C. In the Alternative, Obligations Did Exist During the Primary Term.

[¶ 22] If, contrary to the foregoing, the Court concludes that Paragraph 12 could only extend the term of the Leases if Continental had obligations during the primary term, the Court should still concluded that the Leases' term was extended because such an obligation did exist. This Court has previously recognized the existence of an implied covenant to act as a reasonably prudent operator of an oil and gas lease:

> The law is well settled that the lessee in any oil and gas lease has an implied obligation to the lessor to do everything that a reasonably prudent operator should do in operating, developing and protecting the property with due consideration being given to the interests of both the lessor and lessee, if there is no express clause in the lease relieving the lessee of this implied duty.

Feland v. Placid Oil Co., 171 N.W.2d 829, 835 (N.D. 1969). Paragraph (h) of Exhibit A of the Leases states, "Nothing in this Exhibit nor the lease is intended to relieve the Lessee from any implied covenants or from any obligation to act as a reasonable prudent operator giving due regard to the interests of the Lessor." App. 14. Thus, contrary to the Nelsons assertion that Continental had no obligations during the primary term of the Leases, Continental had an implied obligation to act as a reasonably prudent operator, and Continental should not be precluded from taking advantage of Paragraph 12 for lack of such obligations.

IV. Paragraph (p) Does Not Limit the Application or Effect of Paragraph 12.

[¶ 23] The Nelsons argue that Paragraph (p) of Exhibit A to the Leases limits the effect of Paragraph 12. Paragraph (p) provides, in relevant part, "Operations sufficient to hold this lease beyond the primary term shall not include obtaining permits." App. 15.

The Nelsons assert that because the act of obtaining permits alone is deemed insufficient under Paragraph (p) to constitute "operations" sufficient to hold the Leases in effect, Continental's inability to obtain such permits cannot be sufficient to extend the Leases' term under Paragraph 12. A contract must be interpreted as a whole, and each of its parts must be interpreted together so as to give effect to every part if reasonably practicable. N.D.C.C. § 9-07-06. In other words, if Paragraph (p) and Paragraph 12 can be harmonized, this would be preferable to a reading that effectively removes or limits one or the other.

[¶ 24] As noted in Part III.A, *supra*, Paragraph 12 unambiguously provides that "inability to obtain necessary permits" is a circumstance that will justify extension of the Leases' terms if operations are delayed thereby. The Nelsons read Paragraph (p) to totally negate this provision of Paragraph 12. But the Nelsons reading is not the most logical, let alone a necessary, reading of Paragraph (p). The relevant part of Paragraph (p) provides that a lessee may not hold the Leases, under the pretense of having commenced operations thereon, merely by obtaining permits to conduct operations. Thus this provision addresses the sufficiency of obtaining permits vis-à-vis commencement of operations to perpetuate the Leases. On the other hand, the relevant portion of Paragraph 12 provides that when a lessee is unable to obtain permits to conduct operations, the Leases' term may be extended to allow the lessee time to do so. Thus this provision addresses the necessity of obtaining permits vis-à-vis commencement of operations to perpetuate the Leases. It is not inconsistent for the Leases to say (1) obtaining permits is so preliminary to actual drilling operations that such an act should not constitute drilling operations, while at the same time (2) obtaining permits is so preliminary to actual

drilling operations that a lessee's inability to obtain permits should not result in termination of the Leases for failure to commence drilling operations. Accordingly, because Paragraph 12 and Paragraph (p) can be read together in a manner that gives effect to both provisions and accords with Continental's interpretation of the Leases, the Nelsons' limiting interpretation should be disregarded.

[¶ 25] The Nelsons also suggest that their reading of Paragraph 12 and Paragraph (p) accords with N.D.C.C. § 9-07-16, which states that "written" portions of a contract control over "printed" portions. The implication of this argument is that Exhibit A constitutes the written portion, or a portion printed under the special directions of the parties, and Paragraph 12 constitutes the printed or form part. First, the Nelsons are incorrect insofar as N.D.C.C. § 9-07-16 only applies when the two provisions at issue are "absolutely repugnant," and as explained in the preceding paragraph this is not the case. Second, there is no evidence in the record as to whether Exhibit A was derived from a pre-printed form or whether it was prepared at the special direction of the parties. Moreover, it is apparent from the face of the Leases that significant portions of Paragraph 12 were stricken by the parties, including language immediately following the phrase "inability to obtain necessary permits" in the second sentence. App. 12. This indicates that Paragraph 12 was considered in its entirety by the parties and those portions left unstricken were included by the parties with a "special view to their intention." *See* N.D.C.C. § 9-07-06. Accordingly, the Nelsons reliance on N.D.C.C. § 9-07-16 is misplaced, and the Court should not construe Paragraph (p) to limit the application of Paragraph 12 to the facts of this case.

V. Paragraph 12 Does Not Require that the Delay Resulting from Continental's Inability to Obtain Permits Be Unavoidable or Beyond Continental's Reasonable Control.

[¶ 26] Finally, the Nelsons argue that the BLM's failure to approve Continental's May 15, 2012 APD did not result in extension of the Leases' term under Paragraph 12 because this event was within Continental's control and could have been avoided. In support of this argument, however, the Nelsons rely on general principles of *force majeure* without analyzing the actual language of Paragraph 12. This Court has stated that where a contract contains an express *force majeure* clause, the "types of events [that] constitute *force majeure* depend on the specific language included in the clause itself." *See Entzel v. Mortiz Sport & Marine*, 2014 ND 12, ¶ 7, 841 N.W.2d 774 (quoting 30 *Williston on Contracts* § 77.31, at 364 (4th ed. 2004)). This Court has further stated:

> [A] *force majeure* clause relieves one of liability only where nonperformance is due to causes beyond the control of a person who is performing under a contract. An express *force majeure* clause in a contract must be accompanied by proof that the failure to perform was proximately caused by a contingency and that, in spite of skill, diligence, and good faith on the promisor's part, performance remains impossible or unreasonably expensive.

Id. (quoting 30 *Williston on Contracts* § 77.31, at 365 (4th ed. 2004)). But this Court has also recognized that not every *force majeure* event need be beyond the parties' reasonable control, depending on the language of the clause at issue. *See id.* (quoting 30 *Williston on Contracts* § 77.31, at 367 (4th ed. 2004)). Other courts have similarly recognized that when an express *force majeure* clause is under consideration, application of a reasonable control requirement must be dictated by the terms of the clause itself. *See PPG Indus., Inc. v. Shell Oil Co.*, 919 F.2d 17, 18–19 (5th Cir. 1990). Courts have also recognized in the specific context of oil and gas leases that the judicially-crafted doctrinal

elements of *force majeure* do not apply where *force majeure* is dealt with by the parties in the terms of the lease itself. *See Perlman v. Pioneer Ltd. P'ship*, 918 F.2d 1244, 1245.

[¶ 27] Based on the foregoing, in order for the Nelsons to successfully argue that Continental's inability to obtain necessary permits must be unavoidable, or beyond its control, there must be such a requirement contained in Paragraph 12. *Cf. Entzel*, 2014 ND 12, ¶¶ 3, 9–10 (explaining that the *force majeure* clause at issue expressly applied to "delays in the use of the slip that are beyond the control of the landlord"). But Paragraph 12 contains no such requirement. Instead, Paragraph 12 provides in relevant part, "When drilling . . . operations are . . . delayed . . . by inability to obtain necessary permits . . . this lease shall not terminate because of such . . . delay, and, at Lessee's option, the period of such . . . delay shall be added to the term hereof." App. 12. Accordingly, Continental was not required to show that its inability to obtain necessary permits from the BLM was unavoidable, or beyond its reasonable control, and it is undisputed that Continental was in fact unable to obtain a permit to drill from the BLM until after October 25, 2015, more than three years after applying for such permit. Thus the Nelsons' arguments to the contrary are unavailing.

[¶ 28] Furthermore, even if the Court were to conclude that some reasonable control requirement should be read into Paragraph 12, the undisputed facts of this case still show that this has been met. This Court has observed that "[a] party relying on a *force majeure* clause to excuse performance bears the burden of proving that the event was beyond its control and without its fault or negligence." *Entzel*, 2014 ND 12, ¶ 7 (quoting 30 *Williston on Contracts* § 77.31, at 365 (4th ed. 2004)) (emphasis added). In other words, a party need not show that performance under its contract was impossible

under any circumstances; rather, the party must simply show that its attempt to perform was reasonable and in good faith, but was ultimately frustrated by events beyond its control. Based on the evidence presented to the district court by the parties in this case it is undisputed that, despite Continental's diligent, good faith efforts to develop the Subject Lands as part of the 2560 Spacing Unit, Continental was prevented from commencing operations within the primary term of the Leases by a contingency beyond its control, namely the decisions of the U.S. Fish and Wildlife Service and the BLM. CRI App. 2–3, 5–34, 39–136. It is likewise undisputed that the BLM's decision to withhold approval of Continental's May 15, 2012 APD did not arise as a result of the fault or negligence of Continental; rather, Continental had no reason to believe it would be unable to commence operations on the Subject Lands until August 24, 2015, when it received the U.S. Fish and Wildlife Service's Biological Opinion indicating that issues pertaining to protection of the Dakota skipper and its habitat would delay approval of the APD. CRI App. 40. Accordingly, because operations on the Subject Lands were prevented or delayed by Continental's inability to obtain necessary permits from the BLM, the term of the Leases has been extended under Paragraph 12 until February 2, 2019, at the earliest (by adding three years, three months, and nine days on to October 25, 2015, corresponding to the period of time between May 15, 2012, and August 24, 2015).[4] The Nelsons' arguments on this point are thus unavailing and the district court's decision should be affirmed.

[4] Continental acknowledges that there are different possible dates that could be used to determine the end point of the period of delay occasioned by Continental's inability to obtain permits from the BLM: August 24, 2015 (the date of the U.S. Fish and Wildlife Service's Biological Opinion indicating the issues with the Dakota skipper), October 22, 2015 (the date Continental requested modification of the 2560 Spacing Unit to the 1920 Spacing Unit), or December 22, 2015 (the date the BLM approved Continental's

CONCLUSION

[¶ 29] For the reasons stated above, Continental respectfully request that the Court affirm the decision of the district court and direct that judgment be entered accordingly.

Dated this 17th day of May, 2019.

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operations within the 1920 Spacing Unit). This does not present a genuine issue for dispute, however, because all of these dates would place the end of the Leases' primary term well into 2019.

CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for the Appellee Continental Resources, Inc., hereby certifies the above brief is in compliance with Rule 32(a)(8)(A) of the North Dakota Rules of Appellant Procedure. The total number of pages in the brief, excluding the certificate of service and this compliance totals 24 pages.

Dated this 17th day of May, 2019.

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IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson, Plaintiffs-Appellants, v. Continental Resources, Inc., Defendant-Appellee.	Supreme Court No. 20190063

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

CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that the Brief of Appellees and Appendix of Appellees were, on May 17th, 2019, filed and served electronically with the Clerk of the North Dakota Supreme Court and served by e-mail on the following:

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