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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

RHONDA PENNINGTON, STEVEN NELSON, DONALD NELSON, AND CHARLENE BJORNSON,	Supreme Court No. 20190063
Plaintiffs / Appellants	
vs.	**McKenzie County District Court No. 2017-CV-00440**
CONTINENTAL RESOURCES, INC.,	
Defendant / Appellee	

APPELLANTS' REPLY BRIEF

Appeal from a Judgment entered January 10, 2019, and the underlying Order dated January 4, 2019, Northwest Judicial District, McKenzie County, State of North Dakota, The Honorable Daniel El-Dweek Presiding

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SUMMARY OF REPLY

[¶ 1] Continental concedes that the condition precedent to extend the Leases beyond the primary term – production – had not commenced by October 25, 2015. Continental's argument is that the Leases' paragraph 12, the *force majeure* clause, extended the primary term thereby preventing automatic expiration of the Leases. Continental's argument fails as a matter of law.

ARGUMENT

I. Paragraph 12 does not apply during the primary term.

[¶ 2] The Leases are "paid-up" and as a result, "the lessee has no obligation to commence operations during the primary term of the lease." *Irish Oil and Gas, Inc. v. Riemer*, 2011 ND 22, 794 N.W.2d 715, 721 (¶22). Continental ignores *Irish Oil*, and instead cites to *Feland v. Placid Oil Co.*, 171 N.W.2d 829 (N.D. 1969) for the proposition that "This Court has previously recognized the existence of an implied covenant to act as a reasonably prudent operator of an oil and gas lease" and therefore "the Leases' term was extended because such an obligation did exist." (Brief of Appellee, ¶ 22).

[¶ 3] *Feland* provides no support for Continental's argument. In *Feland*, the question to be resolved was:

> What is the effect of a shut-in for a period of nine months of a producing oil well under a clause in the lease, commonly referred to as a 'thereafter' clause, which provides that after the primary term has expired the lease shall continue in effect 'as long thereafter as oil, gas, casinghead gas, casinghead gasoline or any of them is produced from said premises, ***'?

Feland, 171 N.W.2d at 831. *Feland* dealt with a dispute involving the secondary term ("as long thereafter . . .") and not a dispute involving the primary term. *Id*. ("commonly referred to as a 'thereafter' clause, which provides that after the primary term has expired

the lease shall continue in effect 'as long thereafter . . .'). Therefore, nothing in *Feland*'*s* discussion of a lessee's implied obligation to the lessor to act as a reasonably prudent operator during the secondary term is contrary to the statement in *Irish Oil* that under a paid-up lease the lessee has no obligation to commence operations during the primary term.

II. The Leases' habendum clause does not allow extension of the primary term.

[¶ 4] Continental incorrectly argues that the last clause in the Leases' paragraph 3 – "or this lease is otherwise maintained in effect pursuant to the provisions hereof" -- allows paragraph 12 to be applied to extend the primary term. (Brief of Appellee, ¶ 14). But paragraph 3 consists of two distinct parts – the primary term and the secondary term. Paragraph 3 states:

> **Term of Lease**. This lease shall be in force for a primary term of three (3) years from the date hereof, [primary term]
>
> ***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. [secondary term]

To accept Continental's argument, this Court would have to ignore the recognized two-part construction of a habendum clause, and ignore the adverbial modifier "thereafter," which places everything that follows into the discussion of the secondary term. The clause "or otherwise maintained in effect pursuant to the provisions hereof" modifies that time period "thereafter" the primary term and not the primary term itself. Similarly, the phrase "produced in paying quantities" does not extend the primary term but effects how long the secondary period might continue thereafter.

III. Continental points to no case that has applied a *force majeure* clause to extend the primary term of a paid-up lease and cannot substantively distinguish analogous caselaw.

[¶ 5] *Aukema v Chesapeake Appalachia, LLC*, 904 F.Supp.2d 199, 210 (N.D.N.Y. 2012), *Beardslee v. Inflection Energy, LLC*, 31 N.E.3d 80, 85 (Ct. App. 2015), and the instant case, all involve paid-up leases with two-part habendum clauses. The cases all involve an operator's attempt to use *force majeure* clauses to extend the primary term as a result of not obtaining drilling permits. Continental argues that the *force majeure* clauses in *Aukema* are distinguishable because those clauses specifically used the term "obligation" and paragraph 12, as edited by Continental, does not include that term.[1] But Continental ignores the *force majeure* clause in *Beardslee* which does not include the term "obligation":

> [i]f and when drilling ... [is] delayed or interrupted ... as a result of some order, rule, regulation, requisition or necessity of the government, or as the result of any other cause whatsoever beyond the control of Lessee, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding.

Id. at 83. The court in *Beardslee* still reached the same result:

> As the energy companies made no express or implied covenants applicable to the primary term (other than to pay delay rentals, which are not at issue here), the *force majeure* clause must relate to only continuous drilling/production operations during the secondary term of the leases.

Id. at 85.

[1] Without Continental's edits paragraph 12 does include the term "obligation" and refers to preventing "termination" not preventing automatic expiration of the Leases.

[¶ 6] Continental's distinction for the *Beardslee* case is that in *Beardslee* the clause states "delay or interruption" and here paragraph 12 states "prevented or delayed." (Brief of Appellee, ¶ 20). Continental argues that being "prevented" during the primary term would affect a lessee differently from being "delayed." But under either scenario the primary term would automatically expire. Even Continental's edited version of paragraph 12 does not include the term "prevented" and instead relies on the terms "delayed" and "delay." (Brief of Appellee, ¶ 18). The *force majeure* clause in *Beardslee* is almost identical to Continental's edited paragraph 12. The cases that have looked at the interplay between the primary term and a *force majeure* clause in a paid-up lease have all held that a lease's *force majeure* clause cannot be used to extend the lease's primary term. *Id., see also, San Mateo Community College Dist. v. Half Moon Bay Ltd. Partnership,* 65 Cal.App.4th 401, 412 (CA App. 1998) (holding that the *force majeure* clause did not apply during the primary term, because the *force majeure* clause could only excuse covenants or obligations and not the failure of a condition precedent); and *Goldstein v. Lindner*, 648 N.W.2d 892, 899 (Ct. App. Wisc. 2002) (*force majeure* clause in mining lease did not apply to primary term).

IV. The *force majeure* clause is limited by paragraph (p) in Exhibit A, which specifically provides that "Operations sufficient to hold this lease beyond the primary term *shall not include obtaining permits.*"

[¶ 7] Paragraph (a) and (p) in Exhibit A of the Leases are designed to designate the operations sufficient to continue the Leases beyond the primary term. *See* App. 14-15. After the property legal description on Exhibit A and before any additional provisions it states – "Notwithstanding the provisions of this lease to the contrary:" – making clear that if there are conflicting provisions, the added

provisions on Exhibit A control. Paragraph (p) is found in Exhibit A, so it specifically controls over paragraph 12. Continental ignores this explicit conflict resolution provision.

[¶ 8] Paragraph (p) specifically provides that "Operations sufficient to hold this lease beyond the primary term shall not include *obtaining* permits." Therefore, even if the *force majeure* clause was applicable, operations related to *obtaining* permits, which includes the application process, would not be sufficient to maintain the Leases. As such, Continental's claim that it was "prevented or delayed from *obtaining* the necessary permits" is inconsequential to the question of whether the Leases were maintained beyond the primary term. To hold otherwise this Court would have to find that paragraph 12 controls over paragraph (p) despite the explicit language in Exhibit A.

V. Continental ignores the words "inability" and "necessary" in paragraph 12 to argue that simply not getting the permit it desired was sufficient to invoke the *force majeure* clause.

[¶ 9] A *force majeure* clause cannot be invoked to excuse performance that could have been prevented by the exercise of prudence, diligence, and care. *Edington v. Creek Oil Co.*, 690 P.2d 970, 974 (Mont. 1984). Continental's argument is that the BLM's failure to instantly approve the May 15, 2012 APD that it desired had caused an "inability to obtain necessary permits." But the issue is not whether Continental could instantaneously obtain its *desired* permit. The issue is whether Continental had an "*inability* to obtain *necessary* permits." Continental could have begun drilling (within less than 100 days) by dropping Section 20 from its permitting request. Continental

instead made a business decision to hold out for the inclusion of Section 20 until shortly before the expiration of the primary term. (App. 22, ¶ 12).

[¶ 10] Continental now states that the ADP it submitted on May 15, 2012 sought to drill wells in Section 8, "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 issue." (Brief of Appellee, ¶ 5). Continental's statement to this Court is in direct contrast to the facts in the record. The 2560-acre spacing unit consisted of Sections 5, 8, 17, and 20, while the 1920-acre spacing unit eliminated Section 20 and consisted only of Sections 5, 8, and 17. (App. 28, ¶ 6; App. 29, ¶ 9). When asked in discovery about Continental's voluntary withdraw of the May 15, 2012 APD, Continental responded:

> RESPONSE: Continental admits that it withdrew its APDs with the BLM. Continental withdrew its APDs when Continental decided to request that the NDIC amend the spacing of the 20199 Unit from a 2560 acre spacing unit to a 1920 acre spacing unit *in order to remove the acreage inhabited by the Dakota Skipper and eliminate any further delays* associated with the need to obtain approval from the U.S. Forestry Service and U.S. Fish and Wildlife Service. Due to a change in acreage, the BLM required the permitting applications for the 2560 acre spacing unit to be cancelled and new permits to be acquired for the 1920 acre spacing unit.

(App. 22, ¶ 12) (emphasis added). The 160 acres of the leased premises in Section 8 did not give rise to the permitting delays. Continental's business decision to try to keep its Section 20 leases in the spacing unit caused the delay of obtaining production under the Leases. Continental's business decisions do not equate to an "*inability* to obtain *necessary* permits."

[¶ 11] Continental makes the alternative argument that even though it could have obtained the necessary permits at any time, its failure to do so was a breach of its implied duty to act as a reasonably prudent operator, and therefore "Continental should not be

precluded from taking advantage of Paragraph 12 for lack of such obligations." (Brief of Appellee, ¶ 22). Basically, Continental asks this Court to read the word "inability" to include its own imprudent actions that caused it to not obtain the necessary permits. Neither case law, nor basic common sense supports such a conclusion.

CONCLUSION

[¶ 12] Nelsons are entitled to a declaratory judgment that the Leases automatically expired on October 25, 2015. Alternatively, Nelsons are entitled to a remand so that Continental's disputed factual allegations that support its affirmative defense of *force majeure* may be determined.

DATED this 30th day of May, 2019.

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CERTIFICATE OF COMPLIANCE

The undersigned, as attorney for Rhonda Pennington, Steven Nelson, Donald Nelson, and Charlene Bjornson, Plaintiffs and Appellants in the above matter, and as the author of the Appellants' Reply Brief, hereby certifies, in compliance with Rule 28 of the North Dakota Rules of Appellate Procedure, that the Appellants' Reply Brief, excluding words in the Table of Contents, Table of Authorities, and Certificate of Compliance, totals 1931 words.

Dated this 30th day of May, 2019.

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vs.	)	
CONTINENTAL RESOURCES, INC.,	)	
Defendant / Appellee	)	

STATE OF COLORADO)
) ss.
COUNTY OF MESA)

I hereby certify that on May 30, 2019, I electronically filed the Appellants' Reply Brief with the Clerk of the North Dakota Supreme Court, and served the same by email on the following:

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