20190352

FILED
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CLERK OF SUPREME COURT
fEBRUARY 28, 2020
STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

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| Hess Bakken Investments II, LLC; Arkoma Drilling II, L.P.; and Comstock Oil & Gas, LP, | ) | Supreme Court No. 20190352 |
| Plaintiffs-Appellants, | ) | Mountrail County District Court Case No. 31-2018-CV-00245 |
| v. | ) | |
| AgriBank, FCB; Intervention Energy, LLC; and Riverbend Oil & Gas VI, L.L.C., | ) | |
| Defendants-Appellees. | ) | |

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On Appeal from Order Partially Granting Motions to Dismiss
dated July 24, 2019
Case No. 31-2018-CV-00245
County of Mountrail, North Central Judicial District
The Honorable Stacy Louser, Presiding

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**BRIEF OF APPELLANTS HESS BAKKEN INVESTMENTS II, LLC, ARKOMA DRILLING II, L.P., AND COMSTOCK OIL & GAS, LP**

**ORAL ARGUMENT REQUESTED**

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Paul J. Forster (#07398)
Zachary R. Eiken (#07832)
CROWLEY FLECK PLLP
100 West Broadway Ave., Suite 250
P.O. Box 2798
Bismarck, North Dakota 58502-2798
Telephone: (701) 223-6585
Email: pforster@crowleyfleck.com
Attorneys for Plaintiffs and Appellants Hess Bakken Investments II, LLC, Arkoma Drilling II, L.P., and Comstock Oil & Gas, LP

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

[¶1] Whether the District Court erred in concluding the undefined phrase "actual drilling operations" in two oil and gas leases' continuous drilling clauses required spudding a well and could not possibly mean physical construction of a well location with a good-faith intent to complete a well.

[¶2] Whether, alternatively, the District Court erred by failing to recognize questions of fact regarding an extension of the primary term under the Subject Leases' force majeure clauses that precluded dismissal under N.D.R.Civ.P. 12(b)(6).

## ORAL ARGUMENT REQUESTED

[¶3] Appellants Hess Bakken Investments II, LLC, Arkoma Drilling II, L.P., and Comstock Oil & Gas, LP (collectively "the Hess Group") request oral argument in this case. The interpretation of the phrase "actual drilling operations" in an oil and gas lease without an express definition of the term presents an issue of first impression. Accordingly, this Court's interpretation of that phrase could have wide impact in the oil and gas industry in North Dakota and beyond, and oral argument will be helpful.

## STATEMENT OF THE CASE

[¶4] This appeal concerns what the term "actual drilling operations" means in the continuous drilling clause of two oil and gas leases that do not expressly define the term. These clauses provided the Subject Leases[1] "shall not terminate if <u>actual drilling operations</u> on any portion of the leased premises, or on lands with which a portion of the leased premises may be unitized . . . are being conducted at the end of the primary term." (emphasis added). When the leases' primary terms ended on April 2, 2012, a drill site had been constructed for four wells on the leased premises, which were spudded a month

later. Intervention Energy, LLC ("Intervention") took competing leases from AgriBank, FCB ("AgriBank"), and Intervention later sold the competing leases to Riverbend Oil & Gas VI, L.L.C. ("Riverbend").

[¶5] The Hess Group initiated this action to confirm the validity of its oil and gas leases. Both Intervention and Riverbend moved to dismiss the Hess Group's action, with AgriBank joining Intervention's motion. The District Court dismissed the Hess Group's lease validity claims, finding that it would be impossible to establish that "actual drilling operations" could "include work leading up to the placing of the bit in the ground," and ruling instead that the leases required "placing the drill bit in the ground and penetrating the soil" before the end of the primary term. The Hess Group voluntarily dismissed its remaining claims, which were alternative claims to recover drilling costs paid by the Hess Group. The Court entered judgment on September 16, 2019.

[¶6] The Hess Group then timely filed its Notice of Appeal on November 14, 2019. In this appeal, they maintain that the plain meaning of "actual drilling operations" includes on-the-ground drilling preparations like those alleged to have occurred here (as opposed to the mere planning, permitting, or negotiations which may be used to establish "drilling operations"). To rule as the District Court did requires "actual drilling operations" to mean the same thing as "actual drilling," effectively writing the word "operations" out of the leases. Further, every case upon which the District Court relied to support its definition of "actual drilling operations" turned on either an express contractual definition of the term or an application of the definition contained in federal regulations. Any such definition is conspicuously absent in the Hess Group leases. In the alternative, if the Court declines to adopt the Hess Group's construction of "actual drilling operations," the

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[1] Defined below in paragraph 8.

term is at minimum ambiguous, as the Hess Group has put forward a rational interpretation of the contract language. As a final alternative in this appeal, there are questions of fact regarding an extension of the primary term under the Subject Leases' force majeure clauses that precluded dismissal of this case.

## STATEMENT OF THE FACTS

### A. Statement of the Facts as Pled

[¶7] AgriBank owns a mineral estate under the following lands (the "Subject Lands") located in Mountrail County, North Dakota:

> Township 154 North, Range 94 West
> Section 21: S/2SW/4, SE/4SE/4
> Section 28: N/2NE/4, Lots 1, 2, 3 & 4, including all accretion and riparian rights

App. 9.

[¶8] On April 2, 2004, AgriBank executed two separate oil and gas leases covering the Subject Lands, with the first lease (AgriBank Lease No. 17171) covering the Subject Lands in Section 21 and the second lease (AgriBank Lease No. 17174) covering the Subject Lands in Section 28 (collectively the "Subject Leases"). App. 18-23. Both leases had a five-year primary term. App. 18 at ¶ 2; App. 21 at ¶ 2. AgriBank later executed a document entitled Extension of Lease Term, which extended the Subject Leases' primary terms by three additional years, to April 2, 2012. App. 24-26. The Hess Group collectively acquired and owns the working interest in the Subject Leases. App. 10.

[¶9] The Subject Leases contain an identical "Continuous Drilling Clause" that provides the leases "shall not terminate if actual drilling operations on any portion of the leased premises, or on lands with which a portion of the leased premises may be unitized

. . . are being conducted at the end of the primary term." App. 19 at ¶ 7; App 22 at ¶ 7 (emphasis added).

[¶10] The Pugh Clause of the Subject Leases provides that "[n]otwithstanding anything to the contrary herein, <u>drilling operations</u> . . . shall maintain this lease in force . . . ." The Extension of Lease Term recited that the leases were set to expire "in the absence of <u>drilling operations</u> as of the expiration dates" in the Subject Leases. App. 24 (emphasis added).

[¶11] The Subject Leases also include a force majeure clause, stating in relevant part:

> . . . all express and implied obligations of this lease shall be subject to all valid federal and state laws, executive orders, rules and regulations and this lease shall not be terminated, in whole or in part, nor Lessee be held liable in damages for failure to comply with such obligations, if compliance is prevented by any such law, order, rule or regulation. If from any such cause Lessee is prevented from conducting drilling or reworking operations on, or producing oil or gas from the leased premises, the time which such Lessee is so prevented shall not be counted against Lessee, and this lease shall be extended for a period of time equal to that during which such Lessee is so prevented from conducting drilling or reworking operations on, or producing oil or gas from such leased premises . . . .

App. 20 at ¶ 14; App. 22 at ¶ 14.

[¶12] On December 2, 2010, the North Dakota Industrial Commission ("NDIC") issued its Order No. 14461, which established a 2560-acre spacing unit that included the Subject Lands (the "Spacing Unit"). App. 10.

[¶13] In response to well proposals issued by Continental Resources, Inc. ("Continental"), the Hess Group agreed to participate in the risk and costs of drilling two wells within the Spacing Unit, the Sorenson 1-21AH and Thronson 1-28AH wells (collectively "the Hess Wells"). App. 11. This election required the Hess Group to pay a proportionate share of the well costs related to the Hess Wells. *Id.*

[¶14] Continental submitted four Applications for Permit to Drill Horizontal Well to the NDIC in January and February of 2012, seeking permits to drill wells in the Spacing Unit, including the Hess Wells. App. 27-34. On March 20, 2012, the NDIC granted Continental the permits necessary to drill the Hess Wells. App. 35-38.

[¶15] On April 2, 2012, the last day of the Subject Leases' primary terms, Continental filed a series of Form 4 sundry notices with the NDIC requesting permission to move the surface hole locations for the newly permitted wells. App. 43-46. The sundry notices indicate Continental had finished building the location for the Hess Wells on or before April 2, 2012. *Id*. The record is devoid of any further explanation as to why Continental was compelled to move the surface hole locations and unable to drill the wells as originally permitted within the primary term of the lease.

[¶16] Continental ultimately drilled and completed multiple wells producing from the Subject Leases, including the Hess Wells, which were spud on May 5 and May 8 of 2012. App. 12.

[¶17] While Continental was conducting actual drilling operations on the Subject Lands, AgriBank issued competing leases to Intervention dated April 11, 2012 (the "Intervention Leases") that purport to cover the Subject Lands. App. 47-52. Intervention later assigned its interests in the Intervention Leases to Riverbend. App. 53-80.

**B. Procedural Posture**

[¶18] The Hess Group filed this action against AgriBank, Intervention, and Riverbend on December 6, 2018. With the District Court's leave, the Hess Group filed its First Amended Complaint on February 11, 2019.

[¶19] The First Amended Complaint set forth five causes of action. App. 8. In Count One, the Hess Group sought to quiet title to its interests in the Subject Leases. In Count Two, the Hess Group sought a declaration confirming the Subject Leases remain valid and enforceable. In Count Three, the Hess Group sought damages for breach of contract against AgriBank for AgriBank's wrongful receipt of revenues owing to the Hess Group under the Subject Leases. In Count Four, the Hess Group sought damages for unjust enrichment/money had and received for Intervention and Riverbend's wrongful receipt of revenues owing to the Hess Group under the Subject Leases or, alternatively and if the Subject Leases had terminated, the Hess Group sought damages for its payment of well costs for the Hess Wells. In Count Five, the Hess Group sought an accounting concerning Intervention and Riverbend's wrongful receipt of revenues owing to the Hess Group under the Subject Leases or, alternatively and if the Subject Leases had terminated, the Hess Group sought an accounting for all well costs paid by the Hess Group for the Hess Wells. App. 12-16.

[¶20] In lieu of an Answer, Intervention moved to dismiss the First Amended Complaint pursuant to N.D.R.Civ.P. 12(b)(6) on March 4, 2019. App. 81. AgriBank and Riverbend both initially filed answers to the First Amended Complaint and accompanying counterclaims that sought validation of the Intervention Leases. App. 82-117. AgriBank subsequently sought to join Intervention's Motion to Dismiss pursuant to a letter dated April 8, 2019. App. 120. Riverbend filed its own motion to dismiss the First Amended Complaint pursuant to N.D.R.Civ.P. 12(b)(6) on April 29, 2019. App. 127. The District Court held a joint hearing on the Motions to Dismiss on May 16, 2019. App. 128.

[¶21] In its Order dated July 24, 2019, the District Court partially granted and partially denied the Motions to Dismiss. *Id.* The District Court granted the Motions to Dismiss as to the Hess Group's quiet title claim, declaratory relief claim, breach of contract claim, unjust enrichment claim concerning revenues owing to the Hess Group, and accounting claim concerning revenues owing to the Hess Group (collectively the "Court Dismissed Claims"). App. 138. The Court denied the Motions to Dismiss as to the Hess Group's unjust enrichment claim concerning well costs paid by the Hess Group and as to the accounting claim concerning well costs paid by the Hess Group (collectively the "Remaining Claims"). App. 139.

[¶22] On September 13, 2019, the parties stipulated to dismissal of the Hess Group's Remaining Claims with prejudice. App. 140-143. The Court adopted this stipulation on September 14, 2019, ordering the Remaining Claims be dismissed with prejudice. App. 144-145. The Clerk of Court entered judgment dismissing the Hess Group's First Amended Complaint with prejudice on September 16, 2019. App. 146. The Hess Group appealed the dismissal of the Court Dismissed Claims on November 14, 2019. App. 148.

## STANDARD OF REVIEW

### A. This Court reviews district court orders dismissing pleadings under N.D.R.Civ.P. 12(b)(6) de novo.

[¶23] This Court reviews "a district court's decision granting a motion to dismiss under N.D.R.Civ.P. 12(b)(6) de novo." *Martin v. Marquee Pac., LLC*, 2018 ND 28, ¶ 9, 906 N.W.2d 65. On appeal, this Court will affirm a dismissal of the claim only if it cannot discern a potential for proof to support it. *McColl Farms, LLC v. Pflaum*, 2013 ND 169, ¶ 19, 837 N.W.2d 359.

[¶24] A motion to dismiss a complaint under N.D.R.Civ.P. 12(b)(6) faces a high hurdle. Such a motion should be denied unless "it is disclosed with certainty the impossibility of proving a claim upon which relief can be granted." *Ziegelmann v. DaimlerChrysler Corp.*, 2002 ND 134, ¶ 5, 649 N.W.2d 556 (quoting *Lang v. Schafer,* 2000 ND 2, ¶ 7, 603 N.W.2d 904) (emphasis added). Because a motion to dismiss merely tests the sufficiency of the pleadings, a court must "construe the complaint in the light most favorable to the plaintiff, taking as true the well-pleaded allegations in the complaint." *Hale v. State,* 2012 ND 148, ¶ 13, 818 N.W.2d 684*; see also Bala v. State*, 2010 ND 164, ¶ 7, 787 N.W.2d 761. "Because determinations on the merits are generally preferred to dismissal on the pleadings, Rule 12(b)[(6)] motions are viewed with disfavor." *Ziegelmann*, 2002 ND 134, at ¶ 5.

[¶25] Accordingly, the District Court's dismissal of the Hess Group's claims regarding the Subject Leases' validity is fully reviewable on this appeal. This Court must reverse and remand unless it cannot discern any potential for proof to support the claims set forth in the Hess Group's First Amended Complaint.

**B. This Court reviews matters of contractual construction de novo.**

[¶26] "The same general rules that govern interpretation of a contract apply to oil and gas leases." *Johnson v. Statoil Oil & Gas LP*, 2018 ND 227, ¶ 7, 918 N.W.2d 58. Interpretation of a contract is a question of law fully reviewable on appeal. *Id*. On appeal, "this Court will independently examine and construe the contract to determine if the trial court erred in its interpretation." *Id.*

[¶27] Contracts, including oil and gas leases, are interpreted to give effect to the parties' mutual intent at the time of contracting. N.D.C.C. § 9-07-03. The parties' intent is

ascertained from the writing alone if possible. N.D.C.C. § 9-07-04. Words in a contract are construed in the ordinary and popular sense, unless the parties use the words in a technical sense. N.D.C.C. § 9-07-09. Technical words are interpreted as usually understood by people in the profession or business to which they relate, unless they are clearly used in a different sense. N.D.C.C. § 9-07-10. "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. "A contract must be read and considered in its entirety so that all of its provisions are taken into consideration to determine the true intent of the parties." *Egeland v. Continental Res., Inc.*, 2000 ND 169, ¶ 10, 616 N.W.2d 861. This Court attempts to give effect to every clause, sentence, and term in a contract. *Schwarz v. Gierke*, 2010 ND 166, ¶ 16, 788 N.W.2d 302.

[¶28] Disposition of a contractual interpretation dispute is appropriate as a matter of law only when a contract is unambiguous. *Northstar Founders, LLC v. Hayden Capital USA, LLC*, 2014 ND 200, ¶ 46, 855 N.W.2d 614. "A contract is ambiguous when rational arguments can be made for different interpretations." *Golden v. SM Energy Co.*, 2013 ND 17, ¶ 13, 826 N.W.2d 610. When a contract is ambiguous, that ambiguity creates a question of fact precluding disposition as a matter of law. *Id.*; *see also Johnson v. Mineral Estate, Inc.*, 343 N.W.2d 778, 781 (N.D. 1984) (reversing and remanding for trial to ascertain the meaning of ambiguous language in an oil and gas lease). "Whether a contract is ambiguous is a question of law for the court to decide, and on appeal we independently review a contract to determine if it is ambiguous." *Golden*, 2013 ND 17, at ¶ 13.

## ARGUMENT

[¶29] The District Court faced the unique question of whether the term "actual drilling operations," standing on its own and undefined in a lease, can possibly be satisfied by on-the-ground drilling preparations performed with a good-faith intent to complete the well. Contrary to the District Court's ruling, the answer to this question is "yes." Absent any discovery or factual development of the record, the District Court instead ruled that "actual drilling operations" require actual drilling, reading the word "operations" out of the lease. The District Court's ruling relies upon a line of cases that is fundamentally distinguishable and violates rules of contract construction by failing to give meaning and effect to every word in the contract. In addition, the ruling ignores apparent fact issues necessary to address the Hess Group's alternative argument that the Subject Leases were extended by virtue of their force majeure clauses.

### I. "Actual drilling operations" include on-the-ground drilling preparations performed with a good-faith intent to complete a well.

[¶30] In its Order, the District Court concluded the Hess Group's First Amended Complaint failed to state a claim as to the validity of the Subject Leases because "actual drilling operations" required spudding[2] of a well. Specifically, the Court concluded:

> Considering the parties' arguments and relevant caselaw and giving meaning to each word in the phrase "actual drilling operations," this Court finds that the word "operations," in the context of oil and gas leases, refers to the general process of bringing oil and gas to the surface. "Drilling" is the method by which the oil and gas are brought to the surface; and "actual" narrows the drilling process to placing the drill bit in the ground and penetrating the soil and does not include work leading up to the placing of the bit in the ground.

[2] "Spud" means to "start the well drilling process by removing rock, dirt and other sedimentary material with the drill bit." Spud, *Schlumberger Oilfield Glossary* (last visited February 28, 2020), https://www.glossary.oilfield.slb.com/en/Terms/s/spud.aspx.

App. 134-135 at ¶ 21. The District Court's narrow definition of "actual drilling operations" is flawed. As explained below, the plain meaning of "actual drilling operations," taken together with this Court's precedent on the term "drilling operations," must include on-the-ground drilling preparations. In other words, "actual drilling operations" must mean something more than "actual drilling." All of the cases relied upon by the District Court are distinguishable, as all of them relied on special definitions of the term "actual drilling operations" in federal regulations or definition clauses within the lease itself. Critically, the Subject Leases contain no such definition.

### *A. The Hess Group undisputedly engaged in "drilling operations" before the end of the primary term.*

[¶31] As a threshold point, this Court has endorsed a very broad definition of "drilling operations." *See Abell v. GADECO, LLC*, 2017 ND 163, ¶¶ 10-12, 897 N.W.2d 914. As in this case, *Abell* concerned whether an oil and gas lease had terminated at the end of its primary term without a drill bit turning in the ground. *Id.* ¶¶ 4-5. The continuous drilling clause at issue in *Abell* stated the lease would be extended beyond its primary term so long as "operations are conducted on the leased premises," with "operations" defined as "all operations for the drilling of a well for oil or gas, including building of roads, preparation of the drill site, moving in for drilling, drilling, deepening, plugging back, reworking or recompleting and also secondary recovery operations benefitting the leased premises." *Id.* ¶ 2.

[¶32] In holding that preparatory activities would qualify as "drilling operations," this Court's analysis began by recognizing that "[a] substantial body of caselaw has developed defining the meaning of 'drilling operations' for purposes of an oil and gas lease, and those decisions tend to define the phrase as broadly as the parties did in their

lease agreement to include 'preparation of the drill site.'" *Id.* ¶ 10 (citing 3 H. Williams and C. Meyers, *Oil and Gas Law*, § 618.1 (2016)). The *Abell* Court also expressly relied on *Anderson v. Hess Corp.*, 733 F. Supp. 2d 1100 (D.N.D. 2010) *aff'd*, 649 F.3d 891 (8th Cir. 2011), a North Dakota federal district court case interpreting North Dakota law. *Abell*, 2017 ND 163, at ¶¶ 10-11.

[¶33] The court in *Anderson* reiterated a prior holding that "[d]rilling operations commence when (1) work is done preparatory to drilling, (2) the driller has the capability to do the actual drilling, and (3) there is a good faith intent to complete the well." *Anderson*, 733 F. Supp. 2d at 1106 (quoting *Murphy v. Amoco Prod. Co.*, 590 F. Supp. 455, 458 (D.N.D. 1984)). "It is not necessary that the drill bit actually penetrate the ground." *Id.* Instead, "drilling operations" can include pre-drilling activities such as surveying and staking a well, obtaining a permit to drill from the NDIC, leveling and lasering the pad, doing road preparation work, and moving equipment to the location. *Id.* at 1108*; see also Murphy*, 590 F. Supp. 455; *Wold v. Zavanna*, LLC, No. 4:12-CV-00043, 2013 WL 6858827 (D.N.D. Dec. 31, 2013).

[¶34] These cases consistently conclude that preparatory activity constitutes "drilling operations." The District Court distinguished these cases because, according to the District Court, *Abell* interpreted "operations" as a defined term. But that conclusion ignores the broad general meaning of "drilling operations" endorsed by the case. Moreover, that conclusion ignores that the leases at issue in *Anderson*, *Murphy*, and *Wold* apparently did not contain special definitions. *See Anderson*, 733 F. Supp. 2d at 1103; *Murphy*, 590 F. Supp. 455 at 457-58; *Wold*, 2013 WL 6858827 at *1.

[¶35] Here, the complete construction of the well locations before the end of the primary term and spudding of multiple wells within a month later undoubtedly constituted "drilling operations." *See* App. 11, 12. The analysis then turns on what the word "actual" adds to the meaning of "actual drilling operations."

*B. The Hess Group engaged in "actual drilling operations" before the end of the primary term, because real and substantial on-the-ground operations qualify as "actual."*

[¶36] "Actual" means "existing in fact" or "real." *Black's Law Dictionary* 42 (10th ed. 2017). This Court has defined "actual" to mean "[r]eal; substantial; existing presently in fact; having a valid objective existence as opposed to that which is merely theoretical or possible." *Hanneman v. Nygaard*, 2010 ND 113, ¶ 17, 784 N.W.2d 117, 124 (emphasis added) (quoting *Ficklin v. Ficklin*, 2006 ND 40, ¶ 14, 710 N.W.2d 387); *see also Steckler v. Steckler*, 492 N.W.2d 76, 81 (N.D. 1992) (noting other courts have defined "actual" to mean something real as opposed to constructive or speculative: something existing in act, fact, or reality). The word "actual" is an adjective, meaning that it modifies a noun. In the phrase "actual drilling operations," the words "actual" and "drilling" are both adjectives that modify the noun "operations."

[¶37] The courts in *Anderson* and in *Wold* both performed a helpful grammatical exercise of a similar clause, in which two adjectives modified the noun operations. In both cases, the courts determined the phrase "drilling or re-working operations" meant "drilling operations" or "re-working operations" because "drilling" and "re-working" are adjectives that modify the noun "operations." *See Anderson*, 733 F. Supp. 2d at 1106-07; *Wold*, 2013 WL 6858827 at **2-3*; see also Anderson*, 649 F.3d at 895-98. Similarly, the phrase at issue employs the paired adjectives "actual" and "drilling," both modifying the

noun "operations." Therefore, the Subject Leases in this case were extended beyond their primary terms if there were "drilling operations" and "actual operations" on the leased lands as of April 2, 2012.

[¶38] Employing this grammatical analysis, the phrase "actual drilling operations" requires the drilling preparations be "existing in fact," "real," and "substantial" as opposed to something that is "merely theoretical or possible." In other words, it requires a substantial commitment of resources to on-the-ground work, rather than mere site planning or negotiations. This is what the word "actual" adds to the meaning of the contracts. For instance, it may be that site planning and negotiating a surface use and damage agreement may evidence "drilling operations." *See, e.g.*, *Abell* 2017 ND 163, at ¶ 9 (citing negotiation of surface agreement in conjunction with applying for permit and surveying). Mere site planning or negotiations, however, are unlikely to qualify as "actual drilling operations." By contrast, finishing the physical construction of the well pad and surface location, and evidence of timely subsequent drilling and production (as happened here) would qualify as both "drilling operations" and "actual drilling operations."

[¶39] The Hess Group's reading is the only viable interpretation put forth in this case that gives effect to all three words in "actual drilling operations." As a matter of grammar and common sense, "actual drilling operations" cannot mean only "actual drilling." Otherwise, the noun "operations" is rendered a nullity. Intervention's and Riverbend's reasoning, as adopted in the District Court's order, ignores the subject noun in the phrase and its meaning. As just discussed, "operations" is the noun being modified by "drilling" and "actual." And it is the inclusion of the technical term "operations" that

broadens the types of activities that qualify to extend the primary term of the Subject Leases. The court in *Anderson* made this point exactly:

> Professors Williams and Meyers define the terms "drilling" and "drilling operations." "Drilling" is defined as the "[a]ct of boring a hole through which oil and/or gas may be produced if encountered in commercial quantities." Williams & Meyers, *Manual of Oil and Gas Terms* (2009). They define "drilling operations" as follows:
>
> > Any work or actual operations undertaken or commenced in good faith for the purpose of carrying out any of the rights, privileges or duties of the lessee under a 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*, 733 F. Supp. 2d at 1106*; see also Serhienko v. Kiker*, 392 N.W.2d 808, 812-14 (N.D. 1986) (concluding the inclusion of "operations" in the phrase "re-working operations" meant the phrase included steps calculated to bring about a "re-working" of the well so long as those preparatory steps were followed by reworking activity performed with reasonable dispatch); *Anderson*, 649 F.3d at 897 (concluding that inclusion of the word "operations" in addition to "drilling" in the habendum clause broadens the triggering activity beyond just "drilling"); *Wold*, 2013 WL 6858827 at **3-4. In short, had the parties intended for "actual drilling" to be the only conduct sufficient to constitute "actual drilling operations," there would have been no need to include the suffixal term "operations."[3] *Cf. Vanderhoof v. Gravel Prod., Inc.*, 404 N.W.2d 485, 491 (N.D. 1987).

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[3] As further evidence of the parties' intent, the continuous drilling clauses elsewhere specifically refer to "operations," not just "actual drilling operations." App. 19 at ¶ 7 (noting that, "[i]f <u>operations</u> taking place at or after the expiration of the primary term are discontinued for longer than one hundred twenty (120) consecutive days, then this lease shall remain in force and effect only as to the leased premises then included within

[¶40] The District Court erroneously adopted Intervention's argument that a footnote in *Wold* justified construing the phrase "actual drilling operations" to effectively mean "actual drilling." The footnote reads:

> Mineral owners contemplating executing similar lease agreements, but who are dissatisfied with the judicial interpretation placed on the standard form language "drilling or re-working operations," are always free to negotiate other language, e.g., striking the language in question and inserting language requiring some other benchmark, such as actual drilling, or including a definition of "drilling operations" that accomplishes the same thing.

App. 132 at ¶ 13 (quoting *Wold*, 2013 WL 6858827 at *11 n.8). The footnote actually buttresses Hess Group's interpretation. AgriBank was free to draft a lease form with some "other benchmark," and did so by insisting on "actual drilling operations" instead of the broader "drilling operations" language. But just as stated by the *Wold* opinion, if AgriBank hoped to even further limit the phrase, then it should have used "actual drilling," or included a special definition that made clear the lease required "placing the drill bit in the ground and penetrating the soil" or "spudding" the well. *See, e.g., Pennington v. Continental Res., Inc.*, 2019 ND 228, ¶ 13, 932 N.W.2d 897 (lease excluded preparatory or surface work in the definition of "operations"). The District Court's interpretation effectively writes the word "operations" out of the Subject Leases. On its plain language, "actual drilling operations" only required drilling operations that were real and substantial, not "actual drilling" by way of spudding a well.

[¶41] Relevant case law from other jurisdictions supports the Hess Group's interpretation and goes squarely against the Appellees' arguments. For instance, the New

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production unit or units.") (emphasis added); App 22 at ¶ 7 (same). That specific reference clearly indicates the parties' intent that the term "operations" should have significance and meaning in the contract.

Mexico Supreme Court has held on-site preparation for the physical drilling of a well, even without a permit, can suffice to show an operator has "actually commenced drilling operations." *See Enduro Operating LLC v. Echo Prod., Inc.*, 413 P.3d 866, 871-72 (N.M. 2018) (emphasis added) (referring to "activities such as leveling the well location, digging a slush pit, or other good-faith commitment of resources at the drilling site . . . ."). While actual drilling will suffice to show actual drilling operations occurred, "actual drilling . . . is not necessary." *Id.* (emphasis added); *see also Enduro Operating LLC v. Echo Prod., Inc.*, 413 P.3d 866, 871-72 (N.M. 2018)) (concluding the phrase "actual drilling operations," as used in a maritime charter contract for offshore drilling, should be read broadly to encompass activities reasonably incident or anticipated by the principal activity of the contract). These cases properly analyzed similar language to that here without the aid of a clarifying in-contract definition. The cases interpreted the language far more broadly than the District Court did here, and they support the Hess Group's interpretation that "actual drilling operations" does not require "actual drilling."

[¶42] Thus, the facts as pled establish "actual drilling operations" occurred through real and substantial on-the-ground drilling preparations.

*C. The District Court erred in relying on inapplicable authority to summarily dismiss the Hess Group's claims.*

[¶43] The District Court effectively avoided interpreting how the term "actual" relates to the established definition of "drilling operations" by relying on fundamentally distinguishable authority. Specifically, the District Court cited several cases in concluding "actual drilling operations" required spudding of a well. App. 134 at ¶ 19. Critically, however, in each of those cases, the leases expressly defined the term "actual drilling operations" to mean spudding. S*ee Exxon Mobil Corp. v. Ala. Dept. of*

*Conservation and Natural Res.*, 986 So.2d 1093, 1109, 1120 (Ala. 2007) (See, J. concurring in part and concurring in the result); *Peironnet v. Matador Res. Co.*, 144 So.3d 791, 798 (La. 2013); *Rippy Interests, Inc. v. Nash*, 475 S.W.3d 353, 359 n.4 (Tex. Ct. App. 2014). Because the lease or supporting contract expressly defined the key term, none of the cases cited by the District Court needed to interpret the ordinary meaning of "actual drilling operations."

[¶44] AgriBank conspicuously included no such definition in the Subject Leases—just the bare, undefined term "actual drilling operations." Whereas the cases on which the District Court relied required no analysis to interpret "actual drilling operations," the Subject Leases do. The District Court itself noted that difference, but nevertheless based its conclusion on these inapplicable cases. App. 134 at ¶ 19. In doing so, the District Court provided no explanation for why these cases applying special contractual definitions of lease terms are relevant, when a special contractual definition rendered *Abell* completely inapplicable according to the District Court. In sum, the District Court erred in relying upon precedent construing "actual drilling operations" in leases that expressly defined the term to require spudding.

[¶45] Similarly misplaced is any reliance on special federal regulatory definitions of "actual drilling operations." Specifically, the District Court relied on the Interior Board of Land Appeals' decision in *Estelle Wolf*, which concluded that the phrase "actual drilling operations" in the federal government's lease means a drill bit turning in the ground. App. 130 at ¶ 10 (citing 37 IBLA 195, 195 (Oct. 12, 1978)). But the District Court ignored that federal regulations provide a definition for that phrase as used in federal leases. *See* 30 U.S.C. § 181; 30 U.S.C. § 226; 43 C.F.R. 3100.0-3(a)(1). *Estelle*

*Wolf* specifically relied on this language in coming to its holding. *Estelle Wolf*, 37 IBLA at 195. The decision quoted then 43 C.F.R. 3107.2-1, which provided that "'actual drilling operations' shall include not only the physical drilling of a well but the testing, completing or equipping of such well for the production of oil or gas." *Id.* In other words, the regulations confined the meaning of the term to "physical drilling" and operations that occur thereafter, and that definition bound the Interior Board of Land Appeals.

[¶46] Accordingly, *Estelle Wolf* and the related line of federal decisions interpreting federal leases are all different from the case at hand. A regulatory definition that expressly defined "actual drilling operations" obviated any need to interpret the ordinary meaning of lease language. Indeed, the Interior Board of Land Appeals expressly disclaimed any connection between its reasoning and cases interpreting the plain language of common law fee leases. Specifically, the *Estelle Wolfe* opinion stated that "the public land leases contain many provisions not generally found in fee leases . . . . Under 30 U.S.C. § 189 (1976), the Secretary of the Interior has authority to prescribe all necessary and proper rules and regulations to accomplish the purpose of the Mineral Leasing Act." *Id.* at 198. As a consequence, "[i]t then follows as the night the day that the Secretary may interpret the meaning of the words he has placed in his regulations . . . <u>without following cases involving fee land leases</u>." *Id.* (emphasis added).

[¶47] In other words, the federal government retains the regulatory power to unilaterally define the terms of the contract between itself and its mineral lessee. *Boesche v. Udall*, 373 U.S. 472, 477–78 (1963). This is the opposite of a private fee lease situation where the lessor and lessee are bound by their contract language. *E.g., Flaten v. Couture*, 2018

ND 136, ¶ 14, 912 N.W.2d 330 ("A contract is to be interpreted to give effect to the mutual intention of the parties at the time of contracting"). Consistent with that approach, courts applying North Dakota law have expressed reluctance to define terms found in private contracts through incorporation of definitions found in federal regulations, absent express intent to incorporate the federal definition. *See Great W. Cas. Co. v. Nat. Cas. Co.*, 53 F. Supp. 3d 1154, 1184-87 (D.N.D. 2014) (concluding a federal definition of the term "employee" should not be read into a private insurance contract). Just as the *Estelle Wolf* decision recognized that common law definitions are inapplicable to terms defined by federal regulation, the federal regulatory standards Intervention relies upon are inapplicable to the Subject Leases at issue, because the Subject Leases are private fee leases to be interpreted by their ordinary meaning under North Dakota law.

[¶48] Finally, the District Court relied upon definitions found in inapplicable North Dakota statutes to support its restrictive definition of "actual drilling operations." App. 130 at ¶ 10. Sections 38-11.1-03(2) and 38-11.2-01(2), N.D.C.C., both include definitions for "drilling operations" that focus on drilling a well and the production and completion activities that "require entry on the surface estate." First, using statutory definitions constructed by a legislature for a specific purpose to interpret private leases would be inappropriate. *See Wold*, 2013 WL 6858827 at *8 (noting N.D.D.C. § 38-11.1-03(2)'s definition "was for an entirely different purpose, and there is no indication the North Dakota Legislature intended to legislate with respect to language used in oil and gas leases."); *Enduro*, 413 P.3d at 870-71. Both of the statutory definition sections relied on by the District Court preface the definitions with the qualifier, "<u>In this chapter</u>, unless the context or subject matter otherwise requires." N.D.C.C. §§ 38-11.1-03 and 38-11.2-

01 (emphasis added). That this Court did not cite these statutory definitions in forming its opinion in *Abell* is telling. *See Abell*, at ¶¶ 10-13. Second, even if these statutory definitions were relevant, the District Court was mistaken about the scope of the definitions. The statutes require that surface owners be compensated for damage caused by operations that "require entry upon the surface estate." N.D.C.C. §§ 38-11.1-03(2) and 38-11.2-01(2). Presumably, the Legislature intended that surface owners would be compensated for disturbances caused by preparatory activities such as constructing an access road and well pad. As such, the definitions only buttress the Hess Group's arguments, if they apply at all.

[¶49] In sum, the District Court relied on inapposite authority to conclude that "actual drilling operations" required spudding a well. The authorities only underscore the atextual nature of Appellees' argument.

*D. In the alternative, the District Court erred by treating the contract language as unambiguous and ignoring extrinsic evidence of intent.*

[¶50] This Court should adopt the Hess Group's interpretation of "actual drilling operations," for all the reasons described above. It is the only rational interpretation and gives meaning to all words in the contract. However, should the Court decline to adopt the Hess Group's interpretation as a matter of law, then the contract is ambiguous. At minimum, the Hess Group has provided a rational interpretation of the Subject Leases sufficient to preclude dismissal of its claims as a matter of law. Disposition based upon contractual interpretation is appropriate as a matter of law only when a contract is unambiguous. *Northstar*, 2014 ND 200, at ¶ 46. "A contract is ambiguous when rational arguments can be made for different interpretations." *Golden*, 2013 ND 17, at ¶ 13. When a contract is ambiguous, that ambiguity creates a question of fact precluding

disposition as a matter of law. *Id.*; *Johnson*, 343 N.W.2d at 781 (reversing and remanding for trial when oil and gas lease contained ambiguous language).

[¶51] Importantly, requiring "actual drilling" under the continuous drilling clauses would create disharmony with other lease provisions that maintained the Subject Leases if only "drilling operations" occurred. Specifically, the Pugh Clause of the Subject Leases provides that, "[n]otwithstanding anything to the contrary herein contained, <u>drilling operations</u> . . . shall maintain this lease in force . . . ." as to acreage within a defined unit. App. 19 at ¶ 6; App. 22 at ¶ 6 (emphasis added). Moreover, an extension instrument amended the Subject Leases, and it likewise stated the leases were maintained through "drilling operations." Specifically, the Extension of Lease Term recited that "said leases expire in the absence of <u>drilling operations</u>." App. 24 (emphasis added). Both of these provisions state the Subject Leases can be maintained by "drilling operations," full stop. This "drilling operations" language must be harmonized with the Continuous Drilling Clause, but it cannot be harmonized with Appellees' interpretation that "actual drilling operations" requires spudding the well. Such disharmony gives rise to an ambiguity, should the Court decline to adopt the Hess Group's interpretation of "actual drilling operations." *See Woodworth v. Chillemi*, 1999 ND 43, ¶ 13, 590 N.W.2d 446, 450 (concluding internally inconsistent judgment was ambiguous).

[¶52] In addition, the Subject Leases derive from AgriBank's lease form and, as such, must be interpreted most strongly against the party who created the ambiguity. Docket No. 57 at ¶¶ 43-44; *West v. Alpar Res., Inc.*, 298 N.W.2d 484, 490 (N.D. 1980) ("Pursuant to Section 9-07-19, N.D.C.C., the language of a contract, in cases of uncertainty, should be interpreted most strongly against the party who caused the

uncertainty to exist.”). The Hess Group additionally suggested other parol evidence could bear on the meaning of “actual drilling operations,” including, but not limited to, the history of revisions to AgriBank’s lease form. *See also Alumni Ass'n of University of North Dakota v. Hart Agency, Inc.*, 283 N.W.2d 119 (N.D. 1979) (addressing the availability of facts and circumstances to aid in the interpretation of a contract); *Myaer v. Nodak Mut. Ins. Co.*, 2012 ND 21 ¶¶ 10, 16-17 812 N.W.2d 345 (looking to the technical meaning of contract term for purposes of interpretation).

[¶53] The District Court did not address the Hess Group’s alternative argument on ambiguity, making no explicit ruling the Subject Leases were unambiguous, nor concluding the Hess Group’s interpretation of “actual drilling operations” was irrational or unreasonable. That lack of a ruling on this point, which was necessary to dispose of the Hess Group’s claims as a matter of law, was erroneous. *Sailer v. Sailer*, 2009 ND 73, ¶ 28, 764 N.W.2d 445 (noting a district court errs as a matter of law when it does not make all required findings). The Hess Group has, at a minimum, provided a rational argument as to the meaning of “actual drilling operations.” Should the Court conclude that Appellees have also put forth a rational argument (the Hess Group disputes that they have), then the term is ambiguous. *Cf. Guidry v. Am. Pub. Life Ins. Co.,* 512 F.3d 177, 182 (5th Cir. 2007) (concluding the phrase “actual charges,” as used in an insurance policy, was ambiguous as to what charges a policy covered); *Ward v. Dixie Nat. Life Ins. Co.*, No. 06–2022, 2007 WL 4293319 (4th Cir. Nov. 29, 2007) (same); *Pedicini v. Life Ins. Co. of Ala.*, 682 F.3d 522 (6th Cir. 2012) (same). Such an ambiguity can be resolved only by development of the facts surrounding the parties’ intent at the time of contracting, course of conduct, and industry custom and practice. Thus, even if the Court

refuses to adopt the Hess Group's construction, remand for further case development is proper.

## II. Alternatively, the District Court erred by failing to recognize questions of fact regarding the Subject Leases' force majeure clauses that precluded dismissal under Rule N.D.R.Civ.P. 12(b)(6).

[¶54] "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." *Pennington v. Cont'l Res., Inc.*, 2019 ND 228, ¶ 18, 932 N.W.2d 897, 902 (quoting *Entzel v. Moritz Sport and Marine*, 2014 ND 12, ¶ 7, 841 N.W.2d 774 and 30 Williston on Contracts § 77:31, 366 (4th ed.)). "Whether a party acted in good faith is a question of fact." *Id.* (citation omitted). In *Pennington*, this Court recently held that a lessee's diligence and good faith implicated fact issues precluding summary judgment on the extension of an oil and gas lease by virtue of a force majeure clause similar to that here. *Id.* ¶¶ 17–21.

[¶55] Even assuming the District Court correctly concluded "actual drilling operations" requires spudding of a well, and further assuming no ambiguity exists as to that issue, the District Court erred in dismissing the Hess Group's claims. The Subject Leases each contained identical force majeure clauses, providing:

> . . . all express and implied obligations of this lease shall be subject to all valid federal and state laws, executive orders, rules and regulations and this lease shall not be terminated, in whole or in part, nor Lessee be held liable in damages for failure to comply with such obligations, if compliance is prevented by any such law, order, rule or regulation. If from any such cause Lessee is prevented from conducting drilling or reworking operations on, or producing oil or gas from the leased premises, the time which such Lessee is so prevented shall not be counted against Lessee, and this lease shall be extended for a period of time equal to that during which such Lessee is so prevented from conducting drilling or

> reworking operations on, or producing oil or gas from such leased premises . . . .

App. 20 at ¶ 14; App. 23 at ¶ 14. If force majeure circumstances existed, the Subject Leases were extended for a time period equal to that "during which such Lessee is so prevented from conducting drilling or reworking operations." *Id.*; *see also Pennington*, 2019 ND 228, at ¶¶ 11-16 (considering a comparable regulatory force majeure clause).

[¶56] The facts as pled suggest the provision was triggered due to regulatory delays. Continental operated the Hess Wells, and was the entity responsible for obtaining the necessary permits to commence "actual drilling operations" in the Subject Leases' primary term. The facts as alleged show that Continental received approved drilling permits from the NDIC in March 2012, with the Hess Wells approved on March 20, 2012. Then, Continental filed a sundry notice requesting NDIC permission to move the surface hole location on April 2, 2012, the last day of the Subject Leases' primary term. The first Hess Well was spud on May 5, 2012, just thirty-three days after the expiration of the Subject Leases' primary term. *See supra* at ¶¶ 14–16. The issues surrounding whether the force majeure clause was triggered by permitting delays or the need to move the surface hole location, and Continental's good faith diligence toward pursuing the permit at issue, are factual issues that should have precluded granting the motion to dismiss if the District Court is correct about the definition of "actual drilling operations." The Hess Group should be allowed to develop a record on this issue.

## CONCLUSION

[¶57] The Subject Leases' primary terms ended on April 2, 2012, but the Subject Leases did not terminate on that date because "actual drilling operations" were being conducted. At that time, the operator of the Subject Leases, Continental, had obtained drilling

permits and had finished construction of the well location. Continental then revised the permits and spud the first Hess Well within thirty-three days of the April 2, 2012 date. The Hess Wells were ultimately completed and are producing wells. Giving effect to this Court's precedents, persuasive authorities from other jurisdictions, and rules of contract interpretation, "actual drilling operations" were being conducted on April 2, 2012, and the Subject Leases remain valid and enforceable.

[¶58] For the reasons set forth above, the Hess Group respectfully requests the Court reverse the District Court's Order on the Motions to Dismiss because "actual drilling operations" occurred under the facts pled by the Hess Group. The Court should then remand for further proceedings consistent with this Court's ruling. Alternatively, if the Court does not adopt the Hess Group's proposed construction of the Subject Leases, the Hess Group respectfully requests the Court reverse the District Court's Order on the Motions to Dismiss and remand for further proceedings to address (i) whether, in light of any ambiguity, extrinsic evidence of intent supports the Hess Group's rational interpretation and (ii) whether force majeure circumstances existed extending the primary term.

DATED this 28th day of February, 2020.

*/s/ Paul J. Forster*

Paul J. Forster (#07398)
Zachary R. Eiken (#07832)
CROWLEY FLECK PLLP
100 West Broadway Ave., Suite 250
P.O. Box 2798
Bismarck, North Dakota 58502-2798
Telephone: (701) 223-6585
Email: pforster@crowleyfleck.com
zeiken@crowleyfleck.com
Attorneys for Plaintiffs and Appellants Hess Bakken Investments II, LLC, Arkoma Drilling II, L.P., and Comstock Oil & Gas, LP

## CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

[¶59] This Brief contains 36 pages, excluding the parts of the brief exempted by N.D.R.App.P. 32(a)(8)(A). I certify that this Brief complies with the typeface requirements of N.D.R.App.P. 32 and the type style requirements of that rule, because it has been prepared in a proportionally-spaced typeface using a Microsoft Word, Times New Roman, 12 point font.

By: *<u>/s/ Paul J. Forster</u>*
Paul J. Forster (#07398)

**CERTIFICATE OF SERVICE**

[¶60] I hereby certify that true and correct copies of the Brief of Appellants Hess Bakken Investments II, LLC, Arkoma Drilling II, L.P., and Comstock Oil & Gas, LP and Appendix were on the 28th day of February, 2020, served electronically on the following:

Joshua A. Swanson
VOGEL LAW FIRM
jswanson@vogellaw.com
*Attorney for Defendant-Appellee*
*Intervention Energy, LLC*

Elizabeth L. Pendlay
PENDLAY LAW OFFICE
liz@crosbylaw.net
*Attorney for Defendant-Appellee*
*AgriBank, FCB*

Scott M. Knudsvig
Matthew H. Olson
Pringle & Herigstad, P.C.
sknudsvig@pringlend.com
molson@pringlend.com
*Attorneys for Defendant-Appellee*
*Riverbend Oil & Gas VI, L.L.C.*

By: */s/ Paul J. Forster*
Paul J. Forster (#07398)